

# Music and Law\*

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“No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings . . . and listening to great music.”

—Felix Frankfurter<sup>1</sup>

Not just reading! Always singing!

.....

O, how dreary in the letters,  
Black on white, the song appears.

—Johann Wolfgang von Goethe<sup>2</sup>

## I. Introduction<sup>3</sup>

“As lawyers know—to their cost—it is very difficult to say things habitually, even things one doubts, without coming to believe them.”

—James Boyd White<sup>4</sup>

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1. Felix Frankfurter, *Advice to a Young Man Interested in Going into Law*, in OF LAW AND MEN 103-4 (PHILIP ELMAN ED., 1956).

2. Johann Wolfgang von Goethe, *An Lina*, GOETHES GEDICHTE IN ZEITLICHER FOLGE IN EINEM BAND 508 (1982).

3. Renate Neumann, *Recht und Musik*, DIE FREUDEN DES JUNGEN BAECKERMEISTERS LEHMANN 179 (Erlinghagen et al. eds., 1993); Bernhard Grossfeld, *The Invisible Hand: Patterns of Order in Comparative Law*, 49 S. AFR. L.J. 648 (1997); Edward J. Eberle & Bernhard Grossfeld, *Law and Poetry*, 11 ROGER WILLIAMS U.L. REV. 353 (2006); Bernhard Grossfeld, *Literature, Language and the Law*, 20 DE JURE 217 (1987).

4. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 54 (1990). *But see* the discussion in Samuel Kucherow, *Indigenous and Foreign Influence on the Early Russian Legal*

Law and Music is a connection often discussed in law; just consider the relations between copyright and music. This is not the case, however, when we change the emphasis and put music in the first place: Music and Law. What about the social nature of music?<sup>5</sup> Does music come before the law? There is not much literature about this subject,<sup>6</sup> but comparative law has opened our eyes for it.<sup>7</sup>

Law is the commitment of a community to voluntarily accepted obligations, an invitation to fuller life. But why does law exert authority? Why do we obey the law? Is this simply a matter of force or is it a tendency to march with the common melody?<sup>8</sup> What stitches on the back of the carpet create the decorative, seductive patterns on the front?<sup>9</sup> Can we turn over the legal carpet to find out? Why do we dance to the tune—even voluntarily? Is it a matter of aesthetics only?<sup>10</sup>

On my wall hangs a Japanese carving  
The mask of an evil demon, decorated with gold laquer  
Sympathetically I observe  
The swollen veins in the forehead, indicating  
What a strain it is to be evil.

—Bertold Brecht<sup>11</sup>

Let us have a look into the wider background.<sup>12</sup>

## II. Lawyer-Musicians

“The law has one way of seeing it. Poetry has another. But the journey is the same.”  
—Archibald MacLeish<sup>13</sup>

*Heritage*, 31 SLAVIC REV. 257, 258-260 (1972); Oswald P. Backus III, *Legal Analysis and the History of Early Russian Law*, 31 SLAVIC REV. 283, 285 (1972).

5. KENTON O'HARA & BARRY BROWN, CONSUMING MUSIC TOGETHER: SOCIAL AND COLLABORATIVE ASPECTS OF MUSIC CONSUMPTION (2006).

6. Desmond Manderson, *Statuta v. Acts: Interpretation, Music, and Early English Legislation*, 7 YALE J.L. & HUMAN. 317 (1995); see also Karl Johnson & Ann Scales, *An Absolutely True Story: Seven Reasons Why We Sing*, 16 N.M.L. REV. 433 (1986); Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 1987 J. LEGAL EDUC. 1 (1987); Aviam Soifer, *MuSings*, 37 J. LEGAL EDUC. 20 (1987); Alfred C. Aman, *Studying Music, Learning Law: A Musical Perspective on Clinical Legal Education*, 13 CORNELL L.F. 8 (1987); Jennifer Jaff, *Law and Lawyer in Pop Music: A Reason for Self-Reflection*, 40 U. MIAMI L. REV. 659 (1986); Derek Roebuck, *Language, Law and Truth*, 1 ASIA PAC. L. REV. 51 (1992).

7. Bernhard Grossfeld & Edward Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291 (2003); Bernhard Grossfeld, *Comparatists and Languages*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 154 (Pierre Legrand & Roderick Munday eds., 2003).

8. Manderson, *supra* note 6, at 318.

9. Cf. Richard P. Wolfson, *Aesthetics In and About the Law*, 33 KY. L. REV. 33 (1945).

10. Cf. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002). For a general background, see Bennett Reimer, *Facing the Risks of the 'Mozart Effect'*, 86 MUSIC EDUCATORS J. 37 (1999); AMANDA EUBANKS WINKLER, O LET US HOWLE SOME HEAVY NOTE (2006).

11. BERTOLD BRECHT, DIE GEDICHTE VON BERTOLT BRECHT IN EINEM BAND 850 (1981).

12. Cf. Desmond Manderson & David Caudill, *Modes of Law: Music and Legal Theory*, 20 CARDOZO L. REV. 1325 (1999).

13. Archibald MacLeish, *Apologia*, 85 HARV. L. REV. 1505, 1510 (1972).

It is now well known that there is a close relation between poetry and law<sup>14</sup> and that the European and American experience is filled with lawyer-poets.<sup>15</sup> But what about lawyer-musicians?

To begin, it might be worthwhile to mention that quite a few prominent musicians have studied law. This started during the Middle Ages when the *Quadrivium* was taught in the Cathedral Schools in Europe as part of the *artes liberales*, which included geometry, arithmetic, astronomy, and music. Because every law student had to pass these stages first, it is no wonder that quite a few prominent lawyers were active musicians. Johannes Tinctorius (1435-1511) was a famous teacher of music; Giovanni Battista Doni (1595-1647) researched old Greek music; and Johann Kuhnau (1660-1722) published a dissertation related to music (*De Juribus circa musicos Ecclesiasticos*) while also being Johann Sebastian Bach's predecessor as *Thomascantor*.<sup>16</sup>

This tradition continued into the eighteenth century, some examples being: Georg Philipp Telemann (1681-1767), Benedetto Marcello (1686-1739), Wilhelm Friedemann Bach (1710-1784), Carl Philipp Emanuel Bach (1714-1788), Christian Gottlob Neeffe (1748-1798)—Beethoven's music teacher, Georg Joseph Vogler (1749-1814)—Giacomo Meyerbeer's and Carl Maria von Weber's music teacher, Johannes Nikolaus Forkel (1749-1818)—founder of the study of music as an academic discipline, and Wolfgang Nikolaus Pertl (1667-1724)—the maternal grandfather of Wolfgang Amadeus Mozart and a court supervisor.<sup>17</sup>

The tradition further continued into the nineteenth and twentieth centuries. Some of the most prominent examples include: Anton Friedrich Justus Thibaut (1772-1840)—as a very prominent law professor in Heidelberg, he sponsored Carl Maria von Weber and Richard Schumann; E.T. Amadeus (1776-1822); Franz von Suppé (1819 -1895); Hans Freiherr von Buelow (1830-1894); Peter Tschaikowski (1840-1893); and Igor Strawinsky (1882-1971).<sup>18</sup>

### III. Glances of History<sup>19</sup>

I always thought that if the biblical statement "in the beginning was the word" is literally true, then this word must have been sung. The Bible tells the complete story of creation not only in words but as a verbal act of creation. . . . Can you imagine that God simply uttered "be it light" as we order coffee? Even in the original language:

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14. Eberle & Grossfeld, *supra* note 3, at 11; Dennis Kurzon, *Poetic Language and Court Opinions*, in *LAW AND AESTHETICS*, 240 (Roberta Kevelson ed., 1992); Thomas O. Beebee, *The Legal Theater of Bertold Brecht*, in *LAW AND AESTHETICS* 37 (Roberta Kevelson ed., 1992).

15. Randy Lee, *Bruce Springsteen's Hope and the Lawyer as Poet Advocate*, 14 *WIDENER L.J.* 867 (2005); James R. Elkins, *An Anthology of Poetry by Lawyers*, 28 *LEGAL STUD. F.* 1(2004).

16. Mainly taken from Neumann, *supra* note 3, at 189.

17. *See id.* at 189.

18. *Id.*

19. Manderson, *supra* note 6.

Y'hi Or? I always imagined that God must have sung the two inspiring words Y'HI – O-O-OR!

— Leonard Bernstein<sup>20</sup>

#### A. MUSICAL ORDER

History tells us that music has been seen as a means of social organization to increase and to harmonize physical and spiritual forces. Music stands for the deeply rooted rhythm and harmony of life that cannot be verbalized.<sup>21</sup> It was heard as embodying objective reality and manifesting intrinsic values that related to morality.<sup>22</sup> Law has often been seen as a kind of social music, as “the music of the court.”<sup>23</sup> There seems to be a similar relation with respect to poetry, which Percy Bysshe Shelley calls “the echo of eternal music.”<sup>24</sup>

Since early times, music has been associated with order, and from there it has often been equated with law. Tones and rhythms evoke our internal structures. They help us to “sing” our structures into a complex world and make societies “swing” together. Quite understandably then, the Greek god Apollo was the god of order, of music, and of the art of healing, or—to put it slightly differently—of law, of songs, and of medicine. The deeper background appears in the word justice; the Vedic root of it means “the healing word/the healing song.”<sup>25</sup>

The Roman word *carmina* (as in *Carmina Burana*) means songs and laws. Thomas Hobbes (1588-1679) tells us: “And in ancient time, before letters were in common use, the Lawes were many times put into verse, that the rude people taking pleasure in singing, or reciting them, might more easily reteine them in memory.”<sup>26</sup> Plato showed music’s political power by invoking Damon of Athens’ idea that he would rather control the modes of music in a city than its laws. He was of opinion that the modes of music are more decisive for the character of the citizens. Plato was so aware of the interaction of music with law that he warned: “One has to be careful to introduce a new kind of music, as this puts

20. “Ich habe mir immer gedacht, waere die alttestamentarische Behauptung, ‚im Anfang war das Wort‘ buchstaeblich wahr, dann muesste dieses Wort ein gesungenes Wort gewesen sein. Die Bibel berichtet uns die gesamte Schoepfungsgeschichte nicht nur verbal, sondern auch als einen verbalen Schoepfungsakt . . . Koennen Sie sich vorstellen, das Gott ‚Es werde Licht‘ so ganz einfach vor sich hin gesagt hat, so wie man Kaffee bestellt? Selbst in der Originalsprache: Y'hi Or? Ich hatte stets die Phantasievorstellung, dass Gott die beiden flammenden Worte Y'HI – O-O-OR! gesungen haben muss.” LEONARD BERSTEIN, *MUSIK-DIE OFFENE FRAGE* 24 (2d ed., 1979).

21. WILHELM DILTHEY, *DAS ERLEBNIS UND DIE DICHTUNG* (15th ed. 1970); Hans Ulrich Gumbrecht, *Erinnerung an Herkuenfte*, in *FRANKFURTER ALLGEMEINE ZEITUNG*, n.3 (Nov. 30, 2005).

22. Fred Hutchison, *The Music of the Spheres*, *RENEW AMERICA* (Feb. 28, 2005), <http://www.renewamerica.us/columns/hutchison/050228>.

23. Alexander Wedderburn, Speech, House of Commons, in *16 PARL. HIST.* 1290 (1770).

24. Percy Bysshe Shelley, *A Defence of Poetry*, in *SHELLEY'S POETRY AND PROSE* 480, 485 (Donald H. Reiman & Sharon B. Powers eds., 1977). “Together they achieve what neither alone is capable of: the moving of men and women. And that is the most that poets, musicians or lawyers can hope to achieve.”

