

# Crime Music

Bennett Capers\*

## I. INTRODUCTION

There is a small but rich history of legal scholars drawing uncommon connections between music and the law. Professor Jerome Frank argued that understanding the work musicians do when they interpret a musical composition can help us better understand the work judges do when they interpret rules and statutes,<sup>1</sup> and when they engage in fact finding.<sup>2</sup> Professor John Calmore noted the many similarities between critical race theory and jazz, most notably in the sense that they are both oppositional cultural practices.<sup>3</sup> Judge Posner wrote about the authentic music movement (the insistence that period music be played with period instruments and as true to the composer's original intent as possible), and argued that understanding this type of originalism could shed light on the merits *vel non* of constitutional originalism;<sup>4</sup> Professors Jack Balkin and Sandy Levinson made similar observations.<sup>5</sup> And most recently, Professor Paul Butler proffered a hip-hop theory of punishment.<sup>6</sup>

The ambition of this brief essay is to continue this rich tradition. However, my agenda is decidedly different. What holds particular interest for me is not

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<sup>1</sup> Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1260 (1947).

<sup>2</sup> Jerome Frank, *Say It With Music*, 61 HARV. L. REV. 921, 921 (1948).

<sup>3</sup> 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, 2130-31 (1992). Other scholars have also drawn on the connection between jazz and law. See, e.g., Jonathan A. Beyer, Note, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 GEO. L.J. 537 (2000); Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853 (2003). The late Kellis Parker, who was the first tenured black professor at my alma mater, Columbia Law School, passed away before he completed his book project *Jazz: The Law the Slaves Made*, a work that would have further contributed to this area of scholarship. For a brief description of Parker's work, see Alfred L. Brophy, *Foreword: Lawyers and Social Change in American Legal History*, 54 ALA. L. REV. 771, 778 & n.35 (2003).

<sup>4</sup> Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1366, 1380 (1990).

<sup>5</sup> Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

<sup>6</sup> See generally Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

music as a way of thinking about the process of legal interpretation or punishment. Rather, my interest is in generating a discussion about music as it relates to crime. My interest is in music as a tool of crime prevention. And my interest is in music as a tool of death.

## II. LAMENTATION

The quickest way to a person's brain is through his eyes, but even  
in the movies the quickest way to his heart and feelings is still  
through the ear.  
Aaron Copland<sup>7</sup>

When Douglas Oliver Kelly was tried and convicted of first degree murder, rape, and robbery in connection with the slaying of nineteen-year-old Sara Weir, he did not present evidence during the capital phase of the trial.<sup>8</sup> Perhaps he thought a jury sentence of death was a foregone conclusion given the evidence mounted against him during the guilt phase, which included evidence, admitted under California's counterpart to Federal Rule of Evidence 404(b), of several prior rapes.<sup>9</sup>

The prosecution, for its part, took no such chances. The prosecution presented testimony from Sara Weir's mother, evidence linking Kelly to yet another rape, and a twenty-minute videotape.<sup>10</sup> The videotape, which was more like a video scrapbook, was introduced and narrated by Sara Weir's mother, and consisted of still photographs and home video clips depicting Sara's life, from infancy through high school graduation.<sup>11</sup> The video closed with an image of Sara's grave site, and then a shot of four horsemen galloping across the Canadian countryside while Sara's mother intoned, "As time goes by I try very hard not to think of Sara in terms of this terrible crime that we've had to deal with here in the court, but rather think of her in a place like this . . . . This is the kind of heaven she

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<sup>7</sup> Aaron Copland, *The Aims of Music for Films*, N.Y. TIMES, Mar. 10, 1940, at 7.

<sup>8</sup> *People v. Kelly*, 171 P.3d 548, 557 (Cal. 2007).

<sup>9</sup> The evidence established that the defendant had engaged in a pattern of sexually assaulting his female acquaintances and attempting to obtain money from them. One assault involved the defendant raping a female acquaintance while holding a pair of scissors to her throat. The rape occurred in an apartment that the defendant claimed was his, but which in fact belonged to another of his female acquaintances, who had temporarily moved out of the apartment. Sara Weir's body was later found nude and decomposed under a bed in the same apartment, her head partially covered by a baseball helmet and tape. A pair of bloodstained scissors, similar to the pair the defendant had used to rape his prior victim, was found nearby. The autopsy established that Sara had died of a total of 29 stab wounds by a single weapon, possibly scissors. Defendant's palm prints and fingerprints were found on the helmet and the tape. The defendant was eventually arrested near the Mexican border. In his possession were two of Sara Weir's personal checks. *Id.* at 554–56.

<sup>10</sup> *Id.* at 557.

<sup>11</sup> *Id.* at 557–58.

seems to belong in.”<sup>12</sup> The visuals and the narration, however, were only two components of the twenty-minute video montage. The third component was a soundtrack. Setting the mood for the images and narration was the music of Irish, new-age artist Enya.<sup>13</sup>

Was anyone surprised, I wonder, when the jury returned a verdict of death?

The case I am describing is *People v. Kelly*,<sup>14</sup> which received some notoriety when it looked as if the United States Supreme Court might grant certiorari following the California Supreme Court’s affirmance of the verdict.<sup>15</sup> Kelly’s argument in his petition for certiorari was straightforward: The admission during the penalty phase of the video-montage, narrated by the victim’s mother and set to the music of Enya, exceeded the bounds of *Payne v. Tennessee*,<sup>16</sup> injected excessive emotionalism into the process, and created an unconstitutional risk of arbitrary capital sentencing in violation of the Eighth Amendment.<sup>17</sup> Kelly also argued that courts across the country had reached conflicting determinations about admitting videotaped victim impact evidence, and urged the Court to “establish meaningful controls on the form of victim impact evidence that can be admitted in capital trials.”<sup>18</sup> In the end, the Court denied certiorari, though Justices Breyer and Stevens wrote vigorous dissents.<sup>19</sup> In the end, Douglas Oliver Kelly remains on death row.

The problem, as is often the case, was precedent. In *Payne v. Tennessee*, the Court reversed its decision in *Booth v. Maryland*,<sup>20</sup> issued just four years earlier, and ruled that the Eighth Amendment does not preclude a capital sentencing jury from considering victim impact evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family.<sup>21</sup> Given the importance of *Payne* to the conviction and sentence of Douglas Oliver Kelly, a

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<sup>12</sup> *Id.* at 570–72. Ben Winograd, *Petition Preview: Enya, the Death Penalty, and Video Victim Impact Evidence*, SCOTUSBLOG, Aug. 30, 2008, <http://www.scotusblog.com/wp/petition-preview-enya-the-death-penalty-and-video-victim-impact-evidence>.

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

<sup>14</sup> 171 P.3d 548 (Cal. 2007).

<sup>15</sup> See, e.g., Bill Mears, *Justices Allow Video Scrapbooks of Crime Victims*, CNN, Nov. 10, 2008, available at <http://www.cnn.com/2008/CRIME/11/10/scotus.victim.impact/index.html>; On the Media, *Enya Gets Played*, NATIONAL PUBLIC RADIO, Nov. 14, 2008 (transcript available at <http://www.onthemedial.org/transcripts/2008/11/14/06>); Jerry Markon, *Poignant Videos of Victims Valid in Court*, WASH. POST, Nov. 29, 2008, at A3.

<sup>16</sup> 501 U.S. 808 (1991).

