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Doubting Doubleness, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought

PETER MARGULIES*

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In 1965, Duke Ellington almost won a Pulitzer Prize. A jury considering candidates for the prize for music recommended Ellington, who at that time was in his sixties.¹ Ellington had been playing, composing, and arranging jazz for over forty years, and had been an international figure since his orchestra's first triumphant tour of Europe in 1933.² The Pulitzer Prize board, however, rejected the jury's recommendation.³ Ellington, when asked for comment on the board's veto, wryly observed, "Fate doesn't want me to be famous too young."⁴

Ellington was rejected because the board deemed his music insufficiently "serious;" it regularly awarded the prize to composers working in the European art music idiom descended from Haydn, Mozart, Beethoven, Brahms, Mahler, and Schoenberg. Recipients of the Pulitzer Prize for music typically have viewed representation of image, mood, or story—and traditions of tonality, harmony, and tempo which promote such representation—as alienating art from its essence. Such composers rigorously avoid any programmatic content. Instead, they work out problems of musical form isolated as much as possible from non-musical referents.

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1. See THE DUKE ELLINGTON READER 67 (Mark Tucker ed., 1993) [hereinafter ELLINGTON READER].

2. See *id.*

3. Two members of the jury resigned in protest. See Nat Hentoff, *This Cat Needs No Pulitzer Prize*, N.Y. TIMES MAG., Sept. 12, 1965, at 64 reprinted in ELLINGTON READER, *supra* note 1, at 362.

4. *Id.* at 363. After this Article was accepted for publication, Wynton Marsalis became the first jazz musician to receive a Pulitzer Prize. See *Pulitzer Prizes Break New Ground with First Award to Jazz Musician*, CHI. TRIB., Apr. 8, 1997, at 8.

This separation of musical form from mood, image, or story was the antithesis of Ellington's practice. Ellington integrated form with "social and cultural content" derived from the achievements, aspirations, and frustrations of African-Americans.⁵ In his most complex work, *Black, Brown and Beige*,⁶ Ellington combined swing instrumentals, work and sorrow songs, a waltz, the blues, a calypso, and his own urbane narration to produce what he called a "tone parallel" to the African-American experience.⁷ Ellington's boundary-crossing between form and representation defied the critical consensus about the aesthetics of form in European art music. When Ellington sought to bend form to accomplish programmatic purposes, particularly to depict the tension and dynamism in African-American life, critics of "serious" music viewed him as a less than serious composer.

The difficulties encountered by Ellington are echoed in the struggles of scholars telling outsider narratives⁸ in the legal academy.⁹ Out-

5. See, e.g., LE ROI JONES, in *BLACK MUSIC* 14 (1968).

6. The first performance of *Black, Brown and Beige* appears in the album *THE DUKE ELLINGTON CARNEGIE HALL CONCERTS* (Prestige 1943).

7. See Irving Kolodin, Program for the First Carnegie Hall Concert (Jan. 23, 1943) reprinted in *ELLINGTON READER*, supra note 1, at 160, 162. Consideration of Ellington's contributions must also acknowledge the role of Billy Strayhorn, Ellington's long-time collaborator and the composer of the Ellington band's theme song, *Take the 'A' Train*, as well as *Johnny Come Lately*, *Chelsea Bridge*, and *Passion Flower*. See *Billy Strayhorn Interviewed by Bill Coss*, *DOWN BEAT*, June 7, 1962, at 22 reprinted in *ELLINGTON READER*, supra note 1, at 498.

8. I use the term outsider to refer to people of color, women, gays and lesbians, and people with disabilities. For legal narratives centering on the role of race, see DERRICK BELL, *GOSPEL CHOIRS* (1996); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); DERRICK BELL, *AND WE ARE NOT SAVED* (1987); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995); PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG* (1995); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991). Feminist narratives are discussed in Kathryn Abrams, *Hearing the Call of Stories*, 79 *CAL. L. REV.* 971 (1991). For outsider legal narratives focusing on gays and lesbians, see William N. Eskridge, Jr., *Gaylegal Narratives*, 46 *STAN. L. REV.* 607 (1994); Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511 (1992). Narratives about persons with disabilities are discussed in Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 *EMORY L.J.* 245 (1994) (book review). An important strand of outsider narrative deals with intersecting axes of subordination, i.e., subordination based both on race or ethnicity and gender. See Margaret E. Montoya, *Mascaras, Trenzas, Y Greñas: Unmasking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 *CHICANO-LATINO L. REV.* 1, 18-26 (1994) (describing the alienation felt by a Latina student at Harvard Law School upon encountering elite legal academia's ignorance about the Latina experience). In this essay, I focus on Williams's work because it has attracted the widest critical attention.

The growing literature on lawyering for outsiders parallels these innovations in narrative. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING* (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991); Naomi R. Cahn, *Inconsistent Stories*, 81 *GEO. L.J.* 2475 (1993); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2459 (1989); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *YALE L.J.* 763 (1995); Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 *TEX. L. REV.* 1139 (1995) (book

sider scholars like Patricia Williams and Derrick Bell have used narrative to advance perspectives which resist articulation in traditional law review article format. By crossing the boundaries between narrative, theory, and doctrinal analysis, outsider scholars have expressed the alienation felt by outsiders, as well as the redemption experienced in the every day rituals of outsider communities, and the partial redemption experienced in the assertion of legal rights.

While these scholars have garnered validation in many quarters, powerful voices have criticized the outsider narrative. Some of the critics hail from the radical Left, including most prominently Mark Tushnet, a dean of the Critical Legal Studies movement ("CLS") for almost twenty years.¹⁰ Other critics, such as Richard Posner, are typically considered conservatives.¹¹ The critics also include political liberals such as Daniel Farber and Suzanna Sherry.¹² All of these critiques find fault

review); Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695 (1994); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

9. Discussion of outsider narratives should not obscure the fact that outsider scholarship is diverse in method and substance. While scholarship employing narrative has received the most attention from the legal academy, most work by critical race, feminist, or gaylegal scholars is more discursive or analytical than narrative in form. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991) (noting intersecting sources of oppression, both within and without outsider communities, experienced by women of color who are survivors of domestic violence); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 439-40 (1993) (arguing that the concept of "race" in American law embodies the assumptions of the majority culture); Stephen A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313 (1992) (critiquing Supreme Court decisions which restrict plaintiffs' remedies in employment discrimination cases); David Wilkins, *Two Paths to the Mountaintop?: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993) (arguing that black corporate lawyers have an obligation to practice law in the interests of the black community). In addition, outsider scholars do not march in lockstep on substantive issues. See, e.g., Kimberle Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 111, 128-31 (1993) (criticizing Henry Louis Gates for unduly discounting sexist images in rap).

10. See Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1992); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1515 n.1 (1991). For another critique from the radical Left, see Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995). For a more balanced account from the Left, see Wendy Brown, *Rights and Identity in Late Modernity: Revisiting the "Jewish Question"*, in IDENTITIES, POLITICS, AND RIGHTS 85 (Austin Sarat & Thomas R. Kearns eds., 1995).

11. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 368-84 (1995).

12. See Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Randall L. Kennedy, *Racial Critiques of Legal*

with the boundary-crossing of outsider scholars.¹³

This Essay argues that criticism of both Duke Ellington and outsider narrative scholars reflects tension between a High Modernist school of thought which guards boundaries between genres, and an outsider double consciousness which seeks to cross those boundaries. This High Modernism is a kind of formalism¹⁴ exemplified by the work of the influential art critic, Clement Greenberg,¹⁵ and by some essays of the Frankfurt School philosopher, Theodor Adorno, particularly Adorno's critique of jazz.¹⁶ The High Modernist perspective stresses the abstraction of form within a given genre, including music, painting, or law.¹⁷

Academia, in *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 8, at 316 (African-American civil rights scholar argues that outsider narratives unduly favor outsider perspectives).

13. Outsider scholars and their allies have also critiqued the critiques, while elaborating on their goals and methods. *See, e.g.*, Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, in *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 8, at 451 (critiquing Randall Kennedy); Robin Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 *HARV. L. REV.* 1864 (1990) (critiquing Randall Kennedy); Eskridge, *supra* note 8 (critiquing Farber and Sherry); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 *GEO. L.J.* 1845 (1994) (critiquing Farber, Sherry and Tushnet); Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?* 95 *COLUM. L. REV.* 1568 (1995) (book review) (reviewing POSNER, *supra* note 12); Gary Peller, *The Discourse of Constitutional Degradation*, 81 *GEO. L.J.* 313 (1992) (critiquing Tushnet); *see also* Alex M. Johnson, Jr., *The New Voice of Color*, 100 *YALE L.J.* 2007, 2020-33 (1991) (comparing critical feminist and race approaches); *cf.* Abrams, *supra* note 8 (analyzing narratives and offering provisional criteria for assessing their value); Jane B. Baron, *Resistance to Stories*, 67 *S. CAL. L. REV.* 255 (1994) (critiquing Farber and Sherry); Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 *U. COLO. L. REV.* 683 (1992). For rejoinders by Establishment critics of outsider narratives, *see* Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 *STAN. L. REV.* 647 (1994) (replying to Eskridge).

14. David Luban calls this formalist approach "neo-Kantian modernism." *See* DAVID LUBAN, *LEGAL MODERNISM* 51, 54-59 (1994).

15. *See* CLEMENT GREENBERG, *ART AND CULTURE* (1961); for a response to Greenberg, *see* T.J. Clark, *Clement Greenberg's Theory of Art*, in *THE POLITICS OF INTERPRETATION* 203 (W.J.T. Mitchell ed., 1983) (critiquing Greenberg); *but see* Michael Fried, *How Modernism Works: A Response to T.J. Clark*, in *THE POLITICS OF INTERPRETATION*, *supra*, at 221 (disputing Clark's claim that the turn toward the abstract in modernist painting embodies an essentialist claim about the ideal properties of art).

16. *See* THEODOR W. ADORNO, *Perennial Fashion—Jazz*, in *PRISMS* 119 (1983); THEODOR W. ADORNO, *Arnold Schoenberg, 1874-1951*, in *PRISMS*, *supra*, at 147; THEODOR W. ADORNO, *Reconciliation under Duress*, in *AESTHETICS AND POLITICS* 151 (1977); THEODOR W. ADORNO, *Commitment*, in *AESTHETICS AND POLITICS*, *supra*, at 177; *cf.* MARTIN JAY, *THE DIALECTICAL IMAGINATION* (1973) (analyzing the contributions of the Frankfurt School). I am grateful to Jonathan Simon for bringing Adorno's essay on jazz to my attention.

17. A number of commentators recently have drawn parallels between trends in music and art, and developments in law. *See e.g.*, LUBAN, *supra* note 14; POSNER, *supra* note 11, at 237; Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, in *AFTER IDENTITY* 229 (Dan Danielson & Karen Engle eds., 1995); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 *S. CAL. L. REV.* 2129 (1992); Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 *CARDOZO L. REV.* 229 (1994);

For High Modernists, an artist compromises her work by linking it with goals beyond the canvas or the concert hall, such as contributing to the cultural identity of a marginalized group. For example, Greenberg states that “[i]f [art] succeeds, it does so, as all art must, by going beyond . . . its prophetic rightness and wrongness. No more here than anywhere else does art, as art, depend upon its accuracy as anything other than art.”¹⁸

In his critique of outsider legal narratives, the CLS scholar Mark Tushnet, echoes the High Modernist attempt to construct “neutral” laws for art which sidestep the particularity of outsider prophecy. For example, when outside scholar Patricia Williams eschews formal narrative resolutions, to evoke the tensions of outsider experience, Tushnet chastises her for corrupting the aesthetics of form—for violating principles of “narrative integrity.”¹⁹ On one level, this echo of High Modernism is not surprising. CLS at its origin borrowed heavily from European High Modern cultural criticism—particularly the criticism of the “Frankfurt School,” including Jurgen Habermas, Herbert Marcuse, and Adorno.²⁰ What is more remarkable is how High Modernist assumptions push a veteran CLS scholar like Tushnet into championing neutrality against advocacy in law—a position which CLS has historically fiercely opposed.

Critiques of outsider narratives also follow High Modernism in privileging elite culture over the vernacular. For High Modernists such as Adorno, genres like jazz and movies, shaped in part by the vernacular—by visual representation, dance rhythms, and other modes of communication accessible to people without elite credentials—are a form of “mass production . . . which debases and betrays culture,”²¹ not to be confused with pillars of the modernist canon such as “cubism, Eliot’s poetry and Joyce’s prose.”²² Similarly, Tushnet associates Patricia Williams and other outsider narrative scholars with *The Degradation of Constitutional Discourse*.²³ In addition, many CLS scholars view

Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) (book review); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

18. See GREENBERG, *supra* note 15, at 266, 271.

19. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 256-58, 265-71.