25. Cf. *Matthew* 8:8: The Roman centurion said: “Only say the word and my servant will be healed.”

26. THOMAS HOBBS, *LEVIATHAN* 189 (Richard Tuck ed., 1991).

everything in jeopardy. Rules of music have never been changed without endangering the most important laws of the State.”<sup>27</sup>

## B. RENASCENCE

The music of law found a new promoter with the English lawyer-poet John Davies (1569-1626) and his lengthy poem “Orchestra; or, A Poem Expressing the Antiquity and Excellency of Dancing” (1596). Davies proposes to “Judicially proving the true observation of time and measure, in the Authentical and laudable use of Dancing.”<sup>28</sup> Of the 131 verses of seven lines each, we quote just two by way of example:

So Music to her own sweet tunes doth trip,  
 With tricks of three, five, eight, fifteen, and more;  
 So doth the art of numbring seem to skip  
 From even to odd, in her proportion'd score:  
 So do those skills, whose quick eyes do explore  
 The just dimension both of Earth and Heaven,  
 In all their rules observe a measure even.  
 Lo this is Dancing's true nobility:  
 Dancing the child of Music and of Love;  
 Dancing itself both love and harmony,  
 Where all agree, and all in order move;  
 Dancing the art that all arts do approve:  
 The fair Character of the world's consent,  
 The Heav'n's true figure, and the' Earths ornament.<sup>29</sup>

## C. MUSIC OF THE SPHERES

“Geometry will draw the soul towards truth.”

—Plato<sup>30</sup>

For Johannes Kepler (1571-1630) in his *harmonice mundi* (Harmony of the World, 1619), the order of the planets filled the air with celestial music (“music of the spheres”).<sup>31</sup> Kepler thought he had found mathematical harmonies and truthful proportions between the orbits of the planets that compelled nature to order.<sup>32</sup> The planets filled the air with

27. PLATO, *THE REPUBLIC*, Book IV, no. 424. See also Karl R. Popper, *Die offene Gesellschaft und ihre Feinde*, in *1 DER ZAUBER PLATONS* 63 (7th ed., 1992).

28. John Davies, *Orchestra; or, A Poem Expressing the Antiquity and Excellency of Dancing*, in *THE WORKS OF THE ENGLISH POETS, FROM CHAUCER TO COWPER* 104 (Dr. Samuel Johnson & Alexander Chalmers, eds., 1810).

29. *Id.* at 110.

30. PLATO, *supra* note 27.

31. Robert R. Reilly, *The Music of the Spheres, or the Metaphysics of Music*, 37 *INTERCOLLEGIATE REV.* 12 (2001). The term stems from the Pythagorean theory (6th century B.C.).

32. SIGLIND BRUHN, *THE MUSICAL ORDER OF THE WORLD: KEPLER, HESSE, HINDEMITH* (2005); Marion Bauer, *Natural Law: Its Influence on Modern Music*, 6 *MUSICAL Q.* 469 (1920).

celestial music, "each planet singing its own tune."<sup>33</sup> Even Lorenzo, in Shakespeare's *The Merchant of Venice*, remarks to his love:

There's not the smallest orb which thou behold'st  
But in its motion like an angel sings,  
Still quiring to the young-eyed cherubims."<sup>34</sup>

Thomas Browne (1605–1682) is quoted as follows:

Sure there is music even in the beauty, and the silent note which Cupid strikes, far sweeter than the sound of an instrument. For there is music wherever there is harmony, order, proportion; and thus far we may maintain 'the music of the spheres': for those well-ordered motions, and regular paces, though they give no sound unto the ear, yet to the understanding they strike a note most full of harmony.<sup>35</sup>

Johann Sebastian Bach (1685–1750) wrote a cantata based upon Psalm 19:

The heavens are telling the glory of the Eternal,  
And the firmament showeth his handiwork.  
Day unto day utters speech  
And night unto night showeth knowledge.  
There is no speech nor language  
Where their voice is not heard.  
Their line is gone out through all the world  
And their words to the end of the world.<sup>36</sup>

#### D. MILITARY SONGS

The musician-poet Stravinsky tells us: "The phenomenon music is given to us solely to construe order between every thing, and in particular an order between men and time."<sup>37</sup> One only has to think of military music and its lyrics that make soldiers march orderly—even into their death. It works like a magic flute.<sup>38</sup> As Niccolo Machiavelli so eloquently opined, "[A] man that is dancing, and keeps time with the music, cannot make a false step; so an army that properly observes the beat of its drums cannot easily be disordered."<sup>39</sup>

33. DANIEL KORNSTEIN, *THE MUSIC OF THE LAWS* 13 (1982).

34. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 5, sc. 1.

35. SIR THOMAS BROWN, *RELIGIO MEDICI* sec. 9 (London 1635).

36. Hutchison, *supra* note 22; cf. HERTA KLUGE-KANH, *JOHANN SEBASTIAN BACH: DIE VERSCHLUESSELTEN THEOLOGISCHEN AUSSAGEN IN SEINEM SPAETWERK* (1985).

37. Neumann, *supra* note 3.

38. JACQUES CHAILLEY, *THE MAGIC FLUTE, MASONIC OPERA—AN INTERPRETATION OF THE LIBRETTO AND THE MUSIC* (1982); Brenda Danet, *The Magic Flute: A Prosodic Analysis of Binominal Expressions in Legal Hebrew*, 4 *TEXT* 143 (1984).

39. Niccolo Machiavelli (1469–1527), *quoted in* ALFRED CROSBY, *THE MEASURE OF REALITY: QUANTIFICATION & WESTERN SOCIETY 1250-1600* 7 (1997).

#### IV. Law as Composition

This idea of law as composition is finding new resonance today. Statutes are sometimes seen as a score of music;<sup>40</sup> and lawgivers are likened to musical composers:<sup>41</sup> “The legislature is like a composer.”<sup>42</sup> Both write texts that others must interpret.<sup>43</sup> The same metaphor is transferred to procedures in courts:

To me, the procedures of sonata form strongly resemble a courtroom trial. The opening themes (especially if the work is in minor key) may be heard as arguments of the prosecution and defense; the development tends to sound like arguments, objections, cross-examinations, and, frequently, the presentation of new evidence; the recapitulation is the summing up and final statements; the coda is the announcement of the verdict and sentencing. As in real life, this outline is very compelling, and it is a powerful way to get to the heart (or truth) of an infinity of human dramas.<sup>44</sup>

#### V. Legal Traditions

We are like men that hear  
Disjointed notes of some supernal choir.

—Alfred Noyes<sup>45</sup>

“The history of a people is found in its songs.”

—George Jellinek<sup>46</sup>

Why might might not that be  
the skull of a lawyer?

—William Shakespeare<sup>47</sup>

40. Mark Fleischer, Note, *The Interpretive Process and People v. Marotta: A Search for Safety in the Shadow Between Concept and Reality*, 58 S. CAL. L. REV. 1051, 1067 (1985).

41. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Sanford Levison & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991); J. M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Sere-nader” and “The Lying Crowds of Jews”*, 20 CARDOZO L. REV. 1513 (1999), available at <http://www.yale.edu/lawweb/jbalkin/articles/interp1.pdf>.

42. Frank, *supra* note 41, at 1264.

43. Kornstein, *supra* note 33. For a similar discussion in German see Guenther Hirsch, *Zwischenrufe*, in ZEITSCHRIFT FUER RECHTSPOLITIK 16 (2006); Bernd Ruethers, *Deckel!*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 27, 2006, at 31.

44. BRUCE ADOLPHE, OF MOZART, PARROTS, AND CHERRY BLOSSOMS IN THE WIND: A COMPOSER EXPLORES MYSTERIES OF THE MUSICAL MIND 39 (2004).

45. ALFRED NOYES, WATCHERS OF THE SKY 85 (Frederick A. Stokes 1922).

46. This quote is attributed to George Jellinek, the Hungarian-born host of the syndicated music-oriented radio series “The Vocal Scene,” which he hosted for thirty years on station WQXR in New York City. (Though Jellinek retired in 2004, “The Vocal Scene” can still be heard on radio stations including WQXR, WFMT in Chicago and XM Satellite Radio’s VOX channel).

47. SHAKESPEARE, HAMLET act 5, sc.1, lines 105-06.

## A. BIBLE

The European tradition of joining music and law found its counterpart in the Jewish concept of music, prayer, and liturgy in the Torah (originally “poetic scrolls”).<sup>48</sup> The “logogene music” of reading aloud was equal to singing.<sup>49</sup> Crucial is the position of the cantor (*hazzan*). He is the interpreter of sacred text, performer, and sometime improviser in a long line of musicians with a rich heritage.<sup>50</sup> This method adds musical experience to the written text but also goes beyond that; singing turns around vowels that are not in the written text. Thus, singing creates meaning!

This tradition branched over into Christianity in particular by way of the Psalms that were sung. Thus, even the order of our alphabet is defined by singing, i.e., by singing Psalm 119:

“Your laws become my songs  
Wherever I make my home.”<sup>51</sup>

## B. WILLIAM SHAKESPEARE

Shakespeare defined an outlaw in musical terms:

The man that hath no music in himself,  
Nor is not moved with concord of sweet sounds,  
Is fit for treasons, stratagems, and spoils;  
The motions of his spirit are dull as night,  
And his affections dark as Erebus:  
Let no such man be trusted!<sup>52</sup>

## C. GEORG FRIEDRICH HAENDEL

Music is similarly important for the modern concept of law, in particular regarding law and economics. The European roots for this relationship can be found in Georg Friedrich Haendel’s (1685-1759) Oratorium “Judas Maccabaeus” (1746). Adam Smith (1723-1790) was a professor of theology and had his emotional basis in a religious faith in the never-ending grace of God, expressed as the “invisible hand” in the “Wealth of Nations” (1776). The religious emphasis of this “economic theology”<sup>53</sup> can be traced back to Haendel’s work, wherein Judas sings:

How vain is man, who boasts in fight  
The valour of gigantic might!

48. DAVID ROSENBERG, *A POET’S BIBLE: BLUES OF THE SKY, JOB SPEAKS, AND LIGHTWORKS* (1978).

49. EHSAN AHMED, *THE LAW AND THE SONG: HEBRAIC, CHRISTIAN AND PAGAN REVIVALS IN SIXTEENTH-CENTURY FRANCE* (1997).

50. MARK SLOBIN, *CHOSEN VOICES: THE STORY OF THE AMERICAN CANTORATE* (1990); ERIC WERNER, *A VOICE STILL HEARD: THE VOICE OF THE CANTOR* (1976).

51. *Psalms* 119:54.

