

ROCK ‘N’ ROLL ‘N’ LEGAL REASONING: HOW POPULAR MUSIC ILLUSTRATES THE COMMON LAW

By

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I. INTRODUCTION

In the weeks preceding the commencement of the U.S. Senate hearings to confirm Supreme Court nominee Sonia Sotomayor, the public debate was raging in the newspapers and in the blogs. Will she show sufficient respect for the rule of law?¹ How will her ethnicity and gender affect her rulings?² Will she decide cases based on her “feelings”? Is her self-acknowledged “empathy” a positive or negative trait for a Supreme Court Justice?³ In this national discussion, the very nature of the American legal system is examined and debated and the complexity and contradictory conceptualizations of our Common Law system are brought to the fore.

It should be little wonder that students have difficulty in grasping the nuances of the foundations of our legal system. Students who are paying attention cannot help but be perplexed by the paradoxes presented in a system that simultaneously seeks stability and asks for adaptability, promises predictability yet needs novelty, shapes society while being itself shaped by social need. Words, alone, because of nuance in meaning, connotation and understanding, are not always sufficient to adequately illustrate the rich and diverse environment of the Common Law. In 1931, Justice Cardozo wrote, “Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech.”⁴ Cardozo goes on to suggest that literary style in judicial writings may enhance legal understanding.⁵ In order to effectively enhance students’ understanding of legal concepts in the classroom, educators must reach beyond words to seek out and utilize media that is simultaneously familiar to students and sufficiently analogous to the functioning of these legal institutions. This article suggests the use of popular music as analogy to illustrate two concepts relevant to an understanding of the American legal system; *stare decisis* and statutory interpretation.

This article does not seek to contribute to the scholarly debate over whether music provides a useful analogy to inform scholars in the function of these legal institutions. Rather, this article seeks to provide scholars with pedagogical tools to inform student understanding of the function of these legal institutions.

II. MUSIC AS ANALOGY FOR THE LAW

Music and the law are not strangers. References to popular music are prevalent in judicial decisions.⁶ Law and music analogy comprises a rich body of scholarship and debate. Most of the work focuses on the process of music, from creation to appreciation by an audience as analogy for the creation and interpretation of law. Legal Realist, Jerome Frank, likens the process of judicial interpretation of legislation to that of the musical performer interpreting the work of a composer. “The legislature is like a composer. It cannot help itself: It must leave interpretation to others, principally to the courts.”⁷ He specifically addresses the role of the judge as a law-maker by analogizing the jurists’ role to that of the musical performer. “Those who complain today of any ‘judicial legislation’ in statutory interpretation are complaining of the intrusion of the judges’ personalities. However, just as [composer Ernst] Krenek shows that the effect of the performer’s personal reactions cannot be excluded, so legal thinkers, in increasing numbers, have shown that the personal element in statutory construction is unavoidable.”⁸ In advocating that judges must look beyond the words of a statute to fulfill the intent of the legislature in “trying to base their solutions on the their honest estimates of the community’s sense of values,” Frank echoes the words of Learned Hand, “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.”⁹ Frank expands the music analogy to aid his well known advocacy for study of the judicial fact-finding process, “In deciding any case where the testimony is in conflict or where credibility is otherwise a pivotal factor (and most cases fit in that

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category), a court contrives, so to speak, an individual song (a song for that particular case) in which the legal words are the music and the 'facts' are the words."¹⁰

Sanford Levinson and J.M. Balkin have enriched Frank's analogies with respect to legal interpretation.¹¹ They posit that music is a better analog for law than literature, because of the characteristic of performance.

*The texts we call law are not law-in-action, but only 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. Just as the music of the Eroica is not identical to 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.*¹²

Levinson and Balkin embrace the music analogy principally for three reasons. First, they argue, both law and music feature a triangulation of relationships. In law, these relationships exist among the institutions that create the law, the institutions that interpret the law and the persons affected by the interpretation. In music the triangular relationship embraces the creator of the text, the performer and the audience. Second, the law "consists of not only texts but the enforcement and implementation of these texts in practice."¹³ Music, of necessity, requires the performance of the texts, often by the coordinated effort of many and diverse talents. Finally, legal interpretation, which includes not only adjudication and enforcement but also the offering of legal advice, has an impact on the audience. It shapes and directs and affects the thoughts and conduct of others. Music, likewise, has impact on its listeners. Both, then, have responsibilities to their audiences.¹⁴

Levinson and Balkin have used the music analogy to explore theories of constitutional interpretation. Robert Bork's "originalism" was analogized to the "Authentic Performance" or "Early Music Movement"¹⁵ while a "living" tradition of constitutional interpretation was analogized to a modern performance of early music pieces that employ modern instruments and technique.¹⁶ They have further enriched the scholarship by analogizing the process that results when, in constitutional interpretation, a jurist is confronted with what she believes to be an unjust passage. Analogy is made to performance of musical pieces which may contain lyrics deemed to be offensive to a modern audience.¹⁷

The concept that both law and music necessarily depend on interpretation by performers has also been advanced by Daniel Kornstein in *Music of the Laws*.¹⁸ The musical/legal interpretation analogy also serves as an effective starting point to Alan C. Hutchinson's inquiry into the effects that legal interpretations have on democracy.¹⁹ Hutchinson acknowledges the nuance and complexity of law in rejecting the notion that in singing "Law's Song" lawyers are merely employing and expounding rules which remain immune or autonomous from the effects of the singing. "Legal reasoning then is something more than simply what lawyers happen to say or sing. Indeed, if it was only that, it would warrant neither greater nor lesser respect and deference than that which ideologues, steelworkers, and accountants say or sing."²⁰ Ian Gallacher analogizes constitutional interpreters, particularly Supreme Court Justice Antonin Scalia, to an orchestra conductor's direction of the first movement of Beethoven's *Eroica*.²¹

Music analogy has also effectively informed understanding of law and the legal system beyond the concepts of judicial interpretation of statutes and constitutions. In *Songs Without Music*, Desmond Manderson supersedes the analogy to legal interpretation to conceptualize law as a cultural form significantly affecting societal values and to be understood through legal aesthetics. "Legal aesthetics" suggests that the discourse of law is fundamentally governed by rhetoric, metaphor, form, images, and symbols,"²² much like music. To explain his theory of legal aesthetics, "each chapter is based on a different musical form, and each uses music as a comparison and exemplar."²³ Carol Wiesbrod embraces music as metaphor for law by recognizing the rich tradition of musical metaphor in many areas of study. She considers the way that high culture has dealt with folk songs and makes analogy to the Uniform Commercial Code treatment and acceptance of traditional merchant customs.²⁴ Timothy Hall argues that the music analogy is best applicable to the understanding of contract law.²⁵ Unlike the previous writers who see the musical text as a statute or constitution which commands fidelity in interpretation, Hall sees a more mutually beneficial relationship between the composer and the performer. "A score is not a command, but is a blueprint from which a performer creates an instance of a work. Unlike a statute, but like a contract, the musical work is not merely a text, but, as suggested by the title of a recent book on the historically informed performance movement, is a combination of 'Text and Act.'²⁶ Amy D. Ronner uses a music analogy to argue that law student practice in appellate legal clinics provides a more effective educational experience than the mere study of black letter law, alone, without consideration of the effects of the legal argument.²⁷ As music "does not invite excision of import from expression,"²⁸ so to must the study of the law.