<sup>17</sup> Kelly also argued that the videotape was so inflammatory and prejudicial that it rendered his death sentence fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. *Kelly*, 171 P.3d at 549.

<sup>18</sup> See *Petition for Writ of Certiorari, Kelly v. California*, 129 S. Ct. 564 (2008) (No. 07-11073).

<sup>19</sup> See 129 S. Ct. 564 (2008); 129 S. Ct. 567 (2008).

<sup>20</sup> 482 U.S. 496 (1987).

<sup>21</sup> *Id.* at 508.

recitation of the facts is in order. In *Payne*, the evidence established that the defendant, intoxicated and on drugs, stabbed to death Charisse Christopher, a twenty-eight-year-old mother of two, and her two-year-old daughter. Her three-year-old son, despite suffering from wounds inflicted by a butcher knife, survived.<sup>22</sup> At issue was the testimony of Charisse's mother who, during the penalty phase, made the following statement about the effect the murders had had on the three-year-old son:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.<sup>23</sup>

On appeal, *Payne* argued that the admission of this evidence violated his Eighth Amendment rights in contravention of *Booth v. Maryland*, in which the Court had held that victim impact evidence is per se inadmissible in the sentencing phase of a capital case.<sup>24</sup> Writing for the *Payne* majority, Chief Justice Rehnquist concluded that *Booth* was incorrectly decided, and that evidence about the victim and the impact of the murder on the victim's family may be relevant in determining the harm caused by the defendant and the defendant's blameworthiness, and may be a necessary counterweight to the mitigating evidence offered by the defendant.<sup>25</sup> The Court rejected the concern, expressed in *Booth*, that the admission of such evidence would encourage jurors to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.<sup>26</sup> Rather, such evidence would show each victim's "uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be."<sup>27</sup>

*Payne* is a troubling decision. Perhaps most troubling is the Court's suggestion that victim impact evidence merely shows each victim's uniqueness as a human being, and does not invite jurors to make comparable judgments about victim worth. Common sense belies this claim. We are likely to find the killer of a hardworking, devoted parent more blameworthy, and thus more deserving of death, than the killer of a reprobate. Indeed, only a few years before deciding *Payne*, the Court was presented with statistical evidence that such comparative judgments about the value of victims were already being made with respect to race

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<sup>22</sup> *Payne*, 501 U.S. at 811–13.

<sup>23</sup> *Id.* at 814–15.

<sup>24</sup> *Id.* at 817–19.

<sup>25</sup> *Id.* at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

<sup>26</sup> *Id.* at 826–27.

<sup>27</sup> *Id.* at 823.

in imposing death. In *McCleskey v. Kemp*,<sup>28</sup> the Court had before it evidence that the imposition of the death penalty in Georgia depended in great part on the race of the victim.<sup>29</sup> After taking account of 230 variables that could explain the disparities on non-racial grounds, a study concluded that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing black victims.<sup>30</sup> By allowing jurors access to victim information not known to the defendant, *Payne* arguably compounds the *McCleskey* problem, permitting jurors to rank the murderer of a mother of two as more blameworthy than the murderer of a single woman without children; to rank the murderer of a heterosexual woman as more blameworthy than the murderer of a lesbian; to rank the murderer of a middle-class person as more blameworthy than the murderer of a poor person; to rank the murderer of a white person as more blameworthy than the murderer of a black or Hispanic person. Far from supporting the notion that we all have equal worth and that we are all equal before the law, *Payne* gives its imprimatur to the notion that, while we may all be equal, some of us are “more equal than others.”<sup>31</sup>

There are other problems with *Payne*, of course, both in the Court’s reasoning and in the Court’s conclusion. Had the Court really thought it necessary that the prosecution be able to show that each victim is a unique human being, the Court could have accomplished as much by authorizing a jury instruction to that effect. The majority’s argument that precluding such evidence would turn the victim into a “faceless stranger”<sup>32</sup> is similarly flawed, since even without victim impact evidence, the jury would invariably already have before it information about the victim that was known to the defendant, as well as photographs of the victim and other background information relating to the circumstances of the crime. There is also the problem of unreasoned, unreflective emotion that Susan Bandes has addressed: that such evidence “interferes with—and indeed may completely block—the jury’s ability to empathize with the defendant or comprehend his humanity.”<sup>33</sup> There is even the perverse incentive that *Payne* raises: a criminal

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<sup>28</sup> 481 U.S. 279 (1987).

<sup>29</sup> *Id.* at 286.

<sup>30</sup> The study, conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth, also found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; and 19% of the cases involving white defendants and black victims. For more on this study and *McCleskey*, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

<sup>31</sup> GEORGE ORWELL, *ANIMAL FARM* 112 (1946).

<sup>32</sup> *Payne*, 501 U.S. at 825 (citing *South Carolina v. Gathers*, 490 U.S. 805, 821 (O’Connor, J., dissenting)).

<sup>33</sup> Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 402 (1996). *But see* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 655–56 (1989) (arguing that decisions about punishment should not be divorced from emotive discourse), and Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW*

who leaves no surviving victims, say, by slaughtering an entire family, may be better positioned than the criminal who kills some family members, but not all. There is the problem that, under *Payne*, victim impact statements are admissible whether the defendant presents mitigating evidence or not—after all, this was the case in *Kelly*—thus undercutting the Court’s purported concern about counterbalancing the defendant’s mitigation case. And there is the problem of the slippery slope left exposed by *Payne*, which arguably permits not only brief statements about the victim’s life, but lengthy videotaped eulogies of the kind made in *Kelly*.<sup>34</sup>

But for now, my complaint is a narrow one, though it does relate to *Payne*’s slippery slope and the resulting evidence that sealed the death sentence of Douglas Oliver Kelly. My complaint is with the use of music.

### III. ON MUSIC

Too often we think of music as something that is simply heard, of which we are merely passive recipients. Perhaps this is a result of its very ubiquity. On elevators, in shopping malls, in restaurants, in waiting rooms, in gyms, music is often the one constant. Events too have their music. It is hard to imagine a wedding, or a bar mitzvah, or a funeral, or even a sporting event without music. Certain compositions even signify specific events. This is true on a communal level. One has only to hear a snippet of Mendelssohn’s *Wedding March* to think of weddings. Sir Edward Elgar’s *Pomp and Circumstance*, originally used for the coronation of King Edward VII, immediately brings to mind graduation. But this is also true on the personal level. Couples have *their song*. We even use the signs of music to express other sentiments. *He touched a chord in me. She got played. He marches to his own beat.* We call our dating site *eHarmony*.

Before the advent of radio, music itself was often an event, a luxury to be treasured, something that had to be sought out. Now, we exist in a “matrix of sound.”<sup>35</sup> Think about it. Music has become more commonplace than dancing, or reading, or sex. Like language, it is there, everywhere. With iPods and iPhones, we carry it with us. By pressing play or shuffle or loop, we arrange our own soundtracks to fit the mood and the place. Even without iPods, we hear it in our heads. Sometimes, this is because we’ve beckoned it, like an old friend. Other times, it is because it has crept surreptitiously into our skulls, musical earworms and viruses, what Oliver Sacks refers to as “cognitively infectious musical

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135, 149, 157 (Peter Brooks & Paul Gewirtz eds., 1996) (defending the use of victim impact statements in part because they give voice to “outsider” voices).

