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LAW, MUSIC, AND OTHER PERFORMING ARTS

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***1597**

"[I]nterpretation" is a chameleon. When a performing musician "interprets" a work of music, is he expressing the composer's, or even the composition's, "meaning," or is he not rather expressing himself within the interstices of the score?

—Richard Posner¹

Today the conductor, more than any one musical figure, shapes our musical life and thought. That may not be how things should be, but it is the way they are. In a future, fully automated age, it may be that the conductor, along with all performing musicians, will be obsolete. Musical creators are working toward that day, assembling electronic scores that, once put on tape, never vary But until that unfortunate day is here, let us be thankful that there still remain interpretive musicians to synthesize the product of the composer. For without the interplay between the minds of the creator and interpreter, music is not only stale, flat and unprofitable. It is meaningless Musical notation is an inexact art, no matter how composers sweat and strive to perfect it. Symbols and instructions on the printed page are subject to various interpretations, not to one interpretation.

—Harold Schonberg²

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¹ R. POSNER, THE PROBLEMS OF JURISPRUDENCE 271 (1990).

² H. SCHONBERG, THE GREAT CONDUCTORS 23-24 (1967).

The legislature is like a composer. It cannot help itself: It must leave interpretation to others, principally to the courts.

—Jerome Frank³

***1598 I. PROBLEMS FOR THE PERFORMING ARTIST:
BEETHOVEN'S F-NATURAL,
SCHUBERT'S REPEATS, AND THE FEDERAL LAND POLICY
AND MANAGEMENT ACT OF 1976**

The eminent pianist and writer Charles Rosen has noted that "[t]here is an irritating or piquant wrong note in the [score of the] first movement of Beethoven's first piano concerto, a high F-natural where the melody obviously calls for an F-sharp."⁴ What accounts for an "obvious" error by this giant of classical music? The answer, says Rosen, lies in the developmental state of the piano when Beethoven composed the concerto: the piano keyboard stopped at F-natural, which therefore established the limit of what was physically possible for a performer to play. To be sure, Beethoven might have written "aspirationally" and composed what, though impossible under current conditions, could nonetheless be aspired to under some future imagined state. Thus Rosen writes of a piano sonata in which Beethoven "asks for a successive crescendo and diminuendo on a single sustained note," even though "the instrument that can realize this has not yet been invented."⁵ But at least this suggests that Beethoven was capable of envisioning the possibility of radical transformation regarding piano design and wanted to signify an intention should those possibilities ever be realized. What, then, does the performer do with the F-natural, where Beethoven appears instead to have acquiesced to the limits of the instrument?

Though the piano that can simultaneously heighten and reduce the sound level of the same note apparently still awaits its development, the piano has indeed been transformed beyond the instrument known to Beethoven in Vienna. Indeed, the expansion of the keyboard happened only shortly after the composition of the first concerto; high F-sharps soon were available to both

³ Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1264 (1947).

⁴ Rosen, *The Shock of the Old* (Book Review), N.Y. REV. BOOKS, July 19, 1990, at 46, 48.

⁵ *Id.* at 48.

composers and performers, as exemplified by Beethoven's own use of this note in a number of subsequent compositions, including, interestingly enough, a cadenza meant to be performed as part of the first concerto.⁶ He did not, however, return to the initial composition and physically change the notation of the earlier F-natural, in spite of an announced intention, in Rosen's words, "of revising his early *1599 works in order to make use of the extended range."⁷ What, then, is a performer to do when she comes to the measure in question? Should she feel bound by the "plain meaning" of the written score, which displays the F-natural, or ignore it and play what Rosen, a gifted pianist, calls the "obviously" preferable F-sharp?

What note should be played is only the first question. Just as important is another. Should we expect the performer, along with playing whatever note she thinks preferable, to offer a "theory" of musical performance that explicitly offers a justification for the note played? Such a theory, for example, would recognize the presence of such contending factors as the standard meaning of musical notation (to those trained in reading music), the composer's presumed intent, the likely sound heard by the initial audiences of the piece, the expectations of the modern audience, or purely aesthetic desirability—i.e. (or is it e.g.?) the production of beautiful and satisfying sequences of sound. Consider also our reactions if the performer gave as a response to our question, "Why did you play that note?" something like, "I just perform and play the note that feels right to me. If you want a theory of performance, go ask someone else. I can't imagine why you would expect one from me, or why you would feel that being given a theory would be of any use."⁸

If we expect the performer to be able to defend her choice to F-sharp or not to F-sharp, would we (however that "we" is defined) advise the performer to look not only at traditional musical materials, but also at what lawyers have done when deciding the meaning of legal notation? It should already be obvious that a lawyer (including, paradigmatically, an adjudicator) engaged in the performance of legal practice—for example, by being asked to construe a statute or a Constitution—can easily be presented with what appear to be equally "obvious" mistakes and be confronted by similar dilemmas of interpretation. Consider, for example, a provision of the Federal Land Policy and Management Act of 1976 that requires firms with unpatented mining claims on federal lands annually to reregister those claims "prior to December 31."⁹ What is the status of a claim

⁶ See *id.*

⁷ *Id.*

⁸ Cf. Fish, *Dennis Martinez and the Uses of Theory*, 96 *YALE L.J.* 1773 (1987) (asserting a lack of a relationship between theory and practice).

⁹ Federal Land Policy and Management Act of 1976 ' 314, 43 U.S.C. ' 1744(a) (1988).

filed on December 31?¹⁰ What do we *1600 expect from the legal performer faced with giving meaning to the ink on the page, and how, beyond the obvious difference in subject matter, would those expectations differ from those directed at the musical performer?

Before answering that question, we ask our readers to consider one more musical example, this time from the piano sonatas of Franz Schubert. The great pianist Alfred Brendel has indicated that he feels no duty to follow the repeat signs that appear at the end of the first sections (the so-called "expositions") of Schubert's last piano sonatas.¹¹ It has, apparently, been believed since at least the late nineteenth century that "these repeats were vestigial manifestations of an archaic mentality and therefore merely pro forma."¹² One reason offered for skipping the repeats is that most members of a modern audience have in fact heard, perhaps repeatedly, the pieces in question (and, of course, they can, by purchasing a record, repeatedly hear the piece, even if previously unknown to them, in the future); they therefore do not benefit from the repeats being played in the same way as did earlier audiences who only rarely could hear any given piece of music.

A second reason deals with contemporary concert practices. Most modern audiences expect three sonatas in the course of a concert, to be played within a two-hour period. Taking all of the repeats would require violating one of these expectations. People would either feel "cheated" by being presented with a meager program or imposed upon by the demand that they remain in the concert hall for two-and-a-half hours in order to get their full allotment of three sonatas.

Brendel's advice to skip the repeats has not met with universal enthusiasm. Neal Zaslaw, a professor of music at Cornell University, believes that "there is no evidence that the repeats . . . were not meant at face value," and he goes on to add that "[r]epeats are repeats, not question marks. They are there because the composers intended them."¹³ To be sure, Professor Zaslaw is no

¹⁰ See *United States v. Locke*, 471 U.S. 84 (1985). This case is discussed by Judge Posner in *R. POSNER*, supra note 1, at 267-69, in which he criticizes the majority of the Court for barring claims filed on December 31 because they are not "prior" to that date.

¹¹ See Brendel, *Schubert's Last Sonatas: An Exchange* (Book Review), *N.Y. REV. BOOKS*, Mar. 16, 1989, at 42, 42-43; see also Zaslaw, *Repeat Performance* (Book Review), *N.Y. REV. BOOKS*, Apr. 27, 1989, at 58-59 for a lengthy letter to the editor responding to Brendel's argument.

¹² Zaslaw, supra note 11, at 59.

¹³ *Id.*

fanatic. He ***1601** "sees nothing wrong with omitting them if time is short, the evening growing late, the performer or the audience seeming tired."¹⁴ He laconically notes that even the greatest composers, "who made their livings by composing and performing frequently and to order, understood and accepted the realities of adapting the music to the occasion."¹⁵ Still, he seems to suggest, one ought at least both have a good reason for ignoring the repeats and have the decency to admit that one is rejecting the composer's intentions on the matter. Again, one wonders, what is a performer to do, with what rationale, and might a conversation with one's counterparts in the law be at all helpful?

This essay is a review of *Authenticity and Early Music*,¹⁶ a collection of essays that exemplify the heated debates now occurring over what is variously called the Early Music Movement or the Authentic Performance Movement. The movement itself has diverse features, including the rediscovery of forgotten music, especially that of the pre-Baroque period, and the careful reconstruction and renovation of period instruments.¹⁷ But the more controversial aspect of the Early Music Movement is the claim of its followers that music should be played according to the "authentic" performance practices of the era in which it was composed.¹⁸ The phrase "early music" has thus become somewhat of a misnomer. The study and application of performance practices of the Renaissance has paved the way in the past twenty years for authentic performances of the Baroque period—Vivaldi, Bach, and Handel, and then on to the music of the classical period—Beethoven, Haydn and Mozart. Nor have the devotees of authentic performance been content to rest with the close of the eighteenth century. For example, one of the most controversial early music conductors of Beethoven, Roger Norrington, has begun issuing "authentic" renditions of Berlioz, Mendelssohn, and Schumann symphonies. If Schumann's Spring Symphony is made authentic, can Brahms be far behind?

As Will Crutchfield explains in his essay, these developments have created considerable anxiety in "traditional musicians," an anxiety, Crutchfield argues, that is well justified:

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *AUTHENTICITY AND EARLY MUSIC* (N. Kenyon ed. 1988).

¹⁷ See Kenyon, *Authenticity and Early Music: Some Issues and Questions*, in *AUTHENTICITY AND EARLY MUSIC*, *supra* note 16, at 1.

¹⁸ See *id.* at 4-5.

***1602** They know it will not stop with Beethoven any more than it stopped with Bach ten years ago. The movement not only hits them in the pocketbook, but questions the very basis of their art. It is as though we told a generation of scientists that their Ph.Ds were based on a now discredited body of theory—say Ptolemaic astronomy—and now, sorry, the degrees are no good. Worse: it is as though we had been told that Ptolemy was right after all.¹⁹

As Crutchfield suggests, great sums of money—in recording contracts and record sales—and great professional power and prestige are at stake in the debates over authentic performance. It is no accident that Raymond Leppard, one of the foremost interpreters of Baroque music in an earlier generation, looks askance at the claims made by disciples of authenticity, some of whose recordings inevitably compete with his own.²⁰ The monetary interest alone, a cynic might suggest, is enough to attract the attention of lawyers. Of course, that is not quite the reason we became interested in these matters. Our interest is in the theory of interpreting commands. We are legal academics writing primarily, we presume, for other legal academics, who are either legal performers in their own right or, with at least some regularity, critics (in the sense of evaluators) of the legal performances of others.

There are two obvious questions raised by our writing this review, even prior to the specific points we will be making below. The first concerns competence. Are we reviewing the book as "experts" who can claim some special training in the areas being discussed by the book's contributors and offer critical assessments of and contributions to the scholarly literature of musicology? The answer, in the case of one of us (Levinson), is unequivocally no; though he listens to music a great deal, his critical acumen is limited almost entirely to "knowing what he likes." The case for the other (Balkin) is a bit more complicated,²¹ but he would also make no claims to being a member of the musicological scholarly community to which one ordinarily looks for "authoritative" pronouncements about the quality of scholarly work. But so what? Why would one believe that one must be an "expert" in an area in order to have ***1603** interesting things to say about a given book? And this question, it should be noted, is as true for books about law (about which we are suitably certified experts) as for books about early music. One of us (Levinson) has written a book explicitly attacking the notion

¹⁹ Crutchfield, *Fashion, Conviction, and Performance Style in an Age of Revivals*, in *AUTHENTICITY AND EARLY MUSIC*, supra note 16, at 19, 20.

²⁰ See Kenyon, supra note 17, at 7-8.

²¹ Balkin, unlike Levinson, studied composition and orchestration in his youth, and has published an article on Puccini's opera *Turandot*. See Balkin, *Turandot's Victory*, 2 *YALE J. OF L. & HUM.* 299 (1990).

that conversation about constitutional law should be restricted to those who have been properly credentialed.²² Thus, if we are so bold to review a book on early music, we should not be afraid to see books on law reviewed in *Early Music*, the leading journal in that field. On the contrary, we would welcome such reviews, at least if musicians think there are any useful comparisons to be made.

This last point leads to a second, equally obvious, question: Why should any lawyer care in the slightest about the debates occurring in the alien field of music (or musicologists about the debates played out in the legal academy)? Richard Posner, the author of one of the quotations opening this essay, devoted much of his book *Law and Literature: A Misunderstood Relation*²³ to attacking the premise that legal analysts really have anything to learn, at least professionally, from the interpretive dilemmas faced by their colleagues in departments of literature. "T here are," wrote Posner, "too many differences between works of literature and enactments of legislatures or of constitutional conventions to permit much fruitful analogizing of legislative to literary interpretation."²⁴ One of us (Levinson) had written that "t here are as many plausible readings of the United States Constitution as there are versions of Hamlet."²⁵ Though agreeing that Hamlet and the Constitution both present many genuine interpretive puzzles, Posner insists that they are "so different from each other that it is unlikely that a Hamlet scholar will have anything useful to say about the Constitution or a constitutional scholar anything useful to say about Hamlet."²⁶ Posner's allusion to musical performance in the *1604 opening quotation notwithstanding, it is unclear whether his skepticism about insights from literary scholars would dissipate if they were replaced by insights from musicologists.

²² See S. LEVINSON, *CONSTITUTIONAL FAITH* 49-50 (1988) (defending a "protestant" approach that minimalizes institutional authority and invites all citizens to participate as equals in constitutional dialogue).

²³ R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

²⁴ *Id.* at 218.

²⁵ Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373, 391 (1982). Interestingly, most readers have read this passage as asserting the infinite malleability of the Constitution rather than, say, the limited number of plausible versions of Hamlet. This probably says more about the layman's views about plausible artistic interpretation than it does about Levinson's views of the Constitution. See *infra* note 64. Here Posner attacks the utility of discussing Hamlet and the Constitution together rather than the view that either has a particular set of plausible meanings.

²⁶ R. POSNER, *supra* note 23, at 263.

We think that Posner is wrong in dismissing the potential benefits of communication between literary and legal analysts, but we also think that the question is not truly a theoretical one, as suggested by Posner's use of the word "unlikely" rather than, say, "inherently impossible." The ultimate test in regard to the interplay of law and literature, music, or any other field is the practical aid given the analyst, the felt sense of illumination provided by thinking about Beethoven's F-natural or Hamlet while wrestling with the possible meanings of a statute, regulation, or the Constitution of the United States.

Posner's dismissal of the potential interaction between legal analysts and disciplinary outsiders (or vice versa) begs a number of important questions. One is the assumption that there would have to be a transdisciplinary theory of interpretation-in-general that could be applied to all texts in order for different disciplines to have important things to say to each other. In fact, many modern students of hermeneutics have rejected the plausibility of a "science" of "interpretation in general."²⁷ As a tradition now identified with Wittgenstein and his successors insists, there are only "practices," each constituted by inchoate and unformalizable standards that establish one's statements or, indeed, pianistic performances, as "legitimately assertable"²⁸ by persons within the interpretive community²⁹ that constitutes the practice in question.

At the same time, an increasingly common practice in the contemporary academy is precisely to look outside the narrowest disciplinary boundaries for potential insight in solving the puzzles presented by one's own disciplinary materials. To adopt Claude Levi-Strauss's famous notion, the essence of the post-modernist, post-structuralist interpreter is to be a bricoleur, who resourcefully and opportunistically borrows whatever tools might be available to solve particular problems at hand.³⁰ There are obvious similarities between bricolage and contemporary pragmatism. The bricoleur is not a self-conscious theorist. What justifies using any given tool is its usefulness. There is no theoretically a priori way of deciding what tools are either "essential" or

²⁷ Cf. R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 8-11 (1979) (arguing that standards of correct judgment differ among various disciplines and that neither philosophy nor any other master discipline can impose its own external standards on them).

²⁸ S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 78 (1982).

²⁹ See S. FISH, *IS THERE A TEXT IN THIS CLASS?* 303-71 (1980).

³⁰ See C. LEVI-STRAUSS, *THE SAVAGE MIND* 16-36 (1966); G. GARVEY, *CONSTITUTIONAL Bricolage* 15 (1971).

"absolutely inappropriate." Thus the pragmatist temperament, which is most likely to reject the notion of a transcendental science of interpretation, is also the most likely to look to other disciplines for analogies and comparisons that might be useful in the pragmatist's own work. Ironically, it is only after one gives up the dream of a single tool useful on every occasion that one begins to see the merits of the diverse tools available for construction, whether of buildings or of theories.

