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WHAT'S WRONG WITH INTERNATIONAL LAW SCHOLARSHIP?

I Hate International Law Scholarship (Sort of)

David J. Bederman*

I loathe the international law scholarship for much the same reasons David Byrne hates world music. Music might seem an odd pairing with international law. And certainly David Byrne (rock musician, member of the former band, "Talking Heads," and now manager of his own record label) is an especially peculiar companion for me in this meditation on what is wrong with international law as an academic discipline. But in a recent article in *The New York Times*,¹ Byrne lays out his appraisal of world music—what it is, what it has come to mean, and how the idea of multicultural and international sound has come to be perverted and distorted in the global marketplace of art and business. It is a powerful critique. It is all the more so since Byrne has been closely identified with world music, and he has been active in introducing American (meaning Western, parochial, and narrow-eared) audiences to the pleasures, nuances, and challenges of foreign and alternative music.

In a similar vein, it might be regarded as strange for me to criticize international legal scholarship so openly since I have spent much of my professional life as a self-avowed academic, international lawyer, and advocate for the advancement of the role of international law in the United States. Teaching public international law has been central to my professional identity. But, just as David Byrne has become disenchanted with what world music has come to mean in the marketplace of sound, I have grown disillusioned with how the currency of international legal scholarship has come to be traded in the bazaar of ideas. This essay makes a very modest attempt to connect the problems of globalization in music with the internationalization of law. But, it also goes one step further to catalogue the pathologies—what I call here "the deadly sins"—that afflict current international legal scholarship as it struggles for a place in the legal academy, in the councils of power, and in the public square.

I

A close reading of David Byrne's contribution in *The New York Times* would

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1. David Byrne, *Crossing Music's Borders In Search of Identity: I Hate World Music*, NY Times B at 1, 26 (Oct 3, 1999).

quickly indicate that he is a master of conceit and artistic misdirection. Indeed, he does not hate world music at all. He just despises how world music has come to be portrayed and caricatured in a domestic musical aesthetic. Moreover, he fears how those who compose, play, and market world music have come to pander to a musical fashion and sensibility that actually despises and belittles what they do. I share these same visceral reactions and fears for international law scholarship.

World music has become, according to Byrne, merely a “name for a bin in the record store signifying stuff that doesn’t belong anywhere else in the store.”² In the same way, as international law has developed as a distinct and separate discipline within the American legal academy in the past century, it, too, has acquired a reputation for being a catch-all for forms of law and legal thinking that cannot be comfortably positioned in a construct of domestic law. International law scholarship has, almost by default, become legal writing and study that does not belong anywhere else. This sense of separation, of “otherness,” is manifested in both the process of how international law scholarship is generated and how it is presented to its audience.

International legal scholarship, like world music, has thus been relegated to a “ghetto.”³ Consider David Byrne’s concerns for world music:

the use of the term world music is a way of dismissing artists or their music as irrelevant to one’s own life. It’s a way of relegating this “thing” into the realm of something exotic and therefore cute, weird but safe, because exotica is beautiful but irrelevant; they are, by definition, not like us. Maybe that’s why I hate the term. It groups everything and anything that isn’t “us” into “them.”⁴

This pathology in the appreciation of world music is symptomatic of a larger illness that has come as a byproduct of globalization and multiculturalism. As Professor Edward Said has noted,⁵ the characterization by one dominant culture of something as “other” or “different” or “strange” or “exotic” is a common mechanism of cultural hegemony. That which is “other,” even though notionally lauded and praised, is still inevitably, but subtly, diminished and rendered irrelevant. As Byrne notes in the context of world music, “viewing people and cultures as exotic is a distancing mechanism that too often allows for exploitation and racism.”⁶ What is even worse, Byrne observes, is the way in which world music is marketed:

White folks . . . need their Cuban musicians old and sweet, their Eastern and Asian artists “spiritual.” The myths and clichés of national and cultural traits flourish in the marketing of music. There is a myth . . . that exotic “traditional” music is more honest, more soulful and more in touch with a people’s real and true feelings than the kid wearing jeans and the latest sports gear on Mexican television.

