

INTERPRETING LAW AND MUSIC: PERFORMANCE  
NOTES ON  
“THE BANJO SERENADER” AND  
“THE LYING CROWD OF JEWS”

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INTRODUCTION: A LITTLE LIST OF PERFORMANCE PROBLEMS

In 1992 Sir Charles Mackerras recorded a new version of Gilbert and Sullivan’s *The Mikado* with the Welsh National Opera Orchestra and Chorus.<sup>1</sup> Sweeping away the cobwebs of previous tradition, he produced a fresh new version that was immediately hailed by the critics. The authors of *The Penguin Guide to Compact Discs* (“*Penguin Guide*”) awarded it not only three stars for “an outstanding performance and recording in every way,”<sup>2</sup> but also a “rosette”—their highest recommendation, signifying a performance of special excellence and quality.<sup>3</sup>

Yet, as the *Penguin Guide*’s authors noted, Mackerras’s performance was in many ways unusual. Mackerras sought to fit the entire work onto a single compact disc, meaning that the performance had to last less than eighty minutes.<sup>4</sup> To this end, he omitted the overture, a choice that might easily enough be defended on the ground that the overture was not in fact by Sullivan himself, but was a pastiche of themes from the operetta strung together by another hand.<sup>5</sup> No such defense could be offered of Mackerras’s decision to omit all of W.S. Gilbert’s witty dialogue. One might defend the latter on grounds of the changed context of performance: many people listening at home might

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1 See GILBERT AND SULLIVAN, *THE MIKADO* (Sir Charles Mackerras cond., Telarc 1992) [hereinafter MACKERRAS’S *THE MIKADO*].

2 IVAN MARCH ET AL., *THE PENGUIN GUIDE TO COMPACT DISCS AND CASSETTES: NEW EDITION* viii, 1314-15 (1996) [hereinafter *THE PENGUIN GUIDE*].

3 See *id.* at ix, 1314.

4 The recorded performance lasts 79 minutes and ten seconds. See MACKERRAS’S *THE MIKADO*, *supra* note 1.

5 See *THE PENGUIN GUIDE*, *supra* note 2, at 1314.

wish to skip the dialogue and go straight to the musical numbers. But tailoring the CD for those listeners merely begs larger questions about recording works originally crafted for the stage. Has Mackerras done justice to a piece intended for performance in front of a live audience? When offered as a series of unconnected musical numbers, *The Mikado* begins to sound more like a comic oratorio than an operetta.

Finally, and most important for our purposes, Mackerras made two other alterations; one strongly suspects they were motivated by something other than a desire to save valuable time. Listeners will not hear the entire middle verse of Ko-Ko's famous aria "I've got a little list." As Gilbert and Sullivan fans know, in this song, Ko-Ko, the Lord High Executioner, describes his list "[o]f society offenders who might well be underground, [a]nd who never would be missed."<sup>6</sup>

The omitted middle verse, which appeared in the original 1885 production, runs as follows:

There's the nigger serenader, and the others of his race,  
 And the piano-organist—I've got him on the list!  
 And the people who eat peppermint and puff it in your face,  
     They never would be missed—they never would be missed!  
 Then the idiot who praises, with enthusiastic tone,  
 All centuries but this, and every country but his own;  
 And the lady from the provinces, who dresses like a guy,  
 And who "doesn't think she waltzes, but would rather like to  
     try";  
 And that singular anomaly, the lady novelist—  
     I don't think she'd be missed—I'm *sure* she'd not be  
 missed!<sup>7</sup>

These lines were presumably omitted on the grounds that they are offensive (or as the *Penguin Guide* delicately puts it, "unpalatable"<sup>8</sup>) to

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6 W.S. GILBERT & SIR ARTHUR SEYMOUR SULLIVAN, *The Mikado; or, The Town of Titipu*, in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 305-06 (1941) [hereinafter THE COMPLETE PLAYS].

7 *Id.* at 305.

8 THE PENGUIN GUIDE, *supra* note 2, at 1314. Compare *Liner Notes* to MACKERRAS'S THE MIKADO, *supra* note 1, at 15-16 (omitting second verse), with THE COMPLETE PLAYS, *supra* note 6, at 305-06 (including second verse). We could write an entire essay on how performers confront (or fail to confront) the racism found in music, especially popular music. Paul Robeson, one of whose signature songs was "Ol' Man River," changed the lyrics in significant ways. When Robeson first began to perform Hammerstein's and Kern's *Showboat* in 1928, he sang the lyrics as written, including the line "Niggers all work on the Mississippi." By the early 1930s, he changed the key word to "Darkies," and, when he filmed the movie in 1935, he substituted "There's an ol' man called the Mississippi; that's the ol' man I don't like to be." He also changed the line "I'm tired of livin' and scared of dyin'" to "I must keep fightin' until I'm dyin'." See MARTIN BAUML DUBERMAN, PAUL ROBESON 604-05 n.14 (1988).

Apparently, *Showboat*'s original lyricist was not amused. "In regard to Robeson's changes in his lyrics," Duberman writes, "Oscar Hammerstein II is quoted as saying, 'As the author of

today's audiences. (Of course this begs the question whether the entire work should be considered offensive to the Japanese.<sup>9</sup>) Nevertheless, given that there are only three verses in the entire song this is surely a significant omission: Mackerras has literally chopped a third out of the piece!

Nor is this the only editorial change in the libretto. In *The Mikado*'s famous Act II aria, where his "object all sublime" is to "let the punishment fit the crime,"<sup>10</sup> Mackerras alters the following verse:

The lady who dyes a chemical yellow  
Or stains her gray hair puce,  
Or pinches her figger,  
Is blacked like a nigger  
With permanent walnut juice.

by substituting for the last three lines:

Or pinches her figger,  
Is painted with vigour  
And permanent walnut juice.<sup>11</sup>

In fact, Mackerras could have offered a tradition of past performance to justify the second alteration, if not the first. Apparently, in response to repeated objections from American audiences (and particularly American blacks), the D'Oyly Carte Opera Company, the original performer and artistic custodian of the operettas, asked A. P. Herbert to alter the lyrics for American performance in 1948.<sup>12</sup> Herbert inserted

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these words, I have no intention of changing them or permitting anyone else to change them. I further suggest that Paul write his own songs and leave mine alone.'" *Id.* (quoting NEW YORK AGE, June 18, 1949). Nevertheless, Robeson has become so identified with the song over the years that one might well ask whether a truly "authentic" performance of "Ol' Man River" is one using Robeson's lyrics or Hammerstein's. As we explain in this essay, it all depends on what one means by authenticity.

Interestingly, one of Robeson's attempts at making Hammerstein's lyrics less overtly racist backfired when he performed it in London; and it demonstrates how important audience response is to the political meaning of lyrics, whatever the author's asserted intentions. Robeson changed the line "You get a little drunk and you land in jail," which played to racist stereotypes, to the more defiant "You show a little spunk and you land in jail." In New York, this line had been greeted with great applause, but it was met with "dead silence" in London. As Duberman reports, "Robeson later learned that to the English 'spunk' meant semen, and promptly changed the line again, substituting 'grit.'" *Id.*

<sup>9</sup> The usual defense is that "everyone" understands that the Japanese in Gilbert's libretto are thinly disguised caricatures of persons in British society. See THE ANNOTATED GILBERT AND SULLIVAN 258-59 (Ian Bradley ed., 1982). Ironically, by 1907 the music from *The Mikado* was sufficiently popular in Japan that it formed part of the regular repertoire of the Japanese Imperial Army and Navy bands, while the British had stopped performing it temporarily for fear of giving offense. See *id.* at 259.

<sup>10</sup> THE COMPLETE PLAYS, *supra* note 6, at 331.

<sup>11</sup> Compare *id.* at 331-32, with *Liner Notes* to MACKERRAS'S THE MIKADO, *supra* note 1, at 27.

<sup>12</sup> See THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 9, at 274.

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the new lyrics in *The Mikado*'s aria and changed "the nigger serenader and the others of his race" in Ko-Ko's list song to "the banjo serenader and the others of his race."<sup>13</sup> Apparently Herbert and D'Oyly Carte believed this change cured any potential racism or offensiveness in the lyrics, although one wonders if present-day audiences would be so easily appeased.

Rupert D'Oyly Carte wrote to *The London Times* on May 28, 1948 that the modifications made for American performances would henceforth be employed "in the British Empire," arguing that "Gilbert would surely have approved" of Herbert's changes.<sup>14</sup> Although this sounds like an appeal to original intention, D'Oyly Carte offered no evidence or argument to support his assertion. Whatever the justification, it has remained in official D'Oyly Carte libretti and performances ever since.<sup>15</sup>

By contrast, the D'Oyly Carte Opera Company has not officially modified Ko-Ko's stated willingness to execute "the lady novelist" or "the lady from the provinces who dresses like a guy," though contemporary audiences might well regard the former as misogynistic and the latter as (possibly) homophobic. While no one has yet raised objection to dispatching the cross-dressing lady, Ian Bradley tells us:

Even within Gilbert's lifetime there ceased to be anything either singular or anomalous about the lady novelist (if indeed there ever had been), and for Edwardian revivals he variously substituted "the critic dramatist," "the scorching bicyclist" and "the scorching motorist." Throughout the 1920s and the 1930s Sir Henry Lytton sang of "that singular anomaly, the prohibitionist," while in 1942 it became "the clothing rationist."<sup>16</sup>

However, published librettos remained faithful to the original text with respect to these verses, unlike the cases of "painted with vigour" and "the banjo serenader."<sup>17</sup> In any case, Mackerras apparently decided that even the modified verse was still offensive, and he simply omitted it. Whatever one might say about the purported authority for A. P. Herbert's changes, there is no evidence whatsoever that Gilbert would have acquiesced to Mackerras's excision of Ko-Ko's second verse, much less his deletion of the whole of the dialogue.

Given these cuts, it is quite interesting that the authors of the *Penguin Guide* lavished such praise on Mackerras's performance. They are usually quite finicky in their demands for textual authenticity and completeness. For example, they praise Mackerras on another occasion for

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.* at 324-25.

offering the complete original version of Leos Janáček's *Glagolitic Mass*,<sup>18</sup> and they commend Claudio Abbado for recording Schubert's original melody in the slow movement of the Great C major symphony, not the familiar version resulting from editorial changes by Johannes Brahms.<sup>19</sup> Even more to the point, they award a rosette to John McGlinn for "faithfully following the original score" of Kern and Hammerstein's *Showboat*, a score whose lyrics can surely raise hackles as great as anything found in *The Mikado*.<sup>20</sup> Finally, the authors of the *Penguin Guide* downgrade many performances for employing cuts, even those of long standing or ones sanctioned by the composer.<sup>21</sup> Indeed, sometimes they criticize performances for failing to observe repeats.<sup>22</sup>

Given their scruples in these cases, what best explains the authors' award of a rosette, their highest honor, to Mackerras's version of *The Mikado*? Shouldn't the omission of the dialogue, and the offending verses of Ko-Ko's and *The Mikado*'s arias make the performance less acceptable on grounds of fidelity or authenticity? Of course, this raises the question whether "authenticity"—whether defined in terms of the composer's original intentions, fidelity to the text, or adherence to the conditions of performance when the work was premiered—is a worthy touchstone for judging performances. Perhaps, on the contrary, Mackerras did precisely what a conscientious conductor/performer should do in recording this work for contemporary audiences. Faced with a text that is undeniably offensive by today's standards, the conductor excises or redacts it to produce a rewarding aesthetic experience. In one sense, altering the work may be more faithful to its best qualities. It also increases the chances that an operetta like *The Mikado* will maintain its place within the canon of performed works and therefore carry the fame of Gilbert and Sullivan forward to future generations.

Debates about how to perform *The Mikado* for modern audiences

18 See THE PENGUIN GUIDE, *supra* note 2, at 650.

19 See *id.* at 1125.

20 See *id.* at 658. *Showboat* is, of course, the source of "Old Man River," the song whose lyrics were changed by Paul Robeson. See *supra* note 8.

21 See, e.g., THE PENGUIN GUIDE, *supra* note 2, at 1334 (expressing disappointment at Emil Gilels' performance of Tchaikovsky's Second Piano Concerto because it uses the truncated Siloti edition); IVAN MARCH, ET AL., THE PENGUIN GUIDE TO COMPACT DISCS YEARBOOK 1997/8 329 (1997) [hereinafter YEARBOOK] (downgrading Earl Wild's performance of Rachmaninoff's Piano Concerto no. 3 because of cuts in the text); *id.* at 442 (noting that the "one snag" in the Academy of St. Martin-in-the-Fields' performance of Tchaikovsky's *Souvenir de Florence*, Op. 70, is that "their version has been subjected to some tactful cutting").

22 See, e.g., YEARBOOK, *supra* note 21 at 144 (noting that Cristoph von Dohnányi's performance of Dvořák's *New World* Symphony "should by rights be a first recommendation, but it fails to observe the first-movement exposition repeat").

must seem strangely familiar to lawyers, who are continually worried about fidelity to text, the authority of original intentions, and the problem of interpretation under changed conditions. Yet, all of these problems arise regularly in musical and dramatic performance.

What is surprising, though, is that for many years when law professors searched for analogies between law and art, they looked not to operas and plays for comparisons but to poems and novels. Indeed, the analogy between law and the literary text has been central to the law-as-literature movement from its inception. Both of us have contributed to the development of this analogy,<sup>23</sup> and both of us have learned much from it. Yet every analogy has its limitations, and we think it is time to move on. We believe that the comparison between law and the literary text interpreted by an individual reader is inadequate in important respects. A much better analogy, we think, is to the performing arts—music and drama—and to the collectivities and institutions that are charged with the responsibilities and duties of public performance. In other words, we think it is time to replace the study of law as literature with the more general study of law as a performing art.

Law, like music or drama, is best understood as performance—the acting out of texts rather than the texts themselves. The American Legal Realists distinguished “law on the books” from “law in action.”<sup>24</sup> Our claim takes this distinction one step further: “Laws on the books”—that is, legal texts—by themselves do not constitute the social practice of law, just as music on a page does not constitute the social practice of music. Law and music require transforming the ink on the page into the enacted behavior of others. In an important sense, there is *only* “law (or music, or drama) in action,” in contrast to poetry or fiction, whose texts do not require public performance but can be read silently to one’s self. Like music and drama, law takes place before an audience to whom the interpreter owes special responsibilities. Legal, musical, and dramatic interpreters must persuade others that the conception of the work put before them is, in some sense, authoritative. And whether or not their performances do persuade, they have effects on the audience.

For this reason, the best examples of legal performers are not law professors, but persons at the cusp of decision, who must determine—often under highly imperfect circumstances—how a text should be given concrete meaning in the social context before them. That context

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<sup>23</sup> See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743 (1987); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

<sup>24</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 35 (1910); see also Karl Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COL. L. REV. 431, 435 n.3 (1930) (reiterating the distinction while criticizing Pound’s conception).

concrete meaning in the social context before them. That context must include the political and institutional constraints of the moment as well as the capacities of the other performers in the legal system. Most judges, like most directors, are not blessed with all-star casts of Callases and Oliviers guaranteed to give thoughtful and inspired performances, or with subtle and sophisticated audiences, eager to receive the latest and most daring interpretations. Like actors and directors, judges must take into account the interpretive abilities and predilections of others. Judicial performances depend on further performances by lower court judges and executive officials. The efficacy of their work often depends on acceptance by others: not only by other government officials, but by the people as a whole. The wise judge, like the wise director, understands the limitations and the interests of her co-performers and her audience and tailors her interpretations accordingly. Characterizing law as a performing art emphasizes something that tends to be neglected in comparisons between law and literature—the “audience” for legal performance. Like other performing arts, legal performance is more than the interpretation of a text by a performer: it involves a triangle of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances.