52. SHAKESPEARE, *THE MERCHANT OF VENICE* act 5, sc. 1, line 83.

53. DUNCAN K. FOLEY, *ADAM’S FALLACY: A GUIDE TO ECONOMIC THEOLOGY* (2006).



And dreams not that a hand unseen,  
Directs and guides this weak machine.”<sup>54</sup>

This song revolutionized the Western law. It had a particularly strong impact on the market-oriented German Civil Code from 1900. Some regard Adam Smith as the greatest Jurist in Germany in the nineteenth century—but behind him stands Haendel.<sup>55</sup>

#### D. KARL LLEWELLYN

Karl Llewellyn is a prime witness from the legal side for the interaction of song and law. We can see this role from his “A Come-All-Ye for Lawyers” song in “The Common Law Tradition,” from which we will quote the first and the last (the fourth) verses:

Come gather and sing to the Common Law whose leaf and seed we are,  
Whether we live by the wagling jaw or counsel, miles from the Bar.  
The wood is good and the sap is strong that gave us Coke and Hale,  
Right is a battle to win from Wrong, in spite of contempt and jail.  
It calls for brain and calls for will, but an acorn knows his mission:  
Law is the Oak of Li – ber – ty still, in the Common Law Tradition.  
Row – dy dow – dy doo-dle – e – o In the Common Law Tradition.  
Row – dy dow – dy doo-dle – e – o In the Common Law Tradition.  
So sing Brandeis, Burch and Swan and Doe, sing Campell, Cooley, Cowen, A-mi-  
don, Lump-kin up they go! The blind ones sing we down!  
Each man who wrought on the migh – ty bench our weal in peace and war Had  
served like us in the front-line trench: He fought at the Bar be – fore It calls for brain  
and it calls for will, but an a – corn knows his mis – sion: Law is the Oak of Li – ber –  
ty still in the Common Law Tradition.  
Row – dy dow – dy doo-dle – ee – o In the Common Law Tradition.  
Row – dy dow – dy doo-dle – ee – o In the Common Law Tradition.<sup>56</sup>

The words are from Karl Llewellyn, and the arrangement is from Jerry Green and Christopher Moore. The words “had served like us in the front-line trenches” seem to refer to Llewellyn’s experience in World War I.<sup>57</sup>

#### E. Wallace Stevens

The lawyer-poet seems to see the interaction between music and law in a similar way. In “The Idea of Order at Key West” we hear:

She was the single artificer of the world  
In which she sang. And when she sang, the sea,  
Whatever self it had, became the self  
That was her song, for she was the maker. Then we,

54. GEORG FRIDERIC HAENDEL, *JUDAS MACCABAEUS* act 2 (1746).

55. Bernhard Grossfeld, *Language Poetry and Law*, in *LAW AND LANGUAGE, RECHT AND SPRACHE* 27 (Thomas Lundmark & Astrid Wallow eds., 2006).

56. KARL LLEWELLYN, *THE COMMON LAW TRADITION* 399 (1960).

57. See Karl Llewellyn, *When I Was a Schoolboy Over There in Germany*, U. of Chicago Archives.

As we beheld her striding there alone,  
 Knew that there never was a world for her  
 Except the one she sang and, singing, made.<sup>58</sup>

#### F. PATRIOTIC SONGS/NATIONAL ANTHEMS

This land is my land,  
 This land is your land,  
 From California to Manhattan Island,  
 From the redwood forest to the Gulfstream waters,  
 This land was made for you and me.”<sup>59</sup>

Very rarely discussed is the legal importance of national anthems, though it is apparent. The Germans sing “Unity, Justice and Freedom / Are the basis of happiness”—small wonder that the German constitution puts freedom on the highest pedestal. Americans hail “The land of the free and the home of the brave” with clear consequences; as one American employment law attorney remarked, “[J]udges will rarely rule against entrepreneurial spirit . . . . ‘Judges hate to stifle people trying to better themselves . . . . There’s this notion that entrepreneurialism is inherently American and limiting it is decidedly against it.’”<sup>60</sup>

#### VI. What’s Left?

“Seeing is believing but touching’s the truth.”

—Desmond Manderson <sup>61</sup>

The lawyers know  
 a dead man’s thoughts too well.”

—Carl Sandburg<sup>62</sup>

Law is neither poetic nor musical anymore. The demise of the aural culture was mainly triggered by the rise of Roman law (*ratio scripta*) in the twelfth century<sup>63</sup> and by a technological breakthrough: Gutenberg’s invention of moveable letter for the printing press in 1450. It first caused an oeco-linguistic revolution by improving communications over wider distances. Previously, much had turned on the faithfulness of distant correspondence; family-based and emotionally-based networks were a natural solution. But the printed letter reached further out. It made our culture uniquely literate; most of us became typographic men and women. The visual became dominant in Western culture.<sup>64</sup>

58. WALLACE STEVENS, *The Ideal of Order at Key West*, in COLLECTED POEMS OF WALLACE STEVENS 128-29 (Alfred A. Knopf, ed., 1954).

59. Woody Guthrie, *This Land Is Your Land* (1940).

60. Matt Villano, *How to Moonlight as an Entrepreneur*, N.Y. TIMES, Oct. 29, 2006 (quoting Craig Annunziata), available at <http://www.nytimes.com/2006/10/29/jobs/29advi.html>.

61. Manderson, *supra* note 6, at 337.

62. Carl Sandburg, *The Lawyers Know Too Much*, in THE COMPLETE POEMS OF CARL SANDBURG (1950).

63. See Peter Richards, *Scales of Justice*, CAMBRIDGE ALUMNI MAGAZINE, Easter Term 2006, at 14.

64. Manderson, *supra* note 6, at 322.

Literates seemed to lose an essential condition for preserving the performance of an oral epic.<sup>65</sup> Aurality did not reign supreme any longer; the music of the message disappeared.<sup>66</sup> Did we go too far in only one direction?

The trend was supported through Platonian philosophy. According to Plato, the poet destroys the rational part of the mind and “establishes a bad system of government in people’s minds by gratifying their irrational side.”<sup>67</sup> In his eyes, poetry does not help to make reason reign over our entire being.<sup>68</sup> Thus, law was seen as matter of words only.<sup>69</sup> Karl Llewellyn pleaded instead for “Justice, Efficiency, and Warmth”—for “finding a symbol for law of a very different character from that of a large, cold, figure, distant, blind and carrying a sword—a symbol—earth rooted and friendly as an oak.”<sup>70</sup>

## VII. Gods Return

Why might not that be  
the skull of a lawyer?

—William Shakespeare<sup>71</sup>

But gods that once have been remain in the subconscious. Music has left its signs in figurative metaphors that decorate court opinions.

### A. POETRY<sup>72</sup>

This use of metaphors runs parallel to the increasing interest in poetry<sup>73</sup> as a verbal icon,<sup>74</sup> in legal poetry,<sup>75</sup> and in legal fairy tales.<sup>76</sup>

65. William Dalrymple, *Homer in India*, THE NEW YORKER, Nov. 20, 2006; see MILMAN PARRY, THE MAKING OF THE HOMERIC VERSE (1971).

66. See Jack Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brains: Are We Educating Half-Brained Lawyers*, 50 AM. J. COM L. 175 (2002).

67. PLATO, *supra* note 27, at 605b.

68. Joseph G. Kronick, *The Death of Theory and the Example of Socrates*, 91 SW. REV. 455, 463 (2006).

69. Karl Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 227 (1942).

70. *Id.* at 224. A. F. Koni, the great jurist in the late Imperial Russia on judicial reform, stated: “For new plantings an oak was felled that stood on guard over the forest.” A.F. Koni, *quoted in* SERGEI M. KAZANTSEV, THE JUDICIAL REFORM OF 1864 AND THE PROCURACY (1997).

71. SHAKESPEARE, HAMLET act 5, sc. 2, lines 95-96.

72. Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597 (2003).

73. David Lehman, *The Sound of Poetry*, WALL ST. J., April 7-9, 2006, at W19; Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. 1227 (1993).

74. W. K. WIMSATT, JR., THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY 273 (1954).

75. Eberle & Grossfeld, *supra* note 3, at 11; Bernhard Grossfeld, *Language, Poetry and Law*, in LAW AND LANGUAGE—RECHT UND SPRACHE 25 (Thomas Lundmark & Astrid Wallow eds., 2006); R. Perry Sentell Jr., *Torts in Verse: The Foundational Cases*, 39 GA. L. REV. 1197 (2005); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1848 (2005); Elkins, *supra* note 15; James R. Elkins, *The Remnants of a Lost and Forgotten Library: On Finding the Lawyer Poets*, 30 LEGAL STUD. F. 1 (2006); Michael Stanford, *The Cyclopean Eye, the Courty Game, Admissions Against Interest: Five Modern American Lawyer Poets*, 30 LEGAL STUD. F. 9 (2006). See also the poems in 28 LEGAL STUD. F. 47-734 (2006). For more details, see JAMES R. ELKINS, STRANGERS TO US ALL: LAWYERS AND POETRY, <http://74.125.45.104/search?q=cache:cnQUONSRnaIJ:myweb.wynet.edu/~jelkins/lp-2001/intro/lp1.html+Strangers+to+Us+All:+Lawyers+and+Poetry&hl=en&ct=clnk&cd=1&gl=us> (Google cache page).

Poetical reports of law cases are not very common; yet it appears to me desirable that they should be so. Many advantages would accrue from such a measure. They would, in the first place, be more commonly deposited in the memory. . . . In the next place, being divested of the infinite circumlocution and the endless embarrassment in which they are involved by it, they would become surprisingly intelligible in comparison with their present obscurity. And lastly they would by that means be rendered susceptible of musical embellishment; and instead of being quoted in the country with that dull monotony which is so wearisome to bystanders, and frequently lulls even the judges themselves to sleep, might be rehearsed in recitation, which would have an admirable effect in keeping the attention fixed and lively, and could not fail to disperse that heavy atmosphere of sadness and gravity which hangs over the jurisprudence of our country.<sup>77</sup>

## B. MUSICAL METAPHORS

### 1. *Civil Rights Movement*

Like poetry and fairy tales, popular music has close ties with storytelling, a major field of literature and law. There might also be political factors that helped songs into the court: The civil rights movement of the 1960s opened the eyes to the potential power of law and inspired many to become lawyers.<sup>78</sup> Popular music lyrics also can introduce a metaphor for a legal concept and restate an ideal in a more colorful language.<sup>79</sup> Today, there is song out there for virtually any legal topic.<sup>80</sup> The following chapters will illustrate a few examples.

### 2. *U.S. Supreme Court*

The U.S. Supreme Court frequently references music. For example:

- The use of reasonableness standards “will produce a discordant symphony.”<sup>81</sup>
- A claim would clash with “the leitmotif of Justice Harlan’s concurring opinion . . . (or be more Wagnerian, im Gegenteil) . . . it is the dissent that sings from another opera.”<sup>82</sup>
- “[D]iscordance can mask disapproval of the music itself.”<sup>83</sup>
- “New music always sounds loud to old ears. Beethoven seemed to make more noise than Mozart; Liszt was noisier than Beethoven; Schoenberg and Stravinsky,

76. Gustav O. W. Mueller, *The Criminological Significance of the Grimms’ Fairy Tales*, in RUTH B. BOTTIGHEIMER, *FAIRY TALES AND SOCIETY: ILLUSION AND PARADIGM* 273 (1986).

77. Letter from William Cowper to Rev. William Unwin (Dec. 1780), quoted in DAVID MURRAY, *LAWYERS’ MERRIMENTS* 83-84 (2005).

78. Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 546-47 (2007).

79. *Id.* at 19.

80. *Id.* at 20; cf. Thilo Tetzlaff, *Why Law Needs Pop: Global Law and Global Music?*, 7 L. & POPULAR CULTURE 316, 316 (2005).

81. *United States v. Booker*, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting).

82. *Minneola v. Cater*, 525 U.S. 83, 98 n.3 (1998).

83. *Ward v. Rock Against Racism*, 491 U.S. 781, 810 (1998).

noisier than any of their predecessors. . . .’ One music artist wrote of Prokofiev: ‘Those who do not believe that genius is evident in superabundance of noise, looked in vain for a new musical message.’”<sup>84</sup>

- “But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like ‘rock and roll.’”<sup>85</sup>
- “The music selected by one bureaucrat may be as offensive to some as it is soothing to others.”<sup>86</sup>
- “Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows.”<sup>87</sup>

### 3. *Federal Courts*

The Federal Courts have made frequent references to music, some of which follow:

- “Freemasonry flourished in the Eighteenth Century Europe, where it enjoyed the generous patronage of many among the aristocracy and the nobility of Prussia, Austria and France, and growing popularity among intellectuals and musicians. Voltaire became a Freemason at age 83. Haydn was a freemason, as was Mozart, whose 1791 opera *Die Zauberfloete* (The Magic Flute) celebrates Masonic values, symbolism and imagery.”<sup>88</sup>
- “The law in this area is an unfinished symphony.”<sup>89</sup>
- “Thus, inasmuch as Austin’s duties involve the expression of the church’s musical tradition, it is a fallacy to denominate them as merely secular. We refuse to demote music below other liturgical forms or to sever it from its spiritual moorings. We cannot say, for example, that the reading of scripture or the reciting of prayers is any more integral to religious worship than the singing of hymns or the intonation of chants. Whether spoken or sung, psalms lift eyes unto the hills. It is not for us to place the oratorios of Handel, the cantatas of Bach, or the simplest of hymns beneath the reading of the sacred texts from which they draw. The Songs of the Confucian Sacrificial Ceremony, the gamelan music of Javanese mysticism, and the ballads of Sephardic song can be every bit as spiritually intimate as spoken prayers. We cannot deny free exercise protection to the former any more than we can to the latter.”<sup>90</sup>

84. *Id.* at 810 n.7.