Indeed, Judge Posner, who has recently announced himself a pragmatist in his book, *The Problems of Jurisprudence*,³¹ has hardly practiced what he preached in *Law and Literature: A Misunderstood Relationship*,³² and his later writing suggests he may now be somewhat more latitudinarian. He has, for example, recently published a devastating review of Robert Bork's originalist jurisprudence under the title *Bork and Beethoven*.³³ Posner raises, but does not consider at any real length, some of the questions elaborated in the present review. He notes particularly, and valuably, that conservative intellectuals associated with the magazine *Commentary* seem both to embrace Bork's originalism—the view that "original intent" should control constitutional interpretation—and to be hostile to what on the surface seems to be a very similar view, identified with partisans of "authentic" performance—that a musical performer should try, as much as possible, to recreate the original sounds of a musical composition.³⁴ He is certainly correct in noticing that explanation of this apparent inconsistency requires some analysis of the cultural moment in which both make their respective appearances. Indeed, it is precisely the insight displayed by juxtaposing Bork and Beethoven (or, more accurately, Bork and *Commentary's* music critic Samuel Lipman) that seems to disconfirm the rigid disciplinary separations advocated in *Law and Literature: A Misunderstood Relation*.

*1606 Given that we, too, consider ourselves pragmatists, we certainly have no desire to criticize Posner's argument by positing another equally aprioristic notion that reading literary theory or musicology will necessarily be helpful. Nor, certainly, do we wish to argue that law, literature, and music are identical enterprises operating under similar rules of practice. They are not. But to concede that law and music are importantly different does not necessarily imply that they do not also share enough similarities to make comparison useful (and,

³¹ R. POSNER, *supra* note 1.

³² R. POSNER, *supra* note 23.

³³ Posner, *Bork and Beethoven* (Book Review), 42 *STAN. L. REV.* 1365 (1990) (reviewing R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* (1990)).

³⁴ See *id.*

once more, we emphasize that pragmatic usefulness is the primary criterion we are employing).

Rudyard Kipling put the matter succinctly: "[W]hat should they know of England who only England know?"³⁵ Presumably one can paraphrase (though not parody) Kipling by asking "what should they know of Texas tort law who only Texas tort law know" (the justification, presumably, for teaching in our classes de facto comparative tort law rather than concentrating on the law of a single jurisdiction); "what should they know of tort law who only tort law know" (the justification, presumably, for asking our students to compare the notion of warranty as developed in contract law against developments in the products liability branch of tort law); or "what should they know of American tort law who only American tort law know" (the justification, presumably, for offering to our students courses on other societies' responses to the problems treated by American tort law). So the question ultimately becomes, "What should they know of law who only law know"? Obviously one can know a great deal about England without leaving its shores, and one can make the same claim about the other examples. But is Kipling really "refuted" by that recognition? Would we not, instead, say that few people cannot learn more about their own society by experiencing another? Is this not why most of us refer to travel as "broadening"? Surely this term implies more than simply amassing information about a different society. Rather, it suggests that a realization of how they do things in Tanzania will provide insights into how we behave here in the States. This has certainly been our own experience, and, we are confident, the experience of most of our readers.

Why does Posner, who is notably catholic in his own intellectual interests and well aware of the importance of looking outside ***1607** traditional legal materials for insight into the law, reject the utility of a lawyer's reading literary theory? The primary reason seems to lie in Posner's insistence that law and literature are fundamentally different enterprises, with fundamentally different points. "A poet tries to create a work of art, a thing of beauty and pleasure."³⁶ This is, for Posner, presumably true of literary writers in general, even if their genre is the novel or short story rather than the poem. The legislature (or the constitutional convention), on the other hand, "is trying to give commands to its subordinates in our government system."³⁷ The notion of "command" is central to Posner's theory. "A command," he says, "is designed to set up a direct channel between the issuer's mind and the recipient's; it is a communication, to be decoded

³⁵ Kipling, "The English Flag," quoted in OXFORD DICTIONARY OF QUOTATIONS 298 (3d ed. 1979).

³⁶ R. POSNER, *supra* note 23, at 240.

³⁷ *Id.*

in accordance with the sender's intentions."³⁸ Nor is Posner alone in this view. Robin West, normally no great ally of Posnerian thought, concurs: "legal interpretation is the attempt to ascertain the meaning behind a command; literary interpretation is the attempt to ascertain the meaning behind an artistic expression."³⁹

In their differentiation of law and literature, both Posner and West take the poem and the novel as the model of artistic expression. This is a fortunate example for both scholars, since the poem and the novel seem to have little to do with the phenomenon of command. Although Shelley might have claimed that poets were the unacknowledged legislators of mankind,⁴⁰ that designation is clearly metaphorical in a way that is not true of the senator or representative anguishing about a vote or the military commander ordering troops into action. Posner thus argues that "law is coercion rather than persuasion,"⁴¹ and he offers the interpretation of military orders as a good analogue to statutory interpretation *1608 in general.⁴² For her part, West asserts that "law is a product of power," and that legal interpretation is criticism of power.⁴³

It is not the purpose of this review to question Posner's or West's reliance on law-as-command or law-as-emanation-of-power, although both of us believe that undue emphasis on this theory produces an impoverished account of law.⁴⁴ Indeed, for purposes of this review, we will gladly accept their view that

³⁸ *Id.*

³⁹ West, *Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 *TENN. L. REV.* 203, 277 (1987).

⁴⁰ See M. SHELLEY, *A DEFENCE OF POETRY* (1821), quoted in *OXFORD DICTIONARY OF QUOTATIONS*, *supra* note 35, at 505. See also Samuel Johnson's quite similar statement, "[The poet] must write as . . . the legislator of mankind, and consider himself as presiding over the thoughts and manners of future generations; as a being superior to time and place." S. JOHNSON, *RASSELAS* (1759), quoted in *OXFORD DICTIONARY OF QUOTATIONS*, *supra* note 35, at 282.

⁴¹ R. POSNER, *supra* note 23, at 249. See also R. POSNER, *supra* note 1, at 296 (1990) ("Agreement on the meaning of legal texts may in many cases depend ultimately on force-law's ultimate backing.").

⁴² See R. POSNER, *supra* note 1, at 272-73.

⁴³ West, *supra* note 39, at 277.

⁴⁴ At the same time, we believe that an account of law which focuses only on community-enhancing or permissive aspects is equally impoverished. See, e.g., Levinson, *Conversing about Justice*, 100 *YALE L.J.* 1855 (1991).

law does indeed often command in a way that a poem or a novel does not. We will also acknowledge that there has been too much insistence that techniques of poetic interpretation could prove useful to the legal analyst, and that law-and-literature scholars have overemphasized the similarities between law and literature and underemphasized the differences. But note that what is interesting about the examples that lead off this review—Beethoven's F-natural and Schubert's repeats—is that they appear to be law-like commands. Consider in this context the comments of early music apostle Christopher Hogwood regarding the discovery of new material relevant to a composer's presumed intentions: "That's the wonderful thing, I think, about coming across new versions of pieces or new evidence. Suddenly that gives you this extra energy: 'Ah, a new set of instructions for embellishment . . . ah, wonderful!'"⁴⁵ If this is not a command theory of language, we do not know what would be.

Indeed, when one looks at any musical score, one is faced predominantly not with expression, but command. For what is a musical score but a series of directions concerning tempo, meter, pitch, rhythm, attack, and orchestration that are to be carried out over time by a group of performers? To be sure, the skilled musician can read a score like the ordinary person can read a novel, but this is not normally the way either enjoys music. Rather, one listens to the result of the commands brought to life by the performers so instructed. We can therefore imagine a continuum of artistic genres, some of which are more command oriented, like the musical score, and others which are less so, like the poem and *1609 the novel. The differences are, like those in all continua, a matter of degree. Even a poem may contain instructions (whether explicit or implicit) on how it is to be read—for example, through punctuation and accent marks. Far closer to the musical score is the play, which includes both the lines to be spoken by actors and the relevant stage directions. To be sure, plays can be read silently without performing them, and studied and appreciated like poems and novels. But most people would agree that the artistic expression in a play is not fully realized except through its performance on the stage. Dramatic genres thus undermine the distinction between interpretation of artistic expression and interpretation of command, for a play's artistic interpretation requires interpretation and observance of commands.

At first glance it might seem odd to speak of the lawyer or the judge as a "performer" of law. But in fact, the comparison, first noted by Jerome Frank, is quite apt.⁴⁶ As John Chipman Gray, one of the precursors of realism, pointed out at the turn of the century, the texts we call law are not law-in-action but only

⁴⁵ Taruskin, *The Pastness of the Present and the Presence of the Past*, in *AUTHENTICITY AND EARLY MUSIC*, supra note 16, at 150 (ellipsis in original) (quoting Christopher Hogwood).

⁴⁶ See Frank, supra note 3, at 1264.

sources of law—they require the interpretation and application of lawyers, judges, and other legal officials to become law in the sense of a practice of social regulation.⁴⁷ Just as the music of the Eroica is not identical with its score, but needs a performer to realize it, so too the social practice of law is not fully identical with its written texts, but needs the activity of those entrusted with its performance to be realized.⁴⁸

Another reason often given to doubt the relevance of artistic interpretation to legal interpretation is the differences in consequences that flow from the interpretive act. Legal interpretation affects people's lives and fortunes, whereas nothing of consequence flows from what literary interpreters do. A second, related claim is that unlike artistic interpretation, adjudication is distinctively an act of power.⁴⁹ Thus, Professor West argues that adjudication, although in form an interpretive act, is actually an "imperative act"—"an exercise of power in a way in which truly interpretive acts, such as literary interpretation, are not."⁵⁰

***1610** As to the first point, it seems clear that more rides on whether a young lieutenant obeys what she believes to be a mistaken order of her commander than if Alfred Brendel takes a repeat in a Schubert sonata. But that is true only because of the particular examples offered. In fact, much more may turn on certain directorial decisions in mounting productions of plays or operas than the adjudicated result of the average fender-bender. As noted above, the authentic performance movement is controversial not merely because of its hermeneutic claims, but because it threatens to throw a large number of traditional performers out of a job. If Maestro Norrington is correct, the New York Philharmonic would be best advised to keep its nose out of Schubert, Dvorak and the Romantics—the backbone of the modern symphony orchestra's repertory—to say nothing of Beethoven and Mozart. It had best stick to music it can play authentically—Shostakovich and perhaps Walter Piston. No doubt this will have a significant impact on its subscriptions. It will have an even greater effect on recording contracts, whose royalties often make up a sizeable chunk of a first-class orchestra's revenues. The authentic performance movement is controversial because it has thrown down the gauntlet—play Beethoven with extra woodwinds and an extremely astringent string tone or do not play him at all.

⁴⁷ J. GRAY, *THE NATURE AND SOURCES OF LAW* 170 (2d ed. 1921).

⁴⁸ See Frank, *supra* note 3, at 1270-71. For a similar argument, see D. KORNSTEIN, *THE MUSIC OF THE LAWS* 108 (1982). The foreword to this book of essays, interestingly, was written by Robert Bork. *Id.* at 9-12.

⁴⁹ West, *supra* note 39, at 277.

⁵⁰ *Id.* at 207.

To be sure, Roger Norrington does not have the same power that the Supreme Court does. He cannot enjoin the New York Philharmonic from playing music "incorrectly," and those who disagree with him can offer competing readings of the music, unlike lower courts who are presumably bound by Supreme Court interpretations of federal law.⁵¹ But even if Norrington has less power to enforce conformity with his views than an appellate court, it is a mistake to view him as having no power at all, especially to the extent that his devotees gain control and influence over institutions that shape our musical tastes and preferences.

One need only look at changes in the Penguin Stereo Record Guide ⁵²—a record collector's bible authored by contributors to Gramophone Magazine—to see what is at stake in the debates over authenticity in terms of economic power, status, and artistic prestige. In the second edition, published in 1975, the authors speak paternalistically but often approvingly of the very small ***1611** number of authentic performances of Baroque music then recorded; in their view, it's quite all right if you like that sort of thing.⁵³ But traditional performances constitute virtually all recommended albums of Baroque music. As the Eighties progressed, more and more authentic performances, first of Baroque, and then of Classical music appeared. In the 1984 successor volume, *The Complete Penguin Stereo Record and Cassette Guide*,⁵⁴ the authors express their approval of many individual "authentic" performances, tempered with occasional distress at the new fundamentalism that appears to inform them.⁵⁵ "Traditional", rather than

⁵¹ We are indebted to Richard Posner for this point.

⁵² E. GREENFIELD, R. LAYTON & I. MARCH, *THE PENGUIN STEREO RECORD GUIDE* (2d ed. 1975).

⁵³ Discussing Nikolas Harnoncourt's and Gustav Leonhardt's cycle of Bach cantatas for Telefunken records, which at that time was virtually the only example of authentic performance committed to record, the authors note that the use of boys instead of female sopranos "will undoubtedly deter some collectors." *Id.* at 45. Although generally supportive of the project, the authors complain of "a certain want of rhythmic freedom" and too much "expressive caution" in the performances, so that "the grandeur of Bach's inspiration is at times lost to view." *Id.* The tendency to accent all main beats heavily, they note, is "a constant source of irritation throughout the series." *Id.* at 47.

⁵⁴ E. GREENFIELD, R. LAYTON & I. MARCH, *THE COMPLETE PENGUIN STEREO AND CASSETTE RECORD GUIDE* (1984).

⁵⁵ For example, in the middle of a highly positive review of Herman Bauman's recording of the Mozart Horn Concertos on a valveless horn, the authors note:

"authentic", performances, however, constitute the lion's share of recommendations.⁵⁶ In the work's latest incarnation, *The Penguin Guide to Compact Discs*,⁵⁷ published this past year, the field of Baroque music has been largely ceded to authentic performers. It is assumed that most listeners will want such performances, although recommendations are still offered for those who insist on more traditional *1612 versions.⁵⁸ With millions of classical music discs sold each year on the recommendations of *Gramophone* and similar magazines, it is clear that interpretive debates are hardly exclusively about matters of expression.⁵⁹

We are not convinced that the playing of 'original instruments' always demonstrates their full expressive potential and in the case of the french horn it would seem perverse to use a valveless instrument, when a narrow bore modern horn . . . can sound the same, yet produce uniformity of timbre and stay in tune throughout its compass.

Id. at 682. Similarly, in the book's introduction, the authors argue:

While it is undoubtedly valuable to have an educated opinion of what the music sounded like in the composer's own time, sometimes considerations of scholarship—however dedicated—seem to inhibit the spirit of the music-making. Advocates of the 'authentic' school often seem to regard any kind of expressive licence as reactionary

Id. at vii.

⁵⁶ See, e.g., id. at 21-24 (offering recommendations for Bach's Brandenburg Concertos); id. at 65-67 (Bach's St. Matthew Passion); id. at 1165-69 (Vivaldi's Four Seasons).

⁵⁷ E. GREENFIELD, R. LAYTON & I. MARCH, *THE PENGUIN GUIDE TO COMPACT DISCS* (1990) [hereinafter *GUIDE TO DISCS*].

⁵⁸ See, e.g., id. at 22 (recommending Trevor Pinnock's performance of Bach's Brandenburg Concertos while suggesting alternatives "[f]or those who still cannot quite attune their ears to the style of string playing favoured by the authentic school").

⁵⁹ And, as Nicholas Kenyon reports in his introduction to *Authenticity and Early Music*, record companies have indeed found that authenticity sells:

[I]t quickly became clear to the record companies that the legend 'Performed on Authentic Instruments' was regarded as some sort of seal of Good Musical Housekeeping, and the implication of much of their activity was that the use of such instruments guaranteed or at least went some considerable way to ensuring 'authentic' performance. Eventually

As for Professor West's second point—that legal interpretation is an act of power, while artistic interpretation is not—we think this borders on the naive. One does not have to be a Nietzschean to recognize the struggles for power and prestige involved in debates over artistic interpretation. Indeed, the essays in *Authenticity and Early Music* speak of nothing so much as the battle for authority between early music acolytes and their traditional opponents.⁶⁰ Richard Taruskin complains loudly of the "authoritarian" appropriation of the word "authenticity" by early music advocates,⁶¹ while ***1613** Will Crutchfield begins his essay by noting that the authentic performance movement "has come to resemble a juggernaut, a steamroller, a conquering army."⁶²

Like Professor West, we also may have too easily accepted that the paradigm of interpretive debate was a solitary scholar lecturing on Keats' *Ode to a Nightingale* from a lectern. Yet it has become increasingly clear that many acts of interpretation are performative utterances which simultaneously constitute acts of

we reached the absurd situation where the American company releasing the Academy of Ancient Music's recording of the Pachelbel Canon affixed a sticker to the disc proclaiming: 'Authentic Edition. The famous Kanon as Pachelbel heard it.' Those of us who had difficulty knowing what Pachelbel looked like, never mind what he heard like, had some problems with this.

Kenyon, *supra* note 17, at 6.

⁶⁰ See, e.g., Taruskin, *supra*note 46, at 139 (noting that the classical music scene "has lately taken on the appearance of a 'battlefield', . . . [and] we are fighting it out, in this book and elsewhere.") (quoting Crutchfield, *A Report From the Battlefield*, N.Y. Times, July 28, 1985, at 1.).

⁶¹ Taruskin, *supra* note 45, at 138-39 ("One is hardly free to say, 'I prefer inauthenticity to authenticity,' or, 'I prefer inappropriateness to appropriateness,'—at least if one is interested in maintaining respectability with the crowd that swears by the Harvard Dictionary [of Music]."). Interestingly enough, Judge Posner has also criticized the "authoritarianism" of those who look to "tradition" for privileged insight into the law. See R. POSNER, *supra* note 1, at 448.