<sup>34</sup> See *Payne v. Tennessee*, 501 U.S. 808 (1991); *People v. Kelly*, 171 P.3d 548 (Cal. 2007). Indeed, this creates its own class privileges, favoring those victims whose lives were captured on videotape, perhaps by doting parents holding camcorders, over those victims whose lives, because of financial constraints, remained unfilmed and undocumented.

<sup>35</sup> Lily E. Hirsch, *Weaponizing Classical Music: Crime Prevention and Symbolic Power in the Age of Repetition*, 19 J. POPULAR MUSIC STUD. 342, 344–45 (2007).

agents,”<sup>36</sup> fragments or entire compositions that repeat themselves *ad nauseam*. Plop, plop, fizz, fizz. Oh what a relief it is.<sup>37</sup>

Music’s ubiquity should be taken as evidence of its power, not its impotence. In fact, music is physical, both in its production (an assemblage not only of notes, but of waves, of vibrations) and in its result. Its vibrations enter the body, setting up other, reactive vibrations in their wake. And our bodies, in turn, respond. As Nietzsche observed, we listen to music with our muscles.<sup>38</sup> Music can cause the pulse to accelerate, can raise the blood pressure, can activate sweat glands.<sup>39</sup> We tap our feet, bob our heads, and drum our fingers. At the church I attended as a child, music, especially pulsing, rhythmic music, was enough to cause women to “catch the holy ghost,” to call out, to dance, to speak in tongues. For some, music can even induce epileptic seizures,<sup>40</sup> or induce panic. Consider writer and feminist Marie Cardinal’s reaction upon first hearing Louis Armstrong play, which she recounts in her celebrated memoir *The Words to Say It*:

I was nineteen or twenty. Armstrong was going to improvise with his trumpet, to build a whole composition in which each note would be important and would contain within itself the essence of the whole. I was not disappointed: the atmosphere warmed up very fast. The scaffolding and flying buttresses of the jazz instruments supported Armstrong’s trumpet, creating spaces which were adequate enough for it to climb higher, establish itself, and take off again. The sounds of the trumpet sometimes piled up together, fusing a new musical base, a sort of matrix which gave birth to one precise, unique note, tracing a sound whose path was almost painful, so absolutely necessary had its equilibrium and duration become; it tore at the nerves of those who followed it.

My heart began to accelerate, becoming more important than the music, shaking the bars of my rib cage, compressing my lungs so the air could no longer enter them. Gripped by panic at the idea of dying there in the middle of spasms, stomping feet, and the crowd howling, I ran into the street like someone possessed.<sup>41</sup>

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<sup>36</sup> OLIVER SACKS, *MUSICOPHILIA: TALES OF MUSIC AND THE BRAIN* 42 (2007).

<sup>37</sup> For those too young to remember, this jingle comes from one of the most famous and infectious television commercials of the 1970s, a commercial for Alka-Seltzer. See *A CENTURY OF AMERICAN ICONS: 100 PRODUCTS AND SLOGANS FROM THE 20<sup>TH</sup> CENTURY* 154, 156 (Mary Cross ed., 2002).

<sup>38</sup> FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 427–28 (Walter Kaufmann ed., Walter Kaufmann & R. J. Hollingdale trans., 1967).

<sup>39</sup> JAMES L. MURSELL, *THE PSYCHOLOGY OF MUSIC* 27–28 (1937).

<sup>40</sup> SACKS, *supra* note 36, at 23.

<sup>41</sup> MARIE CARDINAL, *THE WORDS TO SAY IT* 39 (Pat Goodheart trans., 1983).

This is an extreme example to be sure, perhaps as rare as synesthesia. But even for those of us who are immune from such visceral reactions, or for those of us who can tamp down such impulses, our bodies still respond, whether we are cognizant of our responses or not. “We keep time to music, involuntarily, even if we are not consciously attending to it, and our faces and postures mirror the ‘narrative’ of the melody, and the thoughts and feelings it provokes.”<sup>42</sup>

Even this only begins to get at the work music does. After all, even without training, we understand music, perceive tones, and comprehend timbre and melody and rhythm. Music is built into us, there is something primal about it, instinctual; “musicophilia”<sup>43</sup> is in our nature. Our first sense is one of music, of rhythm, of sound:

We begin to hear before we are born, four-and-a-half months after conception. From then on, we develop in a continuous and luxurious bath of sounds: the song of our mother’s voice, the swash of her breathing, the trumpeting of her intestines, the timpani of her heart. Throughout the second four-and-a-half months, Sound rules as solitary Queen of our senses: the close and liquid world of uterine darkness makes Sight and Smell impossible, Taste monochromatic, and Touch a dim and generalized hint of what is to come.<sup>44</sup>

Is it any surprise then that newborns can detect rhythm?<sup>45</sup> Even when we are adults, rhythm has the ability to comfort and lull.<sup>46</sup> To say: You are safe here.

Music is also a way of knowing. This is true of pure or absolute music—the term musicologists use for unaccompanied instrumental compositions—and can be a matter of survival. The tom-toms of the Native Americans were often the first warning to settlers of trouble. Among black slaves, music could communicate an escape route, or warn of impending danger. But this way of knowing is also true of music that accompanies filmic modes of representation. It is Bernard Herrmann’s score in *Psycho* that tells us that Janet Leigh is in danger, long before the blade of the knife cuts through the shower curtain.<sup>47</sup> This is because a “film’s sounds (and its silences) shape what we know, and how that knowledge feels.”<sup>48</sup>

<sup>42</sup> SACKS, *supra* note 36, at xi.

<sup>43</sup> *Id.* at x.

<sup>44</sup> PATRICIA PISTERS, *THE MATRIX OF VISUAL CULTURE: WORKING WITH DELEUZE IN FILM THEORY* 177 (2003) (quoting film editor/sound designer Walter Murch).

<sup>45</sup> István Winkler et al., *Newborn Infants Detect the Beat in Music*, 106 *PROC. NAT’L ACAD. SCI.* 2468, 2470 (2009).

<sup>46</sup> See, e.g., John O’Neil, *Lullaby for the Sleep-Deprived*, *N.Y. TIMES*, Feb. 8, 2005, at F6 (reporting on study indicating that older adults sleep better, and longer, if they listen to soothing music at bedtime).

<sup>47</sup> *PSYCHO* (Paramount Pictures 1960) (score by Bernard Herrmann).

<sup>48</sup> Ruth Buchanan & Rebecca Johnson, *Strange Encounters: Exploring Law and Film in the Affective Register*, 46 *STUD. L. POL. & SOC’Y* 33, 42 (2009).

This knowledge may even contradict what we see. As film theorist Mary Ann Doane has observed:

If the ideology of the visible demands that the spectator understand the image as a truthful representation of reality, the ideology of the audible demands that there exist simultaneously a different truth and another order of reality for the subject to grasp.

The frequency with which the words “mood” or “atmosphere” appear in the discourse of sound technicians testifies to the significance of this other truth.<sup>49</sup>

Studies bear this out.<sup>50</sup> For example, in one study, subjects were presented with the identical stimulus film, but accompanied by different musical scores. How each subject understood the film—the relationship between the characters and its conflict—depended heavily on the score they heard. Even more importantly, the score influenced each subject’s expectation about the narrative arc of the film. The music thus became teleological, completing the picture, forecasting just how things would end. How things should end.<sup>51</sup> Whether happily—as in happily ever after—or in death.

