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THE BLUES AND THE RULE OF LAW: MUSICAL EXPRESSIONS OF THE FAILURE OF JUSTICE¹

*David Pimentel, University of Idaho**

TABLE OF CONTENTS

- I. INTRODUCTION – WHAT DOES BLUES HAVE TO DO WITH THE RULE OF LAW?..... 192
- II. AMERICA’S FAILED PROMISE OF BLACKSTONE’S RIGHTS AND THE RULE OF LAW..... 194
- III. THE BLUES REFLECTS THE HUMAN TOLL OF AMERICA’S RULE OF LAW FAILURE..... 198
 - A. THE BLUES BECAME A VEHICLE TO CALL OUT SYSTEMIC INJUSTICE..... 199
 - 1. LEGAL INSTITUTIONS (E.G. COURTS AND POLICE) AS OPPRESSORS 203
 - 2. GEOGRAPHY OF OPPRESSION – THE SOUTH..... 205
 - 3. GEOGRAPHY OF OPPRESSION OUTSIDE THE SOUTH 206

1. The first draft of this paper was prepared for, and presented at, the International Conference on the Blues at Delta State University, in Cleveland, Mississippi, in October 2016. Succeeding versions have been presented annually at the Lionel Hampton Jazz Festival at the University of Idaho each February, 2017-20. This is the first that the presentation has been published in written form. The music referenced in this paper is included in a YouTube playlist accessible here: <https://www.youtube.com/playlist?list=PLjtGMK3czg7nAWCYf9LvmlsWBBZmpICEq>. It is strongly recommended that the reader listen to these music clips as she or he reads, for a better appreciation of the music under discussion. Zmums, Blues and the Rule of Law, YOUTUBE (Sept. 26, 2020), <https://www.youtube.com/playlist?list=PLjtGMK3czg7nAWCYf9LvmlsWBBZmpICEq>.

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4. FEDERAL OPPRESSION (IN THE MILITARY)	208
5. DISCRIMINATION BETWEEN BLACK AND LIGHTER- SKINNED PEOPLE OF COLOR	208
B. LIONIZATION OF THE OUTLAW AND THE PROMISE OF CHANGE	210
IV. WHAT'S UNIQUE ABOUT THE AMERICAN RULE OF LAW EXPERIENCE – HOW IT FOSTERED THE BLUES	214
V. CONCLUSION: THE BLUES' LEGACY AND THE FUTURE RULE OF LAW	218

*"The blues tells a story. Every line of the blues has a meaning."*²
— John Lee Hooker

*"When I'm singing the blues, I'm singing life."*³
— Etta James

*"There's still injustice happening in my world. I sing my songs
at concerts and I'm so grateful that the people are ready to hear
them."*⁴
— Mavis Staples

I. INTRODUCTION – WHAT DOES BLUES HAVE TO DO WITH THE RULE OF LAW?

Emerging during the Jim Crow era, blues music was a product, at least in part, of the failure of the rule of law to deliver on Blackstone's rights to America's Black community. Sir William Blackstone articulated the basic rights that government should

2. Barry Kerzner, *Celebrating 100 Years of John Lee Hooker*, AMERICAN BLUES SCENE (Aug. 22, 2017), <https://www.americanbluesscene.com/celebrating-100-years-of-john-lee-hooker/>.

3. Peter Keepnews, *Etta James Dies at 73; Voice Behind 'At Last,'* N.Y. TIMES (Jan. 20, 2012), <https://www.nytimes.com/2012/01/21/arts/music/etta-james-singer-dies-at-73.html>.

4. Interview with Mavis Staples, Singer-songwriter, The Staples Singers (Oct. 21, 2008), <https://pitchfork.com/features/interview/7387-mavis-staples/>.

protect, and our system has focused on those rights as touchstones for the rule of law, a state in which laws are adopted democratically, applied transparently, and administered even-handedly.⁵ U.S. history, however, illustrates that lofty rhetoric fails to translate into effective legal protections for minority groups and individuals, particularly Black Americans. Blues tunes convey the lament of an oppressed and aggrieved people, tracing Black American history from slavery through the Reconstruction Era to the present day.

Blues music also lionized the outlaw—those who defy unjust legal authority—who became heroes in the music and in the popular culture. While these heroes could be jailed, the artists who sang the blues about the injustice of it all found just enough protection in the First Amendment, or its penumbral culture of free speech protection, that they could not be silenced.⁶ Inspired by the denial of a just rule of law, the blues became a vehicle to communicate shared oppression and advocate for legal change.⁷

The blues grew out of the absence of the promised protections of the rule of law, and directly from the experience of enslaved people.⁸ Blues music was an effective vehicle for change because it communicated the mournfulness of the oppressed and pricked the conscience of the oppressor. A moving testament to the depth of the human soul, it was cultivated and nurtured by the ugliest injustices. And then, in time, the beauty and power of the blues cultivated and nurtured the rule of law, bringing a blossoming of justice and hope. The promise of justice through the rule of law for Black Americans remains as-yet unrealized in many respects, as there does not yet appear to be a consensus that “Black lives matter” in the United States. But the history of the blues suggests a role that music can play—with the lament of injustice and the celebration of the outlaw—in bringing it about.

Part II discusses Blackstone’s conception of rights reflecting the rule of law, how American legal texts adopted these principles, and how America systemically denied these protections to Black communities. Part III traces the roots and history of the blues, demonstrating how blues music was a means to communicate the

5. See generally STROMSETH, WIPPMAN & BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006).

6. See *infra* note 111, et. seq.

7. See *infra* Section III.A.

8. See *infra* note 40 and accompanying text.

government's failure to deliver the protection of the rule of law to suffering Black communities. Part IV analyzes the legacy of the blues and the future of the rule of law in relation to popular music.

II. AMERICA'S FAILED PROMISE OF BLACKSTONE'S RIGHTS AND THE RULE OF LAW

Sir William Blackstone laid much of the foundation for modern Anglo-American law in 1765, with the publication of his *Commentaries on the Laws of England*.⁹ His work drew heavily on the primeval foundations of personal rights in our legal tradition, in the Magna Carta and the English Bill of Rights in 1689, and heavily influenced the founders of the American Republic.¹⁰ Blackstone defined key rights for government protection as: (1) personal security, (2) liberty, and (3) private property.¹¹ He went on to set forth subsidiary rights, including: (a) limitations on legislative and executive (i.e. royal) power, (b) the right to seek a remedy in court for redress of injuries, (c) the right to petition the executive and legislature for redress of grievances, and (d) the right to bear arms to restrain the violence of oppression.¹² These words and phrases crept into the founding documents of the United States, and continue to define the relationship between government and the individual in America today.¹³

The lofty promises of these documents, however, stand in sharp contrast with the history of their implementation in the United States. Our social history tells a heartbreaking story of persistent injustices, particularly in protecting the rights of Black communities and other communities of color. White majorities have deprived minorities of a meaningful role in lawmaking.¹⁴ They have often concealed their racism, hiding behind facially neutral laws such as zoning and poll taxes.¹⁵ The governments they have elected, and the public servants they have employed, have a

9. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996).

