

1-1-2006

Lyrics and the law : the constitution of law in music.

Aaron R. S., Lorenz

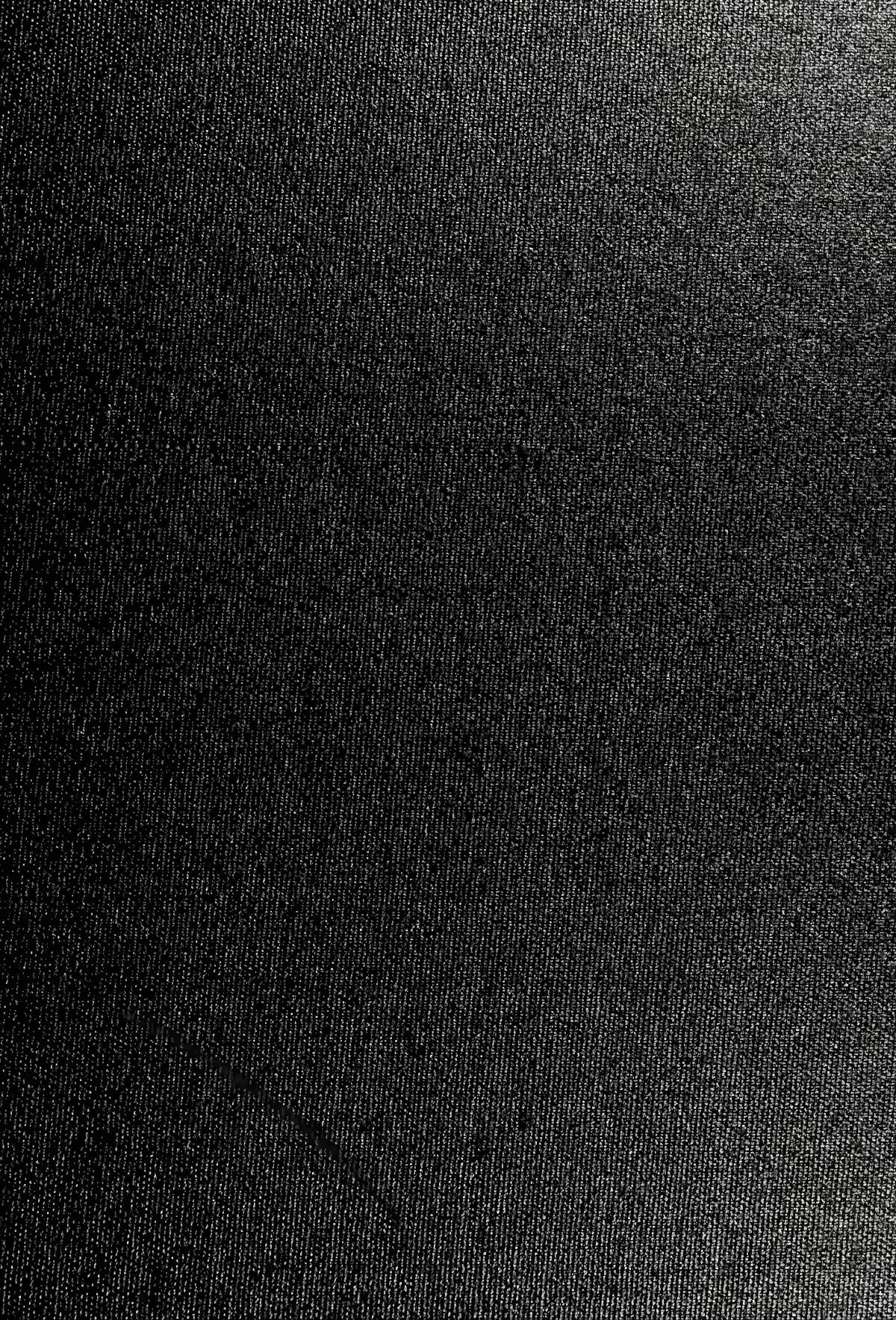
University of Massachusetts Amherst

Follow this and additional works at: https://scholarworks.umass.edu/dissertations_1

Recommended Citation

Lorenz, Aaron R. S., "Lyrics and the law : the constitution of law in music." (2006). *Doctoral Dissertations 1896 - February 2014*. 2399.
https://scholarworks.umass.edu/dissertations_1/2399

This Open Access Dissertation is brought to you for free and open access by ScholarWorks@UMass Amherst. It has been accepted for inclusion in Doctoral Dissertations 1896 - February 2014 by an authorized administrator of ScholarWorks@UMass Amherst. For more information, please contact scholarworks@library.umass.edu.



LYRICS AND THE LAW:
THE CONSTITUTION OF LAW IN MUSIC

A Dissertation Presented

by

AARON R.S. LORENZ

Submitted to the Graduate School of the
University of Massachusetts Amherst in partial fulfillment
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

February 2006

Department of Political Science

© Copyright by Aaron R.S. Lorenz 2006

All Rights Reserved

LYRICS AND THE LAW:
THE CONSTITUTION OF LAW IN MUSIC

A Dissertation Presented

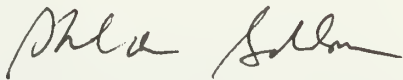
by

AARON R.S. LORENZ

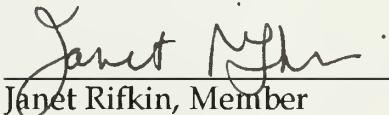
Approved as to style and content by:



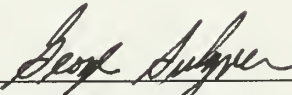
John Brigham, Chair



Sheldon Goldman, Member



Janet Rifkin, Member



George Sulzner, Chair
Department of Political Science

DEDICATION

To Martin and Malcolm, Bob and Peter.

ACKNOWLEDGMENTS

This project has been a culmination of many years of guidance and assistance by friends, family, and colleagues. I owe great thanks to many academics in both the Political Science and Legal Studies fields. Graduate students in Political Science have helped me develop a deeper understanding of public law and made valuable comments on various parts of this work. They include Farid Benavides, Laura Donaldson, Alec Ewald, and Laura Hatcher. Laura Hatcher, in particular, deserves a special thank you for her constant support of my work and continued friendship. Outside of UMass, Susan Burgess, Stephen Davis, Christine Harrington and Roger Steffens have provided invaluable comments on my work. Susan's comments in particular have been influential in my revisions. Christine has been a friend and mentor and reminded me that my scholarship is exciting and tangential.

A special and unique thank you must be given to the members of the Legal Studies department. They have been advocates of my work and teaching since I first came to Massachusetts and their enthusiasm for scholarship is a testament to the field of education.

Of course, my greatest debt is owed to my committee members. John Brigham, Sheldon Goldman, and Janet Rifkin have been the most supportive advisers a graduate student could ask for. John has been a mentor that every graduate student wishes to have. He has guided me on my work for countless

hours and I must thank him for his critiques, conversations, and friendship. My appreciation for John goes beyond viewing him as a scholar since his dedication and generosity are valuable for everyone in society. Shelly deserves a special thanks as he has reminded me over the years, on many occasions, that the field of public law can incorporate more than classic constitutional law. And Janet must be thanked profusely since it was her excitement for this topic that led to its own course and, subsequently, years of reflecting on this theme.

My friends and family deserve attention here as well. With too many names to list, I simply want to thank my friends for always taking the time to listen to my arguments and see the strengths when there were very few to be found. My Aunt Susie, Uncle Ken, and cousin David, have been influential contributors to my growth. I thank them daily for reminding me how to be a scholar and an introspective human being. My sister Kelsie and her husband Rick, and even my niece Alexandra deserve special mention here. They have been undyingly supportive of my work and future job prospects. My parents deserve special thanks for their patience and love. While this process has been long and taken me away from family in southern California, their pride and love for me has been a cornerstone of my existence. Finally, I want to thank my consort, Jessica. Jess has been the most valuable addition to my life which has added to my academic happiness. I am certain that without her encouragement, I would not be at this stage of scholarship. But more importantly, without her love I would not be at this stage of life. My debt to Jess is immeasurable.

ABSTRACT

LYRICS AND THE LAW:
THE CONSTITUTION OF LAW IN MUSIC

FEBRUARY 2006

AARON R.S. LORENZ, B.A., CALIFORNIA STATE UNIVERSITY, CHICO

M.A., SAN DIEGO STATE UNIVERSITY

Ph.D., UNIVERSITY OF MASSACHUSETTS AMHERST

Directed by: Professor John Brigham

This is a study of music as a form of jurisprudence. Political science scholars have focused on researching what they view as “political” music. Sociolegal scholars have done scant research from a theoretical perspective in looking at law having a musical rhythm. Rather than connecting the themes within the music to law, I begin with the perspective that the American law creates and maintains inequality. This premise allows for a dissection of the lyrics of various songs to be connected to each other through grand themes. I argue that various musical artists have created their own form of jurisprudence, often more about justice than present U.S. law. Once establishing what justice entails, and the shortcomings that exist within the system, I work through various themes such as race, gender, and class to demonstrate the comparisons between both political scientists and sociolegal scholars with the musicians. Classic legal theories are incorporated to understand the musicians use of judicial interpretation.

Several methodologies are used in this research. Historical analysis establishes the foundation that is necessary to discuss slavery and the genesis of specific genres of music, namely reggae music from Jamaica. While reggae music may be a constant in the project, it is not the sole genre that will be studied. Content analysis of the lyrics, through the prism of the literature, will explain how and why the musicians shape legal discourse. In addition, Supreme Court case law will be studied, specifically relating to First and Fourth Amendment issues. Content analysis in the form of speeches and various interviews will be essential to understanding the goals and actions of the musicians and their impact on legal culture. The result will be an amalgamation of literature that equates musicians with scholars and demonstrates how musicians respond to law.

TABLE OF CONTENTS

	Page
ACKNOWLEDGMENTS	v
ABSTRACT	vii
Chapter	
I. INTRODUCTION	1
II. JURISPRUDENTIAL SCHOOLS OF THOUGHT: NATURAL LAW, LEGAL POSITIVISM, AND LEGAL REALISM	14
III. A CONSTITUTIVE THEORY OF JUSTICE: THE ANATOMY OF MUSIC FROM SLAVERY TO FREEDOM	45
IV. LIVING IN A DIAMOND CITY: CRITICAL RACE THEORY	72
V. CHANTING FOR RECOGNITION: FEMINIST LEGAL THEORY AND THE PERFORMANCE OF LAW	94
VI. CLASS MATTERS: GHETTO UNIVERSITY	123
VII. CONCLUSIONS	159
BIBLIOGRAPHY	170

CHAPTER I

INTRODUCTION

There's been times that I thought
I wouldn't last for long
But now I think I'm able to carry on
It's been a long, long time coming
But I know a change is gonna come
Oh, yes it will.

- Sam Cooke (1931 - 1964)¹

In 1928, Supreme Court Justice Louis Brandeis dissented in *Olmstead v. United States*.² The majority upheld a conviction based on information obtained through the secret wiretapping of a bootlegging suspect. While Brandeis' dissent expressed dissatisfaction with the Court's reasoning, which he thought violated the Fourth Amendment's guarantee against warrantless government searches, it was his criticism of the Court on more practical grounds that raised interesting issues. "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy," Brandeis wrote.³ Since that dissent, scholars have looked for evidence supporting that claim. Many theorists have argued that when individuals experience injustice, they generally become more distrustful of the law. Politicians who argued to overturn Prohibition used that argument. Professor of Law Janice Nadler has conducted a study that confirms Brandeis' theory. Nadler found that college students who had been exposed to newspaper articles about unjust laws were

¹ Sam Cooke, "A Change Is Gonna Come," *Ain't That Good News* (New York: RCA, 1964).

² 277 U.S. 438

³ 277 U.S. 438, 484

more likely than students in a control group to say that they would park in an illegal space, illegally copy software, or eat a small item in a grocery store without paying for it.⁴ In addition, adults who read a story about an injustice and were then asked to serve on a mock jury were more likely to practice jury nullification. Nadler's research reminds us how law is constituted and takes us back to Brandeis' dissent.

My research is not quantitative like Nadler's nor is it doctrinal like Brandeis' words. Rather, I use cases and studies to demonstrate the impact that musicians have in constituting law through their lyrics. Nadler's study is interesting because it notes the impact that newspaper articles can have upon constituting an image of law for the people. However, music reaches far more people than newspapers so one can conclude that its impact is far more reaching. When musicians remind the listener of the injustices in society, call for social change, or give their interpretation of legal theory, an image of law is constituted and that image often becomes the Law. When musicians create music, they are simultaneously creating law. Their experiences, language, and motives encompass their being and develop an image of law, which the listener subsequently adopts. Their lyrics constitute what law is for "the people" which is often a direct response to the State's version of what law is or should be. Music is not similar to or a reaction to law. Rather music is law. I will develop this thesis with reference to various theories of law.

⁴ Janice Nadler, "Flouting the Law," *Texas Law Review* (May 2005, Volume 83), 1400.

Music and law have intriguing commonalities. From the view of language, performance, social impact, or cultural achievement, the intersection of music and law raise interesting issues.⁵ This is certainly not the first time that music and law have been linked. Many philosophers including Plato, Rousseau, Nietzsche, and Adorno have drawn distinctions between music and law. Legal scholars such as Jerome Frank, Richard Posner, Sanford Levinson, and Jack Balkin have continued connecting themes. However, my research reaches beyond their work too. Here, the words of the musicians set to their beats and tones make law. Music is not simply sounds and words. In addition, law is more complicated than law on the books. As Bob Marley reminds us, “music gonna teach ‘dem one lesson.”⁶ But Marley’s message was not simply that music had power to teach but rather that music had power to constitute what that lesson would be. Thus, music’s message, when it pertains to sociolegal issues, constitutes law. Marley, in his early years, wailed:

Music gonna teach ‘dem one lesson
Music gonna teach ‘dem one lesson
Music gonna teach ‘dem one lesson
Teach you about Marco Polo
Teach the truth of Christopher Columbus
How these wicked men rob, cheat, kill the poor defenseless of this land
Heard they’re from this far land
Their light skin made us to understand
Why is it teaching Marco Polo?
Wouldn’t it be great Africa?
Music gonna teach ‘dem one lesson

⁵ Desmond Manderson and David Claudill, “Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop,” *Cardozo Law Review* (May – July 1999), 1325.

⁶ Bob Marley, “Music Gonna Teach” also known as “Musical Lesson,” *Grooving Kingston 12* (Santa Monica, CA: Universal Music Group), 2004.

Music gonna teach 'dem one lesson
Music gonna teach 'dem one lesson.⁷

Marley's message purported that the teachings to his brothers and sisters in Jamaica, and beyond, skewed the image of the past and subsequently altered the image of the present. Marley's music was a performance. However, like music or drama, law is best understood as performance – the acting out of texts rather than the texts themselves.⁸

As Balkin and Levinson remind us, laws on the books – legal texts – do not constitute the social practice of law. As well, just music on a page does not constitute the social practice of music. In a real sense, there is only law or music in action.⁹ Law, like music, takes place before an audience. Certainly law professors are an example of legal performers as they give concrete meaning to a text before their students. Judges may also be legal performers yet the interpretation of their performance is often critiqued, much like an actor or director's work. In the end, the people whom the performance moves and inspires are the true judges of the impact of the music and subsequently, of the law.

In Chapter II, I introduce jurisprudential schools of thought to music. Looking at Natural Law, Legal Positivism, and Legal Realism, I demonstrate the way in which musicians act as jurisprudential theorists. As Michael Franti

⁷ Ibid.

⁸ Jack Balkin and Sanford Levinson, "Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews," *Cardozo Law Review* (May - July 1999), 1518.

⁹ Ibid., 1519.

reminds us, "everyone deserves music."¹⁰ Franti's lyrics ask us an important question about entitlement. His notion of "deserving" music can be equated to deserving justice, since Franti argues that music *is* justice. He sings:

Seven in the morn' step on the floor,
Walk into the kitchen and you open the door.
There ain't much left in the bottle of juice,
Because the seeds that you planted never reproduced.
Computer still runnin', but your mind has crashed,
Because the plans that you made never came to pass.
Now you reconizin' the times is hard,
When you tryin' to take a bite out of your ATM card.¹¹

When Franti sings this tune it goes beyond a performance of music and into the realm of performing law. Franti is really asking the listener about the notion of rights and what "the people" deserve. His words and message are no different than Aristotle or Dworkin.

Natural Law theorists do not simply patrol the world of jurisprudence. Since Natural Law is a cornerstone to the U.S. legal system (see Declaration of Independence or Federalist Papers), it is no surprise that musicians often act as Natural law theorists. I will show various artists and their natural law philosophies. In addition, I will move away from Natural Law and toward Legal Positivism to demonstrate an alternative philosophy of law. Using the famous wills and trusts case *Riggs v. Palmer*, I will connect jurisprudence with lyrics and continue to develop my thesis that musicians create law through their music.

¹⁰ Michael Franti and Spearhead, "Everyone Deserves Music," *Everyone Deserves Music* (San Francisco: Liberation Music), 2003.

¹¹ *Ibid.*

Lastly, the chapter addresses Legal Realism and its connections to music. Each jurisprudential school of thought is connected to specific music and sociolegal themes.

Chapter III introduces a timeline from slavery to freedom in relation to music. Here I attempt to put the role music has played historically into a smaller context. The story of music on the slave ships and how that music affected rebellions and religion is touched upon in this chapter. Once that short timeline is introduced, Constitutive Theory, the mainstay of this dissertation, is presented.

Constitutive theory is a dynamic method to view law and connects remarkably well to music and lyrics. In Chapter III, I outline some important aspects of constitutive theory and give examples of how it relates to music. As Ewick and Silbey note in their seminal work, I conceive of law not so much operating to shape social action but as social action.¹² Law is recognized as both constituting and being constituted by social relations and cultural practices. As Naomi Mezey notes, "law's power is discursive and productive as well as coercive."¹³ Certainly law produces meaning in society but it is also a product of society and is reproduced by musicians when they sing about sociolegal issues, explicitly or subtly. There is truly a mutual constructedness to law and music and I delve into that theme.

¹² Patricia Ewick and Susan Silbey, *The Common Place of Law* (The University of Chicago Press, 1998), 34-35.

¹³ Naomi Mezey, "Approaches to the Cultural Study of Law: Law as Culture" (*Yale Journal of Law and Humanities*, 2001, Volume 13), 47.

Law and justice are important themes and constitutive theory recognizes that. The musicians I address demonstrate not simply the importance of music but also the importance of law. Alan Hunt reminds us that law is important in that it exhibits a symbolic or ideological dimension.¹⁴ The very notion of legalization and legitimation give a direct advantage to some social forces, music being one of them. One of the strengths of constitutive theory is that it argues that the symbolic dimensions of law go beyond simply the legislators or judges. Rather, legal terms such as “rights,” “duties,” “equality,” and “justice” become popular phrases in society because non-traditional legal actors discuss their meaning. Music fits nicely into this discussion because musicians “discuss” these terms through their music which is widely disseminated and played for an eternity. As Bob Marley once noted, “My music will go on forever.” While that is literally true, the symbolism of the music and how it constitutes law is what I address.

Chapter IV looks at Critical Race Theory and reggae music. While much of the dissertation focuses on reggae music, mainly because of its politically conscious lyrics, this chapter specifically addresses race and law from a vantage point not often studied. The reggae metaphor in critical race theory reflects the revolutionary aspect of both genres. The music teaches us the communal aspect

¹⁴ Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (London: Routledge, Inc., 1993), 91.

of meaning-making, a notion that legal thinking should take into account.¹⁵

Music becomes the truth – truths about culture, law, tolerance, belonging – race.¹⁶ Reggae music, like critical race theory becomes the protector, not simply of rights, but of legal consciousness, specifically with regard to race. Critical race theorists absorb societal variables and develop a legal theory from the culture. Reggae musicians absorb societal norms and comment on them. They both incorporate society’s inequalities and give poignant criticism of the imbalance.

It is demeaning and disrespectful to argue that the lyrics that musicians, specifically reggae musicians, write do not have the understanding of law that traditional legal actors have. This chapter attempts to elevate the musicians to the level of legal actor, philosopher, and academic. To do otherwise would be to miss the relevance of bands like Third World:

Say we legal
Cause we no look no friend and we no beg no friend
Them say we ethnic
Ski-dip, them say we ethnic, yeah!

Say we legal and we no tek back chat
And we hardcore and we tough like rock
A boy no pass him place and dis to me face
We no play that no homeboy no play that no

There is a pirate, behind every corner trying to reap what he never sow
Cause we hip to the tricks of the hypocrite
Them don’t know say we know
And when them want get facety them link up we name
To a posse claim say we don’t have no mercy

¹⁵ Desmond Manderson and David Claudill, “Music and Legal Theory: An Interdisciplinary Workshop Introduction,” *Cardozo Law Review* (May-July 1999), 1328.

¹⁶ *Ibid.*

Cause we don't tek no crap from nobody

Say we legal and we no tek back chat
And we hardcore and we tough like rock
A boy no pass him place and dis to me face
We no play that no homeboy no play that no.¹⁷

Third World's message is multifold. They introduce the theme of affirmative action to the listener and give their own perspective on the political/legal issue. In addition, not unlike the Supreme Court in *Plessy v. Ferguson*¹⁸ Third World argues for a different understanding of race.

Chapter V moves away from race and addresses the connections between music and gender. Again, I attempt to remind the reader that musicians constitute law through their music. Most notably with both classic and contemporary music and scholarship, I address the grand theme of women as property and will specifically look at music that either exemplifies the struggle that women endure in sociolegal circles or the more misogynistic lyrics that define women as objects. Here I hope to show that musicians are both responding to law and creating non-traditional jurisprudence. This work should demonstrate the politics of music within a gender discussion.

A great deal of this chapter revolves around the move from music as political pronouncement to music as jurisprudence, and arguably to music as law. That assertion I make is exemplified in society's acceptance of misogynistic music and the FCC's banning of Sarah Jones' response to that misogyny. Yet,

¹⁷ Third World, "Mi Legal," *Committed* (New York: Polygram Records, 1992).

¹⁸ 163 U.S. 537 (1896)

Jones' argument and the basis of her song goes beyond the specifics of the degradation of women and to the philosophy of law. Certainly I am not arguing that all law is misogynistic, but I do posit that law has not been revolutionary in terms of social change for women. Thus, misogynistic musicians remain comfortable creating their music that continues to degrade women. In turn, society remains comfortable, and silent (as is the law), so the optimism for sociolegal change diminishes. The FCC decision reifies my argument. Normatively speaking, "the" revolution entails addressing the unjust foundations of law as they pertain to women.

Folk singer Tracy Chapman fits well into this discussion as she emotionally sings her 1989 tune:

oh my mama told me
'cause she say she learned the hard way
say she wanna spare the children
she say don't give or sell your soul away
'cause all that you have is your soul
don't be tempted by the shiny apple
don't you eat of a bitter fruit
hunger only for a taste of justice
hunger only for a world of truth
'cause all that you have is your soul

i thought thought that i could find a way
to beat the system
to make a deal and have no debts to pay
i'd take it all take it all i'd run away
me for myself first class and first rate
but all that you have is your soul.¹⁹

¹⁹ Tracy Chapman, "All That You Have Is Your Soul," *Crossroads* (New York: Elektra Entertainment, 1989).

Chapman reminds us that justice should be a personal issue that society must address individually. This chapter deals with various examples in which government and society exhibit a lack of an understanding of justice in both literal and abstract terms.

Chapter VI is the last substantive chapter and connects Class and music. Class in the United States is a construct of the Law. As noted by Critical Race Scholars, race too is a legal construct at least in part fashioned by the law. “The intersection of race and class is glaring. Residential segregation creates and perpetuates an ‘underclass’ by concentrating poor African Americans in neighborhoods with extremely high poverty rates.”²⁰ Twentieth century legal history demonstrates how the law has constructed class and how the U.S. Supreme Court has reinforced that construction. Viewing four recent explanations for the existence of an African American underclass, it is clear that various factors, including law, have created the said underclass. Each of the four explanations will be addressed. In addition, the music and the role that musicians play in constituting a response to the creation of an underclass will be discussed. Intertwined implicitly and explicitly in this analysis is a discussion of education. The second half of this chapter will address the connection between the underclass, education, music, and specific African American icons.

²⁰ Olati Johnson and Dorothy Swaine Thomas, “Integrating the Underclass: Confronting America’s Enduring Apartheid,” *Stanford Law Review*, April 1995, Volume 47, 787.

As reggae musicians, Abyssinians declared in their famous anthem on class and rights:

Look, oh Lord, they brought us down here
Have us in bondage, right through these years
Fussing and fighting, among ourselves
Nothing to achieve this way, it's worsen than hell, I say

Get up and fight for your rights my brothers
Get up and fight for your rights my sisters

Took us away from civilization
Brought us to slave in this big plantation
Fussing and fighting, among ourselves
Nothing to achieve this way, it's worsen than hell, I say

Get up and fight for your right, my brother
Get up and fight for your right, my sister.²¹

The song here is a reminder of both the concept of rights and rebellion. It is here, in music, that law can be constituted in very tangible ways.

Popular culture reacts and reflects on the reality that it faces. That reaction comes in many forms but music is the most powerful as well as the most applicable to law. To argue that music is not a tangible form of communication, or further that it does not constitute images of law shows a failure to recognize the constitutive nature of law and art. As Austin Sarat notes, "Film is not simply a mirror reflecting distorted legal and social realities. Rather, film always projects alternative realities which are made different by their filmic invention, or

²¹ Abyssinians, "Declaration of Rights," *Satta Massagana* (Cambridge, MA: Heartbeat Records, 1993).

the editing and framing on which film always depends.”²² Music could replace Sarat’s description of film. Music is a more powerful tool, a weapon of sorts. Musicians are developing law and producing valuable correctives to current legal structure. These correctives may erode law’s authority, delegitimize its power, and further the breakdown in shared norms for social conduct.²³ But if the proliferation of music and its impact on law continues to constitute images of justice, images that effect sociolegal change, then musicians should be elevated to the levels of philosophers and founding fathers. Music can be a powerful tool with force that can affect law. As music changes, so too do values, beliefs, and expectations – variables that also affect law. As musicians construct truth and justice, law’s images of truth and justice change.

²² Richard Sherwin, “Law in Popular Culture,” (*New York Law School Faculty Reprint Series 1*, 1-28 2005), 13-14.

²³ Richard Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (The University of Chicago Press, 2000), 39.

CHAPTER II

JURISPRUDENTIAL SCHOOLS OF THOUGHT: NATURAL LAW, LEGAL POSITIVISM, AND LEGAL REALISM

When modes of music change, the fundamental laws of the state always change with them.

- Plato (428BCE – 348BCE)²⁴

Today, it is not so often that we focus on the connections between music and law. The Ancient Greeks did not share this perspective. Plato's *Republic: Book IV* focuses specifically on a discussion of music that took place between Socrates and Adeimantus. Their exchange involved a debate over whether music was the cornerstone to education or the beginning of lawlessness. Socrates bantered, "As if music were only play and did no harm at all." Adeimantus retorted:

It is harmless – except, of course, that when lawlessness has established itself there, it flows over little by little into characters and ways of life. Then, greatly increased, it steps out into private contracts, and from private contracts, Socrates, it makes its insolent way into the laws and government, until in the end it overthrows everything, public and private.²⁵

For ancient Greek life, music was essential in religious festivals, marriage, and funeral rights.²⁶ Archeologists have found actual musical fragment scores which have shed light on music and its social function. In Athens during the second half of the fifth century B.C.E. , the Odeion (roofed concert hall) of Perikles was

²⁴ Plato, *Plato: Complete Works*, ed. John M. Cooper (Indianapolis: Hackett Publishing Company, Inc., 1997), 1056.

²⁵ *Ibid.*, 1057.

²⁶ http://www.metmuseum.org/toah/hd/grmu/hd_grmu.htm. The Metropolitan Museum of Art in New York has done extensive research on this topic and developed a picture of Greek life for historians and anthropologists to agree on.

erected on the south slope of the Athenian akropolis – physical testimony to the importance of music in Athenian culture.²⁷ Many Greek philosophers saw a relationship between music and mathematics. They saw music as “a paradigm of harmonious order reflecting the cosmos and the human soul.” Today, music is the most influential and accessible societal force. The inertia music creates upon society rivals that of the law and it is this commonality of power that I wish to explore.

Plato’s discourse notes that various artforms and the law have historically intersected, constructing numerous points of debate. In the visual arts, Spanish born painter Francisco de Goya’s (1814) painting *The Shooting of May 3rd 1808* creates on canvas the images of French soldiers executing Spanish citizens. When Spaniards rebelled against Napoleon’s invasion, they were executed by firing squad at night. Several years after the 1808 invasion and execution, Goya painted the memorable piece. Goya’s sympathy for Spain and opposition to Napoleon’s invasion is evident. Goya has massed his figures in four distinct groups – those already dead, those about to shot, those waiting to be shot, and the firing squad itself. His goal was to show man’s inhumanity to man and his abhorrence of it. Goya’s work demonstrates the power of both art and the law. Analysis of this piece presents Goya’s view of the Napoleonic Code as oppressive, not rooted in freedom. Likewise, in poetry Ralph Waldo Emerson’s (1837) *Concord Hymn*, which describes the battles of Lexington and Concord in

²⁷ Ibid.

1775 and the resistance that British soldiers met, depicts life during the Revolutionary Era rife with the struggles of an emerging focus on the Rule of Law. Emerson wrote the poem to be read at the dedication of the monument site for the Battle of Concord, Massachusetts. The poem was sung to the tune of “Old Hundredth” from 1551 and one of the best known melodies in Christian musical traditions. Emerson demonstrates the power that poetry can have in reminding us of the propaganda of the past. In literature Franz Kafka’s (1925) work *The Trial* intersects fiction and law. Kafka’s tale focuses on a man persecuted and put to death by a court of law. Kafka weaves the theme of guilt through the story from an existentialist perspective. Analysis of this novel reveals it as a response to law and society. Furthermore, Kafka’s novel has the courts meeting in rather strange places – attics, lofts, and sub-tenancies of housing projects. This unique judicial system reminds us that the State is quite often tormented by an underground conspiracy. Kafka not only pens a historical fiction but also gives the reader a tool to view the law.

The intersection between these artforms and the law is well established and I do not want to look at art in general. Instead, I propose to focus on the relationship between law and music. Through the lens of music, law is better understood. Indeed, through this perspective law is actually created. In 1973, Bob Marley and Wailers released “Get Up, Stand Up” off of the *Burnin’* album.²⁸ The song was a call to arms yet Marley made this call without firing a shot.

²⁸ Bob Marley and Wailers, “Get Up, Stand Up,” *Burnin’* (New York: Island Records, 1973).

Marley's message was to remind the people of the world, especially those in countries that ignored basic human rights, that their voice and determination could change the legal and political situation.

Get Up, Stand Up, stand up for your right
Get Up, Stand Up, don't give up the fight

Preacher man don't tell me heaven is under the earth
I know you don't know what life is really worth
Is not all that glitters in gold and
Half the story has never been told
So now you see the light, aay
Stand up for your right. Come on

Most people think great God will come from the sky
Take away ev'rything, and make ev'rybody feel high
But if you know what life is worth
You would look for yours on earth
And now you see the light
You stand up for your right, yeah.²⁹

Marley said of the song, "It say man can live."³⁰ But Marley's song did more than simply call for society to stand up for its rights. It became an anthem for a non-governmental organization and in turn, created an image of law for millions of people. Amnesty International, the most famous human rights organization, adopted the song as its anthem and continues to use it to this day. In accordance with the Universal Declaration of Human Rights, a document that outlines basic human rights and is law in numerous countries across the world, Marley's song helped reaffirm the importance of basic rights. Peter Tosh, who co-wrote the

²⁹ Ibid.

