



PART TWO OF TWO

## COMPOSING LAW

BY BRETT G. SCHARFFS<sup>1</sup>

tions emphasize creating order out of chaos, bringing disparate elements together, and engendering harmony or quietude.

In this part, *Composing Law*, I will discuss the most common meaning of the word compose: “to create (a literary, musical, or choreographic work).”<sup>3</sup> While it is unlikely that President Richards had this broad meaning in mind when he told President Hinckley he wanted to compose the situation, I have found it valuable to ponder the richness of the word *compose*, with all its connotations.

This definition might seem to have the least relevance for practicing lawyers. I am sympathetic to this reaction. Indeed, on one level I share it. As a junior securities attorney at a Wall Street law firm, I often felt like a highly paid proofreader, an interchangeable and easily replaceable part, or a fungible billing unit, whose job it was to process enormous quantities of technical and detailed reams of paper without error or complaint. Comparing the daily grind of being a lawyer with the creativity and sublimity of the composition of great music might seem ludicrous, or at least hopelessly naive.

Professor Bruce Ackerman has said that the greatest challenge facing lawyers is to avoid settling for a “self-trivializing conception of lawyering.”<sup>4</sup> In a speech to incoming students, Yale Law School Dean Anthony Kronman suggested one way to avoid such a pitfall.

*Remember the satisfaction that comes from service to the world, and the equally great satisfaction that comes from singularity within it. Remember the pleasure of creation, which you have demonstrated over and over again, and which has propelled you forward in your lives, to this day and place. Remember the thrill of your own novelty, of your power to reimagine the world as you found it. This power will be tested in the years ahead, for you are coming into the house of the law, where the oldest and most deeply entrenched habits of humankind prevail, and where the forces of institutional life, with their pressure toward concession and conformity, are at maximum strength.*<sup>5</sup>

Consider the ingredients of professional satisfaction that Dean Kronman identifies: serving others, relishing and preserving one’s singularity, experiencing the pleasure of creation and the thrill of one’s own novelty, and exercising the power to imagine the world as

something better than one found it. Consider also the forces that push us towards settling for less: entrenched professional habits, institutional imperatives, and the pressures toward concession and conformity.

In the face of these obstacles, one key to overcoming the temptation to settle for a self-trivializing account of lawyering lies in our capacity and our duty to be creators. Perhaps it is more than a coincidence that a striking number of musicologists, composers, and theorists have also been lawyers, including Handel, Schumann, Tchaikovsky, Stravinsky, Bartok, Sibelius, and Schenker.<sup>6</sup> In studying musical composition, we can find some clues to how we might increase our capacity for creativity as lawyers.

I will suggest that lawyers can, should, and must be composers. While the connections between literature and law have been explored at length,<sup>7</sup> the connections between musical composition and lawyering have yet to be explored in depth.<sup>8</sup> This article is a tentative attempt to examine some of the similarities between musical and legal composition, and to reflect upon the paradoxes that arise in each field.

## A SELF-TRIVIALIZING CONCEPTION OF LAWYERING

Many years ago Stephen L Richards of the First Presidency of The Church of Jesus Christ of Latter-day Saints asked a young Gordon B. Hinckley for help with a “very delicate and sensitive matter” that was “fraught with most grave and serious consequences.” When President Hinckley suggested finding a lawyer, President Richards responded, “I am a lawyer. I don’t want to litigate this. I want to compose it.”<sup>2</sup>

While troubled that President Richards’ instincts told him that a lawyer was precisely the sort of person he did not want in such a delicate situation, I was puzzled and intrigued with his use of the word *compose* to describe what he wanted done. In Part I of this article, *Composing Conflict*, I discussed four related definitions of the word compose: (1) to end or settle a dispute, (2) to put together, (3) to put into proper form or order (to create coherence), and (4) to bring about a condition of repose or calmness—and suggested that each of these represents skills, or even habits of character, that every good lawyer should seek to cultivate. These defini-

## THE MUSIC OF THE LAWS

Professor Daniel Kornstein notes that at the beginning of the 17th century, astronomer Johannes Kepler “watched the skies and heard the ‘music of the spheres,’” and suggests that we may also be able to hear the “music of the laws.”<sup>9</sup> Despite a cacophony of laws that often seem “chaotic and confused, an incomprehensible and incoherent welter of apparently contradictory and ever-changing rules, traditions, and practices,”<sup>10</sup> Kornstein urges that “there may well be mysterious harmonies, rhythms, and relationships to be discerned.”<sup>11</sup>

Music and the law, Kornstein argues, share much in common. Each “conjures up a refined, elite endeavor, a product of man’s intelligence at its most highly civilized and highly disciplined. Both music and law are sometimes seen as expressions of the sublime, the beautiful, and the eternal, and both are based on the norms of Western civilization

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Georges Braque, *Violin and Palette*, 1909.  
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and the quiet pursuit of reason. Indeed, music has widened the sphere of legal ideas and enriched law with new images.”<sup>12</sup> Kornstein suggests, it is easy to “sense the quasi-symphonic nature of law.”<sup>13</sup> The basic themes of the law—justice, mercy, due process—serve as leitmotifs, and “[v]ariations on these legal leitmotifs arise from different factual contexts as well as changed moral and social values.”<sup>14</sup>

#### LAWYERS AS PERFORMERS

Most analyses of the connections between music and the law focus upon similarities that arise in musicians’ and lawyers’ roles as performers and, in particular, on similar issues that arise in the interpretation of musical and legal texts.<sup>15</sup> Both music and law involve specialized and sophisticated systems of notation<sup>16</sup> and interpretation.<sup>17</sup> Kornstein observes, “In music, scores provide the texts. In law, the texts are constitutions, statutes, ordinances, regulations, and cases.”<sup>18</sup> The first duty of the musician as well as the lawyer confronted with a text is fidelity to the text and intent as written. Nevertheless, interpretation is ubiquitous. A successful or comprehensive system of notation will not eliminate the possibility of, indeed will retain the necessity for, interpretation.

The composer’s text and intent is always the benchmark against which interpretations of a musical piece will be measured, although the composer’s intent will not exhaust the meanings that can be found or extracted from a composition. A lawyer, like a musician, can be rightly criticized for being mechanical in his interpretation, as well as for taking too great liberties in his interpretation. Composers of music are often surprised—sometimes pleasantly, sometimes not—to see what others have “found” in their work, as is illustrated by the following exchange between Franz Liszt and Frederic Chopin.

