

# SUBJECTIVE ART; OBJECTIVE LAW

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## INTRODUCTION

The fine arts have undergone a revolution. Liberating waves have swept art, music, and literature in the nineteenth and twentieth centuries, empowering artists to experiment with anything and everything. The overwhelming trend has been toward the subjective, experiential, self-referential perspectives of performers, composers, and painters. Form and structure were often cast aside if they impeded the implementation of intensely personal visions.

With the benefit of hindsight, we can see the astonishing enrichment that resulted from this trend. It gave us Monet's *Water Lilies* and Picasso's Cubism. Bach's contrapuntal melodies were succeeded by Bartók's sometimes discordant compositions inspired by folk music. Poetry began emphasizing mood over rhyme and meter. These developments may alternately shock, enlighten, or challenge observers, but there can be no question that they deepened the artistic conversation and expanded the range of artistic expression available.

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Given the strong tides of personal sensibility in artistic expression and indeed in popular culture, it would be surprising if there were not a strong temptation for judges to follow suit. Like the pounding timpani that open Richard Strauss's *Thus Spoke Zarathustra*, the drumbeat of self-reference that has so enriched art has reached the ears of even the more staid practitioners of law. As Justice Holmes famously asserted at the beginning of *The Common Law*, "The life of the law has not been logic: it has been experience."<sup>1</sup> It would hardly be expected, of course, that judges would openly acknowledge the influence upon them of the exaltation of self-expression in the fine arts. But then again it would hardly be expected that a trend so prevalent in painting, sculpture, music, dance, theater, or architecture would somehow leave judges immune from its influence.

Professor Jonathan Turley has made this point while discussing national security law, noting that "[i]n many ways, the endeavors of law and art seem to have converged . . . as the Court has moved from more classic to more impressionistic interpretations of constitutional provisions."<sup>2</sup> However, the phenomenon is hardly limited to national security. Judges feel a strong and understandable temptation, evinced in evocations of judicial empathy, evolving social norms, and living constitutionalism, to do justice as they feel it should be done rather than adhering to the strictures of text and structure. Art's inspirational power and its loosening of form and structure mightily encourage this impulse. In fact, those jurists who reject formal restraints in favor of freewheeling adjudication are the inheritors of the artistic mantle, attempting to claim for judges the freedom artists enjoy.

This form-loosening trend has produced some magnificent art, and some may hope for similarly beneficent results in the duller confines of law. But great art does not make good law. Art and law are created through distinct processes and serve different purposes. Law also commands the full power of the state, wielding ironically a power both greater and lesser than the power of the arts.

These differences make it dangerous for law to imitate art's subjective impulses and emotions. Law is not in the eye of the beholder. The personal feelings that have ignited and revolutionized the arts

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1 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass'n 2009) (1881).

2 See Jonathan Turley, *Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation*, 2003-2004 CATO SUP. CT. REV. 69, 70 (discussing the Supreme Court's recent national security decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)).

undermine the very foundations of law if cross-applied. Instead, law should serve as the foil for art, providing stability and structure in a society whose art should reflect the range of its emotions and ascend the pinnacles of its passions.

To say that the difference between law and art is one of reason versus feeling or tradition versus innovation is much too simple, but to pretend profound differences do not exist would be naïve as well. This Essay proceeds in three parts. Part I briefly touches on the dramatic changes that have occurred in the arts during the nineteenth and twentieth centuries as subjective expressiveness replaced objective form and structure. Part II discusses the significant temptation for judges to borrow the structure-challenging subjectivity of the arts and to apply it in the law. Finally, Part III explains why art and law are so distinctive that a sense of mutual appreciation should not dissolve the sense of distance that serves these respective callings well.

## I. SUBJECTIVE ART

For centuries, from early Egyptian murals to Renaissance religious painting, art proceeded on the assumption that intense beauty was often best achieved within highly stylized, symbolic, and allegorical forms, many of which struck deep communal chords. Indeed, much Egyptian art went so far as to strip the individual of any distinguishing features, the better to accomplish large public works or to reinforce the hierarchical order of the state. Whether art served the state, the church, or some wealthy patron, the primacy of the individual artist was not loudly proclaimed. To be sure, artists had distinctive styles and chose distinctive subjects, but only—and this is crucial—within bounds.

Few would disagree that artistic expression over the past two hundred years has undergone a convulsive change. Throughout the fine arts this change has been twofold. First, there has been a dramatic loosening of form and structure in the artistic disciplines. In addition to this loosening of technical requirements, art has experienced a related, though distinct, rise in subjectivity and self-expression. A brief look at these developments in painting and music helps to illustrate the rise of personal feeling and the fall of impersonal formalities.

### A. *Subjectivity in Painting and Artwork*

The Impressionists and the painters who immediately preceded them are a logical starting point in any discussion of the rise of the subjective in the arts. Art is by definition an act of expression on some level, but by the mid-nineteenth century some painters believed it had

become stale and mechanical. “Proper” artists of the time tended to emphasize carefully studied images of uplifting scenes (or at least time-honored biblical or mythological tales), rendered in painstaking, studio-applied layers of paint.

Artists such as Eugène Delacroix and later Édouard Manet began to question these dogmatic formulations. They challenged the careful outlining of figures, the archly formal poses in a composition, the stultifying technicalities of light and shading.<sup>3</sup> Instead, they painted what they perceived and experienced. As one art historian described a Delacroix painting of charging Arabic horsemen, “All the painter wants is to make us partake in an intensely exciting moment, and to share his joy in the movement and romance of the scene.”<sup>4</sup> This shift from the formal recitation of a particular theme to the communication of feeling for its own sake was both liberating and controversial, and that controversy only grew as younger artists continued to experiment.

Matters came to a head in 1863 in Paris, then the undisputed artistic center of the world.<sup>5</sup> At the time, the Académie des Beaux-Arts controlled admission to the premier exhibition of the year, the Salon de Paris. Artists whose compositions were displayed at the Salon gained instant credibility and a healthy market for their work.<sup>6</sup> As a result, the Académie enjoyed a role as arbiter of artistic standards, which it chose to exercise by accepting only art that reflected “correct” subjects, styles, and techniques. When the Académie rejected a surprisingly high percentage of the 1863 submissions,<sup>7</sup> Emperor Napoleon III, nephew of Napoleon Bonaparte, responded to protests by decreeing that there should be a “Salon des Refusés,” or “exhibition of rejects.”<sup>8</sup> The intent of this exhibition was to allow the rejected artists to display their works in the gallery of public opinion.