There is also evidence to suggest that music can spur individuals to engage in collective action. A recent study suggests that acts of synchrony, including singing music together or even listening to music together, can motivate individuals to feel a group allegiance, to feel a devotion to a common cause.<sup>52</sup> There is a reason why we feel more patriotic when we sing the national anthem at football games, and it has much to do with the fact that we are singing collectively.<sup>53</sup> Similarly, there is a reason we feel empowered when we chant, en masse, “Yes We Can”; or a sense of unity and cohesiveness when we listen to music with others, whether it be at a

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<sup>49</sup> Mary Ann Doane, *Ideology and the Practice of Sound Editing and Mixing*, in *FILM SOUND: THEORY AND PRACTICE* 54, 55 (Elisabeth Weis & John Belton eds., 1985).

<sup>50</sup> See, e.g., Sandra K. Marshall & Annabel J. Cohen, *Effects of Musical Soundtracks on Attitudes Toward Animated Geometric Figures*, 6 *MUSIC PERCEPTION* 95, 100, 108 (1988); Percy H. Tannenbaum, *Music Background in the Judgment of Stage and Television Drama*, 4 *AUDIO-VISUAL COMM. REV.* 92, 99 (1956).

<sup>51</sup> See Claudia Bullerjahn & Markus Güldenring, *An Empirical Investigation of Effects of Film Music Using Qualitative Content Analysis*, 13 *PSYCHOMUSICOLOGY* 99, 112 (1994).

<sup>52</sup> See Scott S. Wiltermuth & Chip Heath, *Synchrony and Cooperation*, 20 *PSYCHOL. SCI.*, 1, 5 (2009); see also Richard Alleyne, *Goose-Stepping May Have Encouraged People To Follow Nazis*, *THE TELEGRAPH* (U.K.), Feb. 4, 2009; David Robson, *How to Control Your Herd of Humans*, *NEW SCIENTIST*, Feb. 7, 2009, at 1. The argument that music has a binding effect is not entirely new. For example, Anthony Storr made this point in his *Music and the Mind*. See ANTHONY STORR, *MUSIC AND THE MIND* 20, 23 (1992).

<sup>53</sup> This may also help to explain why every country has an anthem, a question raised in a *Cardozo Law Review* symposium on music and legal theory. See Desmond Manderson & David Caudill, *Modes of Law: Music and Legal Theory—An Interdisciplinary Workshop Introduction*, 20 *CARDOZO L. REV.* 1325, 1327 (1999).

Grateful Dead or Vampire Weekend concert, or the New York Philharmonic. But there is a dark side too; one that corresponds to Plato's concern that music also has the power to corrupt, and to overcome reason. The mass brawls we associate with football hooliganism in Europe often begin with fans chanting songs. The cohesion to "us" metastasizes into an aversion to "them." Some speculate that listening to music en masse and other acts of synchrony played a role in galvanizing the masses to embrace fascism in Nazi Germany.<sup>54</sup>

It is music's emotive power that I want to focus on. Its power can make us laugh, induce euphoria, give us goose bumps, but it can also enrage us. Think of the riots that erupted when audiences first heard Stravinsky's dissonant *Rites of Spring*. Music can also send us into a tailspin of grief. Think Górecki's *Symphony No. 3*, Sinead O'Connor's *Nothing Compares 2 U*, or Johnny Cash's *Hurt*. Or at its very opposite, music can serve as a lifeline from grief. The stories abound of depression alleviated by music. For John Stuart Mill, only music could relieve his states of melancholia.<sup>55</sup> For some, it may be a particular composition. In his memoir *Darkness Visible*, William Styron describes how hearing a passage from Brahms' *Alto Rhapsody* pulled him from the brink of suicide:

This sound, which like all music—indeed, like all pleasure—I had been numbly unresponsive to for months, pierced my heart like a dagger, and in a flood of swift recollection I thought of all the joys the house had known: the children who had rushed through its rooms, the festivals, the love and work . . . .<sup>56</sup>

Wendy Lesser, in her book *Room for Doubt*, writes of a similar experience following the death of her friend Lenny.

[The] performance of the Brahms Requiem . . . had a powerful effect on me . . . . I went to Berlin thinking I would write about David Hume there . . . [but as] the waves of music pour over me—listening with my whole body, it seemed, and not just with my ears—I realized that I was going to have to write about Lenny instead.

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<sup>54</sup> See, e.g., Jonathan Haidt et al., *Hive Psychology, Happiness, and Public Policy*, 37 J. LEGAL STUD. 133, 147–48 (2008). Anthony Storr makes a similar argument about the Nuremberg rally:

At the Nuremberg rally of 1936, the thunderous cheers [*sic*] of the vast crowd eventually drowned the music of the massed bands which played Hitler in. But the bands were there long before Hitler appeared, preceding his rhetoric with their rhetoric, preparing the huge gathering for Hitler's appearance, binding them together, arousing their expectations, aiding and abetting Hitler's self-dramatization, making it credible that a *petit bourgeois* failure had turned himself into a Messiah.

STORR, *supra* note 52, at 46.

<sup>55</sup> JOHN STUART MILL, AUTOBIOGRAPHY 122 (1952).

<sup>56</sup> WILLIAM STYRON, DARKNESS VISIBLE: A MEMOIR OF MADNESS 66 (1990).

I had been carrying around Lenny's death in a locked package up till then, a locked, frozen package that I couldn't get at but couldn't throw away, either. . . . But as I sat in the Berlin Philharmonic hall and listened to the choral voices singing their incomprehensible words, something warmed and softened in me. I became, for the first time in months, able to feel strongly again.<sup>57</sup>

And in his book *Musicophilia*, Oliver Sacks describes his own musical salvation from grief.

One evening I went to a concert, hoping against hope that the music might revive me, but it did not work; the whole concert bored me—until the last piece was played. It was a piece I had never heard before, by a composer I had never heard of, *The Lamentations of Jeremiah* by Jan Dismus Zelenka (an obscure Czech contemporary of Bach's, I later learned). Suddenly, as I listened, I found my eyes wet with tears. My emotions, frozen for weeks, were flowing once again. Zelenka's *Lamentations* had broken the dam, letting feeling flow where it had been obstructed, immobilized inside me.<sup>58</sup>

Music can even ease one into death, as the burgeoning field of music thanatology makes clear.<sup>59</sup>

New research in the area of neuroscience and brain imaging has done much to explain the *mechanics* of what music does to the emotions. Listening to music causes a series of triggers in the brain, activating first the auditory cortex, then frontal regions, and finally a network of regions—the mesolimbic system—involved in arousal, pleasure, and the transmission of opioids and the production of dopamine, which in turn activate the nucleus accumbens.<sup>60</sup> In a way, music mimics some of the features of language, conveying the same emotions that vocal communication does, but in a non-referential and non-specific way. But music also operates on a level more powerful than language. Indeed, music triggers the same regions of the brain as food, sex, and drugs. In short, music is a “drug without the drugs,”<sup>61</sup> tapping into brain structures associated with motivation, reward, and emotion.

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<sup>57</sup> WENDY LESSER, ROOM FOR DOUBT 119–20 (2007).

<sup>58</sup> SACKS, *supra* note 36, at 296–97.

<sup>59</sup> Music thanatology is an approach to end of life palliative care that combines music and medicine. See Laura Pedersen-Pietersen, *Minding Your Business: For the Dying, Music Can Be More Than Just a Requiem*, N.Y. TIMES, May 10, 1998, at D1.

