A Citation Rhapsody

Music as an analogy for law

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Abstract

Rather than seeking the Holy Grail—a watertight definition of law—an analogy with music is explored. The exercise encourages consideration of the various ways that music and law are manifested—beyond words and text—in the minds of those who produce use and are affected by it. Perhaps Beethoven had a point when he wrote in a letter in 1810, ‘Music is a higher revelation than all wisdom and philosophy’.

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# Introduction

## Thought experiment

Imagine a world in which disputes are decided by musical battles. Judges choose a particular piece to be performed and find in favour of the party who performs it best. Sometimes, the parties are allowed to have champion performers make their cases for them. Gradually, conventions have arisen, by which particular pieces of music are deemed appropriate for particular classes of case. Thus, performances of a Beethoven piano sonata are required in contract disputes, and a Chopin prelude in tort disputes. Sometimes, the choice of sonata or prelude from the specified composers’ *ouevres* is left to the parties. *Moonlight* might compete with *Pathétique*. However, standardisation has also crept in and, occasionally, meetings of judges and other influential people lay down rules requiring particular pieces for particular kinds of dispute, ordering, for example, that Glass’s minimalism should replace Beethoven’s classical romanticism in trust cases.

Sometimes a party chooses to offer a totally new piece of music. Sometimes judges themselves perform the chosen piece to show how they think it ought to have been performed. Sometimes all nine judges insist on playing their versions of the piece—claiming to play what Beethoven really meant, or their own variations on Beethoven’s invention. Sometimes a particularly confident judge plays her own composition.

None of this is any less rational than trial by the ordeals of fire, water and battle.[[1]](#footnote-2) Although not appealing to divine intervention, this imaginary world shares with those trail mediaeval modes a lack of rational connection between the mode of proof and the material rules and facts.

Nevertheless, we see: important choices of which musical texts to invoke; and judgements about interpretation. Two performances, even of the same piece of music, are unlikely to be identical. There are different readings and realisations. Some performers try—by their own lights—to get as close to the composer’s intentions as possible. Others try to impress with their current vision of how a piece might best be performed. Gradually, conventions about how to perform change.

In Eskimo societies (which are small in size but numerous) and in various other groups, there are such practices (Gluckman, 2017), (Bohannan, 1995, pp. 197-198) and (Hoebel, pp. 678-682). Hoebel reports that Eskimos use

‘[s]ong duels…to work off grudges and disputes of all orders, save murder’ (p. 678).

Whilst there can be jostling and butting added, the joking, sarcastic and/or insulting words of the songs seem to play an important part. The performances are to an audience.

‘He who is most heartily applauded is "winner." ‘To win a song contest brings no restitution in its train. The sole advantage is in prestige.’ (p. 679)[[2]](#footnote-3).

Hoebel comments contextually that,

‘direct and intimate experience in so limited a social world, in which sharing and economic cooperation are the supreme virtues, makes all individuals (excepting the abnormals) extremely sensitive to social pressure. The fundamental problem of control is solved at this point. It means that the need for an elaborated law system is forthwith forestalled. It is sufficient, for the most part, that ridicule and disapproval in "public opinion" are effective goads to conformity. This accounts for Birket-Smith's judgment (Birket-Smith, 1936, pp. 54-55), "if there is anything that can disturb the mind of the Eskimo, it is the prospect of standing alone against the crowd.”’ (Hoebel, p. 665)

Whilst there is little evidence of ‘legal institutions’ or formal ‘legal rules’,

‘[t]he paucity of legal rules…is amply compensated for, and in part caused by, the embracing religious norms which control and direct Eskimo social and economic life.’ (Hoebel, p. 668).

But Eskimo society is not cuddly. A good deal of ‘legal’ homicide occurs (pp. 670-675). A close society can be very harsh when conditions demand.

## Ourselves and Others

Michel de Montaigne famously said,

‘[N]either have I said so much of others, but to get a better opportunity to explain myself.’ (de Montaigne, 1592, p. Loc. 3095)

His *Essays* are littered with quotations—and more with each edition. This paper emulates his style. Remember, I’ve *chosen* the quotations to be part of *my* paper.

In law, judges cite others to justify their own verdicts. In music, performers and composers reference others’ works but make *their own* ‘performances’ or compositions. In their various contexts, they exercise a power to decide how and how much to cite others’ work.[[3]](#footnote-4) Performances of passages or whole pieces are sometimes described as ‘readings’ of composers’ works or intentions. ‘Works’ and ‘intentions’ are sometimes regarded as synonymous—but sometimes not. Conductors and soloists take pride in *their* ‘readings’ of a work. Critics talk happily of ‘Pollini’s Beethoven’ or ‘Rattle’s Mahler’.[[4]](#footnote-5)

* 1. In music and in law, interpretation matters. Maybe lawyers are more inclined to pick out a word or sentence, but attention to small fragments is not unusual in music. Consider Wagner’s use of *Leitmotief* to signal particular characters or the many rationales offered for the first four notes of Beethoven’s Fifth Symphony.

‘Beethoven's Fifth Symphony sounds its hammer blows of fate; or perhaps those four notes are a transcription of the song of a Viennese yellow-hammer; or a symbol of war-time victory; or a transformation of a Cherubini choral song. Those first notes of Beethoven's symphony have been heard, interpreted, and explained as all those things and more. It's the single most famous symphonic trajectory of expressive minor-key darkness to coruscating major-key light.’ (Service, 2013)

But this paper is not simply another one about ‘interpretation’. Rather it draws comparisons between music and law—and the role of texts, whether musical or legal—in an effort to elucidate, but not define or confine, the phenomenon that we call ‘law’, or that Llewellyn called ‘our whole institution of ‘Law-Government in action’ (Llewellyn, 1962, pp. 188, 357-360).

‘The *rule* part of the law-institution is thus one *tool*-part of the institution; one hugely developed part; one part vital to communication over space and time and variant personnel; but one vital *tool*-part and no more than that, and a *tool*-part nowhere nearly so effective as it purports to be.’ (p. 357)

Legal texts are rarely treated as whole entities in the way that a symphony might be performed. Citation is mostly of selected passages, making selection a critical element in the justificatory process. In music too, there is frequent citation. Groups will play ‘Selections from…’ and ‘Arrangements of…’ [[5]](#footnote-6) ‘Selection’ and ‘arrangement’ are subjective judgemental processes. Sometimes the object is to honour or to give a taster of the original. Other times the object is to make something new from the original—claiming some separate authority for the new whilst honouring the old. Consider, for example, the Miles Davis/Gil Evans suite based on George Gershwin’s *Porgy and Bess*.[[6]](#footnote-7) Similarly, but even more developmentally, we have the practice in jazz of ‘improvisations on’ standard tunes.

‘If thinking of classical music as reproduction leaves too much out, in the case of most other musics—popular music, jazz, non-Western music—it leaves practically everything out. Such traditions are far more performance traditions than ‘performance of’ traditions, so to speak; jazz ‘standards’…have their own histories…but…their meaning and value lies predominantly in what is enacted through performance.’ (Cook, 1998, p. Loc. 1417).

When composers cite other composers’ work or ‘folk music’, their purposes will vary between: (i) musical suitability or utility;[[7]](#footnote-8) (ii) providing aural ‘hooks’ for audiences;[[8]](#footnote-9) (iii) honouring, but not following slavishly the cited work/composer;[[9]](#footnote-10) (iv) invoking atmosphere;[[10]](#footnote-11) (v) asserting or celebrating loyalty;[[11]](#footnote-12) and (vi) satire[[12]](#footnote-13). In different ways and degrees, these purposes recognize the *validity* of the cited piece, but do not submit to its *control*. Furthermore, performers get only limited choices in these matters. By contrast, in aleatoric passages, the composer licenses—indeed requires—performer creativity.[[13]](#footnote-14) And audiences can only take or leave any or all of these ‘musics’.

## My argument

Probably as the result of learned (not innate) but now implicit bias, we have a tendency to think of ‘law’ in a way that reflects the nineteenth century Industrial Revolutionary ‘model’ (Cook, 1998, p. Loc. 526). That tends to ‘reduce’ law to a ‘rule-producing system’. Although that producer-distributor-consumer model seems to fit well with published music and statutory law, I hope to show—by exploring the music analogy[[14]](#footnote-15)—that we have reason for caution in adopting that model unquestioningly.

Here’s two passages about music that have obvious analogues in law.