There is a perverse need to see foreign performers in their native dress rather than in the T-shirts and baggies that they usually wear off stage. We don’t want them

2. Id at B1.

3. Id at B36.

4. Id at B1.

5. See Edward W. Said, *Cultural and Imperialism* (Knopf 1993); Edward W. Said, *Orientalism* (Pantheon 1978).

6. Byrne, *I Hate World Music*, NY Times at B36 (cited in note 1).

looking too much like us, because then we assume that their music is calculated, marketed, impure.⁷

Some of this applies with equal force to international law scholarship. Of course, the way in which international law is treated by other legal disciplines is certainly not infected with racial or exploitative overtones. But, there is a healthy dose of skepticism and isolationism when domestic legal practitioners, judges, academics, and policy-makers confront international law scholarship. International law is an unwanted intruder into domestic law. In much the same way that common law legal systems resisted the “Romanist” influences of European civil law,⁸ so too do many domestic legal institutions actively repel the application of international law norms. The supreme irony of international law is that, despite its progressive attempts to capture the best rules and practices in all domestic legal cultures and traditions, it remains a stranger to each of them. So, the harder international law works to distance itself from a particular legal cultural hegemony, the more it may be viewed with distrust by all.

International law is obviously separated in a doctrinal way from the dominant domestic legal culture. But, that is not all. Those who identify themselves as international legal scholars are constrained to conform to a weird form of typecasting. This phenomenon is well-observed in American legal academe. At most law schools—despite obvious trends for globalization in legal practice⁹—international law is a form of juridical afterthought, a proverbial tail that wags the legal dog. International law is often regarded as an “enrichment” course, a mere perspective of what domestic law is or should be. International law is thus not valued in its own right, but rather, only for what it can teach us about our own domestic law. Usually the message is that we are justified in feeling smugly superior that we profess a body of law that is, well, legal. Domestic law is, after all, immune from the vagaries of international politics and public morality. Nor is there any real schism between *lex lata* and *lex ferenda* as an essential jurisprudential basis of domestic law, as there is (and ought to be) in international law.¹⁰ A good international lawyer, in this construction of our ghetto, is one that cheerfully dances to the beat of the domestic law pogrom.

If international law is treated in such a dismissive way by the profession and the academy, it necessarily follows that our intellectual work product—international legal scholarship—is subject to this form of typecasting. Like those who play world music, those that “do” international legal scholarship are compelled to mold their writing in a way that is non-threatening to ensure that international law does not look too much like domestic law. Otherwise, we run the risk of absorption within the hegemony that is domestic law studies. But, even more than that, this is expected of us by those on

7. Id at B36.

8. See James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 Yale L J 1841 (1996); Harold J. Berman and Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L J 437 (1996).

9. See Harold J. Berman, *World Law*, 18 Fordham Intl L J 1617 (1995).

10. See, for example, Anne-Marie Slaughter and Steven R. Ratner, *The Method is the Message*, 93 Am J Intl L 410, 415-17 (1999).

the outside. We may not fear, like world musicians, that if we reveal our predilection to domestic law tastes, our work will be regarded as “calculated, marketed, [and] impure.” Rather, the worry is that by pandering in this way we are conceding that international law *really* is subordinate to domestic concerns, that international law is interesting only to the extent that it sheds light on domestic matters.

International lawyers thus can find themselves as accidental tourists in legal academe. We may have come to international law from a study of international relations, or regional studies, or a love of foreign languages or cultures. But, once we enter the domain of law, we engage in a sort of “cultural tourism,” as David Byrne pointed out for connoisseurs of world music.¹¹ For some of us, I suppose, this engagement with international law is superficial; being an international law scholar provided only a convenient point-of-entry for the competitive teaching market. For this sort, I lament (as does David Byrne), that “you can also listen [to foreign music] and remain completely unaffected and unmoved—like a tourist. Your loss.”¹²

But, for those of us that are either more idealistic (I am not), or at least more committed to international law as a theoretical and doctrinal pursuit, there is another, perhaps more serious, danger. This is the danger of familiarity breeding contempt for our subject. In these situations, it may be beneficial, as Byrne notes, “to exoticize that which has become overly familiar.”¹³ I find this a useful defense mechanism, especially when I confront the stresses of situations where I am called upon to play the “role” of international law scholar. Such are the risks of being a member of the “invisible college”¹⁴ of international lawyers.

