A Modest Proposal to Adopt Traditional Central African Tribunal Music Practices in the State and Federal Courts

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"*What music expresses is eternal, infinite, and ideal; it does not express any single specific passion, love, or longing, but rather passion, love, or longing in itself, presented through an endless variety of motivations, unique to music in that one communicates something foreign and inexpressible in any other language.*"[1]

—Richard Wagner

"*Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order*."[2]

—Justice Anthony M. Kennedy

INTRODUCTION

Litigation music is an integral component of the traditional tribunal practices of Central African tribes, such as the Tutsi, located in present-day Rwanda, Burundi, Democratic Republic of the Congo, Uganda, and Tanzania.[3] According to this practice, parties to civil

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1. RICHARD WAGNER, I SÄMTLICHE SCHRIFTEN UND DICHTUNGEN 148 (1841) (Leipzig, 1911).

2. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (citations omitted).

3. EILEEN SOUTHERN, THE MUSIC OF BLACK AMERICANS: A HISTORY 7 (3d ed. 1997).

and criminal proceedings present their arguments to the judge through a highly formalized tradition of chant and oratory-song, alternating between song and speech—not unlike the recitativo and aria components of the European operatic tradition.[4] Arguments are often accompanied by percussion and wind music, dance, drama, and pantomime.[5] Strict legal, cultural, and musical formalities govern these proceedings: for example, the judge opens court with a ritual performance on a particular signal drum and pronounces criminal sentences with a different, unique percussive performance.[6]

Inspired by the traditional Tutsi practice, this Article modestly proposes and defends the constitutional right for criminal defendants to play or perform background or introductory music during the closing argument of a criminal trial or the sentencing phase in a bifurcated case, as derived from the Due Process Clause and the Sixth Amendment of the U.S. Constitution. Part I critiques the modern jury system, focusing on juror inattention and incompetence. Part II explores the communicative nature of music and the current status of music in American courtrooms. Part III outlines the constitutional basis of the right to music, presents an interactive demonstration using four examples of possible trial music, and concludes by introducing a potential counterpart to the constitutional right to music: a constitutional right to noise. Part IV tackles two major objections to this Article's thesis.

I. THE PROMISES AND FAILINGS OF THE SIXTH AMENDMENT

The Sixth Amendment guarantees criminal defendants a right to trial "by an impartial jury."[7] An impartial jury under the Sixth Amendment is one that is unbiased, competent, and alert.[8] For

4. ROSE BRANDEL, THE MUSIC OF CENTRAL AFRICA: AN ETHNOMUSICOLOGICAL STUDY 39 (Martinus Nijhoff 1961).

5. SOUTHERN, *supra* note 3, at 7.

6. BRANDEL, *supra* note 4, at 39.

7. U.S. CONST. amend. VI; *see also* Morgan v. Illinois, 504 U.S. 719, 727 (1992) ("[T]he jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment[.]").

8. *See* Tanner v. United States, 483 U.S. 107, 117 (1987) (recognizing the right to a competent jury); *see also* Commonwealth v. McGhee, 25 N.E.3d 251, 256 (Mass. 2015) (recognizing the right to an "alert and attentive" jury); Guinyard v. Keane, No. 00-CV-6841-JBW, 2002 WL 459923, at *1 (E.D.N.Y. Feb. 27, 2002).

example, sleeping jurors may qualify as grounds for a new trial.[9] The problems with the modern jury are not, however, limited to the rare occasion of a slumbering or illiterate juror. Rather, the modern American jury suffers from endemic and pervasive problems of incompetence and inattentiveness.

A. Juror Incompetence

The average American juror teeters on the brink of illiteracy, calling into question the assumptions underlying the Sixth Amendment. The reading competency of the average American adult lies between the seventh- and eighth-grade level.[10] Twenty-five percent of American adults fail to complete high school, and nearly fifty percent cannot read well enough to locate a single piece of information in a short publication or make low-level inferences based on what they read.[11] A staggering 45 million Americans are functionally illiterate and read below a fifth-grade level.[12]

As a result, there are notorious and numerous anecdotes of juries failing to comprehend simple legal concepts such as "beyond a reasonable doubt," or "preponderance of the evidence."[13] Studies show that fifty to ninety percent of jury instructions are substantially misunderstood.[14] While literacy may not be indicative of a juror's intelligence or ability to make factual deductions, the material in criminal trials and jury instructions is often presented with a

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9. *See* State v. Yamada, 122 P.3d 254, 262 (Haw. 2005) (Acoba dissenting) ("A slumbering juror is not a competent one."); State v. Wiggins, 507 A.2d 518, 522 (Conn. App. 1986) ("[T]he decision of whether a juror who may have been sleeping during part of a trial should be disqualified lies within the sound discretion of the trial court."); *see also* Rhandi Childress, *Convicted by a Sleeping Jury: Harmless Error or a Challenge to the Integrity of Our Criminal Justice System?*, 44 J. MARSHALL L. REV. 751, 769 (2011) (advocating for a structural error-review process for sleeping-jury cases).