Searching for a normative political theory of justice in a system of laws that are inherently constructed based on social values, F. Patrick Hubbard pores over the music of Mary Chapin Carpenter.²⁹ He compares her expressions to John Rawls's theory of justice in a beneficial exercise of mining social values as expressed in popular culture for the purpose of contributing to shape a vision of justice. Other scholars have gleaned legal meaning through examination of the music of Bob Dylan,³⁰ Bruce Springsteen,³¹ Paul Simon,³² Tina Turner,³³ and Carrie Underwood.³⁴ Popular music as a reflection of societal attitudes and beliefs toward the legal system has also been considered.³⁵ Likewise, songs of labor³⁶ and songs about family violence³⁷ have been examined for what they reflect upon the creation of law or the operation of the legal system. Images of Admiralty Law have been considered where found in sea shanties, Gilbert and Sullivan musicals, opera and popular music.³⁸

Direct relationships between music and law have also been explored. Aaron R. S. Lorenz does not analogize law to music. Rather, he explores music as a form of jurisprudence.³⁹ Unlike Frank or Levinson and Balkin who analogize musicians interpreting musical compositions to judges interpreting law in order to illustrate and study legal interpretation, Lorenz studies how musicians engage in legal interpretation and express those understanding of the law in their music, thereby shaping legal discourse itself.⁴⁰ Marja Heimonen turns the tables on the musical performance/legal interpretation analogy by using interpretation and creation of law as an analogy for music construction.⁴¹ "A composer may create a composite piece of music (order) out of a fragment (disorder) just as a judge creates order when he or she decides a case, or a law-giver enacts a statute that takes account of different kinds of interests of people usually represented by political parties or associations."⁴²

Not all who have considered the music/law analogy have embraced it. John Hart Ely dismisses any analogy between constitutional interpretation and jazz improvisation as being unworkable beyond a "gimmicky level" for mere description of theories.⁴³ Likewise, B. S. Markesinis challenges Levinson's belief that music "will help illuminate the enterprise of constitutional analysis" by calling for more concrete examples of the analogy in practice.⁴⁴ While not entirely dismissing the music analogy, Karl Llewellyn found the constructive process of architecture as more aptly applying.⁴⁵ Perhaps most famously, Richard Posner critically dismisses the value that study of musical interpretation may bring to understanding of constitutional interpretation.⁴⁶ He has written, "When a performing musician 'interprets' a work of music, is he expressing the composer's, or even the compositions, 'meaning,' or is he rather expressing *himself* within the interstices of the score?"⁴⁷

The focus of this article is not to engage in the debate over the value of studying musical interpretation to gain greater insight into the process of judicial interpretation. Rather, this article embraces the music analogy for the purpose of teaching students that such a debate exists. However, in dismissing musical performance as merely the expression of the performer, Posner fails to consider that the performer's expression is ultimately a means to an end. The performer's goal is to have a certain effect or create a certain impact on the audience. Even if the performer feels determinedly constrained by the musical text, she may still vary tempo, rhythm, arrangement, instrumentation, emphasis, delivery, and vocalization to achieve the desired result.⁴⁸ Only the unique constellation of the performers' talents provides any further constraint. The music becomes what the audience takes away from what the performer creates, quite apart from what the composer wrote. Likewise, in the process of legal interpretation a judge may undoubtedly employ her own unique talents in education, intellect, upbringing, experience, values and judgment to apply the law in a way so as to have a desired impact upon those affected by the ruling. No matter how well constrained the judge may be by the legal text, she is still positioned to reach her audience with desired effect. Whether this analogy aptly describes a normative theory of judicial interpretation is a topic to be further debated elsewhere. Here, we will explore the ways that the music analogy can help students reach beyond the rhetorical debate, to envision how the law impacts society. "[T]o concede that law and music are importantly different does not necessarily imply that they do not share enough similarities to make comparison useful,"⁴⁹ particularly as a pedagogical device to illuminate some of law's complex nuance.

III. USE OF MUSIC AS A PEDAGOGICAL TOOL IN THE LAW CLASSROOM

The very genesis of the discussion of whether music serves as an apt analogy for law doubles as an argument for the need to employ the analogy in legal education. The Greek concept, *nomos*, is found to be applicable in both "law"⁵⁰ and "music."⁵¹ In each description, *nomos* creates order while simultaneously accepting improvisation. Words, alone, can be inadequate, if not perplexing tools for teaching the law. The law often uses words in ways that allow for different interpretation and impact depending on legal and factual circumstances.⁵² Meaning and connotation of words in law may

stray unexpectedly from their meanings in the “lay” world.⁵³ Pedagogical devices employing a richer range of expression may have important value for reaching beyond words in teaching the law, especially considering the characteristics of multiple intelligences of college students.

In 1983, Howard Gardner’s groundbreaking book, *Frames of Mind*, introduced us to a new paradigm for the understanding of “intelligence.”⁵⁴ He posited that intelligence is not one-dimensional and that, in fact, there are many different types of intelligences. He began with a list of seven: Linguistic, Logical-Mathematical, Spatial, Musical, Bodily-Kinesthetic, Interpersonal and Intrapersonal. Education theorists, embracing Gardner’s foundations, have expanded the concept of student-centered learning to suggest that the most effective methods include those which allow students to learn using their natural intellectual abilities.⁵⁵ Teaching methods should be designed to appeal to as many of the diverse types of intelligences as possible. Law teaching, in the traditional undergraduate reading, lecture and discussion format, tends to appeal to students’ Linguistic intelligences. Law School’s Socratic methods emphasize the application of logic and rationality and may more likely appeal to a student’s Logical-Mathematical intelligences. Among the remaining intelligences described in Gardner’s paradigm, Musical intelligence stands out as a viable resource for effective learning in law.

“College without music, can you imagine it?” is one of the questions asked in the opening minutes of a video produced by the RIAA⁵⁶ intended to educate college students about the pitfalls of free music downloading.⁵⁷ While preferences and intensity of interest may vary, music is a familiar medium to college students. Music is prevalent in society. Even the very few students may not use i-pods, or listen to compact discs or the radio are exposed to popular music on television, in elevators, dining halls, doctor’s offices, shops, and public buildings, and at sporting events and public gatherings. Through the influences of popular culture and socialization, college students already have a mature understanding of how music “works.” They know that music may be composed or it may be traditional. They know that a composition may be subject to different arrangements. They know that the same song may sound different (or similar) depending on the performing artist. They know that some artists perform their own music and some artists perform music written by others. They know that studio and live performance of the same works by the same band will likely exhibit varying degrees of difference. They appreciate the simultaneous familiarity and incongruence of hearing *Carry on My Wayward Son* performed by a marching band⁵⁸ or by the rock band *Kansas*.⁵⁹ They know that whether the music that they hear is described as classical, folk, rock, blues, country, metal, hip-hop, rap, soul, rhythm and blues, pop, jazz or alternative, the music maintains common qualities and adheres to common principles even in its wondrous diversity of sound and effect. With varying degrees of understanding, students have already navigated through some of the nuances and complexities of music. Their experiences provide foundation for understanding of nuance and complexity in law through music analogy.

In this endeavor, this article shifts slightly from two of the principal emphases of most of the prior music/law analogy scholarship. First, the prior work generally examined the analogy with emphasis on the nature of the text and the role of the performer in interpreting the text. This article embraces the relevance of that analysis but seeks to illuminate the value in considering the role of the audience and the importance of the performer’s intended and practical effects of the musical/legal performance upon them as well as the audience’s own expectations for the performance. This shift seems only fitting in that teaching is most certainly constituted in part of performance, with students as the audience. So music is employed in the classroom to impact the student audience so as to illustrate the way law impacts its own audience (society). Second, the prior scholarship tends to rely on discussion of classical or formally composed music. That analogy is most certainly apt as such music contains formal written scores with instructions from the composer to the performer and feels much like the legislative law-making process. This article seeks a nexus between what students have already experienced and what we hope to teach them about the law. Consequently, the focus going forward will be on popular music⁶⁰ and its educational qualities; hoping to use the familiar to navigate the dense.