⁶² Crutchfield, *supra* note 19, at 19. Crutchfield reports that the opera director Frank Corsaro has even coined a phrase for the increasingly common experience of being frustrated in one's artistic attempts by the new musicological fundamentalism: he calls it being "gesellschafted." *Id.* at 20.

power.⁶³ Rather than seeing the legal act of interpretation as exceptional in its complicity with power, we would suggest that it is quite the other way around. The legal act of interpretation, which clothes power through an act of cognition, is the normal, paradigmatic act of interpretation, while an imagined quiet "powerless" lecture on Keats is the exception.

Moreover, we think that West's and Posner's arguments about legal power confuse the effects of interpretive difficulties with their causes. It may well be true that because the meaning of the Constitution is debatable, people's lives will be affected by what interpreters do. Thus, significant consequences turn on the existence of interpretive difficulties. But this fact is not the cause of interpretive difficulty. The cause is the semiotic nature of the command—the fact that the Constitution contains commands encoded in signs requiring interpretation in the light of existing conditions. It is because both the text of the Constitution and the score of Beethoven's Pastoral Symphony are commands inscribed in signs that must be interpreted by performers that difficulties of interpretation arise. Once again, we do not deny that the consequences of the exercise of interpretive power should be in the mind of the interpreter as she interprets, and that they might serve as reasons for interpreting one way rather than another. But the interpreter's power does not create her interpretive difficulties—*1614 rather it is the interpretive difficulties which give rise to her power over others.⁶⁴

⁶³ See S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 135-36, 306, 309 (1990).

⁶⁴ In discussing the relationship of law to music with colleagues, we have also witnessed again and again the unquestioned assumption that, unlike legal interpretation, there are really no standards for judging artistic interpretation, and that, in contrast to legal interpretation and legal scholarship, there is really no good way to say that one performance or interpretation is better, richer, or more faithful than another. We suspect that lawyers and legal scholars who speak in this way have never attended a piano competition. Indeed, the entire system of education and training for musicians is premised on the assumption that some performances are better than others. The same assumption underlies record reviews, critical reviews of concerts, and a host of other institutions that are devoted largely to sorting, judging, and evaluating musical performance and musical talent. This is not to say that people do not disagree heatedly over these matters, or that views about interpretation do not change historically; we would only point out that the same is true of legal interpretation and of legal judgments of quality in scholarship or in judicial reasoning.

We think that the exaggerated emphasis on artistic subjectivity by lawyers and legal scholars forced to confront the analogies between law and music is a projection of what are thought to be undesirable characteristics of the self onto the Other. By opposing law to art in this manner, one is able to suppress the emotional and subjective elements of legal judgment by projecting them onto the opposite, art, while simultaneously downplaying the possibility of

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RECHERCHE DU TEMPS
PERDU⁶⁵**

reasonableness and impartiality in artistic judgment. See Balkin, *The Domestication of Law and Literature*, 14 *LAW & SOC. INQUIRY* 787, 794 (1989); cf. Torres and Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 *LAW & INEQUALITY* 171, 181-85 (1986) (Ideological construction of juries as "emotional" allows judges to suppress recognition of their own biases and unreasonableness.).

As this essay went to press, we came across a fascinating case that yokes legal and artistic interpretation together, and thus actually requires a legal judgment about the plasticity of artistic standards. The Tams-Witmark Music Library, which licenses the rights to the Cole Porter musical "Anything Goes," has denied director Martin Teitel the right to stage the musical with a man in the lead role of Reno Sweeney (created on Broadway by Ethel Merman). See Shewey, *Anything Goes . . . Well Almost*, *Village Voice*, Apr. 23, 1991, at S2, col. 4. Previous productions on *Fire Island* and in *Dallas* were such a success that Teitel's unusual casting was reported in the trade press, at which point Tams-Witmark objected. (Teitel has met Tams-Witmark's action with a sex discrimination suit of his own.) *Id.* The standard Tams-Witmark licensing contract states that there will be "no additions, transpositions, or interpolations of any kind," although the musical is regularly performed in a modified, edited, and reconstituted fashion without complaint. *Id.* Thus in practice, at least, the question may boil down to whether the proposed innovations go too far. Shewey argues that "[i]t's patently clear that Tams- Witmark's objections stem from homophobia, especially dismaying considering Porter's own homosexuality." *Id.* Perhaps Teitel's alteration is no more a breach of the agreement than setting the musical in the present rather than in the 1930's. Nevertheless, in interpreting the contract, we would think it highly irresponsible for a court to find in the director's favor solely on the grounds that no one can tell whether or not a production is faithful to the musical's score and book. No matter how this particular case should be decided, there must be some point at which outraged theatergoers could demand their money back on the grounds that the play promised to them had not, in fact, been performed. We thus maintain once again that legal and musical interpretation are not as different as they first appear; for in musical, as well as in legal interpretation, not anything goes.

⁶⁵ We allude here not only to the title of Proust's epic example of twentieth century modernism, but to the implications of the different English translations offered in its stead. The standard translation is *In Remembrance of Things Past*. Vladimir Nabokov, among others, has preferred the more "literal" *In Search of Lost Time*. See V. NABOKOV, *LECTURES ON LITERATURE* 208 (F. Bowers ed. 1980). The two titles have quite different implications. We

To take up Kipling's metaphor again, perhaps the best way to understand what other countries and cultures contribute to our understanding of England is to begin the journey itself. One quickly discovers that examples like Beethoven's F-natural or Schubert's repeats do not even begin to exhaust the many different kinds of controversies that may arise over performing the music of the (relatively distant) past. We begin, then, with the interpretation of commands in Beethoven's Symphony No. 6 in F, the Pastorale. Consider the following exegesis, given in a booklet accompanying the compact disc recording of Beethoven's Sixth Symphony by The Hanover Band, an English group fully committed to the task of performing music "in a form which [the composer] would recognise."⁶⁶ There is a certain irony in the Hanover Band's aspiration, given that Beethoven went deaf well before the composition of the Pastorale Symphony. It becomes a zen-like question (as in "what is the sound of one hand clapping?") to ask how one would have the slightest idea what Beethoven might "recognise" as the sound of a symphony that in fact he never heard or could hear fully, save in his own mind.

But of course the Hanover Band probably intended to produce the sonic effects experienced by Beethoven's non-hearing-impaired contemporaries. Even if one grants the plausibility of the Hanover Band's ambitions, their achievement is a daunting task, as illustrated by some of the issues discussed in the booklet. They include, but are not limited to, such aspects of musical performance as trying to recreate "the original orchestral sound" (which means in effect offering "an intimate, chamber music approach"), assigning to notes ***1616** the pitch assigned to them in the eighteenth century, mimicking "a late 18th-century feeling for tempo," and presenting "the dramatic address to rhythmic accent and dynamic colour which eyewitnesses [earwitnesses?] describe in Beethoven's own performances."⁶⁷ Also characteristic of "authentic" performance is the Hanover Band's emphasis on the use of "original" instruments, which can mean physical objects either originally produced at the time of composition and performance or built more recently in conformity to what is known about the instruments available at the relevant time. This means, among other things, that horns will have no valves, that pianos will produce sounds quite different from a modern Steinway, and that violins will use catgut instead of contemporary metallic strings.

believe that the debates over "authentic" musical performance turn on whether one can truly recover the past or whether one must realize that those times are irredeemably lost, and the concomitant necessity of recognizing that we live exclusively in our own time, separated and alien from the past.

⁶⁶ C. BROWN, THE HANOVER BAND (1988) (pamphlet accompanying compact disc version of Beethoven's Symphony No. 6 'Pastoral' (Nimbus Records 1988)).

⁶⁷ *Id.*

The sonic effects produced by early music enthusiasts like Hogwood, Norrington, and the members of the Hanover Band are clearly different from what many listeners will be used to. For example, modern string players move their fingers slightly on sustained notes to produce a warmer tone, an effect called vibrato.⁶⁸ Early music players eschew vibrato, producing a string tone that has variously been described as sour, astringent, or vinegary.⁶⁹ Woodwinds and horns often sound out of tune, despite the best of intentions and the most skilled players. In the classical piano concerto, the pianoforte is replaced by the earlier fortepiano, which despite its name produces sounds that are more often piano than forte. Hogwood's tempi are usually much faster than even the fastest traditional performances and display a certain rigidity, while the Hanover Band apparently believe that authenticity requires more flexible changes in tempo than those often heard in traditional performances. Above all, authentic performance produces lighter and more transparent textures in Baroque and Classical music, with ***1617** a corresponding loss of weight and, some would say, grandeur.⁷⁰ The more expressive utterances—for example those in the slow movements of Mozart symphonies—tend to be downplayed,⁷¹ and the general feeling is one of buoyancy and even lack of seriousness, or in Richard Taruskin's words, of music that "seems ready virtually to blow away."⁷²

⁶⁸ THE NEW HARVARD DICTIONARY OF MUSIC 910 (D. Randel ed. 1986) [hereinafter THE NEW HARVARD DICTIONARY].

⁶⁹ One of the most amusing aspects of the reviews in *The Penguin Guide to Compact Discs* is their constant assurances to readers that the strings in their recommended authentic performances do not sound half as bad as one would expect. See, e.g., *GUIDE TO DISCS*, supra note 57, at 299 ("Collectors fearful of the vinegary tone often produced by period violins will find their ears beguiled by sounds of great beauty."); id. at 29 ("Kuijken . . . shows that authentic performance need not be acidly over-abrasive."); id. at 23 (describing Pinnock's performances as "not too abrasive"); id. at 35 ("[T]hese accounts [of Bach solo violin music] are as little painful or scratchy as you are likely to get in the authentic field.").

⁷⁰ See, e.g., id. at 447 (reviewing Trevor Pinnock's performance of Handel's 12 *Concerti grossi*, Op. 6).

⁷¹ See, e.g., id. at 682-83 (reviewing Hogwood's performances of the late Mozart symphonies).

⁷² Taruskin, *The Pastness of the Present and the Presence of the Past*, in *AUTHENTICITY AND EARLY MUSIC*, supra note 16, at 188.

Do these innovations bring us closer to authentic performance, whatever that might mean? Let us begin with the insistence on using original instruments. Malcolm Bilson, an early music specialist who has recently recorded a cycle of Mozart's piano concerti using a fortepiano, has argued not only that Mozart's sonatas sound significantly different when played on a late-eighteenth century piano, but that a performance played on such a piano was importantly better, because more authentic, than one played on a modern Steinway. Charles Rosen disagreed, and he used Bilson's protest as an example of the ideological nature of the "authentic" performance movement in early music.⁷³ Professor Zaslaw, whom we have earlier seen in a debate over repeats with Alfred Brendel, tried to mediate between Rosen and Bilson. Zaslaw argued that the eighteenth-century Stein or Walter pianos used by Mozart and the twentieth-century Steinway or Bosendorfer pianos available to Rosen "are extraordinarily sophisticated instruments, each perfect in its own way. The two types are quite different, having been consciously designed to satisfy two very different aesthetics. Each can do things that the other, with all the good will, musicianship, and brilliant pianistic techniques in the world, cannot do."⁷⁴

Rosen responded, however, that Zaslaw's attempted reconciliation still subscribed to the "erroneous and anachronistic assumption that the conception of an eighteenth-century work was identical with the sound we think the composer expected to hear."⁷⁵ He particularly took exception to Zaslaw's statement that both the Stein and *1618 Steinways are "each perfect in their own way," responding that "there are aspects of the music of Stravinsky, Bartok, Boulez, and Carter that can only be imperfectly realized on a Steinway. I see no reason to accept a claim of perfection on behalf of the Stein."⁷⁶ To the extent that anyone believes that a Stein is "perfect" for the performance of Mozart, Rosen argued, "that is only and tautologically because Mozart is to them what he sounds like on a Stein."⁷⁷ To believe that the Stein was "really so 'perfect' for Mozart" would presumably require that one believe as well that "the greater sustaining and singing power of the new pianos made soon after Mozart's death would be a falling-off from this absolute state."⁷⁸ Rosen freely concedes that "the

⁷³ See Rosen, N.Y. REV. BOOKS, Nov. 8, 1990, at 60 (replying to letter by Malcolm Bilson).

⁷⁴ Zaslaw, N.Y. REV. BOOKS, Feb. 14, 1991, at 50 (letter to the editor).

⁷⁵ Rosen, N.Y. REV. BOOKS, Feb. 14, 1991, at 50 (responding to Zaslaw's letter in the same issue).

⁷⁶ Id.

⁷⁷ Id. (emphasis in original).

⁷⁸ Id.

'improvements' in construction entailed a loss of certain tonal qualities as well as a gain of others. Zaslav's position, however, implies that all the changes be seen as nothing but a loss and a degeneration from the ideal sound."⁷⁹ Zaslav's assertion that Stein pianos were "'consciously (and successfully) designed to satisfy' an aesthetic" is dismissed as "a naive claim that ignores conflicting aesthetic ideals and all manner of mechanical problems that stand in the way of constructing pianos."⁸⁰ Rosen thus accuses Zaslav (and Bilson) of being committed to a notion that there is one best way of presenting Mozart, and he writes a sentence that certainly should strike a familiar chord in anyone familiar with equally acrimonious disputes in the world of legal interpretation: "Multiple possibilities of realizing a musical text are a basic tradition of Western music"⁸¹

But deciding on what kinds of instruments to play is only the beginning. One must also decide on the numbers of instruments, which can obviously make a significant difference in terms of volume, tonal balance, and the like. Yet Harold Schonberg notes that "[o]ften Bach, like most other composers of the time, did not specify instrumentation, and he would use whatever was at hand."⁸² What explains this? The answer is that, " u ntil Haydn and Mozart came along—and, indeed, for many years later outside of the big European cities—the orchestra was altogether a flexible *1619 affair" in terms of the numbers of particular instruments represented and, of course, the quality of the particular players.⁸³ Thus a specific "composer's orchestration depended upon the groups involved," and, indeed, " orchestration would be adapted to fit the needs of individual players."⁸⁴ There is no proof that previous composers expected that later generations would confine themselves to the same size orchestras they were forced to accept. Roger Norrington's attempt to achieve an authentically sized orchestra for his performance of Berlioz's *Symphonie Fantastique* based on 1830 Paris models is particularly troublesome in this respect; if there is one thing we know about Berlioz, it was that no orchestra was too large for his tastes.⁸⁵

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² H. SCHONBERG, *supra* note 2, at 29.

⁸³ Id. at 28.

⁸⁴ Id.

⁸⁵ See *id.* at 113-14 (describing Berlioz's ideal orchestra of 465 instruments and a 360 person chorus).

The Hanover Band is considerably smaller than most contemporary orchestras, with a far greater emphasis on the woodwinds. The reason, of course, is that this reflects the orchestras found in Vienna at the end of the eighteenth century. The members of the Band are directed not by a conductor standing on a podium, as is contemporary practice, but rather "either from the violin or from the keyboard as is in keeping with the period and according to the repertoire."⁸⁶ We are told, no doubt accurately, that "Beethoven directed many performances from the fortepiano added by propulsive internal direction given by the first violin."⁸⁷ What was good enough for Beethoven should, presumably, be good enough for Bernstein, at least if one's goal is fidelity to the former. It does not appear, though, that any early- music enthusiasts adopt the practice of early conductors who kept time by loudly beating a stick on the floor so as to be heard by the members of the orchestra.⁸⁸

"The matter of pitch," we are told, "is crucial to a faithful reconstruction."⁸⁹ Today's "standard pitch" sets the A above ***1620** middle C at 440 cycles per second. The Hanover Band, after much research, adopts "an A sounding at 430 cycles per second."⁹⁰ Not surprisingly, such differences in pitch produce somewhat different sounds. It is worth mentioning in this context what is perhaps the *reductio ad absurdum* of this striving for historically-informed reproduction of sound. In Christopher Hogwood's recording of Beethoven's Third Symphony, the *Eroica*, he purports to recreate the initial performance of the music

⁸⁶ C. BROWN, *supra* note 66.

⁸⁷ *Id.*

⁸⁸ See H. SCHONBERG, *supra* note 2, at 26, 28.

⁸⁹ C. BROWN, *supra* note 66. On pitch, see Fantel, *Equipment That Plays in the Key of Flexibility*, N.Y. Times, Aug. 26, 1990, at 26, col. 1. Fantel, who writes about "sound" for the New York Times, notes that "Beethoven's notion of C differs from ours," and goes on to observe not only that "[t]oday's performances, adhering to the modern convention of 'standard pitch,' take no account of this," but also the fact that compact disk players generally do not allow the listener to adjust the pitch of a recording. *Id.* The market has recognized this defect, though, and it is now possible to buy CD players that "are capable of tuning the music up or down by as much as a whole note." *Id.* Fantel somewhat naively suggests, however, that the listening public might "leave the matter of pitch strictly in the hands of the performers." *Id.* The members of the Hanover Band would respond, though, that most performers cannot be trusted, that only they are presenting the authentic Beethoven experience.

⁹⁰ C. BROWN, *supra* note 66.

by "a very powerful company (consisting almost entirely of amateurs)."⁹¹ Thus the performance features, among other things, the "uncomplicated, rhythmical" approach found in amateur performances even in the present.⁹² If the first performance of the Eroica was mediocre, Hogwood seems to be arguing, well then, that is the price one pays for authenticity.