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3 See E.H. GOMBRICH, *THE STORY OF ART* 506 (16th ed. rev. 1995) (discussing technique in Delacroix’s paintings of Arabic and North African nomads).

4 *Id.*

5 *Id.* at 504 (describing Paris as the artistic capital of Europe).

6 See JOHN REWALD, *THE HISTORY OF IMPRESSIONISM* 79 (4th rev. ed. 1973). The influence of the Académie was so strong that some patrons returned paintings and forced artists to refund the purchase price if the artwork subsequently was rejected. *Id.*

7 See *id.* Of some five thousand paintings submitted, three thousand were rejected. As Rewald notes, “Nobody could remember a similar proportion of refusals.” *Id.*

8 See *id.* at 80–81.

In the short term, the exhibition was not a great success,<sup>9</sup> at least in part because members of the Académie managed to place pieces with the most potential to offend in positions of prominence.<sup>10</sup> Édouard Manet's *Luncheon on the Grass*, at the time an especially controversial image of a nude woman enjoying a casual picnic with two young men in contemporary clothes, was given special prominence.<sup>11</sup> It scandalized viewers.<sup>12</sup> Its bold assertion of an artist's right to paint what he chose, using styles and methods that reflected what he saw, typified the unorthodox approach that had caused the Académie's rejections in the first place.

But the Académie's efforts to impose impersonal standards on something so variable as personal vision foundered. A sense of new-found freedom characterized the works of Manet and the painters who followed, including Monet, Renoir, Degas, Cézanne, Pissarro, and others. In their hands, the attack on inhibitions imposed by form and structure upon artistic freedom proceeded apace. At least in part as a response to the advent of photography and the corresponding competition it posed to purely descriptive artistic portrayals,<sup>13</sup> painters began to assert that art was less about faithful representation of reality and instead that "we must look *at* it, not *through* it."<sup>14</sup>

To achieve this goal, the Impressionists redefined painting until art was "no longer a 'window' [into the picture], but a screen made up of flat patches of color."<sup>15</sup> This transition away from realistic representation to subjective impression even gave the technique its name. In 1874, an art critic savaged the first independent exhibition of the innovators with a critique entitled "Exhibition of the Impressionists."<sup>16</sup> The title mocked one of Monet's works, *Impression, Sunrise*.<sup>17</sup>

9 *Id.* at 82–85 (discussing negative popular opinion about the "Salon des Refusés" at the time).

10 *See id.* at 82.

11 *See* H.W. JANSON & ANTHONY F. JANSON, *HISTORY OF ART 740* (6th ed. rev. 2004) ("[*Luncheon on the Grass*] offended the morality of the day by placing the nude and nattily attired figures in an outdoor setting without allegorical overtones. Even worse, the neutral title offered no 'higher' significance.").

12 Napoleon III himself pronounced the painting "immodest"—an irony coming from a prince not noted as a paragon of morality in his own life. REWALD, *supra* note 6, at 85.

13 JANSON & JANSON, *supra* note 11, at 742 ("Painting needed to be rescued from competition with the camera.").

14 *Id.* (discussing the work of Édouard Manet).

15 *Id.*

16 *See* REWALD, *supra* note 6, at 318.

17 *Id.* at 318–24 (printing the sarcastic critique of the Impressionists' style in its entirety); *see also* GOMBRICH, *supra* note 3, at 519 ("[The 1874 exhibition] contained a

The actual photographic reality of sunlight—or air or water or human form and visage—began to matter less than the artist’s feelings and sensations when looking at a scene.

Impressionism’s triumph, then, lay in its emphasis on the originality of the artist’s own viewpoint, whether expressed in different subjects, colors, or techniques. “All the old bogeys of ‘dignified subject-matter,’ of ‘balanced compositions,’ of ‘correct drawing,’ were laid to rest. The artist was responsible to no one but his own sensibilities for what he painted and how he painted it.”<sup>18</sup> The Impressionists irrevocably changed art through their self-referential questioning of form and structure. Lost was a sense of art as the depiction of defined reality. The innovators brought a striking new way of seeing the world, not necessarily as it is but through the lens of subjective artistic sensibilities.

Nor were the Impressionists the final originators in the self-referential march of artistic imagination. From the 1870s onward, artists continued to break down structure and form, instead emphasizing the reach of their own feelings and imagination. By the twentieth century, artists were shifting away from the romantic and emotional and were beginning to exploit the revolution in technique to its fullest extent. Picasso was developing early Cubist forms,<sup>19</sup> and by 1910 other artists, including Georges Braque, had embraced the abstract artistic style.<sup>20</sup> Their technique provided a definitive statement of subjectivity. As one leading art historian explained, “For a century that questioned the very concept of absolute truth or value, Cubism created an artistic language of intentional ambiguity.”<sup>21</sup> Or to put it another way:

Cubism controverted principles that had prevailed for centuries. For the traditional distinction between solid form and the space around it, Cubism substituted a radically new fusion of mass and void. In place of earlier perspective systems that determined the precise location of discrete objects in illusory depth, Cubism offered an unstable structure of dismembered planes in indeterminate spa-

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picture by Monet which the catalogue described as ‘Impression: sunrise’—it was the picture of a harbour seen through the morning mists. One of the critics found this title particularly ridiculous, and he referred to the whole group of artists as ‘The Impressionists.’ He wanted to convey that these painters did not proceed by sound knowledge, and thought that the impression of a moment was sufficient to be called a picture. The label stuck.”).

18 GOMBRICH, *supra* note 3, at 522.

19 See JANSON & JANSON, *supra* note 11, at 811–12.

20 *Id.* at 812.

21 ROBERT ROSENBLUM, CUBISM AND TWENTIETH-CENTURY ART 14 (2001).

tial positions. Instead of assuming that the work of art was an illusion of a reality that lay beyond it, Cubism proposed that the work of art was itself a reality that represented the very process by which nature is transformed into art.<sup>22</sup>

In other words, the Cubists replaced whatever form the Impressionists and their protégés had retained. Instead of form and structure, they left an intensely probing introspection.