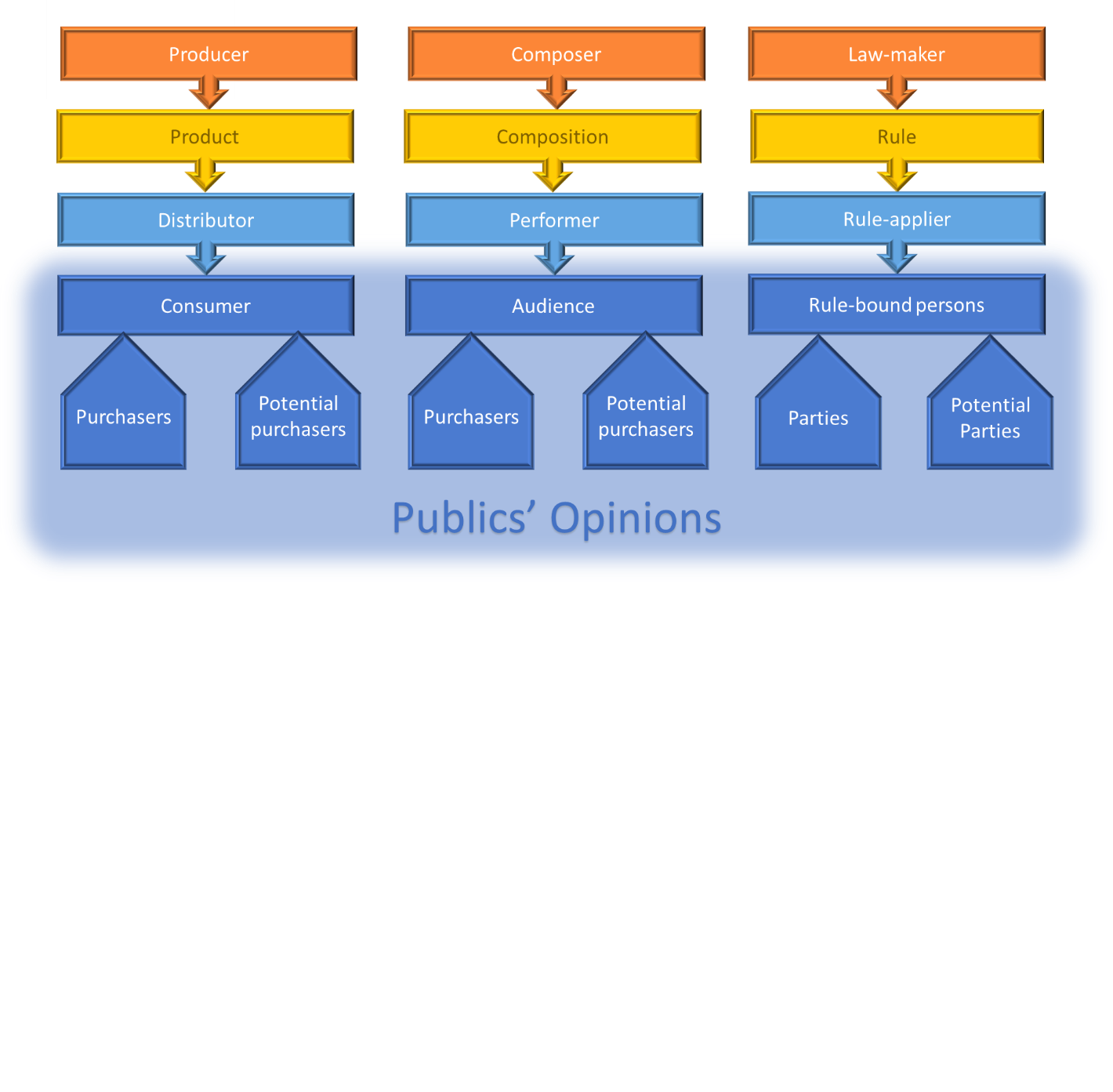
‘[T]he distinction between authorship and reproduction is a very slippery one (doesn’t a performer like Madonna stamp her own identity on a song like ‘Material Girl’, make it her own, regardless of who wrote it?).’ (Cook, 1998, p. loc. 476)

Is not case citation in judgements similarly slippery? And we might compare this second quotation with a growing tendency to treat legal services as a consumer commodity. (Legal Services Board, 2019)

‘The more we behave as musical consumers, treating music as some kind of electronically mediated commodity or lifestyle accessory, the less compatible our behaviour becomes with nineteenth-century conceptions of the composer’s authority.’ (Cook, 1998, p. Loc. 840)

But let’s look at this in the round.

Figure 1 Whose minds are engaged?



Music and law are similar in two important respects:

* (negatively) neither is mind-independent
* (positively) both are manifest in the minds of the parties.

This multifarious mind-dependency conditions any answer to the musicologists’ question, ‘Where is the music?’ and to its analogy, ‘Where is the law?’

# Analogy

Any analogy requires caution. Being essentially *argumentative*, analogy is a poor *probative* tool. Its use can only be *elucidatory*, (Perelman & Olbrechts-Tyteca, pp. 371-372). Similarity and difference can be illuminating, but superficiality is a significant risk. It is easy to liken a musical score to legislation and performances to cases and to note that both law and music make use of signs and conventions that affect interpretation. This paper explores—and hopefully refines—some of those similarities. However, there are also notable ways in which the analogy breaks down. Here’s a few.

### Disapproval

In music, we see no analogue of ‘citation in order to disapprove’.

### Silences function differently

In law, silence—whether deliberate or not—tends to leave a matter regulation-free, whereas in music silences between notes and phrases are mostly deliberately used—by composers and performers—to shape the music.

### Defined limits?

You hear the skylark sing and call it ‘music’. You hear geese honking randomly and do not think them at all ‘musical’. You hear Stravinsky’s *The Rite of Spring* and reject its more savage parts as ‘unmusical’.[[15]](#footnote-16) You attend a ‘performance’ of Cage’s *4’ 33”* (in which no programmed sounds are made) and hear only the sound of the audience moving in their seats, coughing or turning the pages of their programmes. ‘Music-ness’, we might say, is in the minds of its beholders.

But, although there is debate about the meaning, scope and desirability of many of our legal rules and principles, non-jurisprudes spend little time worrying about ‘what is law?’ The institutional dimension solves that problem for them. Rules or principles that are recognised by the organs of Law-Government, are taken—for better or worse—to be ‘law’. Similarly, ‘law-ness’ is manifested in the Law-Government institutions (or stable patterns of recognised authority) that back recognised norms,[[16]](#footnote-17) and to which manifestations of law-ness in other minds are connected. It seems unnecessary to contribute here to the vexed—and probably futile—search for the defining characteristics of some Platonistic concept of law (Priel, 2015, pp. 11-17 esp.). We can grow, sell buy and enjoy tomatoes without deciding whether they should count as ‘fruit’ or ‘vegetable’.[[17]](#footnote-18)

# Contexts

Folk music and folk norms provide an elemental way to begin. Both emerge ‘unofficially’. Both exist and are made manifest only in the minds of those ‘folk’ who engage with them and of whose various ‘folkways’ the songs and norms constitute parts. Both are unwritten until captured by a folk song collector or reflected in decisions that get recorded. Their manifestation in those different minds instantiates shared expectations about: what ‘music’ is and ought to be; and about what proper behaviour is and ought to be. Rather than merely predictive, both sets of expectations are also normative—the more so if officialization and textualization occur. If and when the ‘music-ness’ of sounds or the ‘binding-ness’ of social norms or the ‘legal-ness’ of legal norms are recognised, it is through shared normative expectations.

Officialization and textualization serve to reinforce some of these shared normative expectations. Thus, a performer might not ‘get’ the composer’s ‘drift’ but still call it the work ‘music’. Judges, parties and public might not comprehend the elusive legislative intent but still call the norm ‘law’. A composer’s work might shock or disappoint a proportion of the audience that would still recognise it as ‘music’. Some might heartily disapprove of a norm but still call it ‘law’. Audiences participate in the expectation sharing—their attitudes matter. Where the music is not officialised and/or textualized, audiences are not clearly separable from composers or performers. The social normative position seems broadly analogous.

* + 1. Plausibly, that audiences become more passive as officialization and textualization affects the music and the law. In the performance of mainstream music—say, in in concerts or in TV jingles—the audience rarely gets to join in the music-*making*, although performers will be encouraged in *their* music-making when they become aware of audiences that are more attentive and responsive than others.
    2. But modernity has not divided production from consumption utterly. Unless audiences approve enough of the music to purchase it somehow, composers and performers will fail economically. Neither are the folk roots totally irrelevant.