Audiences are important for two reasons. First, audiences create special responsibilities for performers. Because performing a work affects an audience, performers are responsible for what they choose to perform and how they choose to perform it. Second, audiences play an important although often unacknowledged role in creating the conditions for authentic or faithful performance. Performances exist in traditions and institutions of performance that set standards for what kinds of performances are judged faithful or authentic. Judgments about faithfulness and authenticity, in turn, occur against the backdrop of the many different communities that help shape the tradition, including the audience of fellow performers and laypersons. Standards of faithful or authentic performance are social and evolve over time. They result from negotiation and struggle between performers and these various audiences. This is no less true in law than in music and drama.

In this Article, we discuss law’s status as a performing art by asking how the problem of performing offensive texts is similar to the problem of interpreting and enforcing unjust laws. We argue that these similarities arise from the fact that both are problems of performance, even though we also argue that the two problems differ in many important respects. The triangular relationship between creator, performer, and audience produces a limited set of available options when a performer is faced with a work that would be artistically offensive or le-

gally unjust to perform. Describing these options gives us a deeper and richer understanding of what it means to say that legal interpretation is a kind of performance and that law is a performing art.<sup>25</sup>

### I. THE RESPONSIBILITIES OF PERFORMANCE

As our example of Gilbert and Sullivan suggests, one of the best ways to understand the responsibilities of performance is through the problem of offensive texts. In important ways, the decision about whether and how to perform an offensive text raises difficulties similar to interpreting and enforcing an unjust law. Although the problems of offensiveness and injustice are distinct, they do share one similarity. Both create a problem of conflicting responsibilities for the performer—responsibilities to the work being performed, responsibilities to the performer’s sense of artistic (or legal) integrity, responsibilities to her conception of faithful performance, and responsibilities to the people who will be affected by what the performer does. The quality of a performance often depends on how well the performer harmonizes these conflicting demands.

Consider, for example, a twentieth-century hymn written by Sydney Carter, entitled “Lord of the Dance.”<sup>26</sup> The words are set to the lovely Shaker tune “Simple Gifts,”<sup>27</sup> best known to many through its appearance in Aaron Copland’s ballet *Appalachian Spring*. The lyrics are as follows:

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25 In previous work we have discussed the similarities between legal performance and the performance of musical scores, including questions about “wrong” notes in the score, repeats, harmony, choice of instrumentation, pitch, practices of instrumental performance, and related matters. See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1598-1601, 1615-26 (1991). Because our concern in this Article is offensiveness, we focus primarily on musical lyrics and dramatic performance. Although certain melodies can offend certain audiences because they have achieved particular cultural connotations (for example, music associated with Nazi Germany), lyrics usually create the greatest problems.

26 See HYMNS FOR TODAY No. 42 (1983).

27 See 3B THE HYMNAL COMPANION 1982 1027-29 (Raymond F. Glover ed., 1994) for the history of the song. The original lyrics of “Simple Gifts” are set out in EDWARD D. ANDREWS, THE GIFT TO BE SIMPLE: SONGS, DANCES AND RITUALS OF THE AMERICAN SHAKERS 136 (1940):

‘Tis the gift to be simple, ‘tis the gift to be free,  
 ‘Tis the gift to come down where we ought to be,  
 And when we find ourselves in the place just right,  
 ‘Twill be in the valley of love and delight.  
 When true simplicity is gain’d,  
 To bow and to bend we shan’t be asham’d,  
 To turn, turn will be our delight  
 ‘Till by turning, turning we come round right.

We are grateful to David Hunter for providing us the sources quoted in this footnote and in the text immediately following.



1. I danced in the morning when the world was begun,  
And I danced in the moon and the stars and the sun,  
And I came down from heaven and I danced on the earth;  
At Bethlehem I had my birth.

Refrain:

Dance then wherever you may be;  
I am the Lord of the Dance, said he,  
And I'll lead you all, wherever you may be,  
and I'll lead you all in the dance said he.

2. I danced for the scribe and the pharisee,  
But they would not dance and they wouldn't follow me;  
I danced for the fisherman, for James and John;  
They came with me and the dance went on:  
Refrain

3. I danced on the Sabbath and I cured the lame:  
The holy people said it was a shame.  
They whipped and they stripped and they hung me high,  
And they left me there on a cross to die:  
Refrain

4. They cut me down and I leap up high;  
I am the life that'll never, never die;  
I live in you if you'll live in me:  
I am the Lord of the Dance, said he.<sup>28</sup>

Although the music is lovely, the lyrics are troublesome. The third verse recites the old anti-Semitic accusation that the Jews are Christ-killers. The descriptions in this verse have a long and unfortunate history. Recurrent portrayals of “the holy people . . . whipp[ing] and . . . stripp[ing] and . . . h[anging Jesus] high” go back as far as the Gospels, especially the Gospel according to St. John, the one most overtly hostile to Judaism. As the Catholic Church has recently acknowledged,<sup>29</sup> these religiously sanctioned depictions of Jews and Judaism were major contributing factors to the pervasive anti-Semitism that resulted in a history of discrimination, pogroms, and eventually the Holocaust. Similar problems haunt many other musical works, the most famous of which is

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<sup>28</sup> HYMNS FOR TODAY No. 42 *supra* note 26.

<sup>29</sup> See *The Vatican and the Holocaust: Solemn Words Offered by the Vatican: A Call to Penitence*, N.Y. TIMES, Mar. 17, 1998, at A10 (announcing the Second Vatican Council's rejection of interpretations of the New Testament which engender feelings of hostility toward Jews for their alleged culpability in the crucifixion of Christ).

probably Bach's *St. John Passion*.<sup>30</sup>

More important for our purposes, however, is that "Lord of the Dance" is not simply a text that one reads to one's self, but a song to be performed in front of an audience. "Performance" encompasses many different kinds of activities. A song can be performed before a secular audience, or as part of a religious service. It can be performed live or recorded for future performance. These recordings, in turn, can be played on a home stereo system or they can be broadcast to large numbers of people. In fact, Levinson first became aware of "Lord of the Dance" while listening to his favorite Austin radio station, a public radio station operated by the University of Texas that plays an important role in shaping local culture. People who decide to sing the song before a live audience, perform it in a religious ceremony, record it for mass consumption, or broadcast it to the public, are in a somewhat different position than people who simply read the text silently to themselves. Because performers are inevitably associated with what they choose to perform, questions naturally arise about not only how to perform a particular work, but whether to perform it at all.

Moreover, performances usually exist within traditions and institutions of performance. "Lord of the Dance" is not just a song, it is also a religious hymn. In 1996 the General Conference Hymnal Oversight Committee of the Society of Friends decided to include the "Lord of the Dance" in its newly revised hymnal. The decision did not go unnoticed; it caused a remarkable debate in the pages of *The Friends Journal*.<sup>31</sup> One anguished Quaker wrote a letter decrying the song as "anti-Semitic" and concluding that "[i]t is a sacrilege that 'The Lord of the Dance' has been included in *Songs of the Spirit* and other Quaker song books. It will be a continuing disgrace and a sin for the Religious Society of Friends to continue to disseminate this song."<sup>32</sup> Whatever might be said about reading anti-Semitic lyrics silently to one's self, the protester recognized that the Society of Friends took on additional responsibilities when it authorized public performances as part of its canon of officially approved materials.

The members of the Hymnal Oversight Committee understood that the song might be controversial. They had contacted the author, Sydney Carter, and "engaged in discussions with [him] about his song," but Mr.

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30 J.S. BACH, *ST. JOHN PASSION*, (John Eliot Gardiner cond. DG Archive 1986) [hereinafter GARDINER'S *ST. JOHN PASSION*].

31 See, e.g., *Friends Journal*, May 1997, at 6; *Friends Journal*, Mar. 1997, at 5; *Friends Journal*, Sept. 1996, at 5.

32 *Friends Journal*, Sept. 1996, at 5 (letter of Joseph W. Letson). We are grateful to Professor Larry Ingle, of the University of Tennessee—Chatanooga, for bringing this exchange to our attention.

Carter refused to alter the words.<sup>33</sup> Even so, the Committee might have authorized a redacted version for the hymnal despite Mr. Carter's objections. For example, the committee could have replaced the words "the holy people" with "the faithless people" or even "the unbelievers." Apparently, however, it judged that this was unwise, either out of respect for the author's creative authority, fear of copyright infringement, or because the Committee felt it lacked the institutional authority to require redaction. Instead, the members of the Committee chose another strategy. It denied that the lyrics, properly understood, were anti-Semitic at all. The Committee added a footnote in the hymnal stating that the expression "'They' refers to the authorities responsible for the crucifixion, mainly the Romans."<sup>34</sup> In addition, "[a] historical note further clarifies 'the ambiguous 'they'" and notes the different parties involved: the Pharisees, the Romans, the Sanhedrin, and the Sadducees."<sup>35</sup>

Not everyone in the Quaker community was persuaded, judging by other letters sent to *The Friends Journal*. David Rush wrote the editors that "[n]o one in the world would mistake the Romans for the 'holy people.'"<sup>36</sup> Of course, the Hymnal Oversight Committee might have meant that the word "they" appearing after the words "the holy people" did not refer to the holy people but to a different group of persons. If so, it is not a very persuasive reading; it is hard to see who else the "they" could refer to. Another letter, from Paul Thompson, took a different approach in defense of the lyrics: he argued that "Jesus' first followers were Jewish. So were his opponents. The latter came from the hereditary and professional priesthood, etc."<sup>37</sup> Thus, he argued, "[a]ny attempt by anyone to read more into the phrase 'the Holy People' in Carter's song 'Lord of the Dance' than that is ludicrous, even paranoid. Any attempt to cast the composer as anti-Semitic is unjustifiable."<sup>38</sup> Accusations of paranoia, of course, depend on the plausibility of the "reasonable" alternative. Most specialists in American constitutional law remember the Supreme Court's famous dismissal of the claim that "enforced separation of the two races stamps the colored race with a badge of inferiority" in the 1896 case of *Plessy v. Ferguson*.<sup>39</sup> Justice Brown argued that the suggestion was preposterous: "If this be so, it is not by reason of anything found in the act, but solely because the [para-

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<sup>33</sup> *Id.* at 5-6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Friends Journal*, Mar. 1997, at 5 (letter of David Rush).

<sup>37</sup> *Friends Journal*, May 1997, at 6 (letter of Paul Thompson).

<sup>38</sup> *Id.*

<sup>39</sup> 163 U.S. 537, 551 (1896).

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noid?] colored race chooses to put that construction upon it.”<sup>40</sup>

Whether one agrees with the Hymnal Oversight Committee or its critics, both sides accepted that performance of a text before an audience carries distinctive responsibilities for interpreters. The question was not what was the “best” interpretation of the text in the abstract, but what the text should fairly be read to mean given the institutional context of performance and the social consequences of performing it. The two sides simply disagreed over whether the responsibilities of performance had been met.

Nevertheless, it is interesting to compare the controversy over “Lord of the Dance” with the D’Oyly Carte Opera Company’s decision to alter the “official” lyrics of *The Mikado*. Responding to the outcry from American audiences, the D’Oyly Carte Company, which had carried on the tradition of performing the operettas for decades, felt completely assured in emending Gilbert’s original libretto. Rupert D’Oyly Carte even argued that he was only doing what Gilbert himself would have wanted.<sup>41</sup> Perhaps D’Oyly Carte was practicing an altogether justifiable principle of charity in interpretation: he assumed that Gilbert was a man of his times; the original lyrics manifested mere parochialism rather than conscious malevolence. Surely, it might be argued, a decent person would change a lyric when its offensiveness was brought to his attention, and if the person in question is dead one ought to act on this assumption in the interests of charity. Indeed, if Gilbert were alive today, he would probably never have written such racist lyrics in the first place. In this sense, D’Oyly Carte was more fortunate than the Hymnal Oversight Committee of the Society of Friends, who were able to ask Sydney Carter if he would mind changing his lyrics to “Lord of the Dance” and were met with a firm refusal.

The problem of responsibility for performing offensive lyrics applies equally to “popular” and “high” culture. It is not difficult to find lyrics in popular music—whether rock and roll, blues, or rap music—that are sexist or express reprehensible sentiments. But the problem of offensive lyrics also appears in icons of high culture. Consider, as an example, Johann Sebastian Bach’s *St. John Passion*, which provides a high-culture contrast to the more folksy strains of “Lord of the Dance.” Bach includes a dialogue between Pontius Pilate and “The Jews” in which they repeatedly ask Pilate to crucify Jesus, even though Pilate suggests to them that Jesus is entirely blameless.<sup>42</sup> Bach’s vivid music

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<sup>40</sup> *Id.*

<sup>41</sup> See *supra* notes 12-13 and accompanying text.

<sup>42</sup> The text that Bach set reads as follows in English:  
*Pilate*: What charge do you bring against this man?

shows the crowd in a frenzy as they demand Jesus's death. Bach, of course, was not making this up out of whole cloth. He took his libretto fairly directly from the Gospel according to St. John. John's gospel is the most hostile to Judaism largely because it was written at a time of open conflict between the fledgling Christian church and the Rabbinical Judaism with which it competed.<sup>43</sup>

The offensiveness of Bach's text is not apparent to non-German speaking listeners. Yet, it is clear that Bach did not write his Mass to provide a pleasant aesthetic experience to secular music-lovers. He wanted to convey the glory of God and to generate appropriate devotion in his audience. Moreover, Bach, like most contemporary religionists,

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*Evangelist:* They replied:

*Chorus:* If he were not a criminal we would not have brought him before you.

*Pilate:* Take him away and try him by your own law.

*Evangelist:* The Jews answered:

*Chorus:* We are not allowed to put any man to death.

*Liner Notes* to GARDINER'S ST. JOHN PASSION, *supra* note 30, at 44.

Pilate then addresses Jesus.

*Pilate:* Your own nation and their chief priests have brought you before me. What have you done?

*Evangelist:* Jesus replied:

*Jesus:* My Kingdom does not belong to this world. If it did, my followers would be fighting to save me from arrest by the Jews. My kingly authority comes from elsewhere.

*Id.* at 46. Pilate then addresses the Jews, who demand that he release Barabbas instead of Jesus. Jesus is scourged and beaten, and Pilate pleads with the Jews again:

*Pilate:* Here he is: I am bringing him out to you to let you know that I find no case against him.

....

*Evangelist:* The chief priests and their henchmen saw him and shouted:

*Chorus:* Crucify! Crucify!

....

*Pilate:* Take him and crucify him yourselves; for my part I find no case against him.

*Evangelist:* The Jews answered.

*Chorus:* We have a law; and by that law he ought to die, because he has claimed to be Son of God.

....

*Evangelist:* From that moment Pilate tried hard to release him.

....

*Evangelist:* But the Jews kept shouting:

*Chorus:* If you let this man go, you are no friend to Caesar; any man who claims to be a king is defying Caesar.

....

*Evangelist:* Pilate said to the Jews:

*Pilate:* Here is your king.

*Evangelist:* They shouted:

*Chorus:* Away with him! Crucify him!

*Id.* at 52-58.

<sup>43</sup> On John's hostility toward the Jews, see ELAINE PAGELS, *THE ORIGIN OF SATAN* 98-111 (1995).

presumably believed that religious art helped to make better, more moral and more devoted people.

To sharpen the issue, then, consider Benjamin Britten's well-known English version of Bach's *St. John Passion*, recorded with the English Chamber Orchestra on Decca.<sup>44</sup> Britten was hardly afraid to confront issues of justice and injustice in his music. Think only of his magnificent *War Requiem*, not to mention his operas *Billy Budd* and *Peter Grimes*. For his recording of the *St. John Passion*, Britten used a translation by Peter Pears and Imogen Holst, which, according to the accompanying liner notes, "had the enormous advantage of having been tested and revised through many performances."<sup>45</sup> It "was intended to preserve as much as possible of the dramatic impact of the original for English speaking audiences."<sup>46</sup> Apparently, this "dramatic impact" includes evoking the anti-Semitic elements of the story, which attempt to recreate in the audience both horror at Jesus's death and antipathy towards the hypocritical mob of Jews. The difficult and touchy question—which apparently did not occur to the translators in their many testings and revisions—is whether this dramatic impact can be preserved for an English-speaking audience without engaging in group libel, especially given Britten's knowledge, unavailable to Bach, of the cumulative consequences of such libel in the twentieth century. Interestingly, the authors of the *Penguin Guide* also awarded this recording three stars and a rosette, speaking admiringly of its excellence as a performance.<sup>47</sup> How can this be reconciled with their equal admiration of Mackerras, who deliberately redacted "unpalatable" lyrics from *The Mikado*?