There is no need to survey the whole of the twentieth century because the shift away from defined forms and standards was well and irreversibly underway in the century's earliest years.<sup>23</sup> In fact, the Cubists' impact on twentieth century art is summed up well as "a trumpet call that both asserts [the artists'] freedom to create in a new style and provides them with the mission to define the meaning of their times—and even to reshape society through their art."<sup>24</sup> Artists have learned this lesson well. The loosening of conventional technique in favor of personal sensibility has been so overwhelming that today it can sometimes be difficult for the layman to distinguish artistic masterpieces from children's scribbling. That is not, however, to condemn the artists who have questioned the very essence of their craft, ironically enriching it in the process.

### B. *Subjectivity in Music*

Changes in music have been no less dramatic than those in the visual arts. I focus in this section on changes in classical, rather than popular, music, although the increasing emphasis on spontaneity, emotion, and unconstrained expression are even more the trend in popular music than in classical compositions.

The changes in music are perhaps harder for the layman to grasp than the changes in art. The uninitiated may not comprehend the full depth of the changes wrought by a Cubist, but even a superficial glance serves to illustrate the differences between a Paul Klee and a Caravaggio. In contrast, while the differences between Bach and Bartók are audibly apparent, their significance is not as clear to the lay listener.

But the trend in auditory arts has been no less striking than in visual ones. Music evolved from the technique-bound Baroque and Classical periods of Bach, Haydn, Mozart, and Beethoven,<sup>25</sup> through

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22 *Id.* at 13.

23 *See id.* at 13–14 (describing the early development of Cubism).

24 JANSON & JANSON, *supra* note 11, at 668 (describing modernism).

25 *See generally* MANFRED F. BUKOFZER, *MUSIC IN THE BAROQUE ERA* (1947) (discussing the evolution of music from the early to late Baroque periods); DONALD JAY

the aptly named Romantic period of Mendelssohn, Schumann, and Wagner in the nineteenth century,<sup>26</sup> to the disparate styles of what can only be termed twentieth-century music, typified by Debussy, Stravinsky, Shostakovich, and even more recent innovators.<sup>27</sup> Throughout this progression, there has been a move toward rejecting form and structure in favor of a less regulated expressiveness in which the composer sets the form of composition rather than working within defined and borrowed strictures.

The changes in music are best understood by referencing the Baroque masters' rich and intricate designs. The works of J.S. Bach and others are "distinguished by a fully established tonality which regulated chord progressions, dissonance treatment, and the formal structure."<sup>28</sup> Without fully unpacking all that this sentence describes, it is enough to observe that the music of the Baroque and later the Classical period utilized highly formalized harmony and structure.

Formality, of course, has a discipline and beauty all its own, combining feeling and framework in a manner that enhances the value of each. The emphasis on structure is most familiarly illustrated by the famous sonata form, used extensively by Classical composers such as Haydn, Mozart, and Beethoven.<sup>29</sup> It is worth quoting at some length to explain the concept. Classical composition often consisted of:

- (1) An *exposition* (usually repeated), incorporating a first theme or group of themes in the tonic; a second, often more lyrical, theme or group in the dominant or the relative major (if the movement is in a minor key); and a closing, frequently cadential, theme also in the dominant or relative major . . . .
- (2) A *development* section in which motives or themes from the exposition are presented in new aspects or combinations and in the course of which modulations may be

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GROUT & CLAUDE V. PALISCA, *A HISTORY OF WESTERN MUSIC 807–08* (5th ed. 1996) (defining the Baroque period as 1580–1730 and the Classical period as 1730–1820).

26 See generally ALFRED EINSTEIN, *MUSIC IN THE ROMANTIC ERA* (1947) (providing an overview of music's Romantic period); GROUT & PALISCA, *supra* note 25, at 818 (defining the Romantic period as 1810–1890).

27 See generally WILLIAM W. AUSTIN, *MUSIC IN THE 20TH CENTURY* (1966) (providing an overview of the developments in twentieth-century music).

28 BUKOFZER, *supra* note 25, at 17.

29 See, e.g., GERALD ABRAHAM, *THE CONCISE OXFORD HISTORY OF MUSIC* 523 (1979) (discussing large collections of sonatas by Clementi, C.P.E. Bach, Haydn, Beethoven, and a number of lesser-known composers); *id.* at 498 (discussing several Mozart sonatas for pianoforte, a prototype of the piano); *id.* at 618 (discussing Beethoven's cello sonatas, *Op. 5*, and his violin sonatas, *Op. 12*); GROUT & PALISCA, *supra* note 25, at 471 ("Most instrumental music of Haydn, Mozart, Beethoven, and their contemporaries, whether called sonata, trio, string quartet, or symphony, is written in three or four movements of contrasting mood and tempo.").

made to relatively remote keys. (3) A *recapitulation*, where the material of the exposition is restated in the original order but with all themes in the tonic; following the recapitulation there may be a *coda*.<sup>30</sup>

Sonatas, trios and quartets, concertos and symphonies each had their own sets of forms and standards, not only for the composition as a whole, but also for the individual movements within it.

In contrast, Romantic composers in the nineteenth century emptied the sonata form of many of its technical attributes.<sup>31</sup> A typical example suffices. Franz Liszt's B-minor Sonata, composed in 1852–1853, is not even divided into three or four movements.<sup>32</sup> Instead, it consists of several musical themes introduced in the first fifteen measures, after which the piece solely “consists of a gigantic, highly dramatic development section.”<sup>33</sup> Liszt decided to discard form and structure in the interests of creating a work “‘beautiful beyond all comprehension, great, lovable, deep, and noble—sublime.’”<sup>34</sup> Formality came to be seen as an impediment to this kind of feeling, rather than a vehicle for it.

Indeed, Romantic music's very name suggests a focus on the subjective instead of structure or technique. The emphasis demanded a relaxing of musical form in the interests of exploring new frontiers of emotion. As one historian explained,

Expression of feeling became more intense and personal as the 1800s progressed. The conventions of form and tonal relations were trespassed beyond limits that had once seemed reasonable. The imagination wandered into unexplored realms that sought to recapture a cherished past or to reach a wonderful future. A spirit of longing, of yearning after an impossible fulfillment, haunted most Romantic art . . . .<sup>35</sup>

Indeed, the same author later noted, “Some nineteenth-century writers called instrumental music the ideal Romantic art, because, being free from the burden of words, it could perfectly communicate pure emotion.”<sup>36</sup> This same emphasis expanded to an unprecedented degree throughout the nineteenth century.