20. See Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 411 (1993).

21. See ADORNO, *Perennial Fashion—Jazz*, in PRISMS, *supra* note 16, at 127.

22. *Id.* I do not seek to discredit cubism, Eliot, or Joyce in this Article. Rather, my concern is with the High Modernist critical attitude toward these works, not with the works themselves. In fact, these works are often much more complex than the High Modernist interpretation suggests, particularly in their engagement with vernacular expression.

23. Tushnet asserts that degradation is “too strong” a term to describe the effect on legal discourse of outsider legal narratives, reserving such vigorous condemnation for some recent

rights-talk as the indulgence of a popular fallacy—a form of “false consciousness” which both masks and reinforces alienation.²⁴

The rigid boundaries between form and prophecy, or elite and vernacular, are not responsive to the demands of double consciousness. The double consciousness of outsider groups flows from their experience as part of a broad community, such as the United States, coupled with experience as a marginalized group within that community. Artists from outsider groups seek some sense of membership in the larger society, even as that society oppresses them. These artists also feel the need to prophesy against the injustice they have experienced, and to commemorate a wide range of conditions in outsider life, including alienation, redemption,²⁵ and the comforting, communal rituals of daily existence. The tension between these “unreconciled strivings”²⁶ leads outsider artists to cross boundaries between form and meaning, to bridge “modernity’s enforced separation of art and life.”²⁷ These boundary-

Supreme Court opinions and Clarence Thomas’s testimony at his confirmation hearing. See Tushnet, *Degradation of Discourse*, *supra* note 10, at 251 n.2. Yet a title so loaded is not so easily foresworn. A reader is entitled to wonder why Tushnet grouped outsider narrative under the same rubric as phenomena he labeled as degrading discourse, unless Tushnet wishes the reader to draw the same conclusion about all of the phenomena he describes, including outsider legal narratives.

24. For a comparison of the value outsider scholars place on rights, as compared with CLS commentators see WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8; Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

25. I have assessed the redemptive strand in the history of civil rights litigation in an earlier essay. See Peter Margulies, *Progressive Lawyering and Lost Traditions*, *supra* note 8. For an insightful look at the different pathways to redemption debated at the dawn of the NAACP’s campaign against segregation in public education, see David B. Wilkins, *Social Engineers or Corporate Tools? Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 137 (Austin Sarat ed., 1997). Cf. Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989) (detailing the role of civil rights litigation in the origins of the modern civil rights movement).

26. See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 8 (Vintage ed. 1990).

27. PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* 124 (1993). Because, as Randall Kennedy noted, any discussion of outsiders’ difference can become a new ground for stigmatization, see Kennedy, *Racial Critiques of Legal Academia*, *supra* note 12, a couple of further observations are in order. First, boundary-crossing has been a favored move for many great innovators, including those not typically considered outsiders. Beethoven’s *Eroica* and Ninth Symphonies, for example, combine formal innovation with stirring visions of freedom. (I take no position on the issue of whether Beethoven was in fact a mulatto. Compare WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 110-15 (noting possibility), with POSNER, *supra* note 11, at 375-77 (disputing possibility)). Second, the relationship between modernity, boundary-crossing, and outsider status is highly dynamic. Many of the giants of modernity—Kafka, Freud, Schoenberg, and Marx, for example—were Jews or of Jewish descent, and therefore were outsiders in European culture. See JOHN MURRAY CUDDIHY, *THE ORDEAL OF CIVILITY: FREUD, MARX, LEVI-STRAUSS, AND THE JEWISH STRUGGLE WITH*

crossings yield an aesthetics which incorporates fragments of diverse forms into a mosaic which captures doubleness. Ellington uses music and cultural history to capture this doubleness, while the outsider scholars use narrative, legal analysis, and rights talk.

Doubleness leads outsider innovators to diverge from three dichotomies which are central to the High Modernist analysis. Part I of this Article examines the dichotomy of theory versus experience. Part II considers the elite versus the vernacular. Finally, Part III focuses on alienation versus redemption. In each case, High Modernists have sought to maintain dichotomies already bridged by outsider innovators; the High Modernists have monitored boundaries, which outsider innovators have crossed.

I. THEORY AND EXPERIENCE IN MODERNISM AND OUTSIDER EXPRESSION

One crucial difference between High Modernism and outsider innovation lies in perspectives on theory and experience. For modernists, theory and experience diverge: hence Paul Gilroy's observation about "modernity's enforced separation of art and life."²⁸ In contrast, outsider expression seeks "the reconciliation of art and life . . . as the favored vehicle for communal self-development."²⁹

These divergent views of the relationship between theory and experience play themselves out in different conceptions of form. For High Modernists, form in art and law is hermetic—sealed off from direct reference to experience in the world. To quote Clement Greenberg,

[T]he avant-garde poet or artist tries in effect to imitate God by creat-

MODERNITY (1974). Many of their innovations arguably stemmed from dissatisfaction with the status quo, which was shaped by their outsider status. *See id.*

This outsider status was a grim reality for my mother, a Holocaust survivor, and my father, who in 1938 fled Vienna—a center of gravity for many of the modernist experiments alluded to above—and spent the next decade in the refugee community of Shanghai, China. As a Jew in America, I have been more privileged. My fondest hope for my daughter Sarah, now two-and-a-half years old, is that she will understand her grandparents' experience well enough to feel some sense of kinship with outsiders throughout the world. For my own attempt to draw such connections, *see* Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1994). *See also* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993) (discussing how Judaism influences images of professionalism); Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613 (1993) (same); *cf.* Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413 (considering how religious traditions suggest humanistic responses to issues of inequality).

28. *See* GILROY, *supra* note 27; GREENBERG, *supra* note 15, at 14 (noting "discontinuity between art and life" in modernist painting).

29. GILROY, *supra* note 27.

ing something valid solely on its own terms, in the way nature itself is valid, in the way a landscape—not its picture—is aesthetically valid; something *given*, increate, independent of meanings, similars or originals. Content is to be dissolved so completely into form that the work of art or literature cannot be reduced in whole or in part to anything not itself.³⁰

High Modernism gives art its “own autonomous status.”³¹ Art focuses on the processes of its own creation. In High Modernism, aesthetic evaluation is an assessment of how a given work makes itself pure by following the laws of its genre and avoiding the contamination of direct engagement with society. Music, for example, must “develop its substance according to its intrinsic impulses.”³² Reference to mood, story, or situation—to matter extraneous to these intrinsic impulses—destroys art’s autonomy.³³

In turning away from the representation of experience, modernism also turns away from aesthetic strategies which promote representation. For example, perspective in painting produces the illusion of depth—the representation of three dimensions on the two-dimensional canvas. Emphasizing the flatness of painting by dispensing with perspective is an archetypal modernist move.³⁴ Similarly, Western music uses a variety of resources for representational purposes, including tonal centers, or keys; diatonic scales and chords, or harmonies, based on those tonal centers; and fixed tempos, involving regular beats and rhythmic accents. For modernists, such devices only represent ornament and illusion.³⁵ Uncovering music’s intrinsic impulses requires dispensing with tonal centers, dismantling diatonic harmony, and disrupting regular tempi, thus making clear that music is a sequence of sounds and timbres with no necessary connection to mood, image, or narrative.³⁶ If this discon-

30. GREENBERG, *supra* note 15, at 6.

31. See ADORNO, *Reconciliation under Duress*, in AESTHETICS AND POLITICS, *supra* note 16, at 162. Adorno never went as far as Greenberg in divorcing aesthetics from society. Indeed, Adorno’s foremost interpreter has argued that Adorno’s aesthetic theory includes the relationship between society and artistic form as one of its constitutive elements. See JAY, *supra* note 16, at 176-77. Yet, consistent with Greenberg, Adorno saw art as imperiling itself when it focused too directly on social conditions and practice. See ADORNO, *Reconciliation under Duress*, in AESTHETICS AND POLITICS, *supra* note 16, at 161.

32. See ADORNO, *Arnold Schoenberg, 1874-1951*, in PRISMS, *supra* note 16, at 152.

33. See *id.* (expressing disdain for composers like Richard Strauss, who composed tone poems such as *Tyl Eulenspiegel*, *Salome*, and *Also Sprach Zarathustra*, as requiring “literary and programmatic support” for their music).

34. See GREENBERG, *supra* note 15.

35. Cf. ADORNO, *Arnold Schoenberg, 1874-1951*, in PRISMS, *supra* note 16, at 161 n.1 (noting that diatonic harmony, like perspective in painting, “creates the illusion of spatial depth”).

36. Adorno noted approvingly that Schoenberg’s music, with its stringent avoidance of conventional harmonic structures in favor of sometimes clashing counterpoint melodies, was “music of the intellectual ear.” *Id.* at 157.

nection from representation in art reflects alienation in society, the reflection could only be oblique. A direct reflection of society melts High Modernism's hermetically sealed container of form.

This conception of form contrasts with the dialogic conception of form favored by outsider innovators. For outsider innovators, form is never merely formal. Instead, it is always rich in metaphors for multiple consciousness. Ellington's view of dissonance illustrates how jazz defies High Modernist paradigms. For High Modernists, dissonance³⁷ was a crucial element in a hermetic conception of form—an ascetic manifesto of independence from traditional conceptions of tonality. Ellington, in contrast, treated dissonance not as hermetically formal, but instead as a representation of the African-American experience. He noted that, “[d]issonance is our way of life in America. We are something apart, yet an integral part.”³⁸ Ellington used dissonance to embody that tension between marginalization and belonging which DuBois defined as double consciousness.³⁹ Ellington's observation demonstrated a dialogue between music's formal properties and the assertion of cultural identity.

A closer look at *Black, Brown and Beige*, Ellington's most ambitious work, confirms this point. *Black, Brown and Beige* received its first and last complete public performance at Carnegie Hall in New York City on January 23, 1943. The three-word title of the piece itself reflects the history of double consciousness. It connotes what Ellington wished the piece to be—a “tone parallel” to the history of African-Americans and to the diversity of experience evident in that history. Yet, a little over a year after Pearl Harbor, the title also had a different resonance. It's three words represented a people that helped constitute, even as they remained unacknowledged by, the “Red, White, and Blue.”⁴⁰

The music of *Black, Brown, and Beige* echoes this doubleness. One can interpret the piece in both form and program as an enactment of the search for belonging in the Black diaspora. Its most prominent melodic theme is the eloquent *Come Sunday*, a meditation on resignation and yearning capturing what Ellington called the “‘Church Window’ mood—the Negroes looked in from outside, but the windows were

37. Dissonance is the conjunction of intervals, considered discordant in a European system of tonality, such as a minor second (played on the piano by striking a black key and the neighboring white key simultaneously).

38. See John Pittman, *The Duke Will Stay on top*, reprinted in ELLINGTON READER, *supra* note 1, at 150.

39. See DUBOIS, *supra* note 26, at 8.

40. See Irving Kolodin, Program for the First Carnegie Hall concert (Jan. 23, 1943), reprinted in ELLINGTON READER, *supra* note 1, at 162.

pretty, anyway."⁴¹ *Come Sunday* appears in the first section of the piece, entitled, *Black*. It is then echoed in a more festive cadence in the second section, *Brown*,⁴² in trumpeter/cornetist Rex Stewart's opening statement in *Emancipation Celebration*, as the testimony of faith is joined by rejoicing at the dawn of the Reconstruction Era. As the hope of Reconstruction fades, *Come Sunday's* place is taken by a more alienated slow section, *Blue*, with Ellington's acerbic lyrics:

The Blues don't know nobody as a friend
Ain't been nowhere where they're welcome back again. . .⁴³

Brown also includes a *West Indian Dance*, commemorating Haitian soldiers' participation in the American Revolution, drawing Ellington's observation that the African-American soldier "fought for those who enslaved him."⁴⁴ The third major theme of the section is "Emancipation Celebration," evoking both the promise and the disappointment of the post-Civil War period. In the third section, *Beige*, *Come Sunday* reappears, jostling for attention with *Sugar Hill Penthouse*, an ethereal yet knowing waltz (the waltz itself being an innovation for jazz in this period) connoting the Harlem Renaissance. *Sugar Hill's* bridge recalls the yearning, ascending quality of *Come Sunday*, provoking Ellington's observation that "there are more churches in Harlem than cabarets."⁴⁵ *Come Sunday* finally joins with the martial brass which end the piece, as African-Americans again take up the fight against oppression abroad despite facing oppression at home.