85. *Ginzburg v. United States*, 383 U. S. 463, 489 (1966).

86. *Public Utils. Comm’n v. Pollak*, 343 U. S. 451, 468 (1952) (Douglas, J., dissenting).

87. *United States v. Booker*, 375 F.3d 508, 516 (7th Cir. 2004).

88. *Bressler v. Am. Fed’n of Human Rights*, 44 Fed. Appx. 303, 307 (10th Cir. 2002) (“Masonry is deeply connected with concepts of geometry and numerical concepts, as expressed in the pentagram (‘Salomon’s seal’) and the number 33”); see *MORALS AND DOGMA OF THE ANCIENT AND ACCEPTED SCOTTISH RITE OF FREEMASONRY* (1921). The historical and legal background is found in the “*mos mathematicorum*” and the “*dues geometra*” of the 12th and 13th century. See Bernhard Grossfeld, *Comparative Legal Semiotics: Numbers in Law*, in *RECHTSVERGLEICHUNG ALS ZUKUNFTSTRAECHTIGE AUFGABE* 37 (Otto Sandrock & Bernhard Grossfeld eds., 2004). In particular, see M.T.C. Cronin’s poem “God Creates the World With a Golden Circle From the Chaos”.

89. *Hennessy v. Goldsmith*, 929 F.2d 511, 116 n. 2 (9th Cir. 1991).

90. *EEOC v. Roman Catholic Diocese*, 123 F.3d 795 (4th Cir. 2000).

- “In stark contrast, note Mr. Berg—the smallest fish in the kettle, a man who had no one else to switch on—suffers punishment for his crime with ten thousand, nine hundred and fifty days in prison. What a sad kettle of fish! (fn. 7). Fn. 7: “The line originates in the Gilbert and Sullivan opera *Iolanthe* [1882], Act II. The play dialogue reads: ‘Here’s a pretty kettle of fish!’”<sup>91</sup>
- “The parties in this case have separately orchestrated a series of mortgage transactions and have fashioned clashing interpretations of a common work. Both Marilyn Pollock (‘Pollock’) and the Federal Deposit Insurance Corporation (‘FDIC’) have attempted to present a melodious symphony to the court. Despite utilizing the same notation, the same sheet music, the same instruments documenting their transaction, the parties produce contrapuntal arrangements whose dominant tones fail to generate harmonious melodies. Although successful in individually creating euphonious arrangements, sung together, their mellifluous tunes degenerate in more cacophony than symphony.”<sup>92</sup>
- “We sound the opening notes for our composition by laying out the facts which form the background rhythms over which we can then lay out the conflicting melodies.”<sup>93</sup>
- “In imposing a twenty-five year sentence premised on two prior felony convictions where only one has been shown to exist, this case is aptly characterized by a line from a Gilbert and Sullivan opera: ‘Here’s a pretty kettle fish!’ *Iolanthe*, Act II.”<sup>94</sup>
- “The present movement in this seemingly never-ending symphony is but a minor variation on the prior themes. Thus, unlike a listener to Haydn, the industry should hardly be surprised at the outcome.”<sup>95</sup>
- “This symphony of lead litigation should not remain for ever unfinished. The industry’s arguments . . . likely will continue to strike a discordant note in the courts. The industry must either accept legislative and regulatory atonality, or, if too painful for their ears (and pocketbooks), attempt to return the score to the composers of the lead policy for re-orchestration.”<sup>96</sup>
- “The viewer understands instinctively, based simply on the laws of gravity, that the Sugar Canes jumped up from the floor only a moment earlier, and came down shortly after the photographed moment. An ordinary observer, who had only recently seen a performance of the *Nutcracker*, could probably perceive even more from this photograph. The single instant thus communicates far more than a single chord of a Beethoven symphony—the analogy suggested by the district judge. . . . The judge erroneously held that still photographs cannot infringe choreography.”<sup>97</sup>
- “The process of parole is not a symphony of hope composed by the Governor alone; rather it is a composition by a trio of the Governor, the Board, and the

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91. *United States v. Berg*, 178 F.3d 976 (8th Cir. 1999).

92. *Pollock v. FDIC*, 17 F.3d 798, 798 (5th Cir. 1994).

93. *Id.* at 799-800.

94. *United States v. Hester*, 917 F.2d 1083 (8th Cir. 1990).

95. *United Steel Workers of Am. v. Schuylkill Metals Corp.*, 828 F.2d 314, 315 (5th Cir. 1987).

96. *Id.*

97. *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 163 (2nd Cir. 1986).

inmate. Until each has fully orchestrated his part, the parole symphony is an unfinished one.”<sup>98</sup>

- “We have taken the contrapuntal approach to this case not because the trial court’s symphonies of decision are necessarily disharmonious as contra-indicative, but simply because we believe that Congress, as the caller of compensatory tunes, could have but did not command itself to pay its quasi-somnolent pipers as though they were commercial musicians.”<sup>99</sup>
- “The Supreme Court’s critics are guilty of the fallacy of ‘reduction’ (the ‘nothing but’ fallacy), akin to the evaluation of anything solely in terms of its ingredients (as in the case of the critic who described a Beethoven symphony a nothing but horses hair over cats’ guts).”<sup>100</sup>

#### 4. “Musical Experts”

In addition, we sometimes find legal language full of understanding for music, as an excerpt from a seventh circuit decision so eloquently illustrates:

Music is communicative or descriptive, and “as a form of expression and communication, is protected under the First Amendment.” . . . Bach’s Mass in B Minor, Beethoven’s Pastoral (Sixth) Symphony, Wagner’s Parsifal, Mahler’s Resurrection (Second) Symphony, the Beatles’ Sergeant Pepper’s Lonely Hearts Club Band, like other vocal, religious, and program music, tell stories—sometimes sexually explicit ones, as in Orff’s Carmina Burana, which if it were not sung in Latin, could not be put on the airwaves. . . . People may fairly dispute whether absolute music, such as LaMonte Young’s Well-Tuned Piano, communicates thoughts, but surely it embodies them (the right place for the major third, etc.); all that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. It has the “capacity to appeal to the intellect”, . . . is not “conduct”, and is closer to speech (even an emotional harangue is speech) than to smashing a Ming vase or kicking a cat . . . .<sup>101</sup>

Daniel J. Kornstein even went beyond these allusions. In his book *The Music of the Laws*,<sup>102</sup> he refers to Johannes Kepler’s “music of the spheres”<sup>103</sup> and compares it with “the music of the laws”:

To be sure, law often seems chaotic and confused, an incomprehensible and incoherent welter of apparently contradictory and ever changing rules, traditions, and practices. The confusion is heightened by the increasing number and complexity of laws reaching into every corner of our lives and made necessary by improving technology and changed social policies. And yet, despite this apparent cacophony of laws, there may well be mysterious harmonies, rhythms, and relationships to be discerned. The

98. Clifford v. Beto, 464 F.2d 1191,1195 (5th Cir.1972).

99. Bowman v. Texas Educ. Found., Inc., 454 F.2d 1097, 1103 (5th Cir. 1972).

100. United States v. Grunewald, 233 F.2d 556 (2nd Cir. 1955).

101. Miller v. Civil City of South Bend, 904 F.2d 1081, 1125 (7th Cir. 1990).

102. KORNSTEIN, *supra* note 33.

103. The term stems from the Pythagorean theory (sixth century B. C.).

quest for such harmonies—the search for order out of chaos—may allow us to approach law from a different perspective and with new sensitivity. But to hear the “music of laws”—to see the interconnectedness of apparently unrelated legal phenomena—we need something of Kepler’s spirit.<sup>104</sup> . . . To find the underlying patterns in law, we need Kepler’s attitude of creative simplicity.<sup>105</sup> . . . [T]he growth of the law might be compared to a fugue. The fugue starts with a theme based on a particular rule of law as sung by a particular judge. . . . As modifications of the legal rule occur, each judicial voice enters in turn, singing the theme, often accompanied by the countersubject in some other voice. . . . It shows how a confusing chorus may still be singing a basic theme.<sup>106</sup>

As one early twentieth century poet stated, “We are like men that hear/Disjointed notes of some supernal choir.”<sup>107</sup>

### VIII. New Horizons<sup>108</sup>

“I count the songs that make the legal profession sing, I count the songs in most everything, I count the songs that make the young lawyers cry, I count the songs.”

—Alex B. Long<sup>109</sup>

#### A. MODERN CRITICISM

But there has always continue to be some criticism about “throwing poetry out of the city”<sup>110</sup> in order to present law as autonomous.<sup>111</sup> The idea behind this criticism was that what “imprisms” also “imprisons”<sup>112</sup> and that autonomy becomes hermeticism.<sup>113</sup> “There is such thing as making nothing out of molehill, in consequence of your head being too high to see it.”<sup>114</sup> For quite a few, Shakespeare continues to be the “unacknowledged lawgiver” who reaches into the legal subconscious.<sup>115</sup> He is seen as the prime example for what Shelley described as “poets as the unacknowledged legislators of the world.”<sup>116</sup>

104. KORNSTEIN, *supra* note 33, at 13-14.

105. *Id.* at 15.

106. *Id.* at 18-19.

107. NOYES, *supra* note 45.

108. MICHAEL RONELLENFTSCH, *ROCK & ROLL UND RECHT* (1998); Long, *supra* note 78; Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 (1986); Jennifer Jaff, *Law and Lawyer in Pop Music*, 4 U. MIAMI L. REV. 659 (1985).

109. Long, *supra* note 78, at 5.

110. STANLEY CAVELL, *DER ANSPRUCH DER VERNUNFT. WITTGENSTEIN, SKEPTIZISMUS, MORAL UND TRAGOEDIE* (2006).

111. James B. Baron, *Law, Literature, and the Problems of Interdisciplinary*, 108 YALE L.J. 1059, 1060 (1999).

112. Michael Wood, *Praise and Blame*, N.Y. TIMES BOOK REV., Oct. 29, 2006, at 24.

113. Peter Brooks, *Inevitable Discovery—Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71, 72 (2003).

114. WILKIE COLLINS, *THE MOONSTONE* 104 (1999).

115. DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE’S LEGAL APPEAL* 239, 245 (1994).

116. Shelley, *supra* note 24, at 508.



## B. LEGAL BEAUTY

Karl Llewellyn reminded us that the power of law has to do with its beauty. In his article “On the Good, The True, The Beautiful, in Law” he is looking for a symbol of a “very different character from that of a large, cold, figure, distant, blind and carrying a sword—a symbol earth rooted and friendly as an oak.”<sup>117</sup> But he did not associate it mainly with music: “The esthetic phase of a legal system is cognate to architecture as it is not, for instance, to painting, and as it rather rarely is to music.”<sup>118</sup>

But today music gets higher grades. Desmond Manderson’s “Songs Without Music”<sup>119</sup> uses music as a model to demonstrate that law is not just a rational structure but a “cultural medium of expressive form.”<sup>120</sup> He starts each section of his book with a musical manuscript and wants to show that law is governed by rhetoric, metaphor, form, images, and symbols.<sup>121</sup> Frederic K. Steiner, Jr. praises the “Music of the Law,”<sup>122</sup> a term invoked by Justice Sandra Day O’Connor. We quote Steiner:

To those who do hear the law’s music, the law is something else entirely. It is a music filled with the logic and clarity of Bach, the thunder, sometimes overblown and pompous, of Wagner, the lyric passion of Verdi and Puccini, Mozart’s easy genius, Gershwin’s invention, Brahms’s calm, Haendel’s good manners, Rossini and Vivaldi’s energy, Offenbach’s boisterous panache, Copeland’s folksy common sense, Beethoven’s majesty, and, unfortunately, not a little of the ponderous tedium of Mahler and the sterile intellectualism of Schoenberg.<sup>123</sup>

Today, popular music has become popular in legal writing and in court decisions. Popular song lyrics are more often classified as poetry.<sup>124</sup> The lyrics of popular music are used to help with a particular theme and to give some beauty, some emotional décor<sup>125</sup> to it.<sup>126</sup> This use might not always be regarded as an improvement, but it might be seen as an attempt to write more creatively. Pop culture is sometimes seen as “a way of expressing statements important to civil societies.”<sup>127</sup>

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117. LLEWELLYN, *supra* note 56.