‘Naturally a composer will be most influenced by the music he hears most of—the music of his home. This circumstance ensures a certain geographical difference in style—at least superficially.’ (Bartók, 1921, p. 2)

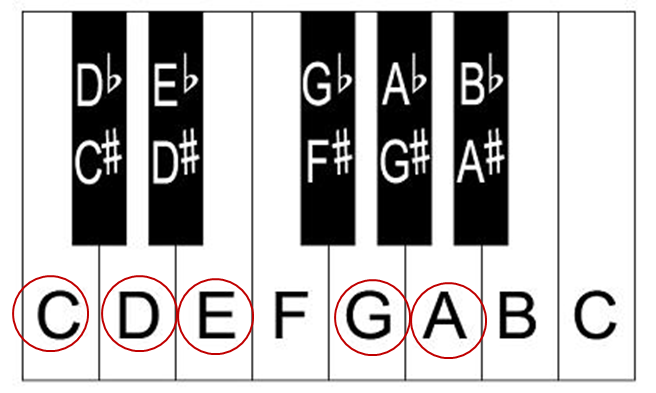
* 1. Although the audience for law ignores or dismisses a high proportion of the rules of contemporary law as being ‘technical’, a substantial proportion of official rules are reasonably strongly connected to popular (actual or plausibly possible) experience and reflect folk mores. Rules prohibiting murder, assault and theft reflect social norms. Rules requiring negligent harm-doers to pay or contractual promisors to honour their undertakings rely on the rules’ normative resonances rather than on officialization for their efficacy. Furthermore, unless a significant proportion of legal norms ‘go with the grain’ of popular expectations, systemic legitimacy will crumble and/or enforcement mechanisms will be overloaded and breakdown.

Of course, traditions vary. Western music is dominated by Pythagorean scales—in which a major scale is heptatonic: keynote, tone, tone, semitone, tone, tone, semitone, [then keynote (8ve)]

—and, since C18th, by equal temperament—which makes  (F sharp) identical with A close up of a logo

Description automatically generated (G flat), and so on. Whereas East Asian music—and a lot of Western folk music—is dominated by the pentatonic scale, which uses only five of the seven notes: keynote, tone, tone, 11/2 tones, [then keynote (8ve)]. These differences affect the overall flavour of the music and condition listeners’ predictive and normative ‘expectations’.

Figure 2 Pythagorean and pentatonic scales, the latter is marked by red circles

* 1. 

There are parallel differences in visual perception. When shown a picture like Figure 3, Westerners will concentrate of the bridge, whereas Easterners will pay more attention than Westerners do to the surrounding forest.

Figure 3



‘[T]he Japanese [subjects] (a) made more statements about contextual information and relationships than American [subjects] did and (b) recognized previously seen objects more accurately when they saw them in their original settings rather than in the novel settings, whereas this manipulation had relatively little effect on Americans.’ (Masuda & Nisbett, 2001, p. 922)

Similarly, when looking at Figure 4 to identify differences, UK and Saudi Arabian subjects made noticeably different patterns of eye movements, with Western narrowness reducing the number of movements needed (Albandri, Underwood, & Smith, 2017).

Figure 4: Pictures used by Albandri *et al*.



Similar patterns of difference can be seen in social and legal norms. Western law tends to be dominated by notions of individuals’ rights, property, actions—and their correlative duties. Disputes are between individuals or the individual and the state. Great corporations are given legal personality and can be treated as if they are individuals. By contrast,

‘East Asian law is influenced by ‘the Confucian political and cosmological view [which] privileges connectedness to others—especially to kin…Kinship, not radical individuality…provides the preferred model for political, social, and economic relations. The Emperor, for example, was conceptualised as a kind of paterfamilias writ large, while district magistrates were popularly known as *fumuguan* or ‘father-and-mother officials.’ (Ruskola, 2012, p. 264)[[18]](#footnote-19)

# Signs and systems

Contexts also influence the signs and systems by which we communicate. Signs function within systems of signs. Music is captured and represented by systems of signs. Words operate within the systems of language communities. But all these systems are human constructs. They are not immutable monoliths.

‘Even constancy itself is no other but a slower and more languishing motion. I cannot fix my object; ‘tis always tottering and reeling by a natural giddiness…’ (de Montaigne, *Essays*, Loc 15255)

* 1. Systems ‘make’ meanings through differences,

‘“Cat” has a meaning because in the system we call “language” it is different from the sign “dog”’ (Lane, 2001, p. 15)

Musical language notation is fundamentally similar. Notes can be higher, lower, longer, shorter than the notes that precede and follow them. That’s how monotony is avoided and music is made. But, whilst still respecting the sign, there is great scope for interpretation. Performers’ and listeners’ minds are engaged beyond the bare mechanics of the signified notes. Similarly, because many words signal mind-dependent concepts, there is scope for differences of interpretation between all who speak, write, hear or read words, phrases and sentences.

Thus, in law, except where the rule is quasi-mathematical, or Euclidian (Swaminathan, 2019), and mind-independent (*e.g.* must be 18 to vote), any certainty that even a statutory provision might have is not an inherent function of the words used but of the strength of the value-consensus amongst the dominant group of language users. When the consensus is strong, taken-for-granted meanings are shared. I throw you a tennis ball and you receive a tennis ball.

‘The novelty, rather than the greatness of things, tempts us to inquire into their causes.’ (de Montaigne, 1592, p. Loc. 3769)

‘When all think alike, no one thinks very much’ (Lippmann, 1915, p. 51).

Certainty then is often an illusion. Many words do not have mind-independent ‘literal meanings’ illusion (Fish, 1989, p. 185) and meaning does not ‘reside…‘‘in’’ language as furniture resides ‘‘in’’ rooms’. (Black J. , 2002, p. 176).

The older the statute or judgment under consideration, the more scope for refreshment—either to get back to what the words meant when first used, or to modernise the rule. Similarly with music—although the encouragement to innovation that a legislature’s inactivity might provide has no analogue in music.

In common law cases there is no clear equivalent to a statute—or musical score. Whilst this expands the scope for the inevitable interpretation, sometimes a part of a judgement becomes recognised as the best statement of the rule and is treated much like a section of a statute. Thus, judgments can be arranged on a spectrum: from almost as ephemeral as some musical performances to more authoritative than the recorded and often re-played or imitated interpretations by great performers.

In music, influential performers set trends in performance. They gather together all the Beethoven Piano Sonatas and find new cross-fertilisations. Concert programme compilers bring together items that are not usually linked. The familiar and unfamiliar interact in the minds of performers and audiences and the musical manifestations grow and change.

Because there is rarely a single authoritative formulation of common law rules, the scope for re-working them seems greater than that for re-working statutory rules or musical texts. It’s more jazz than ‘classical’. Nevertheless, for some cases it is difficult to construct a musical analogue.[[19]](#footnote-20) For example, the decision in *Junior Books* v. *Veitchi*[[20]](#footnote-21) has survived despite the subsequent condemnation[[21]](#footnote-22) of the approach in *Anns* v. *Merton Borough Council* on which *Junior Books* was based.[[22]](#footnote-23) But the *Junior Books* decision survives, I contend, because its conclusion can be explained in terms of the reasonable reliance doctrine to which *Hedley Byrne* v. *Heller Partners* gave new prominence.[[23]](#footnote-24) As a sub-contractor *nominated* by Junior Books, Veitchi knew that Junior Books was—reasonably—relying on Veitchi’s skill.

Nonetheless, in *Hedley Byrne* itself we see almost as many formulations of its justificatory principle as there were judges in the House of Lords. These look like variations on a theme. Thus, Lord Reid spoke of ‘special relationships’ where it is plain that the claimant was trusting the defendant to take reasonable care in giving advice and that the defendant ought to have known that (486). Lord Morris and Lord Hodson thought it a matter of the claimant’s reliance on the defendant’s special skill. (502, 514) Lord Devlin thought the relationship ‘equivalent to contract’ (522). Lord Pearce looked for a business or professional transaction in which the gravity of the matter was clear to the defendant (539). Different words to the same tune perhaps? Variations without a clear statement of the theme?

# Language

There are at least three ways that we might conceive words:

1. like polished diamonds: clear, cut and immutable; or
2. like peaches, with hard stones at their centres and more malleable material around them; or
3. as the best we can do in the struggle to communicate.

## Diamonds are Forever

‘Diamonds never lie to me’ (Black & Barry, 1971)

In 1952, Gerard Hoffnung and John Amis performed a sketch—*Punkt Contrapunkt*—satirising such musicologists as Hans Keller, who pontificated abut music on the BBC’s ‘Third Programme’ (Hoffnung & Amis, 1952). They invented ‘Dr Klaus Domgraf-Fassbender’ and ‘Professor von der Vogelweide’, who both clearly favoured the quasi-mathematical twelve-tone system that, from the 1920s, Arnold Schonberg (perhaps their ‘Bruno Heinz Jaja’) influentially advocated.