This brief sketch of *Black*, *Brown* and *Beige* suggests that the piece is as much cinematic as musical in its ambitions. Images and stories follow each other with a soaring rapidity. Transitions are often as ruthlessly abrupt as edits in a cinematic montage.⁴⁶ Ellington's montage technique also had programmatic implications. The unceremonious transitions and varied motifs invoke the African diaspora, affected by racism, population migration within the United States, immigration, and economic trends, even as the *Come Sunday* theme manifests an abiding hope for future justice.

Ellington's abrupt transitions triggered the doubleness dilemma.

41. *Id.* at 163.

42. See MARTIN WILLIAMS, *Form Beyond Form*, in THE JAZZ TRADITION 94 (1993) reprinted in ELLINGTON READER, *supra* note 1, at 400, 412.

43. See Irving Kolodin, Program for the First Carnegie Hall Concert (Jan. 23, 1943), reprinted in ELLINGTON READER, *supra* note 1, at 163.

44. See *id.* at 162.

45. See Howard Taubman, *The "Duke" Invades Carnegie Hall*, N.Y. TIMES MAG., Jan. 17, 1943, at 10, reprinted in ELLINGTON READER, *supra* note 1, at 155, 160.

46. Cf. ANN DOUGLAS, TERRIBLE HONESTY: MONGREL MANHATTAN IN THE 1920's 422-23 (1995) (suggesting parallels between film and Ellington's music).

Essentialists from both the classical and jazz camps were unhappy with Ellington's transitions.⁴⁷ Classical critics regarded the transitions as more abrupt than the flowing modulations characteristic of European art music. Meanwhile, jazz critics felt that the transitions broke up the steady tempo they regarded as essential. The programmatic aspect of the transitions was ignored by jazz and classical critics alike.

The works of outsider narrative scholars, particularly Patricia Williams, provoke the same concern about form. Williams has persistently crossed boundaries for some time now. In an afterword in *The Alchemy of Race and Rights*, Williams informs the reader only half-ironically that while the staff at the Library of Congress wanted to classify her book, which combines narrative, legal analysis, and cultural criticism with an audacity which serves as fanfare for a new genre, as "Afro-Americans—Civil Rights" or "Law Teachers," she wanted to hold out for "Autobiography," "Fiction," "Gender Studies," and "Medieval Medicine."⁴⁸

Williams's audacity in the use of narrative has attracted considerable attention. Like outsider narrative scholars generally, Williams chooses narrative not just because she enjoys working in this genre, but because narrative allows her to convey the experience of doubleness with greater immediacy. Storytelling builds solidarity within marginalized groups, and also forces dominant groups to confront their own assumptions.⁴⁹ Yet storytelling has encountered resistance in the legal academy, with its tradition of doctrinal analysis and devotion to "neutral principles" which supposedly transcend political or cultural difference.⁵⁰ A crucial element of the outsider narrative project is illustrating how the academic world of neutral principles provides no relief from, and is in large part constituted by, the subordination of difference reflected by the microaggressions⁵¹ of daily encounters with members of the dominant group. Two of Williams's formal strategies attract particular scrutiny: first, unresolved narrative tension, and two, narrative superimposition.

Williams's use of unresolved narrative tension can be seen in her *Au Coton* story. *Au Coton* portrays the author as complicitous or at least

47. See GUNTHER SCHULLER, *THE SWING ERA* 153 (1989).

48. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 257. Williams's second book, *THE ROOSTER'S EGG*, *supra* note 8, also resists categories. I found it, with the assistance of a Borders sales clerk consulting her computerized inventory, in the "Sociology" section.

49. See Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, in *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 8, at 64, 73.

50. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 11.

51. See Peggy C. Davis, *Law as Microaggression*, in *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 8, at 169.

acquiescent in the bigotry of sales clerks at a Manhattan boutique. In the boutique, Williams overhears the young clerks ridiculing Jewish accents and supposed attitudes. Williams, who noted earlier in her book how she remonstrated with a white female acquaintance who had trotted out a stereotype of Jews in conversation,⁵² on this occasion in the boutique describes herself as paralyzed. She cites the desire for approval, fear of making a fuss, and the thrill of even tacitly being part of an “in” group which can exclude others. Williams notes, “[t]he whole room was filled with adolescent vanity, social pressure, and a yearning to belong.”⁵³ Williams acknowledges her own participation in this climate.⁵⁴ She observes further that “it was irresistible, forbidden, almost thrilling, to be on the inside.”⁵⁵ To set this thrill of insider status in context, Williams recalls her father “walking trepidatiously into stores in Savannah, Georgia, shortly after desegregation, cautiously disbelieving of his right to be there, disproportionately grateful for the allowance just to be.”⁵⁶ Williams sidesteps the temptation to offer glib explanations of how she can experience inequality, yet on occasion acquiesce in bigotry directed at others.

For Tushnet, this unresolved tension reveals a failure of form—a failure to follow the principles of “narrative integrity.” Tushnet wishes that Williams had resolved the “stylistic tension” created by “the moments in which Williams presents herself as behaving badly and Williams’s overall righteous self-presentation which has not assimilated those moments.”⁵⁷ Such a simple closure, however, is not Williams’s intent. Like Ellington’s unceremonious transitions in *Black, Brown and Beige*, Williams’s use of tension reflects the diversity of identity and experience within African-American life, and the boundary crossing it makes possible: “I can be black and good and black and bad . . . black and white, male and female, yin and yang, love and hate.”⁵⁸

The formal ambiguity which Williams embraces in *Au Coton* is not inconsistent with many accounts of modernism. What *is* anomalous from a modernist perspective, however, is Williams’s use of formal ambiguity to explicitly promote an agenda of social justice. Williams does not cultivate ambiguity for its own sake. Rather, she uses and is

52. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 125.

53. *Id.* at 127.

54. See *id.*

55. *Id.* at 128.

56. *Id.* at 128-29.

57. Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 277.

58. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 130.

willing to forsake ambiguity as a lens to uncover the experience of difference in a multicultural world. It is Williams's use of narrative superimposition for this purpose that triggers High Modernist anxiety.

This anxiety leads High Modernists to focus on outsider legal narratives and the formal strategies outsiders employ. Anne Coughlin's description of what I call "narrative superimposition" is a good example of this focus in outsider strategies. Coughlin, who calls this approach "interlocking narratives," provides a cogent description of Williams's technique:

[R]ather than simply telling readers a story about an event that she . . . experienced (the "experiential narrative") and then drawing out for us its meaning, Williams often embeds the experiential narrative within yet another narrative (the "framing narrative"). In the framing narrative, Williams describes herself recounting the experiential narrative and its meaning to another group of listeners (usually her students or colleagues) and the framing narrative also reports those listeners' reactions to the experiential narrative.⁵⁹

Williams' *Benetton* story uses the formal strategy of narrative superimposition dialogically, to capture the experience of multiple consciousness. In the *Benetton* story, Williams recounts how, while shopping for her mother's Christmas present, a white clerk denied her admittance to a Benetton boutique, using the store's buzzer system.⁶⁰ The time was 1:00 p.m., and there were several white people in the store, who as Williams puts it, "appeared to be shopping for things for *their* mothers."⁶¹ Williams infers that the supposedly neutral technology of the buzzer system was used to exclude her on the basis of her race. The next day after the store had truly closed, Williams recounts, she placed a poster describing this bias incident on the Benetton window.⁶²

In her framing narrative, Williams draws an implicit parallel between the supposedly neutral buzzer, with its exclusionary effects, and the "neutral" mores of law reviews and establishment legal scholars. When she later submitted an article containing a description of the incident, law review editors sought to edit out all mention of Williams's race.⁶³ An academic colleague chastised Williams for unilaterally placing her poster on the Benetton window, without first offering Benetton an opportunity to respond.⁶⁴

59. Coughlin, *supra* note 10, at 1310.

60. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 44-45.

61. *Id.* at 45 (emphasis in original).

62. See *id.* at 46.

63. See *id.* at 47-48.

64. See *id.* at 51.

Anne Coughlin takes Williams to task for choosing clarity over ambiguity in the framing narrative. According to Coughlin, Williams pre-empts the reader's "interpretive process"⁶⁵ by linking the invocation of neutral principles by the law teacher and law review editor in the framing narrative with the impersonal exclusion facilitated by the Benetton buzzer in the experiential narrative. According to Coughlin, a more ambiguous telling of the framing narrative would have furthered the interpretive process.

The problem with Coughlin's observation about the interpretive process is that it proves Williams's point. Williams's framing narrative for the Benetton story is meant to illustrate how neutral conceptions of process frequently reinforce discrimination.⁶⁶ Fresh from the microaggression of the Benetton buzzer, Williams does not encounter solace and solidarity in the legal academy, but instead a purportedly neutral account of how she overreacted. Williams's narrative superimposition brings home the sensation of strangulation which doubleness can create, as her resistance to a daily indignity is discredited in the legal academy because of her lack of a neutral stance. To Coughlin, Williams "strangles" the interpretive process by rejecting neutrality in the framing narrative.⁶⁷ Ironically, Coughlin, with her insistence on formal neutrality, becomes another character in Williams's framing narrative, brandishing neutrality to stifle the outsider's voice.

Of course, Williams's framing narratives do not always cast her interlocutors as obtuse. To do that would be to abandon her commitment to unresolved tension.⁶⁸ For example, in her new book, *The Rooster's Egg*, Williams describes a dream in which she sees her enslaved great-great-grandmother's image in paintings by an Auschwitz survivor, whom Williams has just met. The paintings are lush landscapes, each also containing "a space of completely bare canvas, an empty patch in the shape of a human being."⁶⁹ In the dream, Williams's great-great-grandmother fills in this patch. When Williams retold this story to her friends, their reactions ranged from empathy to outrage—prompted by her "blended image of historical oppressions."⁷⁰ Her initial defensiveness to their reactions softened, however, when she began to hear about her friends' own histories, which included, "wars in Armenia,

65. See Coughlin, *supra* note 10, at 1311.

66. Williams, unlike CLS scholars, does not give up completely on the neutral, process-based language of rights. Here, as elsewhere, she seeks to bridge an account of the alienation produced by rights with an account of rights' redemption. See *supra* notes 52-65 and accompanying text.

67. See Coughlin, *supra* note 10, at 1312.

68. See *supra* notes 52-59 and accompanying text.

69. See WILLIAMS, *THE ROOSTER'S EGG*, *supra* note 8, at 209.

70. *Id.*

potato famines in Ireland, civil war in Ghana, oppression in Latvia, electoral fraud in Palau, independence movements in Scotland, and the literary tradition of magical realism in South America."⁷¹

This framing narrative has more ambiguity than the depiction of legal academia which frames the *Benetton* story. While Williams describes her friends' diverse stories, she leaves it to the reader to determine how best to realize a vision of social justice out of this "rich, painful, nuanced, complex, compressed amalgam that is American culture in its most generous sense."⁷² Yet, here, too, Williams does not cultivate ambiguity out of a hermetic sense of form. Rather, her ambiguity reflects both the incompleteness and the promise of American democracy in a multicultural world.

Williams's framing narrative echoes the vision which Ellington articulated in his later years. In his introduction to concert audiences of a section of a suite entitled *Afro-Eurasian Eclipse*,⁷³ Ellington cited Marshall McLuhan's evocation of the global village.⁷⁴ Ellington informed his audience that:

In this particular segment, ladies and gentlemen, we have adjusted our perspective to that of the kangaroo and the didjeridoo. This automatically throws us either down under and/or out back. And from that point of view it's most improbable that anyone will ever know exactly who is enjoying the shadow of whom.⁷⁵

Ellington's framing narrative demurely refrains from identifying any villains. In its ambiguity, however, Ellington's irony pierced both the veil which DuBois described as obscuring African-Americans in their own country and the West's Eurocentric pretensions. Ellington's framing narrative, like Williams's, parts company with High Modernism in its programmatic character. Underlying his irony was a multicultural conception of music that was Black, American, yet international in scope.

II. ELITE VERSUS VERNACULAR CULTURE

Ellington's irony in his introduction of *Afro-Eurasian Eclipse* also exemplifies outsider innovators' resistance to another High Modernist dichotomy: the division between elite and vernacular culture.⁷⁶ With a

71. *Id.* at 209-10.

72. *Id.* at 210.

73. See DUKE ELLINGTON ORCHESTRA, *AFRO-EURASIAN ECLIPSE* (Fantasy 1976); cf. Gary Giddins, *Duke Eclipses the Didieridoo*, *THE VILLAGE VOICE*, Apr. 5, 1976, at 104, reprinted in *ELLINGTON READER*, *supra* note 1, at 379 (analyzing the piece).