*One evening . . . Liszt played one of Chopin’s nocturnes, to which he took the liberty of adding some embellishments. Chopin . . . at last could not control himself any longer, and in that tone of sang froid which he sometimes assumed he said, “I beg you, my dear friend, when you do me the honor of playing my compositions, to play them as they are written or else not at all.” “Play it yourself then,” said Liszt, rising from the piano, rather piqued. “With pleasure,” answered Chopin. . . .*

When he left the piano his audience was in tears; Liszt was deeply affected, and said to Chopin, as he embraced him, "Yes, my friend, you were right; works like yours ought not to be meddled with; other people's alterations only spoil them. You are a true poet." "Oh, it is nothing," returned Chopin, gaily, "We have each our own style."<sup>29</sup>

Consumers of a composer's work inevitably will bring their own ideas, needs, skills, predispositions, abilities, and weaknesses to their interpretation of the work.<sup>20</sup> Still, we will usually be able to discern the difference between interpreting a composer's work, writing a variation of it, quoting it, and butchering or mocking it.

Judge Learned Hand observed that when interpreting a statute, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."<sup>21</sup> Thus, both text and context are necessary components of interpretation. Skillful lawyers like skillful musicians know how to create melodies from discrete notes, as well as how to improvise, quote historic sources, and play variations on a theme created by someone else.

#### DELIBERATE PRACTICE

Another similarity between being a skilled performer of music or law involves the disciplines of "deliberate" and "reflective" practice, which includes structured learning activities with feedback. BYU Law Professors Larry Farmer and Gerry Williams have argued that one path to the development of expert-level lawyering skills is disciplined and reflective practice, analogous to practice by skilled musicians and athletes.<sup>22</sup> While repetitive, self-conscious practice is common for musicians and athletes, many lawyers seldom carve time out of their busy routines for analogous practice, self-evaluation, and preparation. It is interesting that we refer to the professional work of lawyers as the "practice" of law, even though so little of what generally travels under the banner of "practice" actually takes place. In a study conducted by Professors Farmer and Williams, the attorney in a large metropolitan area who was consistently rated by his peers as the most

effective lawyer had a disciplined practice of carefully reviewing and assessing his performance at the end of each engagement.<sup>23</sup>

## .03 COMPOSING LAW

While these connections between music and law are significant, my suggestion that lawyers should strive to be composers pushes the musical analogy further. Lawyers are not just performers of other people's works, and being a good lawyer involves more than being a skilled interpreter of texts.<sup>24</sup>

As lawyers, we can easily become preoccupied with perfection, likening our task to attempting to perform without error a Bach fugue, failing to realize that real perfection lies not in performing the fugue flawlessly but in composing it.<sup>25</sup> It is as creators and not merely as performers that we are likely to find our deepest satisfaction as lawyers. Being creative involves more than just hitting every note and avoiding mistakes; it involves the skillful and inspired bringing into being of something new, not out of nothing, and not in disregard of law, but from materials that already exist and in ways that have yet to be imagined.

Compositional skills are easily evident in the writing of an appellate brief,<sup>26</sup> in opening or closing argument in a trial,<sup>27</sup> or the composition of the story that a lawyer hopes to communicate to a jury through the selection, order of appearance, and type of questions asked of witnesses in a trial.<sup>28</sup> Perhaps less obviously, compositional skills are helpful for a lawyer trying to structure a business relationship between parties who are not altogether familiar with or trusting of each other.<sup>29</sup>

I will focus here on two aspects of viewing the lawyer as a composer, one that is apparent from the surface, and one that lies hidden somewhat beneath the surface. The surface relationship between composing music and composing law lies in each discipline's analogous use of similar components of structure and order. The deeper kinship lies in what I will call the paradoxes of composition, or the ways in which composition in each field entails both following and breaking

rules. Inspired composition involves a synthesis of freedom and constraint in ways that result in the creation of something new, although not altogether new.

#### COMPONENTS OF STRUCTURE AND ORDER

According to music educator and theorist Stanley Sadie, "A musical tone is the product of regular vibration in the air, and is perceived when an inner part of the listener's ear is made to vibrate in sympathy."<sup>30</sup> Music is contrasted with noise, which is the product of "irregular vibration."<sup>31</sup> A musical composition comprises "a very large number of musical tones, intended to be heard in a carefully ordered pattern."<sup>32</sup> A successful legal argument, whether to or by a judge, is also made to "vibrate in sympathy," and reflects a "carefully ordered pattern," and the antithesis of a successful legal argument would be the "noise" of "irregular vibrations."<sup>33</sup>

Sadie explains that in music, "The basic systems of ordering are three: *rhythm*, which governs the movement of music in time; *melody*, which means the linear arrangement of tones; and *harmony*, which deals with the simultaneous sounding of different tones."<sup>34</sup> Together with *structure*, each of these elements is among the "materials of music" that the composer has at her disposal in creating a composition.<sup>35</sup> There are several striking similarities between the skillful manipulation and integration of rhythm, melody, structure, and harmony in musical and legal composition.

☐ **Rhythm:** Professor Sadie explains, "The most basic element in music is *rhythm*; some musical systems, in fact, use rhythm alone."<sup>36</sup> Whereas painting and sculpture exist in space, music exists in time. Rhythm is communicated by durational symbols. The *beat* is the "basic pulse of a musical passage."<sup>37</sup> The rate at which the beats occur is the *tempo*.<sup>38</sup> The grouping of beats into consistent patterns throughout a passage is called *meter*.<sup>39</sup>

Lawyers, likewise, must concern themselves with the timing, rhythm, beat, tempo, and meter of their arguments. In the courtroom the importance of such skills is obvious, but they are also helpful in less overtly performance-oriented aspects of lawyering, such as negotiating a contract or setting the stage for settling a lawsuit.

As a young legal assistant to an American judge on the Iran-U.S. Claims Tribunal in

The Hague, I learned an important lesson about the use of rhythm, tempo, and meter in making legal arguments. At that tribunal, the court usually sat in panels of three judges, one from Iran, one from the United States, and one from a neutral country. Given the situational dynamics, the Iranian and American judge each often found themselves trying to convince the neutral country judge to side with their view of the case.

One of the most interesting aspects of the job was that, unlike in U.S. courts, law clerks met in conference with the judges when a case was being deliberated. The deliberations in a given case could often last 30 to 50 hours over the course of several months. In a typical session, the Iranian judge would begin by giving a 90-minute speech about some aspect of the case, during which he would make all manner of misleading and inaccurate statements and characterizations. My boss, Judge George Aldrich, would often speak next, usually for 5 or 10 minutes. Then the neutral country judge would speak. The Iranian judge would then spend another 60 or 70 minutes repeating earlier points and mischaracterizing what Judge Aldrich had said. Judge Aldrich would then respond, again in 5 or 10 minutes.

I was in the grip of a high school debater's mentality that demanded that no ridiculous statement or argument go un rebutted, and Judge Aldrich's self-restraint exasperated me. When I asked Judge Aldrich why he didn't answer in greater detail, his response taught me an important lesson. "I just watch [the neutral country judge] to see whether he is taking ridiculous arguments seriously; if he isn't, I don't want to irritate him by making obvious points." Judge Aldrich explained that he also didn't want to put the neutral judge in the position of appearing to be convinced by the "American" view of the case. "I try to limit myself to situations where I think he may be heading in the wrong direction." With his careful attention to his audience, Judge Aldrich was a master of understanding the rhythm, tempo, and meter of successful legal argumentation.