If the aural picture historically experienced by the work's first audience is the true test of authenticity, it is difficult to know whether Hogwood's suggestion is to be dismissed out of hand or fervently embraced. Indeed, one might go even further in the reconstruction of the exact sounds produced at the premieres of the Beethoven symphonies. Instruments used during the late eighteenth century were often out of tune, especially as the performance progressed, because of the limitations of the stings used at the time, for example. Presumably, then, it would violate the "rule of recognition," as adopted by the Hanover Band or by Hogwood, to play the music consistently in tune, as that is a distinctly "modern" expectation, based on subsequent developments in the technology of musical instruments.⁹³ Emphasis on recreating the actual *1621

⁹¹ Hogwood, Hogwood's Beethoven, *THE GRAMOPHONE*, Mar. 1986, at 1136, quoted in Taruskin, *supra* note 45, at 140.

⁹² See Taruskin, *supra* note 45, at 141 (quoting Clive Brown, notes to Oiseau-Lyre 414338).

⁹³ This is by no means a fanciful concern. We normally expect top-flight modern symphony orchestras to play in tune, but our expectations about what "in tune" performance consists in depends upon several factors, including the invention of horns with valves and the universal adoption of the even tempered scale in the nineteenth century. To preserve acoustically pure intervals in one key necessitates that some intervals in other keys will deviate from acoustic perfection, and the more harmonically distant the key, the greater the disadvantage. See *THE NEW HARVARD DICTIONARY*, *supra* note 68, at 422, 837-38. Different methods of "tempering" or slight adjustment of the scale to compensate for this problem were devised and employed during the 1600s and 1700s. The title of Bach's Well-Tempered Clavier refers to one such method, no longer used today. See *id.* at 838. Eventually, the equal temperament approach gained dominance, but this temperament is not necessarily the same one originally used when early music was first performed. See *id.* at 624, 838. Valveless horns of the type used in Beethoven's era play notes that do not precisely match an even tempered scale, see *id.* at 364, 380, and thus performers must use various devices (such as partially closing off the bell of the horn with the right hand) to approximate the correct pitch. See *id.* at 381. Some out of tune performance on original instruments is also due to the performer's inability to control various aspects of the instrument, for example the gradual loosening of the sounding strings on early stringed instruments or pianos.

conditions of performance, finally, leads one to ask whether recordings proclaiming such "authenticity" should not include coughs, wheezing, and other sounds that were undoubtedly heard in Viennese drawing rooms and concert halls during the playing of the music. At some point one crosses the line that separates scrupulousness from absurdity, but unfortunately one's confidence in the ability to locate that line has been seriously undermined by Hogwood's and the Hanover Band's pronunciamientos.

Of course, not everyone agrees with the Hanover Band's approach to correct interpretation. And indeed, the authors of *Authenticity and Early Music* are united primarily by their skepticism, if not outright hostility, to the ideology revealed in the Hanover Band booklet. For these writers, Proust's title⁹⁴ should undoubtedly be translated to emphasize the "lostness" of the past and, consequently, the inability to present a performance today that could meaningfully replicate earlier performances. All of them would agree with Robert P. Morgan's observation that "we cannot re-create the 'aura' of the original (to borrow Walter Benjamin's useful term), no matter how hard we try."⁹⁵ Difficulties concerning the maintenance or manufacture of "original" instruments or the "proper" pitch of C are only the beginning. Thus, writes Morgan, "perhaps even more critical . . . than original performance inflections is the deeper context in which the works were originally experienced—their status as integral components of a larger cultural environment that has disappeared and is fundamentally irrevocable."⁹⁶ Morgan offers as "only the most obvious" example that much "early music was not intended to be performed in concert."⁹⁷ To take another example, Bach composed his *1622 masses and his religious cantatas to be performed in church as part of the devotional exercises of committed Lutherans.⁹⁸

Perhaps the best way of understanding the problem is by pondering a recent promotional advertisement offered by an Austin, Texas public radio station

⁹⁴ See supra note 65.

⁹⁵ Morgan, *Tradition, Anxiety, and the Current Musical Scene*, in *AUTHENTICITY AND EARLY MUSIC*, supra note 16, at 71.

⁹⁶ *Id.*

⁹⁷ *Id.* In the classical and Romantic periods, chamber and solo instrumental music would usually be performed in the home or at small social gatherings. See Rosen, supra note 4, 75, at 50; Holland, *Heard the One About the Madcap Trill?*, *N.Y. Times*, Apr. 7, 1991, at 25, col. 1 ("[A] lot of music we now listen to silently was written for noisy dinner parties.") (interview with Alfred Brendel).

⁹⁸ See Taruskin, *Facing Up, Finally, to Bach's Dark Vision*, *N.Y. Times*, Jan. 27, 1991, at 25, col. 1.

promising a performance of a Bach mass "just as Bach would have heard it." This advertisement was presumably directed to people eating dinner in their homes, to others working at their places of business, and to still others driving in their cars. The idea that if we wish to recapture the "authentic" experience of Bach or Beethoven all that is necessary is to pop a tape of Hogwood into our car stereo as we speed down interstate 35 seems increasingly preposterous the more that one thinks about it. Moreover, the very idea of recorded music that can be purchased as a commodity in stores (the St. Matthew Passion—on sale now for only \$3.99!)—and can be played over and over again at our whim—is completely foreign to the phenomenology of musical performance in Bach's time, and indeed, of all musical culture until well into the twentieth century.⁹⁹

As Morgan writes, "if we take the notion of context at all seriously, we are left with the painful realization that any concert performance of this music constitutes a basic perversion of its original intentions."¹⁰⁰ What he terms "the authentic function of the music," an interesting term for him to adopt, "is lost to us and cannot be reconstituted. As soon as we place these works in a museum, we wrench them out of their own frame and utterly transform their original meaning."¹⁰¹ Morgan concludes his essay by accusing the authenticity movement of "placing older music in a museum," which, he goes on to note, is an essentially "modern invention,"¹⁰² created precisely at the moment in our culture when we recognized the ineluctable pastness of the past and thus felt the necessity to preserve what was no longer part of our living *1623 experience in an antiseptic environment suitable for distanced observation.

Morgan draws a contrast between placing early music in the equivalent of a museum and treating it as part of an ongoing tradition. Ironically enough, a living tradition involves participants who feel (and this word is used advisedly) comfortable engaging in their own interpretations, their own transformations of the materials that constitute their identity. What allows one, for example, to consider him or herself a "traditional" Jew is surely not some fantasy that one is doing exactly what was done 3000 years ago in ancient Israel, but rather a felt confidence that one is participating as the latest member of a recognizable way of life whose transhistorical identity has endured whatever the surface changes. Few traditions assume stasis as the operative condition of life.

⁹⁹ See W. BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* 217-251 (H. Zohn trans. 1969).

¹⁰⁰ Morgan, *supra* note 95, at 71.

¹⁰¹ *Id.*

¹⁰² *Id.* at 81.

As Will Crutchfield writes, "[o]ne of the unthought-of things the great composers assumed, wanted, and needed was the conviction and passion of great performers,"¹⁰³ who would offer their own emendations of the composer's score. Exemplifying Crutchfield's point is the distinguished theater and opera director Jonathan Miller, who writes of his hope "that by the first night a performance has emerged that has the possibilities of an enormous amount of spontaneous growth and amplification" generated by the performers themselves.¹⁰⁴ He mentions his delight, upon seeing a particular performance of *Rigoletto* that he had directed for the English National Opera, in discovering a host of "things that I had never seen before and never asked them to do." Indeed, "Whenever I have gone back to watch *Rigoletto* I have been delighted to find that it is a truly emergent production,"¹⁰⁵ a collaborative relationship among composer or playwright (who may, of course, be long dead), director, actors and singers, and audience.

For most of us, this notion of living tradition is most obvious in popular music. What makes Thelonious Monk's *Round Midnight* a true "classic" of jazz is most certainly not its ability to be endlessly re-presented in a single canonical note-for-note form, but rather its ability to serve as the basic setting for creations by other great musicians. Even if one exempts jazz from the discussion due to its deliberately improvisatory form, one can find much the same idea of a living tradition in performances of pop, soul, and rock music. *1624 One might also adopt, as Jonathan Miller does in his discussions of the interpretation of plays, Noam Chomsky's distinction between the deep and surface structures of grammar. In Miller's words, "there are an infinite series of sentences, all of whose surface structures are different but that can nevertheless express the same deep structure."¹⁰⁶ It is therefore altogether possible (and legitimate) that "an enormous variety of actual performances" can be faithful to the underlying deep structure of the particular piece that is being interpreted.¹⁰⁷

¹⁰³ Crutchfield, *supra* note 19, at 25.

¹⁰⁴ J. MILLER, *SUBSEQUENT PERFORMANCES* 117 (1986).

¹⁰⁵ *Id.* at 118.

¹⁰⁶ *Id.*

¹⁰⁷ J. MILLER, *supra* note 104, at 118. Having introduced Chomsky into the discussion, we hasten to distance ourselves from any commitment to the general structuralist program that Chomsky is famous for (and that Miller is adopting). Post-structuralist critiques, after all, have argued forcefully against the notion of unique and identifiable deep structures that provide the kind of baseline that Miller strongly endorses to constrain interpretive license. One might respond to Miller's distinction by wondering whether continuous changes in surface over time might lead to what everyone would admit were really profound changes in structure. If the evolution of *Rigoletto* continued apace for ten years in his absence, Miller might well discover, upon his return, that the cumulation of

Nevertheless, (and, we might add, alas), there are popular musicians who themselves are increasingly indicating disdain for those who ostensibly "distort[popular music] in all kinds of insidious ways that are losing track of [the composer's] original authentic sound."¹⁰⁸ Morgan is quoting a "bright young star" of the New York cabaret scene, Michael Feinstein, who has produced an album which "attempts a re-creation of Gershwin's popular songs in their original form," using original orchestrations and texts.¹⁰⁹ Morgan fumes: "This from, of all things, a cabaret singer—a type traditionally committed to extremely personal, even blatantly idiosyncratic stylizations."¹¹⁰ Feinstein's album is entitled, as might be expected, *Pure Gershwin*. The work of cultural anthropologists *1625 may be particularly helpful in understanding what lies behind the use of the "pure" in such settings.¹¹¹ To label those whose interpretations differ from one's own "impure" is no small rhetorical feat. Indeed, it is structurally similar to describing one's opponents as "heretics."¹¹² Such language suggests the smell of the auto-de-fe rather than a willingness to acknowledge the legitimacy of competing perspectives. As Morgan observes with regard to Feinstein's ambitions, " apparently it is no longer Mabel Mercer's or Bobby Short's Gershwin we want or will even tolerate as an acceptable possibility , it is some sort of reincarnation of

so-called "surface alterations" had made his original artistic conception virtually unrecognizable. Cf. Balkin, *Constitutional Interpretation and the Problem of History* (Book Review), 63 N.Y.U. L. REV. 911 (1988) (discussing cumulative effects of commerce clause decisions). Similarly, the history of jazz music has demonstrated that the original notion of variations in melody, while preserving "deep" harmonic structure, eventually led to substituted harmonies in the be-bop era, the adoption of improvisation on modal scales in lieu of harmonic structure in the work of Miles Davis' first quintet, and finally to Ornette Coleman's "free jazz." M. GRIDLEY, *JAZZ STYLES* 40, 44, 51, 120-22, 177-78, 195-201 (1978). For a general discussion, see J. COLLIER, *THE MAKING OF JAZZ: A COMPREHENSIVE HISTORY* (1978).

¹⁰⁸ Morgan, *supra* note 95, at 78 (quoting Holden, *Cabaret's Bright Young Star*, N.Y. Times, June 29, 1986, ' 6 (Magazine), at 33, col. 2).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., M. DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* (1978) (describing the cultural construction of "impurities" that must be suppressed).

¹¹² See R. BORK, *supra* note 33, at 4, 11 for just such a denunciation of opponents.

Gershwin himself."¹¹³ To switch back to "classical" music, it is no longer Leonard Bernstein's or the New York Philharmonic's Beethoven we should want, but rather the Hanover Band's reincarnation. Such an approach, ironically enough, seems not only to embalm a tradition, but to be unfaithful to what is historically known about "original" performance practice, which allowed, indeed celebrated, improvisation.¹¹⁴

Richard Taruskin is perhaps the most polemical (and entertaining) of the opponents of the authentic performance school, which he rechristens "authenticistic."¹¹⁵ His essay, "The Pastness of the Present and the Presence of the Past," casts scorn upon almost all of the claims suggested or implied by the proponents of "authenticity" in early music. Thus, as against the comment by one writer that "an ideal performance is one that perfectly realizes the composer's intentions,"¹¹⁶ Taruskin responds that "we cannot know intentions, for many reasons—or rather, we cannot know we know them."¹¹⁷ In Taruskin's view, "once the piece is finished, the composer regards it and relates to it either as a performer if he is one, or else simply as a listener."¹¹⁸ As for fidelity to text, he *1626 quotes the composer George Perle's view that "the greatest single source of bad performance . . . is literalism . . . It's what you expect nowadays."¹¹⁹

Taruskin also joins most of his fellow essayists in criticizing the historical tendentiousness of many of the "authentic performance" devotees. He argues that many early music performers are simply imposing their own aesthetic preferences under the guise of "authentic" performance practices. He gives the example of David Wulstan's performances of Renaissance choral music, which attempted to "obtain as nearly as possible the sound of the great English Sixteenth

¹¹³ Morgan, *supra* note 95, at 78.

¹¹⁴ See Brett, Text, Context, and the Early Music Editor, in AUTHENTICITY IN EARLY MUSIC, *supra* note 16, at 106-07.

¹¹⁵ Taruskin, *supra* note 45, at 148.

¹¹⁶ *Id.* at 138 n.8 (quoting Grant, On Historical Authenticity in the Performance of Old Music, in ESSAYS ON MUSIC IN HONOR OF ARCHIBALD THOMPSON DAVISON 341 (1957)).

¹¹⁷ *Id.* at 145.

¹¹⁸ *Id.* at 147 (quoting Taruskin, On Letting the Music Speak for Itself: Some Reflections on Musicology and Performance, 1 J. MUSICOLOGY 340 (1982)).

¹¹⁹ *Id.*

Century Choirs."¹²⁰ After some experimentation with the traditional men-boy choirs, Wulstan switched from boy trebles to women, arguing that "because boys' voices now break early, they tend to find the high vocal parts . . . overtaxing: with proper training, however, girls' voices can produce exactly the right sound."¹²¹ This seems a perfectly plausible accommodation until Taruskin points out that Wulstan (like everyone else alive today) had never heard the sound of a "great English Sixteenth Century Choir."¹²² Authentic performance, Taruskin argues, is really the imposition of a post-Stravinskian modernist aesthetic to the music of the past. It is a creation of our own times, satisfying modern aesthetic preferences which are nevertheless justified and even sanctified by claims of historical accuracy.

Interestingly, Taruskin does not condemn per se the practice of making Mozart and Beethoven sound like Stravinsky; he objects, rather, to the claim that this modernization of sound is in fact authentic, and the related claim that this "authentic" practice is the only permissible way to perform early music. Taruskin at last reveals himself to be both a pluralist and a pragmatist in matters of musical performance. The test of an artistic interpretation for him, presumably, is whether it "works" aesthetically— whether it produces a pleasing and satisfying experience to the persons of our own era.¹²³

We have purposely forborne from pointing to all of the obvious affinities between the arguments made (and attacked) by those interested in the performance of early music and those made by *1627 legal analysts concerned with how one should engage in legal performance. A statute or a constitution is, indeed, not a poem; it is designed to structure other people's behavior in certain important ways. But, then, so is the score of a symphony or the text of a play. And the word "structure" is purposely elusive, leaving open the possibility that the particular passions (and, dare we say, political commitments) of the gifted performer might have as much to do with the performance possibilities she chooses as some impossible fidelity to purportedly timeless and acontextual commands contained in the texts. Authenticity and Early Music should thus be of interest to anyone interested in problems of legal interpretation.

But that is only one of the reasons for suggesting that a law-and-music scholarship can complement the already flourishing genre of law-and- literature.

¹²⁰ Id. at 144 (quoting Chislett, notes to Seraphim LP 60256 (works of Tallis)).

¹²¹ Id. (quoting Chislett, notes to Seraphim LP 60256 (works of Tallis)).

¹²² Id.

¹²³ See id. at 204-07.

Perhaps more important than recognition of the affinities of interpretive dilemmas generated by having to work with texts, as important as that recognition may be, is the insight provided into more general issues of cultural development.

III. INTERPRETATION AND MODERNIST ANXIETY

It is our thesis that the early-music movement is best understood as attempting what the English historian Eric Hobsbawm calls the "invention of tradition."¹²⁴ Hobsbawm defines "'invented' traditions" as "responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition."¹²⁵ Faced with "the constant change and innovation of the modern world," one engages in an "attempt to structure at least some parts of social life within it as unchanging and invariant."¹²⁶

Hobsbawm contrasts this pseudo-traditionalism to participation in a living and developing tradition, and, interestingly, one example he gives is the English common law, which he argues is characterized by a remarkable combination of "flexibility in substance and formal adherence to precedent."¹²⁷ In Hobsbawm's view, the common law could never "afford to be invariant, because even in 'traditional' societies life is not so."¹²⁸ Variance means change, *1628 which means history and the realization of "break s in continuity."¹²⁹ Paradoxically, to the extent that one feels firmly rooted in a culture, such changes may be easily assimilated and treated, as we saw earlier, merely as surface manifestations of deeper unchanging continuities that legitimate the enterprise. Thus, it is crucial to note that Charles Rosen, after arguing that " m ultiple possibilities of realizing a musical text are a basic tradition of Western music," immediately follows with the clause, "a tradition which no longer apparently has any reality"¹³⁰ for "authentic" performance devotees. As "breaks" increasingly become defined as "ruptures" separating the past and the present, the stage is set

¹²⁴ See Hobsbawm, Introduction: Inventing Traditions, in *THE INVENTION OF TRADITION* 1-14 (E. Hobsbawm & T. Ranger eds. 1983).