10. Dorothy F. Easley, *"Plain English" Jury Instructions: Why They're Still Needed and What the Appellate Community Can Do to Help*, FLA. BAR J., Oct. 2004, at 66, 66.

11. *Id.*

12. *Staggering Literacy Statistics*, LITERACY PROJECT FOUNDATION, http://literacyprojectfoundation.org/community/statistics/ (last visited Mar. 28, 2017).

13. *See* John P. Cronan, *Is Any of this Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1197 (2002) (discussing cases in which jurors have misapplied the standards provided in the jury charge).

14. *Id*. at 1202–08 (surveying studies).

vocabulary that well exceeds that of the average juror.[15] Combined with the possible negative trends in the IQ level of the modern human,[16] these literacy woes suggest that the average juror of today may be less competent than the juror of yesteryear.

B. Juror Inattentiveness

With the simultaneous rise in digital consumer technology and Attention-Deficit/Hyperactivity Disorder ("ADHD"), today's average juror may be considerably less alert and attentive than the average juror of the pre-digital, pre-ADHD era. ADHD afflicts around ten percent of children,[17] and although some children outgrow the disorder, sixty percent retain attention-deficit problems as adults.[18] Adults with ADHD find it difficult or impossible to "follow directions, remember information, [and] concentrate"[19]—tasks one might consider absolute prerequisites to serve as a competent juror. The distractions of the digital age have further impaired the average juror's attention span. Two-thirds of Americans use smartphone devices, which, together with other electronic gadgets, are responsible for a substantial decrease in the average American's attention span, which declined by 33 percent between 2000 and 2014.[20]

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Based on the foregoing, this Article operates under the assumption that the average juror of 2017 is less competent and less attentive than the average juror of 1917. In response to the failings of

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15. *See* Cronan, *supra* note 13, at 1209 ("Instructions typically reach a vocabulary level well above that of the average citizen, relying on many esoteric legal terms.").

16. *See, e.g.*, Michael A. Woodley et al., *Were the Victorians Cleverer than us? The Decline in General Intelligence Estimated from a Meta-analysis of the Slowing of Simple Reaction Time*, 41 INTELLIGENCE 843, 849 (2013) ("Victorians were indeed substantially cleverer than modern populations.").

17. *Key Findings: Trends in the Parent-Report of Health Care Provider-Diagnosis and Medication for ADHD: United States, 2003–2011*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2011), http://www.cdc.gov/ncbddd/adhd/features/key-findings-adhd72013.html.

18. *ADD & ADHD Health Center*, WEBMD (May 6, 2015), http://www.webmd.com/add-adhd/adhd-adults.

19. *Id.*

20. *Human Attention Span Shortens to 8 Seconds Due to Digital Technology*, MEDICAL DAILY (2015), http://www.medicaldaily.com/human-attention-span-shortens-8-seconds-due-digital-technology-3-ways-stay-focused-333474.

our juries, scholars have proposed rigorous juror-competency exams, professional juries, and even the abolition of juries altogether. As structural changes to the modern jury do not appear forthcoming, this Article proposes the use of trial music—and alternatively trial noise—as a means to combat juror inattentiveness and incompetence. This modest proposal hopes to highlight the need for jury reform if society wishes to take seriously the promise of the Sixth Amendment.

II. A MUSICAL OFFERING

Music has the power to elicit emotional responses, strengthen concentration, and aid in the communication of thematic material or facts. As a tool of persuasion and emotional thematic content, music may be a viable supplement to the trial attorney's rhetorical and theatrical arsenal. This section explores the communicative power of music and identifies the existing musical practices in our state and federal courtrooms.

A. The Power of Music

Trial music serves two distinct purposes. First, trial music serves as a concentration-aiding tool that draws the jury into the drama and gravity of the case. Countless studies have confirmed music's power to boost a listener's concentration abilities.[21] Given the rise in the inattentiveness of the average juror, concentration-boosting music may be an appropriate and cost-effective tool to preserve the constitutional right to an alert jury. Background music, musical preludes, or interludes during closing argument, however, may be insufficient. It may be more helpful to have a constant stream of concentration-boosting music—or noise, as suggested in Section III.C—played in the jury box throughout the course of the entire trial, perhaps even during jury deliberations.

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21. *See generally, e.g.*, J.G. Fox & E.D. Embrey, *Music—an Aid to Productivity*, APPLIED ERGONOMICS Dec. 1972, at 202; R.H. Huang & Y.N. Shin, *Effects of Background Music on Concentration of Workers*, 38 WORK 383, 386 (2011); E. Glenn Schellenberg et al., *Exposure to Music and Cognitive Performance: Tests of Children and Adults*, 35 PSYCHOL. OF MUSIC 5 (2007); *see also Music Moves Brain to Pay Attention, Stanford Study Finds*, STANFORD MEDICINE NEWS (Aug. 1, 2007), https://med.stanford.edu/news/all-news/2007/07/music-moves-brain-to-pay-attention-stanford-study-finds.html.