☐ *Melody*: Professor Sadie defines melody "as a 'succession of notes in a musically expressive order.' Certainly, to most people's minds, melody is the heart of music; no

aspect of musical skill is as much prized as the ability to compose melodies that are shapely, expressive, and memorable."<sup>40</sup>

One important aspect of melody is the "capacity of a line of music to impress itself quickly and clearly on the memory."<sup>41</sup> Melodies are "built out of a series of short phrases, planned sometimes to answer one another, sometimes to repeat or echo."<sup>42</sup> In his analysis of Johann Sebastian Bach's Well-Tempered Clavier, *Bachanalia*, Eric Lewis Altschuler argues that one of the keys to Bach's genius was the "magical method Bach used to organize material," basing a piece on a single theme or motive, and then ensuring that the motive is felt, in some form, in virtually every measure of the piece.<sup>43</sup> Altschuler notes that you can verify Bach's repetition of themes or motives merely by flipping through the pages of a collection of Bach's works. "You'll notice that no two pieces look the same. And that's because each piece has a different motive, and each piece uses its motive almost to the exclusion of anything else."<sup>44</sup>

The basic, memorable message that a lawyer hopes to communicate can be compared to a melody. In the contest over the last presidential election, for example, David Boies, Vice President Gore's lead attorney, did a masterful job of articulating the theme "Every vote must be counted." Sometimes the theme provided the "main material," and sometimes it was "tucked away in the accompaniment," but its presence was always felt. Governor Bush's lawyers also played variations on a simple theme, "The rules cannot be changed at the end of the game." These arguments were made again and again, by various voices, in an assortment of keys<sup>45</sup> and harmonies,<sup>46</sup> marked by modulations<sup>47</sup> and cadences.<sup>48</sup>

☐ *Structure*: The force of a memorable melody can be enhanced when it is integrated into a disciplined musical structure, such as a fugue. Altschuler notes, "The power and beauty of a fugue comes from its basic three-section structure: a clear beginning in which all of the voices are introduced without confusion; a manifest division into beginning, middle, end; and a graceful finish with the coda."<sup>49</sup> Even operating within the formal constraints of the fugue form, Altschuler emphasizes, "The potential for

different ways to fill in a fugue's basic structure is tremendous."<sup>50</sup>

An appellate brief follows a similar fugue-like structure, with a clear beginning in which the voices are introduced, a formal division into beginning, middle, and end, and—hopefully—a graceful finishing coda.<sup>51</sup> A skillful appellate lawyer finds the form liberating rather than constraining, with ample space for creativity and flexibility within its form. An effective trial lawyer will likewise subject her presentation of witnesses and evidence to a disciplined structure that reinforces the main melody of a case.

A musical piece without a good overall structure, Altschuler urges, is like a "bad movie with a few good jokes, a boring play with one dramatic scene, or a lousy book with a few nice pages of dialogue."<sup>52</sup> Altschuler maintains that "Bach recognized the importance of the overall structure of a piece, and always took the greatest care to see that all of his pieces had a superb and clear overall structure that is easy for the listener to follow."<sup>53</sup>

A lawyer without a clear sense of how to structure an argument may leave his audience feeling confused or distracted. A dramatic example of such a failing is the lawyer who changes his theory of the case in the middle of the trial—arguing first that it was not his client on the videotape, and later that even if it was, his client didn't know the girl was a minor.

I was once involved in negotiating a merger agreement with a lawyer who kept changing melodies. When it suited his client's interest, he argued against a proposed contractual term on the grounds that it wasn't a part of the original agreement. Later, he insisted upon dramatic changes to the deal structure, and completely refused to see the force of his earlier arguments. Eventually, there was such a breakdown of trust and fair dealing that the transaction disintegrated.

☐ *Harmony*: When sounds are combined the result may be harmony.<sup>54</sup> Harmony is generally manifest in *chords* (combinations of notes that create a harmony), more specifically in *triads* (three note chords built up in thirds),<sup>55</sup> *inversion* (the transfer of the lowest note to some higher octave),<sup>56</sup> *dissonance* (sounds that embody "a feeling of clashing or of tension, which needs to be resolved"),<sup>57</sup>

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Pablo Picasso, *Mandolin and Guitar*, 1924.

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## *The Lawyer as Writer*

Associate Professor Brett G. Scharffs' research and writing regarding the legal profession have been drawing significant critical attention lately. Last June he was invited to present his paper "Law as Craft" at the Stanford-Yale Junior Faculty Forum. The forum is designed to bridge generations in legal academia by providing select, promising young scholars an opportunity to present papers and receive feedback from distinguished senior professors. The article was also the subject of a day-long work-in-progress workshop sponsored by the Institute for Humane Studies. "Law as Craft" appeared in the *Vanderbilt Law Review* last November.

Professor Scharffs' article is the first sustained comparison of law with other craft traditions such as carpentry, pottery, and quilting. Its thesis is that law—particularly adjudication—combines elements of what Aristotle described as practical wisdom, or *phronesis*, and craft, or *techné*. The article hints at elements of creativity in legal practice that are further explored in Part II of "The Lawyer as Composer."

"Law as Craft" is the third in a series of five articles Professor Scharffs is writing about adjudication and practical reason. The first, "The Role of Humility in Exercising Practical Wisdom," 32 U.C. Davis L. Rev. 127 (1998), uses the Old Testament prophet Micah's injunction to "do justly, and to love mercy, and to walk humbly with thy God" (Micah 6:8) as a springboard for arguing that humility, along with justice and mercy, is one of the most important character traits of judges. The second article, "Adjudication and the Problems of Incommensurability," 42 William & Mary L. Rev. 1369 (2001), explores the tools and resources that adjudication brings to bear on the problems of reasoning about complex, competing, incommensurable values. The final two articles in the series will address the significance of logical error in legal reasoning and the reasons why we prefer rules in some situations and judgment or balancing in others.

and *consonance* (smoother sounding chords that resolve a dissonance).<sup>58</sup> It is reported that Bach was "so fond of full harmony that, besides a constant and active use of the pedals, he is said to have put down such keys by a stick in his mouth, as neither hands nor feet could reach."<sup>59</sup>

Harmony is also important in the law. For example, Peter Goodrich suggests that "euphony, harmony, and audibility were primary virtues of law and, as early constitutional lawyers were to put it, this musicality of governance lay at the source of the normative order that custom and law would become over time."<sup>60</sup> Principles of harmony are also relevant when we try to read two disparate statutes or cases, and we seek an interpretation that will create harmony and integrity between them. In most instances, lawyers will have an obligation to seek to harmonize cases in a way that the meaning and import of each can be preserved, even when urging that they may stand for propositions not previously recognized.