¹²⁵ *Id.* at 2.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 7.

¹³⁰ Rosen, *supra* note 75, at 50.

for those who, dismayed by present practice, preach return to the purity of the past. Such revivalist movements, "common among intellectuals since the Romantics, can never develop or even preserve a living past (except conceivably by setting up human natural sanctuaries for isolated corners of archaic life), but must become 'invented tradition,'"¹³¹ committed to stasis and condemning as impurity, heresy, and defilement what a truly living tradition might see simply as admirable "adaptability."¹³²

Many of the essays in *Authenticity and Early Music* are not centrally concerned with "proper" standards of interpretation at all. They ask a much deeper question: What explains the development at this juncture of our culture of a movement organized around the notion of authenticity in musical performance? This question has implications reaching far beyond the particularity of music; it touches on central aspects of the experience of modernity in Western culture as a whole, including, most certainly, its legal aspects. Thus the study of music, on the surface so different from law, enables us to see things in our own discipline that were there all along but hidden by our very familiarity with it. By studying what the crisis of modernity has meant in music, we can better understand its impact on the law. To handle this crucial topic adequately would require a book of its own. This essay can do nothing more than sketch some points of comparison and suggest further questions for investigation.

There are many ways of describing the phenomenon of modernity and its relation to what has come to be called the *1629 postmodern condition. We might view modernity as the increasing recognition, especially since the Enlightenment, of the conflict between reason and tradition, including revealed religion, as modes of understanding the world.¹³³ We might understand it as the increasing victory of secular or wordly conceptions of life over the religious and transcendent.¹³⁴ We might view it as the increasing replacement of traditional modes of social organization by the bureaucratization and rationalization of

¹³¹ Hobsbawm, *supra* note 124, at 8.

¹³² *Id.*

¹³³ See I. KANT, *What is Enlightenment?*, in *FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT?* 85 (L. Beck trans. 1959); D. HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 12 (1989).

¹³⁴ See T. SEUNG, *CULTURAL THEMATICS* 246-59 (1976); G. HEGEL, *PHILOSOPHY OF HISTORY* 442 (1902).

society,¹³⁵ or as the eventual collapse of the concept of reason into a barren instrumentalism.¹³⁶

We emphasize that modernity is a contested theoretical concept, which might be extended to much of Western culture since the Renaissance or restricted to the particular cultural issues of the late nineteenth and twentieth centuries, which is our particular focus.¹³⁷ Moreover, the features often ascribed to modernity are not always peculiar to the "modern" age, however it is defined. For example, the tension between reason and tradition characteristic of the modern age scarcely begins with the twentieth century, or even with the Enlightenment. One can find anti-traditionalism in the rationalism of Descartes and the skepticism of Hobbes, and still further back in debates in ancient Greek thought. Although we see the conflict between reason and tradition, and the concomitant sense of the disintegration and collapse of tradition as an integral part of what we call "modernity," we do not claim that it is unique to the modern era. Indeed, it is more likely that history is full of what might be called "modernist crises" in many different lands and *1630 times. To speak of modernity, thus, is to speak of one particular cultural moment in Western thought, when the conflict between reason and tradition not only becomes central, but is commingled with other elements that are more peculiarly of our age, such as mass industrialization, and the increasing rationalization and bureaucratization of society.

In this essay we focus on a single strand of the experience of modernity—our relation to the past and, in particular, to the cultural traditions that constitute it. From this perspective, the experience of modernity is the increasing sense of isolation and estrangement from the past and from tradition, spurred on by constantly accelerating changes in culture, economy, and

¹³⁵ See 2 M. WEBER, *ECONOMY AND SOCIETY, AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 1381-1462 (G.Roth & C. Wiltich eds. 1968); M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 182 (T. Parsons trans. 1958).

¹³⁶ This theme is probably most associated with the Frankfurt School of critical theory. See J. HABERMAS, *LEGITIMATION CRISIS* (1975); M. HORKHEIMER, *ECLIPSE OF REASON* (1947); M. HORKHEIMER & T. ADORNO, *THE DIALECTIC OF ENLIGHTENMENT* (1972).

¹³⁷ Compare, e.g., T. SEUNG, *supra* note 134 (describing the creation of a modern "Faustian ethos" which separates the Middle Ages from the Renaissance) with M. BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* 16-17 (1982) (suggesting that the first phase of modernity begins in sixteenth century, but emphasizing modernity as a creature of the nineteenth and twentieth centuries).

technology.¹³⁸ Viewed solely as the collapse of tradition and separation from the past, "modernity" is surely nothing new. Each generation throughout history has probably spoken of the "good old days" that are long past.¹³⁹ One can find jeremiads bewailing the loss of past tradition to change and cosmopolitanism throughout human history, and to this extent the present era has more in common with previous ones than theorists of modernity often admit.¹⁴⁰ What distinguishes our own particular "modern" period is an accelerating spiral of technology and bureaucracy unlike any other in human history; as a result, the sense of distance and fragmentation from the past appears to have become a central, pervasive, and seemingly permanent element of the experience of culture.¹⁴¹

¹³⁸ See, e.g., L. SCAFF, *FLEEING THE IRON CAGE: CULTURE, POLITICS, AND MODERNITY IN THE THOUGHT OF MAX WEBER* 18 (1989) (describing progenitors of modernism as sharing a "consciousness of a dynamic and wrenching destabilization of transmitted cultural traditions"); C. SCHORSKE, *FIN-DE-SIECLE VIENNA: POLITICS AND CULTURE* xix (1980) (describing the modern sense of demise of tradition in "a whirl of infinite innovation"); M. BERMAN, *supra* note 137, at 15, 13 (describing the modern period as "a maelstrom of perpetual disintegration and renewal, of struggle and contradiction, of ambiguity and anguish[,] which generates in people both "a will to change—to transform both themselves and their world—and . . . a terror of disorientation and disintegration, of life falling apart").

¹³⁹ See Luban, *Legal Traditionalism*, (forthcoming 43 *STAN. L. REV.* (1991)).

¹⁴⁰ See *id.*

¹⁴¹ As Marshall Berman argues, nineteenth and twentieth century modernism is distinguished by a

dynamic new landscape . . . [of] steam engines, automatic factories, railroads, vast new industrial zones; of teeming cities that have grown overnight, often with dreadful consequences; of daily newspapers, telegraphs, telephones and other mass media, communicating on an ever wider scale; of increasingly strong national states and multinational aggregations of capital; of mass social movements fighting these modernizations from above with their own modes of modernization from below; of an ever-expanding world market embracing all, capable of the most spectacular growth, capable of appalling waste and devastation, capable of everything except solidity and stability.

M. BERMAN, *supra* note 137, at 18-19.

*1631 Moreover, "modernity," as suggested by Hobsbawm's essay, is linked to the development of a specifically historical sensibility that focuses on the cultural segmentation of time rather than its continuity. An increased attention to the historicist elements of culture brings with it an understanding of the profound differences between the perceptions of times past (and irrevocably lost) and those of our own. It is just such an understanding that leads us to develop periodizations of time—e.g., "ancient times," the "middle ages," and the like—that serve not only to divide the calendar but also to mark significant changes of consciousness that separate the inhabitants of one culture from those of another. Some may applaud such changes as have occurred, as is true of those who see history as a progressive liberation from the cultural blinders dominating past epochs. Others may instead bewail these changes and see them instead as symptoms of decline from some presumably better state of things in the past.¹⁴² But perhaps now more common is the rejection either of applause or of dejection, which are themselves recognized as the products of specific cultural moments, in favor of a somewhat more detached acceptance of the inevitability of change and our inability to place such changes as occur within any master narrative. Our awareness of the breaks between the past and our present situation is joined with a confidence (if that is the right word) that the future will bring equal ruptures that will lead to our own epoch being understood as merely one specific cultural moment. As one of the greatest living historians, David Brion Davis, reminds us, "in the future our own mixtures of insight and blindness will be interpreted from that then-present perspective from which one tries to understand the past. We will then be perceived in ways that we cannot perceive ourselves."¹⁴³ It is precisely this awareness of perceptual gaps, of commitments to such fundamentally different paradigms of understanding that characterizes much of modernist sensibility.

*1632 The literary scholar Paul Fussell, writing about the impact of World War I on Anglo-American culture, argues that "the most pervasive contribution of modern war to modernist culture is irony, widely perceived to be . . . the 'normative mentality' of modern art."¹⁴⁴ Just as Roland Barthes is said to have noted that one can unabashedly say "I will love you forever" only once in one's life, so does an awareness of historical situatedness cause us to stand at a

¹⁴² See, e.g., A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 85 (1987) ("Country, religion, family, ideas of civilization, all the sentimental and historical forces that stood between cosmic infinity and the individual, providing some notion of a place within the whole, have been rationalized and have lost their compelling force.").

¹⁴³ D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770- 1823*, at 15 (1975) (emphasis added).

¹⁴⁴ Fussell, Introduction to *THE NORTON BOOK OF MODERN WAR* 24 (1991).

suitable distance from our own mostdeeply held convictions. To put it mildly, questions about the meaning of authenticity, whether of one's beliefs or practices, go to the heart of modernist culture.¹⁴⁵

As Will Crutchfield notes in his essay "Fashion, Conviction, and Performance Style," the word authenticity has many meanings. It may refer to fidelity to the composer's intentions, or to the composer's text.¹⁴⁶ Yet, Crutchfield insists, there is a more appropriate meaning of authenticity of performance: "This authenticity is what the standee at the opera means when he says he has heard 'the real thing,' 'the genuine article.'"¹⁴⁷ When a performance is authentic in the sense of genuineness, "we feel the music and musician are one The Irish theologian William Fitzgerald supplied . . . the right citation for this: "That is called Authentic, which is sufficient unto itself, which commends, sustains, proves itself, and hath credit and authority from itself."¹⁴⁸

The notion of authenticity as genuineness is deeply tied to the concept of tradition and one's relation to the past. The authentic performance is immersed in a tradition, so that the tradition springs from within it unself- consciously; it is the living embodiment of tradition, of the past. That is why it is sufficient to itself, and needs authority from no outside source. Hence another meaning of "authentic" is idiomatic, sincere, and unaffected. Nevertheless, this conception of authenticity leads to what we might call the "paradox of authenticity." The more one self-consciously tries to be authentic to a tradition, the less authentic one's practice becomes; conversely, true authenticity always emerges where one least expects it, and indeed, it emerges virtually without any effort on the part of the actors who are enmeshed in authentic practice.

***1633** At the risk of frivolity, we might offer a gustatory example drawn from our mutual experiences in the Southwestern United States. We refer, of course, to Tex-Mex cuisine. For those who have not been introduced to this contribution of the great state of Texas, Tex-Mex is an adaptation (some purists would say adulteration) of traditional Mexican dishes by both Chicanos and Anglos living in Texas. Tex-Mex cuisine has by now become quite popular around the United States. Indeed, from Seattle to New York City one can see signs advertising "Authentic Tex-Mex Cuisine." As one might suspect, those of us from Texas have only contempt for such assertions of authenticity, similar, we

¹⁴⁵ See L. TRILLING, *SINCERITY AND AUTHENTICITY* 97-98 (1972).

¹⁴⁶ Crutchfield, *supra* note 19, at 24.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 24-25.

suspect, to the response of a French visitor to being taken to the "Paris Restaurant, featuring authentic French cuisine." Yet at the same time, there is something quite bizarre about the notion of authentic Tex-Mex food. This is, after all, a cuisine whose delicate flavors are produced by prodigious quantities of canned Ro-Tel tomatoes and great slabs of Kraft Velveeta. From the standpoint of "authentic" Mexican food, Tex-Mex is itself an abomination, a veritable monument to inauthenticity.

And yet, at the same time, there is no doubt that Texans can always spot an authentic Tex-Mex institution.¹⁴⁹ The streets of East Austin are full of them, and people are quite vocal about their favorites. Indeed, some people even prefer Tex-Mex to other types of Mexican food. The inauthentic has become the standard of authenticity. The alteration of old habits, the addition of new ingredients, the catch-as-catch-can recombination of elements has produced a new cuisine in its own right that can be authentically or inauthentically reproduced. And the moment that we realize that there can be "authentic" Tex-Mex cuisine—itsself the product of a previous inauthenticity—at that moment the possibility of "inauthentic" Tex-Mex cuisine arises.

It is perhaps only a slight exaggeration to say that many of the problems of modernity and its relation to tradition are summed up in the sign that promises us "Authentic Tex-Mex Cuisine." Each tradition is the result of previous adulteration and abomination. Each tradition by becoming a tradition nevertheless asserts its own authenticity. The self-conscious search to regain and recapture that ***1634** authenticity nevertheless produces inauthentic performance. And the very unself-conscious activity involved in adulteration nevertheless produces ever new examples of the authentic, the authentic that is not yet recognized as such.

We can understand an important aspect of modernity through the concept of authenticity, by which we mean the idea of an organic connection to tradition. Modernity might be described as the experience of feeling self-conscious about one's relationship to the past and to tradition, isolated and alienated—in a word, inauthentic. The paradox of authenticity promises us that the modernist will both invariably fail at regaining this lost authenticity and invariably succeed in epitomizing an authentic experience—the authentic experience of separation from the past, which is the authentic experience of modernity.¹⁵⁰

¹⁴⁹ Of course this statement simply raises the issue of authenticity in the form of another question: Who, after all, counts as a "Texan?" For example, both Levinson and Balkin live in Texas but hail originally from North Carolina and Missouri, respectively.

¹⁵⁰ Because people usually desire what they feel they most lack, often the more self-conscious a person is, the more avidly she will seek authentic experience. Thus, it was no accident that the Romantic era was both an era of extreme self-consciousness and an age which stressed the importance of authenticity. See M. BERMAN, *THE POLITICS OF AUTHENTICITY*:

All of which brings us back to the early music movement. A question that fascinates several of the authors in *Authenticity and Early Music* is why the concept of authenticity has taken center stage, whether as hero or villain, in our own lifetimes. The idea of "authentic" performance practices would have seemed bizarre to earlier ages. A composer of early music, wrote the music historian Donald Grout, would be "astonish[ed] at our interest in such matters. Have we no living tradition of music, that we must be seeking to revive a dead one?"¹⁵¹ Will Crutchfield notes:

[I]f you were an Italian singer in 1888, you did not think of singing Rossini style for Rossini and Mozart style for Mozart and Verdi style for Verdi. You just sang. The way you sang—how you felt a crescendo, where you would instinctively accelerate, where you would feel the need to make an ornament, what a good pianissimo note sounded like to you—would have been in the style of the cultural situation of 1888, a style that developed in symbiosis with the middle and late operas of Verdi, along with the secondary composers such as Ponchielli who were active at the *1635 time The concept did not yet exist of different style-complexes that could be stuck into the heads of performers like a floppy disc into a word processor depending on what program was desired that evening.¹⁵²

There are several reasons for the previous lack of concern with authentic performance. During the nineteenth century there was still a continuous outpouring of what we now label "classical" music. Thus performers focused more on performing the new music of the 1800s, and less upon preserving a repertory of old classics, as is the case today. One played Mozart and Beethoven as one would play other music. There was no division of classical versus early romantic versus late romantic music. There was simply music, and it was performed according to the best stylistic practices of the day.¹⁵³ These stylistic

RADICAL INDIVIDUALISM AND THE EMERGENCE OF MODERN SOCIETY 312-15 (1970) (emphasizing the importance of Montesquieu and Rousseau to the development of the romantic concern for authenticity, and showing the roots of the modern concern for authenticity in romantic self-consciousness).

¹⁵¹ Taruskin, *supra* note 45, at 141 (quoting Grout, *On Historical Authenticity in the Performance of Old Music*, in *ESSAYS ON MUSIC IN HONOR OF ARCHIBALD THOMPSON DAVISON* 346 (1957)).

¹⁵² Crutchfield, *supra* note 19, at 22-23.

¹⁵³ In understanding this point, it is important to distinguish compositional from performance styles. The music of Liszt and Wagner, for

practices colored the music of the past in terms of the tastes of the present. But this coloration was not noticed, because the cultural subject saw herself as at one with the past, not even conscious of following a tradition of performance.