In his study of Bach's *St. John Passion* and its relation to anti-Semitism, Michael Marissen argues that the matter is more complicated than it first appears.<sup>48</sup> Bach set Martin Luther's translation of the Gospel of St. John interspersed "with other writers' extensive poetic commentaries on it in the forms of chorales and arias."<sup>49</sup> "Bach's setting," Marissen argues, "serves to amplify and deepen the verbal messages of the libretto and, at times, to suggest different meanings for the words

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44 J.S. BACH, *ST. JOHN PASSION* (Benjamin Britten cond., London Decca 1995) (recorded 1972).

45 *Liner Notes* to *id.* at 7.

46 *Id.*

47 See THE PENGUIN GUIDE, *supra* note 2, at 78.

48 See MICHAEL MARISSSEN, LUTHERANISM, ANTI-JUDAISM, AND BACH'S *ST. JOHN PASSION* 7 (1998).

49 *Id.* at 8. There are actually several different surviving versions of the libretto, but only one of these is usually performed. *Id.* at 8 n.11.

than they might have if they were simply read.”<sup>50</sup>

In Marissen’s view, Bach’s setting emphasizes two ideas in Lutheran theology. First, all human beings, not simply the Jews or Judas Iscariot, are responsible for Christ’s crucifixion. Second, the Crucifixion was a predestined part of God’s plan.<sup>51</sup> “The symmetry of choruses sung by the Roman soldiers and the Jewish groups,” Marissen suggests, “might better be understood to give formal expression to a Lutheran notion of the inevitability of Jesus’ crucifixion.”<sup>52</sup> At the same time, Bach’s chorales undermine the anti-Semitic elements of the text, because they emphasize that all human beings are sinners, and thus all are responsible for Jesus’s death.<sup>53</sup> Indeed, if there is a hierarchy of guilt in Bach’s *St. John Passion*, Marissen suggests, the least guilty are the Romans, the next most guilty are the Jews, and the most guilty are Protestant Christians, since Bach’s chorales reproach contemporary Christians for Jesus’s crucifixion.<sup>54</sup> Finally, Marissen contrasts Bach’s approach with an earlier setting of the *Passion* by Brockes, which features even more textual condemnations of the Jews.<sup>55</sup>

Marissen acknowledges that, even if Bach’s work is understood as a musical exemplification of Lutheran theology, it does not remove all charges of insensitivity to Jews.<sup>56</sup> However, “Bach’s music . . . [is] at least a step in the right direction.”<sup>57</sup> The difficulty, though, arises in how to perform the work. Because the meaning of the *Passion* is “far from straightforward for the majority of today’s listeners,” Marissen suggests, it might be “irresponsible” to perform it “without an accurate translation and informed program notes or spoken commentary and discussion of some sort.”<sup>58</sup> Although performers do not endorse the messages conveyed in the *Passion*, “the messages should not be overlooked,” and “performances ought to include critical commentary.”<sup>59</sup> Marissen warns that those in charge of performing the work should carefully consider whether “students are intellectually and emotionally prepared to perform in concert, as opposed to study only via recordings, challenging works of this sort.”<sup>60</sup> Indeed, the risk of misinterpretation is apparently so great that if the work cannot be performed with critical

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<sup>50</sup> *Id.* at 8.

<sup>51</sup> *See id.* at 25-27, 33.

<sup>52</sup> *Id.* at 33.

<sup>53</sup> *See id.* at 34-35.

<sup>54</sup> *See id.* at 35, 47 n.21.

<sup>55</sup> *See id.* at 28-30, 47 n.21.

<sup>56</sup> *See id.* at 36.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 6.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

commentary and discussion afterwards, Marissen suggests that “any passages easily running the risk of giving serious offence might be carefully excised or altered but acknowledged as such in the program in order to avoid accusations of censorship.”<sup>61</sup> However, Marissen concludes, “[t]he best approach [based on] conviction and personal experience . . . is not to alter the work but to provide critical commentary.”<sup>62</sup>

One wonders if Marissen would take the same approach with performances of *The Mikado*, or whether he would accept (or insist on) redaction. Perhaps the cases are different in two respects. First, while Marissen holds that the *St. John Passion* is less anti-Semitic than it seems, *The Mikado* really is racist. Second, while scholarly commentary and discussion before and after might adequately enlighten an audience attending a performance of Bach’s *St. John Passion*, this sort of seriousness seems out of place in performing a comic operetta designed to produce laughter and high spirits.

Liturgical performances present more difficult problems for Marissen, because often “the congregation does accept all or most of the liturgy’s passages.”<sup>63</sup> However, liturgical performances of a two hour composition “are exceedingly rare,”<sup>64</sup> and, in any case “fuller contextual commentary on the passion narrative will almost certainly happen as a matter of course (in the pastor’s sermon).”<sup>65</sup> But if no commentary is offered, does that mean the text should be redacted in a liturgical rendition? And how should one deal with a brief hymn like “Lord of the Dance,” which is easily performed at services? Should the pastor (or equivalent leader) require discussion and commentary every time it is performed? Should conspicuous performance notes appear in the hymnal? Or is redaction the proper solution?

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* Even so, Marissen realizes that there can be further objections:

I do not claim . . . to have any sense of . . . the right thing to do for listeners for whom no amount of contextual understanding of Bach’s particular interpretation of John will prevent the gospel from being construed against the Jewish people any less forcefully now than ever. Granting that historians, theologians, and musicologists often have a startlingly naive optimism about the ability of scholarship to mediate in conflicts of opinion or belief, I have come to the conclusion that it would be better to engage the issues critically than to say nothing or to make vain pleas for an end to the performance of Bach’s music and the proclamation of John’s gospel.

*Id.* at 7.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



## II. LAW, MUSIC, AND THE TRIANGLE OF PERFORMANCE

These issues should sound familiar to lawyers who have sparred over the proper interpretation of legal texts, who have fought over the authority of original intention, or who have debated the possibility, or desirability, of separating legal from moral reasoning. We argued several years ago that lawyers could learn something about their own practices from looking at performing arts like music and drama.<sup>66</sup> Part of our argument was that, having mined much of what there is to learn from the analogy of “law-as-literature,” more illumination lies in thinking about “law-as-a-performance-art.”

Every analogy is imperfect (including the one we propose in this Article). Each illuminates certain aspects of the thing to be explained while making others less salient. Nevertheless, we think that the analogy to the performing arts is superior to the analogy to poetry or novels. The analogy of law to literature tends to hide three important features of legal practice.

First, legal practice features a triangular relationship between the institutions that create law, the institutions that interpret law, and the persons affected by the interpretation. Although the law-maker and the law interpreter can be one—as in the case of common law judges—the two categories are analytically distinct. Indeed, in the contemporary administrative and regulatory state, judges spend much of their time interpreting the statutes and regulations made by others. In the performing arts, there is also a triangular relationship between the creator of the text, the performer, and the audience. Reading a poem or novel to one’s self tends to disguise this triangular relationship, because the role of interpreter and audience are merged into one. For this reason, many of us think of reading literature as a “private” experience, in which we curl up in our study with the book or poem in question and try to enter into the imaginative world created by the author. Music, and drama, by contrast, seem more overtly “public.”

To be sure, the distinction between “public” and “private” can easily be problematized and even deconstructed. Readers of poetry may seem isolated, but they live within a complex social world of language, shared values, common expectations, publishing distribution networks, and the like. Moreover, literary figures sometimes read their poetry, short stories, and novels aloud in front of audiences, and so become performance artists. Conversely, people can play music in the privacy of their own homes, just as a group of friends can read a play aloud for their own amusement. Nevertheless, the triangular relationship between

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<sup>66</sup> See Levinson & Balkin, *supra* note 25, at 1606-09, 1613-14.

the text, performer, and audience is more salient in music and drama than in the interpretation of poetry or novels. This salience makes the analogy to music and drama especially valuable.

Second, the social practice of law involves not only texts but the enforcement and implementation of these texts in practice. Indeed, some of the legal realists, influenced by John Chipman Gray, argued that legal texts were not law but only sources of law.<sup>67</sup> In this respect music and drama provide a particularly apt analogy. Though both involve texts, whether scores or scripts, these texts need to be brought to life through action. A Beethoven symphony is more than a set of marks on a page; its score is merely a set of directions for performance. Moreover, in order to be realized, music and drama usually require the coordinated efforts of many different individuals. Often performance occurs under the explicit leadership of a conductor or director, who tries to instantiate an interpretation of the work in the actions of the orchestra or cast of the play.

Third, legal interpretation—which includes adjudication, enforcement, and offering legal advice—is a social activity that shapes, directs, and normalizes the thought and behavior of others. Legal interpretation affects its “audience”: it does things with them and to them. Hence, performance always brings with it special responsibilities to the audience.<sup>68</sup>

The analogy of law to literature tends to underemphasize the responsibility that the legal actor or interpreter bears to the audience affected by what he or she does. These performative aspects are not wholly absent when people read poems or novels to themselves, but they are less obvious. Surely people who read poetry to themselves are affected by what they read; as a result people may well have ethical responsibilities to themselves when they choose to read and interpret literature. (Consider the debate about whether one should even read pornographic literature, let alone sell it or distribute it.) Yet, here again, the model of literature and poetry seems to merge the roles of interpreter and audience into one, whereas the great advantage of the analogy to the performing arts is that these roles are more clearly separated.<sup>69</sup> This

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<sup>67</sup> See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 124-25 (2d ed. 1921) (1909); see also JAMES LANDIS, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213 (1934); Harlan F. Stone, *The Common Law in the United States*, 50 *HARV. L. REV.* 4, 13 (1936) (“[N]o adequate reason [exists] for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning.”).

<sup>68</sup> Lawyers who represent clients perform law before at least two different audiences—the clients they advise and the legal officials whose behavior they are trying to predict.

<sup>69</sup> Perhaps the closest analogy to the performing artist is the literary critic whose criticisms

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separation is important precisely because the performer's interpretations can have effects on others for which the performer can be held morally if not legally responsible.<sup>70</sup>

Our point is well illustrated by a conversation one of us had with a very prominent, theoretically sophisticated, American constitutional scholar about the political problems of performing *The Mikado* and the choices that Mackerras made in his 1992 recording. The constitutional scholar rejected the idea of redaction as a solution. Indeed, he would *insist* on purchasing a CD that contained the original version of the opera to listen to in his own home. When asked if he would be willing to perform *The Mikado* in its original version, he quickly responded, "Of course not." He explained that he would feel "responsible" for the use of the racist lyrics in a public performance, whereas no such responsibility attached to listening to them in the privacy of his own study. Nothing better confirms the intuitive, albeit undertheorized, distinction between "private" consumption through reading or listening, and participating in public performance, with its attendant responsibilities to an audience. Indeed, we wonder if this scholar, well-known as a man of the left and a critic of the public-private distinction, would even feel comfortable being observed walking into a concert hall advertising an "authentic" production of *The Mikado* (especially if the entrance involved crossing the almost inevitable picket line to do so). The public performer (and the public listener) face a situation quite different than the phenomenologically isolated consumer of cultural objects. Tending one's own garden is quite different from putting one's flowers into the stream of (cultural) commerce.

Nevertheless, we should not ignore important differences between

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are read by others.

<sup>70</sup> Consider the dilemma facing an actor about whether she should perform in a production of the Marquis De Sade's *Justine*, or in a production of *The Merchant of Venice* that the actor believes underscores its anti-Semitism.

We should emphasize that performers are not the only persons in the triangle of performance with responsibilities. Audiences also have responsibilities to interpret works charitably and to exercise tolerance even in the face of works they find offensive. Nevertheless, an audience's responsibilities to exercise tolerance in the face of offensive plays or lyrics do not extinguish the corresponding responsibilities of performers. We may expect audiences to tolerate offensive performances or to develop thicker skins because we want people to develop habits of tolerance that are necessary for a robust public sphere of discourse, or for a healthy civil society. However, being tolerant in this way does not mean that performers are acting properly or that their performances are not offensive.

To be sure, some performers may deliberately wish to offend audiences in order to shock them out of habitual modes of thought, thinking that this will improve them or expand their views about the world. Such performers may even believe that they have a responsibility to offend their audiences by exposing them to new ideas. However, it is hard to understand performances of *The Mikado*, or, for that matter, "Lord of the Dance" at a Quaker meeting, as involving this sort of deliberate avant-gardism.

legal, musical, and dramatic performances. Conductors do more than produce different interpretations of a score. Often they refuse to follow clear textual commands, for example, directions in the score to repeat a certain section or to play at a certain metronome marking. Stage directors are even more liberal in their revisions. For example, almost no one—including the Royal Shakespeare Company—performs the entire text of *King Lear*. Apparently excising verses from one of the greatest plays in the English language is not per se illegitimate.

Lawyers and judges, on the other hand, normally are estopped from forthrightly stating that they will choose to regard a given patch of legal text as no longer authoritative, unless, of course, it has been held unconstitutional or, if part of the Constitution itself, it has been repealed by later amendment. Instead, legal interpreters usually evade the force of a particular text by reading it narrowly or in novel ways. But in a deeper sense the similarity remains, for both redaction and interpretation are ways to “perform” a work of art or a body of law. A conductor like Mackerras performs *The Mikado* by leaving out Ko-Ko’s second verse and all of Gilbert’s dialogue. A jurist like Justice Miller in *The Slaughter-House Cases*<sup>71</sup> “performs” the United States Constitution by reading the Privileges and Immunities Clause of the Fourteenth Amendment<sup>72</sup> so narrowly that it has no legal importance and can safely be ignored in future litigation and legal discussions.<sup>73</sup> This is not editing or redaction in a technical sense, but is so in a practical sense. It is likely that significant parts of the Constitution have, as a practical matter, been read out of existence by subsequent judicial interpretations.<sup>74</sup> In addition to the Privileges and Immunities Clause, the most obvious examples would be the Second Amendment<sup>75</sup> and the Republican Form of Government Clause.<sup>76</sup> Few practicing lawyers or court-oriented academics worry much about these textual patches, given their practical irrelevance as part of court-oriented legal argument.<sup>77</sup> Though the lan-

71 83 U.S. (16 Wall.) 36 (1872).

72 U.S. CONST. amend. XIV, § 1.

73 *But see* Saenz v. Roe, No. 98-97, 1999 U.S. LEXIS 3174 (U.S. May 17, 1999), (holding that the Privileges and Immunities Clause protects the right to travel and forbids unequal degrees of state citizenship).

74 Judges’ ability to redact through interpretation is only an instance of a more general feature of legal precedent: judicial doctrine is important precisely because it directs lawyers’ attention to judicial decisions and away from either the text or the original understandings behind the text.