30 GROUT & PALISCA, *supra* note 25, at 471–72.

31 See, e.g., EINSTEIN, *supra* note 26, at 142.

32 *Id.*

33 *Id.*

34 *Id.* (quoting composer Richard Wagner's enthusiastic comments about Liszt's piece).

35 GROUT & PALISCA, *supra* note 25, at 563–64.

36 *Id.* at 564.

Even the titles and subjects adopted by Romantic composers evince a broadening individualism. No one in the Baroque period wrote operas with titles like *Der Ring des Nibelungen* (*The Ring of the Nibelung*), Wagner's masterpiece dealing with Norse legend and mythology. Nor is Wagnerian opera unique. Schumann's pieces, with titles like *Butterflies*, *Carnaval*, *Fantasy Pieces*, and *Scenes from Childhood* represent a lighthearted counterpoint to Wagner's operatic edifices.<sup>37</sup> They "suggest that Schumann wanted listeners to associate them with extramusical poetic fancies"<sup>38</sup> and are thus typical of the Romanticism's new emotionalism.

While the intense feeling of Romanticism may have faded somewhat in the late nineteenth and early twentieth centuries, the questioning of form and structure in music remained a pervasive trend as the Modernist era began. Indeed, if anything, it grew stronger. The trend was evident on a technical level, as the move to develop new musical themes spawned challenges to the very structure of notes themselves. In the late nineteenth and early twentieth century, composers such as Wagner and Debussy experimented with snatches of atonal music, in which the traditional major/minor relationships between notes are discarded.<sup>39</sup> Atonality was dramatically expanded in the twentieth century by Arnold Schoenberg, who spearheaded a significant musical innovation by choosing to treat all twelve notes of the traditional scale indiscriminately in many of his works.<sup>40</sup> This change marked a stunning departure<sup>41</sup> from the traditional twelve tone system that had been used since at least the seventeenth century,

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37 See *id.* at 598 (discussing Schumann's musical compositions and style).

38 *Id.*

39 *Id.* at 733 ("Much late Romantic music, especially in Germany, had been tending toward atonality. Chromatic melody lines and chord progressions—in the music of Wagner, for example—had resulted in passages in which no tonal center could be perceived; but these passages, relatively short and exceptional, were anchored in a tonal context."); see also ALEX ROSS, *THE REST IS NOISE* 39–45 (2007) (discussing Debussy's flirtations with atonality in his works).

40 GROUT & PALISCA, *supra* note 25, at 733 (discussing Schoenberg's decision to "treat all twelve notes of the octave as equal instead of regarding some of them as chromatically altered tones of a diatonic scale"); ROSS, *supra* note 39, at 55–61 (analyzing Schoenberg's life and his use of atonality).

41 See AUSTIN, *supra* note 27, at 194–222 ("Disagreeing about the meanings and values of [Schoenberg's] principles, [musicians] had to agree that Schoenberg somehow contributed as much as any one man to the musical culture of the 20th century . . .").

and it allowed composers even more freedom to express their individuality.<sup>42</sup>

Nor were Schoenberg's changes an isolated phenomenon. In a logical counterpoint to his work, other composers experimented with eliminating distinct notes entirely,<sup>43</sup> replacing them instead with a continuum of sound.<sup>44</sup> Yet a third group questioned the very nature of musical composition itself, calling for significant portions of their pieces to be improvised by musicians rather than writing them out in full.<sup>45</sup> Perhaps the most striking example of this technique is John Cage's famous 1952 composition, "4'33" (four minutes and thirty-three seconds), in which a performer sits in complete silence for the time mentioned in the title.<sup>46</sup> The "music" consists of ambient noise that occurs in the concert hall.<sup>47</sup>

The goal is not to denounce all these changes, any more than it is to suggest that they were adopted by all twentieth-century composers. Rather, such sharp departures, even from the basic concept of what music was supposed to be, illustrate just how much musical form and structure have been supplanted by the self-referential ingenuity of individual artists in modern times.

### C. *Subjectivity in Literature and the Sciences*

It would be repetitive at this point to dwell on changes in the literary and scientific worlds that mirror those in art and music. For one thing, the trends in these fields are more elusive and ambiguous. Even here, however, examples of structural rejections abound. One such example in literature is the dramatic contrast between the rigid quatrains and couplets of Shakespeare's sonnets and the flowing syntax, punctuation, and grammar of E.E. Cummings.<sup>48</sup> The works of both poets expressed emotion, often passionately in the case of Shake-

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42 See GROUT & PALISCA, *supra* note 25, at 751; cf. ROSS, *supra* note 39, at 41 ("Musicians and listeners had long agreed that certain intervals, or pairs of notes, were 'clear,' and that others were 'unclear.' The quoted words can be found on a cuneiform tablet from the Sumerian city of Ur.")

43 GROUT & PALISCA, *supra* note 25, at 751–52 (discussing examples).

44 See *id.* at 751 (discussing the use of "a *continuum*, an unbroken range of sound from the lowest to the highest audible frequencies, without distinguishing separate tones of fixed pitch").

45 *Id.* at 753–54.

46 ROSS, *supra* note 39, at 368–69.

47 *Id.* at 369.

48 Compare, e.g., WILLIAM SHAKESPEARE, *Sonnet 18*, in SHAKESPEARE'S SONNETS 19 (Stephen Booth ed., 2000), with E.E. CUMMINGS, *anyone lived in a pretty how town*, in SELECTED POEMS 109 (Richard S. Kennedy ed., 1994). Cummings's name has frequently been written in lowercase letters in a nod to his unique style, although the

spare. But what distinguishes Cummings's work and that of other twentieth-century writers from their Shakespearean ancestors is the degree to which they have rejected structured stanzas and rigid iambic pentameter in favor of poetry regulated chiefly by the bounds of the poet's own genius and creativity.

Cummings's work rejected not only classical rhyme and meter, but also the minimal structure provided by horizontal lines of text, composing poems in which the letters and words are artistically splashed across the page.<sup>49</sup> It is hardly necessary to point out that Cummings would not have written what he did in Shakespeare's time, or vice versa.