II

I hate what others have made of international law scholarship. But, I deplore even more that I and other academic international lawyers have permitted and suffered, conspired and colluded, and even actively encouraged and promoted the marginalization and trivialization of our work. “The fault . . . is not in our stars, But in ourselves, that we are underlings.”¹⁵ Indeed, I would go further and say that international law scholars—particularly those in American legal academe—have indulged in a number of practices that have led us to our current sad state of affairs. What is worse, many of us seem oblivious to the moral peril in which we now find ourselves. At many levels, international law and lawyers have never seemed more prosperous and influential in law faculties, law firms, and government offices. Our numbers seem to have increased. More and more lawyers desire to profess and practice international law. Our scholarship has seemingly proliferated, filling many

11. Byrne, *I Hate World Music*, NY Times at B36 (cited in note 1).

12. Id.

13. Id.

14. See Oscar Schachter, *The Invisible College of International Lawyers*, 72 Nw U L Rev 217 (1977).

15. William Shakespeare, *Julius Caesar*, I, ii, lns 140-48, in A.L. Rowse, ed, *The Annotated Shakespeare* 1681 (Greenwich House 1978).

more pages than it had fifty, twenty, or even ten years ago. So, what am I worried about?

To some degree, I do fear that we may become the victims of our own success. Tastes in legal academe are cyclical—and fickle. (Just ask those large numbers of scholars who specialized in admiralty law or remedies a half-century ago, or in bankruptcy or environmental subjects a few years ago.) But, although the process of globalization of law practice seems inevitable, if not irreversible, such a course does not necessarily mean that international law and international legal scholarship will emerge triumphant. It may just mean that legal scholarship will take a global turn, but without any sense of cohesion or unity. We might teach international sales as part of contract law, or indulge a taste for comparative constitutionalism as a way to explicate current domestic constitutional doctrines and controversies. But, is this really international law? In one sense—a positive way—it is: we and our students are employing an internationalist perspective. And, believe me, if the alternative to ignorance is half-informed knowledge, I'd take the dim candle to the dark room any day. But, as I have already suggested, viewing international law as merely an excuse for a comparativist stroll reduces us, in David Byrne's metaphor, to nothing better than cultural tourists, and half-hearted ones at that.

What I think we have to realize, as a discipline, is that academic international lawyers have been largely responsible for the current problems in which we now find ourselves. If the currency of our scholarship has been cheapened, it is because we have indulged in certain inflationary practices. If our writing seems less relevant—less (dare I say) edgy—it is because we have simultaneously sought acceptance and advancement in the larger professional world that is domestic law and its culture. It might, therefore, be useful to review the sins that the international law academy has committed that have led us to this juncture. I use the term, "sins," advisedly and metaphorically, of course. While the faults I identify are surely "deadly" in a sense of threatening our professional identity, they are laughably innocent and guileless in comparison with transgressions that really matter.

I have, for example, indulged in the intellectual equivalent of *gluttony*. I have self-consciously added to the staggering volume of international law scholarship. I have often confused quantity for quality in my writing, preferring to write light extemporanea, or to gloat over or gush on about every new treaty, or international law case, or incident. Even as a more senior scholar, I have often felt compelled to write the equivalent of student case comments. Perhaps, it is because I feel a need to declare to the world that things are *happening* in international law. Like domestic law, cases are decided, legislation or treaties are made, and authentic disputes are settled. International law has a strong compulsion to acquire the "look and feel" of domestic legal processes and sources, even though these are markedly different. And, despite attempts to fashion uniquely international forms and approaches,¹⁶ we in the discipline

16. See, for example, W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 *Yale J Int'l L* 1 (1984); Andrew W. Willard, *Incidents: An Essay in Method*, 10

find ourselves desperately wanting to prove the relevance of what we do. What better way to demonstrate that relevance as when a real tribunal decides an international issue or a real problem in international relations is handled in a treaty?