³⁰ Maureen Sheridan, *Bob Marley, Soul Rebel: The Stories Behind Every Song, 1962-1981* (New York: Thunder's Mouth Press, 1999), 44.

song with Marley, would use that theme in his 1982 album *Equal Rights*. On a side note, after Tosh left The Wailers, Marley and Tosh had very little contact with each other. In 1975, Bob Marley and the Wailers were playing a show at a club in London. Marley began his delivery of “Get Up, Stand Up” with his normal passion. During the second verse, with the crowd on its feet, Tosh came to the stage with microphone in hand and began to sing with Marley, to Marley’s surprise. As the audience, now aware of the history they were witnessing, became overwhelmed with emotion, the song ended. Tosh turned to Marley and said, “The Queen feel dat one deh.”³¹ Tosh handed the microphone to Marley. The two never spoke again. In addition, through music, law is oftentimes presented more powerfully than traditional positive law.

Certainly the story above demonstrates music as a performance of law but another example addresses law’s presentation through music. “Bumbo klaat” is one of the most vulgar phrases in Jamaica, and in fact a jailable offense if used in public. The roots of the phrase come from the days of slavery. When African slaves were beaten and bloodied by their oppressors, a towel was sometimes used to wipe up the blood. The slaves referred to this towel as a “bumbo klaat” which can be best translated to “blood clot.” The towel symbolized the literal pain of slavery. In Jamaica, the term was adopted and became synonymous with relieving evil spirits that Babylon had cast upon Jamaica and its people.³² In a

³¹ Ibid.

³² Peter Tosh, *Honorary Citizen* (New York: Sony Music Entertainment Inc., 1997).

1978 interview with reggae photo-journalist Peter Simon, Tosh discussed the phrase, "Bumbo klaat is one of Jamaica's passwords."³³ Tosh believed that the power which this phrase wielded was the very reason it was outlawed by Jamaica's government. In a 1980 show, Tosh astonished the crowd by playing a song entitled "Bumbo Klaat." Tosh forcefully bellowed:

Oh bumbo klaat, Oh Rasta
I said I came upon this land
I left it, my fellow man
But one thing I can't overstand
Is why he don't love his brother man
But when I check, there is so much lies
That is the reason, the children cries
It's been so long, we need a change
So the shitstem we, got to rearrange
If there is obstacles in the road
We've got to throw them, throw them overboard
One night an evil spirit held me down
I could not make one single sound
But then Jah told me, "Son, use the word"
And now I am free as a bird
Oh bumbo klaat, Oh Rasta.³⁴

Tosh's live performance is an example of presenting a vision of law through music. While the lyrics create an image of law, the live performance exemplifies the power of musical presentation in relationship to law. During a late night encounter with duppies (ghosts), Peter found that the only thing that could free him from his paralysis was to say "Move yuh bumbo Klaat!!"³⁵ From that day forth, Peter vowed never to stop saying bumbo klaat. Just as law has multiple

³³ Ibid.

³⁴ Peter Tosh, "Bumbo Klaat," *Honorary Citizen* (New York: Sony Music Entertainment Inc., 1997).

³⁵ Jodie Leroy Piersons and Roger Steffens, "The Peter Tosh Biography - Honorary Citizen," *Honorary Citizen* (New York: Sony Music Entertainment Inc., 1997).

characteristics and goals, so too does music. This multi-dimensional aspect of law helps continue connecting the various commonalities of music and law.

When musicians create music, they are simultaneously creating law. Their experiences, language, and motives encompass their being and develop an image of law, which the listener subsequently adopts. Their lyrics constitute what law is for “the people” which is often a direct response to the State’s version of what law is or should be. Music is not similar to or a reaction to law. Rather music is law. I will develop this thesis with reference to various theories of law. Classic theories of jurisprudence have maintained, at their core, that their particular approach to understanding law are correct. This normative approach means that “right” vs. “wrong” dominates the debate. Attempting to avoid another discussion of viewing law as either the source of oppression or the source of justice, I pose that when musicians respond to law, specifically law’s inequity, they create non-traditional forms of jurisprudence. To completely understand that premise, I must explain the connection between justice, music, and legal theory.

Natural Law

This school of jurisprudence begins with the premise that justice, in some form, is part of the law. The idea is that justice, in the abstract in the very least, exists. When Stevie Wonder sings *Evil*, his lyrics note a response to a normative

legal world where good versus evil is clear.³⁶ Wonder maintains, like the theory of Natural Law, that the principles of law are objective. Wonder is promoting jurisprudence. He is a Natural Law theorist.

Natural law's long history finds expression in the writings of Greek philosophers. Aristotle particularly heavily influenced the notions of natural law. He envisioned two patterns for life: the rational guidance of conduct in accordance with rules and the contemplative activity of the philosopher.³⁷ The latter was reserved for that small minority of individuals blessed with fortune and natural gifts that allowed them to live their days in contemplative activity. This freed them from compliance with a moral code. In contrast, Aristotle's notion of rational guidance in accordance with rules encompasses innate aspects of right and wrong that apply to those that are not philosophers. Human beings have a specific function and in order to fulfill that function, they must work within the confines of certain rules. Those rules might be best understood in legal terms as "rights." The basis of the U.S. legal system rests on the idea that rights find their bedrock in laws.

Natural law notes that rights – freedom of conscience, right to one's own life, right to honor – all have their foundation in law.³⁸ Law is the distributor of rights. It is not enough for one to simply assert their freedoms: one must justify them in some way. This justification comes in the form of law. For example, if I

³⁶ Stevie Wonder, "Evil," *Music of My Mind* (Los Angeles: Motown Record Company, 1972).

³⁷ D.J. O'Connor, *Aquinas and Natural Law* (London: Macmillan and Co., Ltd., 1967), 22.

³⁸ Raymond F. Begin, *Natural and Positive Law* (Washington D.C.: The Catholic University of America Press, 1959), 41.

am a Mormon, drinking alcohol is wrong. It doesn't matter that it may be legal. In natural law, certain rights are inherent. If someone questions my right to live, I need not turn to a license to defend that right. Natural law theorists view rights in accordance with proper human rights. They do not need to turn to law to justify rights, in fact a right can stand against the law as was expressed in the Declaration of Independence. When musicians create music using the language of rights and justice, they may be creating law as well. Returning to Stevie Wonder's 1972 tune *Evil*, one can see jurisprudential variables as a form of Natural Law:

Evil, why do you infest our purest thoughts, with hatred.
Evil, why have you stolen so much love...
Leaving everyone's emotions lost and wandering free.
Evil, why have you taken over God's children's eyes...Evil
Evil, before they could really grow to see,
That your way, is not the way, to make, life what it should be.³⁹

The objective of both natural law and Wonder's tune is to establish a norm.

Defining issues in terms of right and wrong gives credence to the law, as well as ostracizing those opposing the normative statement.

Some scholars argue that natural law uses a higher and superior source of authority as its most powerful justificatory force. Accordingly, Dr. Martin Luther King, Jr. used natural law in his movement for civil rights in the United States when he reminded his audience that an unjust law is no law at all. Unfortunately, law can be, as musicians note, unjust. So, where is natural law's

³⁹ Stevie Wonder, 1972.

claim grounded? The essence of the argument lies in the notion that morality exists within law. Natural law scholars maintain that laws are not necessarily just nor morally neutral but can be good or bad, just or unjust.⁴⁰ Lon Fuller, famous Harvard Law professor, wrote of the connection between law and justice, which has its roots in addressing the morality of law. In *The Morality of Law*, Fuller argued that natural law is “the enterprise of subjecting human conduct to the governance of rules.”⁴¹ Yet, for Fuller, natural law does not invoke omnipresence or a higher power. Instead, natural law is best described as “lower” laws in the sense that natural law is about the foundation of law.

A dilemma arises in addressing natural law because it is often at odds with the law handed down by the government or the state. Natural law has stood in opposition to positive law when it comes to issues of polygamy, the progressive income tax, or the subjugation of women. Yet, scholars of law often turn to the theory for guidance in these matters. Natural law, and its application, then becomes the genesis for morality as it pertains to law. When musicians respond to this emphasis on morality, they are furthering the connection between law and morality. Natural law may become the savior of a moral life while other philosophies, particularly Positive Law, are the cause of immorality in the world. Steel Pulse, a reggae band from Jamaica and Birmingham, England demonstrate their adherence to natural law in their song, *Wild Goose Chase*.

⁴⁰ David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge University Press, 1993), 1.

⁴¹ Lon Fuller, *The Morality of Law* (Yale University Press, 1964), 96.

I thought the destruction of creation
Would be nuclear power and radiation
I thought judgement
Would come
When dem drop
De neutron bomb
I thought man was heading
For extinction with
Contraceptive pills
That was made to kill
Legal murder
They call abortion
I thought the invention of
Of robots yes
All forms of life
Would eventually stop
But now dem dog gone crazy
Mass producing test tube babies
On a wild goose chase
Laws of nature they just can't face
Ambition is to mash up the damn place
Who shall save the human race?⁴²

Steel Pulse argues that they saw the end of the world coming through nuclear war but they have revised that view. Instead, according to Pulse, the end of the world is coming through immorality, citing abortion as an example. Again, natural law does not make specific mention of the use of contraception, abortion, or test tube babies, but a natural law scholar would argue that such acts are immoral. In 1965, the Court decided *Griswold v. Connecticut* and discussed the natural law foundation inherent in the U.S. Constitution.⁴³ The case entailed issues of privacy surrounding contraception for married couples. The State of Connecticut used a natural law argument in its stance that licensed physicians

⁴² Steel Pulse, "Wild Goose Chase," *Earth Crisis* (New York: Elektra Records, 1984).

⁴³ *Griswold v. Connecticut* 381 U.S. 479 (1965).

should be prevented from giving advice to married couples to prevent conception. The basis of the argument is that the use of contraception is immoral and allows mankind to play with God's plan. While the motivation behind the Connecticut Statute may have been Natural Law, the law addressed by the Supreme Court is clearly positivistic. Pulse connects morality and law as well. In their arguments, movement away from natural law is a move away from justice.

In jurisprudential terms, justice is a positive goal. The label of "injustice" applies when something occurs in opposition to the normative side. Concern surrounding justice as an entitlement is a notion inherent in natural law. Just as natural law scholars and musicians connect morality and law, the connection between justice and law is equally as explicit. As a sign of this, we can first look to the names of institutions of law such as courts of justice or justices of the peace, or, simply, Justice, for a Supreme Court member.⁴⁴ The idea is that law brings justice into the equation or more succinctly, the product of law is justice. Thus, an unjust law might trouble us more since we question whether it is correct to use the term "law" at all. Peter Tosh, reggae musician, social critic, and founding member of Bob Marley and the Wailers sang about justice in *Equal Rights*.

Everyone is crying out for peace yes
None is crying out for justice
I don't want no peace
I need equal rights and justice

⁴⁴ Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987), 185.

Got to get it
Equal rights and justice
Everybody want to go to heaven
But nobody want to die
Everybody want to go to up to heaven
But none of them want to die
Just give me my share.⁴⁵

Tosh notes the importance of justice over peace. And by peace, he suggests legal order, thereby putting justice on the other side of positive law. Moral principles – justice – dictate acts of benevolence. Tosh is arguing that morality informs us that rights should be applied equally, and that justice will follow. Interestingly, he sings that one must fight for justice -- one must attempt to “get it.” This is extraordinarily valuable because it underscores the notion of justice as a commodity or as Weinreb describes it, justice as an entitlement. According to Tosh, justice is a fading notion that is not implicit in the law.

Legal scholars echo Tosh’s criticism. Much of the scholarship surrounding justice asks whether law and justice are related. This underscores the argument that justice remains a goal and not an implicit component of jurisprudence. Taking exception to the fleeting notion of justice, I show that injustice is not a rare ingredient in the legal system. Rather, most injustices occur continuously within the framework of law, in normal times.⁴⁶ Jimmy Cliff,

⁴⁵ Peter Tosh, “Equal Rights,” *Equal Rights* (New York: Columbia Records, 1977).

⁴⁶ Thomas R. Kearns and Austin Sarat, “Legal Justice and Injustice: Toward a Situated Perspective,” in *Justice and Injustice in Law and Legal Theory*, eds. Thomas R. Kearns and Austin Sarat (Ann Arbor: University of Michigan Press, 1998), 2.

reggae musician and star of *The Harder They Come*⁴⁷ sings specifically about the lack of justice within the legal system and where that injustice will lead. His song is an attack on the system and warning that the result will undoubtedly be one of revolution.

I work all day and night to find my daily needs
But freedom is suppressed by another one's greed
Why should certain ones control another ones needs
It's rebellion these kind of action breeds
I can't get no justice under this system
I can't get no justice in this society.⁴⁸

Cliff recognizes the constant barrage of injustices that exist rather than attempting to argue that justice and law are connected. Yet, for Cliff, the opportunity to argue that an unjust law is no law at all is closed because his position as an oppressed black man, on an island with a history of slavery and colonial rule, is one silenced in traditional circles. The music is his only method to create the people's law.

As theorizing continues surrounding the connection between law and justice, scholars pose similar arguments to their musician-scholar counterparts.

Kearns and Sarat write:

Justice has the characteristic of a promissory statement. A promise states now something to be performed in the future. Being just always lies in the future, it is a promise made to the future...The promise, like all promises, does not have a present time, a time when you can say: 'there it is, justice

⁴⁷ *The Harder They Come*, made in 1973 by Perry Henzel, remains an influential political piece for Jamaicans and followers of reggae music. The movie uses music as its tool to demonstrate the corruption within the Jamaican sociolegal system.

⁴⁸ Jimmy Cliff, "No Justice," *Images* (Miami: Vision Records, 1989).

is this or that.' Suspended between the law and the good...justice is always still to come or always already performed.⁴⁹

Both Tosh and Cliff recognize this and argue that "justice too long delayed is justice denied."⁵⁰

Natural law continues to rely on the notion that morality creates law and is necessary for its existence. Thus, humankind plays no role in formulating natural law; it is the law of morality.⁵¹ However, just as musicians argue that natural law does not resolve all legal issues, some scholars argue that Legal Positivism can better address issues of justice.

Legal Positivism

Legal Positivism rests on the principle that law is created by a sovereign body. All laws emanating from that sovereign body, originated by man, create the paradigm of law. Pioneered by John Austin, legal positivism attempts to release morality from law and simply focus on enacted law as controlling law.⁵² The body of rules that follow from the duly constituted legal authority receive backing by the coercion of the state. Legal positivism seeks positive law, not necessarily right law. Certainly, it is the hope that the enacted law is beneficial and logical, but all rulings do not emerge through the force of logic.

⁴⁹ Kearns and Sarat, 3-4.

⁵⁰ This quote belongs to Dr. Martin Luther King, Jr. He used it numerous times in his public speeches and specifically in *Letter From a Birmingham Jail*.

⁵¹ See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1962), chapter 9. Compare with Lon Fuller, *The Morality of Law* (Yale University Press, 1964), chapters 2 and 3.

⁵² See John Austin, *Lectures on Jurisprudence and Philosophy of Positive Law* (St. Clair Shores, MI: Scholarly Press, 1977), Jeremy Bentham, *Of Laws In General* (London: Athlone Press, 1970), Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

What then does legal positivism do to advance the law's justice?

Musicians certainly respond to that question and their response mirrors much of the scholarship on the subject. The result is a debate that focuses on the role of the judge. Legal positivists argue, in essence, that the judge announcing the ruling to the parties makes law. Yet, the ruling, simply law enacted by the sovereign body, already existed. Judicial interpretation is weakened under the guidelines of a legal positivist system. In 1968, then California Governor Ronald Reagan, in criticizing a state supreme court ruling, suggested that "the courts, like the legislature and executive branch, are responsible to the people."⁵³

Reagan was taken to task by Boalt Hall law students:

As students of the law...we must, with all 'due respect, call attention to the grave inaccuracy of your statement....The court's first duty is to the law, and the Constitution of the United States is the highest embodiment of that law. Thus, so long as the Constitution remains unchanged, and there is a conflict between what people would have, and what the Constitution provides, the Supreme Court must inevitably follow the dictates of the Constitution, irrespective of how unpopular such a decision might be.⁵⁴

The problem is that under a positivist system, little room is left for interpretation. Judges do not interpret the law or the meaning of the law but instead decide whether the law has been "broken." In addition, judges become mere mechanisms of the status quo. Change becomes very difficult in a positivistic society since legality in the abstract is simply based on the law on the books.

⁵³ Harry P. Stumpf, *American Judicial Politics* (New Jersey: Prentice Hall, 1997), 10.

⁵⁴ *Ibid.*

Musician Lauryn Hill criticizes this notion and specifically the idea that the criminal justice system, as a whole, lacks efficacy. She wails:

It's the mystery of Inequity...
Said it's the misery of Inequity...
Said it's the history of Inequity...
Yo! Ya'll can't handle the truth in a courtroom of lies
Perjures the jurors
Witness despised
Crooked lawyers
False Indictments publicized
Its entertainment...the arraignments
The subpoenas
High profile gladiators in bloodthirsty arenas
Enter the Dragon
Black-robe crooked-balance
Souls bought and sold and paroled for thirty talents
Do we expect the system made for the elect
To possibly judge correct?
Properly serve and protect?
Materially corrupt
Spiritually amuck
Oblivious to the cause
Prosperously bankrupt
Blind leading the blind
Guilty never defined
Filthy as swine
A generation pure in its own mind
Legal extortion
Blown out of proportion
In vein deceit
The truth is obsolete
Only two positions:
Victimizer or Victim
Both end up in destruction trusting this crooked system⁵⁵

Hill's message is an indictment of those who would see the law as only the instruments in our legal system. To some extent her indictment might even

⁵⁵ Lauryn Hill, "The Mystery of Iniquity," *MTV Unplugged 2.0* (New York: Columbia Records, 2002).

apply to the law students of Boalt Hall who argued that the written law is the controlling law. While the debate surrounding the level at which judges should interpret law has been raging for many years, Hill's attempt to incorporate music into the debate creates two issues. First, it exemplifies the constitutive nature of the music and its relationship to law. Hill is a product of the society -- the same society that created Justice Clarence Thomas and Judge Leon Higgenbotham. Second, Hill's musical genre is hip hop, an urban-based style that reaches the many who do not read U.S. Supreme Court opinions or understand the notion of strict scrutiny versus rational basis. Hill is the teacher of the law, and thus, the creator of it as well.

Much of the criticism of contemporary popular music, and specifically hip hop music is that its "gangsta" style is detrimental to society and that the "gangsters" are truly to blame for continued violence, racism, and misogyny. However, that perspective fails to take into account the notion that we are products of our society. Hill's critique of the criminal justice system indicts the inequity of the system, not the black youths who are products of that inequity. Here, we must understand what forces drove the emergence of hip hop, and specifically gangsta rap. Scholar Michael Eric Dyson has maintained that music may "crudely expose harmful beliefs and practices that are often maintained with deceptive civility in much of the mainstream society, including many black

communities.”⁵⁶ The civility that Dyson writes of is the adherence to law without regard to interpretation. The law constitutes the sole basis of legitimate domination and normative order. Yet, legal positivism allows the law to reinforce race, gender, and class relations. Sociolegal change is difficult because society accepts law and uses history to support the reasons for law’s existence.

One contemporary form of positive law is “originalism” when it comes to interpretation of the U.S. Constitution. Scholar Keith Whittington argues that originalism, the idea that the U.S. Constitution should be interpreted in the way the authors originally intended, is supported in the Constitution and that it reinforces the political nature of the document. While Whittington’s argument has salience, it does not address the dilemma of oppression under a positivist system. Whittington writes:

Moreover, the democratic assumptions underlying much originalist thought, especially those that advocate a form of judicial restraint that accepts authoritarian judgment of the elected branches, call forth a political conception of the Constitution. The fact that all parties face the same text results in relatively few obvious constitutional violations; the two interpretive approaches should lead to the same outcomes in most cases.⁵⁷

Hill would respond that the outcomes are consistently unjust; thus, the continued use of positivist notions further embeds the autonomy of law and not of logic.

⁵⁶ Michael Eric Dyson, *Between God and Gangsta Rap* (Cambridge: Oxford University Press, 1996), 177.

⁵⁷ Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent & Judicial Review* (University Press of Kansas, 1999), 79.

Returning to the music of Peter Tosh, justice remains a theme deeply associated with his artform. Moreover, on the 1976 album *Legalize It*, Tosh simultaneously uses the law to argue his point while discrediting the law for being unjust. On the title track, Tosh sings about the need to legalize marijuana. He roars:

Legalize it
Don't criticize it
Legalize it
And I will advertize it
Singers smoke it
And players of instrument, too
Legalize it
That's the best thing you can do
Doctors smoke it
Nurses smoke it
Judges smoke it
Even lawyer, too
So you've got to...
Legalize it
It's good for the flu
Good for asthma
Good for tuberculosis
Even numara thrombosis.⁵⁸

The legal scholar is interested in this Tosh tune for various reasons but I begin with the title, *Legalize It*. This is both a command and legal positivist refrain. It is a command in the political sense in that Tosh argues that if the Jamaican Government legalizes marijuana, he will advertise it through his use and promotion. His argument is similar to that of legalization activists in the United States. However, the legal positivist refrain is one that deserves greater attention.

⁵⁸ Peter Tosh, "Legalize It," *Legalize It* (New York: Columbia Records, 1976).

Tosh is arguing that marijuana should be legalized and once this occurs, its use will be just. The basis of Tosh's argument rests on the notion that the law decides right and wrong. Thus, if the law codifies marijuana as legal, then such an act makes smoking marijuana justified. Tosh is simultaneously using the law to bring about his goal as well as attacking the law for its inaction. In addition, he poses a policy-argument which references the various societal people who already use marijuana despite its illegality. While legal positivism does not rest on policy choices but rather on the passing of law by a sovereign body, Tosh is using the rationale that marijuana is widely used and in essence, legal in a defacto sense. Tosh is both influenced by the law and performing it in his piece. He uses the autonomy of law under a positivist system to achieve his goal.

Continuing on the same topic, Tosh spoke in various interviews about the use of marijuana and the need for its legalization. The interesting aspect of this argument is Tosh's use of legal language and his maintenance of his positivistic stance. "It is totally illegal for me not to smoke herb or unlawful, or what you would say as ungodly because it is against my religion not to smoke herb," exclaimed Tosh.⁵⁹ He continued to discuss why marijuana should be legalized but hesitated as he noted that his words could be construed as "subversive 'pon

⁵⁹ Peter Tosh, "Herb Smoking," *I Am That I Am* (Stone Mountain, Georgia: JAD Records, 2001).

the radio.”⁶⁰ Tosh continued to indict the legal system for its lack of insight into the legalization movement:

And the people that make the law and call this dangerous drugs and poison, they don't charge you for attempting suicide when you commit acts and felony because when a man is using something dangerous to his temple that means he is committing a felony or attempting to commit a felony to his system or destroying the system but they don't charge you with that, they charge you with possession of ganja. I don't know what ganja is. Ganja is a bird from Australia.⁶¹

Tosh's argument remains rooted in the unjust aspect of the law yet argues that by changing the law, marijuana's illicit nature disappears. His reliance on and admonition of the law remains a fascinating aspect, especially from a constitutive sense.

Tosh, an unabashed Rastafarian, blamed the various problems throughout the world on the inadequate distribution of resources causing “complications upon creation.”⁶² Tosh's belief in Rastafari is interesting because it offers some contradictions as he often balanced between reliance on Jah (Rastafarians use the term Jah as God from the word Jehovah) and use of the law. Yet, Tosh remained vigilant that “all those things, unconstitutional laws, man's inhumanity to man, cause injustices.”⁶³ Whittington argues that we all face the same text in regards to viewing the Constitution. Tosh disagrees and, more subtly, argues that one need not be told what is right or wrong, just or unjust, constitutional or

⁶⁰ Tosh spoke with a thick Jamaican patois accent. In addition, as noted in Chapter IV, Rastafarians have reconstructed portions of the English language as displays of their independence. In this case “pon” is simply a shortened version of “upon.”

⁶¹ Peter Tosh, “Herb Smoking.”

⁶² Ibid.

⁶³ Ibid.

unconstitutional. Rather, he posits that the text, or in this case the law criminalizing marijuana, is unjust. Certainly one attempting to use the law to support his use of marijuana leaves him disenfranchised. Unlike Whittington's argument, while all parties face the same text, the text is not interpreted in the same way for each party. Tosh concludes in his diatribe on marijuana:

I don't smoke marijuana, I smoke herb. The lawmakers make every name illegal to incriminate the underprivileged and I who happen to be one of the so-called underprivileged happen to grow in the constituency of those laws where they call the healing of the nation ganja and all form of dangerous and abusive names. (Question from interviewer: Ganja is an abusive name?) Yes I. Ganja is a bird from Australia. And I don't smoke ganja, I smoke herb. Herb and music is the healing of the nation. Herb is the key to the doors of inspiration.⁶⁴

Tosh reminds us both that music is the key to effecting sociolegal change and that the law may not always be logical yet society continues to follow it.

Legal positivists and natural law theorists often turn to case law for support of their arguments. In legal circles, some argue that tough cases make bad law. A tough case from 1889 helps clarify the positivist position as well as demonstrate positivism's lack of focus on logic and reliance on the autonomy of law. In 1889, the New York Court of Appeals decided the case of *Riggs v. Palmer*. The case involved a will made by Frances Palmer. Frances decreed that upon his death, his estate would be divided between his two daughters, Mrs. Riggs and Mrs. Preston, as well as his grandson Elmer. Elmer lived with his grandfather and became aware of Frances' intentions of removing him from the will. Before

⁶⁴ Ibid.

Frances was able to modify the will, Elmer killed his grandfather. Elmer was sixteen years old at the time of the murder. Mrs. Riggs and Mrs. Preston brought before the court the argument that Elmer should not be allowed to profit from his grandfather's death and the estate should be divided between the two daughters. The court was faced with deciding whether a person can willfully kill another, in which they will receive compensation upon the death of the testator.

The New York court faced a difficult issue because there was no law to follow. This was the first case of its kind leaving precedence out of the equation. Thus, if the court used the will as its governing authority, Elmer would be able to profit from murdering his grandfather. The majority opinion argued that it was unconscionable to allow Elmer to profit from the murder. They claimed:

Where we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more, than his words express. Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view. He who considers only the letter of an instrument goes but skin deep into its meaning.⁶⁵

The court reasoned, from a natural law perspective, that it was wrong to allow Elmer to profit from his acts. Instead, they had to reinterpret the will and in essence, rewrite the document.

The dissent argued that the court is being asked to rewrite the will and laws do not allow for such action. Public policy does not demand rewriting the will but does demand the proper execution of the laws. If the will states that

⁶⁵ *Riggs v. Palmer* 113 N.Y. 506, 507 (1889).

Elmer receives compensation upon his grandfather's death, then it must be followed.

This case exemplifies the difficulty of the law and the line between legal positivism and natural law. The positivist notes that the will must be followed since it is the role of the court to enforce the law. The natural law scholar views the case as an opportunity to influence the law in promoting right since Frances could not have imagined a scenario where he would want his grandson profiting from such a murder. In time, states have adopted laws that prohibit actions like the one Elmer took but that does not diffuse the philosophical question that arises when one must ask: if there is no controlling law, what is one to do? Chinese philosopher Lao Tze wrote, "When the way is lost, there remains the law."⁶⁶

Legal Realism

Legal realism, the dominant legal movement of the 20th century, highlights action instead of ideas. Influenced by the famous jurist, Oliver Wendell Holmes, realists understand law in terms of experience. A sound body of law should correspond with the actual feelings and demands of a community regardless of issues of right or wrong. Legal realism places the judge at the center of the law, a notion that we are reminded of as the Supreme Court

⁶⁶ Interestingly, the translation of the quote is also translated to mean "...there remains harmony." Equating law and harmony is apropos for this chapter.

remains a definitive source for the meaning of the fundamental law in America.⁶⁷ Realists argue that judicial decisions, being policy oriented, should be based on the best sociolegal data. The necessities of the time, the prevalent moral and political theories, intuitions of public policy, and even the prejudices which judges share with their fellow men/women, have the greatest role in determining the rules of governance.⁶⁸ Traditional legal rules and concepts have limited value. While few realists argue that doctrine plays no role in court decisions, most agree that judges pay some attention to “paper rules” but are mainly influenced by power decisions. The crux of the issue arises: if doctrine does not determine outcome, what does? The realist argues that the answer is hunches.⁶⁹

In a simple sense, realists decide the outcome and search for the law to support their argument. Thus, prejudices influence the credibility of the parties, mold facts, and shape how the law should respond. There are three implications of adhering to a legal realist system. First, the conception of adjudication that dominates most realist writing is inconsistent with a democratic system of government. If judges derive little if any guidance from statutes (enacted by elected representatives) or from common law rules (implicitly ratified through legislatures’ inaction) then judges, most of whom are neither elected nor accountable to the people, routinely make law. Second, the power of judicial

⁶⁷ John Brigham, “The Upper Courts: Scholarship and Authority,” *Social Epistemology* Vol. 5, 1991, 16.

⁶⁸ Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881), 1-2.

⁶⁹ See the work of Roscoe Pound, Benjamin Cardozo, Karl N. Llewellyn, and Jerome Frank.

review is questioned. Judicial review is an important aspect of American legal thought and is consistent with the federal and state constitutions and does not represent the usurpation of lawmaking authority by the judiciary. However, when judges are guided by a combination of idiosyncratic hunches and class biases, the theory of judicial review is undermined. Lastly, legal realism casts doubt on attaining the political ideal of the rule of law. The rule of law entails the notion that government power should be restrained and that judges should be free from biases and immune to pressure. Adherence to well publicized rules means that no one is above the law, promotes individual liberty, and reduces arbitrariness and inequality.

John Brigham argues that “realism has changed the way in which we see action on textual authority by undercutting the authority of the text.”⁷⁰ Lauryn Hill echoes this in her song I mentioned earlier in this chapter:

Enter the Dragon
Black-robe crooked-balance
Souls bought and sold and paroled for thirty talents
Court reporter catch the surface on the paper
File it in the system not acknowledged by the Maker
Swearing by the bible blatantly blasphemous
Publicly perpetrating that "In God We Trust"
Cross-examined by a master manipulator
The faster intimidator
Receiving the judge's favor
Deceiving sabers doing injury to their neighbors
For status, gratis, apparatus and legal waivers
See the bailiff
Representing security
Holding the word of God soliciting perjury

⁷⁰ John Brigham, 17.

The prosecution
Political prostitution
The more money you pay.. the further away solution
Legal actors
Babylon's benefactors
Masquerading as the agency for the clients
Hypocritical giants
Morally non-compliant
Orally armed to do bodily harm
Polluted, recruited and suited judicial charm
And the defense isn't making any sense
Faking the confidence of escaping the consequence
That a defendant is depending on the system.⁷¹

Brigham's argument coincides with Hill's sentiment that we have become cynical about the capacity to bring about justice. Hill argues in her song that the legal actors (judges, attorneys, bailiffs) are all pieces of the system that is rooted in injustice. She seems to recognize that law is indeterminate but continues to promote the social arrangements and institutions determined by law.⁷² Hill views those social arrangements and institutions as corrupt:

Materially corrupt
Spiritually amuck
Oblivious to the cause
Prosperously bankrupt
Blind leading the blind
Guilty never defined
Filthy as swine
A generation pure in its own mind.⁷³

⁷¹ Lauryn Hill, "Mystery of Iniquity."

⁷² This idea is taken from John Brigham and Christine Harrington, "Realism and Its Consequences: An Inquiry into Contemporary Sociological Research," *International Journal of the Sociology of Law* Vol. 17, 1989. I will later revisit their work and their call for a constitutive approach to law.

⁷³ Lauryn Hill, "Mystery of Iniquity."

It is Hill's version of the Law that infiltrates her community and constitutes the law and reminds us how musicians are jurisprudential scholars.