IV. *STARE DECISIS*

Stare decisis is one of the principal foundations of a common law legal system. It is the principle that seeks to demand fidelity to the rule of law. That is, a judicial decision today should be based on the judicial decisions of yesterday. This is one of the ways that we, as a society, can know that a judge’s legal decision is not her subjective imposition of her beliefs, but is constituted of the rules of law that preceded the decision and have applied in similar cases. Or, as the indignantly accused choirmaster admonishes the court in Anton Chekov’s, *Worse and Worse*, “Your Honor, one must try a case according to law and not according to notions.”⁶¹ The need for the appearance of legitimacy in the law is crucial for an orderly society. Legal legitimacy facilitates law abiding conduct. The import of *stare decisis* for creating at least the

appearance of legitimacy in the law is manifest. “The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”⁶² There are specific rules demanding adherence to binding precedent and relaxed consideration of persuasive precedent. In sum, a lower court is bound by the previous decisions of a higher court in the same legal jurisdiction. Any court is bound by its own prior decisions. There are three well-recognized releases from the requirement of fidelity to precedent; when the prior decision was erroneous, when the rule of the prior decision is no longer applicable due to changes in society or society's needs, and when the case being decided is distinguishable from its precedent on the facts.

The pedagogical challenge with *stare decisis* is found not in its general principles, but in its nuances. The importance of predictability in the law is a concept that students may grasp. The contribution of *stare decisis* to advance the goal of predictability is also readily evident. The fact that the principle cannot command absolute adherence is also apparent through a detailed explanation of the recognized exceptions. However, underlying the very function of *stare decisis* is the presumption that there is generally a single, widely-held understanding of each and every rule of law that is plainly and uniformly gleaned from the prior decisions and equally plainly and uniformly capable of being applied to the case being decided. While this presumption reinforces students' understanding of the law as ‘rules,’ it manifests an immature understanding of how the law works. Moving beyond this level of understanding is where students tend to lose grasp of the concept and begin to descend the slippery slope of confusion.

“The law must be stable but must not stand still.”⁶³ Roscoe Pound's succinct summation of society's simultaneous need for stability and change in law has become a legal axiom. Its power lies not only in its insight and accuracy, but in its juxtaposition of two potentially divergent forces. The law must be predictable, yet adaptable to changing times and circumstances. The law must be concurrently constant and evolutionary. The law simultaneously shapes society and is shaped by society. For students to understand the rich complexity of the law, these apparent incongruities must be explored and explained. While students may understand the need to depart from precedent in the appropriate case, it is difficult to define what constitutes an allegedly appropriate exercise of that discretion versus allegedly inappropriate judicial legislation, and more difficult still to explain purported examples of either. Likewise, what satisfactory explanation may be had for cases where the words of the decision swear fidelity to precedent, yet the outcome arguably betrays the oath? Further, how are students to be made to comprehend inconsistent decision from different Courts of Appeal both adhering to the same Supreme Court precedent? These and other uncomfortably confusing judicial results are often explained under the general catch-all concept of “interpretation.”

To the legal professional, the effect of interpretation on the rule of law is as expected as cheese and tomato sauce on pizza. In law school, students learn the art of “thinking like a lawyer.” At the very minimum, law students are made to understand that law is, in its essence, constituted of interpretation. Undergraduates lack this richer understanding of law's recipe. Indeed, the very existence of credible legal arguments on each side of a case belies the concept of a single meaning and application of a rule of law. The issuance of majority, concurring and dissenting opinions on a case confirm that the multiplicity of interpretation of a legal principle is not merely the result of the zealous legal advocacy of trial and appellate lawyers, but rather a product of different judicial understandings of the rule of law, how the law should be applied, when the rule should be applied or to what effect it should be applied. In short, individual judges “hear” the law differently. It comes to their consciousness and understanding the way they are prepared to hear it by their upbringing, beliefs, education, values, concepts and understandings of the world, law, justice and their role as judges. Indeed, the latter value may profoundly impact the extent to which all the others are employed to constitute any particular decision. It may be said that one judge applies a legal principle broadly, while another applies it narrowly because of natural differences in the way they are inclined to perform the law to achieve a desired impact on the audience. It can be argued that one judge sees the need to apply an exception to a general rule while another sees no compulsion to demand any such deviation depending on the way each hears the melody of “law's song” as it applies to the facts and is intended to impact the audience.

V. USING POPULAR MUSIC TO ILLUSTRATE STARE DECISIS IN THE CLASSROOM

A. Adherence to Precedent

What happens to the rule of law over time under the principle of *stare decisis* may be analogized to what happens to the music of a rock band over time. What should an audience expect from a new performance by a band that has been

performing together for many years or whose members have dispersed and been replaced? In 1981, the rock band, *Journey* released a single entitled, *Don't Stop Believing*.⁶⁴ The song became a national hit and a signature song for the band's identity.⁶⁵ Over the course of the next twenty-nine years, the band and its members traversed an unsurprising path for a rock band, experiencing tremendous collective popularity, stylistic modification, breakup, varying degrees of individual success and disappointment, changes in personnel, a brief reunion, and continued recording and touring despite personnel changes that ultimately have left the band with only one of its original members.⁶⁶ Over that same time, musical tastes and culture likewise experienced significant change as an entire generation was born and grown to adulthood.

For purposes of analogy, consider the band, *Journey*, as the U.S. Supreme Court, or another appropriate appellate court. The melody, lyrics, rhythm, tempo, and feeling of the song *Don't Stop Believing* is "the law." The personnel of *Journey* changed over time with various defections and replacements, as the personnel of the Supreme Court changes over time as justices retire and are replaced. Likewise, over nearly three decades, *Journey* has been faced with the challenge of changing culture, taste and musical popularity much as the Supreme Court must assess changing societal norms and needs over time. What has happened to the song *Don't Stop Believing* over time may illustrate to students the expected effect of *stare decisis* on the law over time.

Advancements in technology and the delivery and sharing of various media in popular culture provide the educator with ever expanding resources for incorporation of popular culture in the classroom.⁶⁷ Video clips of the band's live performances of *Don't Stop Believing* over the decades are readily available on the internet.⁶⁸ By opening and projecting the videos in class, the instructor is able to present students with a side by side comparison of performance of the same song, by the same band with significant personnel changes over 3 decades. The images bear out striking similarity of sound, tempo, rhythm, and feeling despite the passage of time. Most likely, a fan of Journey's 1980's performance with lead vocals by Steve Perry would find a satisfying similarity in the 2000 performance with lead vocals by Steve Augeri and the 2009 performance with lead vocals by Arnel Pineda. A 2008 concertgoer familiar with the 1981 performance and studio release would likewise find the performance to be well within the range of expectations. In short, nearly thirty years after its release, *Don't Stop Believing* as performed by *Journey* sounds as much like its original performance as can be expected and still appeals to the audiences that enjoyed it in the 80's as well as a new generation of fans, some of whom have been born after the song's first performance. The song changes little over three decades despite the obvious replacement of the lead singer and other band personnel.⁶⁹ An audience for a live performance today, hears much the same performance that audiences heard in 1981. The principle of *stare decisis* would have students expecting the same results in law that they have just seen with the live performances of the song, *Don't Stop Believing*.

As with *Don't Stop Believing*, students are likely familiar with the "Miranda Warnings" resulting from the U.S. Supreme Court's 1966 decision⁷⁰ due to the proliferation of popular television shows and movies depicting suspects being "read their rights."⁷¹ Students will tend to understand the Miranda warnings as "law." In 2000, the U.S. Supreme Court had the opportunity to reconsider the efficacy of its 1966 *Miranda* decision.⁷² The Court had understandably undergone a complete turnover of personnel since the original decision. Likewise, social mores and needs had experienced a generation of evolution. In reaffirming its validity, Chief Justice Rhenquist wrote, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our natural culture."⁷³ The "performance" of *Miranda* law today sounds quite similar to its 1966 "performance." Over the years, the *Miranda* rules have been subject to clarification, exception and modification.⁷⁴ It has changed modestly showing minor stylistic changes, perhaps becoming more defined through the function of the common law system. Yet, *Miranda* stands, reaffirmed appealing to the old and new audiences with the same effect – much in the same way as *Don't Stop Believing* has maintained its appeal.