10. *Id.*

11. See 1 WILLIAM BLACKSTONE, COMMENTARIES *120-41.

12. *Id.*

13. Alschuler, *supra* note 9, at 2 ("All of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's Commentaries].").

14. JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 53-54, 68-69 (2003).

15. *Id.* at 68-69.

long history of applying double standards in implementing the law, always to the detriment of the already-oppressed.¹⁶

Our democratic system, which is based on majoritarian politics, frequently overlooks the interests of the minority. Winners of elections rule, and they predictably serve their respective constituency, namely, the majority who elected them. After all, that is what they were elected to do. Minorities cannot expect effective representation, or even adequate protection of their rights, by a simple majoritarian government.¹⁷ The framers anticipated and considered this problem,¹⁸ but throughout U.S. history, and even today, effective checks on majoritarian tyranny have proven to be elusive, leaving large minority populations thoroughly disenfranchised.¹⁹

The ugliest manifestations of this phenomenon are shown through the history of Black communities in America, who were systematically excluded from participation in government and denied such fundamental rights as liberty and property during most of the American experiment.²⁰ It was not the failure of the legal

16. *Id.*

17. By definition, the majority wins elections, and they do so because the majority supports candidates who will pursue the majority's agenda. The minority's interests, which failed to carry the day when the votes were cast, are unlikely to register as priorities for those who won election by promising to serve the interests of the majority.

18. Unfortunately, the minorities the framers were concerned about protecting were, for the most part, political minorities, still composed of white land-owning men. See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 296 (2007).

19. See generally DONALD L. BEAHM, CONCEPTIONS OF AND CORRECTIONS TO MAJORITARIAN TYRANNY (2002). The *Federalist Papers* anticipated this problem—"If a majority be united by a common interest, the rights of the minority will be insecure"—but dismissed it as unlikely to materialize: "the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." THE FEDERALIST No. 51 (James Madison). Madison's concern here, however, was not focused on racial minorities, or other groups subject to wholesale disenfranchisement by the majority; it appears his treatment of the issue was limited to the atomistic interests of white, land-owning men in the minority of opinion with this reference to "the rights of individuals, or of the minority." *Id.*

20. Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 56 (1998). The idea of the "American experiment" is reflected in the letters of Thomas Jefferson ("[N]o experiment can be more interesting than that we are now trying, & which we trust will end in establishing the fact that man may be governed by reason and truth." Letter From Thomas Jefferson to John Tyler (June 28, 1804), in NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-43-02-0557> (last visited Jan. 30, 2021)) and in such iconic sources as the Gettysburg Address ("[T]esting whether that

system, but precisely the success of democratically-adopted legal institutions—such as the Fugitive Slave Act and Jim Crow Laws—that kept them in a state of subjugation and oppression.²¹

Blackstone's promises were nothing but empty words for nineteenth century Black Americans. The law not only failed to ensure, but actively hindered access to, such basic rights as personal security, liberty, and private property. Black Americans also had little access to subsidiary rights; the right to petition the courts for redress of injuries or to petition the legislature and executive for redress of grievances were routinely shrugged off.²² Even when granted a hearing, such as in the notorious Dred Scott case, the judiciary typically failed to recognize, much less vindicate, their wrongs.²³ In the case of Dred Scott, the U.S. Supreme Court concluded that because Mr. Scott had been a slave before coming to a free state, he was not a person with rights, but property.²⁴ The Court acted to protect the right to private property, one of Blackstone's key rights, in complete disregard to the right to liberty, another of Blackstone's rights, that should have been afforded to Mr. Scott.²⁵

Consistent with Blackstone's articulation of rights, the failure of these other rights yielded to the right to bear arms "to restrain the violence of oppression."²⁶ Indeed, nothing short of armed conflict—*i.e.* a Civil War—was sufficient to end slavery, recognize personhood, and grant the rights of access to justice and to representation for Black Americans.²⁷

nation, or any nation so conceived and so dedicated, can long endure." Abraham Lincoln, *Gettysburg Address* (1863), in OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=36&page=transcript> (last visited Jan. 30, 2021)), to such modern sources as Stacy Abrams' Democratic response to the State of the Union speech in 2019 ("Our progress has always found refuge in the basic instinct of the American experiment—to do right by our people." Michael Pearlstein, *The "Great" And "Entrusted" American Experiment (No, Not the Think Tank)*, AMERICAN EXPERIMENT (Feb. 12, 2019), <https://www.americanexperiment.org/2019/02/great-entrusted-american-experiment-no-not-think-tank/>).

21. See Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 56 (1998).

22. See generally GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR* (2013).

23. See generally *Scott v. Sandford*, 60 U.S. 393 (1857).

24. See *id.* at 625-26.

25. *Id.* at 529.

26. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *141.

27. See generally EPPS, *supra* note 22. Of course, even in 2020, there have been widespread protests against the violence of oppression, particularly against police

Following the Civil War, Reconstruction Era America continued to fall short in fulfilling these promises, even after citizenship was granted for Black Americans. State and local governments created a new system of oppression through Jim Crow, preserving some of the status quos of slavery.²⁸ In the hallmark oppression case, *Plessy v. Ferguson*, the Supreme Court washed their hands of discriminatory accountability.²⁹ The Court hid behind the lie of legal objectivity and held, “[l]egislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences. . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”³⁰ Additionally, *The Slaughter-House Cases* read the Fourteenth Amendment—putatively protecting due process, equal protection, and privileges and immunities—into effective nullity through their incredibly narrow interpretation.³¹ Black citizens were still a minority, and the white majority was happy in many jurisdictions, not limited to the American South,³² to adopt Jim Crow laws to disenfranchise the Black American community and to continue to deny them their rights.³³

When American diplomats and policymakers talk about the rule of law today, the focus of comments are often on other countries which “lack” the rule of law, rather than an introspective look at our own failure to deliver the rule of law for our own citizens.³⁴ International aid agencies and organizations, mostly from the West, want to ensure that access to justice is universal and that

violence against Black Americans. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>).

28. See generally PACKARD, *supra* note 14.

29. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

30. *Id.* at 551-52.

31. See G. STONE, L. SEIDMAN, C. SUNSTEIN, M. TUSHNET, *CONSTITUTIONAL LAW* 801 (3d. ed. 1996).

32. See Steve Luxenberg, *The Forgotten Northern Origins of Jim Crow*, TIME (Feb. 12, 2019), <https://time.com/5527029/jim-crow-plessy-history/>.