Much of the experience of being a first-year law student seems to involve learning about the various ways in which judges and lawyers try to harmonize a series of cases. During my first semester of law school, I often found myself bewildered and annoyed that what clearly appeared to be the holding of a case turned out to not dictate the outcome in the next case, and that some distinction that did not seem at all important in the earlier case became decisive in the next. Professor Kornstein cites former *New York Times* music critic Harold C. Schonberg, who as a child "realized that performers 'did' things to music—sometimes elegantly and convincingly, sometimes outlandishly and stupidly. It puzzled me that pianists could play the same work so differently."<sup>61</sup> Kornstein notes that as "law students, we realized that judges and lawyers 'did' things to precedent—sometimes elegantly and convincingly, sometimes outlandishly and stupidly. It probably still puzzles most of us that judges and lawyers can read the same precedents so differently."<sup>62</sup>

☒ *Additional Elements:* I believe that one way we as lawyers can critically reflect upon our effectiveness is to think about musical concepts such as rhythm, melody, structure, and harmony and ask ourselves whether we

utilize these constituents of composition well in our work. In addition to these elements, we may find a wide variety of other aspects of musical composition helpful in formulating and evaluating our work as lawyers: techniques such as the use of pitch,<sup>63</sup> volume and dynamics,<sup>64</sup> counterpoint and polyphony,<sup>65</sup> sequencing of homophonic passages,<sup>66</sup> color,<sup>67</sup> and parallelism.<sup>68</sup>

#### THE PARADOXES OF COMPOSITION

What is the essence of composition? The composer Gustav Mahler once responded to an inquiry about how music is composed by responding, “Do you know how a trumpet is made? One takes a hole and wraps tin around it; that’s more or less what composing is.”<sup>69</sup>

The futility of seeking to articulate the essence of composition is illustrated by a conversation between the Finnish symphonist Jean Sibelius and Mahler. Sibelius recalled, “When our conversation touched on the essence of the symphony, I said that I admired its severity and style and the profound logic that created an inner connection between all the motifs. . . . Mahler’s opinion was just the reverse, ‘No, the symphony must be like the world. It must embrace everything.’”<sup>70</sup>

The craft of composition is not only difficult to articulate, it involves many contradictions and paradoxes. Composers both follow and break structural rules.<sup>71</sup> In addition, a composer may either seek to build upon or to repudiate the past. During a rehearsal of music by Bach, conductor Paul Hindemith once requested that the string section play with “a more beautiful sound” where members of the section played staccato, absent vibrato and dynamic variation. The concertmaster of the renowned German Orchestra, however, insisted, “We descend from the Bach tradition and this is the style, the right way.”<sup>72</sup> This rigid adherence to past traditions stands in stark contrast to a comment made by contemporary Franco-American composer Edgar Varèse, who once stated, “I refuse to submit myself to sounds that have already been heard.”<sup>73</sup> Law makes similar appeals to the past and to the virtues of innovation to justify favored outcomes.

We can also see the paradoxes of composition in the freedom and constraint experienced by a skillful composer. According to Schenker, “The musical genius is at once the

most law abiding yet freest citizen.”<sup>74</sup> For Schenker, “[t]he music of great composers is ‘unconfined, and is but lightly chained to the eternal laws of nature. They may be unaware of these laws, yet no living being can escape them.’” Alpern likens “Bach’s innate understanding of musical law,” to the “knowledge of a person who has the knack for doing the right thing in every situation without . . . even wondering if the statutes of the penal code might apply.”<sup>75</sup>

Great composers such as Bach and Beethoven instinctively recognize that their creativity is safeguarded rather than confined by law. Thus, they are “grateful for this boundary, for it offers a necessary protection and control of freedom.”<sup>76</sup> An effective lawyer similarly will not feel constrained by the system of laws within which she operates. Rather she will be “lightly chained” to the laws, even when she is not explicitly aware of them, and such laws provide the boundaries within which she can exercise considerable creativity and freedom.

Composition exhibits personal style or even genius, and what makes one composer great may be very different from what makes another great. George Gershwin was forever seeking lessons from anyone he felt might improve his technical skills—from Ravel, Stravinsky, and many others. In Hollywood he became a friend and tennis partner of Schoenberg’s and duly asked the older composer to accept him as a pupil. Schoenberg refused. “I would only make you a bad Schoenberg,” he said, “and you’re such a good Gershwin already.”<sup>77</sup> Similarly, lawyers are most effective when they are true to themselves. Each of us must strive to discover and create our own approaches and styles as lawyers.

Perhaps the most brilliant and moving example of composing the law in the sense of seeing the world anew and mastering the tension between conformity and originality in the law is the example of Jesus Christ kneeling in the dust, drawing with a stick, acting as though he hadn’t heard them, while the Pharisees wait in their rage for His answer. “This woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou?”<sup>78</sup> Christ’s answer, of course, is not an answer at all; rather He responds with a better question, forcing

them to see things in a new light. “He that is without sin among you, let him first cast a stone at her.”<sup>79</sup> With that, He stooped down again and continued writing in the dirt.

## THE HARDEST THING ON EARTH .04

In his speech to incoming law students, Dean Kronman warned, “Your ambitions will be challenged, confined, rebutted, and confused, and you will discover that nothing on earth is harder than to create something new. But never give up. Never concede. Never forget who you are. . . . You have a *duty* to create, and I know that you will meet it—I am completely confident you will—because I know you will never forget the pleasure in creation that drives your lives and that constitutes an essential part of what makes you happy.”<sup>80</sup> In looking to endeavors that are unquestionably creative, such as composing music, we can find ways to increase our creativity in our work as lawyers.

As lawyers, we will be better—not only at our jobs but as people—if we seek to cultivate the skills of a composer in our work. We can do this both by reflecting upon how the various aspects of composition apply in our professional lives, and by learning how to resolve the deeper paradoxes of composition.

In many surveys a distressingly large percentage of lawyers report discontent with their professional lives.<sup>81</sup> If we are to find meaning in our vocation, it is up to us to find better ways to conceive and create understandings of what we are and what we ought to be doing. I sense in my own professional life that I will experience greater meaning and satisfaction if I consciously and reflectively seek opportunities to be a composer.

#### COMPOSING A LIFE

In addition, beyond our vocation as lawyers, in a very real sense, each of our lives is itself a composition, at least in large measure of our own making. Thus, what we can learn from a study of composition may have even deeper implications. In our quiet moments, we would do well to reflect upon what it is that we are composing.