118. *Id.* at 230.

119. DESMOND MANDERSON, *SONGS WITHOUT MUSIC: AESTHETICS DIMENSIONS OF LAW AND JUSTICE* (2000).

120. *Id.* at 201.

121. Brian E. Butler, *Aesthetics and American Law*, 27 *LEGAL STUD. F.* 203, 208 (2003).

122. Frederic K. Steiner, *The Music of the Law*, *THE FINE PRINT*, Apr. 1995, *reprinted in* 7 *GREEN BAG* 167 (2004).

123. *Id.* at 168.

124. Kenji Yoshino, *The City and the Poet*, 114 *YALE L.J.* 1835, 1848 (2005).

125. See Tetzlaff, *supra* note 80.

126. LLEWELLYN, *supra* note 56, at 227.

127. See Tetzlaff, *supra* note 80, at 317.

## C. SONGS ABOUT LAW

“A pamphlet, no matter how good, is never read more than once, but a song is learned by heart and repeated over and over.”

—Ronnie Swartz<sup>128</sup>

In the meantime, the subject of “Songs About Law” has reached the Internet. Ronnie Swartz published a course description of “Social Justice Through Folk Song” as a launching ground to discuss and to perform “historical and contemporary social justice issues and events.”<sup>129</sup> He starts with “We Shall Overcome” and then adds about 130 other examples. Among these examples are “Strange Fruits” (Billie Holliday/Lewis Allen) and several songs by Bob Dylan, Woody Guthrie, and Bruce Springsteen.

We also find “Songs About Law(yers)”<sup>130</sup> that refer to “I Fought the Law” and “Send Lawyers Guns & Money.” Just two examples.

Don Henley, in his “The Garden of Allah,” states:

I am an expert witness because I say I am  
 And I said gentlemen, and I use that word loosely  
 I will testify for you, I’m a gun for hire, and I’m a saint, I’m a liar  
 Because there are no facts, there is no truth  
 Just data to be manipulated  
 I can get any result you like  
 What’s it worth to you?<sup>131</sup>

“Mr. Bad Example” by Warren Zevon includes the following lines: “Of course I went to law school/And took a law degree/And counseled all my clients/To plead insanity. . .”<sup>132</sup>

## IX. Judicial Revitalization

“Lawyers can rock.”

—Russel G. Pearce, Brian Danitz, & Romelia S. Leach<sup>133</sup>

A prominent example is from the Tenth Circuit Court of Appeals.<sup>134</sup> The case involves a criminal conviction for wrecking a train by putting the train in reverse at full throttle, causing a derailment. The Court quoted the following song lyrics:

128. Ronnie Swartz, *Social Justice Through Folk Song* (Spring 2000) (quoting Joe Hill), *available at* <http://www.humboldt.edu/~rjs19/Syllabi/SW494%20-%20Social%20Justice%20Through%20Folk%20Song.pdf> (last visited July 15, 2008).

129. *Id.*

130. Posting of Songs about Law(yers), <http://ask.metafilter.com/24108/Songs-About-Lawyers> (Sept. 15, 2005).

131. DON HENLEY, *The Garden of Allah*, on ACTUAL MILES: HENLEY’S GREATEST HITS (Geffen Records 1995).

132. WARREN ZEVON, *Mr. Bad Example*, on MR. BAD EXAMPLE (Warner Bros. 1991).

133. Russel G. Pearce, Brian Danitz, & Romelia S. Leach, *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L.J. 907 (2005).

134. *United States v. Youts*, 229 F.3d 1312 (10th Cir. 2000).

"He made that freight train boogie, as he rolled down the line"<sup>135</sup>

"All the things I did when I was just a kid/How far away those memories appear./I guess it plain to see they still mean a lot to me/'Cause my ambition was to be an engineer."<sup>136</sup>

"Nine hundred thousand tons of steel, out/of control/ She's more a roller coaster than the train I/ used to know. . ./She wasn't built to/ travel at the speed a/rumour flies/These wheels are bound to jump the tracks/before they burn the ties."<sup>137</sup>

"Never had such a good time in my life/before./I'd like to have it one time more./ One good ride from start to end./ I'd like to take that ride again."<sup>138</sup>

The Seventh Circuit Court of Appeals gives us a more skeptical example:

The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch "hoe." A "hoe", of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden's response. We have taken the liberty of changing "hoe" to "ho", a staple of rap music vernacular as for example, when Ludacris raps "You doin' ho activities with ho tendencies."<sup>139</sup>

Alex B. Long gives us a list of the top ten most frequently cited popular music artists in legal writing (current as of January 23, 2006).<sup>140</sup> The leading "quartet" is Bob Dylan (186 times), The Beatles (seventy-four times), Bruce Springsteen (sixty-nine times), and Paul Simon (fifty-nine times). Bob Dylan is by far the most quoted artist in judicial opinions (twenty-six times).

## X. Individual "Careers"

### A. BOB DYLAN

Bob Dylan's judicial "career" started in 1981 in California with: "You don't need a weatherman to know which way the wind blows."<sup>141</sup> Other examples are: "Come Senators, Congressman, please heed the call/Don't stand in the doorway, don't block up the hall"<sup>142</sup> and "Something is happening/But you don't know what it is/Do you, Mr. Jones?"<sup>143</sup>

135. JOHN DENVER, *Freight Train Boogie/Choo Choo Ch'Boogie*, on ALL ABOARD (Sony/Wonder 1997).

136. JOHN DENVER, *Daddy What's a Train?*, on ALL ABOARD (Sony/Wonder 1997).

137. THE GRATEFUL DEAD, *Tons of Steel*, on IN THE DARK (Arista 1987); see also THE GRATEFUL DEAD, *They Love Each Other*, on REFLECTIONS (Round Records 1976) ("It's nothing they explain. It's like a Diesel train—you better not be there when it rolls over.").

138. THE GRATEFUL DEAD, *Might As Well*, on REFLECTIONS (Round Records, 1976).

139. *United States v. Murphy*, 406 F.3d 857, 859 n. 1 (7th Cir. 2005).

140. Long, *supra* note 78, at 7.

141. *Jorgensen v. Beach 'N' Bay Realty, Inc.*, 125 Cal. App. 3d 155 (1981) (quoting BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME (Columbia Records 1975)).

142. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W. D. Wash. 2001) (quoting BOB DYLAN, *The Times They Are a-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964)).

143. *Kleinschmidt v. Liberty Mut. Ins. Co.*, 142 F.R.D. 502, 503 (S.D. Fla. 1992) (quoting BOB DYLAN, *Ballad of the Thin Man*, on HIGHWAY 61 REVISITED (Columbia Records 1965)).

## B. THE BEATLES

The Beatles are quoted with: “We are more popular than Jesus Christ now,”<sup>144</sup> and “There’s one for you, nineteen for me/But if we really want some funds to free, how soon does asking have to be?”<sup>145</sup> After quoting: “Nothing you can know that isn’t known/Nothing you can see that isn’t shown/Nowhere you can be that isn’t where you’re meant to be” the court continued with: “But as Sportin’ Life said, ‘It ain’t necessarily so.’”<sup>146</sup> Another example is “The Long and Winding Road,” quoted by the Ninth Circuit:

The long and winding road  
That leads to your door  
Will never disappear  
I’ve seen that road before. . .<sup>147</sup>

## C. BRUCE SPRINGSTEEN

Bruce Springsteen<sup>148</sup> appears with: “These memories come back to haunt me, haunt me like a curse/Is a dream a lie if it don’t come true, or is it something worse?”<sup>149</sup> and “Talk about a dream, try to make it real/you wake up in the night, with a fear so real./spend your life waiting for a moment that just won’t come/well don’t waste your time waiting.”<sup>150</sup>

Another court explained with regard to 1,200 months in federal prison: “One hundred years is a long time—one year longer, in fact, than the standard lyrical shorthand for an unimaginable sentence.”<sup>151</sup> The court added the following footnote:

*See, e.g.* Bruce Springsteen, “Johnny 99” (“Well the evidence is clear, gonna let the sentence, son, fit the crime/Prison for 98 and a year and we’ll call it even, Johnny 99.”); Bob Dylan, “Percy’s Song” (“It may be true he’s got a sentence to serve/But ninety-nine years, he just don’t deserve.”); Johnny Cash, “Cocaine Blues” (“The judge he smiled as he picked up his pen/Ninety-nine years in the Folsom pen/Ninety-nine years underneath that ground/I can’t forget the day I shot that damned bitch down.”); Ed Bruce, “Ninety-Seven More to Go” (“Ninety-nine years go so slow/When you still got ninety-seven more to go.”); Bill Anderson, “Ninety-Nine” (“The picture’s still in front of my eyes, the echo in my ears/When the jury said he’s guilty and the judge said ninety-nine years.”); Chloe Bain, “Ninety-Nine Years”

144. *Masson v. New Yorker Magazine*, 501 U. S. 496 (1991) (quoting John Lennon).

145. *Wachovia Bank, N. A. v. United States*, 455 F.3d 1261, 1262 (11th Cir. 2006) (quoting THE BEATLES, *Taxman*, on *REVOLVER* (Capitol Records 1966)).

146. *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (quoting THE BEATLES, *All You Need is Love*, on *MAGICAL MYSTERY TOUR* (Capitol 1967)).

147. *Smith v. Lachter (In re Smith)*, 352 B.R. 702, 703 n.2 (9th Cir. BAP 2003).

148. Symposium, *The Lawyer as Poet Advocate: Bruce Springsteen and the American Lawyer*, 14 *WIDENER L.J.* 719 (2005).

149. *Thompson v. United States*, No. MGJ-95-309, 2001 U.S. Dist. LEXIS 20557, at \* 20 (D. Md. Dec. 12, 2001) (quoting BRUCE SPRINGSTEEN, *The River*, on *THE RIVER* (Columbia Records 1980)).

150. *Farr Man Coffee v. Chester*, 1993 U.S. Dist. LEXIS 8992, at \* 73 (S.D.N.Y. June 28, 1993) (quoting BRUCE SPRINGSTEEN, *Badlands*, on *DARKNESS ON THE EDGE OF TOWN* (Columbia Records 1978)).

151. *United States v. Bullock*, 454 F. 3d 637, 638 (7th Cir. 2006).