But, there is an even more subtle mechanism at work which explains the glut of international law scholarship: the supply and demand of the market. Fifty years ago, there was no such thing as a student-edited international law review. Indeed, there were only a handful of peer-reviewed journals devoted to international law. But, starting in the 1960s with the *Virginia Journal of International Law* and the *Harvard International Law Journal*, this phenomenon began, and by the 1970s and 1980s, the number of such journals proliferated. Today, we have over fifty general international law journals. Indeed, we now have specialized student-edited international law journals for human rights, ocean law, and international environmental law.

This might be regarded as an incredibly ungrateful remark by the kind and gentle editors of the *Chicago Journal of International Law*, but one might legitimately wonder why we need more such journals. It must be that there is a demand. But by whom? I suspect by only two constituencies: law students and international law faculty. Who else reads this stuff? More pertinently, I wonder whether in fact the mechanism of supply and demand has not become profoundly distorted in this process. I am seriously concerned that there are only a limited number of quality pieces of international law scholarship chasing too many openings in international law reviews. When I was the Research and Projects Editor of the *Virginia Journal of International Law*, I found myself in The Hague between my second and third years of law school. There I met a sitting judge on the International Court of Justice. He was interested in submitting a manuscript to the *Journal*, and, to his immense credit, he was worried that the manuscript was of insufficient quality. What I in essence told him was that if he submitted his weekly grocery list, we would be overjoyed to publish it. Although I have later wondered what we would have called it ("The Green Grocers Guide to International Environmental Law" or "International Law At the Millennial Check-Out?"), I have no doubts that the good editors of the *Journal* would have applied liberal amounts of editorial inputs (read, heavy editing) to "make" it publishable. That is where our gluttony has brought us.

As a related, but no less disreputable, sin, we have become *slothful* in our comprehension of what is, properly speaking, international law and international legal studies. Despite the growing doctrinal sophistication of international law, we have a tendency to regard anything with an international aspect as international law. And, while I am glad the schism between private and public international law (a product of nineteenth century positivist attempts to rationalize our subject) is now dissolving, this has sometimes been carried too far. Thus, much of comparative law is now

Yale J Intl L 21 (1984); W. Michael and Andre R. Willard, eds, *International Incidents: The Law that Counts in World Politics* (Princeton 1988); Derek Bowett, *International Incidents: New Genre or New Delusion*, 12 Yale J Intl L 386 (1987).

conflated with public international law. More peculiarly, and I have been especially guilty of this, we have created the subject of foreign relations law and deluded ourselves into thinking that it is both new and subsumes all that is interesting in international law. I knew this notion was carried too far when a scholar I immensely respect was critiquing a chapter in a manuscript I had written on international law in antiquity. He was concerned that a section concerning the perceived nature of treaty obligation in ancient Rome was really “foreign relations law” and not international law. Huh? Foreign relations law, as I understand it, is the study of how domestic legal systems incorporate international law norms and processes. There is no more central question in international law. To hive that off as a peculiar speciality, or (worse yet) cede it to the exclusive domain of domestic constitutional lawyers, would be professional madness.