75 U.S. CONST. amend. II.

76 U.S. CONST. art. IV, § 4.

77 There are, of course, exceptions. See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 (1989) (“To put it mildly, the Second Amendment is not at the forefront of constitutional discussion.”).

guage itself obviously remains part of the text of Constitution, it is almost never used in ordinary legal argument or taught to aspiring law students as doctrinally significant.<sup>78</sup>

It is tempting but incorrect to argue that the difference between legal interpretation and musical or dramatic redaction lies in the fact that the language of the Privileges and Immunities Clause remains in the Constitution, while Ko-Ko's second verse has actually been removed from *The Mikado*. This argument confuses musical texts with performances of music; it also confuses legal texts (and sources of law) with performances of law. Mackerras' performance does not change the text of *The Mikado*. That text remains as it was before his performance. His performance is simply one that omits parts of that text, although if he is successful and influential, a tradition of performance may arise that routinely adopts similar cuts. Likewise, an interpretation of the Privileges and Immunities Clause that reads it out of practical existence does not alter the text of the Constitution as a source of law; it merely produces an interpretation that has the force of law and itself becomes a source of law. The textual provisions of the Privileges and Immunities Clause lay dormant to be discovered and used by future judges willing to overrule *The Slaughter-House Cases*.<sup>79</sup> In the same way the original text of Gilbert's libretto lies available for use by a future conductor mounting a future production.<sup>80</sup>

Just as performers can redact lyrics that they find unpalatable, they can also add things to a performance that may become part of the tradition of performance, although they do not appear in the script or score. *The Mikado* is an excellent example. Over the years any number of lines and bits of physical horseplay have been added to the libretto,

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<sup>78</sup> These are not the only such examples. The post-New Deal Constitution gave diminished vitality to the Contract Clauses of Article I of the Constitution. U.S. CONST. art. I, §§ 9, 10. Before the New Deal, these had served as important constitutional protections of private property. Similarly, the Tenth Amendment, with its reminder that the powers of the national government are delegated, and thus limited, was dismissed as a basically irrelevant "truism," without genuine performative import, in the heady days following the New Deal. *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered."). Nevertheless, the Tenth Amendment has enjoyed a revival in the past decade, as conservative judges on the federal bench have tried to promote the values of federalism. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>79</sup> Cf. *Saenz v. Roe*, 98-97, 1999 U.S. LEXIS 3174 (U.S. May 17, 1999) (where the Supreme Court used the Privileges and Immunities Clause to protect the right to travel of newly arrived citizens who receive welfare benefits).

<sup>80</sup> Compare Toscanini's performances of Wagner, in which Toscanini sought to remove the encrustations of previous interpretive tradition and make the music sound afresh. See HAROLD C. SCHOENBERG, *THE GREAT CONDUCTORS* 252-53 (1967).

sometimes with W.S. Gilbert's subsequent blessing, but often without.<sup>81</sup> Analogous examples in judicial practice are too numerous to mention; indeed, in an important sense the doctrine of stare decisis guarantees this. Every new judicial decision adds doctrinal glosses to existing statutes and constitutions.<sup>82</sup> Perhaps one of the most famous examples is *Bolling v. Sharpe*,<sup>83</sup> a companion case to *Brown v. Board of Education*.<sup>84</sup> *Brown* was decided under the Fourteenth Amendment's Equal Protection Clause, but the Fourteenth Amendment applies to the States and not to the Federal Government.<sup>85</sup> In *Bolling*, the United States Supreme Court held that the Due Process Clause of the Fifth Amendment contains an "equal protection component" so that the federal government could not maintain racially segregated schools in the District of Columbia.<sup>86</sup>

The historical practice of courts in the United States prevents clear cut distinctions or equivalencies between interpretations, redactions (or supplementations), and amendments. First, not all redactions or supplementations of the Constitution through interpretation are so profound in scope and effect that we may regard them effectively as amendments to the document. For example, relatively obvious or straightforward interpretations of the constitutional text (assuming we can agree that they are such) probably do not qualify as amendments. The same is probably true of incremental developments of doctrine (again, assuming that we can uncontroversially identify them). There are also interpretations—like the expansion of Congress's power to regulate interstate commerce in *United States v. Darby*<sup>87</sup>—that do seem like amendments. However, although we can identify clear cases on either side, the distinction that separates them is hardly sharp or clear cut.

Second, the question whether interpretations are like redactions or supplementations in musical and dramatic performance depends on the traditions of legal performance, which vary from country to country. For example, courts in the United States apply doctrines of precedent. This means that later courts and inferior courts are bound by the interpretations of prior and superior courts. This makes the situation in

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81 See, e.g., THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 9, at 259, 262, 268, 270, 272, 274, 276, 280, 296, 304, 310, 316, 318, 332-34, 340, 348, 350.

82 See J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911 (1988).

83 347 U.S. 497 (1954).

84 347 U.S. 483 (1954).

85 See *Bolling*, 347 U.S. at 498-99.

86 See *id.* at 499 ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

87 312 U.S. 100 (1941).

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American law different from the traditions that usually apply in dramatic performance. If one director omits some dialogue in her production of *Hamlet*, a later director is free to adopt the redaction or return to the original text. (This assumes that there is, in fact, a single canonical version of the text, which is not quite true for many of Shakespeare's plays).<sup>88</sup>

To be sure, traditions of performance may compel subsequent directors to follow previous emendations as a matter of custom. Think of the accretions in performance of Italian and German opera, for example. However, this simply states our point in another way: the binding effect of previous redactions and supplementations largely depends on the traditions of performance for particular genres and for the particular work in question. Different traditions of legal, musical, and dramatic performance will produce greater or lesser degrees of similarity between interpretations, redactions, and permanent amendments.

Legal interpretation in the United States is distinctive precisely because doctrines of precedent embed redactions and supplementations into constitutional law, and hence into "the Constitution," as broadly understood, even though the constitutional text is not altered. These changes are not necessarily as permanent as amending the text of the Constitution through a two-thirds vote of each house of Congress and the consent of three-quarters of the state legislatures. The doctrine of precedent in the United States is flexible, especially where constitutional precedents are concerned. Later courts can overrule accretions and return to what they understand to be the unadorned meaning of the constitutional text. In any case, it is important to recognize that these features do not flow from the distinctive nature of legal interpretation, but from the parochial features of American legal practice. In legal systems that do not possess similar doctrines of precedent, previous redactions and supplementations may not have the same effect on future performances; indeed, legal systems without firm rules of precedent may have even more in common with performance traditions in music and drama.

### III. AUTHENTICITY AND TRADITIONS OF PERFORMANCE

Musical, dramatic, and legal performers alike continually face the problem of how faithfully to perform a work, and the related question of what faithful performance permits or requires. Setting the boundaries of faithful performance depends on what one is supposed to be faithful to.

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<sup>88</sup> See G. Blakemore Evans, *Shakespeare's Text*, in *THE RIVERSIDE SHAKESPEARE* 55-74 (G. Blakemore Evans ed., 1997).

Does faithful performance of a legal text require that we hew strictly to the intentions of its framers or the plain meaning of the text? Does faithful performance require that we treat all of the authors' intentions and all parts of the text as equally binding on us? Recall that the author of "Lord of the Dance," Sydney Carter, was consulted about the possibility of changing his text and that he refused to allow any changes. Even so, why should this matter? Once the text leaves his hands, should he retain a veto over subsequent performances?<sup>89</sup> Does musical/dramatic/legal interpretation permit or even demand some degree of flexibility and selectivity in textual exegesis? Should later interpreters be bound by the concrete examples of interpretive practice characteristic of a composer's time? Or is it legitimate to translate the more general concerns of the composers/playwrights/Framers in ways that help solve the musical/dramatic/constitutional problems of our own time?<sup>90</sup>

The question of fidelity is central to the authentic performance movement in music, a movement that has greatly influenced the way people now listen to and perform music of the Renaissance, baroque, and classical periods. For authenticists, fidelity means performing ancient music in roughly the same way it would have been performed at the time it was written.<sup>91</sup> Conversely, performances that fail to do this fail as faithful performance. Indeed, the very use of the term "authentic" to describe the performances of this school casts aspersions on rival conceptions. It suggests that earlier performers who used modern instruments and performance practices were not faithful to the scores they performed, because their performances were somehow "inauthentic."

What consequences does a commitment to "authentic" performance have for the performance of offensive texts? Consider another

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<sup>89</sup> Lawyers might respond that copyright stands in the way of revising Carter's song. But this is too clever a response. Long-dead composers or authors (or their estates) may have no legal rights at all. It does not follow, however, that performers have no moral obligations to perform their works faithfully. Surely the absence of copyright restrictions does not mean that performers of Beethoven or Shakespeare bear no aesthetic responsibilities towards authorial intention, while performers of Sydney Carter do. To clarify the issue, then, let us assume away the particular impediment of copyright law. Could a performer who believes that "Lord of the Dance," when excised of the offensive language, is worth preserving and singing as a way of praising the glory of God omit the verses in question or perhaps rewrite them to contain more suitable sentiments? Or would this mean that whatever is being preserved is *not* "Lord of the Dance," but, rather, an inauthentic, faithless, or *faux*-version?

<sup>90</sup> On the idea of constitutional translation, see, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365 (1997); Sanford Levinson, *Translation: Who Needs It?*, 65 *FORDHAM L. REV.* 1457 (1997); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983). On the theory of dynamic interpretation, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

<sup>91</sup> See Nicholas Kenyon, *Authenticity and Early Music: Some Issues and Questions*, in *AUTHENTICITY AND EARLY MUSIC* 6 (Nicholas Kenyon ed., 1988).



piece written for the glory of God, a motet by Antoine Busnoys, recently recorded by the early music group Pomerium.<sup>92</sup> Busnoys, the “‘first singer’ at the court of Charles the Bold, the Duke of Burgundy,”<sup>93</sup> died in 1492, leaving as his legacy some extraordinarily beautiful music. One of the most striking compositions on the CD is the motet *Victime pascali*, described by Alexander Blachly, the director of Pomerium, as “the most adventurous of all his creations.”<sup>94</sup> *Victime pascali* is a setting of traditional Catholic liturgy. It begins, “Let Christians offer praises to the paschal victim.”<sup>95</sup> The key verses ask Mary Magdalene to tell what she saw, to which she answers, “The tomb of the living Christ, the glory of the Resurrected One . . . . Christ our hope has risen and will precede his followers to Galilee.”<sup>96</sup> At this point the liturgy set by Busnoys reads: “*Credendum est magis soli Marie veraci/quam Judeorum turbe fallaci*,” helpfully translated in the album notes as “More trust is to be put in honest Mary alone than in the lying crowd of Jews.”<sup>97</sup> Interestingly, Blachly notes that “[t]his verse has long been abolished from the Catholic liturgy, but,” he insists, “to excise it here would render the piece unperformable. Despite misgivings, we have left the text intact.”<sup>98</sup>

Blachly took a path quite different from Sir Charles Mackerras or, for that matter, Rupert D’Oyly Carte. Where they thought it important to redact W.S. Gilbert’s text for contemporary audiences, Blachly believed it incumbent upon him to present the motet in all of its offensiveness, regardless of the Church’s subsequent recognition of its pernicious aspects.

Blachly’s defense seems to suggest that one simply could not perform the piece without the offending lines. Perhaps this might be true if one excised them while offering nothing in their place. But is this the

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92 See ANTOINE BUSNOYS: *IN HYDRAULIS & OTHER WORKS* (Alexander Blachly dir., Dorian 1983) [hereinafter BLACHLEY’S *IN HYDRAULIS*].

93 RICHARD TARUSKIN, *TEXT AND ACT: ESSAYS ON MUSIC AND PERFORMANCE* 354 (1995).

94 *Album Notes* to BLACHLEY’S *IN HYDRAULIS*, *supra* note 92, at 5.

95 *Id.*

96 *Id.* (internal quotations omitted).

97 *Id.*

98 *Id.* at n.\*. As a matter of fact, most of those contemporary listeners of the CD of Busnoy’s work probably have no idea of the “literal meaning” of what they are listening to, precisely because they do not know Church Latin, and rare indeed would be the performance in a context where supertitles made the audience aware of what, precisely, was being listened to (in a semantic sense). Levinson confesses that, as a “secular Jew,” he often prefers, when attending synagogue, to sing traditional Jewish prayers in Hebrew, which he does not understand, rather than read them in English, precisely because he is then made all too aware of how much he in fact does not agree with the beliefs and doctrines of his religion. It is often easier as well to worship before the altars of High Musical Culture if one does not know the particular languages of the music being performed.

only viable alternative? Reviewing the disc, the musicologist Richard Taruskin, himself an active performer of medieval music (and the editor of some key works of Busnoys), strongly disagreed. One need not eliminate the entire line; it would be sufficient, Taruskin notes, simply to substitute the word “*peccatorum*—‘of sinners’—instead of *Judeorum*.”<sup>99</sup> So revised, the motet would proclaim that Mary is more trustworthy than the lying crowd of sinners. The number of syllables in the two Latin words is the same, and there is no reason to doubt Taruskin’s assumption that the revised version would be eminently “performable.” (This is, of course, precisely what A.P. Herbert did for Gilbert’s lyrics.) Perhaps Blachly simply did not think of this possibility, but no future performer, having read Taruskin (or, for that matter, this Article) can take refuge in that excuse. Hence, if future singers insist on adherence to the original text, it must be for reasons other than technical performance considerations.

Pomerium is part of the authentic performance movement, and so Blachly’s decision may rest on a judgment about what authentic performance requires. Blachly may have believed that fidelity to the musical score requires singing about “the lying crowd of Jews.” A performer has no authority to change the text of a score or a libretto and, indeed, the conductor or director is under an injunction to repeat exactly, or in more legal terms, to “enforce,” what has been written on the page. Perhaps Blachly believed he was also honoring original intention by presuming that composers would desire that their lyrics be performed exactly as written indefinitely into the future. Nevertheless, this may hardly constitute charity in interpretation, and it may wrench the music from its original context of performance. Busnoys’s motet was originally religious music, and not, as it has now become, a source of entertainment for devotees of ancient music in a pervasively secular age. The Catholic Church viewed, and continues to view, its liturgy as performative—as having beneficial effects on its intended audience. If Busnoys was in fact a loyal son of the Church, would he not, at the very least, have acquiesced and even applauded the Church’s later decision to reject the liturgical text he originally set? Is not Blachly *insulting* Busnoys by inferring that he would prefer to be known to twentieth-century audiences as a thoughtless anti-Semite at variance with the Church’s own teachings?

Blachly’s hesitation to innovate might stem from yet another source. Performers often feel comfortable in revising works of art for performance because the performers are part of a tradition of perform-

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<sup>99</sup> TARUSKIN, *supra* note 93, at 357.

ance that connects them with the work of art and, hence, authorizes and empowers their interpretations. Thus, a pianist in the early to mid-twentieth-century could feel connected to the work of Chopin because he or she was immersed in a tradition of romantic performance that extended back for a century, and because he or she was part of a long line of students and teachers organically connected to this tradition. Being part of this tradition gives a performer the freedom and the authority to improvise and innovate within it. Different genres allow different degrees of freedom in revision and alteration, and some make improvisation central to their art.<sup>100</sup> An excellent example is the tradition of performing Gilbert and Sullivan operettas. This tradition has produced many accretions to the libretto and score, and there is a long practice of altering lyrics to make satirical points about contemporary issues.<sup>101</sup> Within such a tradition the argument for rigorous textual fidelity to the original libretto or even to the conditions of original performance becomes much less persuasive. Quite the contrary: no “authentic” Gilbert and Sullivan performance would be complete without a little horsing around on stage.

As the example of *The Mikado* demonstrates, traditional performance practices do not always respect the text as sacrosanct. Over the years the D’Oyly Carte Opera Company and, indeed, many other performers of Gilbert and Sullivan’s operettas, have routinely substituted topical lyrics, altered the order of songs and choruses, and even added new characters to the operettas.<sup>102</sup> One could easily solve the problem of performing Ko-Ko’s list song by rewriting the lyrics in any number of ways, for example:

There’s the unctuous lounge performer and the others of his  
race  
And the ballpark organist, I’ve got him on my list!

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<sup>100</sup> Nevertheless, we should note that even improvisation carries certain limits. Jazz musicians have distinctive styles of authentic improvisation that constrain performers. For example, it will not do to perform a bebop solo in a Dixieland jazz band.

<sup>101</sup> See generally *The Annotated Gilbert And Sullivan*, *supra* note 9.