<sup>60</sup> DANIEL J. LEVITIN, THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION 191 (2006).

<sup>61</sup> Moira Farr, *Blue Notes*, UTNE READER, Nov. 2008 (quoting David Huron, head of the Cognitive and Systematic Musicology Laboratory at The Ohio State University).

But in the end, the work that music does is still a mystery, still elusive, still catches us by surprise, still seems to defy comprehension. Claude Lévi-Strauss likened music to myth: “A myth coded in sounds instead of words, the musical work furnishes a grid of signification, a matrix of relationships which filters and organizes lived experience; it substitutes for experience and produces the pleasurable illusion that contradictions can be overcome and difficulties resolved.”<sup>62</sup> Perhaps Schopenhauer came closer. “The inexpressible depth of all music,” he wrote, “so easy to understand and yet so inexplicable, is due to the fact that it reproduces all the emotions of our innermost being, but entirely without reality and remote from its pain. . . . [M]usic expresses only the quintessence of life and of its events, never these themselves.”<sup>63</sup>

Steven Pinker has suggested that music, in the end, is insignificant, inconsequential, disposable. “What benefit could there be to diverting time and energy to the making of plinking noises[?] . . . As far as biological cause and effect are concerned, music is useless. . . . [It] could vanish from our species and the rest of our lifestyle would be virtually unchanged.”<sup>64</sup> One is reminded of the alien beings in Arthur C. Clarke’s novel *Childhood’s End*, perplexed by the pleasure humans find in listening to music.<sup>65</sup> Or of the *Star Trek* episode in which a space probe, whose entire existence is based on eliminating imperfection, concludes that Lt. Uhura is imperfect because she sings to herself.<sup>66</sup> Or of the California Supreme Court’s opinion in *Kelly*, in which it dismissed music as merely something in the background.<sup>67</sup>

But Pinker is wrong. As were the aliens in *Childhood’s End* and the probe in *Star Trek*. As was the California Supreme Court. Music is part of us. We are part of music. To imagine us without music is to imagine us without language. And the work that music does is manifold.

This is music.

#### IV. DIFFERENT TRAINS

The very fact that music taps into something that operates differently than language, that music can shape and mold behavior, can even spur collective action, certainly has implications for rethinking the *Kelly* case. It also has implications for future decisions to admit music in the penalty phase of capital cases, which seem likely given the Supreme Court’s denial of certiorari. But there are larger

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<sup>62</sup> Claude Lévi-Strauss, *Ravel’s Boléro*, L’HOMME, Apr.-June 1971, at 5 (quoted in MOVIE MUSIC, THE FILM READER 42 (Kay Dickinson ed., 2003)).

<sup>63</sup> ARTHUR SCHOPENHAUER, 1 THE WORLD AS WILL AND REPRESENTATION 261, 264 (E.F.J. Payne trans., 1969) (1819).

<sup>64</sup> STEVEN PINKER, HOW THE MIND WORKS 528 (1997).

<sup>65</sup> ARTHUR C. CLARKE, CHILDHOOD’S END (1953).

<sup>66</sup> *Star Trek: The Changeling* (NBC television broadcast Sept. 29, 1967).

<sup>67</sup> *People v. Kelly*, 171 P.3d 548, 571–72 (Cal. 2007).

implications. And this is where we should all take note. It has implications for crime.

To a certain extent, efforts to tap into music as a tool against crime have been underway for some time. Most of us are already familiar with the use of music as a tool of consumerism: at malls and at shopping centers, music is programmed to encourage customers to spend.<sup>68</sup> But just as music has been used to attract, it has also been used to repel. Consider a program, dubbed the “Manilow Method,” begun in a suburb just outside Sydney, Australia. The “problem” was that teenagers were loitering, needlessly revving their car engines, and playing music too loudly. In short, they were being teenagers. Town officials responded by piping Barry Manilow’s greatest hits through loud speakers every Friday, Saturday, and Sunday night between 9 p.m. and midnight.<sup>69</sup> As the deputy mayor explained, the idea behind the program was to disperse teenagers by playing music “that doesn’t appeal to these people.”<sup>70</sup> The program received so much media attention that Manilow, who remains ranked Number One on a list of the “Top 10 Pop Artists for the Terminally Uncool,”<sup>71</sup> felt compelled to publicly respond. In addition to arguing that playing *any* music for that long would “drive any rationally minded human out of their mind,”<sup>72</sup> Manilow questioned the assumptions the town had made about *his* music.

But have they thought that these hoodlums might like my music? What if some of them began to sing along to “Can’t Smile Without You?” Or lit candles when “I Write The Songs” was played? Or, heaven forbid, danced around to the infectious beat of “Copacabana”?

What if this actually attracts more hoodlums? What if it puts smiles on their faces?<sup>73</sup>

In fact, the youths neither sang along nor lit candles (or Bic lighters). Nor did they dance. Instead, as if on cue, the teenagers dispersed. As the author of the article

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<sup>68</sup> See, e.g., Jonathan Sterne, *Sounds Like the Mall of America: Programmed Music and the Architectonics of Commercial Space*, 41 *ETHNOMUSICOLOGY* 22 (1997).

<sup>69</sup> Bernard Lagan, *Q: How Do You Get Rid of Boy Racers? A: Play Barry Manilow at Full Volume*, *THE TIMES* (Sydney, Austl.), July 18, 2006, at 5.

<sup>70</sup> See *Manilow to Drive Out ‘Hooligans’*, *BBC NEWS*, June 5, 2006, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/5047610.stm>. See also *Barry Manilow Wrecks the Rockdale Rebel Rousers*, *ABC SYDNEY*, Mar. 6, 2007, available at <http://www.abc.net.au/local/stories/2007/03/06/1854460.htm>.

<sup>71</sup> Bill Lamb, *Top 10 Pop Artists for the Terminally Uncool*, *ABOUT.COM*, available at [http://top40.about.com/od/top10lists/ss/uncoolpop\\_10.htm](http://top40.about.com/od/top10lists/ss/uncoolpop_10.htm) (last visited Apr. 15, 2010).

<sup>72</sup> See *Manilow Unhappy with Music-as-Weapon Ploy*, *TOURDATES.CO.UK*, July 19, 2006, available at <http://www.tourdates.co.uk/news/8278-Manilow-unhappy-with-music-as-weapon-ploy> (last visited Apr. 15, 2010).

<sup>73</sup> *Id.*

put it in her rejoinder to Manilow's protestations, "[T]he youths have now left the area."<sup>74</sup>

The program outside Sydney, Australia, is not alone. There have been other efforts to drive away groups deemed "undesirable," what Mike Davis terms the "pariah groups,"<sup>75</sup> whether such groups consist of teenagers, drug dealers, or the homeless. In parks in West Palm Beach, Florida, classical music is played over loudspeakers.<sup>76</sup> Hartford, Connecticut has looked into transmitting classical music in its parks.<sup>77</sup> Boston, Massachusetts has used classical music in subways.<sup>78</sup> In Santa Rosa, California, music was piped from a classical radio station into the Old Courthouse Square.<sup>79</sup> Other locales have been even more aggressive. In Canada, music is used as an anti-loitering tool in its parks; Australia streams music in its railway stations; London does the same on the London Underground, as does Copenhagen.<sup>80</sup> Music as a deterrent dates at least back to the mid-1980s when the convenience store 7-Eleven began using classical music to discourage teens from hanging out in its parking lots.<sup>81</sup> Looking back, one could even say that music as a deterrent began earlier, though perhaps unintentionally, with the circulation of Muzak in the 1930s.