("The sentence was sharp, folks, it cut like a knife/For ninety-nine years, folks, is almost for life."). . .<sup>152</sup>

#### D. PAUL SIMON

Paul Simon got the following recognitions:

If you'll be my bodyguard,  
I can be your long lost pal!  
I can call you Betty,  
And Betty, when you call me,  
You can call me Al!  
You can call me Al.<sup>153</sup>

In another instance, the court had to decide whether "St. Vincent Rock" in the Caribbean Sea is a rock or an island. The court argued:

Thus, for example, in the metaphysical sense, we can discern no reason why something could not be both a rock and an island at the same time. See Paul Simon and Art Garfunkel, *I am a Rock* . . . ("A winter's day, in a deep and dark December. I am alone, gazing from my window, to the street below, on a freshly fallen silent shroud of snow. I am a rock, I am an island. I have built walls, a fortress deep and mighty, that none may penetrate. I have no need of friendship, friendship causes pain. It's laughter and it's loving I disdain. I am a rock, I am an island. Don't talk of love. Well I've heard the word before. It's sleeping in my memory. I won't disturb the slumber of feelings that have died. If I never loved, I never would have cried. I am a rock, I am an island. I have my books and my poetry to protect me. I am shielded in my armor. Hiding in my room, safe within my womb, I touch no one and no one touches me. I am a rock, I am an island. And a rock feels no pain. And an island never cries."). Of course, neither Simon nor Garfunkel has been identified as a nautical expert.<sup>154</sup>

Other examples of references to Paul Simon include:

"Just slip out the back, Jack."<sup>155</sup>

"Negotiations and love songs are often mistaken for one and the same."<sup>156</sup>

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152. *Id.* at 638 n.1.

153. *Ass'n of Civilian Technicians v. FLRA*, 353 F.3d 46, 52 (D.C. Cir. 2004).

154. *United States v. McPhee*, 336 F.3d 1269, 1276 n.9 (11th Cir. 2003) (quoting PAUL SIMON & ART GARFUNKEL, *I am a Rock*, on SOUNDS OF SILENCE (Columbia Records 1966)).

155. *Kahn v. INS*, 36 F.3d 1412, 1418 (9th Cir. 1994) (quoting PAUL SIMON, *50 Ways to Leave Your Lover*, on STILL NEGOTIATIONS AND LOVE SONGS 1971-1986 (Warner Brothers Records 1988)).

156. *Crellin Tech. v. Equipmentlease Corp.*, 18 F.3d 1, 2 (1st Cir. 1994) (quoting PAUL SIMON, *Train in the Distance*, on NEGOTIATIONS AND LOVE SONGS 1971-1986 (Warner Brothers Records, 1988)).

In a case involving an investigator who disregarded clear signs of trouble in a company's prospectus, the court quoted: "A man hears what he wants to hear and disregards the rest."<sup>157</sup> The court then added the complete verse in the footnote:

I am a just a poor boy  
 Though my story's seldom told,  
 I have squandered my resistance  
 For a pocketful of mumbles,  
 Such are promises  
 All lies and jest  
 Still a man hears what he wants to hear  
 And disregards the rest.<sup>158</sup>

## XI. Scepticism

There is still room for skepticism. As one practicing attorney stated:

For myself, my position as a line prosecutor to an Attorney General or to a United States Attorney, I prefer to focus on the power of truth over the attractive of entertainment, the substance of fact over the style of song lyrics. Poets may try to highlight a cause, to bring about change, and to right what is wrong; but as lawyers and advocates, we accomplish that every day. I can think of no better job than that of being a lawyer advocate.<sup>159</sup>

Richard Sherwin in "When Law Goes Pop"<sup>160</sup> is of the opinion that the ever-present contemporary media are detrimental to the legal profession; as he stated, "The courtroom is now awash in the images and metaphors drawn from mass media. While 'law cases enact a battle for reality' the fight must now take place within the (reductionist) options offered by the media."<sup>161</sup> In his eyes this delegitimizes legal practice by questioning the autonomy of law.

Other scholars, however, do not share this view, as they accept the idea that law is embodied in culture and art.<sup>162</sup> They regard "aesthetic issues as unavoidable."<sup>163</sup> Adam Geary, for instance, calls law "a kind of confidence trick":

If one is not aware that legal concepts are reified and abstracted, they appear to have some kind of foundational substance, a kind of autonomy or independent being. This loses sight of the notion that the system manufactures its own conditions of legiti-

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157. *Havenick v. Network Express, Inc.*, 981 F. Supp. 480, 522 (E.D. Mich. 1997) (quoting PAUL SIMON, *The Boxer*, on BRIDGE OVER TROUBLED WATER (Columbia Records 1968)).

158. *Id.* at 522 n.6.

159. Tom Corbett, *The Lawyer-Advocate v. The Poet-Advocate*, 14 WIDENER L. REV. 737, 741 (2005).

160. RICHARD SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2002).

161. *Id.* at 24.

162. Brian E. Butler, *Aesthetics and American Law*, 27 LEGAL STUD. F. 203, 206 (2003).

163. *Id.* at 215.

macy and then attempts to legislate them as a priori universals that have a legitimizing effect through their appeal to reason.<sup>164</sup>

Poetry and music may break up this circular justification!

## XII. American Indians

“The tradition is to see that harmony is re-established, so when all is said . . . the resolution is understood and consented to by everyone. That’s why we don’t say that someone won or lost a cause.”

—Chief Justice Herb Yazzie<sup>165</sup>

“These songs and the dances that we do, they make us Kiow, they show us the way of our ancestors.”<sup>166</sup>

### A. FAR NORTH

In the Arctic area well down the Pacific coast, adversaries in the Native American tradition engage in power duels and present their plans to the public ear.<sup>167</sup> There, juridical songs and drum-contest songs take the place of the courts of law. There was even a yearning to excel in this practice.

The Eskimos intone their pleas for the public ear to the beat of the Arctic tambourine. Airing of grievances and gaining of public sympathy is the issue.<sup>168</sup> It is said that the Eskimos reached an exceptional ability to express moods through their training in drum-contest songs:<sup>169</sup> “We are thus face to face with a style of literature which is as frankly decorative as a patterned textile. The pattern is far from random; but it is its color and intricacy, its fineness and splendor, that have meaning, not the action told by its figures.”<sup>170</sup>

### B. SOUTHWEST

The beginning was mist  
 The first Holy Ones talked and—  
 sang as always  
 They created light, night, and day.  
 They sang into place the  
 mountains, the rivers  
 plants and animals.

164. ADAM GEAREY, *LAW AND AESTHETICS* 32 (2001).

165. Chief Justice Herb Yazzie, in: *Oyez! Oyez! Oyez! The Supreme Court of the Navajo Nation is in session*, *Law Quadrangle Notes*, The University of Michigan Law School, 49.1 Summer 2006, at 7.

166. Tesi Green, *Museum of Indian Art and Culture*, Santa Fe (2005).

167. HERBERT JOSEPH SPINDEN, *SONGS OF THE TEWA* 29 (2d ed, 1993).

168. *Id.* at 29. For examples, *see id.* at 30, 110.

169. *Id.* at 31

170. *Id.* at 57.

They sang us into life.

—Luci Tapahonso<sup>171</sup>

We meet ritualistic songs and poems. Seeing order in heaven instills the belief that there might be an order in human affairs.<sup>172</sup> Poetry is not a free standing utterance, but rather the servant of music and ceremony.<sup>173</sup> Many songs are said to have been composed in dreams.<sup>174</sup> Singing was equated to creating as the songs had been ordained:

Earth Magician now comes hither,  
 Earth Magicians now come hither.  
 From the depths the songs are rising  
 And by him are here established.<sup>175</sup>

Numerical rhythms turning around the numbers four and seven were also popular.

In the fourth valley  
 He beheld seven bends of a great river  
 Enwrapped in a cloud of white smoke from many fires.  
 Seven villages he saw among the seven bends of the river  
 Enwrapped in a cloud of white smoke from many fires.<sup>176</sup>

Consider also “Song of the Sky Loom”:

Oh our Mother the Earth, oh our Father the Sky,  
 Your children are we, and with tired backs  
 We bring you the gifts that you love.  
 Then weave for us a garment of brightness;  
 May the warp be the light of morning,  
 May the weft be the red light of evening,  
 May the fringes be the falling rain,  
 May the border be the standing rainbow,  
 Thus weave for us a garment of brightness  
 That we may walk fittingly where grass is green,  
 Oh our Mother the Earth, oh our Father the Sky.<sup>177</sup>

### C. OKLAHOMA

Songs stand for winning the future in a radically different environment:

We are kneaded out of this clay  
 We are clay people.

171. Luci Tapahonso, *Untitled Poem*, in *HERE, NOW, AND ALWAYS. VOICES OF THE FIRST PEOPLES OF THE SOUTHWEST* 32, 32 (Joan K. O'Donnell ed., 2001).

172. SPINDEN, *supra* note 167, at 11.

173. *Id.* at 14.

174. *Id.* at 20.

175.

176. *Id.* at 29; cf. Bernhard Grossfeld, *Numbers in Law*, 1995 S. AFR. L.J. 396 (1995).

177. SPINDEN, *supra* note 167, at 94.



We are a people of miracles.  
 . . . .  
 The dark dirt of Mississippi  
 The waters of Misha Sopokni  
 The red clay of Okla Homma  
 They mingle with our bones.  
 We are clay people.  
 We are a people of miracles.  
 We are not vanishing; we are not going anywhere.  
 We live here.  
 We live in Louisiana, Alabama, Mississippi, Texas.  
 Oklahoma.  
 We live in California.  
 We live in Washington, D.C.  
 We are everywhere.  
 . . . .  
 We are Americans,  
 And like all Americans,  
 We love our freedom.  
 . . . .  
 We are clay people.  
 We are people of miracles.<sup>178</sup>

### XIII. Australian Aborigines<sup>179</sup>

#### A. GEO-SONGS

The power of rhythmic poetical songs for creating life patterns can still be experienced when visiting Australian aboriginals. They never domesticated animals to carry their goods, and they do not know the wheel. They do not use letters; they feel proud to carry their law "in their heads and souls, [not] on paper."<sup>180</sup> We observe the rise of the oldest known human songs into modern law.

#### B. EXAMPLES

"The Emianja Song":  
 Into the serpent lake may he glide down;

178. TIM TINGLE, WALKING THE CHOCTAW ROAD: STORIES FROM RED PEOPLE MEMORIES 139 (2003). For a wider background see R. A. LAFFERTY, OKLA HANNALI (1972).

179. Linda Barwick & Allan Maret, *Aboriginal Traditions*, in CURRENCY COMPANION TO MUSIC AND DANCE IN AUSTRALIA 26, 26 (John Whiteoak & Aline Scott-Maxwell eds., 2003); LYNN HUME, WITCHCRAFT AND PAGANISM IN AUSTRALIA 44 (1997); SAM D. GILL, STORYTRACKING (1998); Bernhard Grossfeld & Josef Hoeltzenbein, *Poetic Legal Dreams: Cross-Cultural Pioneers*, 47 AM. J. COMP. L. 47 (2007) Bernhard Grossfeld & Josef Hoeltzenbein, *Geo-Songs: Modern Land Law*, 2006 RECHTSTHEORIE 443 (2006) [hereinafter *Geo-Songs*].

180. *Geo-Songs*, *supra* note 179.

Into the serpent hollow may he glide down!  
 Let him scar the ground as with a stick;  
 Let him glide along in the snake furrow!

. . . .

'My tail tip is healing without a scar, is healing without a scar;  
 My mouth is healing without a scar, is healing without a scar.'  
 'My mouth is healing without a scar, is healing without a scar;  
 My mouth is growing whole again, is growing whole again.'  
 'My mouth is growing whole again, is growing whole again;  
 My tail tip is growing whole again, is growing whole again.'<sup>181</sup>

"When the Ancestors traveled across the country the metamorphosed into topographical features and left some of this invisible potency from themselves in the land and in objects. This is the tie that links living human beings with the land."<sup>182</sup>

"Malangi must drink this water, and bathe in this water, to keep him strong."<sup>183</sup>

"This is not a rock, it is my grandfather.