KDF ‘In Chermany, every selbst-respecting young composer carries no more the pen or the forking tune but the mathematical sliprule and the spanner.

VDV Musik paper is out of date, graph paper is essential and every good Cherman composer is ready to put his spanner in the works, nein?...

KDF Each note is like a little polished diamond, like what Igor Stravinsky has said.

VDV But of course Stravinsky has only said this after, *Gott sei Dank*, he has stopped writing his old tonal Kitsch.’

There is some foundation for this. Stravinsky held that, ‘Composers combine notes, that's all.’ (Stravinsky & Craft, 1982, p. 52) and that ‘[t]he phenomenon of music is given to us with the sole purpose of establishing an order in things, including, and particularly, the co-ordination between *man* [sic] and *time*.’ (Stravinsky, 1962, p. 54). He went so far as to ‘ask…his interpreters to be wholly unimaginative.’ (Frank, 1947, p. 1267) and considered,

‘that music is, by its very nature, essentially powerless to express anything at all, whether a feeling, an attitude of mind, a psychological mood, a phenomenon of nature, etc. Expression has never been an inherent property of music. That is by no means the purpose of its existence. If, as is nearly always the case, music appears to express something, this is only an illusion and not a reality. It is simply an additional attribute which, by tacit and inveterate agreement, we have lent it, thrust upon it, as a label, a convention—in short, an aspect which, unconsciously or by force of habit, we have come to confuse with its essential being.’ (Stravinsky, 1962, pp. 53-54)

Frank, quoting (Krenek, 1939)[[24]](#footnote-25) comments, that

‘this is possible "in the case of the highly mechanized music[[25]](#footnote-26) that Stravinsky writes." Likewise, a legislature can write a highly mechanized statute [and]…can make plain when it wants literalness, and when it wants to authorize judicial legislation. It can, in effect, say to the courts, "Play this statute with tenderness," or that statute "with determination."’ (Frank, 1947, p. 1267)

Adding the word ‘reasonable’ to a requirement is a frequently-used way to permit, if not mandate, a *con tenerazza* approach. Examples of statutory language requiring extra *deciso* are scarcer, but Article 118 of the Geneva Convention has a stern clarity,

‘Imprisonment in premises without daylight, and, in general, all forms of cruelty without exception are forbidden.’ (International Committee of the Red Cross, 1949)

Frank adds that the legislature ‘can give *unequivocal* directions to the courts’ (pp. 1267, emphasis added). However, that is only possible under one or other of two conditions:

1. when the words used are quasi-mathematical[[26]](#footnote-27) (*e.g*. no vote unless 18 or older); or
2. when a firm consensus-as-to-meaning exists between legislature and judges.[[27]](#footnote-28)

There is a romantic notion that music ‘comes to’ its composer, and that the composer is thereafter simply an amanuensis. Thus, Louis Schlösser reported in 1885 that Beethoven had—some 60 years previously—said,

‘[T]he fundamental idea never deserts me—it arises before me, grows—I see and hear the picture in all its extent and dimensions stand before my mind like a cast and there remains for me nothing but the labour of writing it down, which is quickly accomplished.’ (Thayer, 1964, p. 851)[[28]](#footnote-29)

However, as Cook points out (1998, pp. Locs. 1146-1229), Beethoven’s sketchbooks, with their many crossings out and reworkings, belie the notion of a—perhaps divinely inspired—fully-formed ‘entity’ in Beethoven’s mind that had merely to be written down and passed on to performer and audience.

A similar fancy affects much of the thinking about social—and hence legal—norms. Concepts of ‘right’ and ‘justice’ etc. can be thought to exist independently of their application. Strong doctrinalists might spend their careers searching for concepts’ true meanings. Others—like WB Gallie (1965) and Ronald Dworkin (1977, pp. 134-136)—recognise that those meanings are contestable and, sometimes, contested—that there will be many different ‘conceptions’ of some concepts. Many will take the existence of these ‘moral particles’ (Dworkin, 2011, p. 9) to be ‘real’. Dworkin has not convinced all philosophers, let alone the world of serious every-day thinkers and practitioners, that both this philosophical realism—and its sceptical wholesale rejection by ‘anti-realists’—mistakes the whole issue and that,

‘Value judgements are true, when they are true….in view of the substantive case that can be made for them. The moral realm is the realm of *argument*, not brute, raw fact.’ (Dworkin, 2011, p. 11)(emphasis added)

There are implications for our conceptions of moral and legal argument. Realists[[29]](#footnote-30) take value concepts to be, in essence, ‘mind-independent’. Minds will be engaged in their interpretation, but for them the value-concepts’ existences cannot be in issue. Rather than adopt an extreme sceptical anti-realist position, it is more productive to consider the nature of the arguments about value. If, as Dworkin contends, all important questions about value are themselves value-judgements (Dworkin, 2011, p. 11), we should consider how our ideas of value emerge.

Instead of a ‘given’ concepts, there are ‘passions’, ‘intuitions’—some innate, some learned but deeply-ingrained like the music of a composer’s home (Bartók, 1921)—and ‘hunches’ that ‘come upon us’ as instant value-judgements when we are confronted by circumstances, events and disputes. This is Kahnemann’s System 1 (Kahneman, 2012, pp. 19-30). Thereafter, like Beethoven crossing out and re-working his manuscripts, our minds are effortfully engaged in justification under Kahneman’s System 2 (Kahneman, 2012, pp. 19-30, 48-49). Only occasionally does this effortful reflection result in refutation and rejection of the original ‘hunch’ and, occasionally, refutation. Sauer calls this effortful questioning of intuitions ‘System 3’ (Sauer, 2019).

To recognise the dominance of System 1 offends our sense of ourselves as rational beings. Consequently., those who write about it for legal audiences are pushing a boulder up a steep hill. Judge Hutcheson’s revelatory piece (1929) is widely thought simply a curiosity—not to be taken seriously. The implications of David Hume’s celebrated dictum,

‘We speak not strictly and philosophically when we talk of the combat of passion and of reason. Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.’ (Hume, 1739, p. 415)

rarely disrupt our ‘rational’ analyses of caselaw and statutes. Jonathan Haidt’s exposé of the ‘rationalist delusion’ (Haidt, 2013) that ‘the rationalist tail wags the emotional dog’ (Haidt, 2001) can safely be left in another compartment labelled ‘psychology’. Nonetheless,

‘[T]he most important question to ask about norms is what system of beliefs supports and defines norms.’ (Bicchieri, 2014, p. 209)

Furthermore, it is changes in those beliefs that account for legal change. Thus, in *Yemshaw* v. *Hounslow London Borough Council*, the reach of ‘violence’ in Section 177(1) was extended beyond physical violence to include psychological violence—a recognition of the greater appreciation of the realities of abusive domestic relationships.[[30]](#footnote-31) Similarly, the common law changes. *Donoghue* v. *Stevenson[[31]](#footnote-32)* is not primarily a legal principle. It is an innovative policy decision that would have been unthinkable sixty years previously, when the dominant social group thought contract a sacred engine of economic progress and tort liabilities potential interferences with industrial and economic progress. The refutation in 1932 of the ‘no contract, therefore no duty’ approach to manufacturers’ tort-based liabilities to consumers reflected a growing recognition that consumers as such had some rights and, more widely, that social welfare is not merely for charity but is a legitimate concern of Law-Government.

## A Hart of Steel[[32]](#footnote-33)

‘ ‘Cause the feelings come and go I And you never really know | If the feeling's ever real | So you got to have a heart of steel’ (Lord & Drennig, 1986)

Whereas musical text is dominated by signs that have quasi-mathematical precision and are ‘true by definition’, most of the words used in law are not. This suggests that ‘core-and-penumbra’ thinking about musical notation is often quite appropriate. This sign requires that an ‘A natural’ crotchet be played: *i.e*. it demands that the performer produce a sound that, in conventional concert pitch, will register 440 Hz. Hence, the ‘core’ has the quasi-mathematical certainty that words such as ‘hypotenuse’ or ‘18’ share. Nevertheless, the style of attack and release, and the note’s precise length are not controlled by that sign. As functions of the general conventions that constitute the particular ‘style’ and/or of performers’ discretion, there might be some bending of the pitch of the note—at its beginning (*e.g*. slurring from the previous note, *portamento*) and/or during (*e.g*. vibrato, pitch bends) and/or end (*e.g.* ‘falls’ in jazz). Nonetheless, there is a core requirement of 440 Hz.[[33]](#footnote-34)

By contrast, in law, few expressions[[34]](#footnote-35) have a quasi-mathematical core.[[35]](#footnote-36) Of course, in positing the now ubiquitous ‘no vehicles in the park’ scenario, HLA Hart famously wrote,

’‘There *must* be a core of settled meaning, but there *will* be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.’ (Hart, 1958, pp. 607, emphases added).[[36]](#footnote-37)

But most so-called ‘cores’ and ‘literal meanings’ have only an *apparent* certainty, which occurs if, and only if, they reflect a strong value-consensus amongst the dominant language community. Not even dictionaries—nor, in France, the *Académie Française*[[37]](#footnote-38)—can control usage. As Julia Black puts it,

‘[C]ertainty is…mutuality of interpretation’ (Black J. , 2002, p. 179).