To modern ears, the difference between Mozart and Mahler, or between Rossini and Puccini, is so great that it is difficult to comprehend this mindset. Perhaps the best analogy is to the popular music of today—rock and roll. When Bruce Springsteen plays a cover of "Twist and Shout" during a 1990's rock and roll concert, he simply plays the music as a rock and roll song. He does not engage in self-conscious inquiry into early 1960's performance practices. Nor does the audience find this at all unseemly. Nevertheless, rock and roll performance has changed greatly since the 1950s and 60s, due in part to developments in electronic instrument and recording technology, the increased importance of the large stadium or arena as a venue for concerts, and even the development of the music video.¹⁵⁴

Interestingly, no one yet thinks it very important to duplicate the earlier sound exactly. That is because, to paraphrase the song, it's still rock and roll to us. One can easily predict, however, that future Michael Feinsteins will make it their mission to present purportedly pure Buddy Holly or Little Richard songs and to denigrate as illegitimate and contemptible the versions played by performers like Springsteen and others whom we now benightedly identify as great rock-and-rollers in their own right.

There is an important connection between being unself-consciously within a cultural tradition that is still growing and developing, and a similar unself-consciousness about authenticity in performance. It is precisely because we don't think about authenticity very much when it comes to rock music that we can be quite sure that rock and roll is still a living tradition of popular culture, in a way that (for example) ragtime is not. As Will Crutchfield puts it:

The great benefit of this close, narrow correspondence between contemporary composition and performing style—as we can still observe

example, shocked their nineteenth century contemporaries because of its harmonic audacity, and was often seen as a betrayal of sound compositional principles and traditions. But these qualms about new harmonic practices did not lead nineteenth century critics to think that earlier music should be performed differently than contemporary music. We emphasize, however, that the gradual breakdown of the tonal system of harmony by the beginning of the twentieth century, and the development of a musical avant-garde divorced from popular tastes, did eventually contribute to the modern experience of separation between performers and composers of "classical" music, as discussed *infra text* accompanying notes 155-57. We simply note here that these effects had not yet fully been felt in the nineteenth century.

¹⁵⁴ Watch, e.g., MTV.

it in popular music, on historic recordings, in a very few elder statesmen among today's artists, and in specialists centering their work in the music of today—is that the performer can be so confident in the basic grammar and syntax of his stylistic language that true improvisation, true spontaneity of utterance, becomes possible within it. If the thriving triangular relationship between composers, performers, and the public had not broken down, historically informed performance would be neither likely nor desirable today.¹⁵⁵

This triangular relationship between new music, audience, and performer began to deteriorate for what is now called "classical" music around the turn of the century. Although contemporary "classical" music continues to be written and performed, it has lost much of its audience, partly because of its deliberate embrace of atonality and partly because of its avant-gardist tendencies. A new generation of performers has sprung up who see their basic task not as the performance of contemporary music but the preservation of a classical repertory which extends roughly from the Baroque period to the beginning of the twentieth century. The classical performer becomes less and less the advocate of new music and more and more the curator of museum pieces. But the very notion of the museum, which suggests preservation of the past, also suggests separation from it as well.¹⁵⁶ This distancing and alienation of the performer from the cultural tradition that spawned the music she regularly performs occurs in stages, and it appears differently in different subjects. The process is gradual; the performances of the 1950s seem more distanced than the performances of the 1920s, even if the former in turn seem terribly old-fashioned by today's standards.

The recognition of one's separation from a cultural tradition triggers two characteristic reactions. The first is to cling ever more tenaciously to the tradition as it is perceived to exist. The fear that the center will not hold, and that one must therefore reassert its centrality all the more urgently, creates a feeling of uncertainty and apprehension. This is the experience of modernist anxiety. The unease of modernism, where "all that is solid melts into air,"¹⁵⁷ produces the emotional search for resonance, tranquility, solidity, and stability.

¹⁵⁵ Crutchfield, *supra* note 19, at 23.

¹⁵⁶ For an illuminating discussion of the problem, see Donath, *The Gene Autry Western Heritage Museum: The Problem of an Authentic Western Mystique*, 43 *AM. Q.* 82 (Mar. 1991) (criticizing the Autry museum for displacing historical meaning in favor of an unreflective worship of the western mystique).

¹⁵⁷ M. BERMAN, *supra* note 137, at 15. The original phrase, of course, comes from Marx. See K. MARK & F. ENGELS, *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER* 338 (1972).

And yet the problem of modernity is precisely the self-consciousness that we have become partly alienated from the past. For the past, once the process of alienation has begun, can never fully be recaptured. The further removed in time one is from tradition, the less one can regain the sense of organic unity with it. Because one cannot recapture the spirit of what has been lost, one attempts to recapture the letter—that is, the concrete historical manifestations of the tradition. The result in classical music is what Crutchfield calls the "museum model" of authenticity—"the precise reconstruction of sounds as near as possible to those heard by the composer."¹⁵⁸ This attempt is doomed to failure, if its goal is to recapture authenticity in the sense of organic connection to tradition. The mere imitation of a tradition does not really bring the tradition back to life. A crucial difference separates improvisation within the tradition and careful imitation of previous examples. The improviser extends and alters the tradition by unself-consciously living ***1638** within it, while alteration is precisely what the imitator fears most. It is precisely this fear of alteration, Crutchfield argues, that the Early Music Movement must overcome if it is to avoid becoming a sterile and lifeless project:

If we resurrect historical information on performing style simply to settle on 'correct' ways of playing, to promulgate and refine rules, to settle questions . . . if we seek nothing more than to write dozens more programs for the floppy discs we insert in students' brains—then it would be better if we had never started. If instead we seek an immersion in the disciplines of the past . . . because we aspire to the freedom and the power that can be gained through purposeful accomplishment—then historically informed performance may enable some of our performers to create anew for themselves the life-giving musical culture that swarmed around musicians in healthier times without their having to think about it The crucial challenge is to keep that aliveness in mind as the goal; though it can be approached only indirectly, it is more important than the correctness.¹⁵⁹

The deliberate search for authenticity thus inevitably fails but, paradoxically, also inevitably succeeds. The experience of this search to regain authenticity is itself authentic to our time—it is the authentic experience of modernity. Thus, as Richard Taruskin suggests, the "authentic" performance movement is really the imposition of the aesthetic of modernism on the music of the past.¹⁶⁰ Despite the claims of its advocates, "authentic" performance of music does not present music as it really was, whatever that mysterious phrase might mean. Rather, "authentic" performance presents music how we really like it (or at least how contemporary musicians like it)—dressed in modernist garb to suit the

¹⁵⁸ Crutchfield, *supra* note 19, at 25.

¹⁵⁹ *Id.* at 25-26.

¹⁶⁰ See Taruskin, *supra* note 45, at 152, 155, 167-69.

tastes of our era, not Bach's or Mozart's.¹⁶¹ The advocate of authenticity is quite right that her goal is to make Mozart sound fresh and new to our ears. But this goal has not been achieved by producing what Mozart really sounded like. Rather, it has been achieved by making him sound modern—with lighter textures, faster tempi, and austere and astringent string tone.¹⁶² We have adapted Mozart to our age just as the romantics adapted him to theirs, only we have done it under the banner of "authenticity." However, *1639 the felt need to make performance "authentic," even when the result is really quitemodern, is wholly authentic to the modern era.

The second characteristic reaction produced by modernity is the recognition that the past cannot be regained. It is to embrace, or at least to accept, the alienation of the spirit from its historical moorings. It is to comprehend our relation to the past as artificial and instrumental—to see the past as separate from us, but nevertheless something we can use for our own purposes. This reaction to modernity leads to the eclectic use of the past, to the juxtaposition of different elements of different traditions, in short, to pastiche. It is the type of modernist response that eventually leads towards what is now called post-modernism. When tradition becomes instrumental, we embrace it with a wink and a nod. Everyone, including the interpreter, knows that the performance is, in some sense, inauthentic, and that the interpreter is playing a role. But this does not raise concern, as long as it serves the purposes (aesthetic or otherwise) of the interpreter. By forsaking modernist anxiety, the interpreter moves closer and closer towards post-modern irony.¹⁶³

The post-modern response to the crisis of modernity in art creates a artistic discourse that closes in upon itself and becomes increasingly self-referential. Postmodernism shares this feature with some earlier forms of artistic modernism. The subject of culture increasingly becomes culture itself. This tendency meshes with the postmodernist practice of pastiche, as previous cultural artifacts are juxtaposed and referred to in order to call up their various cultural

¹⁶¹ See *id.* at 197-98, 203-04.

¹⁶² See *id.* at 187-88, 190-91 (tracing stylistic changes in performances of Bach's Fifth Brandenburg Concerto).

¹⁶³ Because of the similarities between postmodernism and modernism, there is considerable debate among philosophers and historians of culture over whether postmodernism is truly a different and separate stage of culture, or is instead merely a later stage of modernism. See D. HARVEY, *supra* note 133, at 113-18. This should hardly be surprising, as both concepts are heavily contested in theoretical discussion. In this essay, we view postmodernism as furthering some but not other features present in modernism—for example, modernist irony as opposed to modernist anxiety.

associations in the mind. It meshes as well with the postmodernist attitude of irony and detachment—the previous work of art is referred to not to reassert what it means or conveys, but to comment on it or even undermine it. A good example of post-modern pastiche, irony, and self-reference is the recent film, *The Freshman*,¹⁶⁴ in which the actor Marlon Brando deliberately parodies his earlier role as the mafia chieftain Don Corleone in *The Godfather*.¹⁶⁵ The creators of the film make the young hero a film student who attends classes on cinematic history and technique, so that lectures about and scenes from *The Godfather* can be liberally interspersed throughout the movie. The hero is taken under the wing of Marlon Brando's character, who reminds the student eerily of the Godfather in the film he is studying in class. In turn, Brando does not play a mafia don; rather, he plays Marlon Brando playing a mafia don. Brando's performance is a continual reminder to the audience that he is playing a role, that he knows he is playing a role and that he knows that the audience knows he knows he is playing a role, and so on indefinitely.¹⁶⁶

¹⁶⁴ *The Freshman* (Tristar Pictures 1990).

¹⁶⁵ *The Godfather* (Paramount Studios 1972).

¹⁶⁶ It is worth mentioning in this context the movie's remarkable final scene, which involves Bert Parks serenading a group of very rich gourmets who have gathered to feast on the meat of freshly killed endangered species. As the latest victim-to-be is paraded before them, Parks proudly sings "[t]here she goes, your komodo dragon." A few moments later, he is offering a spirited rendition of Bob Dylan's "I Ain't Gonna Work on Maggie's Farm No More." Parks' presence in the movie is left completely unexplained. What is the meaning of juxtaposing Parks—a longtime symbol of the Miss America Pageant (itself a symbol of American values of an earlier era)—with the selfish excesses and insatiable appetites of 1980's materialism represented by the slaying of the hapless reptile? Is the reference to the soon-to-be devoured dragon a sly accusation that the Miss America Pageant is nothing more than a ritualized "meat market"? What is meant by the juxtaposition of Parks with the music of Bob Dylan, a symbol of the rebellious 1960s, which began to put the values characterized by the Miss America Pageant into question? Is Parks' refusal "to work on Maggie's farm" a reference to his firing by ungrateful pageant directors who (it is rumored) felt that because he had so visibly aged, he no longer presented the right image? Is Parks, like Brando, a knowing participant in the ironies of the movie, or is he, as his performance suggests, blissfully unaware of the subtexts and subsubtexts of his performance? Finally, are the creators of the movie really making a statement through this pastiche of cultural icons, or are they simply having fun and perhaps even laughing at us for noticing the inexhaustible possibilities of cross reference? The mind boggles—and of course, that is precisely the way the postmodern artist would have it. To take the movie seriously is not to take what it says seriously. To be engaged with it is simultaneously to become detached from the cultural symbols that it invokes.

Robert Morgan's essay identifies these two reactions to the modernist predicament—*anxiety and detachment*—with the different compositional approaches of Arnold Schoenberg and Igor Stravinsky.¹⁶⁷ Schoenberg, the founder of atonal composition, represents the earlier stage of modernist anxiety. Already fully self-conscious of the tradition of western classical music from Bach and Beethoven to the present day, Schoenberg feels the weight of ***1641** tradition heavily on his back.¹⁶⁸ He routinely describes his artistic goals in terms of progress—of moving forward with the project of the western musical tradition. Schoenberg sees himself as one who must carry on the traditions that burden him in the best way he knows how.¹⁶⁹ He thus views atonal composition as an inevitable development of western musical practices:

Schoenberg . . . holds the traditional view, but in a form whose very extremity shows that it is reaching a critical, and perhaps even terminal stage. He understood his own development as a logical and necessary continuation of the dominant compositional tendencies that had (in his view) consistently shaped the mainstream of serious western music. This explains Schoenberg's discomfort at being considered a revolutionary—a composer in some way fundamentally separated from the past. In his own eyes, the course he followed offered the only possible realization of the musical implications inherent in the work of his greatest predecessors. Schoenberg believed his music to be progressive, certainly, but not in its basic aesthetic (or even technical) assumptions, fundamentally different from the music of the past.¹⁷⁰

In contrast, Stravinsky shows much more of the ironic detachment of a later stage of modernism. Although he is not himself a postmodernist, he displays several modernist attitudes that in the hands of later artists will eventually blossom into what we now call the postmodern temperament. He picks and chooses different stylistic features from different eras, melding them in compositions by the force of his personality.¹⁷¹ Unlike Schoenberg, Stravinsky sees himself as fully separated from the past, studying it not to continue it but to borrow from it piecemeal for his own purposes. The result is a compositional eclecticism characteristic of Stravinsky's style. As Morgan argues, Stravinsky's

¹⁶⁷ See Morgan, *supra* note 95, at 60.

¹⁶⁸ See *id.* at 60-61.

¹⁶⁹ See *id.* 61-62.

¹⁷⁰ *Id.* at 60-61 (footnotes omitted).

¹⁷¹ See *id.* at 65-66.

modernism presaged the compositional attitudes of the present day, in which "composers adopt and discard musical styles at will, not only from work to work but within single compositions."¹⁷² In their search for musical styles to adopt for their own purposes, contemporary composers are considerably more eclectic even than Stravinsky, for "they do not limit themselves to the repertory of western concert music, but extend their grasp to music of other cultures, popular music, folk *1642 music, jazz, etc., moving freely back and forth across cultural boundaries as well as temporal ones."¹⁷³

Yet this eclecticism of the modern composer itself betrays a fact about the culture of the present—the felt absence of a cultural center, of a tradition of one's own. There is, Morgan says, "no well-defined sense of the musical present."¹⁷⁴ The loss of a cultural center, he argues, is simply the flip side of the Stravinskian attitude towards history. "Only when the current moment loses an essential character and personality of its own, and thus loses its ability to cast its own peculiar coloration on the past, is one able to look upon the past with such detachment and objectivity."¹⁷⁵ According to Morgan, one who recognizes, even embraces, such a notion of our situation, must also recognize that "the concept of culture, at least as previously understood, becomes extremely shaky."¹⁷⁶ More important, perhaps, is the recognition that "our sense of the musical present, and thereby of our own musical selves, is fatally threatened, dissolving into a patchwork of disconnected fragments snatched from here, there, and everywhere."¹⁷⁷ Few have better described the postmodernist sensibility.

It is interesting in this light to compare Stravinsky's compositional practices with his attitudes about musical performance. Stravinsky demanded strict adherence to the musical text.¹⁷⁸ Indeed, he pronounced that "to interpret a piece of music is to realize its portrait, and what I demand is the realization of the piece itself and not of its portrait."¹⁷⁹ Elsewhere he invidiously contrasted,

¹⁷² Id. at 66.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id. at 67.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ See Taruskin, *supra* note 45, at 181.

¹⁷⁹ I. STRAVINSKY, PROGRAM, STRAVINSKY FESTIVAL, LONDON SYMPHONY ORCHESTRA 41 (1979), quoted in Levinson, *On*

against loathsome "interpretation," what he termed objective "execution"—"the strict putting into effect of an explicit will that contains nothing beyond what it specifically commands."¹⁸⁰ As Taruskin argues, the essence of performance for *1643 Stravinsky was "scrupulous fidelity to the letter of the text, and an ascetic avoidance of unspecified nuance in the name of expression."¹⁸¹ As we should already have come to expect, Stravinsky denounced those whose interpretations differed from his own not only as mistaken, but also, far more significantly, as perpetrators of "criminal assaults" and "betrayals."¹⁸² In fact, Stravinsky's eclecticism and his demands for "objectivity" in performance are two sides of the same coin. It is precisely because one has become so detached from the past and thus from a living tradition encompassing earlier music that one must make reference to "objective" indicia—for example, the written text, the actual size of the musical forces at the first performance, and so on.

Indeed, not only are detachment and objectivity two sides of the same modernist coin, but, more surprisingly, so are the desires for authenticity and novelty.¹⁸³ Morgan points to the deep connection between the search for novelty in musical culture—whether it be new techniques of composition or the desire to make Bach and Mozart sound fresh and new to our ears—and the search for performance practices of the past. Both searches are a means of expressing

Interpretation: The Adultery Clause of the Ten Commandments, 58 S. CAL. L. REV. 719, 724 (1985).