<sup>102</sup> The part of Go-To—sung by a bass—did not appear in the original libretto and vocal score of *The Mikado*, “nor, indeed, is the part included in the current Macmillan and Chappell editions of the libretto.” *Id.* at 310. The part was added at the operetta’s first run because the person playing the part of Pish-Tush—a bass-baritone—could not reach the low notes the score demanded in the Act II madrigal “Brightly Dawns our Wedding Day.” See *id.* at 310. As a result, Gilbert added a part for a true bass in order to sing the bass line of the madrigal. Later the D’Oyly Carte Opera Company kept Go-To on as a character, giving him the additional line “[w]hy, who are you to ask this question?” addressed to Nanki-Poo in Act I, line 23. The original libretto assigns this simply to “A Noble.” See *id.* at 261, 310. However, as Ian Bradley notes, “many amateur companies have dispensed with his services” and permitted the person playing Pish-Tush to sing the madrigal. *Id.* at 310. This is the practice adopted by Mackerras as well. See MACKERRAS’S, *THE MIKADO*, *supra* note 1, at track 16, *Liner Notes to id.* at 5, 25.

And the people who eat garlic shrimp and puff it in your face,  
 They never would be missed, they never would be missed.  
 And the idiot who praises with a condescending tone  
 Every century but this and every country but his own,  
 And the earnest student radical who dresses like a geek  
 And pierces every body part attempting to be chic,  
 And that singular monstrosity, the tabloid journalist  
 I don't think he'd be missed, I'm sure he'd not be missed.  
 You may put them on the list, you may put them on the list.  
 And they'd none of them be missed, they'd none of them be  
 missed!

And, one hopes, none of the old racist lyrics would be missed, either.

For performers who inhabit an ongoing tradition, the authenticity of performance is assured by living and working within the tradition. For example, Italian opera singers sing Verdi or Puccini as they learned them from earlier generations of opera singers. Even though it is possible to trace definite stylistic changes between generations, no one doubts the authenticity of the opera singer who has the music, as they say, "in her blood." Rock and roll performers imitate the recordings and the performers they grew up with; jazz musicians borrow from the styles and techniques of the recent past. Indeed, as we have pointed out in previous work, arguments for textual rigidity and adherence to original intention arise only after one no longer feels part of an organic tradition of performance.<sup>103</sup>

Only when connections to the tradition are severed and people feel isolated and separated from the past do they attempt to cling to concrete exemplars of the tradition as guarantees of authenticity. Then opera singers try to figure out exactly how the performers sang *Rigoletto* at the opening performance; rock musicians try to resuscitate old electric guitars to get just the right amount of distortion. Yet, ironically, the more people cling to these concrete exemplars of authenticity rather than to the world that fostered them, the less likely they are to be authentic to that former world. Surely one can play Bach on a baroque trumpet, but this hardly ensures the authenticity of what one plays. We no longer live in Bach's world; a world in which music was written for religious purposes, a world in which all performances were live and offered in religious contexts before an audience of believers, a world in which any particular piece might be performed only a few times in the composer's lifetime. Today's "authentic" performances are usually recorded so that they can be played anywhere at anytime for the amusement of secular audiences. Today we can listen to authentic perform-

<sup>103</sup> See Levinson & Balkin, *supra* note 25, at 1637, 1643-44.

ances of Bach's religious music in our underwear, working in our office cubicle, or speeding down the highway at seventy miles per hour.<sup>104</sup> The notion that using a baroque trumpet in a Bach cantata somehow guarantees "authenticity" threatens to make a mockery of that word.

Perhaps then, Blachly might argue that he is powerless to change the text of Busnoys's motet precisely because we no longer live in an organic tradition of performance of Renaissance polyphony. But this, too, begs an important question. For even if Blachly and Pomerium are not part of Busnoys's traditions, they do seem to be part of a contemporary tradition of authentic performance. The authentic performance movement hoped to discover old and forgotten music and make well-known music fresh and alive by adopting the instrumental and performance practices of the past. It is this tradition of performance, and not some trans-historical principle of fidelity to text, that seems to counsel that Pomerium preserve Busnoys's original language. Yet, precisely because Blachly and Pomerium form part of this tradition, they are also free to improvise within it, to make this music fresh and alive through a creative use of authentic practices. For example, because many musical works were performed in alternative versions, authenticists have sometimes combined them to produce the most aesthetically satisfying version for modern audiences.<sup>105</sup> It by no means follows from the principles or commitments of authentic performance or the authentic performance movement that Busnoys's motet must be sung in all of its textual ugliness.<sup>106</sup> As the constitutional scholar in the earlier anecdote

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<sup>104</sup> See *id.* at 1622, 1637.

<sup>105</sup> See, e.g., Donald Burrows, "A Fine Entertainment;" GEORGE FRIDERIC HANDEL, MESSIAH, THE ENGLISH CONCERT AND CHOIR, liner notes at 18 (Trevor Pinnock cond., DG Archiv 1988) (noting that "the combination of solo voices in this recording is not precisely the same as that available for any of Handel's performances").

<sup>106</sup> Blachly's position about Busnoys text also seems based on artistic criteria of integrity in performance that are largely independent of moral or political considerations. There is an interesting analogy to law. Just as a jurist might argue that the rule of law requires us to be bound by law regardless of its justice in the individual case, so, too, Blachly seems to be arguing, that artists and performers like himself are bound by principles of artistic performance that require him to obey the text regardless of its offensiveness or injustices. Blachly is offering an artistic equivalent to a version of legal positivism. Positivism claims that there is a discourse of law and legality that is in principle separate from the discourse of individual and political morality. But Blachly is offering something more than a positivist definition of artistic performance. He is also making a normative claim about what existing conventions dictate and how one should interpret music. This is by no means required by legal positivism. Many positivists believe that legal interpreters may look to moral considerations to help them solve legal questions as long as the legal conventions of their particular society permit it. See, e.g., H.L.A. HART, THE CONCEPT OF LAW 250 (2d ed. 1994). In the same way, someone like Mackerras might contend that a person deciding how best to perform *The Mikado* can take political and moral consequences into account. Our conventions of appropriate musical and dramatic performance permit considering these questions even though there is much more to good performance than political morality.

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suggested, performers are indeed “responsible” for the choices they make.<sup>107</sup> It is not enough to plead that one must perform the texts as the author left them, or even—as in the case of Sydney Carter—that the author explicitly rejected the changes in question.

We emphasize once again that these considerations do not depend on whether one regards the work in question as “high” or “low” culture, or—as in the case of Gilbert and Sullivan—an indeterminate “middle brow” that has changed its status over time. Rock and roll performers often change and revise lyrics for performance, not because they constitute “low” culture, but because they are immersed in an ongoing tradition of performance in which revisions are permissible and even expected features of artistic creativity. Nevertheless, we predict that as time passes, and future generations are increasingly distanced from those traditions, an “authentic performance” movement may well spring up, demanding that “Thunder Road” be performed exactly as Bruce Springsteen originally performed it in the middle 1970s. The irony, of course, will be delicious, since Springsteen prided himself on revising his music continually in live concerts.

The authentic performance movement is best understood as a movement that is authentic to its own times: delving into performance practices of the past to rediscover the music of the past and make it fresh, meaningful, and alive to contemporary audiences.<sup>108</sup> That is because authenticists do not perform in front of eighteenth-century parishioners or nineteenth-century bourgeoisie; they want to communicate the glory, the beauty, and the wonder of great works of art to audiences of their own day. Moreover, the triumph of the authentic performance movement in baroque music is not due solely to the quality of the arguments leveled by its musicologists and performers. Rather, the movement has succeeded because audiences and other performers have gradually accepted its aesthetic and warmed to its style. Gradually they have acknowledged that this is what it means to perform baroque music “authentically.”

What is true of the authentic performance movement is true of performance generally. The types of performance that are, or will be, considered authentic in any generation are shaped by that generation’s community of performers and by contemporary audiences rather than by any trans-historical perspective. Although authenticity appears at first glance to concern the performer’s relationship with a text or score, it actually concerns the performer’s relationship to other people. Judgments of authenticity concern a person’s relationship to some form of

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<sup>107</sup> See *supra* text accompanying note 70.

<sup>108</sup> See Levinson & Balkin, *supra* note 25, at 1626.

community, whether past or present. Appeals to authenticity appeal to the authority of a tradition or a culture and, hence, to their embodiment in some community. Consider the statement that Jones is a “real country singer” or that Smith a “real journalist.” These claims assume that there is a community of country musicians or journalists with relatively common and mutually accepted practices and commitments that help define that community and its members.<sup>109</sup> The authentic country music singer or journalist abides by those practices; she is recognized by other members of the community as part of that community, or she claims that she should be so recognized. Because there are no Platonic forms of the Country Music Singer or the Journalist in the heavens, the question of who is “real” and who ersatz must refer to an actual or imagined community of authentic practice. People use the notions of authenticity or fidelity both to define themselves with respect to the practice and to define and regulate the practice. If Jones is an authentic country music singer, then what he does must be *echt* and not *ersatz*; he can be a model for others who hope to join the community or otherwise behave in an authentic manner.

Thus, the statement that a person is authentic or that their practices are authentic is not mere description. It is a method of normative regulation, a boundary drawing exercise that, if accepted by others, exercises power over them and over their imaginations. People often make claims about what is authentic or faithful to a tradition in order to encourage the tradition to take a certain direction or to return to its roots. These exhortations imagine that there is a purer form of authenticity or fidelity to which members of the existing community should aspire. Even among those judged authentic by the standards of the rest of the world, the participants could be still more authentic, more true to the best or most central features of their tradition.

Conversely, the statements that Jones is not a “real” country music singer but just a “drugstore cowboy,” or that Smith is not a “real” jour-

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<sup>109</sup> In his study of American country music, Richard Peterson argues that the right to speak authentically in country music “is inscribed in the signifiers of group membership.” RICHARD A. PETERSON, *CREATING COUNTRY MUSIC: FABRICATING AUTHENTICITY* 218 (1997). Peterson adds:

For musicians, establishing the right to speak involves knowing all the conventions of making the music . . . and the nuances of voice and gesture that make their work sound “country . . .”. Music and performance are vital to the audience, but signifiers are also vital. The boots, the hat, the outfit, a soft rural Southern accent, as well as the sound and subjects of the songs, all help.

*Id.* (citations omitted). Perhaps equally important is a certain type of rough life history and a commitment to the emotional experiences that undergird country music. As Hank Williams, Sr., once said, “You have to plow a lot of ground and look at the back side of a mule for a lot of years to sing a country song.” *Id.* at 217.

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nalist but merely a promoter of salacious gossip also refer to a community of practice. Statements of exclusion help shape a community by defining who is not within it and which practices lay outside it. Indeed, claiming that certain persons and practices are not authentic may be a much more powerful way of regulating a community than pointing to authentic role models or identifying authentic performances. That is because the criteria of authentic practice are often contested and unclear, and it is often easier to say what they are not than what they are. Moreover, when practices and communities are contested—as they almost always are in some way—people may try to gain acceptance and authority by making claims about who is in the practice and who is not, who is authentic and who is merely a poseur or wannabe.

In these debates and struggles the audience for performance plays an important, if sometimes unacknowledged, role. Appeals about authenticity are appeals to an audience. There can be many audiences for performance, including not only the practitioners themselves, but others who are affected by their performances or those who note and comment on them. Consider again the example of country music singers. The notion of who is an authentic or “real” country musician surely depends on the judgments of other country artists. It also depends, however, on the views of country music fans who may never have picked up an instrument in their lives. Audiences may be attracted to the music of an artist that other country singers disdain as ersatz, as a rock and roll “crossover,” or as someone trying to pollute country music with alien influences. Over time, acceptance by country music audiences (a category that is itself continually changing and subject to contestation) may transform the formerly ersatz country singer into a central example of the genre.<sup>110</sup> In this way, the notions of authenticity involve a continuous negotiation, and struggle, between “lay” and “expert” audiences, and between existing and prospective members of the performing community. In like fashion, the former talk show host or Internet gossip mongerer may grudgingly become accepted as a “real” journalist if he or she wins the sort of recognition by popular audiences that eventually sways and reshapes professional judgments.

The effect of audiences on standards of proper musical interpretation is probably most obvious in popular genres like country music or Broadway musicals. Yet even classical performers must negotiate between different communities and audiences. Authenticists try to bridge the chasm between themselves and a lost community of performance

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<sup>110</sup> See David S. Caudill, *Fabricating Authenticity: Law Students as Country Music Stars*, 20 CARDOZO L. REV. [] (1999); see also PETERSON, *supra* note 109, at 217-20 (describing the various factors that shape the audience judgments of the authenticity of country performers).



practice. They want to perform in a way that would have pleased Bach or Busnoys. But this is hardly the only community or audience involved. Performers also seek acceptance by the general community of classical music performers, by fellow authentic specialists, and by the public. It is no surprise then, that what we call authentic performance is shaped by the tastes of the present as much as the past. A successful performance must communicate to, and be accepted by, an audience, and the only ones available are people living in this century.

Indeed, throughout the world of classical music, standards of proper performance are in continual negotiation with various lay and professional communities. There is a cult or priesthood of professional performers trained and disciplined through music conservatories, orchestras, summer music festivals, competitions, and similar institutions. These institutions place enormous pressure on artists—especially younger artists—to perform according to accepted standards of interpretation. Even the most rebellious and adventurous performers must take these institutional judgments and influences into account.<sup>111</sup> Classical performers must also reckon with the tastes of audiences—both those who attend concerts and the increasing number who experience classical music only through recordings. Even though classical performers can gradually change audience tastes—as the authentic performance movement changed tastes about baroque performance—they cannot completely reject their audience’s sensibilities. Finally, an entire industry of classical performance, including record companies, producers, and impresarios, tries to please audiences—or, as they are increasingly thought of, “consumers”—by imagining what kinds of music, what kinds of performers, and what kinds of performances will most delight them and attract their dollars.

The effect of audience tastes on judgments about classical performance is quite complicated. On the one hand, audience demand for “pop” or “lite” classics tends to tempt artists away from serious or authentic performance; some artists may self-consciously reject these tendencies, leading to exaggerated or mandarin habits of performance that try to establish their purity and superiority by avoiding any hint of playing to the crowd. In this case audience tastes shape performance by serving as something to reject. On the other hand, audience demand for popularized forms of classical music helps reconfigure what artists think are acceptable canons of performance, subtly altering those canons

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<sup>111</sup> We should also point out that there are similar cults of authentic performance among more popular genres like rock and roll, blues, and jazz. Many performers apprentice with producers, bands, and individual artists in order to learn the authentic way to perform different musical styles.

through an ongoing negotiation between artists and audiences.

We believe that there are important lessons here for legal performance, and in particular legal performance of the Constitution. Constitutional interpretation—or what is the same thing, constitutional performance—takes place against both professional and popular understandings of the Constitution. Constitutional performance takes place within a tradition of constitutional interpretations. That tradition involves and requires both constitutional performers and constitutional audiences. Finally, the tradition changes over time, even though it may appear to its participants as a continuous whole. Just as each generation sees different things in canonical works of art, and performs them differently in accordance with that vision, so too each generation has its own Constitution and its own standards of constitutional performance.

The performers and the audience for constitutional interpretation include both professionals and laypersons. The meaning of the Constitution is strongly shaped by the professional culture of legal performance: the attitudes of lawyers, judges, as well as the academic culture that trains them. However, the “authentic” meaning of the Constitution as an ongoing tradition—the sense of what it means to be faithful to the Constitution—is also deeply shaped by the understandings of the people who live under it. The meaning of the Constitution demands political acceptance by the people in each generation.<sup>112</sup> That is why social movements shape the meaning of the Constitution even without official amendment: the performance of the Constitution is always a negotiation between legal elites, popular interpreters, and the great audience of the American people.<sup>113</sup>

At the same time, social movements often appeal to notions of authenticity even as they are changing the meaning of the Constitution; they demand a return to the central ideals of the nation or to the purity of its past practices. These are appeals to an invented tradition; they reinterpret and reconfigure the past in order to represent it for contemporary Americans.