33. Craig-Taylor, *supra* note 21.

34. See, e.g., RULE OF LAW HANDBOOK V (Helen Bowman & Tim Child, eds., 2015) (quoting The White House, *National Security Strategy*, 37 (May 2010)) (“America’s commitment to the rule of law is fundamental to our efforts to build an international order that is capable of confronting the emerging challenges of the 21st century.”); see also Justice Kennedy to Class of ‘09: *Spread freedom and the rule of law*, STANFORD REPORT (June 14, 2009), <http://news.stanford.edu/news/2009/june17/kennedy-061709.html> (Justice Anthony Kennedy’s 2009 commencement speech at Stanford, addressing the rule of law).

human rights are duly respected.³⁵ The American government has played a large role, partnering with other highly developed democracies and with these international organizations, to promote the rule of law abroad.³⁶

It is sobering, therefore, to reflect on our own hypocrisy, i.e. the failure of the American legal system to deliver on Blackstone's promised rights for Black Americans beginning as early as 1619 and continuing to this day. Reflecting on how our legal and political system failed Black America, it should be easy for us to avoid what legal scholar Gerhard Casper characterized as a "Western superiority complex" when it comes to the rule of law.³⁷

III. THE BLUES REFLECTS THE HUMAN TOLL OF AMERICA'S RULE OF LAW FAILURE

So, what does all this have to do with the blues? While the precise details for when and where the blues began has been widely debated, there is a general consensus that it emerged from Black American communities during the Jim Crow era, and gained currency in the first decades of the twentieth century.³⁸ There is circumstantial yet compelling evidence that blues music was a product, at least in part, of the failure of the rule of law to deliver on Blackstone's rights to Black Americans at that time.³⁹

35. *What is the Rule of Law?*, UNITED NATIONS: RULE OF LAW, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Dec. 27, 2020) ("The rule of law is fundamental to international peace and security and political stability The rule of law is an important component of sustaining peace, as advanced by the General Assembly and Security Council in the twin resolutions on the review of the peacebuilding architecture.").

36. See generally RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD* (2012).

37. Gerhard Casper, *Rule of Law? Whose Law?* 5 (CDDRL, Working Paper No. 20, Aug. 13, 2004) (Casper, a German American who served as Dean of the University of Chicago Law School and later president of Stanford University, was referencing what he described as the "most serious [rule of law] lapses . . . in the 20th century" which occurred in the West, specifically in Nazi Germany).

38. REMY CORBET, *A SOUND FOR RECOGNITION: BLUES MUSIC AND THE AFRICAN AMERICAN COMMUNITY* (2011).

39. Jeffrey Robbins, *Louis Armstrong a Rhapsody on Repetition and Time*, in *THE COUNTER-NARRATIVES OF RADICAL THEOLOGY AND POPULAR MUSIC: SONGS OF FEAR AND TREMBLING* 82 (Mike Grimshaw ed., 2014) ("Put in historical and political terms, the birth of jazz and the legal codification of Jim Crow segregation laws throughout the American south were concomitant."). The close connection between the origins of jazz and blues are widely acknowledged. See, e.g., *Jazz and Blues—Who Knew!*, GREG TIVIS, <http://www.gregtivis.com/articles/Jazz-and-Blues.php> (last visited Dec. 27, 2020); Stephanie Hall, *The Painful Birth of Blues and Jazz*, LIBRARY OF CONGRESS:

A. THE BLUES BECAME A VEHICLE TO CALL OUT SYSTEMIC INJUSTICE

Many blues tunes reflect the despair of a people who are denied access to justice. Even after the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments following the Civil War, majoritarian America could not (or at least did not) deliver on Blackstone's fundamental rights. Despite repeated attempts over the years by a pantheon of civil rights advocates, redress of injuries in the courts and the legislature were very slow in coming. The lament of the oppressed was heard through music, detailing the indignities suffered and specifically the failure of legal institutions to protect them. The roots of blues are with enslaved people in the fields, based in spirituals, work songs, and field hollers.⁴⁰ Although the lyrics were not hopeful, in light of America's refusal to grant liberty to Black enslaved Americans, the songs were a refusal of "resignation, retreat, or defeat."⁴¹ As blues music grew in popularity and recorded music became increasingly accessible, music that was usually enjoyed only by the Black community found its way into white living rooms and dance halls.⁴²

Many songs communicated the social violence enacted on Black citizens and the government's failure to regulate these types of discriminatory acts. For example, Fats Waller's "Black and Blue" from 1929, recorded by Ethel Waters in 1930, and famously covered by Louis Armstrong states,

"I'm white/hurt inside, but that don't help my case
Cause I can't hide what is on my face
How will it end? Ain't got a friend
My only sin is in my skin
What did I do to be so black and blue?"⁴³

FOLKLIFE TODAY (Feb. 24, 2017), <https://blogs.loc.gov/folklife/2017/02/birth-of-blues-and-jazz/>.

40. *Jazz and Blues—Who Knew!*, GREG TIVIS, <http://www.gregtivis.com/articles/Jazz-and-Blues.php> (last visited Dec. 27, 2020).

41. Ralph Eastman, *Country Blues Performance and the Oral Tradition*, 8 BLACK MUSIC RESEARCH J. 161-162 (1988).

42. Cheryl L. Keyes, *The Aesthetic Significance of African American Sound Culture and Its Impact on American Popular Music Style and Industry*, 45 THE WORLD OF MUSIC, no. 3, 2003, at 110.

43. LOUIS ARMSTRONG, BLACK AND BLUE (Columbia Records 1929); see also Zmums, *supra* note 1.

The vocals in “Black and Blue” lament the plight of the Black American, the discrimination he faced daily due solely to his skin color, and constituted a “risky and weighty commentary.”⁴⁴ While the song was not a direct indictment of the legal system, it is clear by implication that the legal system failed to protect Waller from discrimination. The song’s message resonated with its audiences and found its way into Ralph Ellison’s 1947 novel *The Invisible Man*, in which the protagonist describes how the song moved him, “demand[ing] action, the kind of which I was incapable.”⁴⁵ Jeffrey Robbins observed: “Ellison ultimately saw in Armstrong’s ‘Black and Blue’ ‘an anthem whose stark honesty point[s] to the possibility of deliverance.’”⁴⁶

Armstrong was enormously popular with white audiences—he was prominently featured in the über-white musical *High Society* starring Bing Crosby, Grace Kelly, and Frank Sinatra, which is a powerful testament to his popularity with white America.⁴⁷ As a result, Armstrong’s music bridged the divide and carried messages to white audiences. Charles Black, for example, who later worked for the legal team that litigated *Brown v. Board of Education*, said that “he became involved in civil rights after hearing Armstrong play at a 1931 dance.”⁴⁸ Black said it was “impossible to overstate the significance [of that experience to] a sixteen-year-old Southern boy.”⁴⁹

The music was a powerful vehicle in overcoming ugly barriers. For example:

44. Michael Verity, *Jazz and the Civil Rights Movement*, LIVEABOUTDOTCOM (July 15, 2018), <https://www.liveabout.com/jazz-and-the-civil-rights-movement-2039542>.