Second, beyond its function as a concentration-aiding tool, trial music can be employed as an emotive-rhetorical communication device that allows defense counsel to translate thematic arguments into a musical language. Musical communication allows one to speak in a highly visceral and physical medium: "Listening to music is a muscular exercise nowadays."[22] The effect of music on the mind, emotions, spirit, and body is a complex subject that has been examined for thousands of years and which this Article addresses in only a cursory manner.[23]

In general, there are two theories of musical effect on a listener: the expression theory and the arousal theory.[24] The expression theory posits that music itself contains and transmits innate emotional or thematic content.[25] This theory is most closely associated with the Baroque theory of affects, or *Figurenlehre*, which holds that certain melodic structures, intervals, harmonies, and rhythms contain inherent emotional or thematic content.[26] Joachim Burmeister, the late-Renaissance music theorist and one of the first proponents of *Figurenlehre*, described this concept under the term *pathopoeia*, which includes, for example, creatures such as the *passus duriusculus*, a semitone descent used by countless composers to express pain and longing, such as by J.S. Bach in the opening chorus of his cantata *Weinen, Klagen, Sorgen, Zagen*, or by Henry Purcell in Dido's Lament from his opera *Dido and Aeneas*.[27]

In contrast to the expression theory, the arousal theory posits that music does not bear any given innate emotional or thematic content, but rather arouses the listener, who—through memory, empathy, cultural association, or otherwise—responds consciously or

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22. FRIEDRICH NIETZSCHE, DER WILLE ZUR MACHT ALS KUNST 809 (1901).

23. For a general overview of the power of music on humans, *see generally* THE PSYCHOLOGY OF MUSIC (Diana Deutsch ed., 2d ed. 1999).

24. *See* Iben Have, *Background Music and Background Feelings: Background Music in Audio-Visual Media*, J. MUSIC & MEANING, Spring 2008, at 1, 8, http://www.musicandmeaning.net/issues/pdf/JMMart_6_5.pdf.

25. *Id.* at 9.

26. *See* Peter Williams, *Figurenlehre from Monteverdi to Wagner*, 120 MUSICAL TIMES 476, 476 (1979) ("A musical figure is not only a pattern of notes: it corresponds to a literary idea and to what we now (coincidentally?) call a 'figure of speech.'").

27. JOACHIM BURMEISTER, MUSICA POETICA 175 (Bärenreiter-Verlag 1606) ("Pathopoeia (παθοποιία) is a figure suited for arousing the affectations, which occurs when semitones that belong neither to the mode nor to the genus of the piece are employed and introduced in order to apply the resources of one class to another. The same holds when the semitones proper to the mode of the piece are used more often than is customary.").

subconsciously with a given emotion or thought.[28] Studies have shown that listeners of certain types of music are able to uniformly register such music as happy, sad, or fearful based on cultural cues.[29]

An additional model of trial music may take the form of Wagnerian *leitmotifs*. Under a Wagnerian *leitmotif* model, defense counsel might play short *leitmotifs* (with harmonic, melodic, and rhythmic components as desired) during direct- or cross-examination of a witness. Defense counsel could even employ a complex and sophisticated palette of *leitmotifs* corresponding to different themes or fact patterns that are elicited during direct- or cross-examination. Then, during closing argument, counsel could use the *leitmotifs* as an arousal tool to reconjure the themes or fact patterns as elicited from the witnesses. For example, imagine the communicative power of the opening riff of Beethoven's Fifth Symphony, if properly employed to punctuate the cross-examination of a key witness.

Regardless of whether music operates through the expression or arousal theory, trial music offers defense counsel a supplementary medium to communicate emotional, rhetorical, and thematic content to the jury. By expanding the range of available communicative media, counsel can then tailor closing arguments to best persuade the average juror. Is the average juror of today truly an inattentive analphabet, addicted to reality television and accustomed to processing information through plastic, saccharine, frenetic, commercialized formats with flashing lights, theme music, and a laugh track? If so, the promise of the Sixth Amendment can be fulfilled only by permitting defense counsel to communicate at the juror's level.

B. Music in the Courts

The Tutsi tribunal practices described in the Introduction may seem foreign to the American jurist, if not downright exotic. As described, Tutsi litigants present arguments in a formal style of oratory chant, accompanied by drums and music, and the judge's rulings and statements are accompanied by his own ceremonial percussive pronouncements.[30] It should not, however, be forgotten

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28. Have, *supra* note 24, at 9.