Case law remains a source of knowledge for the legal scholar and it is no different for the realist. Legal realists often turn to Holmes' dissent in *Lochner*⁷⁴ as enlightened judicial reasoning. Holmes reasoned that "general propositions do not decide concrete cases" and saw more subtle aspects of the law as influential to the fundamental principles of jurisprudence.⁷⁵ But as Brigham reminded us earlier, under the realist notion the judge is the center of the law. Thus, under the common law system, judges clearly make the law. While musicians may not respond to specific cases in which a realist idea is promoted, musicians are responding to the law's response to a societal question. Oftentimes, the law's response is inadequate in the eyes of the musician, thus constituting law for the listener. Reggae musicians, The Heartical Crew created a song responding to the death row imprisonment of Mumia Abu Jamal. In the song, The Heartical Crew referenced the law as the source of injustice:

Free Mumia
Free Mumia
From the hands of the downpressor
Free Mumia
Free Mumia
Facts are facts
Fiction are fiction
He is the wrong man in the investigation
Racist politricks of the prosecution
Stripped him of his rights of the Constitution

⁷⁴ *Lochner v. New York* 198 U.S. 45 (1905).

⁷⁵ 198 U.S. 45, 75.

Trial by error, trial of deception
His testimony through intimidation
So much perjury so many violation
Babylon gonna burn if they kill the wrong man.⁷⁶

Viewing the Constitution as possessing rights demonstrates the recognition that those rights will be disseminated, or in the case of Abu Jamal, taken from him unjustly. While Holmes' promotion of realism has influenced American legal thought, musicians remain integral in countering the legal realist notions of the power of the judge and the judge as the source of justice. Michael Franti and Spearhead yell in their tune:

False advertising sayin' "halls of Justice"
You tellin' the youth don't be so violent
Then you drop bombs on every single continent
Mandatory minimum sentencin'
'Cause he got caught with a pocket fulla medicine
Do that again another ten up in the pen
I feel so mad I wanna bomb an institution.⁷⁷

Musical commentary such as this remains the thrust of this project and examples will accumulate as I continue to show how musicians create law.

In creating law, musicians act in a different manner than legislators or judges. A constitutive perspective on law will be examined in the next chapter. This perspective emphasizes the role that social relations play in generating law.⁷⁸ In essence, law is social. The constitution of our legal life takes place in

⁷⁶ The Heartical Crew, "Free Mumia," *Without Apology: Reggae Free Mumia* (New York: Without Apology Music, 1999).

⁷⁷ Michael Franti and Spearhead, "Oh My God," *Stay Human*. (San Francisco: Six Degrees Records, 2001).

⁷⁸ Brigham and Harrington, 57.

the intersection of different social practices that amount to law.⁷⁹ Just as Holmes philosophized about the nature of law, so too have musicians. Looking at the law from outside the perspective of a legal actor does not invalidate the perspective. Rather, it reinforces the constitutive nature of law and reminds us that the interpretation of the law cannot solely remain in the hands of the realist if we want sociolegal change in institutions and communities.

⁷⁹ Ibid.

CHAPTER III

A CONSTITUTIVE THEORY OF JUSTICE: THE ANATOMY OF MUSIC FROM SLAVERY TO FREEDOM

We shall overcome
Oh deep in my heart
I do believe
We shall overcome someday
We'll walk hand in hand
We shall all be free someday.

- Charles Tindley (1851 – 1933)⁸⁰

Bull Connor's dogs attacking defenseless blacks in Alabama or city workers turning back marchers for civil rights with fire hoses, remain images that those in the 1960s will never forget. They become an indelible picture for contemporary America to view as television programs revisit the cantankerous fight for civil rights in the United States. As those scenes replay in our minds and on television, a soundtrack floats through the background. Accompanying the civil rights struggle was music. This music had an urgency and it had a message. It reminded the listener (and viewer) that society was in turmoil and built an audio foundation from which to ponder that turmoil.

While there are individual aspects of music, there are universal ones as well. One aspect of law is its claim to govern all, at least in a territory where it applies. Music is rather similar. Some use music to motivate while others use it to calm their nerves. Some use music to tell a tale while others use it to recall a moment in the past. Yet for everyone, the effect of music is monumental to their

⁸⁰ Charles Tindley wrote "I'll Overcome Someday" in 1900 which provided the basis for the civil rights anthem, "We Shall Overcome." Tindley is often considered the "Father of Gospel Music."

person. It guides us in our daily lives regardless of our social status. Rarely a day goes by when one does not come into contact with music. In the hills of Nepal, one might hear a bootleg version of Bob Marley's *Get Up, Stand Up*. A writer who locks himself in his home for a month to finish his book or dissertation will still find music on the television or radio that recalls him to a different time. Music is the soul of America – it is the guiding force of culture in the United States. Instantly, the relationship between music and law begins to unfold. Both music and law are powerful tools of human creation. Both are things we turn to in times of trouble. And both are what we look to for counsel and information. This chapter is designed to create that link and highlight the connection between music and law. Music is at least part of the law, or expressions of law. I begin with a brief historical outline of the importance of music during the days of slavery and move to the struggle for civil rights in the 1960s. The historical discussion is followed by drawing the connection between music and law through Constitutive Theory. Using constitutive theory, I show that musicians create law by constituting it. The effect that music has is not enough. I posit that musicians constitute law in their creation, performance, and dissemination of music. To feel that power of music, the historical outline is necessary.

Do You Remember Those Days of Slavery?

The 1982 tune by Jamaican reggae artist Eek-A-Mouse entitled *Do You Remember Those Days of Slavery* uses the scattling of bebop with the beat of reggae

to tell the listener of life on the slaveships and the journey from Africa to the Caribbean and beyond.⁸¹ The music helps provide a sound that exemplifies the pain that African slaves endured on their involuntary trips from their homeland. But beyond the surface, the music reinforces the idea that music is a pure form of human expression. Music is needed so as not to forget our history and know our destiny.⁸² That history is best understood in this project by looking more closely at African music and subsequent African-American music. While other forms of music are also political and have sociolegal issues present, black music has its roots constantly drawing from disenfranchisement. Race remains intertwined to the law and music throughout this project, with specific attention paid to race and music in its own chapter. But the struggle for freedom is still alive and the story of that struggle is still being told – by musicians.

Cornel West, the professor of Afro-American Studies as well as Religious Studies at Harvard University and Princeton University released a “musical” album of sorts in 2001. In it West attempted to put to music, some of the political commentary that has made him famous. The opening “song” gives a timeline for music’s historical impact. It began with guttural cries, and wrenching moans, and visceral groans, and weary laments, and silent tears and how people of African descent were able to transfigure such misery into joy and a sense of

⁸¹ Eek-A-Mouse, “Do You Remember Those Days of Slavery,” *Skidip!* (Newton, NJ: Shanachie Records, 1982).

⁸² This notion is borrowed from Bob Marley from his 1976 tune “Rat Race” which was a song ringing with political statements and argued that the violence surrounding elections in Jamaica sadly brought the human race into being the rat race.

sustaining themselves against overwhelming odds.⁸³ Vicious theft from Africa, pernicious passage to the New World America, atrocious enslavement on dilapidated plantations all brought pain to the slaves. Yet, in wooden churches, on God-forsaken creeks, in make-shift churches, these slaves would forge a connection: the spirituals. Spirituals gave a sense of self against a society that told them they were nobody and no one. The history of Negro spirituals is closely linked to the abolition of slavery in 1865, the Black Renaissance of 1925, and the first Dr. Martin Luther King, Jr. Day in 1985. All three are marked milestones for blacks and connected law, race, and music. Keep keepin' on was the theme.⁸⁴ As the years evolved, so did the music. The Blues brought the painful laughter of the grand art. The tragic comic sensibility of working against the odds meant that being down didn't worry the enslaved or recently free. Private agony and public misery could not keep the Negro down. One could never allow misery to have the last word, even if all you could do was sing a song or a little moan. Or even crack a smile.

West argues, that then came "the most sophisticated, the most refined art ever created, not just in America but in the twentieth century: Jazz."⁸⁵ It was European instruments with New World African sensibilities that allowed a fusion of voices balancing the collective vision of a trio, a quartet, or the quintet, or maybe just the solo. And then came Rhythm and Blues, soothing the listener

⁸³ Cornel West, "The Journey," *Sketches of My Culture* (New York: Artemis Records, 2001).

⁸⁴ This short historical synopsis of the history of black music is taken from the work of Cornel West.

⁸⁵ *Ibid.*

into hearing the pain of the past mixed with the hope of the future. Yet, for West it is hip hop that should be considered the greatest musical creation of the last twenty-five years of the younger generation. Fusing linguistic virtuosity with rhythmic velocity, hip hop connects the many struggles for freedom. "The music soothes our bruises, it caresses our bruises; it attempts to give us a taste of the freedom we so deeply want, even if we can experience it only for a moment," West sings in his only CD to date.⁸⁶ But the struggle goes on. The story must be told and retold. Every generation must be connected to that story to be linked to that struggle for freedom. Let us unfold that story and lay bare the drama.

Let My People Go

Using slave music as the genesis of all contemporary music, we can see the importance that music has played in the lives of the builders of this nation. I look to connect music with slavery because there has rarely been a greater tragedy than that of the African taken from his/her homeland and forced to work without compensation. Seized from the shores of West Africa, men and women were taken from their families and traveled to lands very different than the Ivory Coast or Ghana. Understanding the depths of despair that these many slaves endured allows us to view their faith and use of music as all the more powerful.

In 1619, the first Dutch slave ship arrived on the shores of the United States. By the 1660s, slavery began to take shape. The slaves, who endured the

⁸⁶ Ibid.

passage from West Africa across the Atlantic, were instantly frightened and repressed by the slave masters so as to avoid uprisings. On the ships, the African slaves unified in their struggle by creating their rhythms and melodies. The power of the African art lies in the fact that they have always been an integral part of life, accompanying all social functions – weddings, funerals, communal work and play, festivals, and religious ceremonies.⁸⁷ The slave masters remained dictatorial in their action that music must be banned from the slave ships. This exemplifies the recognition that the slave masters saw in the power of music. For the slaves, the music – their only outlet – remained a crucial aspect in the transmission of information. The slave songs acted as songs of advice, warning, information, and morality.⁸⁸ Once the slave ships found land in the Caribbean and coast of the yet to-be-formed United States, the slaves had developed a belief in music that permeated their culture.

Slavery in Jamaica, in particular, lacked any vestige of humanity.⁸⁹ A small number of planters held absolute power over the slaves. Through violence, the slaves remained dominated by the minority. Under such conditions, two reactions were inevitable: fight or flight. While each occurred in Jamaica for different slaves at different times, both fight and flight incorporated music. In 1693, Maroons – Spanish slaves in Jamaica – in the hills of Jamaica, began staging slave uprisings against the slave masters. Communicating with other tribal

⁸⁷ John Collins, *West African Pop Roots* (Temple University Press, 1992), 3.

⁸⁸ *Ibid.*

⁸⁹ Leonard E. Barrett, *The Rastafarians: The Sounds of Cultural Dissonance* (Boston: Beacon Press, 1988), 29.

groups, the Maroons used music as their language.⁹⁰ Subsequent uprisings brought the inspired youth to resist as well. Years later, the slaves survived by playing “drums of freedom” and telling that they survived slavery and would survive colonialism. “Time is longer than rope,” they said.⁹¹ Andrew Tosh, son of Peter Tosh, would later make a song entitled *Time Is Longer Than Rope* signifying the lasting effect of music and the development of political ideologies.⁹²

Beyond the music and dancing dating back to West African shores, the African soon-to-be-slaves accompanied their music with song. These songs made their way to the battlefields, often times recalling the tribal disputes that plagued the small villages.⁹³ The songs were to honor their chief men and were a deep part of African life. Dancing and singing for joy and grief, love and hate, prosperity and calamity, and sometimes just to pass the time, the Africans felt that the music – in sound and spirit was integral to their life and their past. Whenever Africans assembled, they accompanied their songs and dances with drums.⁹⁴ The music was employed during love-making, at marriage, birth, farming, fishing, hunting, and education. There were songs at feasts, wakes, and funerals. Slave masters recognized the importance of music to the slaves and

⁹⁰ Ibid., 32.

⁹¹ Horace Campbell, *Rasta and Resistance: From Marcus Garvey to Walter Rodney* (Trenton, NJ: Africa World Press, Inc., 1987), 39-40.

⁹² Andrew Tosh, “Time is Longer Than Rope,” *Make Place for the Youth* (Duarte, CA: Psalm Records, 2000).

⁹³ Miles Mark Fisher, *Negro Slave Songs in the United States* (New York: The Citadel Press, 1963), 2.

⁹⁴ Ibid., 5.

tried to limit it on the voyage to the Caribbean and America.⁹⁵ I note this because it demonstrates the importance of music to a people and subsequently to a movement. Slave masters, in control of law, knew that stifling the slaves' ability to use music would hamper their communication processes. The colonies would later follow in this approach by making it a crime to teach a slave to read and write. Education is method for advancement and liberation and slavery depended upon a non-educated group of enslaved Africans. Education could lead to rebellion. Slave masters also recognized that music could also lead to rebellion. This reinforces the power of music during the formation of the United States. This power remains today.

The Black...Red, White, and Blue

Music remained influential for the colonists in the 1770s as the Revolutionary War neared. *Yankee Doodle*, originally written by a British army surgeon, was penned to make fun of the American soldiers. However, noting the power of the song, Patriots began singing the song with pride, even using it at the Battles of Lexington and Concord to insult the retreating British soldiers. *Dixie*, an anthem of the Confederate South and song played at Jefferson Davis' inauguration as Confederate President in 1861 reminds us of how music and politics collide. Even recently, the late Supreme Court Chief Justice Rehnquist led a sing-along of *Dixie* at a judicial conference in Virginia in 1999. Various congressional officials, particularly black leaders, found Rehnquist's decision

⁹⁵ See Christian Schultz, *Travels on an Inland Voyage* (Ridgewood, NJ: The Gregg Press, 1968)

especially troubling. The scholarship on slave songs and subsequent importance of music in rebellions, connects music and consciousness. Oftentimes, the music was the only method for educating the disenfranchised.

Lawrence Levine argues the point further. He posits Africans were thrust into American society and denied access to their ideology and dreams which formed the core of their consciousness. They were then forced to fall back on the only cultural frame of reference that made any sense to them and gave them a feeling of security: music.⁹⁶ Historians have frequently failed to see the importance of music on *constituting* the Africans' image of law and society. Frederick Douglass' narrative explains the power of music in both educating and constituting law – in this case, the law of slavery:

They (slaves) would then sing most exultingly the following words:

“I am going away to the Great House Farm!
O, yea! O, yea! O!”

This they would sing, as a chorus, to words which to many would seem unmeaning jargon, but which, nevertheless, were full of meaning to themselves. I have sometimes thought that the mere hearing of those songs would do more to impress minds with the horrible character of slavery, than the reading of whole volumes of philosophy on the subject could do.⁹⁷

⁹⁶ Lawrence M. Levin, “Slave Songs and Slave Consciousness,” in *The Afro-American Slaves: Community or Chaos?* Ed. Randall M. Miller (Malabar, Florida: Robert E. Krieger Publishing Company, 1981), 72.

⁹⁷ Frederick Douglass, *Narrative of the Life of Frederick Douglass: An American Slave* (Harvard University Press, 1960), 36-37

The music can eternally educate. As Douglass noted, “the mere recurrence to those songs, even now, afflicts me; and while I am writing these lines, an expression of feeling has already found its way down my cheek.”⁹⁸

Constituting Law⁹⁹

Taking that grand step from slave music to law, and even further to constitutive theory, one might think is implausible. On the contrary, music is a common thread that connects issues of law, race, gender, and class over time. More specifically, musicians incorporate legal and political language into their lyrics which allows for a greater understanding of law and politics for the layperson. As John Brigham notes:

Because legal forms tend to be depicted as outside of social and political movements, I have tried to bring them inside, to demonstrate how they ‘inform’ the language, purposes, and strategies of movement activity. When activists speak to one another, they use the language created for them by the legal system, even when they are voicing opposition to it.¹⁰⁰

Charles Tindley’s 1900 tune is evidence of activists using language designed to build movement activity. Bob Marley and Eek-A-Mouse did the same over seventy-five years later; I intend to show those connections. Just as Brigham explains, activists – or for this case, musicians – use the language created for them by the system. Bridging this gap from Jamaica to law and then to constitutive theory can best be seen in some of the work of Mutabaruka.

⁹⁸ Ibid., 37.

⁹⁹ I use Constitutive Theory as an integral piece of this project. For further reading see Patricia Ewick and Susan Silbey, *The Common Place of Law*, Christine Harrington, *Shadow Justice*, Austin Sarat and Thomas Kearns, *The Law in Everyday Life*, and Roberto Unger, *Law in Modern Society*.

¹⁰⁰ John Brigham, *The Constitution of Interests* (New York University Press, 1996), 2.

Mutabaruka, a Jamaican born 10 years before Jamaica's independence, uses Jamaica as his platform to discuss broader issues through his music. While he might sing about black freedom in Jamaica, he wants the message to be extrapolated to the larger issue of Race.¹⁰¹ His music is a combination between spoken word and dub roots music as he utilizes his deep patois voice to entrance the listener. When not creating music, Mutabaruka is a radio personality who gives musings on politics, law, religion, and class from Kingston, Jamaica. In 1991, Mutabaruka created a song that demonstrates the constitutive nature of music and draws Jamaican and U.S. politics closer together. During the rock steady era of the late 1960s, numerous tunes emerged from Jamaica depicting a spoken courtroom drama. Prince Buster and Lee Perry were the first to cut a tune called "Judge Dread" in which Buster is the angry Judge Dread and Perry plays various defendants. The song condemned local rudies to sentences in excess of 400 years.¹⁰² The success of "Judge Dread" in Jamaica spawned Derrick Morgan's "Court Dismissed" and Lee Perry's "Set Them Free." In 1971, Peter Tosh created "Here Comes the Judge" which sounded more like a one-act play than a song. In it, Tosh featured himself as the lead role of judge (or "grudge" as we would later call them) and passed sentence on those he considers

¹⁰¹ See Mutabaruka, "Blakk Wi Blak...k...k..." (Newton, New Jersey: Shanachie Records, 1991). Read/listen to "Blakk Wi Blakk" and/or "I Don't Have a Color Problem" to see his use of race in Jamaica as an example of the larger issue of race and law.

¹⁰² Rudies or rude boys describes the emergence of a rebellious youth movement of disenfranchised urban males who grew from the 1962 independence. The movement continued to grow and became a place for those disenchanted and alienated from the system to rebel. The rude boys (bwoys) have become synonymous with the class struggle in Jamaica.

to be the real rude boys, the so-called great men of history.¹⁰³ In the song, Tosh outlines the crimes committed by Vasco de Gama, Sir Francis Drake, and Christopher Columbus (“Chris-T’ief Come-Rob-Us); crimes which include colonialism, imperialism, slave trading, killing 50 million black people without a cause, and teaching black people to hate themselves. In 1980, Tosh commented on his tune:

When I listen to that song it is like the manifestation of some prophecy, because that song was prophesied for the manifestation in this dispensation of time, because it said, ‘Here comes the judge,’ seen. That does not mean the judge in what they call our colonial judiciary shitstem. I mean the Judge of Righteousness. The time is now.¹⁰⁴

Certainly Tosh’s claims of Jah being the ultimate judge create issues for us in looking at the law without viewing it from a natural law perspective. However, his use of the courtroom setting immediately intrigues the constitutive theorist. By analyzing Mutabaruka’s more contemporary tune, “People’s Court I,” the jurisprudence of music is evident.

In 1991, Mutabaruka, following in the steps of Buster, Perry, Morgan, and Tosh, created a song entitled “People’s Court I.” Mutabaruka sets the song and instantly draws in the legal scholar. He gives us the song’s theme by introducing the main player in the song, Judge Better Must Come. Just like Charles Tindley’s tune, *We Shall Overcome*, Mutabaruka believes in a future with sociolegal change. He notes, with a banging gavel in the distance, “My court is now in session. I am

¹⁰³ A portion of this was taken from various conversations with Roger Steffens and the remaining portion was taken from Steffens’ work describing Tosh’s CD box set, *Honorary Citizen*.

¹⁰⁴ Peter Tosh, *Honorary Citizen* (New York: Sony Music, 1997).

from Africa and I have come to try all you politicians for selling out black people.”¹⁰⁵ The initial intrigue lies not solely in the substance but in the court setting. Mutabaruka, forced by the ineffectiveness of the legal system, must turn to music to address social injustice. He first lays the rules of the court for the two politicians that he is trying – Senator Change Mimind and Mr. Religious Belief. Explaining to the defendants that they are being tried for tricking black people allows the listener to have an understanding of both what fairness means to Mutabaruka and what the legal system should focus on: “crimes of principle.” Mutabaruka continues on angrily:

This is the people’s court and I not allowing any politrickin here
If you disturb me again I will give you 1000 years for contempt of court
U are also charged for chargin de people too much taxes
Because of your mismanagement spendin money then taxing the people
for it
U keep borrowing money from the I.M.F. and the World Bank in the
people’s name
Continuing de oppression of the black people by the same colonial
masters
Why u can’t learn no so call third world country has been able to break
loose from these money hogs
You have black people in a vicious cycle.¹⁰⁶

While these lines clearly demonstrate the political aspects of the lyrics, they also represent the sociolegal aspects. It is not simply a song that expresses its political viewpoint through language and allows the listener to agree or disagree. Rather, Mutabaruka is using both the court setting and legal language to describe a

¹⁰⁵ Mutabaruka, “The People’s Court,” *Blakk Wi Blakk...k...k* (Newton, New Jersey: Shanachie Records, 1991).

¹⁰⁶ *Ibid.*

rather far-fetched notion of trying the system. I do not argue that this song ends injustice, but it does constitute law for society, not simply Jamaican society either.

Mutabaruka's song, followed three years later by "The People's Court II,"¹⁰⁷ is an example of how music can constitute the image of the law for the people, and thus, act as a teacher of jurisprudence. In both songs, Mutabaruka finishes the song with a sentencing by Judge Better Must Come. The sentence, of over 1000 years, demonstrates the ineffectiveness of the song, since such a sentence is certainly implausible. Yet, it also signifies the hope that Mutabaruka has for his definition of justice and fairness to someday be recognized and utilized in a traditional court setting. Mutabaruka's work is a step away from the traditional court setting and a move toward justice, a constitutive theory of justice.

Constituting Music

While justice is a nebulous notion, so too is the meaning of music. Connecting music and law requires viewing music as a cultural process. This idea works well in tying together constitutive theory and music. Music is a cultural process; that is social or cultural elements are contained within and pass through sonic components.¹⁰⁸ Musicologists and ethnomusicologists have spent considerable time looking at the character and function of music. The tradition of studying the *process* of music has been the result. However, here, I take the

¹⁰⁷ Mutabaruka, "The People's Court II," *Melanin Man* (Newton, New Jersey: Shanachie Records, 1994).

¹⁰⁸ John Shepherd and Peter Wicke, *Music and Cultural Theory* (Malden, MA: Blackwell Publishers Inc., 1997), 8.

analysis beyond context and text. Instead, I show that music autonomously constitutes the individual. In oversimplifying terms, individual awareness is constituted by what music one listens to. Studies have been done by sociologists on musical scholarship and its convergence upon philosophy.¹⁰⁹ My focus is narrower. Instead of looking at the sociology of music and its impact, I look at how music has constituted sociolegal meaning for citizens, particularly in the United States. I term this “constituting music” because music, images, lyrics, and movements associated with the music all compile the political and legal ideologies for the listener.

Constituting Meaning

The real question of how law is constituted, which can be asked tracing back to the slave ships crossing the Atlantic, relates to the gap between legal ideals and legal reality.¹¹⁰ David Trubek describes this gap as being a necessary consequence of a liberal democracy – he argues that law is not and cannot be perfect. This gap between the ideals of law and performance is a feature of legal existence.¹¹¹ This Realism (noted in Chapter II) represents the abandonment of social-engineering that law is often associated with. Realists certainly note that law represents an effort to mediate conflicts but is doomed to remain imperfect. Musicians recognize this realism but argue for a reconstituting of legal meanings.

¹⁰⁹ Ibid.

¹¹⁰ David Trubek, “Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law,” (11 Law Soc. Rev. 529-569, 1977), 544.

¹¹¹ Ibid.

The classic debate regarding law's meaning has centered around law in books and law in action. Yet, law in books vs. law in action has historically implied that each share the same goal: equality and justice. Trubek notes that gap between legal ideals and legal reality accepts that equality and justice are not the constant goals of a legal system. Damian "Jr. Gong" Marley, one of Bob Marley's sons, sings about the disconnect between justice and the legal system.

He bellows:

Di youths dem ballin' out
Hear the ghetto youths dem ballin' out
Di youths dem saying justice ah weh dem really need overall
Di way dem deal wid mankind
All my gyal start ball
Justice ah weh di youths dem need overall
Di way dem deal wid mankind.¹¹²

Marley's words, while in Patois, describe Trubek's assertion that law's ideals and reality remain divorced. The argument by politicians that law's ideal is to achieve justice is Marley's main criticism. The politics of law find its way to the hills of Jamaica.

Trubek's initial contention states that when looking at legal reality, "a system must begin with ideals basic to our society...I propose that we examine law in terms of its contribution to these values."¹¹³ For Trubek, a legal order is not an end to itself. Instead, the system must be justified by its contribution to

¹¹² Damian "Jr. Gong" Marley, "More Justice," *HalfWay Tree* (New York: Motown Records, 2001).

¹¹³ Trubek, 546.

the aforementioned values.¹¹⁴ Of course these “values” are the source of great debate but the intimation and often explicit demand for values in society by various musicians allows for legal meaning to be constituted.

Certainly, the demands by the disenfranchised (based on race, gender, and class) are a cornerstone of this project, not all music is directed toward those groups. Fugazi, a punk band from the United States, penned a song for the former Supreme Court Justice William Brennan before his death. In my correspondence with Fugazi, they wrote that the song was designed to exemplify the very different approaches to justice by members of The Court. Fugazi sang:

Justice brennan,
It's all over, it's all over i said,
The last fair deal going down.
You let your gown to the ground,
But I'm not waiting around until the kiss-off.
Wasn't it you who said yeah you can shoot me lightly,
But ask me to be excused, I won't go die politely
Justice brennan, I know it's not your fault,
It's just that you're busted and dripping.¹¹⁵

While the meaning and substance of the song could be debated (which is why I contacted Fugazi), I posit that the song constitutes a meaning of law for the listener and thus creates an image of law.

Constituting Image

¹¹⁴ Ibid.

¹¹⁵ Fugazi, “Dear Justice Letter,” *Steady Diet of Nothing* (Washington D.C: Dischord Records, 1991).

Popular conceptions, categories, emotions, and beliefs about law, truth, and justice enter into the legal system in a variety of ways.¹¹⁶ With so many legal actors and a plethora of legal images in society, law's ideals and law's reality do not always correspond. Richard Sherwin's work has demonstrated the "vanishing line between law and popular culture." Sherwin notes that popular conceptions of law might enter into the law when jurors substitute their own common sense beliefs for confusing rules of law quickly read by judges in jury instructions that go beyond a lay person's ability to absorb.¹¹⁷ Mass media can have an influence on law as well. Look to California in 1994 when an incensed media pushed a community to demand revenge for the murder of 12-year-old Polly Klaas. The "three-strikes-and-you're-out" law soon followed. Such laws have become part of societal vernacular and embedded in our image of law. The image of what constitutes law, in fact *is* law.

Law Professor Naomi Mezey's work on legal culture helps illustrate that images in society often translate to more concrete examples of legal culture influencing law – culture constitutes law. This allows for an easy transition in regards to music since music is a cultural expression and has the ability to reach billions of people over an eternity. Mezey argues that we often think of law and

¹¹⁶ Richard Sherwin, "Law in Popular Culture," (*New York Law School Faculty Reprint Series 1, 1-28 2005*), 3.

¹¹⁷ *Ibid.*

culture as disconnected.¹¹⁸ Such a view is unwise for both legal scholars and citizens of a legal system. Mezey explains:

For example, we tend to think of playing baseball or going to a baseball game as cultural acts with no significant legal implications. We also assume that a lawsuit challenging baseball's exemption from antitrust laws is a legal act with few cultural implications. I think both of these assumptions are profoundly wrong, and that our understandings of the game and the lawsuit are impoverished when we fail to account for the ways in which the game is a product of law and the lawsuit a product of culture - how the meaning of each is bound up in the other, and in the complex entanglement of law and culture.¹¹⁹

The trouble is that the politics of law are equally as pervasive as are the various areas that law and culture intersect. Mezey notes that definitions of culture are the first to be critiqued. The various aspects of legal culture contribute to the way that law's image is constituted.

Law is a powerful force in society that operates through signification.¹²⁰ Legal agents order and reorder meanings and images of law. Musicians and songwriters belong in this group of legal actors in a framework that takes seriously the importance for law of constituting meaning. Historical developments like those discussed in the law of slavery and from the colonial period show many instances where music affects far more people than a Supreme Court opinion or piece of legislation. As Clifford Geertz wrote, "law is

¹¹⁸ See Naomi Mezey, "Approaches to the Cultural Study of Law: Law as Culture" (*Yale Journal of Law and Humanities*, 2001, Volume 13, (35-67).

¹¹⁹ Mezey, 36.

¹²⁰ *Ibid.*, 45.

one distinctive manner of imagining the real.”¹²¹ Law has meaning-making power on its own but in many cases the meaning that we see in law comes from music.

Mezey gives an example of the way law and culture connect and images begin to develop. I will use her example and correlate it to music and constitutive theory. Among some gay men in the Bay Area, paying a bridge toll for the car behind you does not signify altruism but rather sexual interest. The practice of picking up men on the freeway has multiple meanings in differing contexts. There are changing meanings for changing images and symbols. A trench coat can signify the desire to stay dry; the private detective portrayed in movies of the 1940s; or it can be worn to convey an affiliation with a subculture of disaffected middle-class youth. Getting back to the Bay Area, law might use its immense power to prohibit drivers from paying more than one toll. Law can argue that it is neutral since it could be deemed dangerous for traffic to have tolls paid in such a manner. However, law’s mission might be to thwart the gay population from connecting with each other. This example certainly demonstrates the power that law holds. In addition, it shows how embedded law and culture have become. I would add that when music takes on such an issue – gay rights – the image of law’s role becomes constituted by the lyrics.¹²²

Constituting Rights

¹²¹ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 184.

¹²² While it would be useful to locate a song that relates to the Bay Area example, I have reserved the bulk of comparisons for Chapters IV, V, and VI.

The language of rights is a topic heavily researched and discussed in the Public Law field.¹²³ Furthermore, rights are a more “tangible” way for a lay person and legal scholar to recognize legal change. Some studies have been done that demonstrate that ignoring the law – the law in books – has not led to greater violations of rights. While other studies have shown – making its way to the Supreme Court – that law is often so culturally embedded, legal change is not possible.

Robert King and Cass Sunstein studied the impact of speed limit changes upon society.¹²⁴ They attempted to discern whether law and culture connected to affect rights. Montana’s speed limit law changes is a perfect example. For nearly twenty years before the federally imposed fifty-five mile-per-hour speed limit in 1975, Montana had no set speed limit. Instead they used something called “The Basic Rule” which required daytime speed to be reasonable and prudent under the prevailing conditions. From 1975 to 1995, Montana followed the federal speed limit. In 1995, they returned to the basic rule. King and Sunstein studied this small issue and determined that the changes in the law had little impact on the behavior of drivers. They found that Montana drivers ignored the fifty-five mile-per-hour speed limit when it was imposed but did not drive significantly faster when it was rescinded.¹²⁵ The result in Montana, and

¹²³ See Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991) for one excellent example.

¹²⁴ Robert E. King and Cass R. Sunstein, “Doing Without Speed Limits” (79 B.U. L. Rev. 155, 162-68 1999), 163.

¹²⁵ *Ibid.*

other states has been that states set formal speed limits that correspond with the general practices of motorists in the state. King and Sunstein show us that law and rights can be constituted by the people. My thesis has been that musicians are among the most accessible of cultural and sociolegal figures and that they ably assist in constituting rights.