45. RALPH ELLISON, *INVISIBLE MAN* 9 (1947).

46. Robbins, *supra* note 39, at 86 (quoting TERRY TEACHOUT, *POPS: A LIFE OF LOUIS ARMSTRONG*, 139 (2010)); *see also id.* at 82 (“If jazz was America’s gift to the music of the world, and thereby an essential component in America’s ‘intellectual declaration of independence,’ then it was an Americanization of culture that was just as much an Africanizing of American culture. In other words, the story of jazz, at least in its origins, is the story of race in America.”) (quoting Oliver Wendell Holmes, as referenced in SUSAN CHEEVER, *AMERICAN BLOOMSBURY*, 80 (2006)).

47. *HIGH SOCIETY* (MGM 1956). The movie is an almost cringe-worthy depiction of affluent America in Newport, Rhode Island—which, along with the movie’s audience, allows itself to be entertained by these Black musicians (with Bing Crosby, a white man, explaining jazz music to the white audience). A highly relevant clip of the film can be seen at <https://www.youtube.com/watch?v=xum6ULWbIX0>.

48. Charles Hersch, *Poisoning Their Coffee: Louis Armstrong and Civil Rights*, 34 *POLITY* 371, 381 (2002) (citing JOSHUA BERRETT, *THE LOUIS ARMSTRONG COMPANION* 188 (1999)).

49. *Id.*

Armstrong was arrested by the Memphis Police Department in 1931. His crime? He sat next to his manager's wife, a white woman, on a bus. Armstrong and his band were thrown in jail as policemen shouted that they needed cotton pickers in the area. Armstrong's manager got him out in time to play his show the next evening. When he did play, Armstrong dedicated a song to the local constabulary, several of whom were in the room, then cued the band to play "I'll Be Glad When You're Dead, You Old Rascal You." The band stiffened, expecting another night in jail, or worse. Instead, he scatted so artfully that, afterward, the cops on duty actually thanked him.⁵⁰

As Armstrong explained it later in life, the beauty of the music—of the song "Black and Blue" in particular—enabled him to deliver the message to white audiences, and with variations of tone, elicit very positive responses:

It's a serious thing, and I used to sing it serious—like shame on you for this and that. But I don't want to look at the song and be depressed and thinking about marching and equal rights. We all have our moments for them problems, but—well, the song's a pretty thing. Way I sing it now with a little chuckle, get a *big* reaction.⁵¹

The message of the song "Black and Blue" got through at some level, it appears, and undoubtedly played a role in engendering sympathy among Armstrong's white audiences for the plight of Black Americans. As Jeffrey Robbins put it, "Black and Blue" was "[an] almost incomprehensible expression of racial subjugation and degradation which Armstrong somehow made into a mainstream hit decades before such public proclamations of black pride were acceptable."⁵²

Billie Holiday's haunting and even macabre song "Strange Fruit," written in 1937, conjured appalling images of lynchings in the South.⁵³ "Strange Fruit" received both thunderous applause

50. Ben Schwartz, *What Louis Armstrong Really Thinks*, NEW YORKER (Feb. 25, 2014), <https://www.newyorker.com/books/page-turner/what-louis-armstrong-really-thinks>.

51. Hersch, *supra* note 48, at 372 (quoting LOUIS ARMSTRONG INTERVIEWED BY RICHARD MERYMAN, LOUIS ARMSTRONG—A SELF PORTRAIT 42 (1971)).

52. Robbins, *supra* note 39, at 85-86.

53. Eudie Pak, *The Tragic Story Behind Billie Holiday's "Strange Fruit"*, BIOGRAPHY (May 27, 2020), <https://www.biography.com/news/billie-holiday-strange-fruit>.

and eerie silence from the predominantly white audiences that heard it.⁵⁴ The song was blacklisted by major radio stations and recording labels.⁵⁵ Nevertheless, white audiences loved and listened to Billie Holiday enough that she was able to work the song into her performances and force them to hear it, no matter how uncomfortable it may have made them.⁵⁶ She sang:

Southern trees bear a strange fruit
 Blood on the leaves and blood at the root
 Black bodies swingin' in the Southern breeze
 Strange fruit hangin' from the poplar trees.

Pastoral scene of the gallant South
 The bulgin' eyes and the twisted mouth
 Scent of magnolias sweet and fresh
 Then the sudden smell of burnin' flesh.⁵⁷

Black Americans' "personal security," one of Blackstone's fundamental rights, was routinely disregarded and unprotected in the communities where such lynchings occurred. Although the government did not carry out these "extrajudicial killings"⁵⁸ itself, it effectively condoned the practice by failing to protect those threatened, or to prosecute those responsible for these atrocities after the fact.⁵⁹ The failure of the law to address this barbarity remains a particularly ugly stain on America's rule of law legacy.⁶⁰

54. *Id.*

55. Aida Amoako, *Strange Fruit: The most shocking song of all time?*, BBC (Apr. 17, 2019), <https://www.bbc.com/culture/article/20190415-strange-fruit-the-most-shocking-song-of-all-time>.

56. *Id.*

57. BILLIE HOLIDAY, *STRANGE FRUIT* (Commodore 1939); Zmums, *supra* note 1.

58. See generally UDI SOMMER & VICTOR ASAL, *EXTRAJUDICIAL KILLINGS: COMPARATIVE ANALYSES OF HUMAN RIGHTS VIOLATIONS* (2019).

59. See generally EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2007).

60. Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE J.L. & FEMINISM* 31 (1996). The problem with lynchings persists today, but fortunately (hopefully?), the incidents are not so "routinely disregarded." See, e.g., Anna North, *The Deaths Of 2 Black Men by Hanging, And Calls For Investigation, Explained*, *VOX* (June 15, 2020), <https://www.vox.com/2020/6/15/21291465/robert-fuller-palmdale-california-malcolm-harsch-hanging>.

1. LEGAL INSTITUTIONS (E.G. COURTS AND POLICE) AS OPPRESSORS

Not only were private actors to blame for racial discrimination, legal institutions also acted as oppressors. Complaints of discriminatory police practices are disturbingly current today, as the relationship between police and Black America continues to be fraught with tension.⁶¹ These themes show up in blues lyrics such as “Midnight Special” recorded by Huddie Ledbetter, better known as Leadbelly, in 1936, but arguably much older than that. Leadbelly sang:

If you ever go to Houston, boy, you better walk right,
 And you better not squabble, and you better not fight.
 Benson Crocker will arrest you, Jimmy Boone will take you
 down.
 You can bet your bottom dollar that you are Sugar Land
 bound.⁶²

Leadbelly’s use of the word “boy” almost indicated that he was singing to other Black men,⁶³ warning them that local law enforcement in Houston would be looking for an excuse to send them to “Sugar Land,” the location of a Texas State Penitentiary at the time.⁶⁴

It is not entirely clear who Benson Crocker and Jimmy Boone are, but the general understanding that these were references to law enforcement is supported both by context and later covers of the song that substituted less ambiguous lyrics, such as the 1969

61. See, e.g., Matt Furber, John Eligon and Audra D. S. Burch, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/minneapolis-police.html>.