74. Gary Giddins, *Duke Eclipses the Didieroo*, *THE VILLAGE VOICE*, Apr. 5, 1976, at 104, reprinted in *ELLINGTON READER*, *supra* note 1, at 379 n.2.

75. *Id.* at 380 n.2 (quoting DUKE ELLINGTON ORCHESTRA).

76. By "elite" culture, I refer to culture produced by a select few for a select few who have

nonchalance that was the product of careful craft, Ellington juxtaposes the language of the elite (“perspective”) with two examples of the vernacular, here imported from Australia (“down under,” “out back”). To complete his deconstruction of the elite/vernacular divide, Ellington connects his two vernacular examples with the academic “and/or.”⁷⁷ This kind of boundary-crossing is a hallmark of outsider innovation, while it is anathema to High Modernists.

For High Modernists like Adorno, the vernacular is dangerous because its very accessibility makes it a crucial element of mass culture, which reinforces the ideology of the status quo.⁷⁸ According to Adorno, jazz-as-mass-culture has regressive political consequences. With its veneer of nonconformism,⁷⁹ it can bolster an already oppressive status quo, by “proclaim[ing] the stupor of tolerated excess to be the realm of freedom.”⁸⁰

According to Adorno, two formal attributes of jazz accounted for its reinforcement of hegemony: syncopated rhythm and blues tonality. Syncopation involves the displacement of rhythmic accents from their accustomed points in a musical measure, or “bar.” A bar of music in 4/4 time, the most common time signature, has four beats. Typically, accents fall on beats 1 and 3, as in most marches: oom-pah, oom-pah.

undergone an “initiation” into the former group’s “craft secrets.” See GREENBERG, *supra* note 15, at 8. This initiation usually requires some level of affluence, a substantial commitment of time, and an acquaintance with theoretical or abstract concepts. European atonal music and the critical legal studies of Mark Tushnet are examples of elite culture. See ADORNO, *Arnold Schoenberg, 1874-1951*, in PRISMS, *supra* note 16; Tushnet, *Critical Legal Studies: A Political History*, *supra* note 10. Vernacular culture, in contrast, is often the province of the poor and the working classes, and is usually concrete, not theoretical. While vernacular culture may take as much time to master as elite culture, simple appreciation may be more readily attainable. The blues, discussed in greater depth *infra* notes 82-103 and accompanying text, is an example of vernacular culture. See HOUSTON BAKER, *BLUES, IDEOLOGY, AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY* 2-3 (1984). Jazz and outsider legal narratives seek to bridge these boundaries.

77. In this introduction, as in much of his public speaking and writing, including his reply to the Pulitzer Prize board’s rejection (“Fate doesn’t want me to be famous too young”), Ellington perfected the venerable African-American art of “signifying,” defined as the mockery of Anglo-European pretensions as part of the “metamorphosis” of “European cultural form” into an assertion of African-American identity. See Ralph Ellison, *Homage to Duke Ellington on His Birthday*, in ELLINGTON READER, *supra* note 1, at 394, 398-99; cf. HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* (1988) (analyzing signifying). As Ellison observes, “Ellington’s is a creative mockery in that it rises above itself to offer us something better, more creative and hopeful, than we’ve attained while seeking other standards.” Ellison, *Homage to Duke Ellington on His Birthday*, in ELLINGTON READER, *supra* note 1, at 399.

78. See ADORNO, *Perennial Fashions—Jazz*, in PRISMS, *supra* note 16, at 125-26.

79. For discussion of the nonconformist ethos of jazz and African-American urban culture, see ANDREW ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* 65 (1989); Manthia Diawara, *Malcolm X and the Black Public Sphere: Conversionists Versus Culturalists*, in *THE BLACK PUBLIC SPHERE* 39 (Black Public Sphere Collective ed., 1995).

80. See ADORNO, *PERENNIAL FASHION—JAZZ*, in PRISMS, *supra* note 16, at 127.

A basic form of syncopation ubiquitous in jazz and other vernacular music, like rock and roll and rhythm and blues, instead falls on beats 2 and 4—the “back beats.”⁸¹ Syncopation breaks up the rigidity of march time, and replaces it with a more fluid motion, which is better-suited to dance. Ellington and Strayhorn’s well-known composition, *Satin Doll* is an example of syncopation. The final phrase in the tune’s “A” theme, with the appropriate accents and beats indicated, is:

1	2	3	4	1	2	3	4	1
	Speaks	Latin,			That	Satin		Doll.

The accents fall on the second and fourth beats, lending the phrase its relaxed character.⁸² This relaxation, however, occurs against an underlying pulse of four beats or quarter notes to the bar. For Adorno, syncopation’s coexistence with a regular underlying pulse reveals jazz’s function as a reinforcement of hegemony: Jazz employs “the ostensibly disruptive principle of syncopation . . . without ever really disturbing the crude unity of the basic rhythm, the identically sustained metre, the quarter-note.”⁸³

Adorno’s second target in jazz was blues tonality, which he argued also embodied merely a superficial change in the musical status quo. Here its useful to note that the blues has many formal attributes, most of which, like the formal devices used by Duke Ellington are dialogic in character. These attributes interact with assertions of cultural identity. Most blues are twelve measures or bars long, and are built around three chords. This structure differs from the typical structure of the American popular song. For example, Gershwin’s *I Got Rhythm* is built around eight bar units, and has two themes, an A theme and B theme or “bridge.” The blues typically has no bridge,⁸⁴ but the additional four measures in its twelve bar form allow for the blues’s characteristic rhetorical move. A set-up line is repeated and capped by an ironic tag line which reflects the singer’s special acquaintance with sorrow:

81. Hence Chuck Berry’s historic advice about the music he helped pioneer out of jazz and rhythm-and-blues in the 1950’s: “It’s got a back beat, you can’t lose it, it’s gotta be rock ‘n roll music, if you wanna dance with me.”

82. The vernacular language of the lyrics follows this scheme, particularly by starting the phrase with a verb—“Speaks”—and omitting the preceding pronoun. A lyric that instead read, “He speaks Latin,” would destroy the syncopation.

83. ADORNO, *Perennial Fashion—Jazz*, in *PRISMS*, *supra* note 16, at 121.

84. Jazz composers like Ellington, however, occasionally have written bridges in order to expand the boundaries of the form.

[A Blues Chorus]

Chord: C

Bar #: 1

Lyric: The first time I met the blues . . . they came walking
through the woods,

F

4

The first time I met the blues . . . they came walking

C

6

through the woods,

G

8

They stopped at my house first . . . and done me all

C

10

the harm they could.⁸⁵

Innovations in timbre and tonality accompany the sorrowful ironies of the blues. Blues tonality is shaped by the presence of blue notes—the flatted third and seventh—which are a half-tone lower than the equivalent notes in the European major scale. In the example above, the notes for “blues,” “through,” and “harm” would be blue notes. These blue notes create tension with the tonal center, as one would expect to see them in a minor, not a major scale, or in a major scale a half step lower than the ostensible key. Indeed, blue notes provoke an even greater tension, because they are most accurately played as approximately a *quarter-tone* flat compared with their major scale counterparts. Sometimes a musician will “smear” the blue note, by sliding up or down to it, going through infinite gradations of pitch along the way.

To promote uniformity of the tempered diatonic scale, however, the modern tempered Western scale has banned the quarter tone and banished approximate pitch with its orderly sequence of half and whole tones, analogized to the white and black keys on the piano. One cannot precisely notate blue notes in a score, because they are microtones which defy the diatonically-based conventions of Western musical notation.

Blue notes are not merely a formal device; the tension they create helps evoke the yearning of the African-American experience, and the

85. Houston Baker quotes this verse from the blues singer Little Brother Montgomery. See BAKER, *supra* note 76, at 15.

wail or cry of felt injustice. Blues tonality is an expression of African-Americans' non-Western origins and their desire for freedom. As Amiri Baraka observes:

[Black music] demands . . . that many many half, quarter, etc. tones be sounded, implied, hummed, slurred, that the whole sound of a life get in . . . no matter the "precision" the Europeans claim with their "reasonable" scale which will get only the sounds of an order and reason that patently deny most colored peoples the right to exist.⁸⁶

The paradox of blues tonality is that it creates tension by playing off of some kind of tonal center. While blues tonality pushes the envelope of the harmonically and musically acceptable, it does not jettison tonality altogether. For Adorno, this attachment to tonal centers is the second instance of how jazz reinforces hegemony. According to Adorno, blues tonality acts as a kind of surface disruption which reinforces the musical status quo exemplified by the diatonic scale. Adorno compares blues tonality unfavorably with the more thoroughgoing rejection of diatonic tonality practiced by 20th century "serious" composers such as Schoenberg. He warns that:

Anyone who allows the growing respectability of mass culture to seduce him into equating a popular song with modern art because of a few false notes squeaked by a clarinet; anyone who mistakes a triad studded with 'dirty notes' for atonality, has already capitulated to barbarism.⁸⁷

For Adorno, jazz's failure to cast aside rhythmic and tonal tradition is fatal. Because of this timidity "[j]azz is taken for granted as an institution, house-broken and scrubbed behind the ears."⁸⁸

86. See JONES, *supra* note 5, at 194.

87. See ADORNO, *Perennial Fashion—Jazz*, *supra* note 16, at 127.

88. *Id.* at 128. Tellingly, where Adorno saw any true "negation," i.e., a contribution to the dialectic which would criticize the status quo and point the way toward a less hierarchical future, it was in the less regimented attitude toward sexuality which he perceived in popular music. See JAY, *supra* note 16, at 188. Adorno's receptiveness toward this element in jazz was, of course, a typical dialectical reversal of the familiar charge that jazz encouraged immoral behavior, particularly in the young. Social scientists sought to demonstrate the debilitating effects of jazz in the 1930's, through a series of experiments in which two young subjects "remained formal" throughout the playing of a series of recordings of classical music, "but as the music turned to jazz . . . became familiar and more personal toward one another." See *Ellington Refutes Cry That Swing Started Sex Crimes!*, DOWN BEAT, Dec. 1937, at 2, reprinted in ELLINGTON READER, *supra* note 1, at 128-29.

Ellington responded to this damning evidence with his usual flair for the ironic. He recommended that investigators looking for rampant sex in music consult Igor Stravinsky's ballet score, *The Rite of Spring*. *Id.* at 129. Stravinsky's piece had indeed started a riot at its premiere. See LUBAN, *supra* note 14, at 52. Yet Adorno was ultimately not sanguine about the liberating effects of jazz on sexuality. His doubts sprung from his contempt for the dance, which he regarded as a backward, "prebourgeois tonal form." See JAY, *supra* note 16, at 183 (quoting Adorno). Adorno preferred Schoenberg to Stravinsky in large part because Stravinsky relied on the folk form of the dance, while Schoenberg generally avoided such entanglements. See *id.*

Jazz artists like Duke Ellington have never accepted the rigid dichotomy of elite and vernacular advanced by theorists like Adorno. Instead, they have crossed boundaries between the two spheres, rejecting the High Modernist assertion that liberation requires an abandonment of vernacular forms like blues and dance. Rather, jazz artists have sought to play with these vernacular forms in a virtuoso manner, increasing their expressive power and assertion of cultural identity. Rather than discount the vernacular, they have again turned to the dialogic and away from the hermetic, presenting the tension between vernacular and elite as a metaphor for the tension created by multiple consciousness.

Ellington's introduction to *Afro-Eurasian Eclipse* offers an example of such boundary crossing in rhetoric; his music itself offers a wealth of other instances. Ellington sought to integrate the rootedness of the vernacular with the abstraction of elite culture. This is reflected in his approach to the two principal targets of Adorno's disdain—dance rhythm and blues tonality.

The relationship between dance and Ellington's music is complex. On the one hand, Ellington's music never lost its connection to dance. Much of his music over the course of half a century was built around tempos suitable for dancing. Yet the dancing that Ellington envisioned accompanying to his music was not, as Adorno would have it, a product of the "culture industry."⁸⁹ Ellington disclaimed any interest in "waiting for the brainwashers to decide what rinse or tint is the thing in your tonal climate".⁹⁰ He wrote for dancing that was a ritual affirmation of African-American community—like music, it signified "[w]hat we could not say openly."⁹¹

Nonetheless, Ellington struggled most of his career against the socially-imposed limitation of writing only in the regular tempos most conducive to dancing. The pressure to conform strictly to dance tempos came not only from the public, but also from a certain vision of modernism, which viewed the "primitive" as a source of renewal for Western culture.⁹² For example, some influential jazz critics viewed the vernacular as the only "authentic" element in jazz. Indeed, these critics generated much of the negative reaction to Ellington's most ambitious extended work, *Black, Brown and Beige*. One prominent critic, John Hammond, who had earlier criticized the "pretension" of Ellington's first attempt to break away from the structures of dance-oriented popular

89. See ADORNO, *Perennial Fashion—Jazz*, in PRISMS, *supra* note 167, at 126.

90. See DUKE ELLINGTON, *MUSIC IS MY MISTRESS* 286 (1973).

91. See Duke Ellington, *The Duke Steps Out*, RHYTHM, Mar. 1931, at 20, reprinted in ELLINGTON READER, *supra* note 1, at 46, 49.