This is a place where the dreaming  
 Comes up, right up from inside the ground."<sup>184</sup>

### C. HERMANSBURG

"If your totem is the ibis, the old law said you must look after ibis . . . but you mustn't eat your totem . . . . That way each animal was protected by somebody."

—Penny Tweedie<sup>185</sup>

These songs were first researched in Hermansburg (named in 1877 after Hermannsburg in Northern Germany) in the Northern Territory.<sup>186</sup> The Lutheran missionary Carl Strehlow<sup>187</sup> began the pioneering work there<sup>188</sup>—against many difficulties and under bitter criticism.<sup>189</sup> His son, Theodore George Henry Strehlow,<sup>190</sup> was the first Westerner

181. THEODORE GEORGE HENRY STREHLOW, *SONGS OF CENTRAL AUSTRALIA* 271 (1971) (quoting "The Emianja Song"). The song was sung over people who were suffering from deep and dangerous wounds sustained in fights or in accidents. Since the serpent ancestor had healed his own deadly wounds with the charm verses, it was believed that human beings would derive similar benefits from singing them.

182. *Id.* at 61.

183. PENNY TWEEDIE, *ABORIGINAL AUSTRALIANS: SPIRIT OF ARNHAM LAND* 61 (2001).

184. HUME, *supra* note 179, at 70 (quoting George Timamin, *One Land, One Law, One People*).

185. TWEEDIE, *supra* note 183, at 57.

186. P. A. SCHERER, *VENTURE OF FAITH: AN EPIC IN AUSTRALIAN MISSIONARY HISTORY* (1971).

187. WALTER F. VEIT, *Strehlow, Carl Friedrich Theodor (1871-1922)*, *AUSTRALIAN DICTIONARY OF BIOGRAPHY—ONLINE EDITION* (2006), <http://www.adb.online.anu.edu.au/biogs/A120138b.htm?hilite=Strehlow>.

188. CARL STREHLOW, *Die Aranda-und Loritja-Stämme in ZENTRAL-AUSTRALIEN: VON CARL STREHLOW (UND MORITZ FREIH. VON LEONHARDI) NO. 1-7* (Frankfurt a.M. Jos. Baer & Co. 1920).

189. *Cf.* BERNHARD GROSSFELD & OLIVER NIEDOSTADEK, *RECHTSVERGLEICHER: VERKANNT, VERGESSEN, VERDRÄNGT* (1998).

190. Dr. John Morton, *Ted Strehlow, a Controversial Anthropologist*, *CULTURE MATTERS*, Mar. 29, 2008, <http://culturematters.wordpress.com/2008/03/29/ted-strehlow-a-controversial-anthropologist>.

to understand and to speak the local *Arrente* (*Aranda*) as his native language.<sup>191</sup> He had met the *Arrentes* (*Arandas*) as companions of his early childhood, not as objects of study.<sup>192</sup>

#### D. DREAMING

The Aboriginal “dreaming” or “dreamtime” is the imprecise English translation of a complex geographical/poetical concept coming from the beginning of time;<sup>193</sup> it relates to a spiritual power that is deeply present in the land.<sup>194</sup> For the Aboriginals, dreaming is the poetic key to reality; poetic songs and the sacred are inseparably linked. The great ancestors, the totemic spirits, brought light into the darkness<sup>195</sup> and formed the countryside. Time just is; it is not a linear sequence moving from past to present to future: “It is one in which the long past is ever present and ties both future and past to the moment when a correct reproduction of a Dreaming performance takes place.”<sup>196</sup>

Painting, dancing, and singing, the Aboriginals carry out the sacrificial rites through which the living maintain contacts with the previous generations (like making the sign of the cross or celebrating the Holy Mass, reading the Bible aloud, or reciting the Koran by heart). It is a sharing of experience about the never-ending creation<sup>197</sup> and expresses a pattern of order by naming, through totems and metrical songs<sup>198</sup> with strong powers of suggestion. Totems fix the individual’s social position, sacred initiation boards (*tjurunga*) protect his dignity, and “songs have the power to heal and to harm.”<sup>199</sup> Even the words used to describe the process of composition have to do with naming.<sup>200</sup> As “geo-songs,” all ceremonies belong to special places; they form a totemic (dreaming) landscape:<sup>201</sup> “Gesture, song, whispers, drawing, silence, shift of sound and sense, the named and the unnamed, tacit presuppositions, signs that only sang in the right place, signs that lived in music not in nests of other words alone—all this not to mention dance and elaborate ritual.”<sup>202</sup>

All this is based on an intimate knowledge of the locality described on the part of the listeners.<sup>203</sup> The ancestors allocate holy places and define the land owned by the clan.<sup>204</sup>

191. See BARRY HILL, *BROKEN SONG: T.G. H. STREHLOW AND ABORIGINAL POSSESSION* (2002).

192. For more materials, see STREHLOW CONFERENCE, *TRADITIONS IN THE MIST OF CHANGE: COMMUNITIES, CULTURES AND THE STREHLOW LEGACY IN CENTRAL AUSTRALIA, ALICE SPRINGS, N.T. 18-20 September 2002* (2004); STREHLOW RESEARCH CENTER, *OCCASIONAL PAPER NO. 3: THE STRUGGLE FOR SOULS AND SCIENCE, CONSTRUCTING THE FIFTH CONTINENT: GERMAN MISSIONARIES AND SCIENTISTS IN AUSTRALIA* (2004).

193. Louise Anderson, *The Law and the Desert: Alternative Methods of Delivering Justice*, 30 J.L. & Soc’y 120 (Mar. 2003).

194. HUME, *supra* note 179, at 52.

195. TWEEDIE, *supra* 183, at 135.

196. Catherine J. Ellis, *Time Consciousness of Aboriginal Performers*, in *PROBLEMS & SOLUTIONS* 149, 153 (Hannie C. Kassler & Jill Stubbington, eds, 1984).

197. HUME, *supra* note 179, at 94.

198. JENNIFER ISAACS, *AUSTRALIAN DREAMING: 40,000 YEARS OF ABORIGINAL HISTORY* (1984); STREHLOW CONFERENCE, *supra* note 192.

199. HUME, *supra* note 179, at 106.

200. Ellis, *supra* note 196, at 150.

201. HOWARD MORPHY, *ABORIGINAL ART* 103 (1998).

202. HILL, *supra* note 191, at 176.

203. *Id.*

204. ISAACS, *supra* note 198, at 10.

"Songs in series describe the activities of the Dreamtime ancestor at each site, and Aboriginal claimants use the songs as mnemonic to guide them from place to place."<sup>205</sup> It fits well into this concept that "dreaming sites" are economically important and resource-rich areas.<sup>206</sup> Aboriginals dig for water at sites where the myths say that water was created.<sup>207</sup>

The Aboriginals believe that these songs were composed by their totemic ancestors and that they are the absolute expression of both truth and beauty—a heritage that endures into eternity. When singing, they are reincarnated into their previous existence as totemic ancestors;<sup>208</sup> they became present as "law-makers." We experience a kind of "anamnesis" that is the biblical notion of memorial—a remembering that makes present.<sup>209</sup> This experience brings the singers back into the life rhythms of their communities and defines land rights and marriage conventions.<sup>210</sup> The High Court of Australia explains them as follows: "They identified with them in a way which transcends common law notions of property and possession."<sup>211</sup>

#### E. TOUCHING TEACHING

"I am teaching our children these stories about our great ancestors and about all the creatures in the sea. We sing and dance these stories in our ceremonies to celebrate and to pass on this knowledge."

—Penny Tweedie<sup>212</sup>

The music goes along with a general sensitivity in communications. Grandparents stretch their hands over the fire and gently touch the child on various parts of the body, lovingly talking or singing to her (called Wuduu, or the warming and the laying of hands). A grandfather speaks or sings to his granddaughter:

Don't Take  
 Don't take for somebody else  
 Wuduu Wuduu  
 At the fire I touch you  
 I hand you the strength of Wuduu  
 Don't let yourself be turned.  
 Have on your ankle,  
 Have on your knee,  
 Have on your thigh.

205. Grace Koch, *Peoples of the Northwest and Aboriginal Songs in Land Claims*, in CURRENCY COMPANION TO MUSIC AND DANCE IN AUSTRALIA 25 (John Whiteoak & Aline Scott-Maxwell eds., 2003); cf. Jacinta Ruri & Anna Crosbie, *The Key to Unlocking Maori Land: The Extension of the Maori Land Court's Jurisdiction*, 10 CANTERBURY L. REV. 318 (2004); Verity Winship, Comment, *Native American Treaties*, 113 HARV. L. REV. 389 (1999).

206. HUME, *supra* note 179, at 72.

207. ISAACS, *supra* note 198, at 124.

208. STREHLOW, *supra* note 181, at 244.

209. Cf. "Amen, I say to you, today you will be with me in Paradise." *Luke* 23:42. From earthly time ("chronos") to God's time ("chiros"). Cf. CATECHISM OF THE CATHOLIC CHURCH NO. 1330.

210. SCOTT CANE, *PILA NGURU: THE SPINIFEX PEOPLE* (2002).

211. *Mabo v. Queensland* (1992) 175 C.L.R. 1.

212. TWEEDIE, *supra* note 183, at 155.

Stay strong  
 Don't let your forehead swell  
 Wait, wait.  
 Don't say the words of men.  
 Don't go begging, granddaughter.  
 Namaaraalee showed us the Wuduu that we make for little boys and girls.  
 The men who know still touch them  
 So each day they learned to grow.  
 Her two thighs, her two legs, her fingers,  
 The words are put there  
 That the Wandjinas gave us.  
 They said to keep on  
 And until today the words have lived.  
 The Wuduu touching will not stop,  
 It is our strength.<sup>213</sup>

The idea is that the *Wuduu* on infants ensures that they will walk strongly, grow tall, and observe the laws of their people. They will be independent and respected members of the community: "We are teaching our young men so they will always be custodians to keep this law strong."<sup>214</sup>

#### F. STRENGTH

Pictorial and poetic law can exert an enormous strength over time; just consider the many proverbs that are taken from legal history.<sup>215</sup> Also consider its stupendous success when re-establishing local property rights. Here again, the geo-songs of Australian Aborigines are a prime example, as they function as like title deeds.<sup>216</sup>

While it is an impressive fact that poetic and narrative commemoration of the exploits and travels of totemic personalities does provide current generations with an extraordinarily detailed map of the traditional territories of central Australian tribes, a fact that is moreover extremely fortunate in view of the immense usefulness of this knowledge to modern Aboriginal communities in their pursuit of land claims in the current era.<sup>217</sup>

213. Wuduu chant *quoted in* ISAACS, *supra* note 198, at 176.

214. TWEEDIE, *supra* note 183, at 99.

215. BERNHARD GROSSFELD, *UNSERE SPRACHE: DIE SICHT DES JURISTEN* (1990).

216. Koch, *supra* note 205.

217. Ken Hale, *Remarks on Creativity in Aboriginal Verse*, in *PROBLEMS & SOLUTIONS* 254, 256 (Jannie C. Kassler & Jill Stubbington eds. 1984).