62. LEADBELLY, MIDNIGHT SPECIAL (Victor 1941); see Zmums, *supra* note 1.

63. The use of the word “boy” was the subject of another blues tune by Big Bill Broonzy complaining about being called “boy,” even at the age of 53. BIG BILL BROONZY, I WONDER WHEN I’LL GET TO BE CALLED A MAN (Smithsonian Folkways 1957); see Zmums, *supra* note 1.

64. See Kristi Nix, *Historic preservation efforts on track for Sugar Land prison, now set for demolition*, HOUSTON CHRONICLE (Mar. 19, 2018), <https://www.chron.com/neighborhood/sugarland/news/article/Historic-preservation-efforts-on-track-for-Sugar-12764184.php>. For a modern look at systemic racism in the prison system, see Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003); see also Cheryl Harris, *Whitewashing Race: Scapegoating Culture* 94 CAL. L. REV. 907 (2006).

version by the all-white group Creedence Clearwater Revival (CCR):

If you're ever in Houston, well, you better do the right;
 You better not gamble, there, you better not fight, at all
 Or the sheriff will grab ya and the boys will bring you down.
 The next thing you know, boy, Oh, you're prison bound.⁶⁵

CCR's version also included this injunction: "But you better not complain, boy, you get in trouble with the man."⁶⁶ CCR's references to the "sheriff," the "prison," and "the man" all bespeak the role of law enforcement, so we see this as an example of white performers not only embracing the message, but decoding it for their white audiences.⁶⁷

J.B. Lenoir's 1965 "Alabama Blues" strikes similar themes, depicting the police officer as the bad guy:

I never will go back to Alabama, that is not the place for me
 You know they killed my sister and my brother,
 and the whole world let them peoples go down there free.

* * *

My brother was takin' up for my mother, and a police officer
 shot him down
 I can't help but to sit down and cry sometime,
 think about how my poor brother lost his life.

Alabama, Alabama, why you want to be so mean
 You got my people behind a barbwire fence,
 now you tryin' to take my freedom away from me.⁶⁸

The language is stark and confrontational, condemning not just the police officer who "shot him down" but the entire state of Alabama that "want[s] to be so mean."

65. CREEDENCE CLEARWATER REVIVAL, MIDNIGHT SPECIAL (Fantasy Records 1969); see Zmums, *supra* note 1.

66. *Id.*

67. Others who covered the song, both Black and white, include: Big Bill Broonzy, Sonny Terry & Brownie McGhee, Odetta, The Kingston Trio, Pete Seeger, Burl Ives, Joe Turner and his Blues Kings, Johnny Rivers, Cisco Houston, Woody Guthrie, Van Morrison, Little Richard, Buckwheat Zydeco, The Spencer Davis Group, Paul Evans, Lonnie Donegan, and ABBA, among others. *The Midnight Special by CCR, SECOND HAND SONGS*, <https://secondhandsongs.com/performance/105605/versions> (last visited Dec. 27, 2020).

68. J.B. LENOIR, ALABAMA BLUES (CBS 1965); see Zmums, *supra* note 1.

2. GEOGRAPHY OF OPPRESSION – THE SOUTH

The blaming of localities, most notably in the South, finds expression in a number of songs. A particularly compelling example is “Mississippi Goddam,” debuted by Nina Simone in Greenwich Village in late 1963; soon after, Simone performed the song to what was almost certainly an overwhelmingly white audience in Carnegie Hall.⁶⁹ The Carnegie Hall performance was recorded, and reached a very wide audience.⁷⁰ Simone said that she got inspiration from the killing of four little girls in the Birmingham, Alabama, church bombing and the killing of Medgar Evers in Mississippi.⁷¹ As she introduced the song, she emphasized the second syllable, e.g. “God-DAM,” and added, “and I mean every word of it.”⁷² Not strictly blues, the song has a jaunty melody. As Simone explained, the song “is a show tune, but the show hasn’t been written for it yet.”⁷³

Alabama’s gotten me so upset
 Tennessee made me lose my rest
 And everybody knows about Mississippi Goddam.

Picket lines
 School boycotts
 They try to say it’s a communist plot
 All I want is equality
 For my sister my brother my people and me

Oh, but this whole country is full of lies
 You’re all gonna die and die like flies
 I don’t trust you any more
 You keep on saying ‘Go slow!’

69. Patrick Garvin *Cover Songs Uncovered: “Mississippi Goddam”* THE POP CULTURE EXPERIMENT (Jan. 15, 2018) <https://popcultureexperiment.com/2018/01/15/mississippi-goddam-cover-songs-uncovered/>; Claudia Roth Pierpont, *A Raised Voice: How Nina Simone Turned the Movement Into Music*, THE NEW YORKER (Aug. 11, 2014) <https://www.newyorker.com/magazine/2014/08/11/raised-voice>.

70. Tom Maxwell, *A History of American Protest Music: When Nina Simone Sang What Everyone Was Thinking*, LONGREADS (Apr. 2017), <https://longreads.com/2017/04/20/a-history-of-american-protest-music-when-nina-simone-sang-what-everyone-was-thinking/>.

71. *Id.*

72. NINA SIMONE, *MISSISSIPPI GODDAM* (Philips Records 1964). Simone’s comment about “mean[ing] every word of it” appears at 0:17 into the song.

73. *Id.*; Zmums, *supra* note 1. Simone’s comment about the song being a show tune appears at 1:12.

'Go slow!'

But that's just the trouble, 'Do it slow'
 Desegregation, 'Do it slow'
 Mass participation, 'Do it slow'
 Reunification, 'Do it slow'
 Do things gradually, 'Do it slow'
 But bring more tragedy, 'Do it slow'
 Why don't you see it?
 Why don't you feel it?
 I don't know, I don't know.

You don't have to live next to me
 Just give me my equality
 Everybody knows about Mississippi
 Everybody knows about Alabama
 Everybody knows about Mississippi Goddam.⁷⁴

J.B. Lenoir added his indictment of Mississippi to his "Alabama Blues"; in his 1965 song "Born Dead" he lamented the fate of every Black child born in that state:

Lord why was I born in Mississippi
 When it's so hard to get ahead?
 [repeat]
 Every black child born in Mississippi
 You know the poor child was born dead.⁷⁵

Lenoir's unsparing language is, once again, a harsh condemnation of Mississippi.