92. See Berman, *supra* note 17. We can detect traces of this view in Adorno's surmises about jazz's transformative potential for sexuality. See *supra* note 89.

songs, *Reminiscing in Tempo*,⁹³ asserted at *Black, Brown and Beige*'s Carnegie Hall premiere that Ellington "has introduced complex harmonies solely for effect and has experimented with material farther and farther away from dance music . . . the more complicated his music becomes the less feeling his soloists are able to impart to their work."⁹⁴ The dichotomy between complexity and "feeling"—between elite and vernacular culture—presented in Hammond's account is the flip side of Adorno's High Modernist analysis. The only difference is which end of the dichotomy each prefers: Hammond prefers feeling over thought in his jazz, while Adorno prefers abstract thought over what he views as manufactured feeling. The cardinal similarity in Hammond's and Adorno's perspectives is that each criticizes outsider innovators like Ellington who wish to bridge dichotomies, not reinforce them.

While modernist criticism left its mark on Ellington, he nonetheless found ways to cross boundaries. This is illustrated in his use of both dance rhythms and blues tonality in the *Brown* section of *Black, Brown and Beige*. *Brown* starts with two dance movements, *Emancipation Celebration* and *West Indian Dance*. These movements demonstrate the importance of dance in African-American culture and memory. The final movement of the *Brown* section, *The Blues*, however, deconstructs the dance. If one listens for dance rhythms in *The Blues*, one notices immediately that they do not dominate the piece. *The Blues* begins out of tempo, with a brass fanfare, followed by a bleak female voice in a minor key declaiming to eerie accompaniment:

The Blues . . .

The Blues ain't . . .

The Blues ain't nothing . . .

A more definite sense of time emerges in the next passage:

The Blues ain't nothing but a cold grey day

And all night long it stays that way.⁹⁵

Even here, however, the orchestra punctuates the vocal with accelerating and decelerating bursts of music. The rhythm section—bass, drums, and piano—does not play a regular pulse. If there is a dance suggested here,

93. See John Hammond, *The Tragedy of Duke Ellington*, DOWN BEAT, Nov. 3, 1935, at 1, reprinted in ELLINGTON READER, *supra* note 1, at 118, 119.

94. John Hammond, *Is the Duke Deserting Jazz?*, JAZZ, May 1943, at 15, reprinted in ELLINGTON READER, *supra* note 1, at 171, 172.

95. Irving Kolodin, *Program for the First Carnegie Hall Concert* (Jan. 23, 1943), reprinted in ELLINGTON READER, *supra* note 1, at 163.

it is a dance "timeless and unhampered by any lineal form,"⁹⁶ which Ellington had envisioned more than ten years earlier when he announced his goal of composing a "record of my race *written by a member of it*."⁹⁷

Of course, this record of race should not slight the more vernacular enactments of dance rooted in the African-American experience.⁹⁸ To acknowledge the vernacular, the rhythm section accompanies a gruffly lyrical interlude played at the premiere by the great tenor saxophonist, Ben Webster. This lyrical interlude is based on the same pitches as the earlier vocal phrase, "Blues ain't nothin'."⁹⁹ This is followed by another passage in tempo—a speech-like blues chorus from the trombones, with ominous punctuations from the rest of the horns, later performed separately by Ellington as *Carnegie Blues*.¹⁰⁰ A long-delayed secondary vocal theme follows close on the heels of the trombones, with the orchestra picking up momentum in its accompaniment:

The Blues ain't sump'n that you sing in rhyme
 The Blues ain't nothin' but a dark cloud markin' time
 The Blues is a one-way ticket from your love to nowhere
 The Blues ain't nothin' but a black crepe veil ready to wear.¹⁰¹

Finally, the tempo dissolves, as the lonely voice of the out-of-tempo opening returns with an inversion of the opening lyrics:

The Blues ain't nothin' . . .
 The Blues ain't . . .
 The Blues . . .

The movement ends with a low rumbling chord, which, lacking a clear tonal center,¹⁰² offers no resolution, but only the timeless uncertainty of the blues, receding into the future.

Scholarly reaction to outsider legal narratives echoes the criticisms directed at musical innovators such as Ellington. Indeed, the criticisms of outsider legal narratives are strikingly similar to Adorno's criticisms

96. See Duke Ellington, *The Duke Steps Out*, RHYTHM, Mar. 1931, at 20, reprinted in ELLINGTON READER, *supra* note 1, at 49.

97. *Id.* at 50 (emphasis in original).

98. Cf. Ralph Ellison, SHADOW AND ACT 261, 268 (1972) (tracing Ellington's lasting appeal as a composer in part to his affinity for the "Saturday night or the Sunday morning breakfast dance, which are still among the living social forms" within the African-American community).

99. See Brian Priestley & Alan Cohen, *Black, Brown & Beige*, COMPOSER 51, Spring 1974, at 33-37, reprinted in ELLINGTON READER, *supra* note 1, at 185, 198 n.*.

100. See *id.*

101. See Irving Kolodin, *Program for the First Carnegie Hall Concert* (Jan. 23, 1943), reprinted in ELLINGTON READER, *supra* note 1, at 163.

102. See SCHULLER, *supra* note 47, at 147.

of jazz: 1) outsider narratives are really kitsch—i.e., mass culture dressed up to seem elite; and 2) the commitments in outsider legal narratives, particularly the commitments to some conception of legal rights, actually work to bolster the status quo.¹⁰³

Few critiques of outsider legal narratives seize on the kitsch theme with Adorno's vigor, but traces of this High Modernist trope are nonetheless apparent. We have already noted that Tushnet links Patricia Williams and other outsider narrative scholars with *The Degradation of Constitutional Discourse*.¹⁰⁴ Tushnet confirms this view of outsider narratives as disposable consumer culture by analogizing them to the "telling anecdotes of talented journalists."¹⁰⁵ Coughlin makes the kitsch theme even more explicit, analogizing outsider legal narratives to "middle-class culture's formative 'stock' narrative, namely, the rags-to-riches story popularized by Horatio Alger, Jr."¹⁰⁶ What makes outsider legal narratives, with their self-revelation and candor, even more kitschy for Coughlin is that, while Horatio Alger clearly labelled his stories as fiction, outsiders like Patricia Williams are "willing to market even themselves."¹⁰⁷ Coughlin argues that this self-marketing subverts the radicalism of the outsider message, by propagating images of success which belie the outsiders' claims of marginalization.¹⁰⁸

Another criticism of outsider legal narrataives—that the vernacular legitimates the status quo—is readily apparent in the CLS disdain for "rights talk." Like jazz for Adorno, rights-talk for CLS scholars is a standardized product. Rights-talk legitimates oppression because of its power as a pervasive vernacular in American society—a "mythical narrative" which conceals the influence of socio-economic factors on law,¹⁰⁹ just as jazz's blues tonality and syncopated rhythms obscure the manipulation of its audience by the "culture industry." For CLS scholars like Mark Tushnet, rights-talk confers the appearance of social change, while co-opting growing social movements which might otherwise insist on more wholesale transformations of society. Following

103. See generally ADORNO, *Perennial Fashion—Jazz*, in PRISMS, *supra* note 16.

104. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 251 n.2.

105. See *id.* at 260. Adorno, in his essay on Schoenberg, explicitly contrasts art with "journalistic language." See ADORNO, *Arnold Schoenberg, 1874-1951*, in PRISMS, *supra* note 16, at 154.

106. Coughlin, *supra* note 10, at 1292.

107. See *id.* at 1283. Cf. Kennedy, *Racial Critiques of Legal Academia*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 8, at 316 (arguing that outsider scholars' claims to special expertise on issues of marginalization is designed in part to give minority scholars more of a place in academia—be it jobs, promotions, or prestige).

108. See Coughlin, *supra* note 10, at 1283.

109. See Peter Gabel, *Reification in Legal Reasoning*, in CRITICAL LEGAL STUDIES 17, 36 (James Boyle ed., 1992).

Marx, Tushnet argues that the seductiveness of having “rights” produces a “false consciousness”¹¹⁰ in the oppressed, akin to the hypnotic effect of dance rhythm and blues tonality described by Adorno in his critique of jazz. Because of this false consciousness, in a well-known quote Tushnet argues that “It is not just that rights-talk does not do much good. In the contemporary United States, it is positively harmful.”¹¹¹ Under this view, outsiders who seek rights are at best misguided and at worst tools of hegemony, like the jitterbugging youth in Adorno’s essay.

In contrast to these critiques, outsider legal narratives have viewed rights and stories not as a form of kitsch, but instead as an opportunity for bridging the gap between the elite and the vernacular.¹¹² For outsider narrative scholars, rights have both vernacular and elite dimensions. Rights are vernacular because they are portrayed in outsider narratives as arising from the experience of speech against silence. While CLS scholars discuss rights on the level of consciousness—a consciousness which they see as false—outsider narrative scholars focus much more concretely on the sensory experience of rights-assertion. In an eloquent passage, Patricia Williams evokes the experience of asserting rights through all five senses—sight, hearing, smell, taste, and touch—as well as through heart, mind, and soul: The term, *rights*, she observes, “feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate reconstructing (deconstruction is too awful to think about!).”¹¹³ Here, Williams unites sensory perception (“feels,” “mouths,” “deliciously”) and cerebration (“reconstructing,” “deconstruction,” and “selfhood”)—vernacular and elite expression—in a manner too audacious for most CLS scholars. This boundary crossing is at the heart of outsider legal narrative.¹¹⁴

Of course, the use of narrative by outsider scholars is itself a venerable act of boundary crossing. Narratives offer a sense of immediacy which the detachment of elite expression cannot match. For outsiders, this immediacy is vital to build solidarity among marginalized groups, and overcome hegemonic narratives in the dominant culture.¹¹⁵ Using narrative, a representation of the vernacular, in areas formerly reserved

110. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1385-86 (1984).

111. *Id.* at 1386.

112. The outsider legal narrative approach to rights is discussed in greater depth in the next section of this article, which examines the dichotomy of alienation and redemption.

113. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 8, at 84, 92.

114. *Id.*

115. See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & SOC’Y REV. 197 (1995); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988).

for elite expression has been a staple of outsider strategies for generations. For example, Thurgood Marshall was a persuasive advocate in the United States Supreme Court because he was able to bring doctrine to life with stories, like his story in *Brown* of black and white children playing together, and then using these stories as a bridge to a discussion of segregated schools.¹¹⁶ W.E.B. DuBois begins his book *The Souls of Black Folk* with a personal reminiscence of his encounters with white people who approach him gingerly, eye him "curiously or compassionately," and proceed to ask him some variant of, "How does it feel to be a problem?"¹¹⁷ DuBois's story places the reader in the narrator's surreal position, perpetually subject to inspection by a succession of strangers. An elite account, sounding solely in theoretical or doctrinal analysis, would not have the same impact. Starting with this example from his own experience, DuBois is able to drive home his thesis that "the problem of the twentieth century is the problem of the color line."¹¹⁸

With the bridging of elite and vernacular, Williams aims for the same impact. Consider her analysis of the greater importance of rights to outsiders, as compared with adherents of CLS. Williams could have started her analysis with an exegesis of CLS thought on rights and false consciousness. Instead, she starts with a story about the divergent strategies she and Peter Gabel, a founder of CLS with whom she is teaching a contracts class, employ in renting apartments in New York City. Gabel rents an apartment by handing over a \$900 cash deposit to strangers: based on a handshake, without a lease, an exchange of keys, or a receipt. Questioned by Williams about his seeming rashness, Gabel asserts that he "didn't need to sign a lease because it imposed too much formality."¹¹⁹ In essence, according to Gabel, a lease is yet another example of the false consciousness promoted by rights-talk, which crowds out trust and any semblance of community in social relations. In contrast, Williams rents through friends who own an apartment building, and signs an elaborate lease.¹²⁰ As an African-American, Williams worries that the informality sought by Gabel would have left her helpless in the face of discrimination. She then would be left dependent on the dominant culture's assessment of her "needs." She regards trust and legal rights as co-existent, not mutually exclusive: "[t]o show that I can speak the lan-

116. See Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9, 15 (1994); Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in Brown*, 68 N.Y.U. L. REV. 226, 231 (1993).