B. The Effect of Interpretation

In explaining the effect of judicial interpretation on *stare decisis*, analogy may be made to the process of performance of traditional music. A traditional or folk song is typically communicated, shared and passed along through the oral tradition. While music and lyrics may be periodically written down, these written records are typically based on the recollections of the hearer or collector. In law, general legal principles are like folk music. They are known and understood by both legal professionals and the average citizen, although perhaps not equally well. "A person is liable for the damages that naturally and probably result from her negligent acts or omissions," is a general statement of law. Like a folk song, its existence is generally known but location of the specific source of origin is not strictly necessary to widespread acceptance of the principle.⁷⁵ The principle is constituted from innumerable judicial decisions much as a folk song has been subject to

innumerable interpretations through performance. The precise words (lyrics) used to express the concept may vary among judges (performers). The ultimate impact of the legal principle upon the parties in a case and society generally may depend upon the specific interpretation of the principle as expressed by a judge or appellate court. And that interpretation depends upon the performances of the law with which the judge or justices are familiar and comfortable.

Consider, for example, the traditional Irish folk song, *Whiskey in the Jar*.⁷⁶ No original text of lyrics and melody is identifiable. Several examples of mid-nineteenth century *songsheets*, inexpensive printings of lyrics only, used mostly as an advertising device by the printer, have been collected.⁷⁷ The song has been often recorded and its number of performances in pubs, at festivals and in living rooms and backyards is certainly incalculable. In this way, folk songs are much like the common law. A judge reviewing precedent in considering a decision is much like a musician who listens to performances of a folk song in preparation for her own performance. Melody, tempo, rhythm and even lyrics will vary in folk song performances, much as legal decisions from different jurisdictions and times will show variations. The musician will perform the song as she conceptualizes it and “hears” it in her head and in consideration of her own musical abilities and preferences. The judge will decide the case based on how she “interprets” the prior decisions necessarily affected by her own understandings of law, justice, fairness and her role as a judge.

Once again, *YouTube* provides the medium to illustrate the analogy between traditional music performance and the common law. One version of *Whiskey in the Jar* is available as performed by *The Frobisher Bay Volunteers*.⁷⁸ The performance features a banjo as the principal carrier of the melody backed by lightly strumming acoustic guitars. The most striking vocal device is the group’s well executed harmony across both verse and chorus. The feeling of the song evokes images of a light romp on horseback along lush green seaside meadows in the Irish countryside. A second version of the song is available as performed by the rock band *Metallica*.⁷⁹ *Metallica*’s brand of music is often classified as “heavy metal” rock.⁸⁰ The performance is noticeably loud. The rhythm is driven by aggressive percussion and electric bass. The principal instrumentation is electric guitar including use of distortion. The vocalization is simple but forcefully performed and without harmony. The feeling of the performance is reminiscent of the *Bohemian Rhapsody* “headbanging” scene from the movie *Wayne’s World*.⁸¹ A third performance by Nell Bryden and her band features a driving “bar band” rhythm that inclines one to swing out onto the dance floor of a crowded and boisterous pub.⁸² Her vocals are featured prominently along with some snappy acoustic guitar solos.

Although all three groups perform the same song with the same melody and similar lyrics, the manner of performance and the effect of the three performances on the audience could not be more diverse.⁸³ In arranging their different performances, the performers no doubt were first exposed to the song from different sources, and found different versions more aesthetically pleasing to their ears, sensibilities, musical values and taste. Developing a vision for the effect sought upon the audience and constrained only by talent and ability, the performances are rendered for dissimilar audiences who are variously impacted. Neither performance is superior to the other; neither is the “right” or “wrong” arrangement. With the common law principle of *stare decisis*, different judges encounter the same legal precedent but hear the music of the law differently. How one hears the music of the law is affected by one’s own unique character or constellation of qualities - background, upbringing, prejudices, education, culture, beliefs, taste, understanding and visions of the role of jurists. Consequently, different judges perform the law differently with divergent impacts and results for the audience (society). Neither performance (decision) is superior to the other. Neither legal decision is “right” or “wrong.” As with the musical performance, the popularity of the result is a matter of taste and preference, not empirical testing.

An example in law of differing performances of the same legal principle might be properly found in any Supreme Court decision that spawns a dissenting opinion. Specifically, in *Kelo v. New London*,⁸⁴ the Court considered the constitutional prohibition against a government taking of private property for public use without just compensation.⁸⁵ The legal principle of *eminent domain* is, once again, like a folk song. It is a power inherent in the sovereign, generally accepted and understood with origins preceding the Magna Carta.⁸⁶ Legal interpretation has mostly considered the limitations on the power. The specific issue in *Kelo*, concerned what kinds of use constituted “public use.” The city’s intent was to take property owned by some private parties (homeowners) in order to make the land available for beneficial use by other private parties (developers). The legal principle of “public use” allows a government to exercise the *eminent domain* power when the use is for a “public purpose.” The majority opinion in *Kelo* takes an expansive view of *eminent domain* power and requires of the government only a rational determination that the public will be benefitted by the alternative use, deferring to the legislative determination of what use might be “better.” The dissent considered the same “public purpose” doctrine but saw it more narrowly drawn and argued that the government was constrained to exercise *eminent domain* only when the property condition itself, as it existed, constituted a public detriment that needed to be eradicated. The majority heard the principle to

say, “If the town has a problem, it may solve the problem for the enhancement of the public good by using the *eminent domain* power.” The dissent heard the principle to say, “If the town has a property use that is detrimental to the town, the town may use the *eminent domain* power to eradicate the detriment for the public good.” The public purpose doctrine is the same song, heard differently. The intended impact of the legal performance on the audience was different. Indeed, the performances were aimed at different audiences. The feeling of the majority’s legal performance was focused on the communal good. The feeling of the dissent’s legal performance embraced greater deference for the rights of individual property owners.

VI. STATUTORY INTERPRETATION

“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.”⁸⁷ With these oft-quoted words from the landmark case of *Marbury v. Madison*, Chief Justice John Marshall confidently proclaimed the role of the courts in America’s nascent constitutional scheme of government. Civics classes today teach our students the concept of separation of powers, explaining the role of the judicial branch as that of “interpreting” the law.⁸⁸ Legal and political commentators will endlessly debate the proper exercise of the court’s role often phrased in an arguably meaningless distinction between “finding law” and “making law.”⁸⁹ Debates over method and jurisprudential theories aside, there is universal agreement that our legal system relies heavily upon the role of the courts in interpreting statutes. Sometimes interpretation is necessary in order to determine how a statute may apply to a unique set of factual circumstances. Legislatures in “making law” cannot be expected to anticipate every possible factual scenario that may inevitably fall under a statutory mandate. Sometimes a court’s interpretive function is necessary in order to settle an ambiguity over the meaning of words or phrases inartfully drafted or explained in the legislative enactment. Sometimes, the horse-trading nature of the legislative policy-making process leaves a statute in more or less need of clarification as it is applied to actual conduct engaged in by real people.

Any single instance of statutory interpretation is hardly difficult for undergraduate students to comprehend. The explanation is no more complex than “the court determined the words to mean such and such or to apply in this way or that.” But while any single instance of statutory interpretation is law it is only a part of “the law.” It is through the accumulation of judicial decisions that build and enhance and enrich the body of the common law that “the law” is constituted. Once again, students’ abilities to come to a proper understanding of the nuance of this process cannot be taken for granted. The experience of popular song interpretation may provide a useful analogy to the statutory interpretation process.