3. GEOGRAPHY OF OPPRESSION OUTSIDE THE SOUTH

Leadbelly's "Jim Crow Blues" identified the South as a prime place to fight the Jim Crow establishment, "Down in Louisiana, Tennessee, Georgia's a mighty good place to go / And get together, break up this old Jim Crow."⁷⁶ However, the song also makes clear that you find Jim Crow everywhere, not just in the South. "I want to tell you people something that you don't know / It's a lotta Jim

74. NINA SIMONE, MISSISSIPPI GODDAM (Philips Records 1964); *Zmums, supra* note 1.

75. J.B. LENOIR, BORN DEAD (CBS 1965); *see Zmums, supra* note 1.

76. LEADBELLY, JIM CROW BLUES (Folkways Records 1950); *see Zmums, supra* note 1.

Crow in a moving picture show.”⁷⁷ Jim Crow could also be found anywhere you travel:

Bunk Johnson told me too,
This old Jim Crowism dead bad luck for me and you
I been traveling, I been traveling from toe to toe
Everywhere I have been I find some old Jim Crow.

One thing, people, I want everybody to know
*You're gonna find some Jim Crow, every place you go.*⁷⁸

One more example is Leadbelly's tune “The Bourgeois Blues,” which references a location well outside of the Deep South: Washington, D.C.⁷⁹ The song was all the more poignant because it referred to the seat of the very government that should have been respecting and protecting Black Americans' fundamental rights (as identified by Blackstone and embodied in the founding documents of the American Republic):

Well, them white folks in Washington they know how
To call a colored man a n——r just to see him bow

* * *

I tell all the colored folks to listen to me
Don't try to find you no home in Washington, DC
'Cause it's a bourgeois town
Uhm, the bourgeois town
I got the bourgeois blues
Gonna spread the news all around.⁸⁰

Leadbelly's messages are mixed—he advises avoiding places where discrimination is rampant (like D.C.), but at the same time observes that Jim Crow is so ubiquitous that it can't be avoided, no matter where you go. In framing these messages, there is a common theme: condemning identified geographies in America.

77. LEADBELLY, JIM CROW BLUES (Folkways Records 1950); *Jim Crow Blues*, *LeadBelly*, GENIUS, <https://genius.com/Lead-belly-jim-crow-blues-annotated> (last visited Dec. 27, 2020).

78. *Id.* (emphasis added).

79. LEADBELLY, THE BOURGEOIS BLUES (1938); see *Zmums*, *supra* note 1.

80. *Id.*

4. FEDERAL OPPRESSION (IN THE MILITARY)

We see the same theme of discrimination with Josh White's World War II-era blues tune "Uncle Sam Says," making it clear that the military—an institution of the Federal Government that should have been protecting the legal rights of Black Americans, particularly ones called up to fight and die for their country—was just as racist and discriminatory as the Jim Crow South⁸¹:

Got my long gov'ment letters, my time to go
 When I got to the Army, found the same old Jim Crow
 Uncle Sam says, "two camps for black and white"
 But when the trouble starts, we'll all be in that same big fight.

If you ask me, I think democracy is fine
 I mean democracy without the color line
 Uncle Sam says, "we'll live the American way"
 Let's get together and kill Jim Crow today.⁸²

While Leadbelly invokes Washington, D.C., the seat of federal authority, Josh White's offering targets that authority directly, i.e. "Uncle Sam." His focus is even sharper, targeting discriminatory practices carried out by the U.S. government and enforced by nothing less powerful than its military forces.

5. DISCRIMINATION BETWEEN BLACK AND LIGHTER-SKINNED PEOPLE OF COLOR

Finally, in 1956, Big Bill Broonzy recorded "White, Brown and Black," which laid the discrimination out in stark terms, but introduced some nuance as well by recognizing that the gradations of injustice correlated with the gradations of skin color. While all persons of color suffer injustice, it was less intense for lighter skinned persons of color:

I went to an employment office.
 Got a number 'n' I got in line.
 They called everybody's number
 But they never did call mine.

[Chorus:] They said if you was white should be all right.

81. See BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1986).

82. JOSH WHITE, *UNCLE SAM SAYS* (Keynote Recordings 1941); see Zmums, *supra* note 1.

If you was brown stick around.
 But as you black, oh brother
 Get back, get back, get back.

Me and a man was workin' side by side.
 This is what it meant.
 They was paying him a dollar an hour.
 And they was paying me fifty cent.

[repeat chorus]

I helped build this country.
 And I fought for it too.
 Now I guess that you can see
 What a black man have to do.

[repeat chorus]

I hope to win sweet victory
 With my little plough and hoe.
 Now I want you to tell me brother,
 "What you gonna do about the old Jim Crow?"

[repeat chorus]⁸³

Of course, not all blues music was about denials of justice. However, blues music was almost always about despair and hopelessness, and the systematic denial of justice to Black Americans was a defining element of Black culture, and certainly a major source of such despair.⁸⁴ The songs listed above are pretty unsparring in the message they convey, and they were far from the only tunes spreading that message.⁸⁵ The fact that such songs are easy

83. BIG BILL BROONZY, *BLACK, BROWN AND WHITE* (Smithsonian Folkways 2000); see Zmums, *supra* note 1.

84. See generally Carol Graham, *Racial gaps in hope, ill-being, and deaths of despair*, BROOKINGS: RACE IN AMERICAN PUBLIC POLICY, (Febr. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/racial-gaps-in-hope-ill-being-and-deaths-of-despair/>.

85. Kim Ruehl discusses ten "essential" songs of the Civil Rights Movement of the 1950s and 1960s, including only one of the songs heretofore mentioned, "Strange Fruit". Kim Ruehl, *10 Essential Civil Rights Songs: The Anthems and Ballads That Fueled the Movement*, THOUGHTCO. (Dec. 14, 2020), <https://www.thoughtco.com/essential-civil-rights-songs-1322740>. These include such

to find now, decades later, suggests not only that they hit their mark, but that they have the staying power to continue to convey their disturbing and powerful messages.

B. LIONIZATION OF THE OUTLAW AND THE PROMISE OF CHANGE

Blues music decried the failures of the rule of law and, as this article has shown, condemned law enforcement for their complicity in the denial of rights. As a result, blues music tended to glorify or lionize the outlaw. If there is no promise of justice in the legal system, justice must be seized through extra-legal means. Accordingly, we see musical protagonists whose heroism may be tied to their status as outlaws.