Whether these strategies actually reduce "soft" offenses like loitering, or merely relocate such offenses elsewhere, remains an open question. But what is clear is that these strategies only begin to tap into the potency of music. Critics have long argued that there is a connection between music and criminal behavior. There is a long history of attempts to regulate vice by regulating certain types of music.<sup>82</sup> And according to some studies, listening to rock music with violent lyrics

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<sup>74</sup> *Id.*

<sup>75</sup> See MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 226 (1990).

<sup>76</sup> Matt Burgard, *A Crime-Fighting Overture: Neighbors Hoping City Adopts Plan to Use Classical Music to Help Clean Up Park*, HARTFORD COURANT, Mar. 4, 2006, at A1.

<sup>77</sup> *Id.*

<sup>78</sup> See *Weekend Edition: Subway Music* (NPR radio broadcast Sept. 22, 2002), available at <http://www.npr.org/templates/story/story.php?storyId=1150414>.

<sup>79</sup> Chris Smith, *The Kids on the Square: Teen Loiterers in SR's Downtown Have City Worried*, PRESS DEMOCRAT, May 19, 1996, at A1.

<sup>80</sup> See Hirsch, *supra* note 35, at 344. See also Elen Midtveit, *Crime Prevention and Exclusion: From Walls to Opera Music*, 6 J. SCANDINAVIAN STUD. IN CRIMINOLOGY & CRIME PREVENTION 23, 32 (2005); Scott Timberg, *Halt, or I'll Play Vivaldi!*, L.A. TIMES, Feb. 13, 2005, at E35.

<sup>81</sup> David Wallis, *Bum-Bum-Ba-Bum: Eine Kleine Bus-Terminal-Clearing Music*, N.Y. TIMES, Aug. 8, 1999, at WK5.

<sup>82</sup> See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 747, 829–45, 850 (1992). See also Anne L. Clark, Note, "As Nasty As They Wanna Be": *Popular Music on Trial*, 65 N.Y.U. L. REV. 1481, 1485–86 (1990). Professor Josh Bowers brought to my attention an even more recent example. In Washington, D.C., there are efforts to suppress "go-go" music because of its perceived connection to violence and drugs. See, e.g., Lori Montgomery, *Go-Go Blamed For Club Violence: District Nightspot Defended, Decried*, WASH. POST, Feb. 20, 2005, at C7.

increases aggressive thoughts and feelings;<sup>83</sup> listening to misogynous rap music facilitates sexually aggressive behavior;<sup>84</sup> and listening to sexually explicit heavy-metal rock music increases negative attitudes towards women.<sup>85</sup> But this suggests that it may also be possible for music to have a socially useful effect. Consider some numbers. In 2004, when the British Transport Police piped classical music into the London Underground, robberies decreased by 33%, staff assaults by 25%, and vandalism by 37%.<sup>86</sup> There was a similar drop in crime in West Palm Beach shortly after a police-initiated deployment of classical music in a crime-ridden neighborhood.<sup>87</sup> While pinpointing an exact cause for any fluctuation in crime is difficult, if not impossible, these numbers do suggest that this is an area worthy of study.

In his now famous *Yale Law Journal* article, Professor Neal Katyal encouraged us to think of architecture as crime control.<sup>88</sup> In doing so, Katyal built upon the Crime Prevention Through Environmental Design (CPTED) movement that dates back to the 1970s and which argues that “soft” measures such as improved lighting and positioning homes around a cul-de-sac can aid in deterring crime and encourage informal social controls.<sup>89</sup> Indeed, the influence of these early advocates can be seen in the “broken windows” approach to crime reduction championed by James Wilson and George Kelling.<sup>90</sup> What I am suggesting complements this thinking. Despite the general reduction in crime in recent years, crime levels in this country are still too high for us to become complacent. Put differently, if we are serious about marshalling ideas to reduce crime and halt the rise in mass incarceration, then shouldn’t we include music among those ideas? Shouldn’t we extend the premises of crime prevention through environmental design into the acoustic realm?<sup>91</sup>

To be sure, using music to control crime raises moral and ethical issues. What does it mean to use music to discourage the homeless from congregating in a particular area, but to do nothing to reduce homelessness? What are the consequences of dispersing teenagers from public areas? Are we as a society better off when youth congregate in public, or when they congregate in private?

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<sup>83</sup> See John O’Neil, *Sour Notes in Songs of Violence*, N.Y. TIMES, May 6, 2003, at F6 (reporting on results of study published in *The Journal of Personality and Social Psychology*).

<sup>84</sup> See Christy Barongan & Gordon C. Nagayama Hall, *The Influence of Misogynous Rap Music on Sexual Aggression Against Women*, 19 PSYCHOL. OF WOMEN Q. 195 (1995).

<sup>85</sup> See Janet S. St. Lawrence & Doris J. Joyner, *The Effects of Sexually Violent Rock Music on Males’ Acceptance of Violence Against Women*, 15 PSYCHOL. OF WOMEN Q. 49 (1991).

<sup>86</sup> Jessica Duchon, *Mind the Bach: Classical Music on the Underground*, THE INDEPENDENT (LONDON), Mar. 26, 2008, at 1.

<sup>87</sup> See Burgard, *supra* note 76.

<sup>88</sup> Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

<sup>89</sup> See Midtveit, *supra* note 80, at 23.

<sup>90</sup> James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC, Mar. 1982, at 29.

<sup>91</sup> This phrasing comes from Jonathan Sterne. See Sterne, *supra* note 68, at 23.

Or are we suggesting that the congregation of teens is the evil to be avoided? To what extent might music be used in ways that are discriminatory? As a society, we might conclude that it is perfectly acceptable to play classical music in a public place to discourage teenagers from loitering. But what are the implications for using music “to keep the 35- to 50-year-old affluent types, while routing out kids”?<sup>92</sup> Might we then conclude that it is acceptable to play “feminine” music<sup>93</sup> on the theory that it is more narrowly tailored: it will discourage aggressive teenage boys, but have no effect on girls? And if we are prepared to go this far, should we also be prepared to articulate why it may or may not be acceptable to play classical music in a public place to discourage the poor, or minorities? These issues are especially important if we elect to use music to target loitering. After all, our history of using loitering laws is a history of using them to discriminate. Consider *Kolender v. Lawson*,<sup>94</sup> in which the Court invoked the void-for-vagueness doctrine to vacate a loitering conviction used to arrest a black man who was out for a stroll in a predominantly white neighborhood.<sup>95</sup> Consider *Papachristou v. City of Jacksonville*,<sup>96</sup> in which the Court invalidated a “prowling by auto[mobile]”<sup>97</sup> conviction where, again, racial discrimination—the convicted defendants were two white women and two black men—seemed to be at play. Or consider the recent case *City of Chicago v. Morales*,<sup>98</sup> in which the Court invalidated a gang loitering ordinance. All of these cases involved minority defendants, and as I have written elsewhere, the subtext of each of these cases was racial equality before the law.<sup>99</sup>

This suggests other questions. What does the use of music as non-physical walls in public spaces, something akin to an *eruv*, say about us as a society, about the notion of equality, about the notion championed by Professor Kenneth Karst that everyone belongs, or at least should belong?<sup>100</sup> How do we resist embracing the elitist, but generally discredited, notion that music is “civilizing,” that it “soothes the savage beast?” How do we avoid the very debate that continues to plague the law and literature movement about the humanistic power of literature,

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<sup>92</sup> Mary Ellen Egan, *Move Along*, CITY PAGES, Jan. 22, 1997, at 18 (quoting Robert Kahle, the former co-director of the Urban Safety Program at Wayne University in Indiana).