A popular song may maintain its general character, effect, and feeling upon audiences over the passage of time even though arranged, performed and interpreted by many different performers. A good example is to follow the path of the song, *The First Cut is the Deepest*,⁹⁰ written in 1967 by an artist then known as Cat Stevens, and now known as Yousef Islam.⁹¹ The song has been performed many times by various musicians. Through the use of *YouTube*, the path of this song may be tracked through five notable versions: the composer’s own recording,⁹² the first hit version recorded by PP Arnold (1967),⁹³ Linda Ronstadt’s live performance (1973),⁹⁴ Rod Stewart’s version (1978),⁹⁵ and Sheryl Crow’s 2003 hit version.⁹⁶

Cat Stevens’ composition may be analogized to a statute. Unlike the folk song, *Whiskey in the Jar*, which has been handed down through the oral tradition, *The First Cut is the Deepest* was specifically penned and written down. The composer legislated the melody and lyrics and audio recorded it for posterity. This recording may be considered the passage of the act. Further, it ostensibly embodies the composer’s vision of the overall intended effect of lyrics, melody, tempo, genre and feeling of performance upon the audience – a legislative history and intent if you will. Arnold’s version, the next interpretation and the first hit version, takes the composer’s text and melody and adds a *Rhythm and Blues* quality in the style of soul music popular at the time. Ronstadt’s version tracks closer to Arnold’s precedent, but adds energy and richness. In the chorus of Ronstadt’s version, there is a slight but noticeable change in the lyrics of the chorus, transferring focus from the “other” in the story to the “self” and, thereby, altering the meaning.⁹⁷ Stewart’s performance slows the tempo, stylistically shifting the feel of the song to more of an acoustic rock ballad and makes two notable textual and substantive changes. In the third line of the first verse Stewart changes the word “got” to “have.” The word change does not affect the meaning of the sentence and is arguably a grammatical improvement. However, the change destroys the three-line rhyming scheme of the verse as composed and falls more clumsily on the ear of the audience.⁹⁸ Even more notably, Stewart truncates the chorus, bringing it to a close after only two lines of the original three-line rhyming scheme and abandoning the reiteration of the “first cut” reference.⁹⁹ Finally, Crow’s popular version matches Stewart’s version, embracing and solidifying in audience memory both the clumsiness of the first verse and the truncated, unfinished sounding chorus over the composer’s own

aesthetic. While there may be many explanations as to why Crow did not return to the original text in arranging her version, at least one likely inference is that she knew Stewart's version and "heard" the song principally in that way.¹⁰⁰ Ultimately, she recorded the song as it sounded right to her, regardless of the composer's intent.¹⁰¹

What has happened to this song over time may be analogized to what happens to a statute over time. Title VII of the Civil Rights Act of 1964 is the foundational statute for claims of employment discrimination.¹⁰² Over four decades, Federal Courts of Appeal and the US Supreme Court have had the opportunity to interpret the language of the statute and its application to individual factual claims of sexual harassment.¹⁰³ Through this body of judicial interpretations, sexual harassment has been recognized as a form of employment discrimination,¹⁰⁴ liability has been imposed for maintenance of a hostile work environment,¹⁰⁵ the standard for evaluating the sexual nature of conduct has been established as a "reasonable woman" standard¹⁰⁶ and same sex harassment has been outlawed.¹⁰⁷ Each decision may be likened to a new performance of the law. Each performance adds, changes, or adjusts the effect of the statutory language by judicial interpretation without amending or altering the original text. Each judicial decision adds to the existing body of law and establishes a precedent for the next court to follow. As with law, each performance of *The First Cut is the Deepest* serves as precedent for those that follow. Subsequent performances exist in relation to the prior precedential performances but each unmistakably reflects the personal talents, beliefs, visions, values and intentions of the individual performers.¹⁰⁸ Also, as with law, a composed text and melody exists and the composer's own performance may be referenced for meaning by subsequent performers. Each performance involves personal interpretation of the underlying composed text and melody, with individual modification of both text and musical elements to achieve particular effect. Ultimately, the song remained popular through performances not unfamiliar to the original, but not entirely the same

VII. CONCLUSION

Foundational principles of our legal institutions can be both complex and nuanced, presenting pedagogical challenges for the legal educator. One effective method is to embrace the students' familiarity with popular music to make evocative analogy to legal principles. In this way, the familiar illustrates the unknown. Likewise, the use of popular music provides a learning medium that transcends the restricted discourse of words alone and accesses an additional pathway to learning through appeal to the learners' musical intelligence. The vast expansion of free music and video resources for classroom use presents the educator with a heretofore unimaginable array of educational materials. Selective and thoughtful use of popular music examples, as illustrated in this article, may be effectively used to illuminate two foundational principles in the law: the function of the principles of *stare decisis*, and the process of judicial interpretation of statutes.

Music and the law are not strangers. As this article has shown, use of music analogies to the law have existed through all recorded time. As educators we are mandated to strive to open students' minds and must not allow ourselves to be limited by convention. Educator Chris Boyd Brewer has stated, "How is it that for most people, music is a powerful part of their personal life (sic) and yet when we go to work or school we turn it off."¹⁰⁹ In turning the music on in our classrooms, we can likewise turn on student interest and enhance the process of learning.

FOOTNOTES

¹ i.e. Ed Whelan, *Her Majesty Sonia Sotomayor*, NATIONAL REVIEW ONLINE, May 27, 2009, at <http://bench.nationalreview.com/post/?q=NTk5NGJiM2UzZTVmMzRjZjM5MmMxOGQzMmNjOTBjN2E> .

² George Will, *Identity Justice*, THE WASHINGTON POST, May 27, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052602348.html> .

³ George Lakoff, *Empathy, Sotomayor, and Democracy: The Conservative Stealth Strategy*, THE HUFFINGTON POST, June 4, 2009, at http://www.huffingtonpost.com/george-lakoff/empathy-sotomayor-and-dem_b_209406.html ; David Brooks, *The Empathy Issue*, N.Y. TIMES, May 28, 2009, at <http://www.nytimes.com/2009/05/29/opinion/29brooks.html> .

⁴ Benjamin Cardozo, *Law And Literature* (Rothman & Co., 1986 ed, orig. 1931) at 8, preview available at http://books.google.com/books?id=beLWFEAWF_EC&pg=PP5&dq=%22write+an+opinion+and+read+it+a+few+years+late+r%22+cardozo&source=gbs_selected_pages&cad=5#v=onepage&q&f=false

⁵ Id.

⁶ Alex B. Long, *[Insert Song Lyrics here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, bepress Legal Series (2006) available at <http://law.bepress.com/expresso/eps/1609/> .