## G. LAND CLAIMS

The Australian Mabo case<sup>218</sup> granting land rights to Aboriginals are striking examples for this proposition.<sup>219</sup> In its final decision, the High Court of Australia explained:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>220</sup>

Another court had expressed a similar sentiment, stating, “[t]he connection with the country . . . is essentially spiritual, is a religious relationship. All things are ‘organic parts of one indissoluble whole.’”<sup>221</sup>

When delineating land rights, the Courts expressly referred to the relation between land and songs. They took regard of the belief that a particular ground was seen as a “snake-dreaming site,”<sup>222</sup> that it was the start of the travel of the ancestors’ mythic lives: “If the cycle of song were broken . . . they would all suffer some loss of tradition. It was the Yawuru who had had responsibility for maintaining the integrity of this particular aspect of the song cycle.”<sup>223</sup>

Poetic songs opened a way into the future. As one Aboriginal speaker related:

People

A race of people who rose with the sun,  
As strong as the sun they had laws,  
Traditions, co-existing with nature,  
The cycle of the sun is likened to the life of man;  
The snake is said to bite when the sun is at its most powerful zenith.  
The snake has already bitten.  
When the snake bites the sun,  
The clan, the man, the sun,  
Must sink cooling to its inevitable settings,  
Yet, it is said, the sun will rise again.<sup>224</sup>

The White invaders are “venomous snakes.”

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218. *Mabo v. Queensland*, 166 C.L.R. 186; *Mabo v. Queensland II* (1992) 175 C.L.R. 1; see Sean Brenman, *Native Title and the Acquisition of Property Under the Australian Constitution*, 28 MELB. U.L. REV. 28 (2004); Kirsten Anker, *Law in the Present Tense: Traditional and Cultural Continuity in Members of the Yorta Yorta Aboriginal Community v. Victoria*, 28 MELB. U.L. REV. 1 (2004); Anderson, *supra* note 193.

219. Koch, *supra* note 205, at 25. For certain similarities in the United States, see LINDSAY G. ROBERTSON, *CONQUEST BY LAW* (2005); Allison M. Dussias, *Kennewick Man, Kinship, and the “Dying Race”*: *The Ninth Circuit’s Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55 (2005); Christine Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005).

220. *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 100.

221. *Western Australia v. Ward* (2002) 191 A.L.R. 1, 15.

222. Already short visits into the outbacks of Central Australia show the overwhelming importance of snakes (often poisonous). They are an early part of a child’s education on what is safe and what is dangerous. Children have to look to the earth first.

223. *Minister for Aboriginal and Torres Strait Islander Affairs v. Western Australia* (1996) 149 A.L.R. 78, 85.

224. ISAACS, *supra* note 198, at 294 (quoting Aboriginal speaker and set into poetry by Andrew Huntley).

## H. SIMILAR FEELINGS/DIFFERENT EXPRESSIONS

The use of poetry for coping with chaos seems to be universal within humanity. Similar feelings appear, though expressed in different pictures, in different geographical environments. This example is a fine one for geography and law, comparative legal semiotics, and the interaction of the two.

## XIV. Lessons

I could be bound in a nutshell  
And count myself a king  
Of infinite space.

—William Shakespeare<sup>225</sup>

Another source tells us:

Many modern readers—and writers too—treat reading as miners treat the earth. They are insensitive to the environment of the text, its connotative play of light and shadow. In fiction and nonfiction alike, they search for syllogisms, arguments that can be extracted and stored, and discard the rest as mere impedimenta. Ideas, facts, and events are nuggets of meaning; everything else is just a bunch of old rocks. The result of this discursive strip-mining is a wasteland in which more has been lost than gained, and much that has always been there is never found.<sup>226</sup>

## A. LAWYERS' STRATEGY

Music and Law is part of the larger subject of Law and the Humanities; it is closely related to Literature and Law, to Poetry and Law. Music might even stand closer to law;<sup>227</sup> “[i]n their quest for persuasive arguments, lawyers are always in search of authority that they can use to convince judges, juries, legislatures, administrative agencies, and other legal decisionmakers of the merits of their positions.”<sup>228</sup> All these aspects are sometimes categorized under the heading “lawyers as rhetors” or “dealing in persuasion.”<sup>229</sup> They co-opt the insights of poetry and turn them into their own uses: “Law uses rhetoric to establish its authority and to legitimate particular acts of legal and political power.”<sup>230</sup>

225. SHAKESPEARE, *HAMLET* act 2, sc. 2.

226. Manderson, *supra* note 6.

227. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991); J. M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Sere-nader” and “The Lying Crowds of Jews”*, 20 CARDOZO L. REV. 1513 (1999).

228. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 177 (2006); cf. RICHARD J. CRAWFORD & CHARLOTTE A. MORRIS, *THE PERSUASIVE EDGE* (2006).

229. Balkin, *supra* note 228, at 179.

230. *Id.* at 184.

## B. POWER OF MUSIC

But does this explain why poetry and music are so often used in court? There could be more behind it: They could be instruments of a multidimensional enlargement and of its harmonic resources. They mirror the world beyond the limits of legalese<sup>231</sup> and break up the hermetic of text addicts. They soften the world of the dominance of the visual in our Western culture<sup>232</sup> and interrupt the circularity of legal arguments: Music is “the soundtrack of our lives.”<sup>233</sup>

C. LAWYERS’ ART<sup>234</sup>

“We lawyers like to think we sell time but people come to us to buy hope.”

—Randy Lee<sup>235</sup>

But there is more to say, coming closer to the lawyers’ art, their craftsmanship:

Springsteen speaks to the average person . . . . He frames the question in a few simple words and that really is his great talent and why we understand his songs and why we have something to learn from them as attorneys. . . . When framing the question I have come to believe that simple is the best. You’ve got to make it so that your mother can understand it at the kitchen table, and you can’t do that with too many words. . . . And finally, your best lawyers, I think, are not the ones necessarily with the best voices, with the biggest vocabularies, with the prestigious firms, or the like. Your best lawyers have a knack. But it is their own knack, their own style. . . . [T]hey all have the ability to speak simply, in English, and to the point. If you can master that, you will be the better lawyer.<sup>236</sup>

D. GLOBALIZATION<sup>237</sup>

Today questions of justice are often global, leading us into cross-cultural engagements demanding dialogical learning processes.<sup>238</sup> We have to be concerned that our inquiry does not come to an end with letter-dogmatism. Therefore, we have to keep alive natural drives, some scientific, others aesthetically persuasive. The term “rationality” is derived from “ratio”, which means “fraction”—a mathematical/geometrical concept. But human beings are neither numbers nor geometrical figures. The term “reason” is derived from “redden,” which means “to speak.” But law and legal practice are more than rhetoric.

Wallace Stegner, an historian and novelist as well as teacher to some of the twentieth century’s greatest minds, once wrote, “How do I know what I think till I see what I say,

231. JOSEF KIMBLE, *LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE* (2006).

232. See Manderson, *supra* note 6, at 324.

233. See Long, *supra* note 78, at 11.

234. See Ken Gormley, *The Lawyer as Artist*, 14 WIDENER L. REV. 753 (2005).

235. Randy Lee, *Bruce Springsteen’s Hope and the Lawyer as Poet Advocate*, 14 WIDENER L.J. 867, 872.

236. Michael Eakin, *What an Advocate Can Learn from Springsteen*, 14 WIDENER L.J. 743,745-750 (2005).

237. FRANCIS J. MOOTZ III, *RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY* (Rhetoric, Culture, & Social Critique Series, U. of Alabama Press, 2006).

238. *Id.* at XI.



somebody asked, kidding the Philistines. But I can't think the question so stupid. How do I know what I think unless I have seen what I say?"<sup>239</sup> What counts is experience and a sensitivity for the social atmosphere. But as in all comparative law, even here we have to have in mind that men experience music and rhythms in different ways: the rules for grouping sounds are not universal. Listeners from different cultures group tone patterns in different way and perceive identical sequences of sounds as different rhythms. This difference seems to be related to the predominant language: even here the mother tongue reigns supreme.<sup>240</sup>

## XV. Conclusion

There are more things in heaven and earth,  
Horatio,  
Than are dreamt of in our philosophy.

—William Shakespeare<sup>241</sup>

Law makes people swing together, not only in rhythms of time (week, months, years, or holidays), but also in respect to value. Musical sounds relate to the length of strings in a perfect geometrical order. Music then gives a sense of togetherness in a common environment. When we march together according to common rhythm we feel that we march orderly in a way that enables us to do things together.

Music makes us aware that law is more than language, ratio, and reason—more than rhetoric and power. It is a human experience flowing from sources we do not fully control.<sup>242</sup> It has to do with human dignity.<sup>243</sup> Where does chaos end and order begin—or vice versa? As Bob Dylan sang:

There's seven people dead  
On a South Dakota farm  
Somewhere in the distance  
There's seven new people born.<sup>244</sup>

Music may even show us the negative force in law.<sup>245</sup> In any event, it revitalizes our thinking. "Songs bring in a fresh breath of air and knock the tiredness out and let some energy into our day to day itinerary."<sup>246</sup> There is even much more in it: Before lawyers

239. WALLACE STEGNER, *ALL THE LITTLE LIVE THINGS*, (1967), *quoted in* MOOTZ, *supra* note 237.

240. JOHN R. IVERSEN & KENGO OHGUSHI, *HOW THE MOTHER TONGUE INFLUENCES THE MUSICAL EAR*, [http://www.acoustics.org/press/152nd/iversen\\_patel\\_ohgushi.html](http://www.acoustics.org/press/152nd/iversen_patel_ohgushi.html) (last visited June 28, 2008).

241. SHAKESPEARE, *HAMLET* act 1, sc. 5.

242. Charles Gardner Geyh, *The Judgment of the Boss on Bossing the Judges: Bruce Springsteen, Judicial Independence, and the Rule of Law*, 14 *WIDENER L.J.* 885 (2005).

243. Abbie Smith, *The Dignity and Humanity of Bruce Springsteen's Criminals*, 14 *WIDENER L.J.* 787 (2005); Robert Coles, *Bruce Springsteen and Staying on the Jersey Side: An Interview With Robert Coles on Human Connection and the Law*, 14 *WIDENER L.J.* 953 (2005).

244. Garrett Epps, "Meanness in this World", 14 *WIDENER L.J.* 847, 854 (quoting BOB DYLAN, *Ballad of Hollis Brown*, on *THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964)).

245. Samuel R. Bagenstos, *The Promise Was Broken: Law as a Negative Force in Bruce Springsteen's Music*, 14 *WIDENER L.J.* 837 (2005).

246. See Pearce et al., *supra* note 133.

speak, they must capture life and then translate it into words that can be understood by the world. But this noble task is easily blurred: the temptation is always present to substitute words for realities and then talk about the words.<sup>247</sup> In view of this tragic intersection, poetry and music are needed to make us hear and see the reality. Thereby, law again is in the highest tradition of these callings;<sup>248</sup> as noted legal scholar Karl Llewellyn told entering students at Columbia Law School:

There was a man in our town  
 And he was wondrous wise;  
 He jumped into a bramble-bush  
 And scratched out both his eyes  
 And when he found that he was blind,  
 With all his might and maine,  
 He jumped into another one,  
 And scratched them in again.<sup>249</sup>

Finally, according to a Bruce Springsteen song:

. . . [a]nd the poets down here  
 Don't write nothing at all  
 They just stand back and let it all be  
 And in the quick of the night  
 They reach for their moment  
 And try to make an honest stand  
 But they wind up wounded  
 Not even dead  
 Tonight in Jungleground.<sup>250</sup>

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247. Lee, *supra* note 15, at 867.

248. Smith, *supra* note 243.

249. KARL LLEWELLYN, *THE BRAMBLE BUSH: OUR LAWS AND ITS STUDY* 1 (1930); see also Henry F. Murray et al., *The Poetic Imagination of Karl Llewellyn*, 29 *TOL. L. REV.* 27 (1997); John Nivala, *From Bauhaus to Courthouse: An Essay on the Educating for Practice of the Craft*, 19 *N.M.L. REV.* 237 (1989).

250. Lee, *supra* note 15, at 872 (quoting BRUCE SPRINGSTEEN, *Jungleground, on BORN TO RUN* (Columbia Records 1975)).