The concept of a ‘literal meaning’—a frequent feature of legal argument—posits the existence of an incontestable and certain core of meaning that is inherent and somehow unchanging.[[38]](#footnote-39) Fish characterises this as the contention that a core meaning is,

'indisputably and irreducibly “there”’ and thus logically distinct from ‘interpretation’ defined as ‘that which issues from some special perspective or set of interests’ (Fish, 1989, p. 184).

This ‘literal meaning’ is the ‘core’ from core-and-penumbra’ under another name. Rightly, Fish drives straight through that mirage.[[39]](#footnote-40)

‘Literal meaning, rather than being independent of perspective, is a product of perspective…[I]t is itself an interpretation and cannot therefore be the indisputable ground on which subsequent interpretation securely rest.’ (Fish, 1989, p. 185)

Disagreement and change will embarrass any who cling to the notion that ‘the text contains its own meaning and constrains its own interpretation’ (Fish, p. 141) . Instead, we should recognise the force of the ‘interpretive communities’ that are capable of agreement and disagreement and have—as a matter of social fact—a degree of authority over both text and its interpretation. (Fish, pp. 141-142). They are also ‘engines of change’.

‘[Their] assumptions are not mechanism for shutting out the world but for organising it, for seeing phenomena as already related to the interests and goals that make the community what it is. The community, in other words, is always engaged in doing work, the work of transforming the landscape into material for its own project; but that project is then itself transformed by the very work it does.’ (Fish, 1989, p. 150)

There are, of course, hierarchical dimensions to these interpretive communities. Great conductors and performers are revered and imitated. Some innovators are more highly regarded, influential and imitated than others. Some innovations add to the available cannons of interpretation.

In law, a settled interpretation amongst judges counts for more than the collective view of a school of academics—or of a community of legal practitioners. We often say that our neophytes must learn to ‘think like a lawyer’. However, they also need to learn how to talk and write like a lawyer—or at least like the relevant community of lawyers. It’s not ‘anything goes’.

‘Judgement is son to hallowed Law—

but Obiter still is Fancy’s child…

Law men put forth the doom they must—

to bind tomorrow by today…

Who hews too close must miss the mark

truth too much true is dying truth.’ (from *Obiter Still*, (Llewellyn, 1962, pp. Obiter Still, 166))

## Misty

‘If a lion could talk, we would not understand him’. (Wittgenstein, 1963, p. 223e)

‘Don't you notice how hopelessly I'm lost | That's why I'm following you’. (Stevens & Gardner, 1954)

In *East Coker*, the second of his *Four Quartets*, TS Eliot writes of the struggle to communicate, and of how communication is not simply a matter of reason, but also of emotion.

‘So here I am… | Trying to use words, and every attempt | Is a wholly new start, and a different kind of failure | Because one has only learnt to get the better of words | For the thing one no longer has to say, or the way in which | One is no longer disposed to say it. And so each venture | Is a new beginning, a raid on the inarticulate | With shabby equipment always deteriorating | In the general mess of imprecision of feeling, | Undisciplined squads of emotion.’ (Eliot, 1936, p. 132)

However, communication functions tolerably well for much of the time because of the strength of the consensus amongst language users. As Cook (1998, p. Loc. 2017) writes in the context of musical communication, the way to avoid solipsism—that the only certainty is one’s own direct experience—is ‘to regard human consciousness as something that is irreducibly public.’ Law too is irreducibly public. ‘Publics’ are complex entities and their stability cannot be guaranteed, but they are all that we can have when we try to communicate our musical or legal ideas.

‘[T]oo often…jurists have taken the categories and ideas found in Roman Law and in the Common Law to be universals. They have tended to overlook the fact that the subject matter and even the legal processes involved in these laws were tightly associated with the cultures of which they were a part.’ (Bohannan, 1995, p. 193)

# Where is the music? Where is the law?

This table summarises the main possibilities.

Table 1: Manifestation Locations

| *Music* | *Law* |
| --- | --- |
| * In folk tradition? | * In folk tradition? |
| * In composers’ minds? | * In legislators’ minds? |
| * In composers’ ‘texts’? | * In legislators’ texts? |
| * In performers’ minds? | * In judges’ minds? |
| * In the sounds of performances? | * In the words or actions of decisions? |
| * In hearers’ minds? | * In hearers’ minds? |

## ‘Music’ in copyright law

Which of the possibilities for music in Table 1 are recognised in copyright law? In passing Copyright, Designs and Patents Act 1988, Parliament did not define ‘musical’ but delegated to judges the responsibility for the term’s interpretation, much as composers delegate to performers the interpretation of such marks as *con vivo* or *con tenerazza* . Nevertheless, the 1988 Act requires that ‘musical works’ be distinguished from ‘literary’ works and ‘dramatic works’. How do we spot ‘musical works’?

First, it is not merely a matter of copying the tune. In *Austin* v. *Columbia Gramophone Company*[[40]](#footnote-41)(1917, ‘*Austin*’), for a stage show, *Polly*,, Austin had arranged tunes that had been used previously by John Gay in 1729 for an unperformed opera. The tunes were not by Gay and were in the public domain. However, the plot lines and musical arrangements of the twentieth-century show differed significantly from those of Gay’s opera. Columbia sought to cash in on the show’s success and commissioned and recorded arrangements of the tunes in Gay’s opera prepared by Albert Ketèlbey. Although Ketèlbey had copied the tunes used in Gay’s original from the British Library manuscript, his arrangements were found to have drawn very substantially—but not note for note—on Austin’s work and to be in breach of Austin’s copyright. Austin had made an original—and thus protected—work that incorporated the melodies Gay had used. Astbury J was ‘satisfied that [Columbia] desired to get as near to [Austin’s] work in the selected tunes as they hoped they could safely go.’ Austin’s copyright was in the arrangements rather than the tunes. Thus, there is ‘music’ in the arrangements and the general sound and atmosphere that they lent to the melodies. Furthermore, Astbury J said in *Austin*,

‘“Infringement of copyright in music is not a question of note for note comparison," but falls to be determined "by the ear as well as by the eye."’[[41]](#footnote-42).

The music is not simply ‘on the page’ or ‘in the performance,’ but ‘in the sound’. The minds of composers/arrangers, performers and listeners are all engaged. The copyrightable ‘music’ is manifest-able to them all.

*Austin* was cited in *Sawkins* v. *Hyperion Records*[[42]](#footnote-43) as authority for the proposition that ‘it is possible to infringe the copyright in a musical work without taking the actual notes.’ Hyperion were held to have done so, by recording performances that used Dr Sawkin’s performing edition of ancient public domain works by Michel-Richard de Lalande, the principal court composer of Louis XIV and Louis XV. *Sawkins* itself demonstrates two further points:

(i) A ‘musical work’ can exist and, if written or otherwise recorded, be protected without an ‘audience’ hearing it. The performing edition was an ‘intellectual creation’ of which Dr Sawkins was the author.[[43]](#footnote-44)

(ii) A performing edition of an ancient piece of music can, in itself, be a ‘musical work.’ Dr Sawkins’s preparation of improved figuration[[44]](#footnote-45) of the bass line of the score, reconstructing some lost viola parts and presenting the whole score and parts in modern notation was not only ‘scholarly’—beyond ‘mere servile copying’[[45]](#footnote-46)—but ‘musical’. Mummery LJ said that Dr Sawkins’s work

‘affect[ed] the sounds, which may be produced by the performers who use the scores: which instrument to play, whether it is to be played soft or loud, or fast or slow, and ornaments, such as trills or slurs. The performance of the editions creates a combination of sounds available for hearing and appreciation through the ears of the listeners.’ [18]

Mummery LJ also said,

‘[53]….But the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person’s spontaneous singing, whistling or humming or of improvisations of sounds by a group of people with or without musical instruments should not be regarded as ‘music’ for copyright purposes.’ [and] [55] ‘In principle, there is no reason for regarding the actual notes of music as the only matter covered by musical copyright.’