¹⁸⁰ I. STRAVINSKY, *THE POETICS OF MUSIC* 163 (A. Knodel and I. Dahl trans. 1956). Of course Stravinsky's demand for objectivity does not avoid interpretive difficulties, even of his own works. In the 1920's, desperate for money, Stravinsky arranged his orchestral compositions for player piano. On these pianola rolls, the dance at the end of his famous ballet *Rite of Spring* "is much faster than on any recordings, including his own 'final' versions of 1960 and 1961." A Dance to the Death, *THE ECONOMIST*, Apr. 6, 1991, at 89. Ben Zander, the conductor of the semi-amateur Boston Philharmonic, has studied the piano rolls and concluded that they reflect Stravinsky's original intentions, but that Stravinsky compromised later because the first orchestras that tackled the piece simply could not perform his complex music at the speed he desired. *Id.* Is a conductor who performs the *Rite* at the faster speed engaging in objective "execution" or loathsome "interpretation"? Did Stravinsky, who performed and recorded the *Rite of Spring* in more than one way, engage in fraudulent "interpretations" of his own music?

¹⁸¹ Taruskin, *supra* note 45, at 181.

¹⁸² *Id.*

¹⁸³ See Morgan, *supra* note 95, at 75.

dissatisfaction with the present.¹⁸⁴ One can escape the present either by catapulting to the future, or by attempting to recapture the past and make it one's own. The modernist always runs, even if she cannot hide.

If modernity has so thoroughly dominated musical culture in this century, it would be surprising if we did not see similar effects in legal culture as well. Obvious examples abound, the most obvious, ironically, being the insistence on the unique legitimacy of original intention as a guide to constitutional meaning.¹⁸⁵ With *1644 modernity comes historicism—the understanding that the past has become alien to us and the desire to recapture what is slipping away. With detachment comes anxiety, and, as Hobsbawm suggests, the desperate attempt to deny the meaningfulness of history even as one denounces one's contemporaries for having deviated so far from purported models of the past.¹⁸⁶ Those who disagree are, as Stravinsky asserted, not merely mistaken, but criminal assailants on the uniquely legitimate way of performing constitutional analysis.

Our thesis is that we will find evidence of modernist anxiety and detachment, with a concomitant quest to regain "objective" indicia of performance and the invention of sacralized "traditions," in many different areas of culture, including, most certainly, both the general legal culture and its bastion of self-consciousness, the legal academy. By focusing on Robert Bork's jurisprudence of original intention as a quintessentially modernist response, we suggest an important difference between our perspective and that presented by David Luban in his interesting and important article, *Legal Modernism*.¹⁸⁷ Luban

¹⁸⁴ *Id.* at 75-76.

¹⁸⁵ See R. BORK, *supra* note 33, at 6-8. We are grateful to Robert Post for pointing out that Thomas Hobbes (whose pessimism, skepticism about values, and statism have much in common with Judge Bork's philosophy) also developed a highly originalist theory of interpretation. See D. HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 145 (1989). Thus the turn to "originalism" is not unique to our current (twentieth century) brand of modernism; it also shows how twentieth century modernism has many antecedents. Moreover, Post's example is an excellent demonstration of how heavily contextual judgments of modernism are. Hobbes is certainly not "modern" in contrast to twentieth century thinkers, but in another sense he is a veritable architect of modernism in his demolition of Aristotelian traditionalism. Cf. Balkin, *Nested Oppositions* (Book Review), 99 *YALE L.J.* 1669, 1678-82 (1990) (depending on context, cultural concepts are always both exemplified by and in opposition to their concrete historical manifestations).

¹⁸⁶ See *supra* text accompanying notes 125-32.

¹⁸⁷ See Luban, *Legal Modernism*, 84 *MICH. L. REV.* 1656 (1986).

argues that the Critical Legal Studies movement represents the best analogy of modernist art to law.¹⁸⁸ The work of CLS scholars, in Luban's view, shares with modernist art a penchant for provocation, a feeling of homelessness in the world, and a tendency towards self-consciousness and self-commentary about its own production.¹⁸⁹ Although Luban takes as his model of inquiry modern art rather than musical performance, and although he assigns to the modern what some might now call postmodern, his discussion of the characteristic features of modernity is largely consistent with our own. For example, Luban's emphasis on "homelessness" as a recurring motif in modernist art¹⁹⁰ describes from another perspective the sense of separation *1645 from tradition and from the past we have seen as characteristic of modernity.

There is much insight in Professor Luban's article. Nevertheless, we disagree with its thesis that legal modernism manifests itself most clearly in the work of CLS scholars or others on the left side of the political spectrum. It is worth noting that, as a historical matter, many leading cultural modernists were scarcely left-wing. As Daniel Bell has written, "[i]n discussing modernism, the categories of 'left' and 'right' make little sense. . . . Nietzsche, Yeats, Pound, and Wyndham Lewis were politically to the right."¹⁹¹ Although Picasso's radical political sympathies were well known,¹⁹² so were Ezra Pound's proclivities towards fascism.¹⁹³ Lionel Trilling has noted the irony of contemporary liberal intellectuals' embrace of modernists as heroes, noting that Proust, James Joyce and Andre Gide were "indifferent to, or even hostile to, the tradition of

¹⁸⁸ See *id.* at 1656-59.

¹⁸⁹ See *id.* at 1657-59.

¹⁹⁰ See *id.* at 1660.

¹⁹¹ D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 51 (1976).

¹⁹² See A. HUFFINGTON, *PICASSO: CREATOR AND DESTROYER* 282-311 (1988).

¹⁹³ On Pound, see J. DIGGINS, *MUSSOLINI AND FASCISM: THE VIEW FROM AMERICAN* 246-47, 437-39 (1972). Even Wallace Stevens, the newly found darling of contemporary legal pragmatists, was not immune from the allure of facism. See *id.* at 245 (describing Stevens' support of Mussolini and his belief that fascism would merely be "'a transitional phase' of a state which hopefully would, like [Stevens'] poetry, wrest order from chaos and thereby lessen the 'disillusionment' and 'misery' in the modern world" (quoting W. STEVENS, *LETTERS OF WALLACE STEVENS* 289-90, 295 (H. Stevens ed. 1966))).

democratic liberalism as we know it," and "do not seem to confirm us in the social and political ideals which we liberals hold."¹⁹⁴

Yet modern culture—and the response to modernity—comprises far more than those who are selectively identified as "modernists." A culture embraces all who live within it. Jerry Falwell is just as much a part of the contemporary American culture produced by the experience of modernity as is Cher, even though each is almost totally uncomprehending of the other (and even though each is in some way a reaction to the other). Modernity is an experience felt by all persons in a culture, even if in different degrees, and even if the reactions to it may be different in different quarters. Two billiard balls may move in opposite directions because of the same cause, a third billiard ball which has struck each object differently. Thus, to adopt Robert Morgan's example, Schoenberg's self-conscious attempt to follow tradition is just as modernist in its own way as Stravinsky's embrace of eclecticism. And Stravinsky's detachment led to both his instrumental use of the past for novelty's sake and his moralistic pursuit of the past via "objective" indicia of performance. In legal terms, modernity has brought us both Critical Legal Studies and Robert Bork.¹⁹⁵

Luban's account of legal modernism, we think, overemphasizes the avant-gardist response to modernity at the expense of those trying to come to terms with tradition and the past either through an anxiously self-conscious adherence to tradition (Schoenberg) or through objectifying the past in concrete terms (Stravinsky). And here the modernist tendencies of the early music movement can provide a useful corrective. The fear that the past is slipping away and the redoubled search to regain tradition is not a retreat from modernism—it is one manifestation of the modernist experience, one version of modernist anxiety. The difference between the modernist and the premodernist is precisely that the modernist feels that there is something that has been lost. The conserving (but not necessarily conservative) response to modernism that is represented by Schoenberg is precisely the desire to cling to a receding tradition in order to relieve this sense of anxiety. While the modernist complains of anxiety, the premodernist asks "what anxiety?"¹⁹⁶

For this reason, an inquiry into legal modernity must consider both the Schoenbergian as well as the Stravinskian attitudes towards tradition and the

¹⁹⁴ L. TRILLING, *THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY* 286 (1954).

¹⁹⁵ See Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 *TEX. L. REV.* 1195, 1216, 1228 (1989).

¹⁹⁶ And, we should add, the postmodernist also asks, "what anxiety?"

past.¹⁹⁷ It follows that we are likely to see the effects of legal modernity not only in the structural equivalent of the avant-garde in law, but in more mainstream reactions as well. If there are undoubted modernist themes in the work of CLS scholars, they are no less present in the work of the political right or the political center. Throughout the political spectrum one will find analogies both to Stravinsky's dual detachment and objectivity and Schoenbergian anxiety. No single view is uniquely "modernist"; all join in trying to make sense of our particular cultural moment, which features an ever-growing sense of disorder and fragmentation.¹⁹⁸

*1647 IV. LEGAL MODERNISM AND THE PURSUIT OF "AUTHENTICITY"

What we have called legal modernity, like so much else in American law, can already be seen in the thought of Oliver Wendell Holmes, and in particular in his most iconoclastic work, *The Path of the Law*,¹⁹⁹ an essay which, almost 100 years after its presentation, still contains the power to startle.²⁰⁰

¹⁹⁷ This is not, of course, to say that Schoenberg and Stravinsky represent the only two possibilities. We agree with Morgan, however, that these two examples throw considerable light on the experience of modernity in music, as well as in culture generally.

¹⁹⁸ For a discussion emphasizing the presence of fragmentation in American law and jurisprudence, see R. POSNER, *supra* note 1, at 203, 296. For a postmodern explanation of legal fragmentation and a delightful romp through the categories of modernism and postmodernism, see Schlag, *supra* note 195. While Schlag emphasizes the epistemological aspects of modernity and postmodernity, we emphasize their broader cultural manifestations.

¹⁹⁹ O. W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920).

²⁰⁰ One is tempted to say that legal modernity begins with Holmes, but in fact the history of legal modernity is considerably more complicated. Moreover, Holmes's thought did not arise out of a vacuum. One of us (Levinson) has devoted considerable effort to showing the influence of a much earlier stream of thought—Emersonianism—on Holmes. S. Levinson, *Skepticism, Democracy, and Judicial Restraint: An Essay on the Thought of Oliver Wendell Holmes and Felix Frankfurter*, ch. 1 (Ph.D. dissertation, Harvard University 1969). Thus, Holmes's thought combines both older and more forward-looking elements, which is part of its endless fascination for historians and other scholars. In beginning our discussion of legal modernism with Holmes, we use Holmes as

Although *The Path of the Law* has many themes, one of its most striking is its author's attitude towards history and tradition. "If we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all," argues Holmes, "we go to tradition."²⁰¹ But one does not study history and historical doctrine for the purpose of veneration. Quite the opposite, for the understanding that a rule is historical "is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules."²⁰² In a truly remarkable metaphor, Holmes tells us that "when you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws and see just what is his strength."²⁰³ Perhaps reflecting the origins of Holmes's own modernist thought in the maelstrom of the Civil War,²⁰⁴ he makes clear that examining the "dragon" of historically-rooted rules "is only the first step. The next is either to kill him, or to tame him *1648 and make him a useful animal."²⁰⁵ This stunning imagery precedes the well-known Holmesian injunction that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."²⁰⁶ And for Holmes "it is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."²⁰⁷ The liberating cure is to reject "antiquarianism" and instead to become the student of economics and statistics. Thus, in a famous phrase, Holmes asks us to wash our traditional beliefs about law and legal traditions in "cynical acid."²⁰⁸

many others have—as less a progenitor than as a symbol of trends that have become central to American legal thought.

²⁰¹ O. W. HOLMES, *supra* note 199, at 186.

²⁰² *Id.* at 186-87.

²⁰³ *Id.* at 187.

²⁰⁴ See S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 43-52, 65-68, 71-73 (1989) (discussing profound impact of war on Holmes and describing the three times he was wounded in battle—at Ball's Bluff, Antietam, and Fredricksburg).

²⁰⁵ O. W. HOLMES, *supra* note 199, at 187.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 174.

The modernism of Holmes is not the modernist anxiety of Schoenberg, who feels the past slipping away and must strive to regain it and follow its commands. It is rather the modernism of Stravinsky, for whom the past is an alien thing, to be used instrumentally in future compositions. The very comparison of history to a monster suggests that the past has already become strange to us, that we have already begun the process of detachment and separation. Another great modernist, James Joyce, speaking through the character of Stephen Daedalus, wrote of history as a nightmare from which he was trying to awake.²⁰⁹ Whether Holmes would have gone quite that far, there can be no doubt that he had only disdain for those who put their faith in history and its "teachings" without reflection about the value and cogency of those purported lessons. The purpose of studying history is not to revere it, but to analyze it—to show it "in the daylight" and "count its teeth and claws."²¹⁰ And this analysis can only proceed, as Morgan points out, "when the current moment . . . loses its ability to cast its own peculiar colouration on the past so that one is able to look upon the past with such detachment and objectivity."²¹¹ In *The Path of the Law*, the legacy of the past is now described as "dogma," itself a word richly redolent of Protestant reformers' critique of the encrusted traditions of the Church they sought to overthrow.²¹²

***1649** The theme of detachment from the legal tradition is also clear in Holmes's call for a social scientific approach. If the legal tradition is a dragon, we are no longer its subjects. Rather, we are to become zoologists, whose purpose is to study and even dissect the creature. The "man of the future" is a social scientist because the goal of legal study has moved from exposition and interpretation of legal texts and doctrines to the study of law as a social phenomenon. "It is perfectly proper," as Holmes pointed out in his essay *Law in Science and Science in Law*, "to regard and study the law simply as a great anthropological document."²¹³ An anthropologist, unlike the native, observes the culture from a psychic distance rather than participating in its beliefs and performing its rituals unself-consciously.

²⁰⁹ See J. JOYCE, *THE PORTABLE JAMES JOYCE* 674 (H. Levin ed. 1966) (excerpts from *Ulysses*).

²¹⁰ O.W. HOLMES, *supra* note 199, at 187.

²¹¹ Morgan, *supra* note 95, at 67.

²¹² O.W. HOLMES, *supra* note 199, at 169.

²¹³ O.W. HOLMES, *Law in Science and Science in Law*, in *COLLECTED LEGAL PAPERS*, *supra* note 199, at 210, 212.

Finally, Holmes's iconoclasm is consistent with another way of looking at the experience of modernism—as a perceived conflict between reason and tradition, a tension which manifests itself, for example, in the conflict between the search for truth through rational inquiry and the need for faith in the teachings of revealed religion.²¹⁴ Holmes makes quite clear that he reconciles this conflict in favor of what he perceives to be reason—in this case the instrumental reason of fitting means to ends—and against received dogmatic tradition. The future of the law is as the servant of reason, which for Holmes is nothing more than rational calculations designed to achieve most effectively what the community wants.²¹⁵ The inefficacious dogmas of the past, on the other hand, are to be eliminated as much as possible.

To be sure, the modernity we find in Holmes is not yet full—fledged. There is an undercurrent of optimism in these remarks that bears neither traces of anxiety about what is slipping away nor doubts about the efficacy of the scientific approach. One could well write an article on "Holmes's last paragraphs," the conclusions to his otherwise pessimistic and sometimes even savage remarks that suddenly transform the occasion into one of hope and (relative) optimism about one's place in the world. Thus *The Path of the Law* concludes by Holmes telling his audience that through the analysis *1650 of the "remoter and more general aspects of the law you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."²¹⁶ Whether a remnant of his grandfather's Calvinist sensibility or a continuing reflection of the influence of Ralph Waldo Emerson's transcendentalist faith in the ultimate resolution of all apparent tensions and contradictions,²¹⁷ there is little of the more contemporary sense of intellectual anxiety about the lack of even a "hint" of some unified perspective of the world. Nor is there any sense of irony about the situation that Holmes finds himself in; it does not occur to him that historicizing the work of previous judges calls into question whether his own work is simply another form of "dogma," to be treated as such by a later generation capable of placing him in a

²¹⁴ We emphasize here that this characteristic feature of modernity by no means originates with Holmes, or even with modernity itself. See *supra* notes 136-41 and accompanying text.

²¹⁵ See O.W. HOLMES, *supra* note 213, at 225.

²¹⁶ *Id.* at 202. And those familiar with Holmes's famous dissent in *Lochner v. New York* are likely to overlook his argument that the test of legislative reasonableness is whether a statute would "infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

²¹⁷ For an extended comparison of Holmes and Emerson, see S. Levinson, *supra* note 200.

discrete historical setting and recognizing his own blindness and lack of insight.²¹⁸

Nevertheless, the seeds of legal modernity are clear enough in *The Path of the Law*. It was therefore entirely fitting that Jerome Frank would see Holmes as a model in his appropriately titled book *Law and the Modern Mind*.²¹⁹ Frank's veneration of Holmes is characteristic of the further development of legal modernity we find in the work of the Realists. The Realists are commonly thought to have launched an attack on the autonomy of law and legal reasoning. But the autonomy of law is of at least two types. The first is the autonomy of law from politics or social beliefs. The second, and equally important sense of autonomy is the autonomy of law from other disciplines, which generates a faith that discrete "legal" methods of analysis will be sufficient to solve legal problems.²²⁰ Because legal decisions might be better explained by the study of social forces than by the results of doctrinal argument, and because legal issues need the expertise of the economist or sociologist, "the *1651 man of the future," as Holmes puts it, must be acquainted with social science.²²¹

With the rise of legal realism, new forms of legal scholarship emerge. Previously, the goal of much legal scholarship had been to explicate or interpret existing law, to offer the best interpretation of legal materials through traditional forms of doctrinal argument. The rise of realism brings with it an additional goal—to suggest policy based reasons for development of legal doctrine in one direction rather than another, even if these policy based reasons are not suggested or implicated by the language of existing legal materials. The realist approach begins to separate the goals of scholarship from those of the bar, although eventually the practicing bar would assimilate the approach of "going beyond the cases," at least in part.²²²

A second and more significant development is the attempt to study law as a social artifact, as Holmes's "great anthropological document." The result is a scholarship where one studies the behavior of lawyers and judges, not to further

²¹⁸ Still less is Holmes's attitude post-modern in his desire to fashion a grand, all-encompassing theory of law.