Possibly the most indicative moment for the constitutive scholar in the past ten years of how culture can influence law, and subsequently rights, is the case of *Dickerson v. United States*.¹²⁶ Reviewing the case of *Miranda v. Arizona*, the *Dickerson* Court addressed whether the warnings spelled out in *Miranda* were required by the Fifth Amendment of the Constitution or merely a prophylactic evidentiary rule designed to safeguard rights but not required by the Constitution.¹²⁷ In *Miranda*, the Court confronted whether confessions from custodial interrogations by police violated the self-incrimination clause of the Fifth Amendment. The Court created what television viewers can recite: “you have the right to remain silent, anything you say can be used in a court of law, you have the right to an attorney, if you cannot afford one, you will be appointed one.” The legal rule, created by the Court, found its way beyond police stations and into culture through television, movies, and music. The *Miranda* warnings became part of culture.¹²⁸ While this is a strong argument for the constitutive nature of law, it is further evidence of the embedded nature of culture and law.

¹²⁶ 530 U.S. 438 (2000).

¹²⁷ 384 U.S. 436 (1966)

¹²⁸ Mezey, 55.

In *Dickerson*, the Court noted that they must “uphold” *Miranda* because the legal rule laid down in 1966 “so effectively infiltrated cultural practice that forty years later the cultural embeddedness of *Miranda* warnings provided the justification for recognizing the constitutional status of the rule.”¹²⁹ The Supreme Court was effectively stating that society has accepted *Miranda* warnings as rights and to overrule *Miranda* would mean to take away rights. Law became so embedded in culture that culture became the rationale for law. Mezey argues that to view *Miranda* as a triumph of law over culture or *Dickerson* as a triumph of culture over law overlooks the broader narrative.¹³⁰ Rather, law and culture are mutually constitutive and legal and cultural meanings and images are created by the intersections between law and culture.

John Brigham’s work, especially his work in the last ten years, uses the images and meanings created through law to view the questions associated with the politics of rights. His work in the previously mentioned *Constitution of Interests* is an especially integral piece to the study of constitutive theory. Brigham asserts that legal practices are a part of the culture – this allows for us to see the reach of law into political life.¹³¹ The law operates at a foundational level of an activity and constitutes what law is rather than simply determining illegalities. Constitutive law works well with music since it narrows the distinction between law and society. The study and discourse surrounding law

¹²⁹ *Ibid.*, 56.

¹³⁰ *Ibid.*, 57.

¹³¹ Brigham, *The Constitution of Interests*, 3.

builds a conception of law from the way people think about law in politics.¹³² As members of society, musicians view legal decisions, engage in legal discourse, and view events of the law. Their output – in the lyrics and music – constitute the law for the listener and thus, for society. Brigham would add that they “permeate the social consciousness and structure social action.”¹³³

Constituting Social Change

The motives of the musicians is certainly at issue in determining whether social action follows from the music. The difficulty of addressing the motives of the musicians is multifold. I am less concerned with motives and more concerned with result, or possibilities. Since the music I address in this project is explicitly or implicitly critical of the politics of law, revolution and rebellion seem to be natural peripheral issues that should be considered. Scholars have argued that music is simply a response to injustice but is not necessarily constituting law or politics, and certainly not revolution.¹³⁴ But sociolegal scholars and philosophers have disputed that argument. Michel Foucault’s extensive research addressed revolution and connects well to my thesis on law and music:

I would say that the state consists in the codification of a whole number of power relations which render its functioning possible, and that revolution is a different type of codification of the same relations. This implies that there are many different kinds of revolution, roughly speaking, as many kinds as there are possible subversive recodifications of power relations, and further that one can perfectly well conceive of revolutions which

¹³² Ibid., 26.

¹³³ Ibid.

¹³⁴ See Carter G. Woodson, *The Mis-Education of the Negro*, Tim Wise, *White Like Me*, Barbara Browning, *Infectious Rhythm*, Guthrie P. Ramsey, Jr., *Race Music*, Herbert Aptheker, *And Why Not Every Man?*, Frank Kofsky, *Black Nationalism and the Revolution in Music*.

leave essentially untouched the power relations which form the basis for the functioning of the state.¹³⁵

Foucault reminds us that revolution and social change come in various forms. Musicians use their lyrics to directly influence society and this influence can be seen through the lens of constitutive theory. Similar to Foucault, musicians recognize that revolution takes on different configurations. Joseph Hill of the Jamaican band Culture, demonstrates this point well as he yelps over horns and steel drums:

If you're ready for revolution, try and find the right man
We are innocent, I am not the one to trick the nation.
If you're ready for revolution, try and find the right man
For all that I am, I am a Rastaman
Trying to heal our nation of the wounds in their heart man.
I would prefer to teach the children
As a nurse, or doctor.
I am not ready to you listen to you talk
I am not ready to hear your statement
When you tell me it's an accident
You take up your gun and put in your waist
And told us that you go look food.¹³⁶

Hill's poignant tale speaks of the importance of leadership in a revolution and the need for integrity in change when the revolution occurs. His message is that of a Critical Race scholar as he describes his goal as a Rastafarian to change the future by educating the youth. The dilemma for Hill is that the ruling class has lied to the masses. Culture's goal is aligned with Critical Race Theories' goal "to further reconstruction of a genuine commonwealth that more justly

¹³⁵ Michel Foucault, *The Foucault Reader*, Edited by Paul Rabinow (New York: Pantheon Books, 1984), 64.

¹³⁶ Culture, "Revolution," *Humble African* (Jamaica, New York: VP Records, 2000).

accommodates people of color; explaining that deconstruction would ultimately lead to reconstruction."¹³⁷ The reggae musician's demand for revolution is both deconstructing and reconstructing.

Conclusion

As Lawrence Friedman notes, "The media spread slogans like 'three strikes and you're out' or 'old enough to do the crime, old enough to do the time.' Criminal policy is made by Polly Klaas and...tort policy is made by the hot coffee at McDonald's."¹³⁸ If the media can influence or constitute the images and meanings in society, then so too can music. Furthermore, music travels from the shores of West Africa to the small island of Jamaica and into the rural towns of mid-western America, establish a legal culture that influences traditional legal actors. While law is important and must be taken seriously, so too must music.¹³⁹ Music influences society in the same way that Friedman describes media's dominion. John Brigham reminds us of the aspects of law in social life – legal culture. He notes that "movements reveal what the law means to them through public discourse."¹⁴⁰ Music allows law to operate in communities. Communities become conscious of the ways law operates and reconstitute law in an image that supports movement activities. Law becomes much more powerful as it operates

¹³⁷ Jonathan A. Beyer, "The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory," *Georgetown Law Journal*, March 2000, 550.

¹³⁸ Lawrence Friedman, "Lexitainment: Legal Process as Theater," *DePaul Law Review* 50, 2000, 557.

¹³⁹ Of course there is music that, pop music for example, that is more benign in its motive and effect. Pop music is addressed in various scholarship but I have chosen not to include it in this project because it is beyond the scope of my research.

¹⁴⁰ Brigham, *The Constitution of Interests*, 154.

in society on our consciousness.¹⁴¹ Brigham notes, and I agree and connect to music, that by expanding the reach of law in theory, we can see that law has been much more expansive than most legal commentators have acknowledged. Law is in politics and music is in politics. I note that when law is in music, music constitutes law and legal culture.

¹⁴¹ *Ibid.*

CHAPTER IV

LIVING IN A DIAMOND CITY: CRITICAL RACE THEORY

We refuse to be
What you wanted us to be
We are what we are
That's the way it's going to be, if you don't know
You can't educate I
For no equal opportunity
Talking about my freedom
People freedom and liberty.

- Bob Marley (1945 – 1981)¹⁴²

For legal scholars enthralled by the impact of jazz music on race, the emergence of critical race theory marked the death of racism in the law.

Professor Jonathan A. Beyer, invoking the work of Archie Shepp, Miles Davis, and Duke Ellington, described death to the Lucifer of the law and the funeral that ensued.¹⁴³

Beyer narrated a funeral procession composed of citizens, scholars, clergy, judges, lawyers, and elected officials. The slow moving procession was accompanied by a slow bass drum sprayed with a soulful trumpet. The burial was marked by the words of a judge who explained what the law could and should have been.¹⁴⁴ As the crowd understood what the law was capable of, the

¹⁴² Bob Marley and the Wailers, "Babylon System," *Survival* (New York: Island Records, 1979).

¹⁴³ Jonathan A. Beyer, "The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory," *Georgetown Law Journal*, March 2000, 537. This chapter is a response, of sorts, to Beyer's work which describes jazz music as a metaphor for critical race theory. From the perspective put forth here, Beyer's work is incomplete in that reggae music better suits the reconstructive nature or critical race scholarship.

¹⁴⁴ *Ibid.*, 537.

trumpet began a louder blast. Beyer describes this metamorphosis as the end of the funeral and the beginning of a carnival.

The faith that racism in the law died with the jazz metaphor as critical race theory emerged is one worthy of adherence. However, death and life in this context should be understood further. The goal of jazz music is certainly marked by the burying of racism in American law. While jazz music attempted, and continues to attempt, to act as the metaphor for critical race theory through reconstructing a pluralist justice from the ashes of racism in the law, reggae music is the metaphor better suited to convey “the repulsion with racism and the optimism shared by critical race scholars.”¹⁴⁵

Critical Race Theory: An Introduction¹⁴⁶

Critical Race Theory emerged as a response to the Critical Legal Studies movement of the 1970s. However, critical race scholars have been furthering their stance on race and law in the United States since the inception of the civil rights movement. Critical Race Theory(CRT), for the purposes of this piece, has six main elements.

First, CRT recognizes that racism is endemic to United States society. The question is not about eliminating racial discrimination and preserving the status quo for the elites. Rather, CRT argues that the traditional interests and values

¹⁴⁵ Ibid., 563.

¹⁴⁶ The introduction to Critical Race Theory is taken from *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* by Mari Matsuda, Charles Lawrence III, Richard Delgado, Kimberle Williams Crenshaw (Boulder, CO: Westview Press, 1993), 6-7.

serve as tools for racial subordination. Law remains the mechanism for socially constructing both race and racism.

Second, CRT is extremely skeptical of legal claims of neutrality, color blindness, and meritocracy. These claims are devoid of social meaning and ahistorical. Claims that societal problems regarding race can be solved through race neutrality is a myth.

Third, CRT challenges ahistoricism and insists on a contextual analysis of the law. Current inequalities can be linked to earlier periods in which the law was fashioned to create a dominate race and subordinate another. Most importantly, CRT scholars argue that race has infested all aspects of group advantage and disadvantage.

Fourth, CRT insists that people of color be part of the analysis and story telling. Their experience is immeasurable. Knowledge, for a CRT scholar, is gained from critical reflection through the experience of racism and active political practice toward eliminating racism.

Fifth, CRT is interdisciplinary. Since it borrows from various traditions like liberalism, law and society, critical legal theory, and pragmatism, the numerous methodologies effective enable the voice for advancing the cause of racial justice.

Lastly, CRT works toward the elimination of racial oppression as a broader goal for ending all forms of oppression. Racial oppression can be linked to other oppressive experiences regarding class, gender, and sexual orientation.

The interests of all people are taken into account because they are subordinated and their consciousness of that subordination is the key to effecting sociolegal change.

The First Verse: Reggae as Revolution

Reggae music has embarked upon the mission of protecting the oppressed; of making the world aware of the downtrodden; presenting the people a vision of life through the eyes of a Jamaican raised on the mean streets of Kingston. Critical race scholars attempting to protest racial inequity within American jurisprudence have often turned to jazz music to find their identity. Contemporary scholarship seems to address the impact of rap music and hip-hop music on racial designation. However, scholars seem to be disregarding reggae music, although it captures critical race theorists' reconstructive criteria.

Reggae music originated, as best as one can prove, from the West African beats of the indigenous people brought over as slaves to the Caribbean. Molded from rock-steady with its pulsating mid-beats and ska with its faster overtones and rebellious lyrics, reggae music emerged in the 1960s. To believe that reggae was born in 1968 when Toots Hibbert of Toots and Maytals recorded the driving number "Do the Reggay," is to believe a myth. Toots is quick to point out that he didn't invent the term; "reggae" was just an expression circulating in the streets meaning, roughly, "raggedy, everyday stuff."¹⁴⁷ But the popular tune captured

¹⁴⁷ Stephen Davis and Peter Simon, *Reggae International* (New York: Random House, 1982), 45.

the term on vinyl and coined the phrase for contemporary use. Reggae incorporated the raw sound of the streets of Jamaica (and other Caribbean islands) with the more polished sounds of Motown artists such as Marvin Gaye, James Brown, and The Temptations. The music seemed to capture the move away from colonial control - as Jamaica gained independence from Britain in 1962 - with recognition of past inequalities and hope for repatriation, redemption, peace, and a return to their homeland, Mama Africa.

By the early 1970s, reggae had evolved into a regional force. Its message included revolution and peace, politics and religion, and of course, race. The emergence of Bob Marley and the Wailers, led by the musical prophet Marley, catapulted reggae into an international phenomenon. Exported from the streets of Trenchtown, Jamaica, a ghetto outside the capital Kingston, Jamaica was no longer solely known for its beautiful beaches. Marley helped push issues of law and politics into the national and international debate.¹⁴⁸ Marley's message, best used here as an example of reggae's protesting spirit, was one which responded to the past and present inequities that plagued not only those of African descent, but those subjected to colonialism and imperialism. In 1973, Marley addressed in song the violence that encompassed Jamaica surrounding the 1972 election of democratic socialist Michael Manley. Marley wrote:

This morning I woke up in a curfew
Oh god, I was a prisoner too - yeah

¹⁴⁸ Nelson W. Keith and Novella Z. Keith, *The Social Origins of Democratic Socialism in Jamaica* (Philadelphia: Temple University Press, 1992), 196.

Could not recognise the faces standing over me
They were all dressed in uniforms of brutality
How many rivers do we have to cross
Before we can talk to the boss...
(That's why we gonna be) Burnin' and a-lootin' tonight
(Say we gonna burn and loot) Burnin' and a-lootin' tonight
(One more thing) Burnin' all pollution tonight
(Oh yeah, yeah) Burnin' all illusions tonight
Give me the food and let me grow
Let the roots man take a blow
All them drugs gonna make you slow now
It's not the music of the ghetto.¹⁴⁹

Commenting on the curfew imposed by the Jamaican government, Marley described a Jamaica where political leaders used the Jamaican people as pawns to fight their battles for power. The result was an international spotlight on a small Caribbean island and its political struggles. Marley used that spotlight to continue his musical revolution.

Similar to jazz music, reggae music permeated white culture as well as African-American culture. Instead of rejecting Marley's claims of racial injustice, many in white culture supported reggae's foundation that colonialism led to the underdevelopment of Africa and the African Diaspora. Marley was not the only reggae musician involved in the reggae revolution. One of Marley's friends, and founding member of the Wailers, Peter Tosh left the Wailers in 1974 to pursue a solo career. Tosh, along with Jimmy Cliff, Toots Hibbert, Joe Higgs, Dennis Brown, Dillinger, and various other artists combined to produce reggae music as both celebration and revolution.

¹⁴⁹ Bob Marley and the Wailers, "Burnin' and Lootin,'" *Burnin'* (New York: Island Records, 1973).

Reggae's beat, easily recognizable and often uplifting, is usually coupled with stinging lyrics that draw the link to critical race theory. The revolution link that I am beginning to outline is both the radical nature of the message as well as the connection of the concept of reconstruction that critical race theory describes.

Marley sang "Revolution" in 1974:

It takes a revolution (revolution) to make a solution
Too much confusion, so much frustration, eh!
I don't wanna live in the park (live in the park)
Can't trust no shadows after dark (shadows after dark), yeah-eh!
So, my friend, I wish that you could see
Like a bird in the tree, the prisoners must be free, yeah! (free)
Never make a politician grant you a favour
They will always want to control you forever, eh! (forever, forever)
So if a fire make it burn (make it burn, make it burn)
And if a blood make ya run (make ya run, run, run),
Rasta de 'pon top, can't you see?
So you can't predict the flop. Eh-eh! ¹⁵⁰

Marley's message in this song in particular, seemed to anger the Jamaica Labour Party (JLP) which was the traditional capitalist party. Led by Edward Seaga, affectionately referred to by followers of reggae as "C-I-A-ga" because of his ties to U.S. President Ronald Reagan, the JLP viewed Marley's message as subversive. With the Peoples National Party (PNP) in power from 1972-1980, led by Prime Minister Michael Manley, Marley and reggae music seemed to have an ally.

The mid 1970s and late 1970s produced profound and influential reggae music. Dominated by Bob Marley's tunes, more reggae artists began to involve

¹⁵⁰ Bob Marley and the Wailers, "Revolution," *Natty Dread* (New York: Island Records, 1974).

themselves in the process – the revolution grew. Regardless of the artists, the predominant message continued to be racial equality. During the post World War II period in the U.S., African Americans, who had fought equally to defend America, sought to increase attacks on legalized social and economic racism.¹⁵¹ Jazz musicians responded accordingly and developed an intense, eccentric, and revolutionary style known as “bebop.”¹⁵² During the 1950s, 1960s, and into the 1970s, reggae musicians paralleled bebop’s creation by capturing the same rage and discontent. They deconstructed traditional jazz, blues, and rhythm and blues and then reconstructed a new sound: reggae. By arranging a mid-beat into the song, the traditional drum intersection was severed and the new tune created a slower, methodical sound. The revolutionary and reconstructing effort did not stop at the sound or the lyrics.

Reggae musicians, generally speaking, hold a strong connection with Rastafarians. Rastafarians emerged from the streets of Kingston, dreadlocked, in the early 1930s as a religious response to Jamaica’s racial history.¹⁵³ Due to the legacy of slavery and colonial oppression combined with the prophecies of Marcus Garvey, young Jamaicans began to embrace the religion of Rastafari. Based on the premise that Emperor of Ethiopia Haile Selassie I is God, Rastas redefine and reinterpret the Bible. Born as Ras Tafari Makonnen in 1892, Selassie ruled Ethiopia from 1930-1974. Rastas view Selassie as Jah Rastafari and

¹⁵¹ Beyer, “The Second Line,” 541.

¹⁵² *Ibid.*, 542.

¹⁵³ Davis and Simon, *Reggae International*, 59.

Ethiopia as their homeland. The attempt was for Jamaicans, and all in the African Diaspora, to have a God in their own light. Marcus Garvey implored, "Since the white people have seen their God through white spectacles, we have only now started out (late though it be) to see our God through our own spectacles...That is the God in whom we believe, but we shall worship him through the spectacles of Ethiopia."¹⁵⁴ Thus, the destiny of reggae music is forever tied with Rasta culture. Within that culture, which I will subsequently refer to as either Reggae or Rasta, included the withdrawal from popular culture.

Inherent in that withdrawal is gradual departing from conventional culture. Reggae musicians, like their bebop counterparts, revolted and restructured their own society. Adopting patterns of dress and speech unique to themselves, Rastas separated themselves from much of mainstream society. Their dreadlocked hair signifies their religious commitments and beliefs. Their dialect, a unique patois, includes various phrases that are purely Rasta. Rasta's use "I" instead of "me" or "I and I" instead of "we" to signify their individuality. They use terms like "overstand" instead of "understand" to reconstruct the framework that is used in society. The distinctions to jazz music and the metaphors to critical race theory are evident. As Professor Beyer writes:

In addition to the music, members of the bebop revolution also adopted distinctive patterns of dress and speech to further separate themselves from dominant America society. In its musical and cultural separatism, bebop replaced dominant norms with dissonant expression. Through

¹⁵⁴ Ibid., 60.

cultural disengagement, bebop challenged contemporary styles in the same way black militancy attacked conventional politics. Similarly, critical race scholars separate themselves from the culture of the legal academy and voice a protest of cultural discrimination analogous to bebop jazz musicians.¹⁵⁵

Reggae musicians were not neutral. During a time when race neutral rhetoric dominated the national debate in America, Rasta culture introduced an answer: reggae.

The Second Verse: Critical Race Theory as Reggae Music

Critical race scholars find "black jazz" or "fire music" of the 1960s to be the period of jazz history most representative of their attack on institutional racism.¹⁵⁶ The explicit political purpose of jazz musicians like Archie Shepp, whose recording titled "Fire Music," meshes well with reggae. Fire musicians, like reggae musicians, sought to deconstruct traditional jazz and inject African styles. Reggae music, like its counterpart fire music, is unique because it exclaims a political as much as a musical purpose.¹⁵⁷

Like reggae music, critical race theory emerged as a response to the enduring political, social, economic, and legal inequities of African Americans. Critical race theories' revolutionary approach is its effort to deconstruct law and legal concepts. Just as Rasta's redefined and reinterpreted the Bible and reggae musicians deconstructed the legacy of colonialism, critical race theorists use the

¹⁵⁵ Beyer, "The Second Line," 542. Beyer notes that bebop musicians, similar to reggae musicians, assigned positive connotations to terms for mental instability such as "crazy" and "insane." See Beyer, note 37. Reversing the meaning is a classic hallmark of the revolutionary.

¹⁵⁶ *Ibid.*, 544.

¹⁵⁷ *Ibid.*

same techniques. The commonality that they both share deconstructionist experiences amplifies the reconstructionist aspect of reggae music as a metaphor for critical race theory.

Reggae music best exemplifies the voice of protest in critical race theory because, like critical race theory, reggae's goal is political reform. Rastafarians may argue that "politricks," as they term politics, has no place in their reality; that their role is to do Jah's work. However, Selassie's message, arguably, was one of world racial harmony, based on Ethiopians maintaining their political, social, and legal power. More appropriately, reggae musicians and critical race theorists share the common objective of dismantling the status quo. In an interview, Marley once said:

My music fights against the system that teaches to live and die...music is the biggest gun, because it saves. It nuh kill, right? The other gun lick off ya head...the revolution is a mechanical thing you know - they've planned it...revolution is not planned. It just happens and you can see it going on around you...not like the Cuban revolution - the whole universe is involved in this revolution.¹⁵⁸

Marley, uncomfortable with his fame, considered himself a messenger of Jah and here on Earth to do Jah's work. That work included what critical race scholars would term "deconstruction."

In order to deconstruct, both reggae musicians and critical race scholars need to have a grasp of the past. Just as Rastas look to the history of colonial

¹⁵⁸ Ian McCann, *Bob Marley: In His Own Words* (London: Omnibus Press, 1993), 39-41.

control, critical race scholars look to the roots of slavery and discrimination. In John O. Calmore's poignant essay on fire music and critical theory, he writes:

It [critical race theory] is concerned with redressing conditions of oppression and subordination which exist beyond their narrow translation into judicially recognizable claims and relief. Historical discrimination and its legacy merge more definitively and symbiotically with the present to provide the temporal context. While not abandoning a faith in rights strategy, Critical Race Theory recognizes that such strategy cannot be divorced from the larger economics and politics of things. It recognizes that whatever the specific issues of legal cases and controversies may be, the overriding issues of social justice and institutional legitimacy always lurk nearby.¹⁵⁹

Rastas recognize the need to explain their history. "Don't forget your history, know your destiny," Marley sang in 1976.¹⁶⁰ Affected by the teachings of Dr. Walter Rodney – a Guyanese born historian who traveled the Caribbean teaching "the people" how Europe underdeveloped Africa – Rastas deconstructed, with the help of Rodney, the racist assumptions that plague world history. Rodney wrote, "the regime has been forced into carrying out a crude manipulation of the symbols of national black pride. Marcus Garvey and Paul Bogle were enshrined as 'National Heroes,' when the methods and achievements of these Black Liberators point the way ever more clearly toward Black Resistance today."¹⁶¹ Rodney's message, often used as a foundation piece by reggae musicians, draws the metaphor to critical race theory by connecting

¹⁵⁹ John O. Calmore, "Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World," in *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (New York: The New Press, 1995), 320.

¹⁶⁰ Bob Marley and the Wailers, "Rat Race," *Rastaman Vibration* (New York: Island Records, 1976).

¹⁶¹ Walter Rodney, *The Groundings with my Brothers* (London: Bogle-L'Ouverture Publications, 1969), 12.

the motif that historical inequities have existed yet institutional legitimacy remains a major theme.

The Chorus: A Reggae Republic¹⁶²

In April of 1980, Bob Marley received a distinction that catapulted him to honor within the world community. Marley was invited to headline at the independence celebration in Zimbabwe as it gained independence from Britain and shed the name Rhodesia. When soldiers of the revolutionary struggle learned of Marley's concert, they broke down gates to hear and witness their idol.¹⁶³ Marley's message had been clear and powerful many times before. But it was here that the reggae republic – the reconstruction with regard to race – truly began. Marley sang in front of a defeated Prince Charles:

Every man got a right
To decide his own destiny
An in this judgment
There is no partiality
So arms in arms, with arms
We will fight this little struggle
'Cause that's the only way
We can overcome our little trouble¹⁶⁴

Those that witnessed Marley's performance claim that the evening was magical.

A man, Marley, born to a Black mother from a White father, returned to Africa to construct a societal discourse based on new, oppositionist accounts of race.

¹⁶² This idea has been adopted from Beyer's piece. By republic, I am referring to a political community where both the needs of the individual and the needs of the community are balanced for the greatest good.

¹⁶³ Roger Steffens, "Bob Marley: Rasta Warrior," in *Chanting Down Babylon: The Rastafari Reader* eds. Nathaniel Samuel Murrell, William David Spencer, and Adrian Anthony McFarlane (Philadelphia; Temple University Press, 1998), 262

¹⁶⁴ Bob Marley and the Wailers, "Zimbabwe," *Survival* (New York: Island Records, 1979).

Critical race theory deconstructs existing social norms and reconstructs a new foundation: the reggae republic. Critical race scholarship is not neutral or objective. The legal scholarship about race has been neutral which has led to debates where race is not considered. Critical race scholarship notes that legal scholarship cannot be written objectively or with detachment.¹⁶⁵ Understanding that race is constructed through legal power, legal scholarship about race is best understood through reconstruction. Just as reggae addresses racial power and the foundations of race, so to does critical race scholarship. There is no position outside of the discourse of racial power from which one can view race. Race must be an immersable activity. Both critical race scholarship and reggae musicians grasp that importance.

Professor Beyer claims that no objective discourse on race exists because conversations involving race inevitably include political positions.¹⁶⁶ One need only look to critical race scholarship regarding color-blind standards in education and employment. Viewing color-blind standards as an actual bias toward reinforcing the status quo concerning racial power, critical race theorists advocate that such political positions simply mask racial identity through a false neutrality. Rastas, with their disenchantment with politricks, reconstruct a new

¹⁶⁵ Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (New York: The New Press, 1995), xiii.

¹⁶⁶ Beyer, "The Second Line," 546.

racial identity through race consciousness and radical political reform. Dr.

Walter Rodney connects reggae's message and critical race theory:

The white world defines who is white, and who is black. In the U.S.A. if one is not white, then one is black; in Britain, if one is not white then one is coloured; in South Africa, one can be white, coloured or black depending upon how white people classify you. Actually I've found out that a lot of whites literally cannot tell one black from another. Partly this may be due to the fact that they do not personally know many black people, but it reflects a psychological tendency to deny our individuality by refusing to consider us as individual human beings...there is nothing with which poverty coincides so absolutely as with the colour black - small or large population, hot or cold climates, rich or poor in natural resources - poverty cuts across all of these factors in order to find black people. That association of wealth with whites and poverty with blacks is not accidental. It is the nature of the imperialist relationship that enriches the metropolis at the expense of the colony.¹⁶⁷

Race consciousness, while not a new idea, is revolutionary because it has been considered taboo by many in mainstream politics. Malcolm X understood the need for a new interpretation. He wrote, "the old interpretation excluded us. It kept us out."¹⁶⁸ Mutabaruka, a reggae musician, Rasta philosopher, and Jamaican radio personality, exemplifies reggae's connection to critical race theory in his 1991 album "Blakk wi Blak...k...k..."¹⁶⁹ Asserting race as integral to the struggle, is both in the style of reggae and critical race scholarship.

Critical race scholarship notes that race has traditionally been understood through an integrationist lens. The conventional result has been defining racial oppression through prejudice and stereotyping based on skin color, and

¹⁶⁷ Rodney, *The Groundings*, 16-19.

¹⁶⁸ Gary Peller, "Race-Consciousness," in *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (New York: The New Press, 1995), 127.

¹⁶⁹ Mutabaruka, *Blakk wi blak...k...k...* (Kingston, Jamaica: Shanachie Records, 1991).

identifying progress by the transcendence of racial consciousness.¹⁷⁰ Reggae and critical race scholarships reconstruct. The process of racial designation has not been simply a linear one. Promoting it as linear implies racial equality as both a goal and inevitable. However, viewing integration as such, implies it as the only solution. Reggae and critical race scholarship redefines the boundaries of race and racism. There is a simultaneous treatment by critical race scholarship and Rastas to treat people as both individuals as well as by racially grouped identification.

The solution to discrimination, according to traditional thought, is equal treatment through neutral norms. Yet, once neutrality replaced discrimination, equal opportunity would follow. Peter Tosh would term such logic as “foolish, part of the Babylon shitstem.” The integrationist would argue that race is inconsequential except as an unfortunate historical occurrence. However, disregarding race is irrational and neither reconstructive nor deconstructive; it simply maintains the status quo. Professor Patricia Williams, in *Seeing a Color-Blind Future*, writes:

Race is not a cipher for the whole of life. When I speak of race, you must bear in mind that this is not the same thing as saying that race explains everything. Race does not explain all forms of misfortune any more than it explains the color of one’s socks. Yet conversations about race so quickly devolve into anxious bouts of wondering why we are not talking about something – anything else, like hard work or personal responsibility or birth order or class or God or the good old glories of the human spirit.

¹⁷⁰ Peller, “Race-Consciousness,” 127.

All these are worthy topics of conversation, surely, but ... can we consider, for just one moment, *race*.¹⁷¹

The confounding problem is that race is a legally constructed norm.

Race is neither an essence nor an illusion, but rather a continuous, contradictory, self-reinforcing, plastic process subject to the macro forces of social and political struggle and the micro effects of daily decisions.¹⁷² It is human interaction that has defined race, not biological differentiation. Racial meanings arise from a social forces, legal in this sense, creating the racial classifications. While I am not positing that all Rastas or reggae musicians view race in the same complex legal terms that Professor Haney Lopez¹⁷³ does, the music shows that they view race as a construct of law. This construct is what they appear to be reconstructing.

Attempting to understand race from a biological standpoint is illusory. Yet, when one looks at race through the lens of a socio-legal microscope, race becomes better understood. Rastas note that race has been a point used to contest their past enslavement. Once such abhorrent treatment is recognized, the inverse seems to be the traditional argument; arguing that equality is based upon race becoming indistinguishable. Critical race scholarship, along with reggae musicians, argues that race must be embraced; it simply must be embraced from

¹⁷¹ Patricia J. Williams, *Seeing a Color-Blind Future: The Paradox of Race* (New York: The Noonday Press, 1997), 63.

¹⁷² Ian F. Haney Lopez, "The Social Construction of Race," in *Critical Race Theory: The Cutting Edge*, ed. Richard Delgado (Philadelphia: Temple University Press, 1995), 193.

¹⁷³ *Ibid.*, 196. Due to the infancy of this study, it is impossible to determine if Rastas and self-pronounced critical race scholars both understand race in the same academic/scholarly ways. However, it is my attempt to draw comparisons and avoid judging gradations of knowledge.

a different standpoint. The invocation of leaders like Malcolm X in reggae music exemplifies the reconstructionist components. During the civil rights struggle in the 1950s and 1960s, Malcolm X spoke on the concept of segregated schools. His ingenious remarks, certainly one of a critical race theorist, addressed the heart of race in America. He summarized the integrationist argument to claim that as long as whites were in schools with blacks, then the black children would receive better a education, simply due to the white presence.¹⁷⁴ Malcolm X analyzed, dissected, deconstructed, and reconstructed. He proposed all-Black schools, staffed with “the type of teacher who has our good at heart.”¹⁷⁵ Critical race scholarship draws upon this notion and so does reggae music.