Whether the influence of Proust upon literature or Freud upon psychology or Einstein upon physics have introduced the world to irreversible self-referentialism, subjectivity, and relateness would no doubt provoke intense debate. None of these giants entirely eliminated form and structure from their respective disciplines. Indeed, Einstein's theories prompted the ongoing search by physicists for a Theory of Everything that could bring order to the universe. Psychology, though initially heavily dependent on Freud's subliminal emphasis, has relied with increasing regularity on the hard sciences both in an attempt to enhance respect for the discipline and in an effort to quantify medical diagnosis of illnesses. Even so, the parameters of form and structure have been bent and stretched in every discipline,<sup>50</sup> and a world of objective points of reference no longer exists.<sup>51</sup> I would argue that on balance this trend is more beneficial than not, but that is hardly the point. It is, at the very least, a necessary and inevitable trend, as science probes new realms of knowledge and each new artistic generation builds upon the genius of its predecessor by making its own distinctive mark. The question for our time is whether law should take up this cudgel of modernity and smash inherited structures—should we look at the pervasive loss of form in art and follow suit? I would argue emphatically that we should not.

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writer himself did not expressly approve. See CHRISTOPHER SAWYER-LAUÇANÑO, E.E. CUMMINGS, at ix (2004).

49 See, e.g., E.E. CUMMINGS, *r-p-o-p-h-e-s-s-a-g-r*, in *SELECTED POEMS*, *supra* note 48, at 42.

50 For an example from a different artistic discipline, see Alastair Macaulay, *Ballroom: More Sexily, Less Strictly*, N.Y. TIMES, Aug. 13, 2009, at C1 (explaining that, from a dance critic's perspective, professional ballroom dancing "has grown unrecognizable in recent decades" due to loosening of the art form).

51 See Turley, *supra* note 2, at 73 ("New scientific theories, particularly atomic physics, had freed artists of the hold of the objects they painted. As Wassily Kandinsky said, '[a]ll things become flimsy, with no strength or certainty.'" (alteration in original) (quoting SAM HUNTER & JOHN JACOBUS, *MODERN ART* 10 (1985)).

## II. LAW AND THE ARTISTIC TEMPTATION

The blossoming of subjectivity and boundless self-expression in the arts during the past two centuries has been powerful. The influence is so strong that the allure for judges to seek analogies in law is nearly irresistible.

The legal and artistic processes do bear some superficial resemblance.<sup>52</sup> Both disciplines are indebted to rules and standards that traditionally defined the fields of play. And soon enough the forms and structures began to chafe and to stand in the way—of artists seeking to put personal feelings on display and of judges seeking to reach a personally preferred result. As Professor Turley notes, “Abstract art and [modern] constitutional theory share a tendency toward the transcendent. Both often begin with an object but then transcend that object through a process of creative translation.”<sup>53</sup>

Additionally, art’s subjectivity provides an example that judges would naturally find alluring. It would be strange if there were no temptation for jurists to follow the astonishing successes of musicians, writers, and painters who have broadened humanity’s horizons and enhanced their own reputations by expressing exactly what they felt. Indeed, successive waves of feeling in different fields of artistic endeavor mirrored and influenced each other. Thus Stravinsky’s music of the early twentieth century contains passages “splintered into fragmentary motifs by rhythmic patterns as jagged and shifting as the angular planes of Cubist painting and equally destructive of a traditional sense of fluid sequence.”<sup>54</sup> James Joyce’s *Ulysses* and Virginia Woolf’s *Mrs. Dalloway* mirror Cubist painting in the way “events are recomposed in a complexity of multiple experiences and interpretations that evoke the simultaneous and contradictory fabric of reality itself.”<sup>55</sup> This cross-pollination of technique in the arts inspires judges to experiment with replacing structure and logic with personal subjectivity.

It would be odd indeed if judges did not somehow feel left out should they fail to devise a Judicial Impressionism or Cubism of their own. Perhaps most tellingly, judges may fear that history will judge them as it has those contemporary critics of Impressionism. In discussing the rejection faced by Monet and his contemporaries, one art historian spoke of the “conspicuous failure of the public to recognize

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52 *See id.* at 70.

53 *Id.* at 71.

54 ROSENBLUM, *supra* note 21, at 43.

55 *Id.*

novel methods.”<sup>56</sup> Though not written about the law, the statement could apply with equal force there. Justice William Brennan voiced the common concern when he spoke of the desire not to “turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance.”<sup>57</sup> It is all too human that judges would be alarmed about missing an important legal innovation just as the public and the establishment painters of nineteenth-century France missed one of the great revolutions in art.

So the everlasting temptation is to embrace modernity before it leaves us behind. For who wishes to be on the wrong side on progress, watching alone the departing train with all others aboard? In expressing the hope that judges would prove self-consciously empathetic, President Barack Obama took up the modern artistic impulse to put the judge’s own feelings upon the legal canvass: “[W]e need somebody who’s got the heart—the empathy—to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor or African-American or gay or disabled or old—and that’s the criteria by which I’ll be selecting my judges.”<sup>58</sup> And in emphasizing the role that one’s own ethnic identity should play on the bench, then-Judge Sonia Sotomayor adapted the self-referential qualities of modern artistic endeavor to law itself. Comments highlighted the artistic perspective in judging, including assertions such as “‘gender and national origins may and will make a difference in our judging,’” “‘there is no objective stance but only a series of perspectives,’” and “‘[p]ersonal experiences affect the facts that judges choose to see,’” in addition to her famous “‘wise Latina woman’” statement.<sup>59</sup>

I intend no disrespect, only profound disagreement, with two sincere and dedicated public servants. And my disagreement is not over whether the world view their sentiments express is right or wrong, but that it has no place in judging. The statements are merely the latest in a long line of pronouncements by artistic jurisprudes and policymakers.<sup>60</sup> The modern artists may be more aggressive in questioning form

56 GOMBRICH, *supra* note 3, at 416.

57 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 436 (1986).

58 Barack Obama, Speech at the Planned Parenthood Conference in Washington, D.C. (July 17, 2007).

59 See, e.g., Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, at A21 (compiling statements by Justice Sotomayor).

60 See, e.g., Theodore Roosevelt, State of the Union Address (Dec. 8, 1908), reprinted in 43 CONG. REC. 21 (1908) (“The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. . . . The decisions of the courts on economic and social questions depend upon their economic and social philosophy . . .”).

and structure than the many jurists who would emulate them, but the artists have at least remained true and faithful to the essence of their calling. The judicial artists by contrast have splashed paint where it does not belong. While I doubt their effort to incorporate artistic technique into law was a conscious one, the effect was surely a unifying one, to make art and law of a piece.