29. *See, e.g.*, Carol L. Krumhansl, *Music: A Link Between Cognition and Emotion*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 45, 46 (2002) (discussing the ability of listeners to identify the specific emotion an instrumental excerpt is meant to elicit).

30. BRANDEL, *supra* note 4, at 39.

that our own American courtroom tradition is also replete with its own rituals, rhythms, and sonorities. Does the bailiff's cry "Oyez, oyez!" not echo the solemn Introit antiphon of the High Mass? Does the judge's strike of the gavel—with its timbre of authority and finality—not resemble the Tutsi chieftain's own percussive practices?

Music in U.S. courtrooms today, however, most frequently appears as background accompaniment to Victim Impact Evidence ("VIE"). VIE is used most often during the sentencing phase of capital trials, where a victim's family members testify about the personal impact of the defendant's crime.[31] VIE may be supplemented with video or photo-montages that depict the victim throughout his or her life.[32] These videos and montages sometimes include background music. In *Payne v. Tennessee*, the Supreme Court established a two-part test for admissibility of VIE: (1) the evidence must provide information about the crime's specific harm either by portraying the individual as someone whose death represents a unique loss to society or by providing evidence of the defendant's moral culpability and blameworthiness; and (2) the evidence may not be so unduly prejudicial that it renders the trial fundamentally unfair.[33]

Scholars have proposed barring the use of music in VIE, noting, *inter alia*, that music is per se prejudicial and will prevent juries from reaching decisions based on rational judgment.[34] One jury simulation study was even able to detect a statistically significant relationship between the use of VIE and a jury's assignment of the death sentence: when VIE was admitted, fifty-one percent of the study participants voted for a death sentence, while only twenty percent voted for a death sentence in the absence of VIE.[35] Despite these concerns, background music remains present in

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31. Emily C. Green, *Music and Emotion in Victim-Impact Evidence*, 16 VAND. J. ENT. & TECH. L. 169, 170 (2013).

32. *Id.*

33. Payne v. Tennessee, 501 U.S. 808, 825 (1991).

34. *See, e.g.*, Alicia N. Harden, *Drawing the Line at Pushing "Play": Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials*, 99 KY. L.J. 845, 876 (2011) (collecting scholarship arguing that music in VIE is per se "irrelevant and highly prejudicial"); Erica A. Schroeder, *Sounds of Prejudice: Background Music during Victim Impact Statements*, 58 U. KAN. L. REV. 473, 473 (2010) (noting that music's "powerful effect on emotion" prevents the jury from setting aside their feelings and making rational decisions).

35. Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492, 498 (2004).

much of today's VIE,[36] although some courts have applied the rules of evidence to prohibit music on a case-by-case basis.[37] California courts, for example, previously found that music is not per se prejudicial but that a manipulative use of background music is problematic because it may "enhance the emotion of the factual presentation" when the musical content itself has no relevance to the case.[38] That rule has recently been replaced with a per se bar on irrelevant background music in VIE.[39]

Dissenting from a denial of certiorari, Justice Stevens argued that video VIE—and particularly musical VIE—is per se prejudicial because the primary effect is to "rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants."[40] Justice Breyer dissented separately from the denial of certiorari, noting that music is one aspect of VIE that tells the jury nothing about the crime's circumstances.[41] Breyer focused on the fact that the emotional charge of VIE was inconsistent with the Court's precedent requiring "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[42] Yet Justice Breyer's and Justice Stevens's concerns are quite inapposite in the context of trial music. Whereas the allegedly "per se prejudicial music" in VIE is used to enhance a defendant's sentence, trial music—as proposed here—would be used for the exculpation and defense of a criminal defendant.

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36. *See, e.g.*, Mercado v. Crawford, No. 3:02-CV-0357-ECR-RAM, 2010 WL 1688770, at *5 (D. Nev. Apr. 26, 2010) (rejecting a claim that video VIE, accompanied by "sentimental background music" is impermissible); State v. Blake, 762 N.W.2d 863 (Table), 2008 WL 4866284, at *5 (Wis. App. Ct. 2009) (refusing to find musical accompaniment to VIE unduly prejudicial); People v. Kelly, 171 P.3d 548, 571 (Cal. 2007); State v. Leon, 132 P.3d 462, 466–67 (Idaho Ct. App. 2006) (permitting video montage with background music). For general information on the use of music in VIE, *see generally* Green, *supra* note 31.

37. *See, e.g.*, State v. Hess, 23 A.3d 373, 392–94 (N.J. 2011) (holding that a VIE video accompanied by music by the Beatles, country songs, and a religious hymn was inadmissible because such videos contain no probative value and instead have the capacity to "unduly arouse or inflame emotions"); United States v. Sampson, 355 F. Supp. 2d 166, 191–93 (D. Mass 2004) (denying VIE video with background music); Salazar v. State, 90 S.W.3d 330, 333–34 (Tex. Crim. App. 2002) (finding Celine Dion's "My Heart Will Go On" to be "extraordinarily emotional" and thus prejudicial).