*Sawkins* accords well with the thesis that music is manifest-able in the minds of composers, arrangers, performers and listeners, but does that mean there can be protection for a ‘style’ beyond the notes on the page? Musical conventions are, as such, widely accepted and are thus ‘public domain’. Hence, the conventional ‘blues’ chord structure or the use of a plagal cadence for ‘Amen’ are, though ‘musical’, unprotected. But in *Williams v. Gaye*[[46]](#footnote-47)the majority in US Court of Appeals (9th Circuit) found for the claimants on the basis that the stylistic get-up of a particular song is protected, not just as notes on a page, or coming from an instrument or singer, but as a composite—composition, arrangement, performance, sound engineering—auditory experience for the listener.[[47]](#footnote-48) For an English court to conclude that, the idea of ‘style’ would have to be accommodated as being a ‘work’ within the 1988 Act and the collective quality of authorship would have to be recognised.

## Audiences

In his phrase ‘a combination of sounds available for hearing and appreciation through the ears of the listeners’, Mummery LJ clearly recognised a role for audiences beyond, composers, arrangers, editors and performers. Audiences experience the music—not necessarily in the way that those earlier in the causal chain intend—and can, on occasions, contribute to the performance atmosphere. Sometimes musicians play to, or for, themselves but other times they communicate with the audience and all share in the fact of having a musical experience, albeit not necessarily identically. The composer might intend to throw a tennis ball, but an audience member might receive a cricket ball.

For music to succeed as a ‘commercial’ enterprise, it must respond to and/or shape audiences’ tastes. Similarly, if law is to retain legitimacy it cannot stray too far too often from dominant public opinion. Unlike music, law is backed by the power of the state, but enforcement costs rise as public support declines. There are also many laws that are not widely noticed or understood. That they are tolerated as ‘necessary technical stuff’ has no obvious analogue in music, save that a lot of people know that so-called ‘classical music’ exists but feel no urge or need to investigate it.

## Not single spies

‘When sorrows come, they come not single spies, but in battalions.’   
*per* Claudius (Hamlet, 1603, p. Act IV Scene V)

Even happy notes and words come in groups. Some might be organised—squads, platoons, companies, battalions, regiments, divisions, corps; and phrases, sentences, paragraphs, chapters, treatises, etc. Others might be more fluid and prone to mixes, overlaps and re-alignments—families, clubs, political parties, gangs, football club supporters, Facebook friends (Hurst, 2019)[[48]](#footnote-49) or Baumanesque ‘swarms’,[[49]](#footnote-50) social classes; and sonatas, fugues, symphonies, ballet scores, etc. There are important issues of *context* and *status* here—‘what we have to study is *not* the sentence but the issuing of an utterance in a speech situation’ (Austin, 1962, p. 139). The music, the drama, the meanings lie largely in clusters and combinations—from micro phrases to *magna opera.* Single words and notes might be separately sounded but they function in contexts. ‘‘[T]he sentence as a whole is the bearer of meaning’ (Ricoeur, 1973, p. 99).[[50]](#footnote-51) The analogy of Matryoshka nested Russian dolls comes to mind but should be rejected. The dolls are identical save for scale. They are also rigid in their boundaries. Both characteristics mislead. Contexts are more like the collective workings of several liquid kaleidoscopes in continual motion, sometimes gradual, sometimes quite sudden. In each of the various contexts, meanings are taken by the various protagonists—from composers to audiences, from law-makers to those who have no ‘official’ roles. It is in these various minds that music and law are manifest And, since there are few ‘brute facts’, the scope for variation is considerable. Table 2 summarises the relevant brute facts. Having noted them, we can explore the notion of *manifestation* or—as Baudrillard might have it—*simulation*.

Table 2: Brute facts table

| *Music* | *Law* |
| --- | --- |
| 1. Composers’ scores, with their notes and markings | 1. The text (words) of statutes and judgments |
| 1. Sounds made by performers referring to 1 | 1. Further judgments and opinions referring to 4 |
| 1. Audience recognition that 2 relates to 1 | 1. ‘Audience’ recognition that 5 relates to 4 |

## Manifestations

‘Let the music take your mind | Everyone feel it deep inside.’ (Kool and the Gang, 1969)

Although not subscribing to John Locke’s *tabula rasa* theory of the human mind, Hume followed Locke’s *empirical* lead. (Pinker, 2003) Our experiences of facts—things, events—in the world, he said, make *impressions* on our minds or give us *ideas*.

‘The difference betwixt [impressions and ideas]…consists in the degrees of force and liveliness, with which they strike up on the mind, and make their way into our fault or consciousness. Those perceptions, which enter with most force and violence, we may name impressions and under this name I comprehend all our sensations, passions and emotions, as they make their first appearance in the soul. By ideas I mean the faint images of these in thinking and reasoning.’[[51]](#footnote-52) (Hume, 1739, pp. 1-2)

The scope for variation in these ideas—person-in-a-context by person-in-a-context—is huge. A and B might witness the same event, but that event might make different impressions in their minds. Their viewpoints can differ. They might well form different ideas of the pleasure of that music, or of which, if any, of those involved in an accident ought to be held responsible.

Exploring music first, modern neuroscience provides some supportive evidence for the proposition that music is manifest in the minds of listeners. Although macaques and humans evidence very similar brain activity patterns in response to visual stimuli, human responses to music and speech are notably more sensitive and varied that those of macaques (Rigby, 2019)[[52]](#footnote-53). However, irrespective of whether the items that subjects liked or disliked happened to be Beethoven or Eminem, Wilkins *et al*., (2014) found similarities in subjects’ ‘liking’ brain activity and also in their ‘disliking' brain activity. The fundamental point is that the available evidence supports neither a simple producer-distributor-consumer model nor the notion of some mind-independent entity that will affect all minds in the same way.

Eliding some aspects of composition and performance in a way reminiscent of aleatoric music, (Forcucci, 2018) shows that is also possible to turn into sounds—which listeners can hear and count as music— the brain waves of an individual ‘performer’ of a ‘composers’ script’.

Find a very resonant space;[[53]](#footnote-54) wear the [electroencephalogram] EEG device; start the algorithm; sit for as long as you feel it necessary; then lie on the floor, for as long as you feel it necessary; sit again for as long as you feel it necessary; take a text and read it mentally; end the performance or start again from the beginning if you feel it necessary’ (p. 84).

This example apart, I have not found evidence that relates strongly to composers’ brain activity during composition. Whilst is seems probable that the same brain areas would be implicated in performers as in listeners (say, when a tune ‘comes to’ the composer in a flash), it seems implausible that the sometimes tortuous processes of composition—recall Beethoven’s crossings out—would manifest the music in brain waves that would then be manifest identically in the brains of performers and listeners in the manner of a simple producer-distributor-consumer model. In my fairly brief researches, I have not found evidence to falsify the following proposition.:

Music is constructed and reconstructed by composers, performers and listeners in essentially mind-dependent ways, much as our memory recalls are re-constructions rather than Rolodexes from which we retrieve the right card; and not recognising that recall is reconstruction.[[54]](#footnote-55).

What then of law? I suggest that the music analogy is powerful and can carry us to a recognition that—despite its rhetorical strategies of concealment—law too is mind-dependent and that constructions and re-constructions are inevitable.

Hume wondered

‘[w]hy we attribute a *continued* existence to objects, even when they are not present to the senses; and why we supposed to have an existence *distinct* from the mind. (Hume, 1739, p. 188)

and concluded

‘Whatever convincing arguments philosophers may fancy they can produce to establish the belief of objects independent of the mind, ‘tis obvious these objects are known but to very few.’ (p. 193)

Table 3 briefly summarises the minds that can be implicated in music and in law.

Table 3: Implicated minds

| *Music* | *Law* |
| --- | --- |
| Composer | Law-maker  Legislature  Judicial legislation |
| Performer  Dutiful  Personalising  Creative | Law-applier  Judges (and counsel)  Rule-followers  Rule-avoiders[[55]](#footnote-56) |
| Audience | Human object of a direct application  Parties in cases |
| Wider discussion  *e.g.* in the media | Wider appreciation  Potential application(s) to selves  Parties to potential cases |

It is difficult to locate, the ‘music’ exclusively at any one of these places. Similarly, the ‘law’ is not rooted in any one place. Neither is quite like ‘a chair in a room’, or even ‘a needle in a haystack’ (Black J. , 2002, p. 176) (Bicchieri 207-208). Law and music seem to be variously manifest in various minds. But is it one thing manifest in several minds, or is each manifestation a construction of that mind?

Table 4 points to the latter. Each activity is launched from a different standpoint and with a different purpose in mind.