<sup>93</sup> According to Susan McClary’s typology, classical music tends to be coded feminine. See SUSAN MCCLARY, *FEMININE ENDINGS: MUSIC, GENDER, AND SEXUALITY* 36 (1991).

<sup>94</sup> 461 U.S. 352 (1983).

<sup>95</sup> The Court vacated the conviction on the ground that the statute was so vague that it vested “virtually complete discretion in the hands of the police.” *Id.* at 358.

<sup>96</sup> 405 U.S. 156 (1972).

<sup>97</sup> *Id.* at 159.

<sup>98</sup> 527 U.S. 41 (1999).

<sup>99</sup> Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. (forthcoming 2011).

<sup>100</sup> See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

with music substituting for literature?<sup>101</sup> How do we avoid thinking of *A Clockwork Orange*, in which music is part of the macabre experiment by which Alex, with Pavlovian efficacy, is reprogrammed at the State Institute for Reclamation of Criminal Types to become not-Alex?<sup>102</sup> How do we address theorist Jacques Attali's concern that music is easily manipulated into "an attribute of power in all its forms," having the ability to either induce beliefs or to induce silence?<sup>103</sup> And how do we steel ourselves against the knowledge that the Nazis used music, first through its Ministry of Public Enlightenment as propaganda, and then in concentration camps as an instrument of torture?<sup>104</sup> For that matter, how do we steel ourselves against rumors that our own government, courtesy of the CIA, is experimenting with music to torture?<sup>105</sup> How do we avoid thinking of that Kate Bush song, where she describes being enlisted by the military to create a music that can kill?<sup>106</sup>

These are important questions, and I raise them because they deserve serious thought. But to reject the use of music because it raises moral and ethical questions—without any attempt to first answer those questions—seems foolish. Notwithstanding Plato's concern about music's ability to corrupt, and to supplant reason, he also believed that it could make men better citizens and could create a

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<sup>101</sup> See, e.g., Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155 (2006).

<sup>102</sup> ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1962).

<sup>103</sup> JACQUES ATTALI, *NOISE: THE POLITICAL ECONOMY OF MUSIC* 6 (Brian Massumi trans., 1985).

<sup>104</sup> See SHIRLI GILBERT, *MUSIC IN THE HOLOCAUST: CONFRONTING LIFE IN THE NAZI GHETTOS AND CAMPS* (2005); John Eckhard, *Music and Concentration Camps: An Approximation*, 20 J. OF MUSICOLOGICAL RES. 269 (Ernest F. Livingstone trans., 2001).

<sup>105</sup> Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 60 (noting that detainees have reportedly been subjected to the sounds of babies crying inconsolably and to the looping of a Yoko Ono album); Terry Teachout, *Musical Torture Instruments: Can Being Forced to Listen Really be that Painful?*, WALL ST. J., Feb. 14–15, 2009, at W12.

<sup>106</sup> See KATE BUSH, *Experiment IV*, on *THE WHOLE STORY* (EMI 1986) (lyrics available at <http://www.sing365.com/music/lyric.nsf/Experiment-IV-lyrics-Kate-Bush>).

We were working secretly  
 For the military.  
 Our experiment in sound,  
 Was nearly ready to begin.  
 We only know in theory  
 What we are doing:  
 Music made for pleasure,  
 Music made to thrill.  
 It was music we were making here until  
 They told us  
 All they wanted  
 Was a sound that could kill someone  
 From a distance.

stronger city.<sup>107</sup> Consider two programs implemented in New York. In 1992, the New York City Transit Authority initiated Poetry in Motion, posting short poems, and excerpts from poems, in subway cars.<sup>108</sup> Over fifteen years, until the program was disbanded in 2008, 239 poems were displayed on over 500,000 placards.<sup>109</sup> During this same period another program, Arts for Transit, installed over 170 works of art in subways.<sup>110</sup> Both of these programs coincided with a crime drop not only on subways,<sup>111</sup> but all over New York City, a crime drop that has far outpaced that in the United States in general. Again, assessing the reason for a fluctuation in crime levels is notoriously difficult, but should we not think about the arts? Imagine someone who has had a hard day at work, but hears relaxing music on his way home. Might he be less inclined to take out his frustration from work on his children, his wife, or a stranger? If the answer is yes, when does it become unconscionable to *not* tap into the power of music?

Allow me to sketch out an idea and a starting point for a conversation, an idea that hopefully avoids many of the moral and ethical problems raised above. Imagine what might happen if, say, the New York City Transit System added music to its subway stations, or to Penn Station, or to the Port Authority Bus Terminal. Might it see a further reduction in crime, like the reduction in robberies and assaults reported by the London Underground once it added music? In London, the key was classical music to exclude undesirable groups. To be clear, what I am suggesting is using music in a way that is neither elitist nor exclusionary. To be clear, I am not suggesting using music to repel certain groups, but rather a music to bind people together, a music that fosters a sense of community. Already, in terms of public art, each subway station in New York has its own signature. Imagine what we might learn if we piped different music in different subway stations.<sup>112</sup> Imagine opera being piped through the station at Lincoln Center, folk music at the Bleeker Street station, jazz at the 125<sup>th</sup> Street Station, or show tunes at 42<sup>nd</sup> Street Station. Stations could even experiment with different types of music, tracking how such music effects crowd control and crime. Again, the advantage of such an approach is that it would serve to unify, not divide, to create a sense of togetherness as a component of crime reduction. It may

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<sup>107</sup> PLATO, REPUBLIC 383c, 398d-399a, 403c (G.M.A. Grube & C.D.C. Reeve trans., 1992).

<sup>108</sup> See Mindy Aloff, *Where Poets Are on a Roll*, N.Y. TIMES, Oct. 21, 1994, at C1.

<sup>109</sup> Jim Dwyer, *The Gift of Prose to Soothe the Traveler*, N.Y. TIMES, June 7, 2008, at B1.

<sup>110</sup> See David W. Dunlap, *Train to the Museum? You're Already There*, N.Y. TIMES, Jan. 21, 2007, at 32.

<sup>111</sup> Matthew L. Wald, *Serious Subway Crimes Continued Falling in 1993, Transit Police Say*, N.Y. TIMES, Feb. 18, 1994, at B3.

<sup>112</sup> One concern is that music, unlike the other arts, is particularly invasive. One cannot close one's ears to music, the way one can look away from a poem or art. Some individuals may prefer their commute to be soundless. To address this concern, stations could experiment with pockets of music, or soundscapes, and pockets without. Other individuals may prefer listening to music of their choice. Nothing in this proposal would prevent those individuals from continuing to listen to their iPods and MP3 players.

even open eyes, and eliminate, or at least rupture, the walls that we think separate us. A lover of Purcell might find something to admire in Steve Reich. A devotee of Billie Holiday might find himself discovering Leontyne Price. A fan of Gregorian chants may find herself whistling to Fleet Foxes.