During the 1960s in Jamaica, color and race were debated. With the election turmoil of the 1970s beginning to fester and PNP leader Michael Manley visiting Ethiopia, race consciousness was at the forefront of national discourse. Rastafarians effectively used their condition (race and class) to dramatize their disagreement with Jamaican politicians.¹⁷⁶ The tone of the demands was rooted in the spirit of the Black Power Movement:

‘In Jamaica true Black power does not attack white as white, brown as brown. All men are equal. The attack is on white, brown or black as oppressing Afro-Jamaican and as an oppressive and social class.’ This position is extremely close to mainstream Rastafarianism.¹⁷⁷

¹⁷⁴ Peller, “Race-Consciousness,” 128.

¹⁷⁵ *Ibid.*, 128.

¹⁷⁶ Keith and Keith, *The Social Origins*, 202.

¹⁷⁷ *Ibid.*, 203. It is worth noting that Rastafarians do not refer, and explicitly deny the reference, that their religion is an “ism.” They view Rasta as reality and “isms” as man-made creations.

The Rasta philosophy follows critical race scholarship. For both, race is a legally constructed norm that has assisted in oppressing Blacks throughout the world. Recognizing race, embracing it, is a both reggae and critical race scholarship.

One of critical race theories' cornerstones is its incorporation of personal narratives into the scholarship. Reggae music uses the same such narratives.

Culture, one of Marley's favorite new bands in the 1970s, sang:

Oh, what a happenin'
Pain on the slaveship
We have been robbed of our
Even my sister has been stripped
Still rest on my heart
Can you imagine the way the people felt
Travelling from home to Jamaica...
After a hard days labor, they took my neighbor
Place him down his knees, hear me now
And then the slavemaster climb on his back,
And mount onto his horse
That burns into my soul.¹⁷⁸

The crux of the message is the result of race as a legal construct, in this case, slavery. Derrick Bell, one of the founders of critical race theory, incorporates narrative into his work and like Rastas, introduces the chord of race consciousness.¹⁷⁹

Many mainstream critics dismissed black jazz as nonmusical. Various complaints have been lodged against critical race theory as unscholarly.¹⁸⁰

However, just as black jazz and reggae music do not follow conventional tones

¹⁷⁸ Culture, "Still Rest My Heart," *Three Sides to My Story* (Kingston, Jamaica: Shanachie Records, 1991).

¹⁷⁹ Beyer, "The Second Line," 547.

¹⁸⁰ *Ibid.*, 547 (citing Mark Tushnet's criticisms of narrative scholars such as Patricia Williams).

and meters, and critical race theorists do not follow traditional academic paths, it is the revolutionary nature that is intriguing, similar, and worthy of study. The metaphor of reggae captures the resistance movement within critical race theory. Critical race theorists have created a reggae republic.

Liner Notes: Conclusion

The first verse of critical race theory is the revolutionary tone with which the theorists describe the past. Giving a history of race unlike contemporary scholars, critical race scholars use the history as their weapon. The death of racism in law that jazz music envisioned has been assisted by reggae artists. The oppositional aims of the Rastafarians have changed the legal and political discourse on law and music. Deconstruction was the answer.

The second verse of critical race theory involves the continuous deconstruction coupled with new reconstructive efforts. From the narrative approaches, critical race scholarship has created a republic: the reggae republic. The republic consists of race conscious scholars and musicians who have expanded the metaphor in order to bring about significant and meaningful change. The rules, which have been social constructs, are not followed by critical race theorists. This, by no means, makes the work less scholarly, simply more unsettling to the status quo.

The reggae metaphor in critical race theory reflects the revolutionary aspect of both genres. The music teaches us the communal aspect of meaning-

making, a notion that legal thinking should take into account.¹⁸¹ Music becomes the truth – truths about culture, law, tolerance, belonging – race.¹⁸² Reggae music, like critical race theory becomes the protector, not simply of rights, but of legal consciousness, specifically with regard to race. Critical race theorists absorb societal variables and develop a legal theory from the culture. Reggae musicians absorb societal norms and comment on them. They both incorporate society's inequalities and give poignant criticism of the imbalance. I have argued, cursorily, that the incorporation by reggae musicians is in fact an aspect of critical race theory. Ziggy Marley, following in the footsteps of his famous father, sings:

From the slaveship to the chain
From the taskmaster's whip to my brain
Kidnapped and slaved, raped and killed
By the lynch Klan again and again.
Now I know you don't care about me.
I'm just a nigger walking down the street
Code of silence is there
Yet your actions speak so loud and clear.
Diallo's killer is going free
Paid by society.
Now I know you don't care about me.
...Amadou Diallo they killed him for nothing
No crime he did not do.
And just like him they suffer for no crime they did not do.
Amadou Diallo, Amadou Diallo, reggae music knows your name.¹⁸³

¹⁸¹ Desmond Manderson and David Claudill, "Music and Legal Theory: An Interdisciplinary Workshop Introduction," *Cardozo Law Review* (May-July 1999, 1328).

¹⁸² *Ibid.*

¹⁸³ Ziggy Marley and the Melody Makers, "I Know You Don't Care About Me," *Live Vol. I* (New York: Elektra Entertainment Group Inc., 2000).

Marley's message here is one that critical race scholarship should be aware of. Marley seems to be arguing that once reggae becomes part of the equation, change occurs. Waling to the spirit of Amadou Diallo, the unarmed black man shot 41 times on his doorstep in New York City, the song seems to embody an effort by Marley to calm Diallo (in spirit) and society that his death shall not be in vain. It is a form of reconstruction.

Reggae music is legal revolution, as is critical race theory. Both refuse to continue the cycle of traditional discourse on race. Race, understood as a legal construct, can be reassessed and through that assessment, education based on new definitions of race are introduced. In 1979, Bob Marley sang of the concept of race in one of his most rebellious songs before his passing in 1981. He wailed:

We refuse to be
What you wanted us to be
We are what we are
That's the way it's going to be.
You can't educate I
For no equal opportunity
Talking about my freedom
People's freedom and liberty.¹⁸⁴

Critical race theory can do more than speak in narratives, it can sing.¹⁸⁵

¹⁸⁴ Bob Marley, "Babylon System," *Survival* (New York: Island Records, 1979).

¹⁸⁵ This theme has been taken from a symposium held in 1998 at the Benjamin N. Cardozo Law School.

CHAPTER V

CHANTING FOR RECOGNITION: FEMINIST LEGAL THEORY AND THE PERFORMANCE OF LAW

If ever I would stop thinking about music and politics...
I would tell you that sometimes I use sex to avoid communication
It's the best escape when we're down on our luck
But I can express more emotions than laughter, anger and let's fuck...
I would tell you that the personal revolution is far more difficult
And is the first step in any revolution, I would tell you that music is the
Expression of emotion and that politics is merely the decoy of perception.
- Michael Franti¹⁸⁶

In 1974, when disco was gaining strength in the United States, Vietnam was coming to a close, and the oil crisis was building momentum, Gil Scott-Heron, writer, poet, composer, pianist, and activist, penned his most memorable musical piece: *The Revolution Will Not Be Televised*. Scott-Heron, armed with a master's degree in creative writing from Johns Hopkins University, gave a voice to the voiceless. His message was to remind both blacks and whites that change was inevitable. To blacks, Scott-Heron wanted to convey - through black popular music - recognition of the work yet to be done on behalf of civil rights. Furthermore, Scott-Heron hoped to instigate change. Against whites, he wanted to make an attack that was articulate, uncompromising, and enraged. If society saw that patience was not an option, change would be possible. Scott-Heron finished his famous tune:

The revolution will not be televised, will not be televised,
will not be televised, will not be televised.

¹⁸⁶ The Disposable Heroes of Hiphoprisy, "Music and Politics," *Hypocrisy is the Greatest Luxury* (New York: Islands Records, 1992).

The revolution will be no re-run brothers;
The revolution will be live.¹⁸⁷

In the shadow of Scott-Heron's work, various musical artists have continued sending messages regarding the inconsistencies and injustices in the United States, specifically within the sociolegal system. Music from The Clash in the 1980s regarding racial unity, the emergence of Hip hop in the 1990s and N.W.A.'s critique of the role of police in the inner cities have each contributed linearly to the continuing spectrum of music and the role music has in disseminating a political message. More importantly, however, each has contributed to the public political discourse in the U.S. The product of a democratic society which stresses dissent is a continued discussion on controversial topics. Within the genre of music, specifically Hip hop, much of that discussion focuses the objectification of women by predominantly male artists. The objectification, both subtle and overt, is only part of the issue. The larger question raised is to what extent does the law participate in reinforcing the misogynistic attitudes of society. I intend to explore that question through the lens of a constitutive theorist, with specific attention paid to the work of both male and female artists. Throughout, I will draw on feminist legal theorist for my perspective as well as those more "classically" misogynistic in their portrayal of women.

¹⁸⁷ Gil Scott-Heron, *The Revolution Will Not Be Televised* (New York: RCA Records, 1974).

I propose to study the connection between law and music, with particular focus on music that is both politically motivated and politically expressive. In their language, performance, social practice, and cultural achievement, law and music have intriguing commonalities. However, unlike judges following precedent and creating common law or legislators writing codes and enacting law, musicians develop a theory of justice by creating an art form that responds to traditional jurisprudence. The musicians' rejoinders fall under the rubric of what Constitutive Theorists deem "constituting law." Professor Patricia Williams views "the law as a history of subtle narratives" and I intend to connect law's narrative to lyrics designed to address the law's shortcomings.¹⁸⁸ I intend to argue that when musicians create such art, they are in fact, constituting law, and in doing so, assembling a non-traditional form of jurisprudence.

Law and culture are constantly interrelated. Culture can include collective identity, race, lifestyle, and rituals. Law is often viewed formally with constitutions, statutes, and judicial opinions dominating the discourse. Separating law and culture produces a failed account of societal structure. The constitutive approach that will be the cornerstone of this project allows for law and culture to be connected and for law to be interpreted in cultural terms. The work of numerous constitutive theorists will lay the foundation for this piece and

¹⁸⁸ Patricia Williams interview with Cornel West, *Restoring Hope: Conversations on the Future of Black America*, ed. Kevin Shawn Sealey (Boston: Beacon Press, 1997), 149.

its perspective that musicians, being a part of culture, act in a fashion that is “extra-legal.” The constitutive approach allows for a study that addresses the role that music plays within society, audibly and lyrically. As well, the constituting of law by these musicians gives us a unique perspective into the non-traditional jurisprudence that I intend to outline. An interesting implication is that lawyers and judges may dominate the legal system but musicians have popular culture for their platform. This may be a more persuasive podium to argue from and I hope to demonstrate the manner in which the musicians perform law.

Most notably with both classic and contemporary music and scholarship, I will address the grand theme of women as property and will specifically look at music that either exemplifies the struggle that women endure in sociolegal circles or the more misogynistic lyrics that define women as objects. Here I hope to show that musicians are both responding to law and creating non-traditional jurisprudence. This work should demonstrate the politics of music within a gender discussion.

My Revolution

A great deal of the constitutive approach regards law’s ability to effect social change. Historical reliance on the law to remedy the ills of the past has perpetuated the myth that legal change equals societal equity. While there are various examples of law acting as an answer to past injustices, a great deal of scholarship demonstrates how law reinforces inequity. For purposes of this

study, I am concerned with how law remains patriarchal and what impact that patriarchy has upon social gains for women, specifically within the realm of music.

Janet Rifkin's 1980 piece for *Harvard Women's Law Journal*, sheds a great deal of light on the issue of law as a male standard. Rifkin works from the perspective that law is powerful as both a symbol and a vehicle of male authority.¹⁸⁹ The result is a male dominated ideology designed to not only block social change but to reify blatant misogyny. Thus, the likelihood of a revolution taking place to undo the system is slight. Individualism is not recognized. By that, I mean that law is a hegemonic ideology designed to "mask or distort social reality in the name of tradition."¹⁹⁰ "My" revolution is replaced with "no" revolution. It is here that I intend to explore law's patriarchy, with the help of Rifkin and various other feminist legal scholars.

In the last twenty-five years, women have begun to be accorded juridical equality with men. In addition, history has recognized the attention that deserves to be paid to the women's movements and the resulting change in legal status. However, the question remains: are women settling for too little, too late? Radical feminists have begun questioning a rights-based movement, wondering if it will improve conditions for women. Joan Hoff argues that most instances of legal change or improvement reflect the American past, not its future. She terms

¹⁸⁹ Janet Rifkin, "Toward a Theory of Law and Patriarchy," in *Feminist Legal Theory: Foundations*, ed. D. Kelly Weisberg (Philadelphia: Temple University Press, 1993), 412.

¹⁹⁰ *Ibid.*, 413.

this lag-time phenomenon the “broken-barometer” theory of historical legal interpretation.¹⁹¹ This term reflects both the continued domination of the male standard in this discourse, as well as the acceptance of change when the change continues to allow for male sociolegal domination. The suffragist movement of the early twentieth century demonstrates this argument. Framed not by objective conditions of female oppression, suffragist protest rationalized the continuation of the status quo. The suffragist, in not challenging the ideology of law which supported the subjugation of women, perpetuated mystifications which supported the status quo.¹⁹² The result is the blending of social custom and legal ideology. The continuance of male domination in legal discourse stifles individuation and decreases the chance of a women calling for “my” revolution.

When the U.S. Supreme Court heard the case *Muller v. Oregon*¹⁹³ in 1908, its decision exemplified differing treatment for men and women. Charged with deciding whether women should be restricted by maximum working hour legislation, the Court reasoned that it must protect “her” health, as well as stave off the “greed and passion of man.” As such, maximum working hour legislation was necessary – but for women only. Legislating this action was beneficial to both the woman and to the human race. While the Court recognized the women’s “right” to work, the male dominated system was reinforced. Simply stated: women are in need of greater protection than men.

¹⁹¹ Joan Huff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York University Press, 1991), 3.

¹⁹² Rifkin, 413.

¹⁹³ *Muller v. Oregon* 208 U.S. 412 (1908).

The result has not only been a male dominated workforce but a male standard for society.

This male standard has been reinforced by constitutive lawmakers in music as well. Aretha Franklin, speaking to millions of women young and old, tells the tale of a man saving her from misery and unhappiness. She bellows:

...I used to feel uninspired...
Before the day I met you, life was so unkind
But your love was the key to peace my mind
Cause you make me feel, you make me feel, you make me feel like
A natural woman
When my soul was in the lost-and-found
You came along to claim it
I didn't know just what was wrong with me
Till your kiss helped me name it
Now I'm no longer doubtful of what I'm living for
Cause if I make you happy I don't need no more.¹⁹⁴

Franklin's tune, a song that many listen to without pondering its deeper issue, sings that the man helped her figure out what was "wrong" with her. She continues to sing that as long as the man is happy, there is no doubt as to what she is living for. This language is similar to the Court's language in 1908 arguing that women are in need of greater protection. Both *Muller* and Franklin reinforce the ideology of the patriarchy of law existing in both traditional legal circles (courts) and constitutive legal circles (music).

Much of U.S. sociolegal history has hinged on the notion that the Supreme Court acts as an agent of social change. A table of cases argues the contrary as do

¹⁹⁴ Aretha Franklin, "Natural Woman," *Aretha Franklin: 30 Greatest Hits* (New York: Atlantic Records, 1967).

many fields critical of the Court's ability or belief in effecting social change.¹⁹⁵

Leslie Friedman Goldstein claims that the Court has slowly evolved into a more pro-feminist Court and that their language and decisions have reinforced that claim.¹⁹⁶ While Goldstein notes "that the Supreme Court's institutional independence from the electorate enables it to play a role of moral leadership,"¹⁹⁷ she fails to recognize the damage that misogynistic language and decisions has upon society. Certainly cases that support and strengthen the constitutional rights of women are valuable, but pronouncements such as *Bradwell* and *Muller*, even if over one hundred years old, remain influential in establishing the foundation of the patriarchy of law. If one buys Goldstein's argument that the Court can play a moral leadership role, then one must also accept that cases where women remain subjugated contribute to the degradation of the gender.

Goldstein remains patient with the Court, arguing that it must balance its institutional role with its place in a democracy. That language, as I will later demonstrate using contemporary musical examples, contributes to the wide acceptance of either incremental change or stagnation. Meanwhile, Rifkin's work recognizes how the legal battles create anger and dissatisfaction, which is instrumental in weakening the patriarchy of law. Yet, when law responds to a particular inequity with claims of rights and precedents, public consciousness is

¹⁹⁵ See scholarship on Critical Race Theory, Feminist Legal Theory, Critical Legal Studies, and Constitutive Theorists. In addition, see cases *Bradwell v. Illinois*, *Muller v. Oregon*, *Rust v. Sullivan*, *Michael M. v. Sonoma County*, and *Cleveland v. LaFleur*.

¹⁹⁶ Leslie Friedman Goldstein, *The Constitutional Rights of Women: Cases in Law and Social Change* (New York: Longman Inc., 1979), 366.

¹⁹⁷ *Ibid.*

diverted from the issues as well as the root of the anger.¹⁹⁸ The revolution remains stifled.

Rifkin gives a historical account of the rise of capitalism and how it rested upon excluding women. The rise of capitalism changed the nature of the workplace. Family changed and the role of women changed with it. By reverting to pre-existing masculine authority, explicit subordination of women took greater hold. Men increasingly excluded women from the workplace, relegating them to the private world of the home. What feminist legal scholars term “the private-public split” was born here. Laws and customs followed, putting wives under the power of their husbands. Law emerged as a symbol of patriarchal power. Socially constructing the manner in which women were subordinated, law put capital interests above gender equity. Recent litigation has merely been exceptional in the paradigm of male-dominant power. As Rifkin concludes, “The struggle for sexual equality can be successful only if it challenges, rather than reifies, the male paradigm of law.”¹⁹⁹ Yet, a great deal of the music, reaching millions in the United States, only further embraces the words of Justice Bradley in *Bradwell*.²⁰⁰ According to the majority Court, there

¹⁹⁸ Rifkin, 414.

¹⁹⁹ *Ibid.*, 417.

²⁰⁰ *Bradwell v. Illinois* 83 U.S. 130 (1873), 141-142. “Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life....The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband....The paramount destiny of and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society should be adapted to the general constitution of things, and cannot be based upon exceptional cases.”

may be intelligent women, but generalizations should be made based on the bulk of women who must be quartered. The public-private sphere issue remains integral to this discussion.

In the midst of the 1987 bicentennial celebration of the U.S. Constitution, “We the People” echoed at most celebrations. One isolated voice, that of Texas congresswoman Barbara Jordan could be heard saying, “as grand as it sounds, it is not true.”²⁰¹ Justice Thurgood Marshall noted at a bicentennial address that the U.S. Constitution was “defective from the start” and that only various amendments could transform it into a document worthy of respecting individual freedoms and human rights. Both Jordan and Marshall recognized the masculinity of the U.S. Constitution. Yet, claims of equality continue to resonate. Critics of feminist legal scholarship argue that equality is the dominant paradigm and that change has come in both juridical and legislative form. This subject recalls George Orwell’s *Animal Farm* in which all the animals were declared to be equal, but some, specifically the pigs, were more equal than all the others. Constitutional gender equality is viewed in the same manner. That is, men and women are deemed equal by the Constitution yet law continues to allow for systemic misogyny. The quality of women’s lives has always been compared to the accolades of the private lives. The job of wife and mother has barometers in place designed to allow for judgment. Only recently have public endeavors begun to play a role in addressing the quality of women’s lives. Common law

²⁰¹ Huff, 21.

and modern case-law precedent have not only kept middle-class women in their private spheres, but it has forced poor women into the public sphere.²⁰² The private is thus political.

In the 1830s, when Alexis de Tocqueville came to America to study democracy, he witnessed, and later wrote, on the role of women. In discussing how women viewed male authority, de Tocqueville observed that they did not feel that their submission to men was degrading. He wrote:

It appeared to me, on the contrary, that they (women) attach a sort of pride to the voluntary surrender of their own will, and make it their boast to bend themselves to the yoke – not to shake it off... Thus, then, whilst they (men) have allowed the social inferiority of women to subsist, they have done all they could to raise her morally and intellectually to the level of man.²⁰³

De Tocqueville did not question *why* so many women were “silent” and seemed to imply that the subordination was voluntary. Overt sexual inequality concerning women’s self-sacrificing roles within marriage and family still resonates within sociolegal circles.

Your Revolution

In 1999, the FCC fined KBOO-FM in Portland, Oregon \$7000 for broadcasting the song *Your Revolution* by poet-performer Sarah Jones. *Your Revolution* was a response by Jones to the misogynistic lyrics and messages of much of contemporary Hip hop. An avid Hip hop admirer, Jones wanted to make others aware of the detriment that such sexist overtones have on society.

²⁰² Ibid., 36.

²⁰³ Ibid., 37.

The uniqueness of Jones' song was that she incorporated the very lyrics of many of the male Hip hop artists. Yet, those male artists are not fined by the FCC while Jones, a woman, was. This action by the FCC reinforces law's acceptance of misogyny as well as perpetuates the public-private sphere outlined in *Bradwell* and *Muller*.

Jones dedicated *Your Revolution* to all of the women and men struggling in the climate of misogyny, money-worship, and mass production of Hip hop's illegitimate child, "Hip-Pop." She especially wanted to dedicate the song to Gil Scott-Heron and his work on the Revolution. Jones wrote:

Your revolution will not happen between these thighs
Your revolution will not happen between these thighs
Your revolution will not happen between these thighs
Will not happen between these thighs
Will not happen between these thighs
The real revolution ain't about bootie size
The Versaces you buys
Or the Lexus you drives
And though we've lost Biggie Smalls
Maybe your notorious revolution
Will never allow you to lace no lyrical douche in my bush
Your revolution will not be you killing me softly with
Fujees
Your revolution ain't gonna knock me up without no ring
And produce little future M.C.'s
Because that revolution will not happen between these thighs
Your revolution will not find me in the back seat of a jeep
With L.L. hard as hell, you know
Doing it and doing and doing it well, you know
Doing it and doing it and doing it well
Your revolution will not be you smacking it up, flipping it
or rubbing it down
Nor will it take you downtown, or humping around
Because that revolution will not happen between these thighs
Your revolution will not have me singing

Ain't no nigger like the one I got
Your revolution will not be you sending me for no drip drip
V.D. shot
Your revolution will not involve me or feeling your nature
rise
Or having you fantasize
Because that revolution will not happen between these thighs
No no not between these thighs
Uh-uh
My Jamaican brother
Your revolution will not make you feel bombastic, and really
fantastic
And have you groping in the dark for that rubber wrapped in
plastic
Uh-uh
You will not be touching your lips to my triple dip of
French vanilla, butter pecan, chocolate deluxe
Or having Akinyele's dream, um hum
A six foot blow job machine, um hum
You wanna subjugate your Queen, uh-huh
Think I'm gonna put it in my mouth just because you
Made a few bucks,
Please brother please
Your revolution will not be me tossing my weave
And making me believe I'm some caviar eating ghetto
Mafia clown
Or me giving up my behind
Just so I can get signed
And maybe have somebody else write my rhymes
I'm Sarah Jones
Not Foxy Brown
You know I'm Sarah Jones
Not Foxy Brown
Your revolution makes me wonder
Where could we go
If we could drop the empty pursuit of props and the ego
We'd revolt back to our roots
Use a little common sense on a quest to make love
De la soul, no pretense, but
Your revolution will not be you flexing your little sex and
status
To express what you feel
Your revolution will not happen between these thighs

Will not happen between these thighs
Will not be you shaking
And me, [sigh] faking between these thighs
Because the real revolution
That's right, I said the real revolution
You know, I'm talking about the revolution
When it comes,
It's gonna be real
It's gonna be real
It's gonna be real
When it finally comes
It's gonna be real²⁰⁴

In order to understand some of Jones' comments, it is necessary to set the context of her song as a response to the artists she mentions.

During the 1980s, when Reaganomics cut the funding to after-school programs, many in the cities had no where to go and nothing in hand to entertain themselves. People then grabbed two turntables and a microphone and explored dance, visual art, and graffiti; all of which created the culture behind Hip hop. Hip hop emerged to discuss, musically, social alienation and prophetic imagination. It is an Afro-diasporic cultural form which attempts to negotiate the experiences of marginalization, brutally truncated opportunity, and oppression within the cultural imperatives of African-American and Caribbean history, identity, and community.²⁰⁵ Hip hop stems from the tension between the postindustrial oppression and the history of black cultural expressiveness. Hip hop recreates the experiences of urban life and appropriates through music

²⁰⁴ <http://www.sarahjonesonline.com>

²⁰⁵ Tricia Rose, "A Style Nobody Can Deal With," in *Microphone Friends: Youth Music and Youth Culture*, eds. Andrew Ross and Tricia Rose (New York: Routledge, 1994), 71.

and lyrics, the identity of surviving in the inner city. While Hip hop's expression has various forms, it is the misogyny that I am most concerned with here. I am not here to explain *how* Hip hop moved from a response to societal oppression to a contributor to it. Instead, I want to look at how Sarah Jones' song, a response to specific inequity within the way the *law* responds to gender issues, was banned and the banning acts as a contributor to societal oppression. This is not, nor could it be, a condemnation of Hip hop and its vitality and reality.

In *Your Revolution*, Jones is responding to corporate commodification of Hip hop by Viacom, MTV, and other capitalist entities. Not only did these corporations take over aspects of Hip hop, they marketed the music with great effort made towards supporting those artists that were either subtly or blatantly misogynistic. These messages are antithetical to what Hip hop was initially about: freedom and justice, with a groove. That commodification has transfused Hip hop to be about misogyny, materialism, and "bitches."²⁰⁶ Jones took lyrics that were being played on the radio by male Hip hop artists and recontextualized them. Her song is not simply a reaction to censorship but also attempts to draw the connection between corporations and the state in administering that censorship. Thus, the song and subsequent banning are examples of the law silencing the marginalized when they attempt to speak out against inequity.

²⁰⁶ A great deal of this discussion remains layered so the insertion of the word "bitch" connotes a great deal here. I use it to remind us that its use has become acceptable in both Hip hop music as well as societal dialogue. This acceptance symbolizes the embedded nature of both music on society as well as society on music. You can use a word that denigrates women but that is legal because women should not be offended by it, or so goes the argument.

Jones' song begins with echoes. The echo is an important reinforcement of the misogyny that society promulgates. The echo here is a narrative device used by Jones and begins the song's forceful statement. It reminds the listener of the double sense of space and pain. It sets the tone for the entire song, taking control back of the women's body – "the revolution will not happen between these thighs." Jones defines what the "real revolution" is about: it is not about the political economy of Hip hop. Hip-Pop, argues Jones, is destroying the roots of the music. Graffiti, breakdancing, and rap music are the central forms of Hip hop and relate most directly to the Afro-diasporic foundations. As Jones notes, the "Versaces you buy" does not invite the misogyny to continue. Recognizing the loss of the Notorious BIG, a pioneer in some sense for Hip hop artists, Jones affirms that his murder does not mean that the sociopolitical tenor of Hip hop's lyrics and music should shift to denigrating women.

Jones utilizes both the context and lyrics that the male artists use yet Jones' song is banned. She addresses LL Cool J, a Hip hop artist who is one of the early mainstream entertainers in the field.²⁰⁷ LL released a song entitled *Doin It* in 1995. In the song, LL describes the moment before he has sex with his girlfriend for the first time and how he is feeling "kinda horny." He goes on to rap that "the kitty cat's tight...here comes the man of steel."²⁰⁸ Set to a deep baseline, meant to be erotic and seductive, LL continues to discuss his ability to pleasure

²⁰⁷ LL Cool J stands for Ladies Love Cool James.

²⁰⁸ LL Cool J, "Doin It," *Mr. Smith* (New York: Def Jam Records, 1995).

his woman and finishes the tune by telling her to go to sleep and he will “take her back downtown tomorrow where they will be doin’ it and doin’ it and doin’ it well.” Jones responds to LL’s promise of servicing the community with a promise of her own:

Your revolution will not find me in the back seat of a jeep
With L.L. hard as hell, you know
Doing it and doing and doing it well, you know
Doing it and doing it and doing it well
Your revolution will not be you smacking it up, flipping it
or rubbing it down
Nor will it take you downtown, or humping around
Because that revolution will not happen between these thighs.²⁰⁹

Jones not only counters LL’s lyrics with lyrics of her own, but she uses LL’s specific words and beats in her tune. LL’s song receives airplay yet Jones’ tune is banned by the FCC.

Jones continues her dissection of contemporary music and moves to the artist known as Shaggy. Shaggy released a tune entitled *Boombastic* in 1995. In it, the artist who not only denigrates women but co-ops reggae music and Rastafarian culture, attempts to set a Hip-Hip and dancehall tone to his supposedly romantic lyrics. Shaggy describes what he will do with the women he is singing to. He sings:

Give me your digits jot down your address
I'll bet you confess when you put me to the test
That I'm Boombastic tell me fantastic touch me on me back she says I'm
Mr. Ro...o...mantic²¹⁰

²⁰⁹ <http://www.sarahjonesonline.com>

²¹⁰ Shaggy, “Boombastic,” *Boombastic* (New York: Virgin Records, 1995).

Jones' response is quick but she again uses both Shaggy's beat, mimicking his "fakin' Jamaican" (one of the reasons he is berated for his co-opting of Jamaican culture), as well as his precise lyrics. She writes:

My Jamaican brother
Your revolution will not make you feel bombastic, and really
fantastic
And have you groping in the dark for that rubber wrapped in
plastic.²¹¹

Again, Jones' song is banned while Shaggy receives airplay on MTV and radio and even network television.

Jones continues on with her barrage of attacks against the misogyny in Hip hop but ends with support for De La Soul, a Hip hop group vigorously creating politically provocative lyrics. De La Soul, Jones notes, is more of an expansive expression of what Hip hop's entails. Jones' praise of De La Soul signifies her recognition of the vitality that Hip hop provides the urban community. My issue rests more on the reaction by the system to the misogyny than the misogyny itself. Tricia Rose, noted scholar of Hip Hop views Rap and Hip hop as stories that attempt to articulate the shifting terms of black marginality in the contemporary American culture that argues for the end to affirmative action. Rose notes:

Rap's contradictory articulations are not signs of absent intellectual clarity; they are a common feature of community and popular cultural dialogues that always offer more than one cultural, social, or political viewpoint. These unusually abundant polyvocal conversations seem irrational when

²¹¹ <http://sarahjonesonline.com>

they are severed from the social contexts where everyday struggles over resources, pleasure, and meanings take place.²¹²

It is not a condemnation of the content of the music but more, a condemnation of the silencing of women. Just as Justice Bradley attempted to silence women in *Bradwell*, the banning of Jones by the FCC is comparable.

In 1999, after Jones' song was played on a radio station in Portland, Oregon, the FCC banned the song and fined Jones \$7000. Arguing that the song could not be aired between 6:00 a.m. and 10:00 p.m. due to its "indecent language" and "likelihood that children would be listening, FCC Chairman Michael Powell, son of Secretary of State Colin Powell, fined the Oregon station. The notice stated that "the rap song *Your Revolution* contains unmistakably patently offensive sexual references...the sexual references appear to be designed to pander and shock." Jones defended her song and her message and began a bevy of interviews noting her point and use of precisely the same language that the high profile artists had used. The FCC continued in its stance and Jones countered with a lawsuit against the FCC arguing that her First Amendment rights were violated. Powell maintained that the FCC was correct in deeming the song offensive yet refused to keep the other songs that Jones mentioned in *Your Revolution* off the air. It appeared as if it was alright for male artists to sing about raping and abusing women, but it was not okay for female artists to answer those claims with voices of independence. Jones has continued to argue that the

²¹² Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* (Hanover, New Hampshire: Wesleyan University Press, 1994), 2.

various Hip hop artists that she mentions have contributed to the misogyny that society accepts. Her song allows the listener to actually hear the subtle and blatant degradation of women that exists within much of the genre. Jones' lyrics state that we don't have to allow this to be true - "the revolution will not happen between these thighs." Her statement is a performance against the law, against the very nature of the misogyny of law which accepts the male point of view. Just as the FCC creates law, and LL Cool J and Shaggy follow that standard, Jones too creates law as she performs her song which attacks the foundation of law itself. When she is silenced, we are reminded of Justice Bradley in *Bradwell*, "The paramount destiny of and mission of woman are to fulfill the noble and benign offices of wife and mother."²¹³ Jones deconstructs that notion and reconstructs a woman's role: your revolution.²¹⁴

The Revolution

A great deal of this project revolves around the move from music as political pronouncement to music as jurisprudence, and arguably to music as law. That assertion I make is exemplified in society's acceptance of misogynistic music and the FCC's banning of Sarah Jones' response to that misogyny. Yet, Jones' argument and the basis of her song goes beyond the specifics of the degradation of women and to the philosophy of law. Certainly I am not arguing that all law is misogynistic, but I do posit that law has not been revolutionary in

²¹³ *Bradwell v. Illinois* 83 U.S. 130 (1873), 141-142.