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- ⁷ Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUMBIA L. REV. 1259, 1264 (1947).
- ⁸ *Id.* referring to the writings of Ernst Krenek, an Austrian–American composer of great influence in the 1930’s and beyond, and composer of the score to *The Wizard of Oz*.
- ⁹ Frank, *supra* at 1267, quoting *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934). Judge Hand was a music collector and performer. Two audio recordings of folk songs that Judge Hand made for the Library of Congress in October of 1942 may be heard at “W is for the Woods” available at <http://www.adirondackmusic.org/subpages/69/6/6/judge-learned-hand>.
- ¹⁰ Frank, *supra* 1277. See also, Jerome Frank, *Say it With Music*, 61 HARVARD L. REV. 921 (1948).
- ¹¹ Sanford Levinson & J.M. Balkin, *Law, Music and Other Performing Arts*, 139 U. PENN. L. REV. 1597 (1991). See also, Levinson & Balkin, *LAW AS PERFORMANCE*, available at <http://www.yale.edu/lawweb/jbalkin/articles/london21.htm>.
- ¹² Levinson & Balkin, 139 U. PENN. L. REV., *supra* note 8 at 1609, referring to J. Gray, *THE NATURE AND SOURCES OF LAW* 170 (2d ed. 1921).
- ¹³ Levinson & Balkin, *LAW AS PERFORMANCE*, *supra* note 8
- ¹⁴ *Id.*
- ¹⁵ This school of musical interpretation and performance advocates that the performer adhere strictly to the original instructions of the composer and employ only instruments that were in use during the time of the composition and for which the composition was specifically written.
- ¹⁶ Levinson & Balkin 139 U. PENN. L. REV., *supra* note 8.
- ¹⁷ Levinson & Balkin, *LAW AS PERFORMANCE*, *supra* note 8.
- ¹⁸ Daniel Kornstein, *MUSIC OF THE LAWS* (Everest House 1982). Interestingly, the forward to this book is authored by Robert Bork who writes, “I found myself in silent debate on almost every page. But that is one of the merits of this book: it provokes thought, agreement, and dissent. Mr. Kornstein has chosen the figure of music to express a way of looking at the law. Since he is an old friend and a former student of mine, it is a pleasure to find that he dances the pattern so well.”
- ¹⁹ Alan Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541 (1989).
- ²⁰ *Id.* at 542.
- ²¹ Ian Gallacher, *Conducting the Constitution: Justice Scalia, Textualism, and the Eroica Symphony*, 9 VANDERBILT J. OF ENTERTAINMENT AND TECH. LAW 301 (2006). Gallacher’s article also provides another useful analogy in comparing the general debate over modes of constitutional interpretation to the famous Monty Python comedy “Argument Sketch”, at 302 n.2; also seen here: <http://www.youtube.com/watch?v=teMlv3ripSM>.
- ²² Desmond Manderson, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* (Univ. of Cal Press 2000) at ix.
- ²³ *Id.* at x.
- ²⁴ Carol Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439 (1999).
- ²⁵ Timothy Hall, *The Score as Contract: Private Law and the Historically Informed Performance Movement*, 20 CARDOZO L. REV. 1589 (1999).
- ²⁶ *Id.* at 1609-10, referring to Richard Turaskin, *TEXT & ACT: ESSAYS ON MUSIC AND PERFORMANCE* (1995).
- ²⁷ Amy D. Ronner, *Some In-house Appellate Litigation Clinic’s Lessons in Professional Responsibility: Music Stories of Candor and Sandbag*, 45 AM. U. L. REV. 859 (1996).
- ²⁸ *Id.* at 859
- ²⁹ F. Patrick Hubbard, *Justice, Creativity, and Popular Culture: the “Jurisprudence” of Mary Chapin Carpenter*, 27 PACIFIC L.J. 1139 (1996)
- ³⁰ Adam Gearey, *Outlaw Blues: Law in the Songs of Bob Dylan*, 20 CARDOZO L. REV. 1401 (1999); *Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases*, 1994 WIS. L. REV. 679 (1994).
- ³¹ David Ray Papke, *Crime, Lawbreaking, and Counterhegemonic Humanism in the Songs of Bruce Springsteen*, abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887431.
- ³² Michael L. Richmond, *Law and Popular Music: An Etude in Two Movements, First Movement - Adagio: The Arc of Love: Divorce and Separation in the Songs of Paul Simon*, 22 LEGAL STUD. FORUM 79 (1998).
- ³³ Gary Minda, *Phenomenology, Tina Turner, and the Law*, 16 N.M. L. REV. 479 (1986)
- ³⁴ Curtis, Nate, “No Other Warranties, Express or Implied”, RES GESTAE, (11/29/2008)

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- ³⁵ Jennifer Jaff, *Law and Lawyer in Pop Music: A Reason For Self-Reflection*, 40 U. Miami L. Rev. 659 (1985)(considering musical works of Joanie Mitchel).
- ³⁶ Michael L. Richmond, *Law, Popular Culture, And Cultural Studies: The Music Of Labor: From Movement To Culture*, 23 LEGAL STUDIES FORUM 211 (1999).
- ³⁷ Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1666 (1990).
- ³⁸ Wilbur Watkin Lewis, *Admiralty Law and Popular Musical Culture*, 31 J. MAR. L. & COM. 533 (2000).
- ³⁹ Aaron R.S. Lorenz, LYRICS AND THE LAW,: THE CONSTITUTION OF LAW IN MUSIC (Van De Plas Pub. 2007)
- ⁴⁰ Others have engaged in similar avenues of study of hip-hop and other popular music expressions of law as being constitutive of the law itself. Nick J. Sciuillo, *Conversations with the Law: Irony, Hyperbole and Identity Politics or Sake Pase? Wyclef Jean, Shottas, and Haitian Jack - A Hip-Hop Creole Fusion of Rhetorical Resistance to the Law*, 34 OKLA. CITY L. REV. 1 (2009).
- ⁴¹ M. Heimonen, *Music Education and Law; Regulation as an Instrument*, PHIL. OF MUS. ED. REV. v. 11.2, p. 170 (2003) General OneFile. Gale. University of Connecticut. 5 June 2009 available at <http://find.galegroup.com.ezproxy.lib.uconn.edu/ips/start.do?prodId=IPS> .
- ⁴² Id.
- ⁴³ John Hart Ely, *Another Such Victory: Constitutional Practice in the World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833 (1991) at 837, n. 10.
- ⁴⁴ B.S. Markesinis, GOOD AND EVIL IN ART AND LAW (Springer 2007) at 12.
- ⁴⁵ K. Llewellyn, *On the Good, the True, the Beautiful in Law*, 9. U. CHI. L. REV 224, 230 (1942).
- ⁴⁶ Richard Posner, *Bork and Beethoven (Book Review)*, 42 STANFORD L. REV. 1365 (1990) (reviewing Robert Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW (1990). Posner also dismisses the value of a Law/Literature analogy in Richard Posner, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988)
- ⁴⁷ R. Posner, THE PROBLEMS OF JURISPRUDENCE 271 (1990).
- ⁴⁸ An excellent example is found in Bette Midler's rendition of *Do You Want To Dance*, which was famously the focus of the commercial appropriation tort claim in *Midler v. Ford*, 849 F. 2d 460 (9 Cir. 1988) and which may be found at <http://www.youtube.com/watch?v=nV5KGvQGaMY> . Midler's sultry 1973 performance evokes emotion far different than that resulting from the light-hearted dance tempo of the 1958 original performance by Bobby Freeman, <http://www.youtube.com/watch?v=lk2zEYkSyHE> , or the rocking surfer sound of the popular 1965 Beach Boys version, <http://www.youtube.com/watch?v=bmmRgPZ1mrc> and especially the hard rock version from the Ramones, http://www.youtube.com/watch?v=MMq1kHEGb3k&playnext_from=TL&videos=18i9u_kFttU . It was precisely this evocative nature of Midler's version that made it the object of Ford's desire. Ford's mid-1980's ad campaign targeted young urban professionals (Yuppies) with television ads backed by songs that would pleasantly evoke their carefree college days of the 1970's.
- ⁴⁹ Levinson & Balkin 139 U. PENN. L. REV., *supra* note 8 at 1606.
- ⁵⁰ “[Nomos is] the concept of law in ancient Greek philosophy. The problems of political authority and the rights and obligations of citizens were a major concern in the thought of the leading Greek Sophists of the late 5th and early 4th centuries BC. They distinguished between nature (physis) and convention (nomos), putting laws in the latter category. Law generally was thought to be a human invention arrived at by consensus for the purpose of restricting natural freedoms for the sake of expediency and self-interest. This view of law as arbitrary and coercive was not conducive to social stability, however, and thus was amended by Plato and other philosophers, who asserted that nomos was, or at least could be, based upon a process of reasoning whereby immutable standards of moral conduct could be discovered, which could then be expressed in specific laws. The dichotomy between the negative and positive views of law was never actually resolved. Encyclopedia Britannica, available at <http://www.britannica.com/EBchecked/topic/417438/nomos>.
- ⁵¹ [Nomos in music is] in early Greek antiquity system of modal categories developed, referred to as nomoi (singular, nomos, “law”). The nomoi represented modes in that they were characterized by distinctive melodic formulas suited to different song types. The performers were free to improvise within the boundaries of these modal formulas. Encyclopedia Britannica, available at <http://www.britannica.com/EBchecked/topic/417442/nomos/417442rellinks/Related-Links>.
- ⁵² In the law, the word “reasonable” is applied to a broad spectrum of conduct and circumstances and is most famously used as the critical element to evaluate the quality of “doubt” in the burden of proof in criminal cases. But the determination of