### III. OBJECTIVE LAW

Temptations exist to be resisted. Not that it ever hurts to have another piece of chocolate, and not that anyone wholly succeeds in willing away the seductive powers of the self-destructive. But law must give it a try. What is good and laudable in art is on that very account corrupting and impoverishing in law—the beauty of the artist’s creation is to be admired, not adopted. For the process of creating law, law’s purpose in society, and its power when invoked are all dramatically different from their counterparts in artistic expression. These crucial differences show how misguided it is for judges to view themselves as “legal artists” composing judicial masterpieces with the palate of language while rejecting the form and structure legal texts provide.

#### A. *Process: Individualist Art; Representative Law*

Perhaps the artist and the lawyer, like the farmer and the cowboy in *Oklahoma!*, can be friends united oddly in the recognition that the processes by which art and law are created could not be more different. At its core, art is typically created by a single individual. It is an act of self-expression intimately tied to the artist’s personality, experiences, and talents. In the end, it all comes down to the power of one. As such, self-expression and self-reference are necessary and unavoidable aspects of the artistic process. The creator invites the viewers or listeners to discover him or her, and in that refracted light to learn more about themselves. Without the spark of singular creativity, it is unlikely that art could be art at all, only a rote, mechanical reproduction that we would cease to appreciate as artistic.

In stark contrast, laws are collective. They reflect either the majoritarian choices of the people themselves or the choices of the people through their chosen representatives. Rather than individual masterpieces, laws are supposed to be communal composites arrived at by the people working through defined processes. The Constitution itself is a compact entered into collectively by “We the People” to “form a more perfect union.”<sup>61</sup> Individuals may put their mark on

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61 U.S. CONST. pmbl.

legislation (Ohio Senator John Sherman's Antitrust Act<sup>62</sup> or the McCain-Feingold Campaign Finance Reform Act<sup>63</sup> of more recent memory come to mind), but even when a particular person champions a piece of legislation it remains the ultimate creation of forces far larger than himself.

Several critical conclusions flow from the distinction in the way law and art are created. Most importantly, judges who rely on singular emotion or distinctive experience in rendering decisions are planting the seeds of artistic creation in terrain where they do not belong. Even the greatest judges have confused the creative differences. Perhaps Justice Benjamin Cardozo's statement that law "in its highest reaches is not discovery, but creation" can be excused as an observation largely confined to the common law.<sup>64</sup> But this transposition of artistic license to judicial latitude is elitist in the extreme. A great society will appreciate art and even be influenced by art, but it has not consented to be governed by the artistic impulse transposed to law. Though artists and judges may move in different circles, each profession comprises its own small and barely penetrable sanctums, not even intended to be representative in any sense. Thus it requires a certain chutzpah, whether conscious or not, to assert that empathy, self-expression, or subjectivity should be used by judges in reaching legal determinations. When the will of a single individual supersedes the collective will of the lawmaking process, we have adopted the artistic model, but without any of the lasting beauty of the artist's creation to show for it.

The tendency to indulge the artistic impulse is not confined to liberals or conservatives. In two cases that have framed the modern era of constitutional law—*Roe v. Wade*<sup>65</sup> and *District of Columbia v. Heller*<sup>66</sup>—judges either painted constitutional rights onto blank canvass or interpreted ambiguous provisions in a manner that degraded the representative quality of law and maximized the opportunity for individual sentiments and preferences. No matter how wise, the judicial artist who bases decisions on his individual feelings and experiences

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62 Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006).

63 Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) (codified as amended primarily in scattered sections of 2 & 47 U.S.C.).

64 See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921) ("As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation . . .").

65 410 U.S. 113 (1973).

66 128 S. Ct. 2783 (2008).

risks impoverishing legal discourse rather than enriching it. Diversity of experience comes from aggregating people's backgrounds democratically. The individual perspective from the bench is all too often idiosyncratic, reflecting a particular upbringing or identity, and the democratic process is intended to submerge precisely that.

Artistically, there is no such conflict because art is not created by the people. The poet, composer, or painter is the creator and can do as he pleases with his creations. But only a creator possesses such authority. It would be absurd to suggest that an observer could draw mustaches on masterpieces or add new themes to a musical score or new lines to a poem without radically altering the composition of the artist.<sup>67</sup> Apart from the danger of destroying a masterpiece, the real problem with such an act is that the observer is not the creator of the work and thus is not the proper party for deciding what changes to it are appropriate. In the same way, a judge cannot modify law based on the urge to empathize because he was not ultimately responsible for the law's creation. That privilege and responsibility lies alone with the creators of law—the people and their duly elected representatives.

Nor does the existence of judicial discretion undermine this point. Of course no one argues that judges are robots. Judges must daily exercise good judgment in reaching decisions. Judges are expected, for example, to exercise discretion in resolving factual disputes and ambiguities in the law itself.<sup>68</sup> However, the fact that some discretion lies at the heart of the judicial function does not justify utilizing personal, subjective criteria either to create ambiguity or to resolve it.

Empathy has no place in the typical factual determination. Imagine John and Emily together in a meadow. The artist is free to use their appearance as a springboard for whatever flight of imaginative fancy he desires. Insofar as their appearance together in the meadow is legally relevant, the judge has discretion only to determine what actually happened when and while they were there. Only then can he

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67 Marcel Duchamp's famous work, *L.H.O.O.Q.*, is effective as an attack on high art precisely because it is a bearded and mustached parody of the *Mona Lisa*. See WILLIAM S. RUBIN, *DADA AND SURREALIST ART* 37 (1968). If the letters of the title are pronounced quickly in French, the result is an off-color remark about the *Mona Lisa*. *Id.*

68 See, e.g., THE FEDERALIST NO. 37, at 228–29 (James Madison) (Clinton Rossiter ed., 1961) (discussing the challenges of ambiguity inherent in all legal documents); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 304 (1989) (“According to Locke and now Madison, political principles are complex ideas that are liable to be indistinctly conceived, and the indistinctness of these complex ideas inevitably produces obscurity.”).

proceed to draw conclusions. In other words, the external reality that is altogether at the service of the artist is the master of the judge, although a judge's well-honed judgment may inform his understanding of what likely took place.