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- 2 Gordon B. Hinckley, *The Healing Power of Christ*, ENSIGN, Nov. 1988, at 54, 59.
- 3 RANDOM HOUSE COLLEGE DICTIONARY 276 (1972); See also MERRIAM WEBSTER COLLEGIATE DICTIONARY 236 (10th ed. 1994) ("to create by mental or artistic labor: produce" and "to formulate and write (a piece of music)").
- 4 Bruce A. Ackerman, *Commencement Remarks*, YALE L. REP. Spring/Summer 1982, at 6.
- 5 Anthony T. Kronman, *The Character of Our Community, welcoming address to entering students at Yale Law School* (1997) (transcript available at Yale Law School).
- 6 See Wayne Alpern, *Music Theory as a Mode of Law*, 20 CARDOZO L. REV. 1459 n.4 (1999). Alpern observes that Henrich Schenker, "the leading music theorist of our time, perhaps of all time," was a lawyer. *Id.* at 1459. Alpern notes that "Unlike other famous musicians who pursued law unenthusiastically or against their will, . . . [Schenker] devoted a substantial amount of time and energy to legal study." *Id.* Schenker observed, "Let mankind observe in art the continuous natural growth of phenomena from the basis of a few principal laws, and learn to trust the power of growing outward from within more than the whims of that low plateau of humanity which believes it possible (or necessary) to create new laws with each new motion of hand or mouth." HENRICH SCHENKER, 2 KONTRAPUNKT [COUNTER-POINT] xvii (John Rothgeb ed. & Trans., 1992), quoted in Alpern, *supra*, at 1482. Schenker could just as easily be speaking in defense of the organic growth of the common law. As Alpern notes, "As the proponents of historical jurisprudence believed of the laws of society, the laws of music for Schenker likewise evolved slowly and naturally from fundamental precepts rooted deep in its past and inherent in the structure of music itself." *Id.* at 1481.
- 7 See e.g., DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL (1994); MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); RICHARD A. POSNER, LAW AND LITERATURE (rev. & enlarged ed. 1998); JAMES BOYD WHITE, THE LEGAL

IMAGINATION (1973). Ronald Dworkin has compared the judge to a chain novelist, who is constrained by two obligations: first, fidelity to what has come before (what Dworkin calls "fit"), and second, a duty to continue the story so as to make it the best it can be (what Dworkin calls "justification"). See RONALD DWORKIN, *LAW'S EMPIRE* 228–232 (1986). James Elkins notes that, "Lawyers are, by profession, storytellers: we relish a good tale and tell stories as a fundamental and functional part of our craft. Lawyers are enmeshed in stories, first as an audience for the stories of our clients and then as storytellers ourselves. We listen to client's stories and retell them to judges and juries . . . We tell stories in legal briefs . . . We relish tales of other lawyers, stories of the impossible accomplished and awesome mastered . . . Lawyers are knee-deep in stories." James R. Elkins, *From the Symposium Editor*, 40 J. LEGAL EDUC. 1,1 (1990).

8 The body of literature about the connections between musical composition or performance and the work of lawyers and judges is growing. Scholars of music and law recently met to discuss how music "might be seen as a legal process" and law as a "musical process." *Symposium, Modes of Law: Music and Legal Theory—an Interdisciplinary Workshop*, 20 CARDOZO L. REV. 1325 (1999). Topics included: *The Score as Contract: Private Law and the Historically Informed Performance Movement*, *Music Theory as a Mode of Law*, *Fusion Folk: A Comment on Law and Music*, and *Origins of the Game Theory of Law and the Limits of Harmony in Plato's Laws*. Earlier writers also explored the musical metaphor. See Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

9 DANIEL KORNSTEIN, *THE MUSIC OF THE LAWS* 13 (1982). "For Kepler, as for the Pythagoreans almost 2,000 years earlier, the planets filled the air with celestial music, each planet singing its own tune." *Id.*

10 *Id.* Kornstein continues, "The confusion is heightened by the increasing number and complexity of laws reaching into every corner of our lives." *Id.* at 13–14.

11 *Id.* at 14. "The quest for such harmonies—the search for order out of chaos—may allow us to approach from a different perspective and with new sensitivity." *Id.* But, Kornstein maintains, "to hear the 'music of the laws'—to see the interconnectedness of apparently unrelated legal phenomena—we need something of Kepler's Spirit." *Id.* Kepler's spirit is characterized by a passion for seeking understanding ("he wanted to grasp the structure of the universe"), boldness ("he had the audacity to conceive of law and order amid a jumble of phenomena"), creative genius ("at times coldly

rational, Kepler had a fertile imagination and triggered the conception of new theoretical systems"), and a willingness to fit theories to facts ("he sacrificed even his most beloved mathematical hypotheses when he saw that they did not fit observational data"). *Id.*

12 *Id.* at 18.

13 *Id.*

14 *Id.*

15 See, e.g., Timothy S. Hall, *The Score as Contract: Private Law and the Historically Informed Performance Movement*, 20 CARDOZO L. REV. 1589 (1999) (analogizing performance of musical work and performance of contract, and claiming interplay between performer and composer is cooperative or collaborative); Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1608, 1633–34 (1991) (identifying musical score as central and asserting "when one looks at any musical score, one is faced predominantly not with expression, but command," but also maintaining that "The self-conscious search to regain and recapture . . . authenticity nevertheless produces inauthentic performance."); Carol Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439 (1999) (critiquing notion of autonomy in law and music, and noting "that both build on previous material, official and unofficial, and that in both there are latitudes and boundaries, ways in which the interpreter is free and ways in which the composer is constrained."). An early example is Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947) (comparing statutory interpretation with interpretation of music); Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921 (1948).

16 Notation makes possible the storage, reproduction, and distribution of a repertory of creative work. See STANLEY SADIE & ALISON LATHAM, *STANLEY SADIE'S MUSIC GUIDE: AN INTRODUCTION* 14 (1st ed. 1986) [hereinafter SADIE & LATHAM]. A system of notation will be successful insofar as it enables a reader of the text to discern how the composer intended the work to sound. In the standard Western musical system, pitch and duration are represented by notes on five-line staves of fixed pitch. *Id.* Similarly, the law has a system of notation, a language of its own.