²¹⁴ On February 20, 2003, the FCC reversed its decision and rescinded the proposed fine. While this decision appears just, this case goes beyond a simple documentation of a serious issue. Instead, this exemplifies the continued nature of inequality within the law in regard to gender.

terms of social change for women. Thus, misogynistic musicians remain comfortable creating their music that continues to degrade women. In turn, society remains comfortable, and silent (as is the law), so the optimism for sociolegal change diminishes. The FCC decision reifies my argument. Normatively speaking, “the” revolution entails addressing the unjust foundations of law as they pertain to women.

Feminist legal theory has situated itself between theory and political change. The legal system must be understood broadly, as including the rules that constitute the formal body of law; the discourses in which those rules are situated, and through which they are articulated and elaborated.²¹⁵ The feminist legal scholar views the various legal actors as constitutive in maintaining the legal culture. Lawyers, clients, law enforcement officials, judges, jurors, arbitrators, mediators, social workers, legislators, bureaucrats, teachers, and students, all sustain the enterprise. Musicians, because of their unique role in society, belong in the discussion concerning legal actors. Thus, the feminist legal scholar must view their art as more than representative of society. Rather, musicians constitute law.

In 1995, Hip hop artist R.Kelly released an infectious tune that remains popular to most of the youth in Hip hop. Kelly’s song, *You Remind Me of Something*, tells the tale of a young man’s adoration for his “girl.” In an attempt

²¹⁵ Clare Dalton, “Where We Stand: Observations on the Situation of Feminist Legal Thought,” *Berkeley Women’s Law Journal*, March 1988, 2.

to lure the woman, Kelly attempts to contrast the woman with his Jeep. Kelly sings:

You remind me of my jeep, I wanna ride it
Something like my sound, I wanna pump it
Girl you look just like my cars, I wanna wax it
And something like my bank account
I wanna spend it, baby.²¹⁶

This tune is socially accepted in the hip hop community. Yet, just as *Bradwell* was accepted or Aretha Franklin's tune was viewed as "neutral," Kelly's tune is blatantly misogynistic. As political prisoner, journalist, and death row social commentator Mumia Abu Jamal writes from his jail cell, "a woman – a living being – reminds a man of a thing – a car."²¹⁷ Abu Jamal goes on to argue that this is more perverse than the much maligned "bitches and hos" comments. While this argument is poignant, it reminds us that we as legal actors are willing to accept a great deal of the subtle and overt misogyny. It is that acceptance that has made R.Kelly's song a hip hop household tune. But more importantly for this study, it is that acceptance that has continued to constitute the argument of supposed "neutral" gender jurisprudence, leaving little room for the revolution.

Susan Burgess addresses the idea of neutrality and its relation to the language of judicial restraint and judicial activism.²¹⁸ Citing numerous examples of socially accepted sexualized language regarding mainstream constitutional

²¹⁶ R. Kelly, "You Remind Me of Something," *R.Kelly* (New York: Jove Records, 1995).

²¹⁷ Mumia Abu Jamal, "A Rap Thing," *All Things Censored Volume I* (San Francisco: AK Press Audio, 1998).

²¹⁸ Susan Burgess, "Queer New Institutionalism," *The Supreme Court in American Politics: New Institutional Interpretations* (University of Kansas Press, 1999), 199-213.

theory, Burgess reminds us that no one has publicly discussed or deconstructed the openly sexualized terminology that seems as unselfconsciously accepted in mainstream constitutional theory as the judicial restraint/judicial activism binarism that it reproduces.²¹⁹ Burgess' analysis of binarism, while sharp, is not my sole concern here. Rather, her argument is invaluable to my assertion regarding neutrality and silence. Furthermore, action by the FCC in the case of Sarah Jones exemplifies the social acceptance of sexualized language as long as the speaker is male. When Powell fined Jones and the radio station for playing *Your Revolution*, he argued that the hip hop song "contains unmistakable patently offensive sexual references. . . . [T]he sexual references appear to be designed to pander and shock." This language used by the FCC is designed to appear neutral. It is an attempt to desexualize an issue replete with sexuality. Jones' song uses quotes of major hip hop artists yet the FCC is silent, arguing it is not an issue with patently offensive references. However, when Jones uses those same quotes in her music as a response to the misogyny, she is fined and in effect, silenced. The FCC argues that it is content based and not because Jones is a woman arguing against the established degradation of women. Yet, inherent in the FCC's argument is the notion of neutrality, reminiscent of Catherine MacKinnon's gender neutrality argument – a staple of feminist legal theory. Burgess intimates of the importance of this even if she uses Queer New Institutionalism as her analytic foundation.

²¹⁹ Ibid., 207.

Catharine A. MacKinnon's seminal work, *Toward a Feminist Theory of the State*, outlines both the connection between Sarah Jones and feminist legal theory as well as initiates her call for social change – revolution – in terms of law and society. MacKinnon's work on "difference and dominance" fits particularly well in the Sarah Jones discussion. MacKinnon argues that difference defines the state's approach to sex equality epistemologically and doctrinally.²²⁰ Just as critical race scholars argue that race, and particularly racism, is a social construction, the feminist legal scholar posits that sexism is a social and legal construction. Misogyny is reified by the law and women are pushed to accept traditional roles, which admonish independence. In turn, women who attempt to define themselves in terms "different" than the state has written into law remain compared to the male standard. In Jones' song, it is clear that her response, as well as her tone, is an attempt to take back that which the state (in this case the state is the male dominated hip hop industry and its misogynistic output) has taken from her. She combats the blatant degradation in commercial hip hop with a halting of the misogyny, if only for a moment. Jones' song contributes to the social doctrine which makes up the misogynistic jurisprudence Jones is hoping to end.²²¹

²²⁰ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 216.

²²¹ A young woman fan commented on Jones' song and what it meant to her, "Sometimes we listen but we don't actually hear. . . . Bringing out the famous rappers and their lyrics allowed me to see that they are viewing women as sex objects. Jones tells us women that we don't have to allow these lyrics to be true, because 'Your revolution will not happen between these thighs.'" Chisun Lee, "The Counter Revolution," *The Village Voice*, June 20-26, 2001.

MacKinnon asks a straightforward question designed to demonstrate the nature of jurisprudence in regards to women. She asks, "To test for gender neutrality, reverse the sexes and compare. To see if a woman was discriminated against on the basis of sex, ask whether a similarly situated man would be or was so treated."²²² MacKinnon's question, while intriguing, remains one centered around the male standard being the referent point. In addition, the basis of Jones' song is a response to the "complexity of male and female sexual narratives" and how they find their way into discussions of sexism and feminism in hip hop.²²³ Thus, to paraphrase MacKinnon using the Jones context, the FCC would argue (as it did) that the law is not inherently unequal in that Jones's song was offensive because of its content and not because of its source. The music is a response to law's inequity and the FCC's initial decision reinforces that inequality. Furthermore, law is constituted by the FCC reinforcing the gender inequity within hip hop. Yet beyond that, I posit that Jones helps constitute law with her response to hip hop's misogyny. Music is a communal activity of meaning-making and the value of the community is something the legal community should take into account.²²⁴

MacKinnon continues in the chapter that bears the similar title to her book, "Toward a Feminist Jurisprudence," with an approach that exemplifies the optimism and "revolutionary" jurisprudence that I equate with Jones.

²²² MacKinnon, *Toward a Feminist Theory of the State*, 217.

²²³ Rose, *Black Noise*, 147.

²²⁴ Desmond Manderson and David Claudill, "Modes of Law: Music and Legal Theory - An Interdisciplinary Workshop," *Cardozo Law Review*, May-July 1999, 1328.

MacKinnon writes, "a jurisprudence is a theory of the relation between life and law."²²⁵ The result in the United States is that "law has become legitimate and social dominance invisible."²²⁶ The FCC ruling was accepted in the very nature of its pronouncement. Society has given law legitimacy and ability to silence the already voiceless, specifically in an instance where the oppressed attempts to reconstruct a feminist jurisprudence. MacKinnon is helpful in this connection as she discusses rape. She notes that no law gives men the right to rape women. However, that is not necessary since the law's response to cases of rape remains inadequate in regards to women's safety. In addition the law's response reinforces social dominance, invisibly, to use the words of MacKinnon. For Jones, the FCC does not have a law that keeps women from using music to address gender inequity nor does it have a law that allows men to degrade women through misogynistic lyrics. Yet, as MacKinnon did in her seminal work, that the actions of the FCC exemplify the manner in which the male supremacist jurisprudence remains the standard between law and life. Law, from the male point of view, combines coercion with authority. This is identical to Jones' premise for making the song. Jones argued, "*Your Revolution* was a response to the cumulative reaction to all this music and culture that I was a part of, and that I love so much, but that was constantly calling me 'bitch' and 'ho' and I was lovingly critiquing something that you know is beautiful but flawed and can be

²²⁵ MacKinnon, *Toward a Feminist Theory of the State*, 237.

²²⁶ *Ibid.*

corrected. I just wanted to reply.”²²⁷ Jones is referring to the strength of hip hop and its social criticism of police, race, class, and various female artists who contest society’s sexual politics. In the same tone as MacKinnon’s work being a response to male jurisprudence, Jones’ song responds to female degradation in hip hop. In doing so, Jones constitutes a female jurisprudence that MacKinnon would be proud of: the revolution is toward a feminist jurisprudence.

The sexual politics of hip hop is a reflection of the sexual politics of society. “Women have to work twice as hard to get half the credit. Unfortunately, that’s just how it is for women in this society. Rap is no different. It’s fucked up,”²²⁸ argued Kid of the hip hop duo Kid-N-Play. Furthermore, the inequity in hip hop and society is directly related to the law. As music has remained the driving political catalyst in relation to social change, specific instances such as the Sarah Jones case reaffirm the above quote. However, problems arise for female rappers responding to male rapper sexism. While women such as Jones may directly criticize sexist male rap lyrics, many female rappers do not display complete opposition to the misogyny. Terms such as “respecting women” are more common than calls for a complete end to sexism. Rose argues that this is due to women rappers being acutely aware of the dominant discursive context within which their responses would be reproduced.²²⁹ This can be seen in the case of Sarah Jones. However, in the Jones case, the song was a direct and blatant attack

²²⁷ Interview with Sarah Jones by Cara Bedick of WMUA, Friday December 13, 2002.

²²⁸ Rose, *Black Noise*, 146.

²²⁹ *Ibid.*, 149.

on the specifics of misogyny that plagues aspects of hip hop. Jones was not supporting the sexual discourse in any way as opposed to what Yo-Yo or Salt 'N' Pepa have done in their music.²³⁰ The result is that both Jones and many like Yo-Yo or Salt 'N' Pepa are silenced – either by the law or by their misperceptions of gender inequity that have been built because of law's unequal pronouncements.

As I continue to argue, the forum for sociolegal change stems from music. Public performance provides a means by which women can occupy public space in ways that affirm the centrality of their voices.²³¹ But we are reminded that the basis of that affirmation is tainted by the inequity in society in regards to women. Thus, women who do voice their opposition to misogyny in hip hop are judged by the male from the male perspective. That base is rooted in the law and can be contested by reframing the discourse. As Tricia Rose writes:

Black women rappers have effectively changed the interpretive framework for the work of male rappers and have contested public sphere discourses, particularly those pertaining to race and gender. As women who challenge sexism expressed by male rappers, yet sustain dialogue with them, who reject the racially coded aesthetic hierarchies in American popular culture by privileging black female bodies, and who support black women's voices and history, black female rappers constitute an

²³⁰ Yo-Yo is a female rapper who sang a song with Ice Cube called "Don't Play with My Yo-Yo." The song features the notion that Yo-Yo is possessed by Ice Cube to protect her from enemies and various unwanted male advances. While Yo-Yo has been praised for her lyrics urging respect for women, her song with Ice Cube indicates the inconsistency associated with female rappers arguing for social and legal change. Yo-Yo, "Don't Play with My Yo-Yo," *Make Way for the Motherlode* (New York: East West, 1991). Salt 'N' Pepa, the female hip hop duo, recorded a song "Independent" in which the duo attacks a man whose weakness is his inability to provide material possessions. They then link masculinity and economic privilege. Both of these examples provide us with what Tricia Rose describes as the inability of female rappers to totally situate themselves in opposition to male rappers. It is this argument that increases the importance of the Jones case. Salt 'N' Pepa, "Independent," *Blacks' Magic* (New York: Next Plateau Records, 1990).

²³¹ Rose, *Black Noise*, 182.

important and resistive voice in rap and contemporary black women's cultural production in general.²³²

Equality will require change, not simply understanding history. A new jurisprudence is necessary; one in which women consent to law.

The case of Sarah Jones exemplifies the complex connection between law, gender, and music but reaffirms the argument that music can act as an integral piece in constituting and mirroring law. Sarah Jones responds to why she chose music as her artform in arguing for social justice:

"I realized early on that the people who moved me to action the most were artists and entertainers who said something substantive and showed that they were thinking about the world in a way that might help make some progress. Yet, at the same time they were entertainers; they weren't preaching to me. They weren't politicians. They were organic leaders or organic thinkers. They helped people listen while they enjoyed themselves and hopefully get informed. The message must be designed to move [you]. There are so many artists who have done that from a Bob Marley to a Richard Pryor to a Gwendolyn Brooks. People whose work I found when I was younger really helped me know that art is one the most powerful tools we have for social change but to also make life more beautiful."²³³

²³² Ibid.

²³³ Interview with Sarah Jones by Cara Bedick of WMUA, Friday December 13, 2002.

CHAPTER VI

CLASS MATTERS: GHETTO UNIVERSITY

A lot of people won't get no supper tonight
A lot of people won't get no justice tonight.
- The Clash²³⁴

The 1980 tune by The Clash, borrowed from Jamaican musicians Willie Williams and Clement "Coxsone" Dodd, addresses the concepts of justice and class. The Clash begins its melody with a reggae midbeat yet quickly moves to a thick bass and guitar to grab the attention of the listener. Their lyrics begin by equating a lack of food with injustice. For the constitutive theorist, it is more than just a song. Instead, this is a narrative for society to better understand economic inequity. It is a call for society to recognize the injustice in the system. It is a reminder that the end, Armageddon, is upon us when people are unable to have economic security. The Clash is not simply equating supper with food. More importantly, they are broadening the discussion of class inequality to note that it is unjust when the bottom 20% of wage earners in the United States rises by 3% from 1979-2001 while the top 5% rises by 81%.²³⁵

Despite varying discussions of a strengthening economy, much of the data and literature demonstrate the embedded inequity between the lower and upper class. This chapter addresses the role that law plays in creating class inequality,

²³⁴ The Clash, "Armageddon Time," *Black Market Clash* (New York: Sony Records, 1980). The song was originally written and recorded by Willie Williams and Clement "Coxsone" Dodd in 1979. It was a Jamaican hit but gained international acclaim once it was covered by The Clash.

²³⁵ U.S. Census, March 2001.

musician's responses to that inequality, and how musicians educate the lower class through icons and heroes and consequently constitute law.

Class Structure

Class structures, particularly in third world countries, link directly to race. According to Aggrey Brown, "Color divisions and class divisions parallel each other Class is usually defined in terms of color, and explanations of the one are usually in terms of the other."²³⁶ As Adam Kuper indicates, "Nonetheless, there is a clear, gross correlation between 'race' and social class. Blacks are concentrated at the bottom of the economic and occupational pyramid and are often the poorest Jamaicans."²³⁷ Barry Chevannes also suggests, "The long and short of these developments is that Jamaica's social structure is not simply a matter of class, but rather of both class and color."²³⁸ While class in Jamaica remains the context for the above references, it is fair to extrapolate the argument to the situation in the United States. It would be unwise to discuss class without recognizing the intersection between class and race. While race has been discussed in a previous chapter, it will continue to receive peripheral coverage here.

Class in the United States is a construct of the Law. As noted by Critical Race Scholars, race too is a legal construct at least in part fashioned by the law.

²³⁶ Aggrey Brown, *Color, Class and Politics in Jamaica* (New Brunswick, New Jersey: Transaction, Inc., 1979), 2.

²³⁷ Adam Kuper, *Changing Jamaica* (Boston, Massachusetts: Routledge & Kegan Paul, 1976), 64.

²³⁸ Barry Chevannes, *Rastafari: Roots and Ideology* (Syracuse, New York: Syracuse University Press, 1979), 8.

“The intersection of race and class is glaring. Residential segregation creates and perpetuates an ‘underclass’ by concentrating poor African Americans in neighborhoods with extremely high poverty rates.”²³⁹ Twentieth century legal history demonstrates how the law has constructed class and how the U.S. Supreme Court has reinforced that construction. Viewing four recent explanations for the existence of an African American underclass, it is clear that various factors, including law, have created the said underclass. Each of the four explanations will be addressed. In addition, the music and the role that musicians play in constituting a response to the creation of an underclass will be discussed. Intertwined implicitly and explicitly in this analysis is a discussion of education. The second half of this chapter will address the connection between the underclass, education, music, and specific African American icons.

The U.S. Government has not adopted an official definition for “underclass.” Rather, it defines its research in the area as a focus on “persistent and concentrated urban poverty.”²⁴⁰ While adequate, this definition does not underscore the historical legacy of how the underclass was created and how it remains maintained. Property and law have historically been connected since the Founding. Derrick Bell notes that race and class relations today are the result of legal constructs in the 18th and 19th centuries. Bell argues that working class whites did not oppose slavery when it first spread in the 1600s. They identified

²³⁹ Olati Johnson and Dorothy Swaine Thomas, “Integrating the Underclass: Confronting America’s Enduring Apartheid,” *Stanford Law Review*, April 1995, Volume 47, 787.

²⁴⁰ Michael B. Katz, “The Urban ‘Underclass’ as a Metaphor of Social Transformation,” in *The ‘Underclass’ Debate*, ed. Michael B. Katz (Princeton University Press, 1993), 21.

with the wealthy landowners on the basis of race - their whiteness - even though they would remain economically subordinate to those able to afford slaves.²⁴¹ Thus slavery provided propertyless whites with a property right in their whiteness.²⁴² Subsequently, legal scholars have noted the connection between property and the U.S. Constitution. Bell has often argued that the Bill of Rights was designed to protect property owners. Furthermore, it is clear that the law has continued to protect property and political arrangements while ignoring the disadvantages to the powerless caught in those relationships.²⁴³ Musicians, products of the sociolegal system, often respond to law's sanctioning of economic disparity. British reggae band UB40 wrote the song that encapsulated the feeling of being a number rather than a human being. Entitled *One in Ten*, UB40 reminded the listener of the being without property in a capitalist society.

I am the one in ten
A number on a list
I am the one in ten
Even though I don't exist
Nobody knows me
Even though I'm always there
A statistic, a reminder
Of a world that doesn't care

Malnutrition dulls my hair
My eyes are black and lifeless
With an underprivileged stare
I'm the beggar on the corner
Will no-one spare a dime?

²⁴¹ Derrick Bell, "White Superiority in America: Its Legal Legacy, Its Economic Costs," in *Critical White Studies: Looking Behind the Mirror*, eds. Richard Delgado and Jean Stefancic (Philadelphia: Temple University Press, 1997), 598.

²⁴² *Ibid.*

²⁴³ *Ibid.*

I'm the child that never learns to read
'Cause no-one spared the time

I'm the murderer and the victim
The licence with the gun
I'm a sad and bruised old lady
In an alley in a slum
I'm a middle aged businessman
With chronic heart disease
I'm another teenaged suicide
In a street that has no trees²⁴⁴

Like The Clash, UB40 sings about justice. They sing of the ramifications of public policy, specifically in relation to creations of class. For them, and thus for the listener, class inequity and resulting underclass is the creation of societal decisions. How this underclass has been created is the crux of the first half of this chapter.

The underclass debate has been stirring among scholars since Roosevelt's New Deal but much of that debate centered around Social Security and Welfare.²⁴⁵ However, in 1977, *Time* magazine published a story announcing the emergence of a menacing underclass in America's inner cities. Drugs, crime, teenage pregnancy, and high unemployment, *not poverty*, defined the "underclass" of which most were young minorities.²⁴⁶ Describing this group as juvenile delinquents, school dropouts, drug addicts, and welfare mothers, the United States began to visualize this emerging underclass. With the publication

²⁴⁴ UB40, "One in Ten," *UB40: 1980-1983* (New York: A&M Records, 1983).

²⁴⁵ For a contextual discussion of the Administrative State, see William H. Simon, "Papers from the Yale Law Journal Symposium on the Legacy of the New Deal: Problems and Possibilities in the in the Administrative State held at the Yale Law School on February 11-13, 1983: Legality, Bureaucracy, and Class in the Welfare System," *Yale Law Journal*, June 1983, Volume 92, 1198.

²⁴⁶ Katz, 3.

of Ken Auletta's *The Underclass* in 1982, the word became commonplace among scholars of Class.

Auletta noted that the emerging mass media image of the underclass reinforced issues of the inner city. He argued that the underclass fell into four distinct categories: 1) the passive poor, which were usually long-term welfare recipients; 2) the hostile street criminals who terrorize most cities²⁴⁷; 3) the hustlers who may not be poor but earn their income through underground activities; 4) the traumatized drunks, drifters, released mental patients who roam the city streets.²⁴⁸ Today, this underclass has become simultaneously idolized and criticized by Hip-Hop artists. Jay-Z, who recently released his final album entitled *The Black Album*, reminds the listener of the glory and pain of the underclass.

They say an eye for an eye, we both lose our sight
And two wrongs don't make a right
But when you been wrong and you know all along that it's just one life
At what point does one fight? (Good question right!)
'Fore you knock the war, try to put your dogs in it
Ten-and-a-halvs, for a minute-and-a-half
Bet that stops all the grinnin and the laughs
When you play the game of life and the win ain't in the bag
When your options is none and the pen is all you have
or the block, niggaz standin tight, there's limits on the ave
Tryin to cop or shot-call theyself cleansin in the cash
But can't put they name on paper cause, then you on blast
Mr. President, there's drugs in our residence
Tell me what you want me to do, come break bread with us

²⁴⁷ Ibid, 4.

²⁴⁸ Ken Auletta, *The Underclass* (New York: Random House, 1982), xvi.

Mr. Governor, I swear there's a cover up
Every other corner there's a liquor store - fuck is up?²⁴⁹

The hostile street criminal is also the teacher of the youth. Speaking the language of the underclass, Jay-Z connects race and class and reminds the listener of the corruption of the inner city. Auletta's 1982 description is put to music by Jay-Z in 2003.

The origins of the debate and genesis of the term underclass are important but major issues of the debate endure. What is the extent to which the underclass is responsible for their own poverty? What role does culture play in perpetuating poverty and dependence? What role does the family structure play in developing and reproducing pathologies? What is the influence of the environment on behavior? What is the capacity of institutions to effect change? Has public policy exacerbated the dilemma of the underclass?²⁵⁰ These are complex and consequential issues yet the questions are mass media commentaries on the underclass. Music both defines the problem of the underclass and gives examples of how that problem manifests itself yet can be solved. "God forgive me for my brash delivery, but I remember vividly what these streets did to me."²⁵¹ We are products of our society. Jay-Z reminds us that when that society divides the poor, there is an emergence of the underclass. As Walter Channing declared in 1843, "The causes of poverty are looked for, and

²⁴⁹ Jay-Z, "Justify My Thug," *The Black Album* (New York: Roc-A-Fella Records, 2003).

²⁵⁰ Katz, 5.

²⁵¹ Jay-Z, "

found in him or her who suffers it.”²⁵² And so, it is the music that the underclass turns to for relief, guidance, and knowledge. As Ziggy Marley bellowed:

When the lights gone out, and the food run out, all we have is the music.
When there ain't no justice to be found, all we have is the music.²⁵³

Marley both recognizes the importance of music as well as the inevitability of injustice. Nihilism plays a significant role in keeping the underclass disenfranchised. It is that nihilism, in part, scholars argue, that explains why the underclass has emerged and continues to grow.

Culture of Poverty

The first explanation for the underclass comes from Oscar Lewis who identified a “culture of poverty.”²⁵⁴ Lewis argued that the culture of poverty originated from endemic unemployment and chronic immobility. The culture then grew which allowed poor people to cope with their feelings of hopelessness and despair that arose because their chances of socioeconomic success were remote. This culture of poverty became a cause of the continuation of the underclass.²⁵⁵ Certainly the emergence of the cultural patterns connects to structural conditions in society, however scholars argue that the culture of poverty has evolved into an independent cause of the continuation of the

²⁵² Walter Channing, *An Address on the Prevention of Pauperism*, (Boston: Office of the Christian World, 1843), 20.

²⁵³ Ziggy Marley and the Melody Makers, “When the Lights Gone Out,” *One Bright Day* (Beverly Hills: Virgin Records, 1989).

²⁵⁴ Oscar Lewis, *La Vida: A Puerto Rican Family in the Culture of Poverty – San Juan and New York* (New York: Random House, 1965).

²⁵⁵ For a peripheral debate of this issue, yet using race as the context of nihilism, see Cornel West, *Race Matters* (New York: Vintage Books, 1994).

underclass. This amounts to blaming the victim. Musicians would rather respond to the creation of the underclass by singing about the roots of the problem and in turn, constituting or reconstituting law. Johnny Cash remains a great example of this argument.

Johnny Cash was born in Arkansas in 1932 and began writing songs and performing in Nashville in the 1950s. His songs and his image provided society with tunes about the downtrodden. Among Cash's most famous performances were his shows for San Quentin and Folsom prisons in the late 1960s. There, before prisoners, Cash spoke to the underclass. He professed his abhorrence for the prison system and the role that the law played in the creation of the prison state.

San Quentin, I hate every inch of you.
You've cut me and have scarred me thru an' thru.
And I'll walk out a wiser weaker man;
Mister Congressman why can't you understand.
San Quentin, what good do you think you do?
Do you think I'll be different when you're through?
You bent my heart and mind and you may my soul,
And your stone walls turn my blood a little cold.
San Quentin, may you rot and burn in hell.
May your walls fall and may I live to tell.
May all the world forget you ever stood.
And may all the world regret you did no good.²⁵⁶

In addition, Cash intimated about the culture of poverty.

Worried man, I'm a weary worried man
Hungry babies don't understand papa is a worried man
The place I used to draw my pay
Slammed the door on me today

²⁵⁶ Johnny Cash, "San Quentin," *At San Quentin* (New York: Columbia Records, 1969).

Well there is no way I can see that I can feed my family
Cause I don't own no money tree and very little lam
But I said mama don't cry
I'll get a job fore the day's gone by
I don't know where though and that's why I'm a worried man.²⁵⁷

The nihilism is evident. But rather than argue that the culture of poverty is the cause of the underclass, Cash viewed the structure as the problem. To conservatives, "the connection between culture and economic structure was somehow lost and the argument was popularly perceived to be that people were poor because they had a defective culture."²⁵⁸ The real issue remains and that is what did Oscar Lewis mean by the "culture of poverty." He did not simply mean economic deprivation. Rather, it referred to a way of life passed down from generation to generation.²⁵⁹ This too can be seen in Cash's music and image and is replete in Hip-Hop history.²⁶⁰

The culture of poverty became a euphemism for the pathology of the underclass and an explanation for their condition. Yet, it also remains an excuse for inaction and punitive public policy.²⁶¹ The music and the musicians respond to that culture of poverty.

Welfare Disincentives

²⁵⁷ Johnny Cash, "I'm A Worried Man," *Ragged Old Flag* (New York: Sony Music, 1974).

²⁵⁸ Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge: Harvard University Press, 1993), 5.

²⁵⁹ Katz, 12.

²⁶⁰ See "The Message" by Grand Master Flash: "Don't push me cause I'm close to the edge, it's like a jungle sometimes I wonder how I keep from going under"; "Fight the Power" by Public Enemy: "People, people we are all the same...no we're not the same because we don't know the game"; "Stakes Is High" by De La Soul: "Experiments when needles and skin connect, no wonder where we live is called the projects."

²⁶¹ Katz, 13.

The second explanation for the cause of the underclass relates to welfare disincentives. Conservatives such as Charles Murray argue that the underclass was rooted in the liberal welfare state. According to this theory, federal antipoverty programs altered the incentives governing the behavior of the poor and ultimately resulted in greater poverty. As incentives to work dissipated, the traditional two-parent family destructed. Subsequently, the pathological behaviors of long-term welfare dependency, unemployment, crime, drug use, and violence increased among poor blacks.²⁶² The response to this conservative approach of blaming the victim centers around structural changes in the U.S. economy. William Julius Wilson argued that large declines in manufacturing jobs had a disproportionate impact on young black inner-city males who lacked the skills to compete for jobs in a new service-sector economy.²⁶³ These structural changes, while not necessarily racist in intent, have affected the black underclass in ways that the white poor have not seen. For example, racial discrimination in the housing market has played and continues to play a significant role in limiting the ability of blacks to grow economically and thus, the law created and maintained the black underclass.

Oscar Lewis' work reminds us that the culture of poverty is an endemic force that must be reconsidered. Once a culture of poverty is formed, it assumes

²⁶² Johnson, 790.

²⁶³ See William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy*.

“a life of its own and is passed from parents to children through ordinary channels of cultural transmission.”²⁶⁴

Institutional Racism

A great deal of the literature surrounding institutional racism connects to precedent-setting Supreme Court cases. While *Scott v. Negro London*, *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Brown v. Board of Education*, and *McCleskey v. Kemp* are all doctrinal examples of institutional racism, they do not completely explain the connection to racism and class. However, it is imperative to understand the constitutional impact of the aforementioned cases before addressing institutional racism in relationship to class and black ghettos.

Scholars of law and race can turn to various cases and time periods to view the genesis of racial policies in the U.S. There are six cases that have impacted race most significantly since the Declaration of Independence. These cases develop a timeline that assists us in determining why institutional racism is a reasonable argument for scholars in 2004. Class and music will be connected to the issue of societal racism once it is sufficiently outlined.

In 1806, the U.S. Supreme Court decided *Scott. Negro London*²⁶⁵ in which the Court was forced to look at whether a slave could sue for his freedom. Fifty years before *Dred Scott*, the Supreme Court decided the fate of the slave London. The case involved Scott, the owner of the slave, London. Scott's father, without

²⁶⁴ Stephen Steinberg, *The Ethnic Myth: Race, Ethnicity, and Class in America* (Boston: Beacon Press, 1989), 107.

²⁶⁵ 7 U.S. 324 (1806)

his son's consent, took London from Maryland to Virginia. After over a year had passed, Scott went to Virginia to retrieve his property. London sued for his freedom using the text of a Virginia statute as his defense, "Slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free."²⁶⁶ London argued that he was free since he had been in Virginia for the required one year. Scott argued that the statute did not apply because the slave was taken to Virginia without his consent. Chief Justice Marshall delivered the opinion of the Court. In it, he argued that the owner must be a person inclined to removing the slave from one state and bringing him to Virginia. Since Scott did not want London brought to Virginia, London cannot take advantage of the statute.