Similarly, the resolution of legal questions is no more amenable than factual determination to the freedom and feeling of artistic process. For the very form and structure that artists often perceive as an impediment to their work are, precisely because of their collective nature, the judge's sole sources of authority. An artist does not need form and structure for legitimacy. A judge has no sanction to decide other than what a particular text means and whether it applies to the situation under consideration. The artist's feelings as caught on canvas are supreme. The judge's feelings about the merits of the legal text before him are, or should be, largely irrelevant. To be sure, there may be disputes over whether a legal text actually applies. But even as to an ambiguous text, the judge must use maxims of statutory interpretation to determine what *others* meant. *Inclusio unius exclusio omnes*, for example, ties the hands of a judge both as to included and omitted terms. The artist is free to include and exclude, to add and subtract, to alter at will—the preconceived structure need mean little to him.

Most importantly, the Constitution occupies a place in the law unlike anything found in art. It exists precisely to cabin the free-flowing exercise of discretion so valuable to creative expression. Indeed, all judges swear on their ascension to the bench to judge “agreeably to the constitution and laws of the United States.”<sup>69</sup> That level of respect to a formal standard certainly has no equivalent among artists, who raise their right hands to no one, and it illustrates the distinct role the Constitution plays.

Suggestions that the text of the Constitution should be interpreted or modified in light of “evolving norms and traditions of our society” through a “dynamic process of interpretation” miss the point of having a Constitution in the first place.<sup>70</sup> The evolving Constitution is, in essence, an advisory Constitution, and it indulges the tendency of judges to assume artistic freedom with what is at bottom a social compact.<sup>71</sup>

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69 Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (current version at 28 U.S.C. § 453 (2006)).

70 See GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION 2 (2009).

71 Indeed, as Michael McConnell has written:

If the Constitution is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution itself is only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient. Taken to its

The collective effort needed to create the Constitution simultaneously thwarted the individual judge's freedom to tamper with it. It is no answer to say that "when it comes to the many provisions that are phrased as broad and general principles, change rather than constancy in interpretation may be necessary to preserve constitutional meaning over time."<sup>72</sup> For that view is so broad and so open-ended that the transformation of judge into artist is rendered well-nigh complete.

Credit the progressives for creative brushstrokes in repainting the damaged rhetoric of living constitutionalism in appealing garb. The trouble is that any interpretative system that encourages judges to use "the entire tradition of opinions and precedents that have sought to vindicate and implement the Constitution"<sup>73</sup> still firmly ensconces individual judges as artists by encouraging them to select from a boundless mosaic of interpretative inputs to create the masterpiece of their choosing. To the extent that the judge is rendered supreme to text, structure, and history, he has become the artist whose control over his canvas is complete. The individualism envisioned in art will have triumphed over the collectivism embodied in law, and the damage to governance by democratic means will be considerable.

Now, of course, the Constitution and laws empower and indeed obligate judges to protect certain individual rights. And outside the constitutional realm, there are notable areas where judges are explicitly directed to exercise discretion that can be empathetic and subjective. For instance, sentencing often involves an inherently discretionary component.<sup>74</sup> But this fact does not support uncabined self-expression in judging. Judges are not justified in exercising empathy in sentencing because of some intrinsic artistic right to ignore text and structure. Rather, the text enacted by the legislature expressly granted judges a limited power to weigh various sentencing criteria in specific situations in the hope of providing flexible sentencing

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logical conclusion, this line of argument does not provide a reason for treating the Constitution as authoritative; it instructs us to disregard the Constitution whenever we disagree with it.

Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1129 (1998).

<sup>72</sup> LIU ET AL., *supra* note 70, at 26.

<sup>73</sup> Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, at 11, 23 (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>74</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 1–14 (2009), available at <http://www.ussc.gov/2009guid/GL2009.pdf> (discussing the history and goals of the U.S. Sentencing Guidelines, specifically the desire to constrain judicial discretion while still retaining the flexibility necessary to respond to specific cases).

schemes rather than rigidly rules-based ones.<sup>75</sup> That judicial discretion can be expanded or limited by the legislature as desired. It would be inaccurate in the extreme to extrapolate from legislatively allowed discretion to justify full blown, self-expressive judicial artistry in all areas of the law. The notion that if artists can do it, why not we, is insidious to law, and the freedoms modern artists have understandably claimed for themselves supply the very rationale for a dramatically different judicial function.

*B. Purpose: Provocative Art; Stabilizing Law*

Just as the processes by which art and law are created are distinct, so also their purposes vary widely. Artistic expression generally is intended to provoke a response, whether verbal or nonverbal, individual or collective. By contrast, through an exquisite balance of liberty and order, law is intended to provide structure in society. This difference again explains why the revolt against formality, so enriching in the artistic context, should not be imitated in law.

It will help to reflect just a moment on the extraordinary role and purposes of the arts. The goal of artistic creation is to enlighten, entertain, or even provoke those who experience it. Art is supposed to be an experience through which people partake of new ideas, new experiences, or even new revelations about themselves. Music uplifts, art beautifies, literature inspires, among many other things.

Because the purpose of art is so broad and so variable, the widest range of expression is needed. The artist needs latitude in reaching out and interacting with those who come in contact with the work. Certain paintings may go in and out of style, some poems may not find a following, and styles of music may come in and out of vogue. These changing, decentralizing developments are healthy in the artistic arena because they provide the richest range of inspiration both for artists and their public.

In contrast, law's great intention is not to provoke. It aims to avoid and to settle disagreements through pre-determined procedures. At its most basic level, law is supposed to provide stability and predictability to society. "[I]n order for the exercise of coercive power to be justified it must be imposed on individuals who are capable of conforming their behavior to its demands and who have the

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<sup>75</sup> Cf. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 848 (1972) ("When discretion is denied the law dictates which standards should be applied by all the judges. When discretion is allowed each judge is entitled to follow different reasons but he must believe that they are the best. Otherwise, discretion can be equated only with arbitrariness, whim, and caprice.").

opportunity to do so.”<sup>76</sup> Law is intended to set the standards by which people behave, business is conducted, and disputes are resolved. It is true that law can be a powerful agent for social change.<sup>77</sup> However, that very power derives from law’s intended status as society’s roadmap for resolving disputes. When a new law reflects or promotes changes in society, it does so because society recognizes that one of law’s purposes is to establish new rules of the game.