²¹⁹ J. FRANK, *LAW AND THE MODERN MIND* (1930).

²²⁰ See Balkin, *supra* note 64, at 795; Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761, 762-66 (1987).

²²¹ O.W. HOLMES, *supra* note 199, at 187.

²²² See Rubin, *The Practice and Discourse of Legal Scholarship*, 86 *MICH. L. REV.* 1835 (1988).

or contribute to their interpretive enterprise, but rather to study the enterprise itself. The most extreme example of this approach is Herman Oliphant's suggestion that scholars might dispense with the study of doctrine altogether and investigate instead the effects that certain "stimuli" (i.e., facts) had on the "responses" (i.e., opinions) produced by judges.²²³ Oliphant's behaviorist approach to legal scholarship, while not universally adopted by the realists, is nevertheless characteristic of a new sense of detachment from the practice of law. The legal scholar has, to a large degree, left the tribe and become an anthropologist. We normally think of realism as the study of "law in action" and thus a movement closer towards what the law "really is." Yet this very goal ironically produces a separation or estrangement between the student and the thing being studied. "Objectivity" requires that the member of the tribe no longer take at face value the natives' explanations for what they are doing. Dispassion requires distance. One cannot pour cynical acid on one's own skin.²²⁴

*1652 Modernity has had a lasting legacy on the forms of legal scholarship in at least three respects. The first is the self-consciously interdisciplinary character of legal scholarship. This essay is no exception. A second is the increasing amount of scholarship, especially in the elite journals, that is about other legal scholarship, rather than about primary legal materials like statutes and cases. Legal scholarship becomes an increasingly self-contained, self-referential discipline, which is "about itself" as much as it is about the legal world outside, either law on the books or law in action. As interdisciplinary movements like law and economics or law and literature spring up, they begin to focus not on their relationship to the work of lawyers and judges, but to their own internal coherence and justification. Legal interpretation is replaced by legal theory, which is replaced by meta-theory, which is replaced by meta-meta theory, and so on.

The third feature is the fragmentation of legal scholarship into new genres such as feminist scholarship, critical legal scholarship, or law and economics. As a result of this fragmentation, it is increasingly difficult for lawyers and legal academics to agree on what good legal scholarship is and how to evaluate it. To some extent, this was always true, as soon as legal scholarship

²²³ Oliphant, *A Return to Stare Decisis*, 14 A.B.A. L.J. 73 (1928).

²²⁴ As Professor Schlegel reminds us, the realist study of law as a social artifact had at least two versions. One might engage in social scientific research with an eye to eventual suggestions for reform, a position that Schlegel associates with William O. Douglas and Charles Clark. Or one might engage in the scientific study of legal institutions for its own sake, a position Schlegel finds most clearly in the work of Underhill Moore. See Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459, 517-19, 539-45, 567-69, 578-85 (1979); Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFFALO L. REV.* 195, 293-95 (1980).

specialized into different subject matters like pleading, property, trusts, and so on. Yet there was a feeling that good legal reasoning transcended doctrinal boundaries, and that the reasonably intelligent contracts professor could recognize it in the work of a colleague who wrote about equity or the law of agency and partnership. The creation of "genres" of scholarship, like law and economics or feminist jurisprudence, which cut across traditional legal departments and categories, undermines such confidence today. Both fields are highly specialized with separate canons; they have very different intellectual approaches and scholarly goals which may, in some instances, be mutually critical of each other. Giving a piece written in one genre to a person who specializes in another may produce consternation, and perhaps even outright rejection.

*1653 The idea of a common language and a common vocabulary among legal academics, and indeed, a common canon of legal materials, has increasingly become a fiction. There is now an identifiable group of scholars who have read *A Jury of Her Peers*²²⁵ or *The Critical Legal Studies Movement*²²⁶ and consider them canonical texts. Other scholars may not have heard of either of these works, much less consulted them. Still others, having heard of them, may view them as, at the least, "outside" the law or, indeed, dangerous to the enterprise of law. Robert Morgan's fear that today "we no longer have a musical culture of our own," and that such culture as we do have has become "a patchwork of disconnected fragments snatched from here, there, and everywhere,"²²⁷ is easily translatable to legal culture. Faced with this Heraclitian whirl of flux and discontinuity in the legal academy, some may be tempted to form authentic performance-of-legal-scholarship movements with a concomitant attempt to delegitimize those they now perceive as contributing to the flux.

As these comments suggest, there is much work to be done in exploring what modernity means for American legal culture. But it also seems clear that the study of the effects of modernity on legal culture requires us to have a point of comparison in other aspects of culture with which our self-identity is not so bound up. The anthropological study of law, in Holmes's time as in our own, requires a form of distancing. One reason to study the effects of modernity in music is precisely because of its distance from law and from our own everyday experiences as lawyers and legal scholars. It is that very distance which allows us to see comparisons within our own discipline that might otherwise go unnoticed or underemphasized. For the student of legal modernity, then, a trip beyond our own

²²⁵ Glaspell, *A Jury of Her Peers*, in *THE BEST SHORT STORIES OF 1917*, 256-82 (E. O'Brien ed. 1918).

²²⁶ Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 563 (1983).

²²⁷ Morgan, *supra* note 95, at 67.

cultural moorings may well be not only a helpful but even a necessary tool of research.

*1654 V. CONCLUSION: LAW, MUSIC, AND OTHER
PERFORMING ARTS

Felix Frankfurter described as "the single most important utterance in the literature of constitutional law"²²⁸ John Marshall's admonition that "it is a constitution we are expounding."²²⁹ Equally important is Marshall's insistence that the Constitution be interpreted so as to "endure for ages to come, and consequently, to be adapted to the various crises of human affairs."²³⁰ It has always been feared, though, that too much "adaptation" would mean not the endurance, but rather the death of the Constitution. Yet how is one to tell the difference? Only half in jest do we announce that the subtext of this review is the question whether the performance of constitutional interpretation is better analogized to the Hanover Band's version of the Pastoral Symphony or to a jazz improvisation on Thelonious Monk's Round Midnight.²³¹ We do not mean to suggest that the choice must be exclusively between these two alternatives. Many other musical analogies might be suggested as well. We do mean to suggest that asking such questions—and wrestling over the answers—helps to illuminate the enterprise of constitutional analysis, including the particular problems posed by this enterprise for those who must confront the profound impact modernity has had on our political and legal culture.²³²

²²⁸ F. FRANKFURTER, John Marshall and the Judicial Function, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 534 (P. Kurland ed. 1970).

²²⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

²³⁰ *Id.* at 415. Not the least of Marshall's rhetorically brilliant gestures is italicizing "crises" instead of "adapt" and "Constitution" instead of "we." See Schlag, *The Problem of the Subject*, 69 TEX. L. REV. (forthcoming 1991).

²³¹ For a recent musing on the similarities between the Constitution and jazz, see Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts are No Different From Legislatures*, 77 VA. L. REV. 833, 837 n.10 (1991) ("On the Constitution as a Lead Sheet.") (italics omitted).

²³² Cf. D. KORNSTEIN, *supra* note 48, at 110 ("For all we know, one night this week Zuvin Mehta . . . will stand at his podium and whisper to the New York Philharmonic: 'We must never forget that it is a symphon we are expounding.'").

*1655 It is often our proudest boast that we in the United States live within the embrace of a constitutional tradition whose origins we can locate and whose continuity we can celebrate even two centuries later. Yet, as we have seen,

Professor Ely suggests that "those who assert the possibility of differentiating valid from invalid constitutional interpretation on the basis of 'craft limits' of a sort they assert are recognized in the arts are likely to be badly disappointed when they get around to a close examination of the analogues." Ely, *supra* note 231, at 837 n.10. The reason is, apparently, that "every time there develops what appears to be a consensus among musicians (and their listeners), to the effect that a certain interval is unacceptable noise, someone who can't be dismissed on any principled basis as 'not a real musician' starts using it, and others often follow." *Id.* Of course, this does not demonstrate that the analogy is useless, only that it cannot serve to legitimate particular limits on the practice of constitutional interpretation by appeal to existing "craft values." And that fact is itself quite interesting.

However, because Ely sees that the analogy to jazz is not much use in legitimating the sort of limits on constitutional interpretation he would like to exist, he concludes that it is not clear what we can learn from the analogy of jazz to constitutional law. See *id.* But for someone who is less interested than Ely in legitimating judicial review by distinguishing it from legislation, and is more interested in asking questions about how legitimation actually occurs, one learns a great deal from the analogy about how seemingly "objective" standards or craft values are constantly altering themselves. Thus, Ely sees his analogy as "not much use" precisely because it does not serve his particular project—because he does not want to conclude that the craft of judicial interpretation, like that of musical interpretation, is always altering itself historically. On the other hand, a person with a quite different project (understanding the phenomenon of constitutional interpretation and how elites justify it to themselves and to others) might find the analogy useful for precisely the reasons that Ely rejects it.

We think this example demonstrates something quite important about the pragmatic enterprise we are engaged in. First, for different projects (legitimation vs. anthropology) different tools may be more or less useful to the task, and thus different analogies will be more or less useful. Second, it does not follow from Ely's discussion that analogies between law and the arts are not possible, or that they will not stimulate thought, but rather that one's ability to use analogies to convince others with very different agendas will be limited because they will tend to reject analogies which move in directions they do not like, and the more unusual the analogy appears, the easier it will be for them to reject it out of hand. This should come as no surprise to anyone who has ever had a discussion with someone with a very different agenda. Thus while asserting that analogies can be helpful, the pragmatist always understands that analogies become more or less useful tools of discussion and persuasion depending upon the audience they are directed to.

explaining what it means to adhere to a tradition, particularly in an age of modernist self-consciousness, is itself an extraordinary difficult assignment. Although tradition seems to imply stasis as much as modernity implies change, in fact, as Roxana Waterston points out, "'tradition' really describes a process of handing down, and as such is just as dynamic and as historical as any other social process."²³³ Yet the abstract ideals of fixed tradition and mutable modernity are simultaneously motivating factors in this dynamic of change. Thus "t radition, like history, is something that is continually being recreated and remodelled in the present, even as it is represented as fixed and unchangeable."²³⁴

***1656** Perhaps the best illustration of the belief that we are participating in a living tradition is found in Justice John Marshall Harlan's well-known analysis of the meaning of "substantive due process" in *Poe v. Ullman*.²³⁵ Harlan looked to the "balance between the liberty of the individual and the demands of organized society struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."²³⁶ Interestingly, Harlan's description of a "living" tradition explicitly involved both continuity with and alterations of previous tradition.²³⁷ It is perhaps no coincidence that Robert Bork, the self-styled apostle of "original intent," describes Harlan's arguments as "entirely legislative" and denounces the opinion as simply a way station toward the "intellectual catastrophe" of *Griswold v. Connecticut*.²³⁸

We believe that in *Poe*, as elsewhere, Harlan showed himself to be a quintessential performer of constitutional law. Another major theme of this review is the importance of grasping the performative aspect of engagement with the law. This is obvious in the case of a judge, but it is present as well in the acts of a vigorous public critic of judges, such as Robert Bork.²³⁹ Insofar as law is a

²³³ R. WATERSON, *THE LIVING HOUSE: AN ANTHROPOLOGY OF ARCHITECTURE IN SOUTH-EAST ASIA* 232 (1990).

²³⁴ *Id.* See also Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1619 (1990) (discussing conceptual affinities between tradition and betrayal in constitutional law).

²³⁵ 367 U.S. 497 (1961).

²³⁶ *Id.* at 542.

²³⁷ See Balkin, *supra* note 234, at 1617-18.

²³⁸ R. BORK, *supra* note 33, at 234.

²³⁹ See S. LEVINSON, *supra* note 22, at 18-53; Balkin, *supra* note 107, at 937 n.116 (discussing role of non-judicial interpretations of the Constitution).

performative art, insight can be gained from looking at performance practices (and theory) in other arts.

Thus, we believe that legal scholars have something to learn from Jonathan Miller's views on the challenges facing anyone called upon to direct a play, and in particular his attack on the notion "of the primary status of the text . . . as a literary work."²⁴⁰ Those who hold such a view, he suggests, believe

that in some peculiar way the play is at its very best when read quietly by the informed reader, who somehow manages to dramatize in his or her imagination a performance that is more congruent with the intentions of the author than any particular performance could ever be, and all performances then represent a lapse from this ideal state.²⁴¹ *1657 Though there may be an important sense in which "great plays can be said to exist without being theatrically performed,"²⁴² one would wonder "why a writer had chosen to cast his ideas in the form of a play at all"²⁴³ inasmuch as the conventional meaning assigned the genre "play" includes performance.²⁴⁴ "I cannot deny the fact that each time a play is staged the production is inevitably a limited version of the range of possible interpretations," but, nonetheless, "the destiny of a great play is to undergo a series of performances each of which is incomplete, and in

²⁴⁰ J. MILLER, *supra* note 104, at 22.

²⁴¹ *Id.*

²⁴² *Id.* at 23.

²⁴³ *Id.*

²⁴⁴ Indeed, Miller points out, "[t]here is a tendency to forget that for a playwright like Shakespeare the written script was not intended for publication but as an aid to performance without any view to a distant posterity." *Id.* Miller would also presumably endorse recent suggestions by Shakespeare scholars that what we refer to today as the "texts" of the plays, deviation from which presumably is questionable, are themselves creations of a decidedly post-Shakespearean moment that overlooks the fact that his own actors felt altogether comfortable engaging in their own "contributions" to the manuscripts handed them. Thus Stephen Orgel notes that Shakespeare wrote his plays for performance rather than as publications to be read outside the theater. "Shakespeare habitually began with more than he needed," so that "his scripts offered the company a range of possibilities, and . . . the process of production was a collaborative one of selection as well as of realization and interpretation." See Brett, *supra* note 114, at 106 (quoting Orgel, *The Authentic Shakespeare*, 21 REPRESENTATIONS 1, 7 (Winter 1988)).

some cases may prove misleading and perverse." Still, "by submitting itself to the possibility of successive re-creation, . . . the play passes through the development that is its birthright."²⁴⁵ Miller's analysis applies to music as well. Although it is surely possible to read a music score and to construct an "ideal" performance in one's mind, this is surely not the conventional practice of experiencing music. Enacted performance, for most of us, is inextricably linked with notes on a page.

Is this not also true of law, especially as conceptualized by those realists, influenced by Holmes, who emphasized "law in action"? Did they not ask us to focus on the performances of actual people—ordinary citizens, lawyers, police, public officials, and judges—rather than to concentrate on mere "law on the books," i.e., the text independent of its performance? To be sure, one can read the texts of the law as collected in statute books and the like, but in that guise they are only in a state of limbo. They await their performance by legal actors and actresses or, to shift the metaphor, by virtuosos of the law who can interpret melodic lines in the law in ways overlooked by previous players.

***1658** It should now be clear why a review that began by considering how to perform Beethoven's first piano concerto should have gone on to address how those designated to engage in legal performance, like judges, interpret statutes or the Constitution. We believe that there is indeed a relation between law and music, derived in part from their common textuality and necessity for subsequent performance. And it should also by now be clear why studying this relationship of common textuality draws us more and more into the study of culture as a whole. For performance, whether legal or musical, is always situated in a culture and reflects the distinctive problematics of that culture. Thus, if ours is a modern culture, our interpretations, our subsequent performances of law and of music, must be understood in the light of the tangled and complicated experience of modernity and its gradual transformation into what is now called the postmodern. Although we have only begun to explore the complexities of the subject in this essay, we firmly believe that any deep understanding of legal thought in the twentieth century requires legal scholars to confront the meaning of modernity for law and legal culture. To the extent that the study of other aspects of culture, including music, must also confront questions of interpretation and subsequent performance under the shadow of modernity, we believe that comparative study can aid us in our more parochial task of understanding the law itself. We think we understand our own "England" better by having visited other shores, and we are confident that others can benefit from the same experience.

We are not suggesting that one best understands England by emigrating from it and establishing one's permanent life elsewhere; similarly, we doubt that one can best understand law by spending all of one's time on what follows the "and" in various "law and . . ." movements. But there are few people left who do not believe that at least some of one's time should be spent looking on what follows the "and," and the question is whether musical performance should

²⁴⁵ J. MILLER, *supra* note 104, at 23.

become a suitable candidate for such study. We think that it should. We should have no trouble recognizing Richard Taruskin, Charles Rosen, Neal Zaslaw, and Christopher Hogwood as our own colleagues engaged in a common enterprise of trying to figure out how one meaningfully inhabits a practice of performance after innocence has been lost. They are all writing interesting, provocative, infuriating, and, most importantly, illuminating work that should interest any of us who daily wrestle with our own performance practices as lawyers, judges, or teachers of the law.