Table 4: Interpretive standpoints

|  |  |
| --- | --- |
| *Music* | *Law* |
| Try to realise composers’ intentions | Rule-following and applying  Rule-enforcing |
| Play fast and loose with the markings but still the same piece | Creative avoidance by re-interpretation |
| Iconoclastic composition or performance | Rule-breaking (*e.g.* civil disobedience) |
| Performances as performers’ self-expression | Rulemaking, filling perceived gaps, or changing previously set norms |
| Refreshing, *e.g.* Beethoven’s *Eroica* on period instruments | Re-interpretation |

# Simulation

Lane (2001, p. 30) summarises Baudrillard’s levels of simulation thus:

* 1. ‘an obvious copy of reality’
  2. ‘a copy so good that it blurs the boundaries between reality and representation’
  3. ‘produces a reality of its own without being based upon any particular bit of the real world’, *i.e.* ‘hyperreal’ in Baudrillard’s terms

Arguably, music and law share that they can be manifest at Levels 1, 3 and 3. In law we see in landmark cases strong examples of Level 3. Lane also identifies in Baudrillard’s writing a fourth ‘fractal stage’ in which ‘all points of reference have dissolved’. Aleatoric music can evidence the fractal stage (Forcucci, 2018), but its legal analogues are anarchy and law-lessness.

## Realism (the un-American kind)

Cook (1998, pp. Locs. 1749-1758) condemns the style of musical education that promotes a conception of music as

‘made up of ‘”things” to hear, constructed out of notes in the same sense that houses are constructed out of bricks.’

He sees two results. First,

[the transformation of music] ‘from being primarily something you do (but do not necessarily know how you do) to something you know (but may not necessarily do); in other words, it is embraced within the structures of the knowledge industry, and of a society which tends to value theory above practice.’

And secondly, the inhibition of musical expression and appreciation when music is straightjacketed.

‘[I]t becomes increasingly difficult to conceive that music might work in other ways, or to hear it properly if it does; the harder you listen, the more you hear it in terms of the notes and chords and formal types of the Western tradition, and the less you can understand music that works primarily in terms of timbre and texture, say.’

The danger for lawyers is that a doctrinalist approach to law inculcates a mistaken, misleading and inhibiting belief in legal concepts as ‘lawrons’[[56]](#footnote-57)—legal ‘particles’ with a fixed, mind-independent existence. The textbook-writing and codification moves in the nineteenth century encouraged—in the name of legal science (Samuel, 2012)—just such a *reification* that invests legal concepts with a spurious mind-independence. Tennyson’s ‘codeless myriad of precedent’ had to be systematized and his ‘wilderness of single instances’ cultivated (Lord Tennyson, 1891). Similarly, Beethoven’s use of opus numbers (Cook, 1998, p. Loc. 702), his proposal to publishers that they publish a complete and authoritative edition of his compositions and the notion of a ‘musical museum’—proposed by Franz Liszt in 1835 but never formally established (Cook, 1998, pp. Locs. 702-720)—are in the same reificatory mode

# Conclusion

‘As in the case of the ‘picture’ and ‘constructivist’ views of art, what we need is balance; we need *both* composition-based and reception-based approaches to music, for the two work in a kind of counterpoint. (Cook, 1998, p. Loc. 1455)

So too, in law—and we should be alert for creative minds to go sometimes beyond that which convention had imagined precedent and statute to be capable of generating.

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1. Leeson, (2011) and (2012), defends the ‘rationality’ of trial by battle and ordeal. [↑](#footnote-ref-2)
2. *Cf.* caveat Hobel’s fn. 53. [↑](#footnote-ref-3)
3. J L Austin identifies ‘performatives’—words that ‘do things’ other than describe or signal other things. A judge’s decision—'the claimant wins’—is a conclusory *verdict* (and not a *justification*). Its validity depends upon a power to decide such things, which is *exercised* when the verdict. *Verdictives* and *exercitives* are two of Austin’s five kinds of *performative*. The others are: commissives (*e.g.* promising; behabatives (*e.g.* apologising); and expositives (*e.g.* stating, describing, postulating, the clarifying of reasons, *etc*.) (Austin, 1962, pp. 148-164). Whilst the expositive category is something of a baggy monster, note that classical sonata form is comprised of: an *exposition* of the first (and second) subject(s); a development section; and a recapitulation of the exposition subject(s). In various ways, ‘sonatas’ are *performed* by composers and performers. [↑](#footnote-ref-4)
4. (*e.g*.) <http://www.arkivmusic.com/classical/album.jsp?album_id=1664687>; <https://www.talkclassical.com/59417-what-do-you-think.html>. [↑](#footnote-ref-5)
5. *E.g*. <https://www.youtube.com/watch?v=6bnE1YLUTHg> Yorkshire Building Society Band playing Gordon Langford’s selection and arrangement of some Gilbert and Sullivan. [↑](#footnote-ref-6)
6. <https://www.discogs.com/Miles-Davis-Porgy-And-Bess/release/1446216>; <https://www.youtube.com/watch?v=Ep8rSxuM-kU> or Shelly Manne and his Friends ‘Modern Jazz Performances of Songs from My Fair Lady’ (1963) LAC 12100. [↑](#footnote-ref-7)
7. Paul Hindemith’s *Symphonic Metamorphosis of Themes by Carl Maria von Weber* (1943); Igor Stravinsky’s *Pulcinella Suite* (1920) re-works music often, but perhaps wrongly, attributed to Giovanni Battista Draghi (1710-1736). [↑](#footnote-ref-8)
8. Johannes Brahms, *Academic Festival Overture* (1880). In some of their symphonies, Haydn (No. 104, Finale) and Beethoven (‘Pastoral’ No. 6, 1st movement) incorporate peasant melodies (Bartók, 1921). [↑](#footnote-ref-9)
9. In *Metamorphosen* (1945), Richard Strauss quotes Beethoven's *Eroica* symphony.

   ‘After he had begun work on this score, Strauss recognized the similarity between one of his main musical ideas and the famous funeral march from Beethoven’s *Eroica* Symphony. Like a great novelist, he made the most of sheer coincidence and even allowed the cellos and basses to quote Beethoven’s theme in the final measures, where he wrote in his manuscript: “In Memoriam!” (Huscher, 2009-2010) [↑](#footnote-ref-10)
10. *Frère Jacques* in Gustav Mahler’s first symphony; *Simple Gifts* (1848, a Shaker melody, by Joseph Brackett) in Aaron Copland’s *Appalachian Spring* (1944); *Sumer is icumen in* (13th century) in Benjamin Britten’s, *Spring Symphony* (1949). [↑](#footnote-ref-11)
11. Amongst many examples, Bohuslav Martinů included nursery rhyme folk melodies from Bohemia and Moravia in *Otvírání studánek* (1955) and in his other compositions. Similarly, Bela Bartok and Zoltan Kodaly collected and incorporated folk songs. [↑](#footnote-ref-12)
12. Jacques Offenbach's *Galop Infernal* (or Cancan) in his *Orpheus in the Underworld* (1858) is played low and slow in Saint-Saëns’s *Tortue* (tortoises) in his *Carnival of the Animals* (1886); and, perhaps, Queen’s version of *God Save the Queen* (*A Night at the Opera*, 1975). [↑](#footnote-ref-13)
13. Pierre Boulez, *Piano Sonata No. 3* (1958). [↑](#footnote-ref-14)
14. Rather than ‘metaphor’ (in which a meaning is ‘borne across’ from one context to another), ‘analogy’, (which speaks etymologically of ‘proportion’) is used here—there being no attempt to describe law in musical terms and thus to fuse ‘theme’ (primary subject, *i.e.* law) and ‘*phoros*’ (secondary subject, *i.e.* music). (Perelman & Olbrechts-Tyteca, 1969, pp. 399-405).