17 Daniel Kornstein suggests that the "central link between music and law is interpretation." KORNSTEIN, *supra* note 9, at 107. See also Daniel J. Kornstein, *Introductory Remarks: Panel on Politics, Symposium: Modes of Law: Music and Legal Theory*, 20 CARDOZO L. REV. 1331, 1331–32 (1999) ("An analogy exists between how musicians interpret musical scores and how lawyers and judges interpret statutes and constitutions. They all have the task of

- interpreting texts. Should musical performers follow a slavish literalism in reading music? Or is that the surest way to miss the composer's message? It is in essence the continuing fundamental debate in constitutional law over original intent versus a living document. Judges and lawyers are performers of legal music."); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947) (early notable entry in the law review literature relating musical and statutory interpretation). Frank compares legislatures to composers, and judges and lawyers to musical performers, and identifies common issues that arise in both interpretive contexts, including creative expansion and improvement ("There is a middle ground, between disregarding the composer's intention and being intelligently imaginative.") versus structure and fidelity to text (Purists insist that a performer should "engage in 'authentic interpretation' which eliminates the interpreter altogether, by 'the actual rendition' of the musical symbols just as they were written, in order to 'serve the true intention of the composer.'"). *Id.* at 1260–64. Karl Llewellyn, in contrast, rejected the musical metaphor. See Karl N. Llewellyn, *On the Good, the True, and the Beautiful in Law*, 9 CHI. L. REV. 224, 230 (1942) (expressing preference for metaphor of architecture).
- 18 KORNSTEIN, *supra* note 9, at 107.
- 19 NORMAN LEBRECHT, *THE BOOK OF MUSICAL ANECDOTES* 136–37 (1985).
- 20 Harold Schonberg notes, "Anybody engaged in recreating the bare, mysterious notes and markings of a composer necessarily has to bring his own ideas to them. . . . Notes have to be played, and it is the performer who has to be the intermediary between composer and listener. Music, then, is a reflection, an interpretation of the mind of the composer expressed through the mind of the performer." *Cited by* KORNSTEIN, *supra* note 9, at 108. Kornstein observes that with slight alteration this passage could have been written about the legal process, and might read: "Anyone engaged in applying the bare, mysterious words of a legislator or a judge necessarily has to bring his own ideas to them. . . . Words have to be interpreted, and it is the lawyer or judge who has to be the intermediary between legislator and citizen. Law, then, is a reflection, an interpretation of the mind of the draftsman expressed through the mind of the lawyer or judge." *Id.*
- 21 *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934) (Learned Hand, dissenting).
- 22 This concept was articulated by Professors Farmer and Williams at a BYU Law School faculty retreat in December 2001, and is the subject of a paper they are currently writing. See also K. Anders

Ericsson, *The Acquisition of Expert Performance: An Introduction to Some of the Issues*, in *THE ROAD TO EXCELLENCE: THE ACQUISITION OF EXPERT PERFORMANCE IN THE ARTS AND SCIENCES, SPORTS AND GAMES* 1–50 (K. Anders Ericsson, ed., 1996); J. A. MOON, *REFLECTION IN LEARNING AND PROFESSIONAL DEVELOPMENT* (2000); D. A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

- 23 *Id.*
- 24 I believe it is more than accidental that while child prodigy musical performers are rather commonplace, child prodigy composers are much rarer. Even performance prodigies often lack depth and emotional range. Composer prodigies such as Mozart are so extraordinary for their level of genius that it is difficult to imagine the more prosaic of us having much if anything to learn from them.
- 25 I am indebted to John Durham Peters for his thinking about the relationship between perfection and creativity.
- 26 "A good [appellate] brief requires much work before pen is even set to paper. . . . There are myriad techniques. Only by experimentation can you determine what best suits your craftsmanship." HERBERT MONTE LEVY, *HOW TO HANDLE AN APPEAL* § 6:1 (4th ed. 2000).
- 27 "At the beginning of the opening statement, the mood is set, the theme is expressed, and the jurors become involved in the real-life drama of the facts and circumstances of the case. . . . In many cases, the first two minutes of the opening statement are the most critical minutes of the entire trial." PETER PERLMAN, *ANNOTATED OPENING STATEMENTS* 1, 3 (1994). The music theorist Johann Matteson (1681–1748), who studied law, "interpreted music as a form of oral advocacy governed by the rules of rhetoric, the cornerstone of legal study since the days of Quintilian and Cicero." Alpern, *supra* note 6, at 1499–1500.
- 28 "[The lawyer] cannot easily remove his witnesses or jurors from the courtroom and bring them to a location in which his argument would be more persuasive. Nonetheless, a litigator can accomplish the same feat by mastering the art of storytelling. In his opening arguments to the jury, or with his foundational questions to a witness, the skillful litigator can weave the facts of the case into a setting; he can lift the jurors and witnesses from their seats and take them where he wishes them to be. He can maintain this effect by continuing to deepen his story as he develops his case, distancing his listeners from facts which may negatively influence them while bringing them to the heart of his argument." Susan E. Kinz, Note, *Love's Litigation: Plato's Phaedrus as Trial by Jury*, 46 DUKE L. J. 815, 823 (1997).

- 29 Vladimir Lenin is supposed to have said: "Trust is good, but control is better." Jeffrey S. Busch & Nicole Hantusch, *I Don't Trust You, But Why Don't You Trust Me? Recognizing the Fragility of Trust and Its Importance in the Partnering Process*, DISP. RESOL. J., Aug.–Oct. 2000, at 56, 58. However, with the assistance of able and honorable lawyers, it seems possible for parties to achieve a mutually satisfactory measure of both. In the area of labor relations, for example, where parties are notoriously divided and distrustful, lawyers "who are knowledgeable about nuances of [the] collective bargaining relationship can be among the most effective dispute resolvers and are often able to lead parties away from divisiveness and frustration." Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. & EMP. J. 465, 504 (1997). However, Professor Snow is at the same time critical of many lawyers who "severely undermine the prospect of a trusting relationship" between labor and management by the use of traditional competitive and adversarial methods. *Id.* at 504.
- 30 SADIE & LATHAM, *supra* note 16, at 14.
- 31 *Id.*
- 32 *Id.*
- 33 Certain 20th-century composers, in their efforts to redefine music and sound, may disagree with Sadie's analysis of music as organized sound. In particular, John Cage created a piece containing no organized sound. In his work 4'33, "the performer sits or stands as if to play but nothing is heard, except the environmental sounds and any audience reaction. These, in Cage's view, have quite as much value as anything he might propose in their place: the function of the artist becomes that of pointing people towards the potential art surrounding them in life." SADIE & LATHAM, *supra* note 16, at 408." This is not unlike the Critical Legal Studies movement within the legal academic community, which has as its main objective to "develop a consciousness-based critique of the existing legal order." Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1563 (1984). This effort, seeks to "critically reexperience the phenomena of everyday life with an eye to illuminating their hidden meanings." *Id.* Cage, like the crits, strives to force his audience to think and listen outside the traditional classical box.
- 34 SADIE & LATHAM, *supra* note 16, at 26.
- 35 *Id.* at 11.
- 36 *Id.* at 17.
- 37 The beat is the "basic pulse underlying mensural music, that is, the temporal unit of a composition." 3 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 20 (Stanley Sadie ed., 2001) [hereinafter NEW GROVE DICTIONARY]. "Part of the coherence

of almost any piece of music lies in the fact that it rests upon a succession of regularly spaced impulses, or beats, against which the rhythmic patterns play, and in relation to which, as to one another, they enter into coherent form . . . Beats fall into groups, or measures, often of the same length throughout a given piece or movement.” WALLACE BERRY, *FORM IN MUSIC* 2 (2d ed. 1986). “To determine the beat of a passage you are listening to, tap your foot to the music or try to imagine the way a conductor would conduct the passage.” KOSTKA & PAYNE, *TONAL HARMONY: WITH AN INTRODUCTION TO TWENTIETH-CENTURY MUSIC* 25 (1st ed. 1984).