Although the people shape notions of faithful or authentic performance of the Constitution, they do not have the power or the ability to shape these ideas in a determinate or fine-tuned way. Their preferences must be accumulated and negotiated through organizations like social movements and political parties; their understandings must be

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112 See Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519-20 (1997).

113 On the role of popular movements in shaping constitutional meaning, see J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2338-42 (1997); Bruce Ackerman, *The Broken Engine of Progressive Politics*, *AMERICAN PROSPECT*, May-June 1998, at 34.

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filtered through elite conceptions and translated into the professional discourse of law. Much may be lost in this accumulation, negotiation, filtering, and translation. Many voices may be distorted, silenced, or remain unheard in this process. But the audience of “We the People” is an important and powerful one in constitutional law. Legal professionals who forget this fact about the Constitution do so at their peril, for they cut themselves off from the wellsprings of a living tradition.

#### IV. HOW TO PERFORM (OR NOT PERFORM) AN OFFENSIVE TEXT

In general, when a performer is faced with an offensive text, there are a limited set of things he or she can do. As we shall see, these correspond roughly to strategies available to lawyers and judges faced with an unjust legal text that they must perform. The similarities between these strategies stem from the common predicament of the performer: she must try to give meaning to textual commands through action before an audience that will hold her responsible for her performance.

Although we can learn something from the similarities between legal and musical or dramatic performance, we can also learn much from their differences. So we begin with two strategies that are often available to the musical or dramatic performer but are not generally available to performers of law. The first solution is to perform the offensive text to edify our cultural memory; the second is to perform the text ironically. Explaining why these strategies are not usually available in law, in turn, will shed light on the distinctive features of legal performance.

##### A. *Preserving Cultural Memory*

One reason to retain racist or anti-Semitic lyrics or texts in performance is to remind audiences that these sentiments are part of their cultural past. If we remove the offending lyrics, audiences may fail to realize how complicit great works of art have been in perpetuating the injustices of their time. Performing offensive lyrics preserves cultural memory about past injustices and reminds us that our contemporary society is still connected to those injustices. Of course, this argument assumes that the audience will appreciate this point about cultural memory. There is always the danger that the approach will backfire. People may tend to accept and even hallow what is long-established. By performing anti-Semitic or racist lyrics, the performer may actually cloak them with prestige and authority or otherwise make them more acceptable. Members of the audience might assume that if great or popular works of art contain anti-Semitic or racist sentiments and expressions, these sentiments and expressions cannot be all that objectionable, and they will make excuses for them.

Debates about public monuments raise similar problems. Many countries are filled with architectural mementos to older, unjust regimes. What should Eastern European countries do with statues of Stalin and what should Germany do with Nazi art and architecture? Many have argued that these public monuments and statues should be removed or destroyed because their very presence lends prestige to unjust regimes and hateful ideas. But another school of thought argues that removing these monuments would simply bury the memory of these regimes: it is far better to have people face up to the history of their country—both good and bad.<sup>114</sup>

Nevertheless, the argument from cultural memory is problematic in several respects. First, the argument does not work very well for certain genres—comedies like *The Mikado*, for example, or religious hymns like “Lord of the Dance.” Comedies are meant to be laughed at and enjoyed; they are not generally occasions for sober reflection. It may be difficult to make the audience take time out to remember a comedy’s vicious elements in the middle of a high spirited performance. One will either spoil the fun, or the desired cultural lessons will be lost. Similar considerations apply to “Lord of the Dance,” at least when it is performed as a religious song. Religious hymns are supposed to inspire reverence. As we pointed out in our discussion of the *St. John Passion*, insisting that members of the audience recognize that the hymn they are singing is anti-Semitic tends to undermine the religious effect of the work.<sup>115</sup>

Second, even though the argument from cultural memory asks us to retain the offensive work, it also requires us to distance ourselves from the work in some way, or to change the context of its appreciation so that it is clear that we are not displaying the work with approval. One might do this by affixing an explanatory plaque to offensive statuary, by moving it to a less prominent location, or by placing it in a museum, thus altering its cultural context.<sup>116</sup> Indeed, one might well think that statues of Stalin should be preserved, and still believe that they should not receive a place of honor. Rather, such relics should be placed in museums where they can properly be viewed as examples of a mistaken or misbegotten past. However, when the focus shifts from statues to plays and songs, it is hard to think of appropriate analogues. One cannot stop in the middle of a performance of *The Mikado* and add

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114 For a more general discussion of the politics of monuments, see SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (1998).

115 See *supra* text accompanying notes 42-62.

116 See LEVINSON, *supra* note 114, at 45-52 (describing the controversies surrounding New Orleans’ Liberty Monument); *id.* at 68-73 (describing museums that house monuments from earlier oppressive political regimes).

explanatory parentheticals to Ko-Ko's song; nor is there any clear equivalent of moving the work to a museum. (The closest analogy is ironic performance, which we will discuss momentarily.)

Third, the more offensive the work of art is, the more difficult the argument for cultural memory becomes, no matter what the genre. Even the most steadfast preservationist of cultural memory would probably balk at retaining a gigantic statue of Hitler in the middle of downtown Berlin that praised him for "finally resolving the Jewish Question." In the same way, the more racist a song, the more its offensiveness outweighs the benefits of live performance.

Fourth, the argument from cultural memory tends to undermine itself. Past injustices may be most important to recall precisely when the works of art that symbolize them are least likely to be retained because they are too offensive. Conversely, offensive works are most likely to be retained precisely when their lessons are most likely to be lost on the intended audience.

Put another way, the argument for retaining offensive art to instruct future generations depends greatly on how wicked the previous regime was thought to be, how deeply the work offends existing audiences, and how great a consensus has emerged about its wickedness. If there is a consensus that a regime was quite wicked, celebratory monuments may be viewed as deeply offensive—as the example of a giant statue of Hitler in the middle of Berlin suggests. But the more offensive the monument, the greater the pressures to remove it.

Conversely, if there is no consensus that the prior regime was wicked, there will be less pressure to remove the monument. But in that case many people will not learn the desired lessons from the past; indeed, their view that the prior regime was partially or wholly justified may be strengthened. After all, aren't there monuments to it?

We can understand this point better by changing our focus from a universally despised regime—Nazi Germany—to a more equivocally treated one, the Confederate States of America. The Confederacy fought a bloody war to gain southern independence and preserve the Southern way of life—a way of life that included, not coincidentally, the institution of chattel slavery. Yet, many Southerners—mostly white—continue to look upon the Confederacy with pride as a noble, yet lost, cause. The South is full of public monuments to the Confederate dead; some Southern states even have holidays commemorating Confederate heroes. There are also monuments to the Southern opposition to Reconstruction. For example, the city of New Orleans retains a monument honoring the racist White Leaguers who staged a coup against a city government staffed by northern whites and recently freed

black slaves.<sup>117</sup>

Not surprisingly, attempts to remove or alter Confederate monuments generate considerable resistance from many Southern whites. But that is not because Southern whites think it important to dwell on the sorry history of chattel slavery in the United States. Rather, it is because they do not view the Confederacy as being as evil as many American blacks do. Indeed, they may find that celebration of “the lost cause” is a useful way to symbolize regional pride or political principles like limited government and states’ rights.

As a result, Confederate memorabilia and the Confederate flag are treated very differently than the Nazi flag. In fact, several Southern state governments have flown the Confederate battle flag atop their state capitols, or have incorporated the Confederate battle flag in their state flags.<sup>118</sup> White college students in the South (and elsewhere) freely display Confederate flags as decorations in their dormitory rooms and as bumper stickers on their cars. That is because, unlike the Nazi party in Germany, there is no widespread consensus that the Confederacy should be vilified and its heroes disdained. Indeed, the leader of the Confederate forces, General Robert E. Lee, is viewed by many as virtually a secular saint.

On the other hand, many American blacks, especially in the South, see expressions of pride in the Confederacy as insulting and as veiled forms of opposition to racial equality. They point to the fact that Southern states did not begin to fly the Confederate flag at their capitols—or, in the case of Georgia, to incorporate elements of its design into their state flags<sup>119</sup>—until the 1950s and 1960s when they did so as symbols of southern resistance to *Brown v. Board of Education*<sup>120</sup> and to federal demands for racial desegregation.<sup>121</sup> Nevertheless, because no general consensus about Confederate symbolism has developed, the lessons of cultural memory are equivocal rather than uniformly pejorative, and it is precisely because these lessons are equivocal that the memorabilia remain. Every year college football players participate in a Blue-Grey game, whose title refers to the distinctive uniforms of the Northern and Southern troops. One can hardly imagine that there would be an annual soccer match between French and German teams called the Resistance-Nazi Cup.

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<sup>117</sup> See *id.* at 45-52.

<sup>118</sup> See *id.* at 75-76, 90-96. For a constitutional analysis of state governments flying the Confederate flag, see James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *YALE L.J.* 505 (1991).

<sup>119</sup> See LEVINSON, *supra* note 114, at 76.

<sup>120</sup> 347 U.S. 483 (1954).

<sup>121</sup> See LEVINSON, *supra* note 114, at 91, 94, 99-100.

Whatever the problems of the cultural memory argument for the performing arts, it is even more difficult to make an analogous argument in law. One might retain offensive lyrics as a matter of cultural memory or cultural literacy, but one would not enforce an unjust law for these reasons. The closest analogy to the cultural memory argument in law occurs not when law is being enforced, but when it is being learned or taught. It is commonplace for constitutional law casebooks to contain universally reviled cases like *Dred Scott v. Sandford*<sup>122</sup> or *Plessy v. Ferguson*.<sup>123</sup> These cases form a sort of “anti-canon” of wrongly decided cases that help frame what the proper principles of constitutional interpretation should be.<sup>124</sup> Yet what is crucial to their anti-canonical status is that their canonically offensive or unjust elements no longer remain enforceable law.<sup>125</sup>

Constitutional law casebooks also usually retain all of the text of the Constitution, even those portions that have been altered or repealed. Imagine, for example, a redacted version of the Constitution that left out the Eighteenth Amendment because it was repealed by the Twenty-First Amendment, or the Importation and Migration Clause of Article I,<sup>126</sup> or the Fugitive Slave Clause of Article IV,<sup>127</sup> on the ground that slavery was abolished by the Thirteenth Amendment. Should such a redacted Constitution be at all objectionable, as long as the deleted passages were no longer enforceable? Here the cultural memory argument seems at its strongest. Precisely because the American Constitution once protected slavery, it is important to remember its complicity with that wicked system.<sup>128</sup> In this sense, these clauses of the Constitution are like public

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122 60 U.S. (19 How.) 393 (1857).

123 163 U.S. 537 (1896).

124 See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

125 For example, parts of *Dred Scott* are still good law: the legal distinction between state and national citizenship was retained even after the passage of the Fourteenth Amendment, and formed the basis for Justice Miller’s majority opinion in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See L.H. LaRue, *The Continuing Presence of Dred Scott*, 42 WASH. & LEE L. REV. 57, 58-59 (1985). Taney’s insistence that constitutional rights apply even in the territories was used to support the argument that “the Constitution follows the Flag” in the controversies over American imperialism that led up to *The Insular Cases*. See *Downes v. Bidwell*, 182 U.S. 244, 299, 342 (1901) (distinguishing between constitutional doctrines for incorporated and unincorporated territories). Taney’s basic principle that American citizens retain their federal constitutional rights as they move from state to federal territory and back remains a correct statement of constitutional doctrine. What makes *Dred Scott* an anti-canonical case are its justifications of slavery and its denial of citizenship to blacks, both of which are no longer enforceable elements of American law.

126 U.S. CONST. art. I, § 9, cl. 1.

127 U.S. CONST. art. IV, § 2, cl. 3.

128 The argument for retaining the Eighteenth Amendment, or those portions of Article II that have been repealed by the Twelfth and Twenty-Second Amendments, respectively, is slightly

monuments to older, unjust regimes. Retaining them as unenforceable—i.e., unperformable—elements of the constitutional text is perhaps the closest analogy to placing them in a museum. They remind us that these were elements of our higher law that we were once committed to.

### B. *Ironic Performance*

A second strategy more easily available to the dramatic arts, but less available to law, is ironic performance. One can perform a work of art with the deliberate purpose of undermining its apparent message or producing the opposite message. Ironic performance is a familiar element within ordinary dramatic performance in part because authors and playwrights already deliberately insert irony or self-undermining language into their texts. A lyricist may deliberately put words in a character's mouth in order to portray the character in a bad light and thus undermine what the character says. The best performance of that text would then tend to convey a message opposite to that directly asserted in the text. In addition, a playwright may assign objectionable positions to characters and then undermine this message or behavior through the larger context of the play. For example, if Ko-Ko is not an altogether sympathetic character in *The Mikado*, then his willingness to execute blacks, lady novelists, and women "who dress like guys," might be a subtle plea for egalitarianism.<sup>129</sup> The point of good interpretation is to recognize ironic and self-undermining language when they appear, rather than taking them at face value. Thus, a director might argue that the complexity of Shakespeare's *The Merchant of Venice*<sup>130</sup> and the eloquence given to many of Shylock's speeches transforms what might at first appear to be an anti-Semitic play into a subtle brief against anti-Semitism.

More to the point, a director may perform a work ironically whether or not he or she believes the author intended this irony. For example, the argument that *The Merchant of Venice* is actually a clever plea against anti-Semitism seems to be undercut by the play's final act, in which the Christian characters rejoice in their victory over Shylock.

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different: it rests on the importance of edifying ourselves about the origins of our institutions, and the evolution of our constitutional system.

<sup>129</sup> This may or may not be a very plausible reading of Gilbert's *The Mikado*: Ko-Ko seems to be at most a curmudgeon and a buffoon rather than a distinctly evil person. Moreover, at some point the inclusion of certain language is offensive whether or not it is designed to convey that the person who speaks it is ignorant or wicked. *The Mikado* itself provides a good example: a conductor might well conclude that Gilbert's original lyrics should be altered even if their purpose was to show Ko-Ko (or the Mikado) in a bad light.

<sup>130</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*.



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A director convinced that *The Merchant of Venice* is truly anti-Semitic might, nevertheless, perform it ironically to produce a “better” performance that attacks anti-Semitism and intolerance. This phenomenon is hardly limited to Shakespeare. Producers may dig up old Broadway musicals and plays and perform them in a tongue-in-cheek fashion, deliberately trading on their stilted dialogue or their out-of-date sentiments. Here what is undermined is not the injustice of the musical, but its pretensions to artistic quality; treating parts of it ironically may result in a better performance (by producing a comic effect or by creating nostalgia) than playing things straight.

In any case, what writers and directors may do for ironic effect does not easily apply to the performance of legal texts. One important difference between an operetta like *The Mikado* and a statute or Constitution is that the former, but not the latter, may have elements deliberately crafted to undermine themselves. It is hard to imagine the Framers of the Constitution placing a clause in Article I that was specifically designed to draw unsavory inferences about itself and thus lead judges not to take it seriously and to refuse to enforce it. Perhaps there are clauses in the Constitution that are not currently enforced, but one cannot imagine that this was their Framers’ intention.

Similarly, legal canons of interpretation usually do not permit interpreters to deliberately read legal texts ironically or in a self-undermining fashion. The claim that a judge is reading a statute so as to undermine its purposes is usually seen as a criticism, not as a compliment. Judges accused of doing this usually deny that they are doing so, whatever their actual motivations. Narrow readings, or readings limiting previous precedents to their facts, are perhaps the closest analogies. Even in these situations, however, the judge must insist, or at least accept, that the legal text is still fully enforceable in its reduced sphere of influence.

In short, legal performers do not normally understand the words of a statute or constitution to deliberately suggest the opposite of what these texts mean. That is because they do not generally regard the language of a statute or constitution as ironic or self-undermining, achieving its goals through indirection, or by invoking disrespect for the content of its language.