“reasonableness” is often left to the subjective conclusions of a jury after instruction by the court. In Connecticut, the jury instruction on reasonable doubt includes, in part, the following: “It is not a doubt raised by anyone simply for the sake of raising a doubt. It is such a doubt as, in serious affairs that concern you, you would heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance. . . . It is, in other words, a real doubt, an honest doubt, a doubt that has its foundation in the evidence or lack of evidence. It is doubt that is honestly entertained and is reasonable in light of the evidence after a fair comparison and careful examination of the entire evidence.” State of Connecticut, Criminal Jury Instructions 2.2-3 Reasonable Doubt (citations omitted) *available at* <http://www.jud.ct.gov/JI/criminal/part2/2.2-3.htm>. In civil law, the “objective” reasonable person is determined by a jury who may or may not be made up of objectively reasonable persons. More accurately, given the prevalence of settlement of civil cases, the conduct expected under the objective reasonable person standard is not what a jury determines it to be, but what lawyers and insurance companies surmise that a jury might determine it to be.

⁵³ Contract law requires that in order for an offeree’s acceptance of an offer to be effective to form a contract, the acceptance must be “unequivocal.” This requirement spawns the wonderfully ironic legal doctrine of a “grumbling acceptance” – one in which the offeree unequivocally expresses her equivocation over the acceptance without disturbing its legally unequivocal nature. See, i.e. M. Belli & A. Wilkinson, EVERYBODY’S GUIDE TO THE LAW (Harper Collins, 2d ed. 2003) at 385-6. Preview available at Google Books,

http://books.google.com/books?id=AioIR4_eKCAC&pg=PA385&lpg=PA385&dq=%22grumbling+acceptance%22&source=bl&ots=Z2RSaf40lx&sig=XLLIJCI18pzR793q6xtJIBbYIE4&hl=en&ei=txorStGaPlnKtge6meG6CA&sa=X&oi=book_result&ct=result&resnum=7#PPA385,M1.

⁵⁴ Howard Gardner, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (Basic Books 1983), Mark K. Smith, *Howard Gardner and Multiple Intelligences*, THE ENCYCLOPEDIA OF INFORMAL EDUCATION, *available at* <http://www.infed.org/thinkers/gardner.htm>.

⁵⁵ Howard Gardner, MULTIPLE INTELLIGENCES: NEW HORIZONS, (Basic Books 2006); Eric Jensen, *Teaching With the Brain in Mind*, (ASSOC. FOR SUPERVISION AND CURRICULUM DEVELOPMENT 1998); Thomas Armstrong, *Multiple Intelligences in the Classroom*, (Assoc. for Supervision and Curriculum Development 1994); Thomas Armstrong, *The Multiple Intelligences of Reading and Writing*, (Assoc. for Supervision and Curriculum Development 1994).

⁵⁶ Recording Industry Association of America, *available at* <http://www.riaa.com/>.

⁵⁷ “Campus Downloading,” *available at* <http://www.campusdownloading.com/>.

⁵⁸ *Carry on My Wayward Son* performed by the Oklahoma State Marching Band, *available at* http://www.youtube.com/watch?v=rRjOC6IT_8I.

⁵⁹ *Carry on My Wayward Son* performed by Kansas (1976), *available at* <http://www.youtube.com/watch?v=CB17uWuBrL0>.

⁶⁰ In referring to “popular music” the author intends to focus on the music that students are likely to hear in their everyday lives; the music that has been played on radio stations and which has been otherwise prevalent in public places and in popular culture during their lifetimes. This music is not strictly bound by composition, adherence to music theory or conventions or principles of musicology. This music might be described as “low culture” and include that described as “commercial” or “top forty” as well as shared music including traditional, folk, bluegrass and similar genres of music recognizable and heard in society at large.

⁶¹ Anton Cheokov, *Worse and Worse* in THE LAW IN LITERATURE (Ephraim London ed., Simon and Schuster 1960).

⁶² *Planned Parenthood v. Casey*, 505 US 833, 855 (1992), citing Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921) at 149.

⁶³ Roscoe Pound, INTERPRETATIONS OF LEGAL HISTORY I, (1923).

⁶⁴ *Don’t Stop Believin’*, WIKIPEDIA *available at* http://en.wikipedia.org/wiki/Don't_Stop_Believin'. While recognizing the shortcomings of Wikipedia as a scholarly reference, the author also recognizes its value as a quick reference to general background information for matters of popular culture.

⁶⁵ *Id.*

⁶⁶ *Journey Band Bio*, *available at* <http://www.journeymusic.com/pages/bio>.

⁶⁷ Perhaps the most valuable of these resources for the college classroom has been YouTube, *available at* <http://www.youtube.com/>. The site provides a diverse source of video material, easily accessed on the internet and deliverable to students in class. However, the reader is cautioned that videos may be removed from availability at anytime. Therefore, upon finding a video that the reader determines to be valuable for class presentation, the video should be

downloaded and stored in a permanent medium. In this author's opinion, YouTube is perhaps the most important educational resource available for use in the undergraduate college classroom.

⁶⁸ 1980's performance featuring lead singer Steve Perry, YouTube, *available at*

http://www.youtube.com/watch?v=barLaHrtvoM&playnext_from=TL&videos=jRkCooRRdGc; 2000 performance featuring lead singer Steve Augeri, YouTube, *available at*

http://www.youtube.com/watch?v=Z8Ji5H61iMM&playnext_from=TL&videos=cOfLmr6-eM; 2009 performance featuring lead singer Arnel Pineda, YouTube, *available at*

http://www.youtube.com/watch?v=5ApvzYi9Jwk&playnext_from=TL&videos=tfGa7dQxoGw.

⁶⁹ The only original member of the band remaining is lead guitarist Neal Schon. Journey, Band Bio, *available at*

<http://www.journeymusic.com/pages/bio>.

⁷⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966)

⁷¹ Eric Longley, *The Miranda Warning*, ST. JAMES ENCYCLOPEDIA OF POP CULTURE, *available at*

http://findarticles.com/p/articles/mi_g1epc/is_tov/ai_2419100811/pg_2/?tag=content:coll

⁷² *Dickerson v. U.S.*, 530 U.S. 428 (2000).

⁷³ *Id.* at p. 443

⁷⁴ See, *ie.* *Michigan v. Tucker*, 417 U.S. 433 (1974), *New York v. Quarles*, 467 U.S. 649 (1984), and *Oregon v. Elstad*, 470 U.S. 298 (1985)

⁷⁵ Legal historians have traced the origins of negligence as an independent tort to the thirteenth century. See e.g. M.J. Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 1964 Cambridge L.J. 234.

⁷⁶ *Whiskey in the Jar*, WIKIPEDIA, *available at* http://en.wikipedia.org/wiki/Whiskey_in_the_Jar.

⁷⁷ Direct internet citation to individual items in the America Singing Digital Collection in the Library of Congress is not available. The collection may be accessed and the title searched to see results; *available at*

<http://memory.loc.gov/ammem/amsshtml/amsshhome.html> .

⁷⁸ *Whiskey in The Jar*, Frobisher Bay Volunteers, YouTube, *available at* <http://www.youtube.com/watch?v=Lj-ukSU5RGY> .