38 *Id.* Tempo markings are “words and other instructions in musical scores used to define the speed and specify the manner of performance.” 25 *NEW GROVE DICTIONARY*, *supra* note 37, at 271. Frequently composers employ one or two Italian words, indicating the speed at which a piece is to be played, ranging from *largo* (very slow), to *adagio* (slow), to *andante* (walking), to *allegro* (fast), to *presto* (very fast). Since the 19th century, tempo markings have become more elaborate and, with the invention of the metronome, more precise. KOSTKA & PAYNE, *supra* note 37, at 25.

39 *Id.*

40 SADIE & LATHAM, *supra* note 16, at 21.

41 *Id.* at 22.

42 *Id.* at 23.

43 ERIN LEWIN ALTSCHULER, *BACHANALIA: THE ESSENTIAL LISTENER’S GUIDE TO BACH’S WELL-TEMPERED CLAVIER* 34 (1994). Altschuler exaggerates his point, coining the word “motivicness” to describe the way Bach organized his music. “Motivicness means that the motive, or theme, of any piece by Bach is in every measure of that piece, not just in some measures, or in a lot of measures, but in every measure, and also that there is hardly anything else *but* the motive in any measure of any piece by Bach.” *Id.*

44 *Id.*

45 According to Sadie, “Second in importance to melody is key.” “[M]ost western music has a strong gravitational pull towards a tonal center.” SADIE & LATHAM, *supra* note 16, at 60. In addition, composers “cause their music to modulate, or change key, in the course of a movement, usually to one or more of the keys nearly related to the principal one of the movement—that is, to keys which have many notes in common with the principal key.” *Id.*

46 There are a variety of ways in which harmony is used in the structure of a movement. “Composers of the Baroque period, for example, often based an entire movement on a fixed, recurring pattern of harmonies (much like twentieth-century jazz, with its sponta-

neously improvised melody and rhythm but pre-arranged harmonic sequence).” SADIE & LATHAM, *supra* note 16, at 61. Kostka and Payne maintain that “[t]he grammar of tonal harmony has some similarities to spoken language, but it is not quite so well understood,” and suggest that “we might draw an analogy between chord functions and parts of speech.” KOSTKA & PAYNE, *supra* note 37, at 181.

47 “Composers develop subtle ways of handling modulation to convey structural meaning—for example, by modulating to very remote keys to create a sense of distance from the home key, or by changing key rapidly to bemuse the listener.” SADIE & LATHAM, *supra* note 16, at 61. Modulation is a “firmly established change of key, as opposed to a passing reference to another key.” 16 *NEW GROVE DICTIONARY*, *supra* note 37, at 876. According to Kostka and Payne, a “modulation is a shift of tonal center that takes place *within* an individual movement.” KOSTKA & PAYNE, *supra* note 37, at 279. Kostka and Payne also note that “[a]lmost all compositions from the tonal era begin and end in the same key. Sometimes the *mode* will be changed, usually from minor to major, but the *keynote* (tonic note) remains the same.” *Id.*

48 A cadence is “the conclusion to a phrase, movement or piece based on a recognizable melodic formula, harmonic progression or dissonance resolution.” 4 *NEW GROVE DICTIONARY*, *supra* note 37, at 778. “The use of cadences—punctuation points, or resting points—can mark out the formal outlines of a movement for the listener.” SADIE & LATHAM, *supra* note 16, at 61. Cadences also convey a “sense of closure or interruption in the rhythmic motion of the musical line.” BERRY, *supra* note 37, at 8.

49 ALTSCHULER, *supra* note 43, at 28. Altschuler marvels that Bach composed “over 200 hours of music, almost all of it excellent,” as well as at least another 50 hours of music Bach wrote down but which has been lost. *Id.* at 33. “In order to compose so many [at least 2400 different] movements, especially with all his other responsibilities, I think Bach must have had a general method for composing pieces and movements so he wouldn’t always be reinventing the wheel. I think he used a three-step compositional process: 1. He found or invented an excellent theme. 2. He filled the piece on the small level with the theme and hardly anything else but the theme. 3. He carefully planned the overall structure of the piece.” *Id.*

50 *Id.* at 28. The relationship between structure and fidelity to rules is expounded nicely by Altschuler’s answer to the question, “What happened to fugues after Bach?” One type of fugue written after Bach, Altschuler labels “academic fugues,” which have been “written by lesser composers and music theo-

rists.” *Id.* at 218. The trouble with academic fugues, Altschuler explains, “is that they are composed under the belief that fugues must adhere to a large set of technical and complex rules. For example, it was thought that a fugue should have a certain amount of stretto [a section of a fugue in which more than one voice is running an entry at the same time], beginning at a certain place in the fugue, and a certain number of entries and a counterexposition at a preassigned spot in the fugue. Adherence to all these rules can make academic fugues sound dry, complicated, stiff, and boring. In contrast to the many rules of academic fugues, Bach used only a handful of general rules when writing his fugues. Within those few rules he exercised immense creativity and flexibility.” *Id.* at 218. Wayne Alpern asks, “Doesn’t the fugue imply the composer’s submission to rules? And is it not within those structures that he finds the full flowering of his freedom as a creator?” Alpern, *supra* note 6, at 1502. Alpern also cites Leonardo da Vinci in support of the proposition, “Strength is born of constraint and dies in freedom. Insubordination boasts of just the opposite and does away with constraint in the ever-disappointed hope of finding in freedom the principle of strength. Instead, it finds in freedom only the arbitrariness of whim and the disorders of fancy. Thus, it loses every vestige of control.” *Id.*

51 Kornstein analogizes the evolution of legal principles in the common law to the development of musical themes in a fugue. “The fugue starts with a theme based on a particular rule of law as sung by a particular judge. While the theme is still being sung, a second judicial voice modifies the first legal rule and introduces a secondary theme—a countersubject—which provides contrasts to the subject. As modifications of the legal rule occur, each judicial voice enters in turn, singing the theme, often accompanied by the countersubject in some other voice.” KORNSTEIN, *supra* note 9, at 18–19. “The legal fugue—the play of principle and counterprinciple, the dialectic of theme and countertheme—fits neatly into the common law process. It shows how a confusing chorus may still be singing a basic theme.” *Id.* at 19.

52 ALTSCHULER, *supra* note 43, at 35.

53 *Id.*

54 Harmony is the “combining of notes simultaneously, to produce chords, and successively, to produce chord progressions. The term is used descriptively to denote notes and chords so combined, and descriptively to denote a system of structural principles governing their combination.” 10 *NEW GROVE DICTIONARY*, *supra* note 37, at 858.