As another form of slothfulness, I detect that much of international law scholarship is being motivated by outrageous fads. It is rare to find someone who wishes to remain an international law generalist. Since international law is admittedly a broad construct, we not only have “top-level domains” of public international law, international business transactions, foreign relations law, and conflicts of law, but also very specific areas of speciality. Some of these are well-deserved, such as human rights and international environmental law. Others are more dubious. In any event, specialization often comes at the expense of understanding the central canonical core of international law—its sources and methods (particularly custom and treaty), and basic principles of state identity, immunities, succession, and responsibility. I think that slothfulness manifests itself also in the paucity of truly integrative and holistic treatises on international law. Monographs on particular doctrinal issues are, of course, essential in building knowledge, but there is also a need for works that attempt to take in the broad horizon of our discipline, particularly in ways that may be counter-intuitive or unexpected.¹⁷

This leads me to a veritable complex of deadly sins of international legal scholarship: *lust*, *envy*, and *greed*. The last of these has chiefly revealed itself as an aggressive tendency on the part of international lawyers to borrow things from other disciplines and to apply them to their own work. Some of this is a rather transparent attempt to gain respect from practitioners of domestic law. More recently, it has been part of a larger phenomenon in legal academe to boost the legitimacy and self-esteem of law professors in academic settings by constantly and outrageously asserting our interdisciplinary credentials. This is not the place to write a screed of the “law and . . .” movement, but suffice it to say, there is a profound danger that unbridled interdisciplinarity will result in law losing any status it might aspire to as neutral and objective, autonomous, and scientific. But, the funny thing is, international legal

17. See, for example, some of my favorite recent works in this genre: Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford 1995); Douglas M. Johnston, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments* (Transnational 1997); Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991).

scholars might have nothing to lose in this gambit. We are already regarded as professing something less than “real” law by our domestic law colleagues; so, what is the harm in boldly experimenting in drawing connections with other disciplines and staking out new approaches to our subject?

I do not question that some of the most exciting work being done today in international law scholarship is examining precisely these questions. Whether it is looking at the role of law and economics or public choice theory in international situations,¹⁸ or examining the now very complicated relationship between international law and international relations theory,¹⁹ or taking fresh looks at religious aspects of international law,²⁰ there is important work to be done on these broader jurisprudential matters. And, although I am less familiar with the growing literature of post-colonial, feminist, or critical race perspectives on international law, they will doubtless be significant (and controversial) as well.

But, at what price has international legal scholarship taken this recent methodological turn? I have previously observed that international law in this past century has been particularly oblivious to its historic and jurisprudential origins. But, we now possibly have indulged in an over-correction to this problem. The problem is in understanding what purpose is served by these methodological approaches. Is it, as David Byrne observed in a complimentary way for world musicians, a process of “tak[ing] elements of global (Western?) music apart, examin[ing] the pieces to see what might be of use and then re-invent[ing] and reassembl[ing] the parts to their own ends.”²¹ If so, international law scholarship finds itself at a deconstructionist juncture. That may not be bad, if the ultimate result is a reintegration of international law doctrines and principles—a new synthesis for our subject. But, it could just as easily result in a further fracturing of our discipline. Whether international law gets reverse-engineered in this methodological frenzy, or simply torn apart, remains to be seen.

So, not only do we have substantial envy by international law scholars of the professional success and standing of other disciplines, we also have growing rage or *wrath* directed at international law itself from within the fold. Don’t get me wrong; international legal scholars ought to be the first and most vociferous critics of the

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18. See, for example, Jeffrey L. Dunoff and Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 Am J Intl L 394 (1999); Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J Intl L 1 (1999); Paul Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 Am U J Intl L & Pol 745 (1995).
 19. See, for example, Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 Am J Intl L 205 (1993); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 Am J Intl L 367 (1998); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 Va J Intl L 107 (1998).
 20. See, for example, Marc W. Janis and Carolyn Evans, eds, *Religion and International Law* (Martinus Nijhoff 1999).
 21. Byrne, *I Hate World Music*, NY Times at B36 (cited in note 1).

failings of international law process. We do nothing to advance our position by apologizing for international law's failures or coddling the weaker doctrines and ideas of the field. But, I fear that the tone and approach of some recent scholarship has taken an ugly turn. I am *not* referring here to the critical, "new stream" of international law scholarship,²² or to the deliberately provocative work being done in the area of U.S. foreign relations law.²³ I rather like this material, even though I strongly disagree with both its descriptive accuracy and normative conclusions. Again, what David Byrne observed for world music is doubly so for international law scholarship: "[f]or at it's [sic] best, music truly is subversive and dangerous. Thank the gods."²⁴