Certainly the case, nearly 200 years old, demonstrates the race relations and issues of slavery at the time. But scholars of institutional racism note that its effect is deeper. Since this project relies heavily on constitutive theory, cases such as *Scott* remain excellent examples of how race can be constituted by the Court, the citizens, and the slaves. The Court recognized the inhumanity of slavery or they would not have pondered "rights" for London. But Marshall chose to follow the letter and intent of the law rather than weigh the moral, or immoral, implications of slavery. This case demonstrates that the law can often be useful in protecting the wealthy property owners. In addition, the case shows

²⁶⁶ 7 U.S. 324, 324.

how the Court recognizes that there are places that slaves can go for freedom.

Those places are established by the Court and within only their dominion. There are arenas for Africans to be free, when the Court sets those conditions.

Between 1806 and 1857, there were numerous cases involving the establishment of institutional racism at both the state and federal levels.

However, from 1857 to 1954, three Supreme Court cases made a greater impact on race and law than any before it. In 1857, the Court decided the case of *Dred Scott v. Sandford*.²⁶⁷ In it, the slave Dred Scott sued for his freedom. The opposite of London, Dred Scott was taken from the slave state of Missouri to the free state of Illinois. Dred Scott was later taken back to Missouri and sued for his freedom.

Dred Scott's slave master argued that no "pure-blooded Negro of African descent...could be a citizen in the sense of Article III of the Constitution." In his opinion, Chief Justice Roger Taney forcefully announced:

The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.²⁶⁸

²⁶⁷ 60 U.S. 393 (1857)

²⁶⁸ 60 U.S. 393, 405.

This easily dispelled the chance of Dred Scott or future slaves from attaining rights under the words of the Constitution. But furthermore, the words remained pronouncements by the Court, an arm of the United States Government, that blacks did not have the same rights as whites. This helped constitute an image of whiteness and blackness for each respective race. In addition, Chief Justice Taney continued:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.²⁶⁹

The Court reminded the citizens (and the enslaved) that they were not there to decide issues of justice - that is for the legislators. Those moments when the legislation is unjust, the Court will sit silently. That message was sent to blacks (and whites) in 1857 and remains a piece to the current debates on race in contemporary times.

As the new century approached, blacks began to hold more stature in society. The Civil War and Reconstruction assisted blacks in gaining slight levels of power and property. In 1896, another precedent setting case emerged. *Plessy v. Ferguson*²⁷⁰ addressed the issues of race in law and helped define race for the next century. The State of Louisiana had a statute that required separate railroad

²⁶⁹ 60 U.S. 393, 406.

²⁷⁰ 163 U.S. 537 (1896)

cars for blacks and whites. Plessy, who was 7/8 white and 1/8 black, decided to sit in the “white” section of the railcar. While his African descent was not discernible, Plessy was arrested for violation of the Louisiana statute. The 1896 Court addressed whether separate railcars for the races was constitutional. The effect of *Plessy* surpasses the meaning of the decision or the language used in the case. Instead, the case demonstrates the Court defining race. Following from the “one drop rule” which deemed that one drop of black blood made a human “black and contaminated,” the Court upheld the separation of the railcars.

Justice Brown delivered the opinion of the Court:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it...We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals...Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.²⁷¹

The Court argued that if the black race was inferior, it was because they (the black race) believed themselves to be inferior. *Plessy* certainly attempted to

²⁷¹ 163 U.S. 537, 551-552.

oppose any notion of institutional racism but I argue otherwise. In fact, the attempt by Justice Brown to distance the Court from the issue of racial equality demonstrates that such silence has been a major contributor to the notion of racism in America. Furthermore, the case has been extrapolated to issues of class and gender and allowed the Court to remain silent on issues of injustice. That silence can be perceived as acquiescence.²⁷²

The 1954 decision of *Brown v. Board of Education*²⁷³ is one of the most heavily researched and written in the history of the Court. I will not add to that scholarship. Rather, I would like to connect the case to this institutional racism timeline that I have created. In 1954, the Court addressed whether separate educational facilities for the races was constitutional. In a unanimous decision, Chief Justice Warren opined that separate facilities are inherently unequal.²⁷⁴ The decision is revered as the most important court decision of the 20th century. Scholars and politicians have used *Brown* as evidence of the Court's role as arbiter of justice. This project is not designed to discuss wisdom of the *Brown* decision. Instead, I look, as musicians do, to the language of the Court. In *Brown*, the Court made an interesting observation in relation to institutional racism.

They noted:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it

²⁷² Some have argued that the words of the Supreme Court are merely words and have little effect on mainstream society. However, I note that Justice Harlan's dissent in *Plessy* helped formulate contemporary affirmative action policies. The language of the Court cannot be underestimated.

²⁷³ 347 U.S. 483 (1954)

²⁷⁴ 347 U.S. 483, 495.

has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.²⁷⁵

The *Brown* court while integrating the schools, noted that black children would be “retarded” without the benefit of attending an integrated school. This language made certain that the image of whiteness for the black children would be that whites are their saviors. Without access to whiteness, blacks would be deficient. While the 1954 case has contributed to a more integrated society, the language that the court used reminds us of the institutional racism that remains pervasive today.

The final case in this timeline came in 1987. In *McCleskey v. Kemp*²⁷⁶ the Court addressed whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment. McCleskey was convicted of robbery and murder and sentenced to death. While McCleskey did not dispute the facts, his petition centered upon the argument that a study done by Professor Baldus showed that there were racial disparities in capital sentencing. In the opinion delivered by Justice Powell, the Court argued that while there might be racism in the society and the criminal justice system, the petitioner must show specific discriminatory

²⁷⁵ 347 U.S. 483, 494

²⁷⁶ 481 U.S. 279

purpose. That is to say, McCleskey must show that a specific Georgia police officer, judge, prosecutor, or juror wanted death imposed because of McCleskey's race. This is certainly a difficult task in a society in which racism is often hidden. The case demonstrates once more that the Court was willing to recognize the racism in society and admitted the Baldus study as applicable (at times) but demanded that McCleskey show specific discriminatory purpose. The Court's admitted fear of dismantling the entire criminal justice system by siding with McCleskey shows once more the impact of race cases on the argument that institutional racism is prevalent in the United States. Institutional racism has contributed to the creation of an underclass in the United States.

Economic Restructuring and African American Middle-Class Migration

The last explanation for the underclass flows from the institutional racism argument. Economic restructuring and African American middle-class migration is in part, a result of *Brown* and the products of integration. A sense of solidarity was altered by a class-based civil rights struggle whose ultimate goal was to bring more freedom to blacks, who already had some semblance of class privilege (in relative terms).²⁷⁷ By the late 1960s class-based racial integration disrupted the racial solidarity that had held blacks together. Blacks were pressured to assimilate into mainstream white culture to increase their class

²⁷⁷ bell hooks, *Where We Stand: Class Matters* (New York, Routledge Inc., 2000), 91.

power and status. Privileged blacks began to leave the underprivileged behind and move into white neighborhoods. Musicians sang of this black flight.²⁷⁸

The notion of connecting race and class with economics was not a new one. In 1944, Gunnar Myrdal had documented the effect of residential segregation on the economic and social status of blacks.²⁷⁹ Myrdal argued that white America had betrayed its ideals regarding race. Scholars such as Kenneth Clark and David Roediger use Myrdal's work to show the history of silence on the part of the white powers in America. As for establishing an underclass, critics argue that Myrdal's work is no longer applicable today. His pressing question that whites would rather have few, if any, blacks in America is countered by the increase in black-white marriages, the deep penetration of black culture into mainstream society, and general integration. However, a black underclass has been the result of the above mentioned historical actions (or inactions).

The difficulty is that class is a cultural as much as an economic formation.²⁸⁰ "Class" is generally invisible in American legal discourse. "The term is used constantly ("class action," "classification") in reference to issues other than social and economic inequality and power. When used in law with regard to economic inequality, the term usually refers to gradational rather

²⁷⁸ See Philadelphia International All-Stars, *Let's Clean Up the Ghetto* and *Segments of Time, Song to the System*.

²⁷⁹ See Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper and Brothers, 1944).

²⁸⁰ Martha Mahoney, "Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases," *Southern California Law Review*, May 2003, 800.

than relational concepts."²⁸¹ Legal discussions of structural inequality seldom use the term "class," instead discussing "race," "poverty," "employee," or "labor," none of which adequately replaces the concept of class. In different ways, each of these terms addresses some questions of power, but none directly addresses the relationships of power between social groups. Since law more easily recognizes race and gender rather than class issues, the need to shape legally cognizable claims has also tended to diminish consciousness of and arguments about class. Recent proposals to use "class" instead of race as the basis for affirmative action have not explored the meaning of class in any relational sense and in reality concern more or less elaborated status-based criteria.²⁸²

Mahoney connects well to the issues of race, class and law and helps move to the final issue of this chapter: class and idols.

Class and idols is my attempt to connect virtually all of the issues and sub-issues of this project by giving more explicit examples. George Jackson, Steve Biko, and Mumia Abu Jamal are the three idols that best demonstrate the constitutive nature of class, music, and law. These three "idols" show that images and meanings on class and race do not come from the Court, but rather from the musicians who constitute the law for their communities.

George Jackson

²⁸¹ Ibid., 843.

²⁸² Ibid.

Musicians can educate the community on issues that many in the political elite structure debate, oftentimes in ways very different than what musicians sing. The underclass does not have access to much of the same tools that middle-class and upper-class elites control. Instead, information surrounding the politics of law, in this chapter the politics of Class, is disseminated through music. Scholars have noted that music can serve an educational purpose to the underclass.²⁸³ However, I posit that musicians constitute law for the listener by incorporating historical figures into their lyrics and building an image and meaning of those figures; musicians create idols.

I begin with George Jackson because his name has been invoked by both reggae musicians as well as folk/rock musicians. George Jackson was born September 23, 1941 in Chicago. Living in segregation, Jackson did not see his first white person until kindergarten. As Jackson grew up, his family moved to a more dangerous area of Chicago where Jackson became more familiar with crime. Jackson became more involved in crime so his father moved the family to Los Angeles.

There, Jackson joined a street gang called The Capones and was arrested several times, one of which involved a department store robbery that earned Jackson 7 months in a youth camp. Upon his release, he was arrested for robbing a gas station and sent back to youth camp. Several months after his release,

²⁸³ See Michael Richmond, "Law, Instrumental Music, and Dance: Reflections of a Common Culture," *Legal Studies Forum*, Volume 27, 2003, 783-814.

Jackson was again arrested for robbing a gas station, this time of 70 dollars. On advice of his attorney, Jackson pled guilty, thinking he would receive a lighter sentence. However, because of Jackson's previous convictions, the judge passed the sentence of one year to life. At age 19, George Jackson entered Soledad Prison.

In 1962, after two years in Soledad, Jackson was transferred to San Quentin. Jackson would spend seven of his ten years in prison in solitary confinement. Jackson's years in San Quentin were described as rebellious. He was accused of organizing inmate awareness on issues of race and class. George began to read the works of Mao, Marx, and Engels. After being denied parole in 1968, for reasons Jackson argues were based on race, he was transferred back to Soledad. While at Soledad in 1970, a black inmate was killed by a white guard in what the guard described as self-defense. A few months later, Jackson along with two other inmates were charged with the murder (beating) of a white guard. The three became nationally known as the Soledad Brothers. Along with help from University of California Professor Angela Davis, Jackson published a book of his letters entitled *Soledad Brother*. Jackson was being hailed as a leader on issues of race and class.

In 1971, George was transferred back to San Quentin where he published *Blood In My Eye*, another collection of his letters and his thinking. On August 21, 1971, George Jackson was shot and killed by white guards in what was called an escape attempt. Jackson's murder helped set off the uprising at Attica state

prison three weeks later. There are various accounts of the death of Jackson but the State of California and San Quentin officials maintain that Jackson was attempting an escape. Jackson's death is believed by Black Panther members and various other organizations to have been an orchestrated murder upon a rebellious inmate who was leading his people on how to effectuate change. For most in the United States, Jackson's life and message is unheard.

In 1971, Bob Dylan penned the tune "George Jackson." The song brought Jackson's message to many who had not known of the inmate/activist. Dylan wrote:

I woke up this mornin',
There were tears in my bed.
They killed a man I really loved
Shot him through the head.
Lord, Lord,
They cut George Jackson down.
Lord, Lord,
They laid him in the ground.

Sent him off to prison
For a seventy-dollar robbery.
Closed the door behind him
And they threw away the key.

He wouldn't take shit from no one
He wouldn't bow down or kneel.
Authorities, they hated him
Because he was just too real.

Prison guards, they cursed him
As they watched him from above
But they were frightened of his power
They were scared of his love.

Sometimes I think this whole world

Is one big prison yard.
Some of us are prisoners
The rest of us are guards.²⁸⁴

Dylan's song is a story of Jackson's life and eventual death. But more than a story, it is a call and command to view Jackson as more than an inmate who was gunned down. Dylan's words "but they were frightened of his power" describes the impact that Jackson had upon both the guards and the readers of his books.

Jackson's words were the catalyst for Dylan's tune. His words have become more accessible to the lower classes and created the idol status for Jackson. His words constitute the image of politics for the underclass and the meaning of law and justice. Jackson wrote:

In the opening stages of such a conflict, before a unified left can be established, before most people have accepted the inevitability of war, before we are able militarily to organize massive violence, we must depend on limited, selective violence tied to an exact political purpose. In the early service of the people, there must be totally committed, professional revolutionaries who understand that all human life is meaningless if it is not accompanied by the controls that determine its quality. I am one of these. My life has absolutely no value. I'm the man under the hatches, the desperate one.²⁸⁵

Jackson's writings implored the reader to take up arms against its aggressor, which according to Jackson was the white power structure. But beyond those calls, Jackson's work connected to the despair associated with the underclass. Jackson's words in the 1960s are quite similar to the work of sociolegal scholars today, with some of the aggression and calls for revolution toned down.

²⁸⁴ Bob Dylan, "George Jackson," *Masterpieces* (New York: CBS Records, 1978).

²⁸⁵ George Jackson, *Blood In My Eye* (Baltimore, MD: Black Classic Press, 1971), 33.

Professor of Law and Political Science Cass Sunstein's 1993 book *The Partial Constitution* is an excellent example of looking to law and the impact of law in places beyond the Supreme Court.²⁸⁶ Sunstein argues that mainstream constitutional theory renders the Constitution "partial" by treating the Supreme Court as the only interpreter and by accepting the status quo as uncontroversial.²⁸⁷ Sunstein and George Jackson are quite similar in their assessment that law comes from the will of the people. Certainly Sunstein and Jackson differ on how to combat inequality but that is beyond the scope of this project. Rather, many in the underclass community may not read the work of Sunstein, a professor at The University of Chicago. However, they may listen to Bob Dylan and use his song to constitute their image of George Jackson and the law.

The British reggae band Steel Pulse followed Dylan's "George Jackson" tune with one of their own. In 1979, they released "Uncle George" which introduced to many in the African Diaspora the life of George Jackson. Once more in 2004, Steel Pulse wanted to remind people of the message of Jackson and released another tune, this one titled "George Jackson." Each song signifies the attempt by Pulse to constitute an image of Jackson for the listener and subsequently an image of the law. The 1979 tune bellowed:

²⁸⁶ Cass Sunstein, *The Partial Constitution* (Harvard University Press, 1993).

²⁸⁷ William Forbath, "Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution," *Stanford Law Review*, July 1994, 1771.

This One's in memory of Uncle George
We brethren aware, we realise what you stood for
George Jackson Soledad brother

Malicious unjust society
He became revolutionary

The framed him Yes they framed him
Backraw back up George
Right now in the morgue
He's rebelling for a cause
Eleven years he's beared the scars of injustice yeh
Deeper scars remain of solitary confinement
No you can't trust the fuzz
He only stole seventy dollars
He was advised to plead guilty
He got not one year but life
For demanding his rights, George

He became revolutionary, Jackson
Confinement confinement²⁸⁸

Steel Pulse was continuing George Jackson message to distrust the white power structure. They tried to show the revolutionary consciousness of Jackson yet Pulse's song created legal consciousness as well. Jackson wrote, "How do we raise a new revolutionary consciousness against a system programmed against our old methods? Revolution is against the law."²⁸⁹

Legal scholars, such as Sunstein and Forbath remind us that we live in a moment of crisis and flux. "Inequalities are widening. The nation's poor are not only poorer and more numerous than twenty years ago; the vanishing of decently paid lower strata jobs, the general erosion of inner cities' economic

²⁸⁸ Steel Pulse, "Uncle George," *Tribute to the Martyrs* (New York: Island Records, 1979).

²⁸⁹ Jackson, *Blood In My Eye*, 176.

bases...They threaten to make the poor, once more, a class apart, cut off from the context of economic opportunity and common political destiny."²⁹⁰ Forbath's words, while more academic, are precisely the same as many artists singing about the underclass, from the underclass.²⁹¹ Furthermore, Jackson, through Bob Dylan and Steel Pulse, has become an idol in the underclass community. In March of 1965, Jackson wrote to his father, "Men are so deeply engaged in making a living that their very existence is shaped and dominated by the system of production...My taxes will go to an order and system of government that will in turn protect me and my interests. I shall not, as long as I call myself a man, compromise with tyranny."²⁹²

Steve Biko

Stephen Biko was born in Kingwilliamstown, Cape Province, South Africa on December 18, 1946. Biko was educated locally and planned on attending medical school. Being raised in South Africa under apartheid which began formally in 1948, Biko witnessed massive violence and political injustices. In 1968, Biko formed the South African Students' Organisation (SASO) and was elected President in July of 1969. Biko would spend the next eight years organizing and making speeches opposing the apartheid system. The National

²⁹⁰ Forbath, 1784.

²⁹¹ See "The Message" by Grand Master Flash: "Don't push me cause I'm close to the edge, it's like a jungle sometimes I wonder how I keep from going under"; "Fight the Power" by Public Enemy: "People, people we are all the same...no we're not the same because we don't know the game"; "Stakes Is High" by De La Soul: "Experiments when needles and skin connect, no wonder where we live is called the projects."

²⁹² George Jackson, *Soledad Brother* (New York: Coward-McCann, 1970), 54.

Party, the ruling party in South Africa, passed various legislation that banned Biko (and others) from speaking to crowds of more than ten people.

Biko was arrested various times and held without being charged. On August 18, 1977, Biko was traveling toward Cape Town when his car was stopped at a roadblock. Biko and his companion, Peter Jones, were arrested under Section 6 of the Terrorism Act which allowed a police officer to arrest without warrant, and detain for interrogation, any person who is believed to be a terrorist. Biko was detained for twenty-four days. On September 12, 1977, Biko died. The official cause of death was renal failure due to his supposed hunger strike. Biko had head injuries as well which were defended as the result of a September 7 scuffle between Biko and a prison police officer. Following the Truth and Reconciliation Commission post-apartheid investigation, the world learned that Biko was beaten to death by the Security Police Officers.

Biko's life is even less well known than George Jackson's. Yet, Biko remains an idol to many in the underclass because of his life as a freedom fighter. Steve Biko's importance for informal and community educators lies in the emphasis he placed on the role played by consciousness and awareness-raising in his work as a black activist. Like Marx in the Nineteenth Century, Biko thought that only the oppressed could liberate themselves, no one could do it for them. Like Gramsci, earlier in the 20th Century, he saw the role of organic intellectuals and the need to pose a counter hegemony to that of the ruling power

in his country.²⁹³ Biko's idea of informal education connects well to the notion of constitutive theory.

The 1987 movie entitled *Cry Freedom* brought Biko's life to light for many who were unaware of the impact of this South African freedom fighter. While movies can play a significant role in constituting images and meanings for viewers, they are not as powerful as music. Musicians took Biko's words of black consciousness and demands for class equality and brought them to the underclass. Biko wrote:

In all aspects of the black-white relationship, now and in the past, we see a constant tendency by whites to depict blacks as of an inferior status. Our culture, our history and indeed all aspects of the black man's life have been battered nearly out of shape in the great collision between the indigenous values and the Anglo-Boer culture.²⁹⁴

Steel Pulse condensed Biko's message into a song and informally educated the people on the life of Stephen Biko. In doing so, they constituted an image of race and class, and the role of law, for the community. Pulse sang:

The night Steve Biko died I cried and I cried
Biko, O, Steve Biko died still in chains
Biko died in chains, moaned for you, yeh

Blame South African security,
A no suicide he wasn't insane
It was not for him to live in Rome, No
Still they wouldn't leave him alone
They provoke him, they arrest him
They took him life away, but can't take him soul,
Then they drug and ill-treat him, till they kill him,

²⁹³ Barry Burke, "Steve Biko and informal education," *The Encyclopedia of Informal Education*, www.infed.org/thinkers/biko.htm. Last updated: January 28, 2005.

²⁹⁴ Steve Biko, *I Write What I Like* (New York: Harper Collins, 1986), 92.

And they claim suicide

I'll never forgive I'll always remember,
Not, not only not only I no,
But papa brothers sisters too,
Him spirit they can't control
Him spirit they can't man-trol
Cannot be bought nor sold
Freedom increase one-hundred fold

The system something's got to be done,
Straight away,
The system of weakheart emotion
They've got to pay
The system of backra corruption
They've got to pay
The system is destroying my nation
The system.....kill him

Freedom increases one hundred fold
Freedom increases one hundred
Freedom.²⁹⁵

The tune demonstrates the personal impact that Biko had on the lives of the band but also teaches (informally) the listener of Biko's message. For Biko, like that of Peter Tosh in earlier chapters, life is not worth living without freedom. Steel Pulse captured that message. Biko, in an interview months before his death, wrote:

I wasn't really afraid that their violence might lead me to make revelations I didn't want to make, because I had nothing to reveal on this particular issue. I was operating from a very good position, and they were in a very weak position. My attitude is, I'm not going to allow them to carry out their program faithfully. If they want to beat me five times, they can do so on the condition that I allow them to beat me five times...It's a fight...So I said to them, 'Listen, if you guys want to do this your way, you have got to handcuff me and bind my feet together, so that I can't respond. If you

²⁹⁵ Steel Pulse, "Biko's Kindred Lament," *Tribute to the Martyrs* (New York: Island Records, 1979).

allow me to respond, I'm certainly going to respond. And I'm afraid you may have to kill me in the process even if it's not your intention.'²⁹⁶

In 1980, Peter Gabriel released "Biko" on *Peter Gabriel (3)* which was a more commercially successful album than Steel Pulse's *Tribute to the Martyrs*. The song exemplifies the power that Biko's life (and death) had over constituting images of justice for the community:

September '77
Port Elizabeth weather fine
It was business as usual
In police room 619

Oh Biko, Biko, because Biko
Oh Biko, Biko, because Biko
Yihla Moja, Yihla Moja²⁹⁷
The man is dead, the man is dead

When I try to sleep at night
I can only dream in red
The outside world is black and white
With only one color dead

You can blow out a candle
But you can't blow out a fire
Once the flames begin to catch
The wind will blow it higher

And the eyes of the world are
Watching now
Watching now.²⁹⁸

Mumia Abu-Jamal

The last idol I have chosen to demonstrate the constitutive power of music and class is one that is as controversial as George Jackson. Mumia Abu-Jamal is

²⁹⁶ Biko, 153.

²⁹⁷ It is believed that "yihla moja" is translated to descending soul.

²⁹⁸ Peter Gabriel, "Biko," *Peter Gabriel (3)* (New York: Geffen Records, 1980).

on death row in Pennsylvania for the murder of white police officer Daniel Faulkner. Mumia is a black man, former member of the Black Panther Party and MOVE Africa and award winning journalist. On December 9, 1981, Mumia was driving a taxi cab to supplement his income as a journalist. After hearing over the police radio that there was an altercation near his brother's neighborhood, Mumia drove to the scene. He witnessed his brother being beaten by Philadelphia police. In his attempt to intervene, Mumia was shot by Philadelphia police. In addition, Officer Faulkner was fatally shot as well.

Witnesses describe two men leaving the scene of the crime. However, when police arrived, they beat Mumia before taking him to the hospital. In addition, they claim that Mumia admitted to the shooting. No attempt was made to find the two men fleeing the scene.

Mumia's trial was before Judge Albert Sabo, who had been accused of bias in protecting police in similar cases. In addition, Sabo presided over trials in which thirty-one defendants were sentenced to death, more than any other U.S. judge.²⁹⁹ Sabo refused to allow Mumia to represent himself and kept Mumia from questioning prospective jurors. In July 1982, Mumia was sentenced to death although he steadfastly maintains his innocence.

Since 1982, Mumia has been the cause-celeb that many in Hollywood have latched on to. Mumia continues to write and speak from death row on topics that go beyond capital punishment. For many, he has come to symbolize the

²⁹⁹ Amnesty International, *The Case of Mumia Abu-Jamal* (New York: Seven Stories Press, 2000).

political prisoner. Musicians have used Mumia's story to bring attention to his plight and extrapolate issues of justice (or injustice) into the community.

In 1999, various reggae artists joined to create the album *Without Apology: Reggae Free Mumia*. Artists like Sister Carol used the music to call for both change in Mumia's case as well as sociolegal change in general:

You see you have some people who no respect me
And most accuse me of Rasta pickney
Well I can't give up freedom and equality
And I know the government can't give me
They tell me about the living
In a free country
Say, I am not sure
So I cannot agree
I want justice Mr. Politician
Me tired of your speech, now me want action
And a reward with satisfaction
Erase the cost
A revolution
Stop all the war against too black a man
Ina Babylon, Babylon.³⁰⁰

Sister Carol's call for justice is one that can only be made through music. But the compilation compact disc goes beyond simply allowing a place for musicians to "vent." Rather, Sister Carol and her various musical comrades are constituting an image of law for the listener. However, the listener is not the elite and oftentimes, not traditionally white middle-class. Instead, music is the method to speak to the underclass who are not educated on the story of Mumia, Biko, or Jackson. The underclass does not read the words of Mumia:

³⁰⁰ Sister Carol, "Shackles," *Without Apology: Reggae Free Mumia* (New York: Without Apology Music, 1999).

Why are the poor among us today to be sacrificed? To satisfy a mere misapprehension? To balance a national budget? Hardly. Less than two percent of the nation's budget pays for welfare, so it is not likely to bust under its weight. Then why?...When millions starve, workers duly fall to silent acquiescence for fear of losing what little they have. Fear crates a cowed labor force which, when faced with givebacks, won't even whimper. High poverty signals capitalism triumphant.³⁰¹

Instead, Mumia's message is translated through music.

Conclusion

In a recent interview with hip hop artist and Hollywood movie star Will Smith, the topic of the impact of black Americans on communities was discussed. Smith described a recent trip that he took to Mozambique. While touring a small village in the African country, Smith came across a shack on which someone had scrawled the name of slain rapper Tupac Shakur. Smith noted, "I was asking the kids: 'What is it about Tupac? Why is that there?' I kept asking why. They were saying 'we want to dress like you dress, wear all the things you wear, talk how you talk.'"³⁰² The musicians are not only making the trends, they are creating the values, mores, and ideologies of their listeners. They are: constituting what the means to a class of people, many of which are disenfranchised because of race, gender, and/or class. Smith's story reminds us what effect musicians have around the world. The villagers in Mozambique may not be aware of *Brown v. Board* but they are aware of Tupac Shakur and his messages on race and class.

³⁰¹ Mumia Abu-Jamal, *Death Blossoms: Reflections from a Prisoner of Conscience* (Farmington, PA: Plough Publishing House, 1997), 116-117.

³⁰² CNN, *Will Smith: Rappers Should Know Impact*. Retrieved June 29, 2005, from <http://www.cnn.com/2005/showbiz/music/06/28/music.willsmith.ap/index.html>.

Various musicians present a different approach to survival; a long term approach to survival. This is based on intellect and skills that cannot be taken away.³⁰³ Rights-based discourse, a topic heavily discussed in music, reminds the listener and the reader that there is a question about whether rights are given or taken. As Malcolm X said in 1965, "Nobody can give you freedom. Nobody can give you equality or justice or anything. If you're a man, you take it."

³⁰³ Ibid.

CHAPTER VII

CONCLUSIONS

Music is a moral law. It gives soul to the universe, wings to the mind, flight to the imagination, and charm and gaiety to life and to everything. For the introduction of a new kind of music must be shunned as imperiling the whole state; since styles of music are never disturbed without affecting the most important political institutions.

- Plato (428BCE – 348BCE)³⁰⁴

I have proposed a new connection between Law and Music, with particular focus on music that is both politically motivated and politically expressive. In their language, performance, social practice, and cultural achievement, law and music have intriguing commonalities.³⁰⁵ However, unlike judges following precedent and creating common law or legislators writing codes and enacting law, musicians develop a theory of justice by creating an art form that responds to traditional jurisprudence. The musicians' rejoinders fall under the rubric of what Constitutive Theorists deem "constituting law." Professor Patricia Williams views "the law as a history of subtle narratives" and I intend to connect law's subtly to specific lyrics designed to address the law's shortcomings.³⁰⁶ I have argued that when musicians create such art, they are in fact, constituting law, and in doing so, assembling a non-traditional form of jurisprudence.

³⁰⁴ Plato, *Plato: Complete Works*, ed. John M. Cooper (Indianapolis: Hackett Publishing Company, Inc., 1997), 1555.

³⁰⁵ Desmond Manderson and David Claudill, "Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop," *Cardozo Law Review* (May – July 1999), 1325.

³⁰⁶ Patricia Williams interview with Cornel West, *Restoring Hope: Conversations on the Future of Black America*, ed. Kevin Shawn Sealey (Boston: Beacon Press, 1997), 149.

Music has been historically recognized as a valuable tool for political motivation and often viewed as revolutionary in its message. Yet the role of musicians in this has been minimalized. I have elevated musicians to equal footing with scholars whose academic achievements have been so revolutionary that political scientists will view their lyrics as valuable examples of sociolegal scholarship. Thus, each chapter of my dissertation entails the dissection of musical lyrics, with particular attention paid to Reggae music – an African Diaspora born genre concerned with issues of race and justice. Through my analysis of the lyrics and their connection to classic and contemporary scholarship, I have provided an argument that musicians use their medium as a method to collectively constitute systems of justice.

In 1975, Bob Dylan penned a song entitled *The Hurricane*.³⁰⁷ In it, Dylan tells the tale of Ruben “Hurricane” Carter, a black man from Paterson, New Jersey, who spent his youth in jail only to become the middleweight boxing champion. Dylan bellows about the fateful night that two black men entered a bar and shot and killed several people. Carter was arrested for the murders, framed, and convicted. After over 20 years in prison, Carter was released. This story may be familiar to many, but its familiarity, I argue, comes from Dylan’s song, not from the newspaper stories or court cases. The subsequent protest for Carter while he was in jail came from many fronts, beyond Dylan, but Dylan’s song was a performance of law. Invoking the theme that “justice is a game,”

³⁰⁷ Bob Dylan, “Hurricane,” *Desire* (New York: Columbia Records, 1975).

Dylan reminds us that musicians can play an integral role in educating the public on issues of injustice. As the music plays on, and lives, the lyrics become more than words in a tune, they become anthems, rituals, mantras – they constitute law.

Law and culture are constantly interrelated. Culture can include collective identity, race, lifestyle, and rituals. Law is often viewed formally with constitutions, statutes, and judicial opinions dominating the discourse. Separating law and culture produces a failed account of societal structure. The constitutive approach that encompasses this project allows for law and culture to be connected and for law to be interpreted in cultural terms. The work of numerous constitutive theorists lay the foundation for this piece from the perspective that musicians, part of culture, act in a fashion that is “extra-legal.”

The role of music has been addressed from a historical perspective. Beginning with work that discusses music on the slaveships, I have traced the importance of music to those in despair, as well as those aiming for social change. I used constitutive theory and contemporary music to connect this phenomenon with current topics of law. Marc Anthony Neal’s³⁰⁸ work, where he examines the role of music, specifically black music, from the perspective that its design is to uplift and effect change, helped serve as a model for my approach in these efforts.