⁷⁹ *Metallica*, Wikipedia, *available at* <http://en.wikipedia.org/wiki/Metallica>. *Whiskey in the Jar*, Metallica, YouTube, *available at*

http://www.youtube.com/watch?v=AiF_kCEjuhI, or live performance, *available at*

<http://www.youtube.com/watch?v=2ZDhnRo8YvQ>. An alternative would be the performance of Thin Lizzy, YouTube, *available at*

http://www.youtube.com/watch?v=I_KKf3oc1YM&feature=related.

⁸⁰ *Id.*

⁸¹ *Bohemian Rhapsody* from Wayne'sWorld, YouTube, *available at*

<http://www.youtube.com/watch?v=2eFRI9H6xYo&feature=related>.

⁸² *Whiskey in the Jar*, Nell Bryden, YouTube, *available at* <http://www.youtube.com/watch?v=tZlyyM1Ubg>,

⁸³ Desmond Manderson describes a similar analogy on the issue of legal interpretation involving the use of the song, *These Are a Few of My Favorite Things*, from the musical, *The Sound of Music* and John Coltrane's improvisational performance of the same melody. "Richard Rodgers would probably neither like nor recognize his original tune in Coltrane's reworking of it. Perhaps, therefore, Coltrane is a judicial activist, making it up as he goes along with barely a fig-leaf of citation to disguise his invention. Or perhaps he has unearthed a truth that lay buried all along in that banal original." Desmond

Manderson, *Desert Island Disks: Ten Reveries on Inter-Disciplinary Pedagogy in Law*, PUBLIC SPACE: THE JOURNAL OF LAW AND SOCIAL JUSTICE, vol. 2 (2008), *available at* <http://www.mcgill.ca/crclaw-discourse/publications/desertislanddisks/>.

Videos of both performances are available through YouTube: *These Are a Few of My Favorite Things*, *The Sound of Music*, YouTube, *available at* <http://www.youtube.com/watch?v=XHTN4Jvi6lg>. *My Favorite Things*, John Coltrane, YouTube, *available at*

http://www.youtube.com/watch?v=NIIPZ5_Tw40.

⁸⁴ *Kelo v. New London*, 545 U.S. 469 (2005).

⁸⁵ “. . . nor shall private property be taken for public use, without just compensation.” U.S. CONST. 5TH AM.

⁸⁶ Daniel P. Dalton, *A History of Eminent Domain*, PUBLIC CORPORATION LAW QUARTERLY, Fall 2006, No. 3, *available at* <http://www.michbar.org/publiccorp/pdfs/fall06.pdf> .

⁸⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 136 (1803) at 177-178.

⁸⁸ U.S. Constitution Online, *Constitutional Topic: Separation of Powers*, *available at* http://www.usconstitution.net/constop_sepp.html.

⁸⁹ See, i.e. Roger Colinvaux, *What is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens*, available at <http://www.law.indiana.edu/ilj/volumes/v72/no4/colinvau.html>.

⁹⁰ *The First Cut is the Deepest*, WIKIPEDIA, available at http://en.wikipedia.org/wiki/The_First_Cut_Is_the_Deepest.

⁹¹ *Cat Stevens*, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Cat_Stevens.

⁹² Cat Stevens, *The First Cut is The Deepest*, YouTube, available at <http://www.youtube.com/watch?v=aBccr-aLu4I>.

⁹³ PP Arnold, *The First Cut is the Deepest*, YouTube, available at http://www.youtube.com/watch?v=zra0pjwlgEA&playnext_from=TL&videos=BTKVidoWXGk.

⁹⁴ Linda Ronstadt, *The First Cut is the Deepest*, from ABC's "In Concert," 11/9/73, YouTube, available at <http://www.youtube.com/watch?v=UwNtgPsjuf8>.

⁹⁵ Rod Stewart, *The First Cut is the Deepest*, YouTube, available at http://www.youtube.com/watch?v=O52C30WzJcQ&playnext_from=TL&videos=x_1t3XpxXmY.

⁹⁶ Sheryl Crow, *The First Cut is the Deepest*, YouTube, available at <http://www.youtube.com/watch?v=iBcAW63YWyk&feature=related>. Crow's version earned a Grammy Award nomination for Best Female Pop Vocal Performance. *Grammy Award for Best Female Pop Vocal Performance*, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Grammy_Award_for_Best_Female_Pop_Vocal_Performance.

⁹⁷ The lyrics as recorded by the composer:

*'Cause when it comes to being lucky she's cursed
When it comes to loving me she's worse
But when it comes to being loved she's first*

Ronstadt's rendition:

*When it comes to being lucky **I'm** cursed
When it comes to loving me he's the worst
But when it comes to being lucky **I'm** cursed*

⁹⁸ The verse as written:

*I would have given you all of my heart
But there's someone who's torn it apart
And she's taking almost all that I've **got**
But if you want, I'll try to love again*

Stewart's version:

*I would have given you all of my heart
But there's someone who's torn it apart
And she's taken just all that I **have**
But if you want, I'll try to love again*

⁹⁹ The chorus as written:

*The first cut is the deepest, baby I know,
The first cut is the deepest.
'Cause when it comes to being lucky she's cursed.
When it comes to loving me she's worse.
But when it comes to being loved she's first.
That's how I know ,
The first cut is the deepest, baby I know,
The first cut is the deepest.*

Stewart's version:

*The first cut is the deepest, baby I know,
The first cut is the deepest.
When it comes to being lucky she's cursed.
When it comes to loving me she's worst.*

¹⁰⁰ In the brief comments preceding the performance available at the link provided, Crow states that she was familiar with the Rod Stewart version but not with the P.P. Arnold version at the time that she recorded her interpretation of the song. Sheryl Crow, *First Cut is the Deepest*, YouTube, available at <http://www.youtube.com/watch?v=AK10EY-ITcE&feature=related>.

¹⁰¹ Notably, in live performances, perhaps in recognition of the improved rhythm of the meter, Crow has sung the third line as originally written by Stevens, ending with “got” rather than “have” as recorded in her hit version. Sheryl Crow, *First Cut is the Deepest*, YouTube, available at http://www.youtube.com/watch?v=KA3ejdkS_v0 and http://www.youtube.com/watch?v=COHxni0k4T4&playnext_from=TL&videos=x_1t3XpxXmY.

¹⁰² The statute states in part: “It shall be an unlawful employment practice for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 USC sec. 703 (a) (1).

¹⁰³ See generally, Ronald Turner, *Making Title VII Law and Policy: the Supreme Court’s Sexual Harassment Jurisprudence*, HOFSTRA LABOR AND EMPL. L. J. Vol. 22, 575, (2005), available at http://law2.hofstra.edu/pdf/Academics/Journals/LaborAndEmploymentLawJournal/labor_Turner_vol22no2.pdf; *Development of Sexual Harassment Law*, available at <http://www.calstate.edu/hr/SHLaw.pdf>.

¹⁰⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)

¹⁰⁵ *Williams v. Saxbe*, 413 F.Supp. 654 (C.A. D.C. 1976)

¹⁰⁶ *Ellison v. Brady*, 924 F.2d 872 (9th cir.1990)

¹⁰⁷ *Oncale v. Sundowner*, 523 U.S. 75 (1998)

¹⁰⁸ Sheryl Crow’s interpretation does not use the three line rhyme in the first verse because she was not aware of its existence at the time that she recorded the song. The only precedent she consulted was the Rod Stewart interpretation. Once she was made aware of the original composition and the prior interpretations, and realized the aesthetic superiority of the three line rhyme, she abandons even her own recorded interpretation in favor of the original text in live performances. See *supra* n. 94.

¹⁰⁹ Chris Boyd Brewer, *Music and Learning: Integrating Music in the Classroom*, available at <http://www.newhorizons.org/strategies/arts/brewer.htm> reprinted from Chris Brewer, MUSIC AND LEARNING (1995).