117. See DUBOIS, *supra* note 26, at 7.

118. *Id.* at 16.

119. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 146.

120. See *id.* at 147.

guage of lease is my way of enhancing trust of me in my business affairs."¹²¹

Williams reinforces her point about the importance of rights to outsiders with a second, superimposed narrative about her family's history during the time of chattel slavery:

[T]he Millers [a family of lawyers] were the slaveholders of my maternal grandmother's clan. The Millers were also my great-great grandparents and great-aunts and who knows what else. My great-great grandfather Austin Miller, a thirty-five year old lawyer, impregnated my eleven-year-old great-great grandmother Sophie, making her the mother of Mary, my great-grandmother, by the time she was twelve.¹²²

Williams's great-great grandmother had no rights, and tasted no sense of community in token for this deprivation. Out of a sense of connection to her past, Williams does not want to be too nonchalant about the rights she possesses today.

Williams's strategies are analogous to Ellington's approach in *The Blues*, from *Black, Brown and Beige*. She superimposes narratives, playing with narrative form, just as Ellington both departs from and gestures to blues form, tonality, and dance rhythms. Williams's complexity makes it ridiculous to compare her work with the simplistic trajectory of the Horatio Alger story.

Yet Williams, like Ellington, is in a double-bind regarding the elite-vernacular dichotomy. In some quarters, Williams is not considered vernacular *enough*. Coughlin, for example, asserts that it would be more authentic to hear from outsiders living in poverty than to hear from middle-class professionals such as Williams. That Williams's success, attained despite the persistence of racism, would become a basis for silencing her is just one of the more recent ironies in a history in which the cultivation of irony is the only antidote to madness. To the outsider legal scholars, invocation of their credentials is not idle ego massage, but is instead linked with vernacular expression. Most outsider descriptions of their success occur in the middle of or in close proximity to stories about the past—including descriptions of relatives, like Williams's maternal grandmother's clan, who were disadvantaged in some way because of their race. Outsider scholars' discussion of their success is thus grounded in the vernacular of outsider experience.

121. *Id.*

122. *Id.* at 155. Tushnet acknowledges the power of this passage. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 276 ("When she describes piecing together her grandmother's history as a slave owned by Austin Miller, and later tells us that when her mother told her, on learning of Williams's decision to go to law school, that 'the Millers were lawyers so you have it in your blood,' the effect is stunning.").

By finding this grounding insufficient, Coughlin sends a quintessential message reinforcing doubleness to the outsider scholars: do not even think about excelling in an elite field like legal academia, because that per se will sever your connections with authentic experience. Instead, Coughlin's message instructs outsider scholars to remain invisible, so that some anthropologist can discover you and tell your story. Coughlin's version of the vernacular is highly unstable. Her recommendation drains attention away from the voices of outsiders, back to the spectacle of their "lives that command our most urgent social obligation."¹²³ This leads away from paying serious heed to outsider vernacular, and outsider assertion of rights, back to the dominant culture's assessment of needs, which Williams viewed as ratifying disempowerment. Ultimately, in her advice that we conduct an "investigation of failed lives" of outsiders,¹²⁴ Coughlin becomes the modern-day equivalent of the parade of strangers pressing their question to DuBois: "How does it feel to be a problem?"¹²⁵ That this question drives even the dominant culture's well-meaning racial discourse at the end of the twentieth century, just as it animated discourse at the century's dawn, would sadden DuBois. It would not, however, surprise him.

III. ALIENATION AND REDEMPTION

It would not surprise DuBois because he had no illusions about the challenges the issue of race posed to America.¹²⁶ His prescience is one reason that his work remains compelling. Another vital reason is DuBois's defiant refusal to resign himself to racial inequity—a refusal fueled by an abiding belief that "sometime, somewhere, men will judge men by their souls and not by their skins."¹²⁷ This bridging of alienation and redemption¹²⁸ is the third and final theme of outsider innovation examined here.

Bridging alienation and redemption is a central theme in Elling-

123. See Coughlin, *supra* note 10, at 1340.

124. *Id.* at 1340.

125. See *supra* notes 115-16 and accompanying text.

126. See DuBois, *supra* note 26, at 191 ("[I]n this drear day . . . human brotherhood is mockery and a snare").

127. *Id.* at 188. The presaging of Martin Luther King, Jr.'s vision that black children will someday be judged, "not by the color of their skin, but by the content of their character" is clear.

128. By "alienation" I mean disillusionment and awareness of marginality, rather than any specifically Marxist connotation of the term. In using the term "redemption," with its religious overtones, I refer not only to a vision of justice and salvation, but also to the goal, exemplified by the Reconstruction Era amendments and the freedmen's hope of "forty acres and a mule," see DuBois, *supra* note 26, at 22 (discussing Freedmen's Bureau) of developing institutions which better serve the ends of justice and equality. Experiencing alienation and working toward redemption simultaneously hones one's sense of irony, producing the "signifying" stance in outsider culture. See *supra* note 77 and accompanying text.

ton's art and persona. Ellington had a complex stance toward American culture, usually displayed through his inimitably urbane signifying,¹²⁹ but which occasionally surfaced more clearly in both words and music.¹³⁰ Consider, for example, Ellington's attitude toward American popular song. This hybrid form, whose foremost practitioners included Irving Berlin, George Gershwin, Cole Porter, and Ellington himself, was a mixture of Viennese operetta, ragtime, and jazz, with a little klezmer music thrown in by Jewish immigrants from Eastern Europe.¹³¹ There is evidence that Ellington resented white songwriters' efforts to use idioms originally developed by African-Americans,¹³² especially when these efforts also involved attempts to depict the African-American experience. Ellington criticized Gershwin's *Porgy and Bess* as inauthentic in its portrayal of black life.¹³³ He also burlesqued Jerome Kern's *Old Man River* by taking this usually somber song at an improbably fast tempo, which made the piece sound like a 1930's version of "Alvin and the Chipmunks."¹³⁴ Yet Ellington was also one of the great popular songwriters himself. Indeed, songs such as *Sophisticated Lady* and *Mood Indigo*,¹³⁵ generated royalties that enabled Ellington to keep his orchestra, with its celebrated soloists.¹³⁶

The complexity of Ellington's views suggests that he believed alienation was valuable not in itself, but in how it could assist in clearing the ground for reconstruction. In the doubled, dialogic manner which this Article argues is a recurring motif in outsider innovation,¹³⁷ Ellington conceived of reconstruction in both communal and experiential terms. That is, he viewed America as a society in need of change, particularly in the area of racial justice. Yet Ellington also viewed change

129. See *supra* notes 74-78 and accompanying text (discussing the blend of vernacular and elite expression in Ellington's public pronouncements).

130. Cf. Ingrid Monson, *Doubleness and Jazz Improvisation: Irony, Parody, and Ethnomusicology*, 20 CRIT. INQUIRY 283 (1994) (discussing the ironic attitude toward American popular songs displayed in some jazz improvisatory practices).

131. See Michael Rogin, *Blackface, White Noise: The Jewish Jazz Singer Finds His Voice*, 18 CRIT. INQUIRY 417 (1992).

132. Cf. Williams, ROOSTER'S EGG, *supra* note 89 (discussing other issues surrounding cross-cultural influence and appropriation).

133. See Edward Murrow, *Duke Ellington on Gershwin's "Porgy,"* NEW THEATRE, Dec. 1935, at 5, 6, reprinted in ELLINGTON READER, *supra* note 1, at 114.

134. See ELLINGTON SMALL GROUPS (Columbia Legacy). We have already discussed the racial subordination which Ellington depicted in the *Work Song* and *Blues* segments of *Black, Brown and Beige*. See *supra* notes 40-48 and accompanying text.

135. Ellington's brilliant Creole clarinetist, Barney Bigard, receives credit for *Mood Indigo*, along with Ellington.

136. These soloists included at different points Johnny Hodges, Ben Webster, Lawrence Brown, and Clark Terry.

137. See *supra* Part I and accompanying text.

as a reflection of personal experience, which bridged the particularity of race with yearnings which all humans share by virtue of being human.

The communal theme is evident in Ellington's work. His music portrays community, which for Ellington is a concept laden with doubleness, with freedom and wholeness for African-Americans driving America's reconstruction. In formulating the epic work that ultimately became *Black, Brown and Beige*, Ellington envisioned a five-part suite, with the fifth part representing a look into the future: "a hundred years from now . . . an apotheosis aiming to put the negro in a more comfortable place among the people of the world and a return to something he lost when he became a slave."¹³⁸ This apotheosis, or resurrection, would restore to African-Americans the freedom taken from them, while also restoring the spirit of freedom from which America had strayed. The fulfilled yearnings of the *Black, Brown, and Beige* would bring the "Red, White, and Blue" back to its best ideals. Ellington made this point clear in a talk he gave just before America's entry into World War II. He argued that the strivings of African-Americans, embodied in black music, would reinvigorate a country which had grown "too lazy, satisfied and confident to sing."¹³⁹ Yet the African-American strivings in Ellington's vision are not merely an earthly vessel for a broader American redemption; in the apotheosis Ellington foresaw, African-Americans personify the spirit of freedom itself. African-Americans, said Ellington:

[F]ought America's wars, provided her labor, gave her music, kept alive her flickering conscience, prodded her on toward the yet unachieved goal, democracy—until we became *more than a part of America!* We—this kicking, yelling, touchy, sensitive, scrupulously-demanding minority—are the personification of the ideal begun by the Pilgrims almost 350 years ago.¹⁴⁰

This vision of apotheosis and reconstruction is rooted in practice and experience. The practice of reconstruction through music is a daily

138. See Brian Priestley & Alan Cohen, *Black, Brown, and Beige*, COMPOSER 51, Spring 1974, at 33-37.

139. Duke Ellington, *We, Too, Sing 'America,'* CAL. EAGLE, Feb. 13, 1941, reprinted in ELLINGTON READER, *supra* note 1, at 147. The title of this talk is a gloss on a line of Langston Hughes': "I, too, sing America," from Hughes's *The Weary Blues* (1926). *Id.* at 146. Hughes's focus on the need for reconstruction was even more intense than Ellington's. Consider his lines:

We, the people, must redeem
Our land . . .
And make America again!

See Vincent G. Harding, *Wrestling Toward the Dawn: The Afro-American Freedom Movement and the Changing Constitution*, in THE CONSTITUTION AND AMERICAN LIFE 58 (David Thelen ed., 1988).

140. Duke Ellington, *We, Too, Sing 'America,'* reprinted in ELLINGTON READER, *supra* note 1, at 147 (emphasis added).

regimen, involving playing with existing forms such as popular songs, dance tempos, and the blues.¹⁴¹ In working through these forms, Ellington evoked experience that was not exclusive to African-Americans, but in fact resonated with humanity. In particular, his emphasis on yearning, insecurity, and redemption touches everyone. Ellington's *Come Sunday*, from *Black, Brown and Beige*, expresses the yearning for divine revelation as well as earthly freedom, and the vulnerability which emerges in sharing that yearning with others. Johnny Hodges's limpid *Come Sunday* theme statement—his alto saxophone accompanied only by bowed bass and tremolo chords on acoustic guitar—evokes this vulnerability. As Ellington noted in a discussion of his later sacred music:

Men are most afraid of being what they are—in direct communication with the world at large. They fear reprisals, the most personal of which is that they 'won't be understood.' . . . Yet, every time God's children have thrown away fear in pursuit of honesty—trying to communicate themselves, understood or not—miracles have happened.¹⁴²

Ellington's emphasis on the doubleness of redemption—practice and ideal, aesthetic and political, communal and personal, particular and universal—contrasts with the wariness about redemption expressed by the High Modernists. To some degree, the High Modernists' skepticism resulted not from a rejection of redemption, but instead from an intense yet unspoken attachment to it. Adorno and most of the other Frankfurt School cultural critics declined to express a redemptive vision;¹⁴³ they argued that the oppressive status quo transformed all discussion of redemption into either pseudo-religiosity¹⁴⁴ or kitsch. For modernists, alienation—the enforced distance from redemption—was the dominant condition of modern life. Laying bare the conditions of alienation was the central goal of art and criticism.¹⁴⁵ Achieving this goal required an emphasis on contingency and a rejection of certainty.¹⁴⁶ This was ultimately incompatible with the need for some abiding commitments, such as a commitment to combat subordination based on race, gender, or religion, which inform a redemptive practice.¹⁴⁷

The High Modernist project of exposing contingency in the

141. See *supra* notes 90-103 and accompanying text.

142. Duke Ellington, *Program Note for "A Concert of Sacred Music,"* in DUKE ELLINGTON COLLECTION, reprinted in ELLINGTON READER, *supra* note 1, at 371.