Of course, this understanding of legal texts is not due to the inherent meaning of the words contained within them, but to the particular traditions of performance through which people trained to interpret legal texts normally read and enforce them. Nor is the idea of ironic or self-undermining performance necessarily inconsistent with a legal regime or the concept of legal norms. We could imagine a legal culture in

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which a thoroughly discredited legal text was read to demonstrate the opposite of what it said. Imagine, for example, an interpretive practice in which outmoded parts of a Constitution might be read negatively or in a bad light. Thus, people might interpret the Fugitive Slave Clause as an implicit criticism of slavery and thus as implying a general constitutional requirement of racial equality. Nevertheless, this practice would require a clear cut way of deciding which parts of the Constitution are to be read positively and which ironically. Our current traditions of legal performance of statutes give us little help in this respect.

The doctrine of *stare decisis* and features of our constitutional tradition do give us a sense of which cases are “wrongly decided.” Hence, we can and do use anti-canonical cases like *Lochner v. New York*<sup>131</sup> or *Dred Scott* to argue for particular constitutional interpretations based on the opposite of what these cases say or do. This is perhaps the closest analogy to “ironic performance,” but it stems largely from the fact that the relevant parts of these texts are no longer law; indeed, in some sense, they are “anti-law.” Truly ironic performances of these cases as *enforceable law* would require something different from our current practice: Once discredited, a case like *Dred Scott* would not be overruled. Rather, it would remain as enforceable law but standing for positions opposite to its “plain” meaning.

Our existing practices of legal performance demand that legal texts be taken seriously as positive statements of what the law requires. Only when we abandon the notion that the law deserves enforcement and respect do we read legal texts in anything like an ironic manner. This explains the treatment of anti-canonical cases like *Lochner* and *Dred Scott*. On the other hand, if social activists believe that the Constitution is fundamentally wicked, they might deliberately interpret its provisions as wicked in order to demonstrate that the document as a whole does not deserve our respect and obedience. A good example is William Lloyd Garrison’s view that the Constitution protected slavery,<sup>132</sup> a position, ironically, which put him in substantial agreement with Chief Justice Taney. Garrison agreed with proponents of slavery that the Constitution was a pro-slavery document: as a result he concluded that the Constitution was not worthy of fidelity or allegiance by the American people.<sup>133</sup> Yet even this sort of reading differs from an ironic reading, since its conclusion is not that the text has a deeper wisdom but that it is simply

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<sup>131</sup> 198 U.S. 45 (1905).

<sup>132</sup> See WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 204 (1963).

<sup>133</sup> Garrison agreed with Taney that the Constitution protected slavery, denounced it as “a covenant with death, and an agreement with hell” and insisted that the Northern states had a moral and political duty to secede from the Union. MERRILL, *supra* note 132, at 205.

wicked and should not be followed at all.

### C. *Non-Ironic Performance*

Assuming that none of the above strategies are possible, what options remain available for a performer faced with a potentially offensive text? Here the analogies between musical/dramatic and legal performance draw closer.

#### 1. What Problem?

The simplest strategy is to deny that there is a problem; the text is not offensive or unjust on its face, or at least it is not so offensive or unjust as to cause concern. This appears to be Sydney Carter's response to the controversy surrounding "Lord of the Dance." The success of this strategy depends heavily on the audience's reaction. If most people agree that the lyrics do not pose a problem, then one can dismiss objections as idiosyncratic. But there are limits to this approach. As the D'Oyly Carte Opera Company discovered, *The Mikado* increasingly upset American audiences (and particularly African American audiences),<sup>134</sup> so that a strategy of simple denial did not work.

#### 2. Innocuous Interpretation/Making the Text "the Best It Can Be"

The performer can read the text so that its meaning is innocuous or even wholesome and upright. This appears to be the strategy followed by the Society of Friends' Hymnal Oversight Committee: It argued that the expression "The Holy People" refers to the Romans, not the Jews.<sup>135</sup> Ronald Dworkin has offered a similar strategy in law: he argues that we should read legal texts to make them "the best they can be" given the constraints of text and precedent.<sup>136</sup>

In his Glasgow address of 1860, the abolitionist Frederick Douglass not only anticipated Dworkin's approach but developed it in a still more radical direction. Whenever there are two possible interpretations of the law, one just and the other unjust, Douglass argued, the interpreter should always strictly construe the text in favor of the more just interpretation.<sup>137</sup> Despite language in the antebellum Constitution

<sup>134</sup> See *supra* text accompanying notes 12-13.

<sup>135</sup> See *supra* text accompanying notes 34-35.

<sup>136</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 313-14 (1986) (arguing that legal interpretation should make the law the best it can be).

<sup>137</sup> Douglass's central interpretive rule was that, "[w]here a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose, we must in all cases adopt that which makes it accomplish an innocent purpose." Frederick Douglass, *Address at Glasgow: The Constitution of the United States: Is it*

that seemed to recognize and even protect the institution of slavery, Douglas held that a strict construction of the Constitution demonstrated that it was actually an anti-slavery document.<sup>138</sup>

Because the word “slavery” never actually appeared in the 1787 Constitution, Douglass asserted, we should interpret all clauses that might refer to slaves either as concerning other individuals—like indentured servants—or as being methods of reducing the power of slaveholders.<sup>139</sup> Further, Douglass claimed, the Constitution’s prohibitions against bills of attainder should be interpreted as modifying state law so that every child of a slave was born free.<sup>140</sup> Douglass’s reading of the Constitution would probably have been rejected out of hand by most well-trained lawyers in 1860, including not only proponents of slavery—who would probably have adopted the strategy of “what problem?”—but also abolitionists like William Lloyd Garrison, who argued that anti-slavery interpretations like Douglass’s were strained and simply played into the hands of people who sought to legitimate and preserve slavery.

These examples suggest that the success of innocuous interpretation may depend on whether the audience will accept it as plausible. If a director simply asserts that Ko-Ko’s song is not racist in the face of audiences who believe otherwise, the director may seriously de-legitimize the performance as a whole. A judge who never finds an unjust result in a statute or the Constitution may be accused of simply reading his or her policy preferences into the law.

Another important factor in the success of innocuous interpretation is the audiences’ sense of why the interpretation is being offered. If the innocent interpretation is seen as mere apology, it may tend to de-legitimize the performance. Some critics of the Hymnal Oversight Committee probably found its interpretation unacceptable because it seemed designed to save face by exculpating an offensive text without really acknowledging its offensiveness. The Committee’s decision made the hymn no less offensive than before; even worse, the authority of the church was behind the hymn, giving it special status and officially asserting that it was not offensive. On the other hand, Frederick Douglass’ radical interpretation of the United States Constitution was clearly designed not to apologize for or legitimate slavery, but to use the text to promote an anti-slavery agenda.

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*Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), in 2 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 476 (1950).

<sup>138</sup> See *id.* at 468-70.

<sup>139</sup> See *id.* at 470-80.

<sup>140</sup> See *id.* at 478.

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Judicial interpretations of statutes and constitutions present a situation significantly different from either of these examples. Because judges can change the content of the law, their innocent interpretations may be more than mere apologies for a law that remains unjust. By interpreting a text innocently, judges can affect the content of the law so that it actually creates fewer injustices in the future. In other words, judicial interpretations that have the force of law are actually closer to redactions than to what the Hymnal Oversight Committee or Douglass did.

By contrast, when a director of *The Mikado* insists that Ko-Ko's song is not racist, he or she does not thereby eliminate its offensiveness. Indeed, some members of the audience may become even more incensed because the director refuses to acknowledge what they clearly understand to be the case. In like fashion, the Hymnal Oversight Committee might be able to change the institutional meaning of the text for purposes of official church discussions, but it could not easily change popular understandings of the lyrics to "Lord of the Dance." Nevertheless, these popular understandings were the source of its offensiveness. Frederick Douglass presents still a third case: Douglass could not change the legal meaning of the Constitution directly, but he could persuade others that his was the best interpretation or that the Constitution should be amended. His radical interpretation is not an apology because it is designed to push popular and legal interpretations toward more just results.

Just as a church organization like the Hymnal Oversight Committee can change the "official" meaning of a hymn or sacred text, a court can directly change the institutional meaning of a legal text. However, by changing the legal meaning of a text, the court also ameliorates its injustice in a way that the Hymnal Oversight Committee could not. Because the source of offensiveness is the popular understanding of the text as sung, the Hymnal Oversight Committee would have to redact the text to eliminate the offensiveness. (In the alternative, it would gradually have to change popular understanding through the teaching and reinforcement of church dogma.) Thus, judicial interpretation is more like redaction because there is a tighter connection between innocent interpretation and eliminating the source of harm. (Of course if a church body is interpreting canon law to ameliorate a previous injustice, it is situated similarly to a secular court.)

In short, the social effect of innocent interpretation depends both on the cause of the harm (offensiveness or injustice) and on the interpreter's authority or ability to eliminate this harm through interpretation. If an innocent interpretation can eliminate the cause of the harm, it

is functionally similar to redaction. The only difference is that the interpreter will insist that the text is being offered complete, because the innocent interpretation is the best interpretation of the text or is what the text “always” meant.

### 3. Constrained by Fidelity or Authenticity

The performer may admit that the text, properly interpreted, is offensive or creates injustice, but nevertheless refuse to redact it because such a performance would not be a faithful or authentic performance. This appears to be Blachley’s position concerning Busnoys’s motet.<sup>141</sup> The argument that one’s hands are tied by commitment to a larger enterprise of performance is quite familiar in law: judges, lawyers, and executive officials often claim that they must follow settled legal methods of interpretation despite their unfortunate consequences. Perhaps the most dramatic example is Justice Taney’s opinion in *Dred Scott*, in which he argues that the original intention of the Framers’ of the Constitution was to deny blacks citizenship:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.<sup>142</sup>

This solution is successful only if the offensiveness of the text or the injustices it produces are not too great. If they are, the decision will tend to de-legitimize the interpretive enterprise. Taney supported slav-

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<sup>141</sup> See *supra* note 98.

<sup>142</sup> 60 U.S. 393, 426 (1856).

ery, so he felt that hewing to original intention hardly worked any injustice at all.<sup>143</sup> Thus, saying that one's hands are tied by requirements of fidelity or authenticity is subtly related to the first strategy of denying that there really is a serious problem.

To be sure, the interpreter might regard the result as unfortunate—that is how Blachley thought of Busnoys's anti-Semitic lyrics. One can certainly imagine a Justice who opposed slavery agreeing with Taney's opinion on the grounds that it is more important to be faithful to the Constitution than to risk subverting the constitutional system and the rule of law.<sup>144</sup> But in this case, almost by definition, the interpreter does not regard the consequences as so bad that he or she needs to dispense with the requirements of authentic performance. Yet, in striking this balance, the interpreter is surely affected by his or her psychological commitment to the enterprise he or she is engaged in, whether it is fidelity to the Constitution or to authentic performances of ancient music. The greater this commitment, the more difficult it becomes to accept that the enterprise produces deeply unjust or offensive results. Hence, the need to reduce cognitive dissonance may lead the interpreter to downplay the performance's injustice or offensiveness.<sup>145</sup> In any case, even if a person has not thought very much about the question, once they are challenged by others for performing an offensive text, their first response may well be to dig in their heels and deny that anything is wrong, insist that they are committed to faithful performance, or both.

Two variations of this argument are worth noting. First, interpreters can argue that they recognize the problem in the text, but that they did the best they could given that they find themselves in a larger tradition that they are powerless to change. Taney's defense of original intention in *Dred Scott* seems to read this way; however, as we have noted, because Taney actively supported slavery, his concerns about the potential injustice of following original intention may be disingenuous. A good musical example is Michael Marissen's defense of Bach's *St. John Passion*.<sup>146</sup> Marissen argues that a careful reading of the score shows that Bach was straining against the anti-Semitism in the Lutheran tradition and that Bach's version of the *St. John Passion* actually uses musical devices to oppose the anti-Semitism of the text while still at-

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<sup>143</sup> We note that Taney's reading of the Framers' intention is contested. See, e.g., Christopher Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMM. 37 (1993).

<sup>144</sup> Compare *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), in which Justice Story defends the right of slavecatchers to seize persons they claim are their runaway slaves on the grounds that this compromise was necessary to preserve the Union.

<sup>145</sup> See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997) [hereinafter Balkin, *Agreements with Hell*].

<sup>146</sup> See MARISSSEN, *supra* note 48.

tempting to remain faithful to the tradition.<sup>147</sup> Yet, the fact that Bach did his best given the constraints of his time does not guarantee that the *St. John Passion* is free from offensive or anti-Semitic lyrics. Similarly, a more liberal construction of slave law does not make slavery a just institution.

The second strategy is the reverse of the first. The advocate of authentic performance can insist that precisely because she is no longer an organic part of a continuing tradition of performance, she must cling to the concrete manifestations of that tradition and does not have the right to alter them. This seems to be one of Blachley's reasons for retaining Busnoys's lyrics. Precisely because the members of Pomerium are fully separated from the traditions of performance of Busnoys's time, they are not free to improvise within them in the way that his contemporaries might. Hence, the best way to perform Busnoys's music authentically is to retain exactly those concrete elements and practices they do know about; and surely the most important of these elements is the actual text. Perhaps the closest analogy in law would be a low-level executive officer who is not a lawyer and therefore feels constrained to take a very formalistic or literal approach to interpreting a statute or regulation.

Blachley's position is ironic for two reasons. First, as we have noted, the authentic performance movement is itself a tradition authentic to its own time; it can decide for itself what the tradition should be. Second, there is no guarantee that one draws closer to authenticity by clinging to concrete representations of a tradition extinguished long ago. A tradition is much more than its concrete manifestations; it is organically related to a whole way of life. One can use a baroque trumpet to play Bach's music, but that does not mean that one regains the cultural situation in which this music was originally performed. The audience is different, and the occasions of performance are different. The meaning of the piece is different in this new setting. Thus, the question is not whether to change things in performance, but how one will change.

#### 4. Redaction

If all other strategies prove unsatisfactory, the performer can redact the text for performance. As we have seen, where judicial performance is at issue, the legal equivalent of redaction is creative interpretation.<sup>148</sup> The judicial performer can interpret the text narrowly so that it has little or no unjust effect, or broadly so that it has a beneficial effect.

Redactions, however, need to be justified, and performers can em-

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<sup>147</sup> See *id.* at 34-36.

<sup>148</sup> See *supra* text accompanying notes 71-79.



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ploy a number of standard arguments for this purpose:

(a) The person who created the text would have approved of the redaction. This is Richard D'Oyly Carte's justification of A.P. Herbert's revision of *The Mikado*.<sup>149</sup> Similarly, a judge can argue that the Framers of the Constitution would have approved of a certain interpretation if they were faced with contemporary problems and conditions. Note that it helps greatly if "the Framers" are not still alive to object to the editorial work done in their name—recall the Hymnal Oversight Committee's encounter with Sydney Carter.<sup>150</sup>

(b) The redaction is justified because it is performed by an institution charged with preserving the traditions of performance. This also seems implicit in D'Oyly Carte's decision. The D'Oyly Carte Opera Company has been the artistic conservator of Gilbert and Sullivan's works from their inception to the present day. It incorporates changed lines and stage directions taken from previous performances into the libretti and scores, thus creating an ongoing and evolving tradition of performance. It also authorizes innovation and improvisation within the tradition. Thus, it has the authority to redact scores to keep up with changing times.

This justification has a clear analogy in American constitutional law. Many legal theorists argue that the Supreme Court is the institution charged with revising the meaning of the Constitution to keep up with changing times.<sup>151</sup> There is simply no better way to explain the actual practice of Supreme Court decisions and their acceptance by the public than assuming some sort of power of constitutional revision. In effect the Supreme Court has the authority to amend the Constitution through successive interpretations of its provisions. Moreover, previous decisions of the courts become parts of the Constitution and are themselves the subject of further elaboration, producing a rich and complicated language of constitutional argument that enables constitutional innovation. The question, therefore, is not whether the Supreme Court has the power to redact (i.e., amend) the Constitution, but whether a particular redaction can be justified by some coherent theory of interpretation.<sup>152</sup>

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<sup>149</sup> See *supra* text accompanying note 13.