    Lawyer-readers will be relieved to know that there are precedents for such an exercise. Karl Llewellyn thought ‘the esthetics of advocacy…closely related to the performing arts—music, drama, dance—and also to composition…especially for self-direction and self-performance, and…those branches in which much was left to improvisation.’ He posited an esthetics of Legal Craftsmanship and another of Substance. He chose architecture—and its functional beauty—as his analogy. (Llewellyn, 1962, pp. 167-168, 175-178). Jerome Frank disagreed and preferred music (Frank, 1947, p. 1260). [↑](#footnote-ref-15)
15. For an account of the ‘riot’ at the first performance in 1913, see (Classic FM, 2018) [↑](#footnote-ref-16)
16. Thus, Eskimos have ‘law-ways’ but hardly any recognisable ‘law-institutions’ (Hoebel, 1940-1941) beyond a recognisable ‘interpretive communities’ (Fish, pp. 141-142). [↑](#footnote-ref-17)
17. But it mattered for tax purposes in *Nix* v. *Hedden* 149 US 304, 13 S. Ct. 981 (1893). <https://supreme.justia.com/cases/federal/us/149/304/> [↑](#footnote-ref-18)
18. See also different attitudes to conflict resolution, *e.g.* (Kawashima, 1969). [↑](#footnote-ref-19)
19. Although sometimes a discredited piece is rehabilitated. [↑](#footnote-ref-20)
20. [1983] 1 AC 520. [↑](#footnote-ref-21)
21. *Murphy* v. *Brentwood District Council* [1991] 1 AC 398. [↑](#footnote-ref-22)
22. [1978] A.C. 728,752-752 *per* Lord Wilberforce, holding that, once reasonable foreseeability of the claimed-for damage has been established, a defendant is liable unless there some strong policy reason to conclude otherwise. [↑](#footnote-ref-23)
23. [1964] AC 465. [↑](#footnote-ref-24)
24. (Frank, 1947) does not give page references for all his citations from (Krenek, 1939). [↑](#footnote-ref-25)
25. But Stravinsky wrote nothing so mechanised as *Musique Concrète*, which assembles recorded sounds to make music or—and here there are stronger parallels with law—computer-generated music (Deahl, 2018). We are already seeing on-line algorithmic adjudication emerging. For an optimistic view of this innovation, see (Coglianese & Lehr, 2017) [↑](#footnote-ref-26)
26. Where units of measurement are involved, there must be consensual adoption of the standard (*e.g*. dress sizes). [↑](#footnote-ref-27)
27. *In re Hutchings* [2019] UKSC 26, provides a convenient example. [↑](#footnote-ref-28)
28. As reported (Cook, 1998, p. Loc. 1164). [↑](#footnote-ref-29)
29. Meaning ‘meta-philosophical realists’, and emphatically not ‘American legal realists’, of the school represented by (*e.g*.) Karl Llewellyn or Jerome Frank. [↑](#footnote-ref-30)
30. [2011] UKSC 3 [24]-[36] *per* Lady Hale. . [↑](#footnote-ref-31)
31. [1932] AC 562 [↑](#footnote-ref-32)
32. Some of this sub-section is borrowed from my ‘Wordfulness for Neophytes’, a paper given at Newcastle University in May 2019. My thanks to Richard Mullender for, in 2018, pointing me towards Stanley Fish. [↑](#footnote-ref-33)
33. Frank (1947, p. 1261) cites the composer, Christian Darnton’s view that ‘the written notes are at best only an approximation to the composer's intention, no matter how fully they are supplemented by verbal directions.’…It ‘makes nonsense of the music to play it as if the truth, the whole truth and nothing but the truth reside in the notes and such directions,’ for ‘all kinds of nuances and inflections, variations of tempo and dynamics are essential to the music…The result varies with the musical insight and interpretative skill of the interpreter.' (Darnton, 1946, pp. 40, 161-162) [↑](#footnote-ref-34)
34. Fuller reminds us that ‘[e]ven in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text. Surely a paragraph does not have a "standard instance" that remains constant whatever the context in which it appears.’ (Fuller, 1958, p. 663) [↑](#footnote-ref-35)
35. Llewellyn insisted that ‘the craftsmen’s ways of using their materials mean as much or more to the result as do the materials themselves….[I]t is the craftsman who mediate between the people and the structured rules and forms of law.’ (Llewellyn, 1962, pp. 176-177) [↑](#footnote-ref-36)
36. See also the extensive criticisms made in (Fuller, 1958, pp. esp. 661-669). [↑](#footnote-ref-37)
37. Article 24 of its Bylaws provides that ‘[t]he primary function of the Académie will be to work, with all possible care and diligence, to give our language definite rules’. [↑](#footnote-ref-38)
38. ‘Natural’ might be used as a synonym for ‘literal’. But, in some instances, there is a link to context and consensus—and hence to usage—as a determinant of meaning. *E.g*. ‘The trouble is that, without expressly acknowledging it, Foskett J,…was…departing from the obvious natural meaning of the word “interested”, such as had been recognised in our law for more than a century without dissent.’ *per* Lord Wilson, *Tillman* v *Egon Zehnder Ltd* [2019] UKSC 32, [49]. [↑](#footnote-ref-39)
39. Frank refers to the ‘the one-word-one-meaning fallacy, based on the false assumption that each verbal symbol refers to one and only one specific subject, [which], if employed in the non-legal world, would compel the conclusion that a clothes-horse is an animal of the equine species, and would make it impossible to speak of "drinking a toast."’ But he perhaps gives core-penumbra thinking too much room when he continues, ‘Even around the more precise words, often there is *a wide fringe of ambiguity*’. Although he rightly adds, ‘which can be dissipated only by a consideration of the context and background’ (pp. 1263, emphasis added).

    *Pace* (*e.g*.) Lord Sumption who, in *Lachaux* v. *Independent Print Ltd* [2019] UKSC 27 [9], referred to the ‘*inherent propensity of the words* to injure the claimant’s reputation’ (my emphasis). [↑](#footnote-ref-40)
40. <http://www.albertketelbey.org.uk/polly/polly.pdf> (accessed 24 July 2019) [1917–23], MacgCC 398. [↑](#footnote-ref-41)
41. (1923) MacgC. (1917-1928) 398, 415 and 409. I rely here on Wilmer LJ in *Francis Day & Hunter Ltd. and Another* v. *Bron and Another* [1963] Ch. 587, 608. [↑](#footnote-ref-42)
42. [2005] EWCA Civ 565 [54] [↑](#footnote-ref-43)
43. *Cf*. ECJ’s emphasis on the ‘author’ and the ‘author’s intellectual creation’ in *Infopaq International v. Danske Dagblades Forening* [2009] EUECJ C-5/08. [↑](#footnote-ref-44)
44. Figuration tells the *keyboard* player what chord to use but not how to present it in the context of the piece. [↑](#footnote-ref-45)
45. *Per* Jacob LJ [85]-[86]. See also Mummery LJ at [31]. [↑](#footnote-ref-46)
46. 2018, 16-55089, D.C. No. 2:13-cv-06004-JAK-AGR. See (McAllister, 2019). [↑](#footnote-ref-47)
47. In dissent Nguyen J, said that, ‘The majority allows the Gayes to accomplish what no one has before: copyright a musical style. “Blurred Lines” and “Got to Give It Up” are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.’ (57). And said later, ‘Whether considered micro- or macroscopically, [the two songs] are objectively dissimilar.’ (79) [↑](#footnote-ref-48)
48. (Hurst, 2019) discusses (Lawrence, 2019). [↑](#footnote-ref-49)
49. Building on the discovery that 56 per cent of Panamanian wasp swarm members were found, surprisingly, to have swapped nests, Bauman writes of the shift from ‘from "solid" modernity…to "liquid" modernity, with its fuzzy and eminently permeable borderlines’ and of ‘the incurable inconclusiveness of the task of self-identification’. (Bauman, 2008, pp. 8, 13) relying on (Jones, 2007) [↑](#footnote-ref-50)
50. Ricoeur adds, ‘[which] should be called the intended rather than the signified of the sentence’ (p. 99). [↑](#footnote-ref-51)
51. Hume went to say, ‘Everyone of himself will readily perceive the difference betwixt feeling and thinking’ and to suggest that the principal difference between impressions and ideas lies in ‘Their degree of force and vivacity’. However, he then limited this claim to ‘simple’—as distinct from ‘complex’—impressions/ideas. His example of an idea (formed in the dark) of red that differs only in degree, not nature, from the red that we see in daylight, is questionable. There are many shades of red. [↑](#footnote-ref-52)
52. Citing (Norman-Haignere, Kanwisher, McDermott, & Conway, 2019). See also (Wu, 2018). ‘At the level of more detailed neuroanatomy, experimentation has made progress in establishing the brain regions associated with such capacities as the different aspects of musical performance, perception and comprehension.’ (Goodenough & Prehn, 2006, p. loc. 1617), citing (Parsons, 2003). [↑](#footnote-ref-53)
53. Because the performer will get different aural feedback, different acoustic situations will generate different musics. [↑](#footnote-ref-54)
54. (Kahneman, 2012, pp. 60-61) (Michaelian & Sutton, 2017) [↑](#footnote-ref-55)
55. ‘If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.’ (Holmes jr, 1897, p. 459) [↑](#footnote-ref-56)
56. Mimicking Dworkin’s invention of moral particles, that he called ‘morons’ (Dworkin, 2011, pp. 32, 42-43). [↑](#footnote-ref-57)