38. People v. Kelly, 171 P.3d 548, 571 (Cal. 2007).

39. People v. Sandoval, 363 P.3d 41, 76 (Cal. 2015).

40. Kelly v. California, 555 U.S. 1020, 1025 (2008) (Stevens, J., dissenting).

41. *Id.* at 1026 (Breyer, J., dissenting).

42. *Id.* at 1027 (citing Gardner v. Florida, 430 U.S. 349, 358 (1977)).

III. A CONSTITUTIONAL RIGHT TO MUSIC

This Part presents the argument for a criminal defendant's constitutional right to plead his case to the jury with the aid of music. Section A briefly sketches the Sixth Amendment and Due Process framework. Section B then presents an interactive examination of such musical accompaniment using excerpts from closing arguments in the prominent criminal trials of Leopold and Loeb, John Hinckley Jr., and O.J. Simpson. Section C then introduces the counterpart to trial music: the constitutional right to noise.

A. The Framework

In addition to the Sixth Amendment right to trial "by an impartial jury,"[43] every criminal defendant also has a right to be heard, founded on the nature of the adversary system, the Due Process Clause, and the right to counsel under the Sixth Amendment.[44] The right to be heard includes the right to argue facts, to argue law, and to use rhetoric and oratory.[45] Arguments may be "couched in vigorous and pungent phrases, embellished with oratorical flourishes, and illuminated by pertinent illustrations."[46] The right to marshal evidence and present a defense is also considered a touchstone of due process.

Thus, the musical rights explored in this Article rest on two independent grounds. First, this Article modestly proposes that the Due Process Clause of the Fifth and Fourteenth Amendments provides criminal defendants with the right to communicate to the jury and marshal evidence using whatever communication media they wish, subject to reasonable limits. Second, this Article modestly proposes that the Sixth Amendment provides criminal defendant with the right to an alert jury, including the supplementary right to use reasonable means to keep the jury alert, which extends to the use of trial music and trial noise.

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43. *See supra* notes 7–9 and accompanying text.

44. *See* Morgan v. Illinois, 504 U.S. 719, 727 (1992) (discussing that "the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment"); *see also* Herring v. New York, 422 U.S. 853, 858 (1975) (striking down New York law that allowed courts to dispense with closing arguments).

45. *See* Wilhelm v. State, 326 A.2d 707, 714 (Md. 1974).

46. F. BUSCH, LAW AND TACTICS IN JURY TRIALS 431 (Students' ed. 1950).

B. Examples of Trial Music

This section presents four examples of trial music. The first three are proposed examples of trial music to accompany the closing arguments of three historical criminal trials: music for the defense of Leopold and Loeb, music for the defense of John Hinckley, Jr., and music for the prosecution of O.J. Simpson. The fourth example proposes music for the potential impeachment trial of President Donald J. Trump.

Example 1. Play the embedded music file at *thereviewoflitigation.org/36brief113*, and continue reading below.

This first example presents an excerpt from the closing arguments at the highly publicized trial of University of Chicago students Nathan Leopold and Richard Loeb for the murder of 14-year-old Robert Franks.[47] Their attorney, Clarence Darrow, delivered a stunning 12-hour closing argument in their defense.[48] At the sentencing hearing, Darrow passionately argued against sentencing the defendants to death.[49] Although Darrow's epic closing argument can hardly be criticized on any account, perhaps incorporating a certain baroque pathos could have added color to his arguments of mercy; for example, with a prelude by J.S. Bach, such as *Ich ruf zu Dir, Herr Jesu Christ*, BWV 639:

> What excuse could you possibly have for putting these boys to death? You would have to turn your back on every precedent of the past. You would have to turn your back on the progress of the world. You would have to ignore all human sentiment and feeling . . . You would have to do all this if you would hang boys of eighteen and nineteen years of age who have come into this court and thrown themselves upon your mercy.[50]

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47. Douglas O. Linder, *The Leopold and Loeb Trial: An Account*, FAMOUS TRIALS, http://famous-trials.com/leopoldandloeb/1741-home.

48. *Id.*

49. *Id.*

50. Douglas O. Linder, *Closing Argument: The State of Illinois v. Nathan Leopold & Richard Loeb*, FAMOUS TRIALS, http://famous-trials.com/index.php?option=com_content&view=article&id=1685&catid=136&Itemid=277.

Example 2. Play the embedded music file at *thereviewoflitigation.org/36brief113*, and continue reading below.