143. See JAY, *supra* note 16, at 262-63.

144. This was their quarrel with the great critic and theorist of the mystic, Walter Benjamin. See *id.* at 263.

145. If redemption was portrayed at all, it was in terms that were vague, and seemed to assume that criticism had little to do with achieving redemption, see *id.* at 262, or terms that dwelt on form as a vehicle of redemption, retreating from the political realm. See GREENBERG, *supra* note 15.

146. See JAY, *supra* note 16.

147. See WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, *supra* note 8, at 154.

assumptions of the dominant order is in many ways consistent with a redemptive vision. The power of such hegemonic assumptions is a perennial obstacle to the emancipation of subordinated groups. Yet, some abiding substantive commitments are necessary to temper the asceticism of critical method. Without such substantive commitments, critical method deteriorates into a kind of intellectual tic—a reflex, like the spasmodic blinking of Inspector Clousseau's superior in the *Pink Panther* movies, which clouds, rather than clarifies vision. In particular, High Modernist's disdain of redemption undermined their analysis of the relationship between outsider expression and aesthetics. As a result, when the High Modernists came closest to a vocabulary of redemption, the redemption envisioned was purely one of aesthetic form. Paradoxically, underlying this formal vision of redemption were assumptions perilously close to the socially constructed "certainties" which the High Modernists attacked.

Adorno's analyses of jazz exemplify how, when applied to outsider expression, critical method relied on an eminently contestable set of aesthetic assumptions. Indeed, Adorno's trashing of jazz as a lowly art form produced from and for mass culture¹⁴⁸ is a breath-takingly virtuosic display of critical invective. There is only one problem with this criticism: while Adorno was an exceptionally able classical pianist, when it came to jazz, he did not know what he was talking about.¹⁴⁹

Adorno's main rhetorical goal was to discredit the emancipatory potential of jazz. To this end, he devised an ingenious psychoanalytic critique, centering on jazz as the equivalent of castration. Adorno noted that another critic more sympathetic to jazz had compared Louis Armstrong to the *castrati*' whose singing electrified 18th century Europe.¹⁵⁰ Gleefully developing his argument, Adorno then noted that in the hip vernacular of the 1940's and 50's, classical music was known as "long hair" music, after the unruly grooming of flamboyant Eastern European pianists.¹⁵¹ In contrast, jazz musicians were called "short haired."¹⁵² Recalling the story of Samson in the Old Testament, Adorno concluded triumphantly that, "What the shorn hair represents hardly requires elaboration."¹⁵³ For those readers still mystified, Adorno elaborated: jazz, he

148. See *supra* notes 79-89 and accompanying text.

149. See Clyde Taylor, *Black Culture is Modern Art, II: The Autobiography*, in AMIRI BARAKA: THE KALEIDOSCOPE TORCH 167, 169 (James B. Gwynne ed., 1985); JAY, *supra* note 16, at 185-88.

150. See ADORNO, *Perennial Fashion—Jazz*, in PRISMS, *supra* note 17, at 130.

151. See *id.*

152. See *id.*

153. *Id.*

asserted, is the embodiment of "castration symbolism."¹⁵⁴ Linking psychoanalysis with his critique of jazz as mass culture, Adorno also noted that, "[Jazz's] rebellious gestures are accompanied by the tendency to blind obeisance, much like the sadomasochistic type described by analytic psychology, the person who chafes against the father-figure while secretly admiring him."¹⁵⁵ Moreover, the paralyzing psychological ambivalence fostered by jazz was rooted in the spirituals which influenced jazz's origins: "The Negro spirituals . . . were slave songs and as such combined the lament of unfreedom with its oppressed confirmation."¹⁵⁶

Adorno's dismissal of spirituals betrays his general ignorance of the importance of music, which has historically been a crucial assertion of African-American cultural autonomy.¹⁵⁷ Music was one of the only assertions of identity available during this period of enslavement, as the development of other forms of expression, linked with literacy, was punishable by death.¹⁵⁸ Adorno was correct about one thing: the spirituals clearly demonstrate the doubleness of the African-American experience. He was profoundly wrong, however, in describing the nature of that doubleness in much the same way that the CLS commentators are wrong about the emancipatory potential of rights. The better view is that the spirituals reflected a doubleness created by the assertion of black cultural identity along with the tapping of a yearning for redemption in both the national and international community.¹⁵⁹

While it would be easy to cite Adorno's ignorance of jazz as reason to discount the importance of this essay in assessing High Modernist thought, such a cavalier approach would ignore the hegemonic aesthetic assumptions behind Adorno's critique. Adorno's dislike of jazz stems from his belief that jazz does not follow notions of form commonly accepted in classical music. For Adorno, the prime virtue of classical music from Bach to Schoenberg is the orderly development of musical themes.¹⁶⁰ In the classic sonata form, for example, melodies are introduced, developed, and give rise to related melodies, which are also developed; ultimately, some reconciliation of the two strains occurs.

154. *Id.*

155. *Id.* at 122.

156. *Id.*

157. See DUBOIS, *supra* note 26.

158. See GILROY, *supra* note 27, at 74.

159. See *infra* notes 200-207 and accompanying text; cf. GILROY, *supra* note 27, at 91 ("The double consciousness which [DuBois] argues is the founding experience of blacks in the West is itself expressed in the double value of [the spirituals] which are always both American and black.").

160. See ADORNO, *Arnold Schoenberg, 1874-1951*, in PRISMS, *supra* note 16, at 154.

While thematic development is a significant feature in jazz,¹⁶¹ it is often more jagged and abrupt than the classical model, like Ellington's transitions in *Black, Brown and Beige*.¹⁶²

These different contours of thematic development in jazz escaped Adorno's notice altogether. Instead, Adorno noted that in jazz, "no single measure follows from the logic of the musical progression."¹⁶³ Jazz does not possess what Adorno approvingly described in Schoenberg's music as a "general unity of motivic-thematic relations."¹⁶⁴ In jazz, techniques such as syncopation and blues inflection are "sorted out and kaleidoscopically mixed into ever-new combinations without there taking place even the slightest interaction between the total scheme and the no less schematic details."¹⁶⁵ In trashing jazz's proffer of redemption through "a creative process governed by formal and informal, democratic rules,"¹⁶⁶ Adorno's critical method remains enmeshed in a "characteristic European ethnocentrism."¹⁶⁷ This is not aberrational nor coincidental. Unless one is willing and unashamed to uphold some bed-rock commitments to antistatist, critical method becomes an ally, not a foe, of the status quo.¹⁶⁸

The legal High Modernists echo the views on reconstruction and alienation displayed by Adorno and the earlier cultural critics. The legal Modernists care too much about redemption to sully it with anything also deployed by the status quo, including the rhetoric of rights.¹⁶⁹ As a result, the legal High Modernists, particularly Mark Tushnet, end up exalting critical method as a redemption of form. Ultimately, critical method becomes a fetish in the legal arena, as it did with Adorno—a fetish which drives the belittling of outsider expression.

Legal scholars, including the "first generation" of CLS commentators, owe a debt to Adorno in their refusal to flesh out a programmatic response to the oppression of the status quo. Like Adorno, CLS commentators critique the status quo, but decline to answer the question,

161. See SCHULLER, *supra* note 47; Martin Williams, *Form Beyond Form*, in *THE JAZZ TRADITION* 94 (1993), reprinted in *ELLINGTON READER*, *supra* note 1 (discussing thematic development in the work of Sonny Rollins, Thelonius Monk, Charlie Parker, John Lewis and the Modern Jazz Quartet, and Horace Silver, inter alia, as well as Ellington).

162. See *supra* notes 95-104 and accompanying text.

163. ADORNO, *Perennial Fashion—Jazz*, in *PRISMS*, *supra* note 16, at 124-25.

164. ADORNO, *Arnold Schoenberg, 1874-1951*, in *PRISMS*, *supra* note 16, at 154.

165. ADORNO, *Perennial Fashion—Jazz*, in *PRISMS*, *supra* note 16, at 124.

166. See GILROY, *supra* note 27, at 200.

167. See JAY, *supra* note 16, at 186.

168. Cf. ADORNO, *Arnold Schoenberg, 1874-1951*, in *PRISMS*, *supra* note 16, at 171-72 (describing the Schoenberg piece, *Survivor of Warsaw*).

169. Cf. LUBAN, *supra* note 14, at 81 (describing utopianism of CLS thinkers as a "messianic impulse in modernism").

"What would you put in its place?"¹⁷⁰ CLS commentators argue that, "[W]e *can't* answer that question . . . because the question itself presupposes virtually every assumption about law and legal scholarship that we are attempting to bring to the surface and to call into question."¹⁷¹ Analyzing the scope of humanity's alienation is for CLS commentators a necessary prerequisite for any reconstructive effort.¹⁷²

As with Adorno, such analysis becomes problematic here when the impossibility of reconstruction makes critical method itself a kind of redemption as performance—a form of fiddling while Rome burns—and ends up reinforcing the status quo. The fetishism of critical method is evident in two of Tushnet's pieces: his influential 1984 article, *An Essay on Rights*, which sparked Patricia Williams's response on rights' importance, and his more recent piece critiquing Williams, *The Degradation of Constitutional Discourse*. Both pieces echo Adorno's rhetorical overkill in his jazz critique and ultimate reinforcement of dominant forms.¹⁷³

An Essay on Rights is particularly fascinating because its critique of rights inadvertently echoes Adorno's castration theme in his jazz critique.¹⁷⁴ The parallel is not exact: Tushnet does not refer to castration, or employ psychoanalytic categories. Yet, Tushnet's underlying point is the same: putatively emancipatory discourse is unmasked as hegemony's tool. Moreover, Tushnet employs the same metaphor of physical trauma and loss. Rights, according to Tushnet, create "a sphere of autonomy *stripped* of any social context and counterpose to it a sphere of social life *stripped* of any content."¹⁷⁵ Although Tushnet is a little more abstract than Adorno—where Adorno envisions the shorn Samson, Tushnet finds only a sphere—the message is identical: purportedly liberating discourses can be harmful to your health.¹⁷⁶

170. See Richard M. Fischl, *The Question That Killed Critical Legal Studies*, 17 L. & Soc. INQUIRY 779, 802 (1993).

171. *Id.* (emphasis in original).

172. Some CLS scholars have put forward more textured, programmatic visions. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). Simon's more recent writing may reflect the realization by CLS commentators that advancing programs at least shapes the terms of debate, and allows commentators to adapt more than just the reactive stance afforded by a critique of the status quo, in which instance the status quo always sets the agenda.

173. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10; Tushnet, *An Essay on Rights*, *supra* note 110.

174. See Tushnet, *An Essay on Rights*, *supra* note 110, at 1392-93.

175. *Id.* (emphasis added).

176. Tushnet continues his rhetorical tour de force in his *Rights* piece with a critique of Habermas, which also offers a comprehensive recital of reasons why Habermas's conception of the "ideal speech situation" will not aid the cause of liberation. See *id.* at 1394-98. Habermas has linked himself with efforts to integrate rights into a progressive conception of law and politics. See Jonathan Simon, *Between Power and Knowledge: Habermas, Foucault, and the Future of Legal Studies*, 28 L. & Soc'y REV. 947 (1994).

An Essay on Rights also echoes Adorno by discounting the role of rights in the struggles of African-Americans. Where Adorno demonstrated a facile ignorance in his dismissal of spirituals,¹⁷⁷ Tushnet simply fails to discuss the issue. He makes the case against rights with virtually no mention of *Brown v. Board of Education*, the 20th century's paradigmatic example of rights-based jurisprudence.¹⁷⁸ This makes about as much sense as Adorno citing Louis Armstrong to support his argument that jazz is a form of castration.