And this could be just the beginning. What would happen if we outfitted our schools, our prisons, our streets, so that music could be played at a moment's notice? Imagine a world in which school fights, or perhaps the tension that is often perceptible well before such fights, were avoided through music. Or a world in which police, noting brewing tension on a street, could saturate the street with music. Imagine a world in which, instead of dogs or billy clubs or taser guns or real guns, the police had the option of using music in their arsenal of tools. The risk, I know, is that these ideas will sound Pollyanna-ish. The risk, I know, is that the very idea of social control is anathema to many. The risk, I know, is that the idea I am proposing—using music to reduce crime—may fail. But if we are to take seriously the possibility of reducing crime in a way that brings us together, should we not at least try?

In a way, what I am suggesting is a return. But only in a way. As early as 1930, Judge Learned Hand argued that the study of the humanities should be part and parcel of being a good lawyer, part and parcel of being a good citizen.<sup>113</sup> The law and literature movement took up this call and advanced it further. James Boyd White, for example, argued that the humanities were, by definition, edifying.<sup>114</sup> Richard Weisberg has made a similar claim.<sup>115</sup> There are counter-arguments, of course, including some strong ones from Judge Richard Posner.<sup>116</sup> What I am suggesting here is perhaps an acceptable variation. I am not suggesting that the humanities or music can make individuals more moral; instead, I am suggesting that the humanities, especially music, may be able to ease tension and reduce the motivation to engage in crime. Let me put this differently. The meta question that law and humanities scholars often ask is how can the humanities help us think in different ways about the law? I am offering a different meta question. How can the law marshal the humanities to make this country a better place?

Neal Katyal has persuasively argued that, “in a world of heterogeneous offenders, government must draw upon all constraints on crime—law, cost, norms, and architecture—to have maximum impact.”<sup>117</sup> What I am suggesting is adding music to the equation.

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<sup>113</sup> See, e.g., LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 81 (3d prtg. 1952). See also Balkin & Levinson, *supra* note 101, at 155–58.

<sup>114</sup> See, e.g., JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

<sup>115</sup> See RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 219–23 (1992).

<sup>116</sup> RICHARD A. POSNER, *LAW AND LITERATURE* 387–88 (rev. ed. 1998). “[I]mmersion in literature does not make us better citizens or better people.” *Id.* at 306.

<sup>117</sup> Katyal, *supra* note 88, at 1046.

## V. MORIMUR

Some years ago, I came across Susanne Langer's *Philosophy in a New Key*,<sup>118</sup> in which she foregrounds the limitations of language. Language's limitations, she argues, inhere from the fact that we use words to make utterances, that words by necessity "have a linear, discrete, successive order; they are strung one after another like beads on a rosary; beyond the very limited meanings of inflections . . . we cannot talk in simultaneous bunches of names."<sup>119</sup> Because of this linearity, language requires us "to string out our ideas," even when our thoughts "rest one within the other."<sup>120</sup> This restriction sets bounds to the complexity of ideas. This is especially true when it comes to emotions and feelings, which language is particularly inept at expressing. But part of Langer's point is that language is not our only means of communication, is not our only way of knowing. There is also the "wordless knowledge" that is communicated in "non-discursive forms."<sup>121</sup> In other words, there is music.

And this brings me back to *People v. Kelly*.<sup>122</sup>

After all, even before *Kelly*, courts had begun admitting videotapes as victim impact statements during the penalty phase of capital trials. In *State v. Gray*,<sup>123</sup> the court admitted "a video of the [victims'] family Christmas."<sup>124</sup> In *Whittlesey v. State*,<sup>125</sup> the court admitted a videotape of the victim playing the piano. In *United States v. Wilson*,<sup>126</sup> the court permitted a twenty-minute videotape of the victim-police officer, who had been interviewed for a television news program. In *People v. Zamudio*,<sup>127</sup> the court allowed a fourteen-minute videotape that chronicled the victim's life history. At least one court other than the *Kelly* court has permitted the use of a videotaped victim impact statement set to music.<sup>128</sup> Now, after the Supreme Court's denial of certiorari in *Kelly*, more prosecutors and victims will likely offer videotapes set to music, and more courts will likely accept them. And though such evidence may be entirely proper in civil trials,<sup>129</sup> and though music

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<sup>118</sup> SUSANNE K. LANGER, *PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART* (3d ed. 1951).

<sup>119</sup> *Id.* at 80.

<sup>120</sup> *Id.* at 81.

<sup>121</sup> *Id.* at 244, 265.

<sup>122</sup> *People v. Kelly*, 171 P.3d 548 (Cal. 2007).

<sup>123</sup> 887 S.W.2d 369 (Mo. 1994).

<sup>124</sup> *Id.* at 389.

<sup>125</sup> 665 A.2d 223, 230 (Md. 1995).

<sup>126</sup> 493 F. Supp. 2d 491, 505 (E.D.N.Y. 2007).

<sup>127</sup> 181 P.3d 105, 118 (Cal. 2008).

<sup>128</sup> *See State v. Leon*, 132 P.3d 462, 466–67 (Idaho Ct. App. 2006).

<sup>129</sup> For example, video evidence may be introduced in personal injury trials to show the impact of the injury to the plaintiff. This is not to suggest that this evidence is unproblematic. *See, e.g.,*

may even be appropriate as a tool of law enforcement, the fact remains that “death is different.”<sup>130</sup> Execution by the state is different. That is why this issue is important.

When I first read the California Supreme Court’s opinion affirming the verdict in *Kelly*, what stood out was the court’s dismissive treatment of music. The court noted that “the background music by Enya may have added an irrelevant factor to the videotape,” and may have added “an emotional element to the videotape,” but concluded that any error was harmless given the ubiquity of such music.<sup>131</sup> The court stated, “These days, background music in videotapes is very common; the soft music here would not have had a significant impact on the jury.”<sup>132</sup> Perhaps even more surprising was the short shrift given to music in Kelly’s petition for certiorari to the United States Supreme Court. Kelly’s argument, in the one paragraph he devoted to the musical component, consisted largely of recounting the California Supreme Court’s conclusion, and arguing that, in fact, music heightens “the emotion experienced by the viewer.”<sup>133</sup> In support of this argument, Kelly quoted the composer Aaron Copland: “The quickest way to a person’s brain is through his eye but even in the movies the quickest way to his heart and feelings is still through his ear.”<sup>134</sup>

But of course this says too little. Music does more than heighten the emotion experienced by listeners. Even “background” music is not really in the background. It is an independent component that not only affects the body; it is a way of knowing that can induce collective action. In a way we have yet to fully comprehend, music, through its emotive power, can tell a listener how the story should end. Whether a life should end. And it does this without language. No court stenographer can record what the music said. Even an audio recording marked as an exhibit and preserved as part of the record on appeal is likely inadequate since any listening will fail to capture music’s collective effect, that in-the-moment effect. This effect, even without language, has its say. This effect, even without language, adds to the mix of thoughts jurors have. This effect, even without language, can say vote yes. Vote death.

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Jody Lyneé Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 U.C. DAVIS L. REV. 137, 169–72 (2006); Jane A. Kalinski, Note, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 SUFFOLK U. L. REV. 789 (1993).

<sup>130</sup> *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

<sup>131</sup> *People v. Kelly*, 171 P.3d 548, 571–72 (Cal. 2007).

<sup>132</sup> *Id.* at 572.

<sup>133</sup> Petition for Writ of Certiorari at 16, *Kelly v. California*, No. 07-11073 (2008).

<sup>134</sup> *Id.* at 16–17 (quoting Copland, *supra* note 7).