This second example explores the possible application of programmatic music. The text below is an excerpt from the closing argument in the trial of John Hinckley, Jr., who was ultimately found not guilty by reason of insanity for the attempted assassination of President Ronald Reagan.[51] Perhaps the rhetorical strength of his attorney's argument supporting the insanity defense could have been heightened by inserting a programmatic musical interlude into his closing argument, such as the theme from Alfred Hitchcock's *Psycho* composed by Bernard Hermann:

> The entire time that Mr. Hinckley was at the Hilton, the moment he saw the President, when he arrived, he was in a deluded state . . . In his delusion, he is not aware of the humanity of those victims. They play a very minor role in his delusional state. They are merely means to the end, to the end he wishes to accomplish: To win the love and affection and establish the relationship with Jodie Foster. . . [T]hese are the acts of a totally irrational individual, driven and motivated by his own world which he created for himself, locked in his own mind, without any opportunity to have any test of those ideas from the real world because of his total isolation.[52]

Example 3. Play the embedded music file at *thereviewoflitigation.org/36brief113*, and continue reading below.

If the right to trial music is recognized by courts, this technique may possibly be made available to the prosecution as well.[53] To that extent, the following excerpt from the prosecution's closing argument in the trial of O.J. Simpson exemplifies how prosecutorial trial music might be used. The prosecution may have succeeded in convicting Mr. Simpson had they selected an appropriate programmatic piece to accompany their exposition of

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51. Douglas O. Linder, *John Hinkley, Jr. Trial (1982)*, FAMOUS TRIALS, http://www.famous-trials.com/johnhinckley.

52. *Id.*

53. *Cf.* Georgia v. McCollum, 505 U.S. 42 (1992) (providing prosecutors with the protections of the *Batson* prohibition against race-based peremptory challenges).

Simpson's alleged motive in his trial for the murders of Nicole Brown Simpson and Ron Goldman. For example, the Act III Interlude from *Wozzeck*, Alban Berg's atonal opera about a jealous man's murderous revenge against his adulterous wife, could have provided excellent accompaniment for the argument:

> The fuse was burning, ladies and gentlemen. He had injured her. He had harmed her. He had beaten her. And he did not fully realize the extent of his own anger, the extent of his own rage at that point. He had hurt her in ways that he apparently himself didn't fully comprehend at the time . . . She didn't want to have sex with him. She didn't want to be with him. That's what led to this whole thing: his passion, his emotion . . . and when that fuse starts burning, ladies and gentlemen, it starts getting shorter and shorter, and it sets him off.[54]

Example 4. Play the embedded music file at *thereviewoflitigation.org/36brief113*, and continue reading below.

The right to *prosecutorial* trial music as explored in Example 3 could conceivably be expanded to trials of various types. In May 2017, members of Congress began calling for the impeachment of President Donald J. Trump on allegations of obstruction of justice related to the investigation of his campaign's collusion with Russian meddling in the 2016 presidential election.[55] In the event that President Trump is indeed impeached and sits for trial in the Senate, the leading prosecutors of the Senate Judiciary Committee might wish to draw from the rich Russian musical tradition as a prelude to their closing arguments. For example, Senate Judiciary Committee Ranking Member Dianne Feinstein may wish to preface her closing arguments by bringing in the National Symphony Orchestra for a live performance of an excerpt from Sergei Prokofiev's programmatic *Scythian Suite*, perhaps, say, the *Dance of the Pagan Monster*, in which the demon god Chuzhbog, Protector of

54. Closing Arguments, People v. Simpson, LANGUAGE AND LAW (Sept. 26, 1995), http://www.languageandlaw.org/TEXTS/TRIAL/SIMPCLOS.HTM.

55. Jonathan Martin & Alexander Burns, *Democratic Leaders Try to Slow Calls to Impeach Trump*, THE NEW YORK TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/us/politics/democrats-trump-impeachment.html?_r=0.

Destruction and Incarnation of Evil, performs his violent dance of corrupt decay.

C. A Constitutional Right to Noise

The preceding examples illustrate some of the possible programmatic and emotive-thematic functions of trial music. There may, however, exist less dramatic and potentially more pragmatic methods for increasing juror concentration: the use of noise frequencies.

Example 5. Play the embedded music file at *thereviewoflitigation.org/36brief113*, and continue reading below.

A criminal defendant's right to noise may be defined as the right to improve jury alertness through the use of background sound frequencies at trial. This could take the form of white noise, i.e., a steady stream of random frequency signals, or pink noise, i.e., a low-frequency variant of white noise, as performed at 120–140 hertz in the example above.[56] Studies have shown that certain types of background frequencies or "noise colors" may improve concentration in individuals with attention problems, such as the average juror.[57] The noise—be it white noise, pink noise, grey noise, or Brownian noise with a Gaussian probability distribution—could be played at a low-volume grumble throughout the entire trial, from voir dire, to witness examinations, closing arguments, and ultimately during jury deliberations. Noise would produce no discernible prejudice in any given case and would serve only to improve jury alertness and concentration.