<sup>150</sup> See *supra* text accompanying note 33.

<sup>151</sup> See, e.g., Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13-36 (Sanford Levinson ed., 1995).

<sup>152</sup> Another obvious analogy in law is the doctrine of *cy pres*, which authorizes courts to rewrite or otherwise circumvent provisions of charitable trusts when changed circumstances frustrate the attainment of the trust's goals. See *RESTATEMENT (SECOND) OF TRUSTS* § 399 (1959).

(c) The redaction is justified because there is an organic and continuous cultural tradition of performance that permits revision and redaction. Even beyond “official” D’Oyly Carte performances, there is an ongoing tradition of improvisation in performing Gilbert and Sullivan operettas. Productions often change or add new lyrics to comment on contemporary politics and society. Many traditions of popular music (of which jazz is only the most obvious) expect and even demand improvisation as a sign of artistic excellence.<sup>153</sup> Directors routinely tailor and shorten Shakespeare’s plays to avoid tiring restless audiences. And when the performance involves a translation into a new medium—for example, from a play to an opera, or from a novel to a movie—considerable artistic license is permitted and even expected.

Just as traditions of performance can exist both within and without specially designated institutions, traditions of legal performance can exist outside a central constitutional court. Some constitutional theorists argue that the changing meanings of the United States Constitution do not stem merely from the decisions of the Supreme Court but from all the various political and legal actors and institutions that contribute to political debate and discussion. Social movements, political parties, mass media, popular culture, and political campaigns all affect popular understandings of what the Constitution means and what the rights of Americans are. These popular understandings, in turn, are assimilated and translated by legal elites, including the Supreme Court and the lower courts. As a result, the tradition of interpretive revision is not centralized; rather, the tradition exists in many places and does not have a single source. Changes in constitutional meaning do not flow from the top down; rather new constitutional meanings circulate from ordinary citizens to legal elites and back.<sup>154</sup>

For example, during the New Deal, federal power to regulate the economy expanded far beyond the original understandings of the 1787 Constitution. Bruce Ackerman argues that these changes in constitutional meaning represent an amendment to the Constitution outside of the provisions of Article V, which require a two-thirds vote of both

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Bill Eskridge’s theory of dynamic statutory interpretation bears important similarities to this common law doctrine, as Eskridge himself points out. See ESKRIDGE, *supra* note 90, at 123.

<sup>153</sup> On the other hand, changes in the way that popular music is produced may change this. Reliance on elaborate mixes has led to recorded performances and lip synching even at so called “live concerts”; this has created new audience expectations that popular songs will be performed exactly as heard on the radio.

<sup>154</sup> See Bruce ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 187-88 (1998) (dialogue between ordinary citizens and political elites); SANFORD LEVINSON, CONSTITUTIONAL FAITH 29 (1988) (Protestant versus Catholic conceptions of constitutional law); Balkin, *The Constitution of Status*, *supra* note 113 at 2338-42 (role of social movements in changing constitutional meanings).

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houses and ratification by three-quarters of the states. This amendment resulted from popular mobilization that supported Roosevelt's New Deal program, and repeatedly returned the Democrats to power by large majorities.<sup>155</sup> The mobilization of popular sentiment changed the constitutional traditions of the country; it was accepted by elites of both parties and was eventually confirmed by the Supreme Court in a series of decisions in the 1930s and 1940s.<sup>156</sup>

### 5. Refuse to Perform

If all else fails, one final strategy remains. The performer can refuse to perform the work on the ground that a faithful performance would require an unjust or offensive reading. As we shall see in the next Part, this possibility brings us to a deeper understanding of the similarities and differences between law and the other performing arts. Although refusals to perform are often possible in the music and drama, they are rarely possible in law. In his study of antebellum judicial interpretation Robert Cover noted that antislavery judges faced with implementing slave law always had the option to resign.<sup>157</sup> That is certainly one way for a conscientious individual to avoid performance of an unjust law. But in a larger sense, the performance of law will still occur, because the judge will simply be replaced by someone else who will perform it.

If we were to look for refusals to perform in the legal system, the best examples would probably involve prosecutors and jurors. Prosecutors often exercise discretion whether to bring prosecutions or to ask for the death penalty. To some extent we might think of these as refusals to perform unjust laws, but in another sense they are forms of discretion traditionally accorded to the role of prosecutor. They are refusals that are incorporated into an existing institution.

Jurors can refuse to perform law in at least two senses. First, jurors can effectively refuse to participate in jury service by offering reasons at *voir dire* why they would not be impartial, why they would not be able to enforce the law, or why they would not be able to render a death sentence. In this situation jurors are similar to judges who resign: someone else will serve on the jury in their place. Second, and more interestingly, jurors can engage in the practice of nullification—in which they hold a defendant innocent on the grounds that they refuse to enforce an unjust law or participate in an unjust prosecution. Not sur-

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<sup>155</sup> See ACKERMAN, *supra* note 154, at 25-26, 309-16, 354-59.

<sup>156</sup> See *id.* at 353-57.

<sup>157</sup> See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6 (1975).

prisingly, many judges and prosecutors strongly disapprove of jury nullification as lawless, but it has a long historical pedigree. One of the most famous trials in American history, the trial of Peter Zenger, involved a jury nullification of a libel law that Zenger's attorney argued violated freedom of speech.<sup>158</sup>

#### V. PERFORMANCE AND CANONICITY

The problems of performance that we have described all rely on the assumption that there are good reasons to perform the text in the first place. Thus, the problems of performing a potentially offensive work are deeply tied to beliefs about its canonical status. If Shakespeare were merely a minor figure of mediocre talent, directors would not be so obsessed about navigating the shoals of *The Merchant of Venice*. Similarly, one doubts that the Oxford University Press would publish a book about refuting charges of anti-Semitism against some long forgotten hack composer.<sup>159</sup> If the composer is Bach, however, everyone recognizes that something important is at stake.

If people regard a particular song or play as part of the artistic canon, or, what often amounts to the same thing, an indelible part of our cultural heritage, the obligation to perform it becomes strong. In that case people are much more likely to make excuses for the work's political shortcomings. On the other hand, the canonicity of a work may also lead, as in the case of *The Mikado*, to continuous attempts at ameliorating it through a tradition of performances and glosses on previous performances.<sup>160</sup> If we have little choice in jettisoning canonical works, we will tend either to accept them too generously, attempt to interpret them in their best possible light, or else to edit or rearrange them closer to our heart's desire. Yet our ability to revise the work depends on existing traditions and institutions of performance. As we have seen, it is much easier to revise Gilbert and Sullivan lyrics within the traditions of the

<sup>158</sup> On the Zenger Trial and the history of jury nullification, see JEFFREY ABRAMSON, WE, THE JURY 57-95 (1994); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1108-15 (1993); Philip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 408-15, 416-19 (1989).

<sup>159</sup> See MARISSSEN, *supra* note 48. The controversy over the *St. John Passion* and Marissen's response to it is discussed in James R. Oestreich, *Of Bach and Jews in the 'St. John Passion,'* N.Y. TIMES, Apr. 26, 1998, at B33.

<sup>160</sup> Consider that if we had to excise all sexism from Shakespeare's plays, we might have little left. Shakespeare's values pervade his work. But what can be said of Shakespeare can also be said of much of Western art and music and not only of past works: if we attempted to rid contemporary music of its sexism, we might have little contemporary music left. Much the same is true, we think, with respect to our constitutional tradition. The injustices of the past are embedded in our constitutional tradition, in ways we do not always understand.

D'Oyly Carte Opera Company than to revise lyrics among devotees of the authentic performance movement. The Catholic Church felt able to revise its liturgy in ways that the Society of Friends did not. The more rigid the sanctions against redaction in the traditions of performance, the more one must fall back on claims that the canonical work, properly interpreted, is not really so bad after all. That, of course, is precisely what the Hymnal Oversight Committee did in the case of "Lord of the Dance." In short, not only are there important relationships between a work's canonical status and the tendency to downplay its evils or embarrassments, there are also important connections between the inability to redact a canonical work overtly, and attempts to revise it through the use of interpretive glosses.<sup>161</sup>

There is an important analogy here to laws, and especially to constitutions. Precisely because legal texts have the force of law, we do not usually think that we can disregard them like mediocre works of art from the past. Rather, we have to live with them, just as we have to live with *The Merchant of Venice* or *The Magic Flute*, whatever their imperfections. Moreover, the Constitution, at least in the United States, is not only a legal text but a symbol of national identity and national pride, and for some even an object of veneration.<sup>162</sup> As a result Americans tend to adopt one of two approaches to its defects. They may tend to overlook its shortcomings, promote its achievements and regard critics as nitpicking, unpatriotic, or worse; on the other hand, they may attempt to read better values into the Constitution through doctrinal glosses or creative interpretations.<sup>163</sup> Both of these practices of performance are likely responses when people are faced with a canonical work of art. And, we think, they are the most likely responses to the performance of constitutive legal texts.

In sum, the interpreter's choice to engage in interpretive glosses or

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<sup>161</sup> One might think that when a performer is trying to get a long neglected work back into the canon the performer will be less tempted to engage in redactions or glosses. That might explain Blachley's resistance to changing Busnoys's text. In fact the opposite usually occurs: when performers are trying to gain a new audience for a work, they may often alter it considerably to suit contemporary tastes. For example, when Mendelssohn performed the Bach *St. Matthew Passion* in 1829—generally thought of as the beginning of the modern revival of Bach's works—he felt free to cut and even reorchestrate Bach's work. See CHRISTOPH WOLFF ET AL., *THE NEW GROVE BACH FAMILY 170-71* (1983). Similarly, Raymond Leppard's revival of Francesco Cavalli's operas and Sir Thomas Beecham's ballets based on Handel's music were both attempts to bring neglected music back into the canon; in both cases the conductors constructed pastiches of music from different compositions that they thought would put these composers in their most attractive light. See *THE PENGUIN GUIDE*, *supra* note 2, at 311-12 (reviewing Leppard recordings of *La Calisto* and *L'Ormindo*); *YEARBOOK*, *supra* note 21, at 182-83 (reviewing recording of *Amaryllis* suite and other pastiches of Handel operas).

<sup>162</sup> See LEVINSON, *CONSTITUTIONAL FAITH* *supra* note 154.

<sup>163</sup> See Balkin, *Agreements with Hell*, *supra* note 145, at 1704, 1709, 1730-36.

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redactions depends on three mutually interlocking considerations:

(1) *The canonical status of the work.* Is the text canonical or can one easily refuse to perform it?

(2) *Availability and ease of authoritative methods of change.* Are there recognized authoritative ways of changing the text, or is there a lack of clear authority to change? If a method of authoritative change exists, is it easy to achieve or is authoritative change difficult or impossible?

(3) *The psychology of the interpreter.* Does the interpreter understand the work as unacceptably unjust or offensive, or is the performer able to reduce cognitive dissonance by believing it has a more innocent interpretation? Similarly, does the performer believe that the audience will see the work as unacceptably unjust or offensive, or can the performer view the audience's opinion as uninformed or unreasonable?<sup>164</sup>

The more canonical the work, the greater its offensiveness to the interpreter, and the less available authoritative methods of change, the more likely the interpreter will engage in redaction, or, in the context of law, an interpretive gloss. (By this we mean an interpretation that preserves the original text but supplements or redacts it for purposes of performance.) Conversely, interpreters will find redactions or interpretive glosses less tempting if they can easily avoid performing the work, if they can convince themselves that the work is not offensive or unjust as it stands, or if it is easy to change the authoritative text.

These three considerations also trade off against each other: interpreters are less likely to find a work offensive if they think it is canonical; and they are less likely to find it canonical if it is deeply offensive. The easier it is to change the work through interpretive gloss or redaction, the more the work can be all things to all people, and this may enhance its canonical status. Finally, the more offensive the work, the more likely the interpreter will search for authoritative methods of change or convince herself that the changes she makes are authoritative. On the other hand, if the interpreter thinks that change is not possible, there will be cognitive pressures to find an innocent interpretation and to hold that people who disagree are just being unreasonable.

If the practice of interpretation is itself a recognized method of altering the authoritative text, the matter becomes more complicated. The

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<sup>164</sup> Students of political science will recognize these considerations by another name: they are questions of ease of exit from an institution, voice in shaping or governing the institution, and loyalty to the institution. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 15-22 (1970) (arguing that easy exit and less voice may produce less loyalty and that difficult exit and increased voice may produce greater loyalty). This should not be surprising once we recognize that interpretive practices are political practices of and within institutions.

choice between authoritative change and interpretive gloss becomes less urgent because interpretive glosses are a method of authoritative change. For example, suppose that the culture of performing Gilbert and Sullivan operettas features the following tradition: performance practices in Gilbert and Sullivan operettas that are long accepted are eventually written into the “official” score and libretto by the D’Oyle Carte Opera Company, which is widely recognized as the artistic conservator of the works. In that case, interpreters have greater incentives to redact and supplement in performance. Their emendations are not necessarily temporary; they may gain acceptance and become a permanent part of the score. Because this method of change is relatively simple, it may become the dominant method of change.

The traditions of American constitutional interpretation are not exactly the same as this hypothetical practice, but they are similar in important respects. After generations of dispute, it still remains unclear to what extent interpretation of the Constitution authoritatively amends it. On the one hand, the doctrine of *stare decisis* means that interpretive glosses—like the narrow construction of the Privileges and Immunities Clause of the Fourteenth Amendment<sup>165</sup> or the “discovery” of an equal protection component that applies against the federal government<sup>166</sup>—are carried through to later cases and are binding upon future judges. In this sense they create new law that is tantamount to amendment, and that is taught as part of “the Constitution” in constitutional law courses. Indeed, most of the material taught in constitutional law courses consists of judicial interpretations as opposed to the constitutional text. On the other hand, precedents can be abandoned, and it always remains possible for a future generation to revert to an older conception of the constitutional text.<sup>167</sup> Thus, the American practice of constitutional performance lies somewhere between a temporary interpretive gloss and a relatively permanent amendment.

Because judicial construction is much easier to achieve than Article V amendment, the American political system faces strong pressures to amend the Constitution through judicial construction (even though, as

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<sup>165</sup> U.S. CONST. amend XIV, § 1.

<sup>166</sup> See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying “equal protection” norm to national government via “due process” requirement of the Fifth Amendment).

<sup>167</sup> We should note, however, that the most famous overrulings in American constitutional history have not been returns to older understandings but rather new interpretive glosses substituted for older ones. See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), *overruling* *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923); *United States v. Darby*, 312 U.S. 100 (1941), *overruling* *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Brown v. Board of Ed.*, 347 U.S. 483 (1954), *overruling* *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 83 (1976).

we have just noted, it is not entirely clear whether these constructions are amendments). However, there is a countervailing tendency; precisely because the Constitution is so canonical, such a symbol of American justice and national greatness, there are strong psychological pressures to believe that it is basically just in the same way that the Hymnal Oversight Committee and devotees of Bach do not wish to believe that “Lord of the Dance” or the *St. John Passion* are anti-Semitic. That means that citizens, lawyers, and judges alike may resist the notion that there is something fundamentally unjust about the Constitution or about current practices of constitutional performance. They may tend to view these accusations as being as “unreasonable” as charges leveled against “Lord of the Dance” or the *St. John Passion*. It may take a sustained campaign by political activists and social movements to change the mind of the majority of the American people and the legal elites who shape constitutional decisions. When they do, however, constitutional change will not be long in coming. This fact brings us back to the central lesson of performance, whether musical, dramatic, or legal. In the last analysis, the various audiences for performance—the people whom the performance moves, inspires, and affects—are the true judges of its fidelity and authenticity.