55 Kostka and Payne explain that “tonal harmony makes use of *tertian* (built of 3rds) chords. The funda-

mental tertian sonority is the *triad*, a three-note chord consisting of a 5th divided into two superimposed 3rds.” KOSTKA & PAYNE, *supra* note 37, at 39.

56 *See id.* at 44.

57 SADIE & LATHAM, *supra* note 16, at 28.

58 *Id.*

59 CHARLES BURNLEY, A GENERAL HISTORY OF MUSIC, *quoted in* LEBRECHT, *supra* note 19, at 19.

60 Peter Goodrich, *Operatic Hermeneutics: Harmony, Euphantasy, and Law in Rossini’s Semiramis*, 20 CARDOZO L. REV. 1649, 1653–54 (1999). Goodrich continues, “The allusion to music as the best rhetoric and to harmony as the proper or proportionate relation of law to justice gains numerous further elaborations in works that endeavor to set out the relation between the parts and the whole of civil and political society.” *Id.* at 1654.

61 KORNSTEIN, *supra* note 9, at 107–08.

62 *Id.* at 108.

63 In music, pitch is the “particular quality of a sound (e.g. an individual musical note) that fixes its position in the scale. 19 NEW GROVE DICTIONARY, *supra* note 37, at 793. “Pitches are named by using the first seven letters of the alphabet: A, B, C, D, E, F, and G.” KOSTKA & PAYNE, *supra* note 37, at 3. For a lawyer, striking the right pitch, knowing how high or how low to go in making one’s point, can be critical. In speaking, one can vary the pitch of one’s voice, enabling one to keep the interest of judge or jury. More significantly, a skillful lawyer will have a sense of where to pitch his argument, how high on the argumentative register to strike a chord.

64 Important messages are communicated by volume in music. Sudden dynamic contrasts between loud and soft as well as carefully controlled crescendos and diminuendos in music punctuate important climaxes. Lawyers, likewise, must be attentive to volume, both in the manner in which they use their voice, and also the intensity with which they try to make a point. Like a composer of music, a lawyer may add a jarring note in order to make sure her audience is still awake.

65 “Much music . . . consists of melody with accompanying harmony. But much, too, consists of melodic lines that are heard against one another and are woven together so that their individual notes harmonize.” SADIE & LATHAM, *supra* note 16, at 29. The intertwining of independent melodic lines is known as polyphony and is most apparent in the contrapuntal music of the Baroque period, for example the fugues of J. S. Bach. Carol Weisbrod suggests that in the law polyphony can be found in majority and dissenting opinions. Weisbrod, *supra* note 15, at 1447; Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist*

*Jurisprudence*, 24 GA. L. REV. 985 (1990). *See also* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2288–95 (1989); Elizabeth P. Hodges, *Writing in a Different Voice*, 66 TEX. L. REV. 629, 640 (1988).

66 A sequence is “a melodic or polyphonic idea consisting of a short figure or motif stated successively at different pitch levels, so that it moves up or down a scale by equidistant intervals . . . Sequences can be used in the construction of a melody or theme itself, but they usually function in the spinning out of musical material by developing a motif related to a previously stated melody.” 23 NEW GROVE DICTIONARY, *supra* note 37, at 107. “Sequences are an important means of achieving unity in tonal music.” KOSTKA & PAYNE, *supra* note 37, at 107.

67 Composers can create variety in their music by the use of various means such as texture, rhythmic character, speed, key structure, color, and dynamic level. Different instruments will have different tone colors, and a composer can utilize these differences including voice (both male and female), strings (violin, viola, cello, double bass), plucked instruments (guitar, lute, harp), keyboard instruments (piano, harpsichord), wind instruments (recorder, flute, oboe, bassoon, clarinet, saxophone, organ), brass (cornet, horn, trumpet, trombone, tuba), and percussion. Lawyers likewise need variety in their voicing and expression to emphasize different points in oral argument.

68 KOSTKA & PAYNE, *supra* note 37, at 458. Parallelism is the simultaneous movement of all voices within a chord in the same direction. It is also commonly known as planning. Parallelism is a means of forcing the listener’s ear away from the tonal center and often facilitates modulation to a new tonal center. *Id.*

69 NATALIE BAUER-LECHNER, ERINNERUNGEN AND GUSTAV MAHLER (1923), *quoted in* LEBRECHT, *supra* note 19, at 248.

70 KARL EKMAN, JEAN SIBELIUS, THE LIFE AND PERSONALITY OF AN ARTIST (1935), *quoted in* LEBRECHT, *supra* note 19, at 271.

71 “Every piece of music, from the simplest song to the most elaborate symphony needs to have some kind of organization, or form.” SADIE & LATHAM, *supra* note 16, at 59. From the beginning of time, each new generation of composers has sought to define its own system of structure by breaking the regulatory bounds of its predecessors and forming its own rules. For example, Debussy relaxed the harmonic tensions of tonic and dominant traditional harmonies through his use of dissonance and block chords, and Arnold Schoenberg replaced the structure of tonality that created major and minor

relationships around a single key with 12-tone serialism. DONALD JAY GROUT & CLAUDE V. PALISCA, A HISTORY OF WESTERN MUSIC 693 (5th ed., W. W. Norton & Co. 1996) (1960).

72 ROBERT JACOBSON, REVERBERATIONS (1976), *quoted in* LEBRECHT, *supra* note 19, at 317.

73 *Id.* at 310.

74 Alpern, *supra* note 6, at 1494.

75 *Id.*

76 *Id.* at 1495. Alpern also notes with interest that Igor Stravinsky, a notable composer of the 20th century, and Schenker, a notable 20th-century theorist, both studied law. *Id.* at 1501. “More striking is that each describes the same dialectic between order and freedom in similar legal imagery. In his *Poetics of Music*, Stravinsky quotes G. K. Chesterton’s juristic remark, ‘rigidity that slightly yields, like Justice swayed by Pity, is all the beauty of earth.’ The notion that musical freedom and constraint temper one another is central to Stravinsky’s neoclassical aesthetic. ‘It is a fact of experience, and one that is only seemingly paradoxical,’ he stated, ‘that we find freedom in a strict submission.’” *Id.* at 1502 (citations omitted).

77 LEBRECHT, *supra* note 19, at 319 (quoting author’s interview with Nuria Schoenberg-Nono).

78 *John* 8:4–5 (King James).

79 *John* 8:7.

80 Kronman, *supra* note 5, at 12.

81 *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (May 1999). Professor Schiltz cites an extensive array of studies and surveys, which indicate that lawyers “are in remarkably poor health and quite unhappy.” *Id.* at 873, 874–888.

#### ART CREDITS

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