IV. OBJECTIONS AND RESPONSES

Two objections arise. First, one might argue that music in the courtroom will create unfair prejudice, confuse the issues, and

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56. Bass Mekanik, *Sonic Overload: Pink Noise 120–140 Hz* (Pandisc Music Corp. 1998).

57. *See, e.g.*, Vanessa H. Rausch, Eva M. Bauch, & Nico Bunzeck, *White Noise Improves Learning by Modulating Activity in Dopaminergic Midbrain Regions and Right Superior Temporal Sulcus*, 26 J. COGNITIVE NEUROSCI. 1469, 1469 (2014) (finding that white noise improves recognition memory); Göran B.W. Söderlund, *The Effects of Background White Noise on Memory Performance in Inattentive School Children*, 6 BEHAVIORAL & BRAIN FUNCTIONS 55, 69 (2010).

mislead the jury. Second, one might also argue that all issues pertaining to music and other multimedia ought to be handled exclusively at the discretion of the presiding judge, who is otherwise responsible for all aspects of courtroom decorum.

A. Prejudice, Rhetoric, and Emotion

One might argue that music by its very nature incites emotions and induces listeners to make decisions based on those emotions as opposed to reason. As such, one might find it inappropriate to expose the jury, as the trier of *fact*, to musical communication of any kind. Furthermore, one might be concerned about music's power to inappropriately convey connotation and allusion, such as Bernard Hermann's music from *Psycho* as depicted in Part IV.

But precisely which characteristics of music make it vulnerable to this criticism, and which cultural norms render it less legitimate a form of communication than rhetoric? During closing argument, a criminal defendant has the right to argue the facts, explain the law, and to employ the rhetorical and oratorical skills of his counsel.[58] As discussed, the rhetorical style of closing argument has few limitations, and may include vigorous, colorful language that has more in common with dramatic oration than with the scientific exposition of fact. It is true that music may contain connotation and allusion, but the same holds with regard to rhetoric. Rhetorical closing argument may include references to the Bible, moral allegory, or even popular fiction. Closing argument is not couched in terms of pure logical reasoning, but rather is a hybrid species of rhetoric and theater.

In his *Gorgias*, Plato expounded upon the meaning and use of rhetoric:

> Socrates: . . . [Y]ou mean that rhetoric produces persuasion. Its entire business is persuasion; the whole sum and substance of it comes to that. Can you, in fact, declare that rhetoric has any further power than to effect persuasion in the listeners' soul?

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58. *Id.*; *see also* Wilhelm v. State, 326 A.2d 707, 714 (Md. 1974) (noting that counsel may "indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions" when making a closing argument).

> Gorgias: No, I can't, Socrates; you seem to me to be giving an adequate definition. This is really its sum and substance . . . The sort of persuasion I mean, Socrates, is the kind used in law courts and other public gatherings.[59]

Gorgias goes on to explain that nothing is greater than "the ability to persuade with words judges in the law courts, senators in the Senate, assemblymen in the Assembly, and men in any other meeting which convenes for the public interest . . . by virtue of this power you will have . . . the power to speak and persuade the vast majority."[60] Further, the kind of persuasion used in the courtroom is not that of producing knowledge, but of producing "belief without knowledge": defense counsel as rhetorician is merely a "creator of beliefs."[61]

Judge Richard Posner has written on rhetoric, and tends to agree with an opposing view, most commonly associated with Aristotle: that "when pruned of its most disreputable techniques, rhetoric was a reasonable and indeed an inescapable method of persuasion."[62] Closing argument in a jury trial is, however, not "pruned of disreputable techniques" as Judge Posner might prefer rhetoric to be, but rather is given quite a free range. Such rhetoric more aptly meets Plato's description, which Judge Posner describes as "the very antithesis of reason—a collection of low tricks for persuading ignorant, emotional people, such as Athenian jurors, rather than a method of discovering truth."[63]

Defense counsel—as rhetorician—does not craft his or her arguments through cold deductive inferences, but rather weaves the entire closing argument together through drama, the craft of storytelling, and emotive thematics. Closing argument and the presentation of a case is not the science of an Aristotelian logician but rather the grand art of persuasion. As Plato explains, rhetoric, by its very nature, serves no purpose other than persuasion, and such persuasion does not produce any certainty of knowledge but rather belief without knowledge.[64] In contrast to Plato's conception of

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59. PLATO, GORGIAS 11–12 (W.C. Helmbold trans., Liberal Arts Press, Bobbs-Merrill Co., Inc., 1952).

60. *Id*. at 10.

61. *Id*. at 13–14.

62. RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 83 (Harvard 2003).

63. *Id.*

64. PLATO, *supra* note 59, at 13.

rhetoric and closing argument, the Supreme Court maintains the legal fiction that our neo-Athenian jurors reach their decisions through cool calculation, noting that it is "difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."[65]

Music has the power to incite emotion, but surely so does every other form of human communication. Further, the concern of inciting emotion in the jury raises far more constitutional concerns with regard to victim-impact evidence than with regard to trial music. This is because trial music—at least initially—serves not to prosecute or enhance a defendant's sentence, but rather to exonerate or mitigate a defendant's sentence.[66]

Despite the foregoing, one might still assume that musical communication affects a juror's emotions more than spoken word. Nonetheless, recent scholarship has cast doubt on the presumption that emotions do not—and should not—play any role in judging or even fact-finding.[67] To wit, emotions enhance the quality of legal decision-making, as they permit the requisite degree of empathy that judges and jurors require to consider the perspectives of all parties. Professor Martha Nussbaum has forcefully rejected the presumption that "emotions are something quite unthinking, opposed to reasoning in some very strong and primitive way, and that they are mindless surges of affect."[68] Rather than "gusts of wind" or "surges of the blood," emotions are the repository and expression of an individual's beliefs—that is, "they embody thoughts."[69]

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65. Saffle v. Parks, 494 U.S. 484, 493 (1990).

66. Whether the prosecution should also possess the tool of trial music, as explored in the O.J. Simpson example in Part II, is a separate question entirely.

67. *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2004 (2010) ("Legal decision making is enriched and refined by the operation of emotions . . . ."); *see also* Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 642 (2011) ("First, emotions are ubiquitous in law. Second, and more importantly, emotion is not necessarily—or even usually—a pernicious influence. Emotion reveals reasons, motivates action in service of reasons, enables reason, and is educable.").

68. Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 24 (1996).

69. *Id.* at 25.

B. Courtroom Decorum

With regard to matters affecting courtroom "formal dignity," "decorum," and trial procedure, the presiding judge has plenary power within limits of due process and a fair trial.[70] Indeed, maintaining decorum is a judge's duty.[71] Beyond the arguments regarding juror prejudice and emotions, perhaps one might argue that the judge ought to possess the power to nix any music, noise, or whatever else might moisten the dry inquiries of law and fact. The Supreme Court has acknowledged this plenary power: "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum."[72] As such, it may well be that judges might attempt to resist litigants' efforts to serenade their fact-finders.

But judicial hostility to trial music and potentially outdated views of decorum are not sufficient to deny a defendant his right to be heard *as he wishes to be heard*. The purpose of decorum and dignity in the modern courtroom is four-fold: 1) to provide a uniform ritual so as to ensure equal administration of the law to all; 2) to assist the participants in the process in arriving at a "fair, truthful, and just decision"; 3) to improve the legitimacy and credibility of the process; and 4) to create an "atmosphere of detachment, objectivity, respect, order, and justice."[73] Cicero considered decorum "inseparable from honor":

> [Decorum is simply the] seemliness of what we do, [which] presupposes honor. It is decorous to think and speak wisely, to act deliberately, and in everything to

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70. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970) ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated.").

71. *See* Code of Conduct for United States Judges, Canon 3, US COURTS (2014), http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (requiring federal judges to "maintain order and decorum in all judicial proceedings").

72. Anderson v. Dunn, 19 U.S. 204, 227 (1821).

73. Steven E. Rau, *Civility, Decorum, and Ritual in the Judiciary*, 37 WM. MITCHELL L. REV. 2097, 2099–100 (2011).

> see and uphold the truth. So all just acts are decorous acts and decorous acts are honorable.[74]

In this light, the judge's duty and power to maintain decorum is merely a means to the end of achieving a fair, just, and honest result by means of a detached, equally administrated, seemly, and honorable trial. Trial music is consistent with these ends, as it has the potential to uniquely and positively contribute to the fairness, justice, and honesty of the trial's result by helping the jury stay alert and by expanding the communicative methods available to defense counsel.

CONCLUSION

Though he may have lacked a formal education, the average juror of the late 18th century was raised in an era of speech and story. Strangers still conversed on the street in the early days of the Republic, and dramatic storytelling was the familial, societal, and national art form. The presentation of evidence through direct examination, cross-examination, and summation in closing argument are precisely such a form of storytelling. For today's juror, however, the Art of Storytelling is foreign—and apparently soporific.

The Framers purposefully couched the promises contained in the Bill of Rights as vague and malleable standards: the only meaningful definition of "due process" is "the process that is due." As we walk blindly toward the 22nd century and beyond, the American project will survive only if we accept the fact that we continually evolve—or devolve—along our human journey. The promises of the Constitution must therefore gain new meaning when today's juror requires the crutch of multimedia—or the stimulation of noise—in order to meaningfully listen to and hear your story.

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74. Sarah Evans Barker, *Ritual & Civility—What Difference Does A Good 'Oyez' Make?*, J. IND. B. ASS'N: RES GESTAE, July 1995, at 10, 15.