But, at some point, however, vigorous scholarship ceases to be constructive. I would like to think that we are all engaged in a common enterprise here: the establishment of international order and justice under a rule of law. I know that sounds corny and hackneyed. But, if that is not your goal in "doing" international law scholarship, then I wonder about your sincerity. Really. I know we can all disagree over both the specific objectives of this ambition and the precise modalities of achieving it, but if we do not all even "buy into" that role for international law (or law in general), then I do worry about the legitimacy of what we do as law professors and practitioners. Just as I have been critical of my colleagues in legal academe who seem to hold in profound contempt the very skills and attitudes that make for fine lawyers, we should be distrustful of those who, through their scholarship, would seek to diminish international law for no reason other than contrarian desire or professional advancement.

But, if I rage at the wrath shown by some in the discipline, let me save the most deadly sin of international law scholarship for last. That is *pride*. In response to their uncertain position in the legal academy, international lawyers have responded by wearing a mantle of defensive remoteness and arrogance. And, in what other area of legal study are the "teachings of the most highly qualified publicists of the various nations," regarded as a "subsidiary means for the determination of rules of [international] law?"²⁵ The very term "publicist" has come to be most closely associated with those who teach and write in the area of international law.²⁶ Many international law scholars do certainly regard themselves as keepers of arcane knowledge, an academic elite. I know I do. A few years ago, my students gave me a t-shirt

22. See, for example, David Kennedy, *International Legal Structures* (Nomos Verlagsgesellschaft 1987); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' 1989).

23. See, for example, Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997); Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv L Rev 2260 (1998); Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L Rev 319 (1997).

24. Byrne, *I Hate World Music*, NY Times at B36 (cited in note 1).

25. Statute of the International Court of Justice, Art 38, para 1(d) (1945), 59 Stat. 1055, TS No 993.

26. See *Black's Law Dictionary* 1244 (West 7th ed 1999).

emblazoned, "I AM a source of international law." I wear it with pride.

There is something more, too. We who have professed international law have always known that our claims to relevance are tenuous, at best. Indeed, that is one of the exciting things in practicing international law in such a setting as the United States (or any other great power for that matter). I can often delude myself into thinking that I am speaking truth (international law rules) to power. There is a pride that comes in assuming that I am engaged in a form of ministry in preaching the gospel of international law to the Philistines.

III

In reaction to these outrageous forms of prideful behavior, we sometimes respond with pitiful attempts at false modesty, and these none-too-subtly influence the scholarly agenda of the discipline. One form this takes is a sense of *reductio*: that all international law scholarship is much alike. We can revel in diversity because (according to this notion) there is nothing that really distinguishes good from bad scholarship, truth from error, and excellence from mediocrity. Don't believe it. Likewise, if one assumes that there is nothing really distinctive about international law as a legal discipline, or that there is really no value to be served in promoting an international rule of law, it would be easy to be led astray and believe in false prophets. Don't go there.

I know that I am as guilty of the sins I have described here as anyone else. And, what I have provided here is a very personal—if not downright eccentric—view of the state of international legal scholarship. So, I adopt a posture much like what David Byrne wrote about his qualms with some aspects of contemporary world music:

I question the authenticity of some of the new-age ethnofusion music that's out there, but I also know that to rule out everything I personally abhor would be to rule out the possibility of a future miracle. Everybody knows the world has two types of music—my kind and everyone else's. And even my kind ain't always so great.

I want to believe in future miracles for international law, for the profession of international lawyering, and for international legal scholarship. And, even if international law scholarship grows and develops in a way that might not be "my kind" of study or writing, I will nonetheless be content if I know that we have remained true to ourselves, our important subject, and our distinct professional identity.

27. Byrne, *I Hate World Music*, NY Times at B36 (cited in note 1).