The distinction between the purposes of law and art can be illustrated by a purely hypothetical example. Suppose a young composer wrote a new piece for the cello and wanted it performed. Somehow, this unknown composer was able to hire the world’s most accomplished cellist and the Lincoln Center for the premier performance. However, on the night of the performance, the cellist decides (correctly) that the new piece is terrible and should never be played. Instead he brilliantly improvises what is immediately recognized as the greatest performance of his fabulous career. People on the street are still speaking of the performance months later, and a generation of musicians finds inspiration in it.

In spite of this amazing artistic success, the renowned cellist would have violated the terms of his contract to play the new composition. Law’s purpose is to stabilize society and to prevent such surprises, even if they serendipitously turn out well. The fact that an intentional breach of contract is an artistic success is irrelevant. A judge would not be justified in excusing the breach based on the musical triumph, no matter how moving the judge found the occasion. The art properly inspired the ages. The law properly held the artist to account.

Because of this fact, it is inappropriate to institutionalize the emotions of judges. As artists are viewed through the purposes of art, judges must be seen through the aims of law. Art is supposed to challenge assumptions and to catalyze change. Law is supposed to channel this same change, to provide a stable foundation upon which society can build new structures in accordance with democratic will. Art is useless as an agent of change if artists are purely imitative of

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76 Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 582 (1993).

77 See, e.g., David E. Van Zandt, *Commonsense Reasoning, Social Change, and the Law*, 81 NW. U. L. REV. 894, 938 (1987) (“In some cases, law is an attempt to alter commonsense ideas of the world in specific areas. Law can be in tension with commonsense theories about the world; it can be an attempt by the legislature or the courts to alter such theories. In this form, law is an ideology imposed from without that seeks to raise the costs of nonadherence so that individuals will alter their pictures of the world and comply.”).

their peers. Law is useless as a stabilizing force if it varies from day to day and from judge to judge. Judicial decision making that relies on the artistic virtues comes dangerously close to negating law's distinctive reason for being—a reason that, if rightly understood, protects through such ancient instruments as contract and copyright the flourishing of art itself.

### C. *Power: Persuasive Art; Binding Law*

Finally, judges should not aspire to artistic status because it is improper to commandeer the power of the state to advance their own subjective interests. Law, unlike art, is a coercive force. Art relies on aesthetic persuasion for its power. The judge is imbued with authority precisely because he is not an aesthete, with the idiosyncratic creativity and talent the term implies.

While many artists could care less about matters of state, others find it a moral imperative to use the power of their craft in protest. But that power, while unquestionably significant, is one step removed from the policy-making process.

It is true that Picasso's *Guernica* served as a compelling warning about the dangers of fascism and modern warfare, and Harper Lee's *To Kill a Mockingbird* remains a powerful condemnation of racial bigotry and inequality. That said, a painter obviously lacks the power to overturn acts of a government, and no author could outlaw racial inequality through a novel. The public must take action on its own in order for the artist's work to have practical effect. *Uncle Tom's Cabin* was effective not because Harriet Beecher Stowe had the power to end slavery but because its anti-slavery message inspired and energized so many Americans prior to the Civil War.<sup>78</sup>

The difference between coercive and persuasive power makes all the difference. An artist's power flows from internal, individual genius; in contrast, a judge is vested with external, positional authority. It is not the judge's individuality or background that grants the power to resolve disputes but rather the judge's position as arbiter appointed by law. Indeed, that position as arbiter of disputes is the entire purpose of having judges. To have any hope of fulfilling this goal, judges must be imbued with official power and the authority to exercise it even to the detriment of individual litigants. Nevertheless, there is an implicit understanding, classically evinced by the image of

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<sup>78</sup> See Darryl Lorenzo Wellington, *Uncle Tom's Shadow*, THE NATION, Dec. 25, 2006, at 26 (recognizing *Uncle Tom's Cabin* as "a social phenomenon and, arguably, the most influential novel in American history").

blind justice, that judges are trusted to wield the sword of justice dispassionately.

It is problematic, to say the least, for a single individual to adopt artistic methods of reaching decisions but to wield the sword of state based solely on that individual experience, emotion, or opinion. The reason that judges are allowed to reach final judgments in cases, backed by the full force of the government, is that law's form and structure provides practical limits on judicial discretion. If a judge ignores those limits and instead views the law as a field for artistic license, that individual has abdicated the very power that makes him a judge. The point can be made by a simple reference to attire. The judge's robe and the violinist's tuxedo may both be black, but the one emphasizes the solemnity of authority, the other the elegance of musical expression.

We of course do not think of the sole artist as dictator—such a comparison would be the furthest thing from our minds. Yet a judicial artist differs from a dictator only in the degree of success the latter has enjoyed in establishing his singular will. Judges are not “dictators of the case,” entitled to impose judgment based on their impressions or self-expressive concepts of what the outcome should be. When they commingle judicial power and artistic method, they become nothing more than citizen-poets whose views are worth no more or less than others who try their hands at suasion from the street.

#### CONCLUSION

One can admire without seeking to emulate. And so it is with law and art. Because artistic process, purpose, and power is so different from that of law, art serves as the perfect model for what judges should not do and ought not to be.

And yet there exists in all of us something of a yearning to be a free artistic spirit, to capture the essence of modernity so evident in great art, to throw off the forms and structure of our own profession as the most innovative artists of our time have thrown off theirs. Just do it, whispers the inner voice. Just march to our own muse in search of perfect equity and superior wisdom that in our self-regard, we suppose to reside within our souls. In the interest of empathy, evolving decency, ethnic identity, or numerous whatevers, exhibit from the bench those striking brushstrokes of personal vision that, truth to say, will always win some measure of public applause.

But America does not need jurists of a modern cast of mind to be a modern nation. The great tides of democratic change will see to that. And while it is one thing to understand the mores and technol-

ogy of modern times, it is quite another to adopt the whole ethic of personal expressiveness that defines the arc of the contemporary arts. To love another, one must first learn to love the good in oneself. And what is true of persons is true of professions as well. To love the arts, judges must first learn to love what is unique and distinctive in the law. There is no shame in that.