The heroes of civil rights were outlaws in two respects. First, many Black people were unfairly targeted and prosecuted, with police seen as their natural enemy. “Midnight Special,” for example, conveys this message strongly—that Benson Crocker and Jimmy Boone are just looking for an opportunity to arrest Black men and send them to Sugarland (prison).⁸⁶ Thus, Black Americans were unfairly on the wrong side of the law to begin with. Second, the protests of the civil rights movement often included civil disobedience.⁸⁷ Protesters and participants in sit-ins and marches were routinely rounded up and arrested, a treatment that protestors often voluntarily and stoically submitted to, convinced that there was greater virtue in lawbreaking than there was in law enforcement.⁸⁸

Again, the music evolved to reflect that, and blues tunes generated sympathy for the outlaw. Leadbelly’s version of “Take This Hammer” speaks to the plight of men on the chain gang who yearned to lay down their hammer and run away.

Take this hammer, carry it to the captain
 Take this hammer, carry it to the captain
 Take this hammer, carry it to the captain
 Tell him I’m gone

well-known tunes as “We Shall Overcome,” “We Shall Not Be Moved,” “Oh Freedom,” and “Keep Your Eyes on the Prize.” *Id.*

86. *See, e.g.* LEADBELLY, MIDNIGHT SPECIAL (Victor 1941); *see* Zmums, *supra* note 1.

87. *Social Protests*, CONSTITUTIONAL RIGHTS FOUNDATION, <https://www.crf-usa.org/black-history-month/social-protests> (last visited Jan. 31, 2021).

88. *Id.*

Tell him I'm gone.

If he asks you was I runnin'
 If he asks you was I runnin'
 If he asks you was I runnin'
 Tell him I was flyin'
 Tell him I was flyin'.⁸⁹

A number of other songs suggest a level of lawlessness as something to be celebrated. Fats Waller's "The Joint Is Jumpin'," for example, suggested that everyone should have a good time before the police arrive to bust up the party.⁹⁰ This is an upbeat song, and not a lament about injustice, but it clearly contemplates that "[w]e're all bums when the wagon comes," presumably referencing a police vehicle, and concludes with:

Aw, mercy, don't mind the hour
 I'm in power,
 I've got bail if we go to jail
 I mean this joint is jumpin'
 Don't give your right name, no, no, no, no, no.⁹¹

Perhaps the police are expected simply because it is late and the party is loud (they cannot be targeting the alcohol, as the song was released four years after Prohibition ended).⁹² Regardless of the police's motivation in busting up the party, the song conveys an almost gleeful defiance of law enforcement (e.g. "Don't give your right name, no . . .").

Even white performers contributed to this ethos,⁹³ as in Bob Dylan's "Outlaw Blues." Dylan styles himself as an outlaw first:

Well, I might look like Robert Ford

89. LEADBELLY, TAKE THIS HAMMER (Victor 1944).

90. FATS WALLER, THE JOINT IS JUMPIN' (Bluebird 1937).

91. *Id.*

92. U.S. CONST. amend. XXI.

93. The sympathetic outlaw became a popular protagonist in country music as well. "[T]he Outlaw movement [in Country Music] was personified by Waylon Jennings and Willie Nelson, men who consciously moved away from Nashville to ply their trade in alternative musical centres like Austin, Texas—and, in doing so, created an alternative template for others to follow. Johnny Cash always had an Outlaw attitude: albums 'At Folsom Prison' and 'At San Quentin', both recorded behind bars, underlined his identification with the underdog." *Country Outlaws*, CLASSIC SELECT WORLD, <http://www.notnowmusic.com/country-outlaws.html> (last visited Dec. 27, 2020).

But I feel just like a Jesse James.⁹⁴

Dylan's lyrics are compelling; he goes on in the song "Outlaw Blues" to identify one of his transgressions as an outlaw is the fact that he loves a brown-skinned woman in Jackson. He is unapologetic, but he conceals her name, presumably to protect her.

I got a woman in Jackson
 I ain't gonna say her name
 I got a woman in Jackson
 I ain't gonna say her name
 She's a brown-skin woman, but I
 Love her just the same.⁹⁵

His announcement that he loves her despite her skin color conveys a defiance of societal and legal norms. Indeed, in 1965, when Dylan recorded the song, anti-miscegenation laws were in place and still considered constitutional, not just in Mississippi, but in nineteen states, including every single state that had been part of the Confederacy.⁹⁶ Indeed, loving a brown-skinned woman in Jackson was a crime, so if Dylan indeed loved her, that would make him an outlaw.

If the promise or hope of justice lies outside the law, then the hero is not the law-abiding citizen, but the outlaw.⁹⁷ The

94. BOB DYLAN, *OUTLAW BLUES* (Warner Bros Inc. 1965); see Zmums, *supra* note 1.

95. BOB DYLAN, *supra* note 94.

96. *Anti-miscegenation laws in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Anti-miscegenation_laws_in_the_United_States (last visited Dec. 27, 2020). Indiana and Wyoming repealed their anti-miscegenation laws the same year that Dylan's song came out, but 16 states still had them on their books when the Supreme Court found them to be unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967) (holding interracial couples have the right to marry; any state law criminalizing interracial marriage struck down as unconstitutional).

97. Groups like The Lumpen, a funk band, and the musical voice of the Black Panthers, seized similar themes in tunes of their own, advocating lawless, even violent behavior to right the wrongs in society, as in their song "No More":

There were times we stood by like we could not see,
 But there won't be no more, can't be no more,
 We'll get guns, to defend, our communities,
 There won't be no more, can't be no more
 We'll control our destiny, no more murder, of
 Our people, in their sleep,
 To this way of life, we're closing the door,
 So there won't be no more, won't be no more.

Free Bobby Now, IT'S ABOUT TIME BPP,

glorification of the outlaw is a cultural manifestation that the rule of law is absent in society. If our heroes are lawbreakers, then society's norms are not reinforcing rule of law norms, which would normally suggest that abiding by the law is both the goal and the expectation of every citizen.⁹⁸

We see this in other countries and societies where the rule of law has broken down, in large part because of public corruption.⁹⁹ Tax evasion carries minimal moral stigma, because the refusal to pay taxes is accomplishing nothing more than keeping the citizen's money out of the hands of the corrupt politicians who will use tax revenues only to enrich their unworthy selves.¹⁰⁰ The otherwise hapless taxpayer gets his revenge by refusing to pay, and he or she is a hero for refusing to subsidize the corrupt oppressors of the working men and women.¹⁰¹

The outlaw, as someone to admire or to sympathize with, rather than to demonize, is consistent with an environment where the rule of law has broken down. Rule of law scholar and practitioner Wade Channell encountered this phenomenon in his efforts to do rule of law work in Bulgaria. He writes:

In the 1950s, Bulgarian author Elin Pelin published the short story titled *Andreshko*, in which the principal character became a hero through resisting [legal] enforcement. The protagonist, Andreshko, is a poor farmer who picks up a traveler while driving his horse cart back to the village. As they converse, Andreshko discovers that the traveler is an enforcement

http://www.itsabouttimebpp.com/Our_Stories/The_Lumpen/pdf/Lumpen_1.pdf (last visited Dec. 27, 2020).