Tushnet, like Adorno, owes a debt to dominant discourse. While Adorno ultimately falls back on notions of form established in European classical music,¹⁷⁹ Tushnet and other critics of outsider legal narratives rely on legal conceptions of credibility. In particular, the legal High Modernists' cross-examination of outsider narratives evokes the trial lawyer's damning phrase, "false in one, false in all."¹⁸⁰ The legal High Modernists focus on supposedly suspect details in outsider narrative sto-

177. See *supra* notes 147-58 and accompanying text.

178. Tushnet's discussion of the limited usefulness of rights focuses on the Supreme Court's expansion of the first amendment to protect commercial speech and strike down limits on political contributions. This analysis is certainly correct in pointing out that rights can reinforce the dominant order. It is telling, however, that Tushnet says nothing about first amendment cases like *NAACP v. Button*, 371 U.S. 415 (1963) (holding that state cannot prohibit solicitation of civil rights plaintiffs), or *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that state cannot compel civil rights group to disclose identities of its members), which supported challenges to the status quo.

Tushnet's omission is puzzling in light of the fact he has devoted a significant portion of his career to provocative analysis of the history of civil rights litigation. See, e.g., MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987); cf. David B. Wilkins, *Social Engineers or Corporate Tools?*, *supra* note 25 (discussing debate within African-American community in the 1920's and 1930's between Ralph Bunche, who favored class struggle in coalition with white workers as the route for African-American emancipation, and Charles Houston, who focused on legal battle against segregation). Moreover, Tushnet is aware of the influence of the redemptive theme in African-American religion on Charles Houston, Thurgood Marshall, and other participants in the NAACP's campaign against segregation in education. See Tushnet, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, *supra*, at 8 ("[T]he Constitution and its text resonated in the lives of these African-American lawyers in the way that, and perhaps because, the Bible resonated in the life of the African-American community"). Tushnet has also recently defended the importance of *Brown* against revisionists who view it as an example of the impotence of courts to effect social change. See Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994). Yet Tushnet has always been more comfortable in analyzing civil rights litigation from a materialist perspective—as a case study in mobilization of legal resources—than in addressing its symbolic importance to African-Americans. This materialist bent may also help explain Tushnet's skepticism about legal scholars' use of narrative and other "soft" approaches.

179. See *supra* notes 158-66 and accompanying text.

180. See Kim L. Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992).

ries then, in classic cross-examination style, use these suspicions to argue that the outsider narrators are not credible.

While one can argue that cross-examination is merely a neutral technique, the cross-examination of outsider narratives reflects what High Modernists acknowledge is clear in other contexts. Cross-examination can unfairly reinforce stereotypes about the lack of credibility of members of subordinated groups, as occurred when conservatives tried to discredit Anita Hill during the Hill-Thomas hearings.¹⁸¹ Indeed, the tenor of these attempted impeachments of outsider narrative is so mundane that each attempt could supply material for Williams' "framing narratives"¹⁸² about the oppressive neutrality of legal academia.

A favorite target of High Modernist cross-examination is part of one of Patricia Williams's stories. In the middle of a story about her erudite final argument in a consumer protection case involving contaminated sausage, the sausage maker's lawyer objected to her summation, "based on too much critical theory in the courtroom."¹⁸³ Kathryn Abrams, a commentator whose nuance, empathy, and attentiveness to experience take her well outside of the High Modernist camp, set the stage for the cross-examination by questioning whether Williams' adversary had actually made this objection.¹⁸⁴ Abrams resolves the issue by concluding that, if Williams was merely "amusing herself and her readers"¹⁸⁵ with an inside joke about reactions to critical theory which happens to fit her larger point, the content of the actual objection and its correspondence to Williams's account are largely irrelevant.¹⁸⁶

Unfortunately, any concession by the witness in cross-examination, or one acting on the witness's behalf, has its perils. Tushnet illustrates this point. He agrees with Abrams that the actual content of the objection by Williams's adversary is irrelevant for the sausage story.¹⁸⁷ Tushnet then, however, springs the cross-examination trap, asserting that if Williams' adversary had not actually mentioned "critical theory," a reader could infer that Williams also added details to other stories.¹⁸⁸

181. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 289-90; cf. *id.* at 290 n.176 (citing Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992)).

182. See *supra* notes 49-57 and accompanying text.

183. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 108.

184. See Abrams, *supra* note 8, at 1026.

185. *Id.*

186. See *id.*

187. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 272.

188. See *id.*

The inference is clear: "false in one, false in all."¹⁸⁹

With all this lawyerly attention to detail, however, one admittedly mundane detail seems to have eluded the commentators. In the sausage story, Williams never quotes her adversary directly, but only characterizes the basis of his objection. The objection could easily have been articulated as, "Your honor, counsel is taking up the court's time," or, "Your honor, please direct counsel to move it along." These scenarios are consistent with Williams's description, especially given that readers of her work do not expect, or desire, a journalistic blow-by-blow account.

This High Modernist cross-examination of Williams's sausage story reveals another parallel with Adorno's jazz critique: the cross-examiners have not done their homework. Anyone reading Williams's story can tell that the account of her adversary's objection is a characterization, not a quote: In the original, there are no quotation marks. Quotation marks do appear in Abrams' discussion of the objection only because she is quoting Williams.¹⁹⁰ Yet, in the crucial portion of Tushnet's discussion, he interprets Abrams as wondering if Williams's adversary had interrupted by literally "saying 'too much critical theory.'"¹⁹¹ Tushnet's tactic assumes a fact contradicted by the record, because Williams never claimed that her adversary had actually uttered this remark.

Before seeking to impeach Williams for lowering the level of legal discourse, Tushnet should have reflected further about the consequences of his own methods. At best, Tushnet's focus on the "objection issue" uses credibility to obscure the larger picture—a tactic which Tushnet rightly decried when used against Anita Hill.¹⁹² At worst, by fudging the issue of what Williams actually wrote about her adversary's objection, Tushnet is doing what he criticizes in Williams: adding to a story until it makes the point he has in mind.

The High Modernists use a similar approach in cross-examining Williams's *Au Coton* story,¹⁹³ in which Williams analyzes her own acquiescence in the antisemitic conversation of the staff at a Manhattan boutique. Tushnet, seconded by a strange bedfellow, Richard Posner,

189. Coughlin takes a similar approach in her discussion of the sausage story. See Coughlin, *supra* note 10, at 1288-91.

190. See Abrams, *supra* note 8, at 1026.

191. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 272 (emphasis added).

192. See *id.* at 289-90.

193. See *supra* notes 53-57 and accompanying text.

uses cross-examination to argue that Williams' story is incomplete.¹⁹⁴ Tushnet surmises that the sales clerks at the store, whose race Williams does not identify, were black. Tushnet believes that Williams does not disclose their race because she lacks the fortitude to confront black antisemitism.¹⁹⁵ Tushnet uses cross-examination techniques to support his conclusion: Williams identifies other bigots by race, Tushnet asserts, so why does she fail to do so here, unless she has something to hide?¹⁹⁶

Tushnet's cross-examination does not do justice to the doubleness which informs Williams's storytelling choices. Like Ellington, and indeed like Tushnet, Williams feels the need to assert an identity that is both particular and general. Her goal in *Au Coton* is to touch a vein of experience common to all persons: the fear, similar to the insecurity about self-revelation cited by Ellington,¹⁹⁷ that saying what we think is right will fracture our fragile sense of belonging, and expose us to widespread ridicule. Telling a story about black antisemitism—assuming, as is far from clear, that Tushnet is right about the clerks' race¹⁹⁸—would have overwhelmed the quiet breadth of personal resonance which Williams sought.¹⁹⁹ By declining Williams's attempt at connection,²⁰⁰ Tushnet, like Adorno resisting the appeal of jazz, reinforces the primacy of alienation in High Modernist method. In addition, Tushnet denies Williams the freedom to assert both the particularity and the generality of double consciousness.

The legal High Modernists' cross-examination also serves as a barrier to boundary-crossing between genres. Williams wants to use boundary-crossing as a way²⁰¹ to create a new genre which combines

194. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 268-70; see also POSNER, *supra* note 11, at 377-80 (relying on Tushnet's analysis).

195. See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 269.

196. See *id.*

197. See *supra* note 92 and accompanying text.

198. See Peller, *supra* note 13, at 325-26.

199. Tushnet is aware that Williams seeks a personal resonance in her story. He argues, however, using the rhetoric of cross-examination, that this resonance undermines Williams's "insistence elsewhere . . . on the specificity of racism." See Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 270. Yet, a closer reading of Williams reveals a recurring, self-conscious interaction between the particularity and the generality of outsider status. Cf. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 124 ("[A] discursive property of black somebody-ness was to be part of a community of souls who had experienced being permanently invisible nobodies; 'black' was a designation for those who had no place else to go; we were both nobody and somebody at the same time, if for different purposes.").

200. Others have felt the connection which Tushnet rejects. See, e.g., Abrams, *supra* note 8, at 1003; Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narrative in Legal Scholarship*, *supra* note 13, at 1860-62; Peller, *supra* note 13, at 327-28.

201. See WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 6-7.

imaginative literature, doctrinal analysis, and theoretical discourse.²⁰² Yet the legal High Modernists try to drag her back toward familiar categories: Tushnet wants Williams to label her work as fiction,²⁰³ while Coughlin wants to pigeonhole Williams' work as "autobiography."²⁰⁴ Williams, and the other outsider narrative scholars, continue the struggle to redeem legal academia from such narrow vistas, just as Ellington resisted the facile dichotomy of "jazz versus classical" music.

The outsider narrative scholars also take a redemptive view of rights-talk. They do not view rights as abstract or reified, as the CLS scholars would have it. Rather, outsider narrative scholars invest the concept of "rights" with the strivings and provisional victories of centuries. This conception of rights does not preclude alienation. Indeed, outsider conceptions of rights assume alienation. Given the history of oppression which outsiders like African-Americans have experienced, it could hardly be otherwise. As Williams notes, "To say that blacks never fully believed in rights is true. Yet is also true that blacks believed in them so much and so hard that we gave them life where there was none before."²⁰⁵ Just as Ellington foresaw an apotheosis of justice for African-Americans,²⁰⁶ Williams considers the ongoing rights-struggles of America, to be "an immense alchemical fire"—"the resurrection of life from ashes four hundred years old."²⁰⁷ The alchemy resides in the dialogue of doubleness between alienation and redemption. This dialogue impels the boundary-crossings of outsider innovation.

IV. CONCLUSION

The scope of outsider innovators' boundary-crossing is best appreciated by looking at the dichotomies which have organized this essay: theory versus experience, elite versus vernacular, and alienation versus redemption. For High Modernists, theory drives experience to higher and higher levels of abstraction. For outsider artists, in contrast, bridging the domains of theory and experience is crucial; the two domains have a dialogic relationship which honors both the abstract and the concrete.

Similarly, High Modernists view conventions such as perspective, harmony, tempo, or rights as vernacular indulgence—emblems of an

202. *See id.* at 7-8.

203. *See* Tushnet, *The Degradation of Constitutional Discourse*, *supra* note 10, at 277.

204. *See* Coughlin, *supra* note 10 at 1287-91.

205. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 163.

206. *See supra* note 138 and accompanying text.

207. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR*, *supra* note 8, at 163.

oppressive mass culture. Outsider innovators—like Ellington in *The Blues* from *Black, Brown, and Beige*, or Patricia Williams in her interlocking narratives—take a different tack. Ellington and Williams blur the boundaries of elite and vernacular by deconstructing and reconstructing blues harmony and tonality, or rights talk and narrative, to achieve a richer expression of identity.

Outsider narrative scholars also differ from High Modernists in their perspectives on alienation and redemption. For High Modernists, depicting the alienation of modern life is the prime imperative in art and law, while redemption is too remote to envision. Ultimately, High Modernism hopes to find a sterile neutrality in method, be it the trashing of jazz, or the cross-examination of outsider stories. For outsider innovators, in contrast, alienation is as familiar as the blues. The challenge for outsider innovators like Ellington or Williams is to reconcile alienation with the yearnings for redemption resonating both in marginalized communities and in all humanity.

The stakes in this debate between outsider voices and High Modernism are high. Boundary-crossing leads to the discovery and development of new domains. The tenor of critique can determine whether these domains thrive. Despite his armor of irony, Ellington was wounded by the criticism of *Black, Brown and Beige*, reinforced decades later by the denial of the Pulitzer Prize; he never undertook a work quite as ambitious. The outsider narrative legal scholars are also seeking to create new ways of doing, speaking, and seeing. Critique can spur these efforts if it is constructive. On the other hand, critiques that are too protective of existing borders chill boundary-crossing.

It is important to remember that High Modernism itself developed from efforts to disrupt settled boundaries in the arts. Modernists challenged the status quo's preference for devices like perspective, harmony, and neutral legal principles. Practitioners of High Modernism in art and law will reinvigorate their own practice if they engage the work of outsiders on the outsiders' own terms, instead of guarding old borders on contested ground.