³⁰⁸ Marc Anthony Neal, *What the Music Said: Black Popular Music and Black Popular Culture* (New York: Routledge), 1999.

Viewing music from the vantage point of “legislating freedom, commodifying struggle” I demonstrated music’s constitutive role in society.

Protest music was naturally an integral part of this project but was to be dissected in a more intensive manner than traditional political science work had done. More than a thematic study, I analyzed the music and the passion that goes with that music and connected it to law.³⁰⁹ Music is not simply an auditory exercise, and this project focused not on the sound as much as the lyrics. Music, like the law, invokes various initial reactions. Yet, once those immediate responses are spent, the song may take on an even greater role in the listener’s consciousness and life. Music, once analyzed, may affect one on a more personal level than the abstract nature of countless legislation or case law. Yet, both music and law each require concentration and each affects our lives on a daily basis. I captured those similarities and expanded on them.

In addition to Neal’s work, that of Desmond Manderson³¹⁰ informed my approach in this case regarding the abstract nature of both music and law. Manderson’s work primarily focuses on classical music, where, there are no lyrics, however, I synthesized his work and extrapolated the meaningful arguments that he poses in regard to law and justice and supplemented this with my lyrical approach. While Manderson notes that sight is the most specific and

³⁰⁹ Aaron Ridley, *Music, Value & the Passions* (Ithaca: Cornell University Press), 1995.

³¹⁰ Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press), 2000.

least diverse sense, it is valuable to address both lyrics and music.³¹¹ Yet, we hear from every direction – it is all around us – as is the law. It is the lyrics that come from the passionate music that I addressed.

The constitutive approach allows for a study that addresses the role that music plays within society, audibly and lyrically. As well, the constituting of law by these musicians gives us a unique perspective into the non-traditional jurisprudence that I outlined. An interesting implication is that lawyers and judges may dominate the legal system but musicians have popular culture for their platform. This may be a more persuasive podium to argue from and I demonstrated the manner in which the musicians perform law.

A major theme of this dissertation has been the idea that singers and musicians build communities through their music. Interestingly, those communities use legal verbiage to communicate. As I noted in Chapter V when discussing hip hop, race and gender rights remain foremost in many genres of music. The struggle to find the redemption in the brutal experience, to envision freedom that could transform the ghetto into a black community is what Amiri Baraka meant when he called black music “changing the same.”³¹² But for the consciously aware musicians, their songs have become invaluable chronicles of the times. The music has been here long before the recordings just as law was in the United States long before the Constitution. The saga of the musicians as they

³¹¹ *Ibid.*, 183.

³¹² Craig Werner, *A Change Is Gonna Come: Music, Race & The Soul of America* (New York: Penguin Putnam Group, 1999), 173.

describe the lives of those living in ghettos below corrugated metal roofs paint not only a picture of Class but an image of how law affects Class. “Their words are as pale as a shroud, as red as spilled blood, as black as the mine, as green as the forest, and, when reflecting happy times, as multicolored as the peoples of Africa themselves,” notes author and musician Frank Tenaille.³¹³

Scholars have argued that images and meaning have most often come from law. That is to say, law is society’s most influential tool. Scholar Marc Anthony Neal wrote, “The Emancipation Proclamation allowed the conditions for the development of black public life and a philosophy of black public life, which ultimately informs the black political and intellectual traditions of the twentieth century.”³¹⁴ I have argued that conditions for the development of black life have occurred from music as well. Today’s black college students are the first generation to experience changing black identities since the civil rights movement as practical opportunities. Music has been integral to that identity. But “Generation Hip Hop” is the generation born after *Bakke*.³¹⁵ This generation has a sense of possibility denied.³¹⁶ And that is precisely where musicians have entered the debate. Shaping the imagery and awareness of sociolegal issues,

³¹³ Frank Tenaille, *Music is the Weapon of the Future: Fifty Years of African Popular Music* (Chicago: Lawrence Hill Books, 2000), xvi.

³¹⁴ Mark Anthony Neal, *What the Music Said: Black Popular Music and Black Public Culture* (New York: Routledge, 1999), 3.

³¹⁵ 438 U.S. 265 (1978)

³¹⁶ Mark Anthony Neal, *Soul Babies: Black Popular Culture and the Post-Soul Aesthetic* (New York: Routledge, 2002), 177.

singers and musicians have constituted law. Jamaican musicians Congos bellowed:

The strength to fight, the fight to make it right
The people cry for freedom
Sufferin' with hunger, nowhere to lay my weary head
Can't you see the problem, faced by 'dis generation
While you sit and ask, and ask for more
What do you want out of my people?
Give them the rights, Give them the rights
Justice for the people,
Give them the rights, Give them the rights
Justice for the nation.³¹⁷

Their work here, in 2005, is designed to demand rights and bring back the possibility of rights into the legal discourse.

In Chapter III, I introduced the term “rude boy” into the debate. I return to it here because it is an applicable finale to this project. As I wrote, rudies or rude boys described the emergence of a rebellious youth movement of disenfranchised urban males who grew from the 1962 independence. The movement continued to grow and became a place for those disenchanted and alienated from the system to rebel. The rude boys (bwoys) have become synonymous with the class struggle in Jamaica and beyond. But as Bunny Wailer, founding member of The Wailers (later to be Bob Marley and the Wailers) describes in an interview, the band specifically wanted to appeal to the rude boys and use the term given to those lesser privileged youths.³¹⁸ The term

³¹⁷ Congos, “Give Them the Rights,” *Give Them the Rights* (San Francisco: Young Tree Records, 2005).

³¹⁸ Bunny Wailer, “Bob’s Migration to the U.S.,” *The Wailers Legacy: Disc I* (Kingston, Jamaica: Tuff Gong Records, Ltd., 2005).

rude boy has not only remained common in reggae music but has permeated other musical genres. More importantly, The Wailers conscious intention to draw attention to the plight of the downpressed youth symbolizes the effort musicians often make to effect sociolegal change through their music.

Interestingly, when The Wailers were beginning their reggae careers, their most controversial song was “Rude Boy Ska” as it wailed, “Walk the proud land my friend, with me, walk the proud land my friend. Give me little soul, oh lord. Rude boy rob? Rude boy rob? I’ve got to keep on moving.”³¹⁹ Today, Jamaicans are aware of rude boys and their economic plight because of The Wailers and other reggae musicians.

The implications of this dissertation are twofold. Initially, my work demonstrates the magnificent impact that singers and musicians can have on the law. With musicians too numerous to mention in the body of the work let alone in the conclusion, I found that law informed the musicians about the injustices in the system and subsequently, the musicians informed the people. As arguably the greatest rapper of the hip hop generation Tupac Shakur said, “I didn’t create thug life, I diagnosed it.” I found that musicians not only use legal verbiage in their work but also become jurisprudential scholars and philosophers as they prescribe variables of Natural Law, Legal Positivism, and Legal Realism to their music. I establish the impact music has had upon society, specifically during

³¹⁹ Bunny Wailer, “Rude Boy Ska,” *The Wailers Legacy: Disc V* (Kingston, Jamaica: Tuff Gong Records, Ltd., 2005).

slavery times and connect it to Constitutive Theory. Constitutive theory converges on musical theory to develop a fluid argument about where law comes from and reminds us that legal actors are not simply judges, lawyers, juries, and legislators. I construct arguments that connect Race and music, Gender and music, and Class and music which gives us a better understanding of both ideas.

Certainly one could argue that the other implication of this dissertation relates to the notion that music has *too much* power over the people. Tipper Gore posed this argument in the 1980s and many in U.S. society supported her claims. The implication of my work could remind some that musicians must be censored at times since they can affect the very fabric of the freedoms U.S. citizens enjoy and expect. As the funk band Parliament Funkadelic recorded in 1978, "One Nation Under a Groove," we should be reminded the power of Funk.³²⁰ Their band title and album title exemplify the claim they make that allegiance belongs to them and to Funk. Of course to many, the word music is about revolution. That power is dangerous. "If musicians can change the law, they have too much power," some might say. "One only has to observe what rock n' roll has done to cause our young people to riot and participate in social rebellion, chaos and bedlam, to understand how significantly music fits into any revolutionary

³²⁰ Mark Anthony Neal, *Songs in the Key of Black Life: A Rhythm and Blues Nation* (New York: Routledge, 2003).

era."³²¹ The implication is that music can instigate and produce savagery as easily as it can constitute law and develop justice. There is a harmful side to music. A side that is unhealthy, destructive, one could argue even sinister. As Henry David Thoreau warned, "Even music may be intoxicating. Such apparently slight causes destroyed Greece and Rome, and will destroy England and America."³²² However, that is not what one should take away from this dissertation.

Rather, this project has been not simply about determining music's power but also about why musicians seem obligated to enter into the sociolegal debate. It is not as simple as saying that injustice exists. Nor can one blame Democrats or Republicans, Prosecutors or Public Defenders for the legal inequity. Instead, this project demonstrates that musicians are more than participants, they are more than voyeurs. The music is really an allegory. Tupac Shakur tells a story about the Vietnam War ending because people "saw the horror." Shakur's goal was to show, in graphic detail, the pain of people of color and lower classes so a community can be established and the injustice would end. For Shakur, singing about his reality gives him a positive sense of normalcy. It is not a sitcom or a game. The question he asked was how can one change the system and no longer perpetuate it. Scholar Paul Chevigny wrote precisely what Tupac sang.

Chevigny noted:

³²¹ David A. Noebel, *The Marxist Minstrels: A Handbook on Communist Subversion of Music* (Tulsa: Oklahoma: American Christian College Press, 1974), 115.

³²² *Ibid.*, i.

The “creative” act is projected to say something that has not been heard before, or show something that has not been seen before. The legal change represents and reflects, in symbolic terms, a change in society: although it may also help to bring about change, it can do so only within an institutional framework of law prepared to accept change as part of a larger tradition.³²³

Chevigny’s words, much like Shakur’s, remind us that legal change is gradual and symbolic. They remind us that change comes by attacking the institution that holds the power. They remind us that law holds a great deal of power and the one who knows best how to manufacture law can best use power. As singers and musicians, non-traditional legal philosophers, blend meaning to their lyrics and law, we can see the constitution of law in their music. Bob Marley said it best, “Life is one big road with lots of signs, when you’re riding through the ruts don’t complicate your mind, flee from hate, mischief, and jealous, don’t bury your thoughts put your vision to reality yeah, Wake Up and Live!”³²⁴

³²³ Paul Chevigny, *Gigs: Jazz and the Cabaret Law in New York City* (New York: Routledge, 1991).

³²⁴ Bob Marley, “Wake Up and Live,” *Survival* (New York: Island Records, 1979).

BIBLIOGRAPHY

Abu-Jamal, Mumia. *Death Blossoms: Reflections from a Prisoner of Conscience*. Farmington, PA: Plough Publishing House, 1997.

_____. "A Rap Thing." *All Things Censored Volume I*. San Francisco: AK Press Audio, 1998.

Abyssinians. "Declaration of Rights." *Satta Massagana*. Cambridge, MA: Heartbeat Records, 1993.

Amnesty International. *The Case of Mumia Abu-Jamal*. New York: Seven Stories Press, 2000.

Aptheker, Herbert. *And Why Not Every Man?* New York: Seven Seas Books, 1961.

Auletta, Ken. *The Underclass*. New York: Random House, 1982.

Balkin, Jack and Sanford Levinson. "Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews." *Cardozo Law Review*, May - July 1999, (1513-1572).

Barrett, Leonard E. *The Rastafarians: The Sounds of Cultural Dissonance*. Boston: Beacon Press, 1988.

Interview with Sarah Jones by Cara Bedick of WMUA, Friday December 13, 2002.

Begin, Raymond F. *Natural and Positive Law*. Washington D.C.: The Catholic University of America Press, 1959.

Bell, Derrick. *And We Are Not Saved: The Elusive Quest for Racial Justice*. New York: Basic Books, 1987.

_____. *Faces at the Bottom of the Well: The Permanence of Racism*. New York: Basic Books, 1992.

_____. "White Superiority in America: Its Legal Legacy, Its Economic Costs." In *Critical White Studies: Looking Behind the Mirror*, eds. Richard Delgado and Jean Stefancic. 596-600. Philadelphia: Temple University Press, 1997.

_____. *Afrolantica Legacies*. Chicago: Third World Press, 1998.

- Beyer, Jonathan A. "The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory." *Georgetown Law Journal*, March 2000, 537-563.
- Biko, Steve. *I Write What I Like*. New York: Harper Collins, 1986.
- Brigham, John and Christine Harrington. "Realism and Its Consequences: An Inquiry into Contemporary Sociological Research." *International Journal of the Sociology of Law*, Vol. 17, 1989.
- Brigham, John. "The Upper Courts: Scholarship and Authority." *Social Epistemology*, 16-19, Vol. 5, 1991.
- _____. *The Constitution of Interests: Beyond the Politics of Rights*. New York University Press, 1996.
- Brown, Aggrey. *Color, Class and Politics in Jamaica*. New Brunswick, New Jersey: Transaction, Inc., 1979.
- Browning, Barbara. *Infectious Rhythm: Metaphors of Contagion and the Spread of African Culture*. New York: Routledge, Inc., 1998.
- Burgess, Susan. "Queer New Institutionalism." In *The Supreme Court in American Politics: New Institutional Interpretations*, eds. Howard Gillman and Cornell Clayton, 199-213. University of Kansas Press, 1999.
- Burke, Barry. "Steve Biko and informal education." *The Encyclopedia of Informal Education*, www.infed.org/thinkers/biko.htm. Last updated: January 28, 2005.
- Calmore, John O. "Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World." In *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas. 315-328. New York: The New Press, 1995.
- Campbell, Horace. *Rasta and Resistance: From Marcus Garvey to Walter Rodney*. Trenton, NJ: Africa World Press, Inc., 1987.
- Cash, Johnny. "San Quentin." *At San Quentin*. New York: Columbia Records, 1969.
- _____. "I'm A Worried Man." *Ragged Old Flag*. New York: Sony Music, 1974.

- Channing, Walter. *An Address on the Prevention of Pauperism*. Boston: Office of the Christian World, 1843.
- Chapman, Tracy. "All That You Have Is Your Soul." *Crossroads*. New York: Elektra Entertainment, 1989.
- Chevannes, Barry. *Rastafari: Roots and Ideology*. Syracuse, New York: Syracuse University Press, 1979.
- Chevigny, Paul. *Gigs: Jazz and the Cabaret Law in New York City*. New York: Routledge, 1991.
- The Clash. "Armageddon Time." *Black Market Clash*. New York: Sony Records, 1980.
- Cliff, Jimmy. "No Justice." *Images*. Miami: Vision Records, 1989.
- CNN. *Will Smith: Rappers Should Know Impact*. Retrieved June 29, 2005, from <http://www.cnn.com/2005/showbiz/music/06/28/music.willsmith.ap/index.html>.
- Collins, John. *West African Pop Roots*. Temple University Press, 1992.
- Congos. "Give Them the Rights." *Give Them the Rights*. San Francisco: Young Tree Records, 2005.
- Cooke, Sam. "A Change Is Gonna Come." *Ain't That Good News*. New York: RCA, 1964.
- Crenshaw, Kimberle, Neil Gotanda, Gary Peller, and Kendall Thomas. *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas. New York: The New Press, 1995.
- Culture. "Still Rest My Heart." *Three Sides to My Story*. Kingston, Jamaica: Shanachie Records, 1991.
- _____. "Revolution," *Humble African*. Jamaica, New York: VP Records, 2000.
- Dalton, Clare. "Where We Stand: Observations on the Situation of Feminist Legal Thought." *Berkeley Women's Law Journal*. March 1988.

- Davis, Stephen and Peter Simon. *Reggae International*. New York: Random House, 1982.
- The Disposable Heroes of Hiphoprisy. "Music and Politics." *Hypocrisy is the Greatest Luxury*. New York: Islands Records, 1992.
- Douglass, Frederick. *Narrative of the Life of Frederick Douglass: An American Slave* Harvard University Press, 1960.
- Dylan, Bob. "Hurricane." *Desire*. New York: Columbia Records, 1975.
- _____. "George Jackson." *Masterpieces*. New York: CBS Records, 1978.
- Dyson, Michael Eric. *Between God and Gansta Rap*. Cambridge: Oxford University Press, 1996.
- Eek-A-Mouse. "Do You Remember Those Days of Slavery." *Skidip!* Newton, NJ: Shanachie Records, 1982.
- Ewick, Patricia and Susan Silbey. *The Common Place of Law*. The University of Chicago Press, 1998.
- Fisher, Miles Mark. *Negro Slave Songs in the United States*. New York: The Citadel Press, 1963.
- Forbath, William. "Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution." *Stanford Law Review*, July 1994, Volume 46, (1771-1805).
- Foucault, Michel. *The Foucault Reader*, Edited by Paul Rabinow. New York: Pantheon Books, 1984.
- Franklin, Aretha. "Natural Woman." *Aretha Franklin: 30 Greatest Hits*. New York: Atlantic Records, 1967.
- Franti, Michael and Spearhead. "Oh My God." *Stay Human*. San Francisco: Six Degrees Records, 2001.
- _____. "Everyone Deserves Music." *Everyone Deserves Music*. San Francisco: Liberation Music, 2003.
- Friedman, Lawrence. "Lexitainment: Legal Process as Theater." *DePaul Law Review* 50, 539-558, 2000.

- Fugazi. "Dear Justice Letter." *Steady Diet of Nothing*. Washington D.C: Dischord Records, 1991.
- Fuller, Lon. *The Morality of Law*. Yale University Press, 1964.
- Gabriel, Peter. "Biko." *Peter Gabriel (3)*. New York: Geffen Records, 1980.
- Geertz, Clifford. *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books, 1983.
- Goldstein, Leslie Friedman. *The Constitutional Rights of Women: Cases in Law and Social Change*. New York: Longman Inc., 1979.
- Haney Lopez, Ian F. "The Social Construction of Race." In *Critical Race Theory: The Cutting Edge*, ed. Richard Delgado. 191-203. Philadelphia: Temple University Press, 1995.
- _____. *White By Law: The Legal Construction of Race*. New York University Press, 1996.
- Harrington, Christine. *Shadow Justice: The Ideology and Institutionalization of Alternatives to Courts*. Westport, CT: Greenwood Press, 1985.
- The Heartical Crew. "Free Mumia." *Without Apology: Reggae Free Mumia*. New York: Without Apology Music, 1999.
- Hill, Lauryn. "The Mystery of Iniquity." *MTV Unplugged 2.0*. New York: Columbia Records, 2002.
- Holmes, Oliver Wendell. *The Common Law*. Boston: Little, Brown, 1881.
- hooks, bell. *Where We Stand: Class Matters*. New York: Routledge Inc., 2000.
- Huff, Joan. *Law, Gender, and Injustice: A Legal History of U.S. Women*. New York University Press, 1991.
- Hunt, Alan. *Explorations in Law and Society: Toward a Constitutive Theory of Law*. London: Routledge, Inc., 1993.
- Jackson, George. *Blood In My Eye*. Baltimore, MD: Black Classic Press, 1971.
- _____. *Soledad Brother*. New York: Coward-McCann, 1970.

- Jay-Z. "Justify My Thug." *The Black Album*. New York: Roc-A-Fella Records, 2003.
- Johnson, Olati and Dorothy Swaine Thomas. "Integrating the Underclass: Confronting America's Enduring Apartheid." *Stanford Law Review*, April 1995, Volume 47, (787-818).
- Jones, Sarah. Retrieved April 4, 2003, from <http://www.sarahjonesonline.com>.
- Katz, Michael B. "The Urban 'Underclass' as a Metaphor of Social Transformation." In *The Underclass Debate*, ed. Michael B. Katz. 3-26. Princeton University Press, 1993.
- Kearns, Thomas R. and Austin Sarat. "Legal Justice and Injustice: Toward a Situated Perspective." In *Justice and Injustice in Law and Legal Theory*, eds. Thomas R. Kearns and Austin Sarat. Ann Arbor: University of Michigan Press, 1998.
- Keith, Nelson W. and Novella Z. Keith. *The Social Origins of Democratic Socialism in Jamaica*. Philadelphia: Temple University Press, 1992.
- R. Kelly. "You Remind Me of Something." *R.Kelly*. New York: Jove Records, 1995.
- Kofsky, Frank. *Black Nationalism and the Revolution in Music*. New York: Pathfinder Press, 1970.
- Kuper, Adam. *Changing Jamaica*. Boston, Massachusetts: Routledge & Kegan Paul, 1976.
- Levine, Lawrence M. "Slave Songs and Slave Consciousness." In *The Afro-American Slaves: Community or Chaos?* Ed. Randall M. Miller. 62-77. Malabar, Florida: Robert E. Krieger Publishing Company, 1981.
- Lewis, Oscar. *La Vida: A Puerto Rican Family in the Culture of Poverty - San Juan and New York*. New York: Random House, 1965.
- LL Cool J. "Doin It." *Mr. Smith*. New York: Def Jam Records, 1995.
- Lyons, David. *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility*. Cambridge University Press, 1993.

- MacKinnon, Catharine A. *Toward a Feminist Theory of the State*. Harvard University Press, 1989.
- Mahoney, Martha. "Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases." *Southern California Law Review*, May 2003, Volume 76, (799-891).
- Manderson, Desmond and David Claudill. "Music and Legal Theory: An Interdisciplinary Workshop Introduction." *Cardozo Law Review*, May-July 1999, (1325-1329).
- _____. "Modes of Law: Music and Legal Theory - An Interdisciplinary Workshop." *Cardozo Law Review*. May-July 1999. 1328-1747.
- Marley, Bob and the Wailers. "Burnin' and Lootin.'" *Burnin'*. New York: Island Records, 1973.
- _____. "Get Up, Stand Up." *Burnin'*. New York: Island Records, 1973.
- _____. "Revolution." *Natty Dread*. New York: Island Records, 1974.
- _____. "Rat Race." *Rastaman Vibration*. New York: Island Records, 1976.
- _____. "Babylon System." *Survival*. New York: Island Records, 1979.
- _____. "Wake Up and Live." *Survival*. New York: Island Records, 1979.
- _____. "Zimbabwe." *Survival*. New York: Island Records, 1979.
- Marley, Damian "Jr. Gong." "More Justice." *HalfWay Tree*. New York: Motown Records, 2001.
- Marley, Ziggy and the Melody Makers. "When the Lights Gone Out." *One Bright Day*. Beverly Hills: Virgin Records, 1989.
- _____. "I Know You Don't Care About Me." *Live Vol. I*. New York: Elektra Entertainment Group Inc., 2000.
- Massey, Douglas S. and Nancy A. Denton. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge: Harvard University Press, 1993.

- Matsuda, Mari, Charles Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw eds. *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. Boulder, CO: Westview Press. 1993.
- McCann, Ian. *Bob Marley: In His Own Words*. London: Omnibus Press, 1993.
- Metropolitan Museum of Art. *Music in Ancient Greece*. Retrieved August 2, 2005, from http://www.metmuseum.org/toah/hd/grmu/hd_grmu.htm.
- Mezey, Naomi. "Approaches to the Cultural Study of Law: Law as Culture." *Yale Journal of Law and Humanities*, 2001, Volume 13, (35-67).
- Myrdal, Gunnar. *An American Dilemma: The Negro Problem and Modern Democracy*. New York: Harper and Brothers, 1944.
- Mutabaruka. *Blakk wi blak...k...k...* Kingston, Jamaica: Shanachie Records, 1991.
- _____. "The People's Court I." *Blakk Wi Blakk...k...k*. Newton, New Jersey: Shanachie Records, 1991.
- Nadler, Janice. "Flouting the Law." *Texas Law Review*, May 2005, Volume 83, (1400-1439).
- Neal, Mark Anthony. *What the Music Said: Black Popular Music and Black Public Culture*. New York: Routledge, 1999.
- _____. *Soul Babies: Black Popular Culture and the Post-Soul Aesthetic*. New York: Routledge, 2002.
- _____. *Songs in the Key of Black Life: A Rhythm and Blues Nation*. New York: Routledge, 2003.
- Noebel, David A. *The Marxist Minstrels: A Handbook on Communist Subversion of Music*. Tulsa: Oklahoma: American Christian College Press, 1974.
- O'Connor, D.J. *Aquinas and Natural Law*. London: Macmillan and Co., Ltd., 1967.
- Peller, Gary. "Race-Consciousness." In *Critical Race Theory: The Key Writings That Formed the Movement*, eds. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas. 127-158. New York: The New Press, 1995.
- Philadelphia International All-Stars. "Let's Clean Up the Ghetto." *Black Power: Music of a Revolution*. New York: Sony Music, Inc., 2004.

- Piersons, Jodie Leroy and Roger Steffens. "The Peter Tosh Biography - Honorary Citizen." *Honorary Citizen*. New York: Sony Music Entertainment Inc., 1997.
- Plato. *Plato: Complete Works*, ed. John M. Cooper. Indianapolis: Hackett Publishing Company, Inc., 1997.
- Ramsey, Guthrie P. Jr. *Race Music: Black Cultures from Bebop to Hip-Hop*. University of California Press, 2003.
- Richmond, Michael. "Law, Instrumental Music, and Dance: Reflections of a Common Culture." *Legal Studies Forum*, Volume 27, 2003, (783-814).
- Rifkin, Janet. "Toward a Theory of Law and Patriarchy." In *Feminist Legal Theory: Foundations*, ed. D. Kelly Weisberg. 412-418. Philadelphia: Temple University Press, 1993.
- Rodney, Walter. *The Groundings with my Brothers*. London: Bogle-L'Ouverture Publications, 1969.
- Rose, Tricia. *Black Noise: Rap Music and Black Culture in Contemporary America*. Hanover, New Hampshire: Wesleyan University Press, 1994.
- _____. "A Style Nobody Can Deal With." In *Microphone Friends: Youth Music and Youth Culture*, eds. Andrew Ross and Tricia Rose. New York: Routledge, 1994.
- Salt 'N' Pepa. "Independent." *Blacks' Magic*. New York: Next Plateau Records, 1990.
- Sarat, Austin and Thomas Kearns. *The Law in Everyday Life*. University of Michigan Press, 1992.
- Schultz, Christian. *Travels on an Inland Voyage*. Ridgewood, NJ: The Gregg Press, 1968.
- Scott-Heron, Gil. *The Revolution Will Not Be Televised*. New York: RCA Records, 1974.
- Segments of Time. "Song to the System." *Black Power: Music of a Revolution*. New York: Sony Music, Inc., 2004.

- Shaggy. "Boombastic." *Boombastic*. New York: Virgin Records, 1995.
- Shepherd, John and Peter Wicke. *Music and Cultural Theory*. Malden, MA: Blackwell Publishers Inc., 1997.
- Sheridan, Maureen. *Bob Marley, Soul Rebel: The Stories Behind Every Song, 1962-1981*. New York: Thunder's Mouth Press, 1999.
- Sherwin, Richard. *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*. The University of Chicago Press, 2000.
- _____. "Law in Popular Culture," *New York Law School Faculty Reprint Series 1*, 1-28, 2005.
- Simon, William H. "Papers from the Yale Law Journal Symposium on the Legacy of the New Deal: Problems and Possibilities in the in the Administrative State held at the Yale Law School on February 11-13, 1983: Legality, Bureaucracy, and Class in the Welfare System." *Yale Law Journal*, June 1983, Volume 92, (1198-1269).
- Sister Carol. "Shackles." *Without Apology: Reggae Free Mumia*. New York: Without Apology Music, 1999.
- Steel Pulse. "Biko's Kindred Lament." *Tribute to the Martyrs*. New York: Island Records, 1979.
- _____. "Uncle George." *Tribute to the Martyrs*. New York: Island Records, 1979.
- _____. "Wild Goose Chase." *Earth Crisis*. New York: Elektra Records, 1984.
- _____. "George Jackson." *African Holocaust*. New York: Sanctuary Records Group, Inc., 2004.
- Steffens, Roger. "Bob Marley: Rasta Warrior." In *Chanting Down Babylon: The Rastafari Reader*, eds. Nathaniel Samuel Murrell, William David Spencer, and Adrian Anthony McFarlane. 253-265. Philadelphia; Temple University Press, 1998.
- Steinberg, Stephen. *The Ethnic Myth: Race, Ethnicity, and Class in America*. Boston: Beacon Press, 1989.

- Sunstein, Cass. *The Partial Constitution*. Harvard University Press, 1993.
- Stumpf, Harry P. *American Judicial Politics*. New Jersey: Prentice Hall, 1997.
- Tenaille, Frank. *Music is the Weapon of the Future: Fifty Years of African Popular Music*. Chicago: Lawrence Hill Books, 2000.
- Third World. "Mi Legal." *Committed*. New York: Polygram Records, 1992.
- Tosh, Andrew. "Time is Longer Than Rope." *Make Place for the Youth*. Duarte, CA: Psalm Records, 2000.
- Tosh, Peter. "Legalize It." *Legalize It*. New York: Columbia Records, 1976.
- _____. "Equal Rights." *Equal Rights*. New York: Columbia Records, 1977.
- _____. "Bumbo Klaat." *Honorary Citizen*. New York: Sony Music Entertainment Inc., 1997.
- _____. *Honorary Citizen*. New York: Sony Music Entertainment Inc., 1997.
- Trubek, David. "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law." *Law Soc. Rev.* 1977, Volume 11(529-569).
- UB40. "One in Ten." *UB40: 1980-1983*. New York: A&M Records, 1983.
- Unger, Roberto. *Law in Modern Society: Toward a Criticism of Social Theory*. New York: Free Press, 1976.
- U.S. Census, March 2001.
- Wailer, Bunny. "Bob's Migration to the U.S." *The Wailers Legacy: Disc I*. Kingston, Jamaica: Tuff Gong Records, Ltd., 2005.
- _____. "Rude Boy Ska." *The Wailers Legacy: Disc V*. Kingston, Jamaica: Tuff Gong Records, Ltd., 2005.
- Weinreb, Lloyd L. *Natural Law and Justice*. Cambridge: Harvard University Press, 1997.
- Werner, Craig. *A Change Is Gonna Come: Music, Race & The Soul of America*. New York: Penguin Putnam Group, 1999.

West, Cornel. "The Journey." *Sketches of My Culture*. New York: Artemis Records, 2001.

Whittington, Keith E. *Constitutional Interpretation: Textual Meaning, Original Intent & Judicial Review*. University Press of Kansas, 1999.

Williams, Patricia J. *The Alchemy of Race and Rights*. Cambridge: Harvard University Press, 1991.

_____. *Seeing a Color-Blind Future: The Paradox of Race*. New York: The Noonday Press, 1997.

Williams, Patricia interviewed by Cornel West. *Restoring Hope: Conversations on the Future of Black America*, ed. Kevin Shawn Sealey. Boston: Beacon Press, 1997.

Wise, Tim. *White Like Me*. Brooklyn, New York: Soft Skull Press, 2005.

Woodson, Carter. *The Mis-Education of the Negro*. Asmata, Eritrea: Africa World Press, Inc., 1933.

Wonder, Stevie. "Evil." *Music of My Mind*. Los Angeles: Motown Record Company, 1972.

Yo-Yo. "Don't Play with My Yo-Yo." *Make Way for the Motherlode*. New York: East West, 1991.

Cases

Bradwell v. Illinois (1873) 83 U.S. 130

Brown v. Board of Education (1954) 347 U.S. 483

Dred Scott v. Sandford (1857) 60 U.S. 393

Griswold v. Connecticut (1965) 381 U.S. 479

Lochner v. New York (1905) 198 U.S. 45

McCleskey v. Kemp (1987) 481 U.S. 279

Muller v. Oregon (1908) 208 U.S. 412

Olmstead v. United States (1928) 277 U.S. 438

Plessy v. Ferguson (1896) 163 U.S. 537

Regents of the University of California v. Bakke (1978) 438 U.S. 265

Riggs v. Palmer (1889) 115 N.Y. 506

Scott v. Negro London (1806) 7 U.S. 324