98. Christopher Wilson, *The Moment When Four Students Sat Down to Take a Stand*, SMITHSONIAN MAGAZINE (Jan. 31, 2020), <https://www.smithsonianmag.com/smithsonian-institution/lessons-worth-learning-moment-greensboro-four-sat-down-lunch-counter-180974087/>.

99. See generally THE ETHICS OF TAX EVASION (Robert W. McGee, ed., 2011); see also Robert W. McGee, *Is It Unethical to Evade Taxes in an Evil or Corrupt State?*, 20 J. OF ACCOUNTING, ETHICS, AND PUB. POLICY 149 (1999).

100. *Id.*

101. The author has lived and worked in a variety of countries (e.g., Bosnia, Italy, Netherlands, Romania, Sudan, and South Sudan), attempting to promote the rule of law, employed or funded by the United Nation and the U.S. Agency for International Development, and has witnessed the variations in moral and social stigma in these various cultures, particularly in those where flawed or even corrupt regimes hold power. See generally HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE (1849).

judge who is going to Andreshko's village to seize the assets of a neighbor in satisfaction of a tax lien. Torn between his legal duties and his loyalty to a friend, Andreshko decides for the friend. He pretends to take a short cut but instead drives the cart into a swamp until it is mired. He then unharnesses the horse and rides home alone, abandoning the enforcement judge. This story has been taught to schoolchildren for over forty years. Today, Andreshko is the patron saint of resistance to enforcement, the heroic defender against attachment.¹⁰²

Channell observes that such a strongly entrenched cultural value—making heroes of those who defy civil authority—poses particular challenges for establishing the rule of law: “Overcoming [Andreshko’s] legacy will not be met simply through better written laws.”¹⁰³

IV. WHAT'S UNIQUE ABOUT THE AMERICAN RULE OF LAW EXPERIENCE – HOW IT FOSTERED THE BLUES

Making the connection between hardship and the blues is hardly novel. Blues singers sing about nothing but hardship, frustration, and disappointment. Why is it an important reflection on the rule of law? Only part of the answer lies in the fact that the law itself, and legal institutions, can be the source of these hardships in which the failure of justice is lamented in the music of the blues, and it is the outlaw who is the hero of the oppressed people. But the protections the rule of law *could* provide were also critical in the story of the blues in twentieth century America.

We can contrast the experience of Black Americans in the early and mid-twentieth century with people around the world who have also been oppressed and denied justice. History is replete with examples of persecutions, pogroms, and exploitation. Why do we *not* see a musical tradition of protest and lament coming out of China or North Korea today? Why did we not see it emerge in Germany during the rise of the Third Reich, when so many people were victimized, the very same years that Leadbelly and Billie Holiday were singing the blues about the fate of Black America?¹⁰⁴

102. Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137, 147 (Thomas Carothers ed., 2006).

103. *Id.*

104. Interestingly, German youth, rather than embrace their own musical traditions of resistance, borrowed from American musical traditions to defy the authority of the

The answer lies, perhaps, again, in the rule of law.

While Black Americans were consistently denied certain rights, the right of free speech was more difficult to deny. The marches and protests could sometimes be shut down with dogs, firehoses, and teargas, on the pretext that public order and safety were at risk.¹⁰⁵ But music is a form of speech that was more difficult to shut down. Radio broadcasts carried this music to wide audiences, and the language of the lament, over the failure of the rule of law in America, could be widely heard.¹⁰⁶

The musical vehicle for lament was appealing, aside from the words,¹⁰⁷ which only increased the appeal to the audience and, therefore, the reach of the message. White audiences started listening, and the messages began to reach people who might otherwise not pay attention.¹⁰⁸ Commenting on the role of music in the South African battle against Apartheid, a struggle that mirrors the American experience in many ways, Sifiso Ntuli said:

A song is something that we communicate to those people who otherwise would not understand where we are coming from. You could give them a long political speech—they would still

Third Reich. The *Swingjugend*, which celebrated the music of Black and Jewish (e.g., Benny Goodman) musicians who were treated mercilessly by the Nazi regime, including but not limited to sending them to concentration camps. Guido Fackler, *Swing Kids Behind Barbed Wire*, MUSIC AND THE HOLOCAUST, <http://holocaustmusic.ort.org/politics-and-propaganda/third-reich/swing-kids-behind-barbed-wire/> (last visited Dec. 27, 2020).

105. SARAH KNUCKEY ET AL., PROTEST AND ASSEMBLY RIGHTS PROJECT, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET 27, <https://chrgj.org/wp-content/uploads/2016/09/suppressing-protest.pdf> (last visited Dec. 27, 2020). Of course, we see the same thing happening today, with the Trump Administration's heavy-handed response to public protest, all in the name of "law and order." See, e.g., Peter Baker, Zolan Kanno-Youngs & Monica Davey, *Trump Threatens to Send Federal Law Enforcement Forces to More Cities*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/us/politics/trump-chicago-portland-federal-agents.html>. But censoring the airwaves, against a backdrop of free-speech protections, has not been an option for those who are unhappy with the message.

106. *Broadcasting the Blues*, MISSISSIPPI BLUES TRAIL <http://www.msbluestrail.org/blues-trail-markers/broadcasting-the-blues> (last visited Dec. 27, 2020).

107. LOUIS ARMSTRONG INTERVIEWED BY RICHARD MERYMAN, LOUIS ARMSTRONG—A SELF PORTRAIT 42 (1971); see also *supra* text accompanying note 50.

108. ULRICH ADELT, BLACK, WHITE AND BLUE: RACIAL POLITICS OF BLUES MUSIC IN THE 1960s (Univ. of Iowa 2007), <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=1313&context=etd> ("In the larger context of the Civil Rights Movement and the burgeoning counterculture, audiences for blues music became increasingly 'white' and European.").

not understand. But I tell you: when you finish that song, people will be like “Damn, I know where you n—a’s are comin’ from. Death unto Apartheid!”¹⁰⁹

Indeed, the music of protest can be, and has been, enormously powerful in changing public opinion, and consequently, improving the guarantees of rights, justice, and the rule of law for minority populations.¹¹⁰ For this reason, perhaps most emphatically, musical expression is protected as speech by the First Amendment.¹¹¹ Justice William O. Douglas acknowledged as much in 1973:

Songs play no less a role in public debate, whether they eulogize the John Brown of the abolitionist movement, or the Joe Hill of the union movement, provide a rallying cry such as “We Shall Overcome,” or express in music the values of the youthful “counterculture.” . . . Under our system, the Government is not to decide what messages, spoken or in music, are of the proper “social value” to reach the people.¹¹²

While First Amendment protection was available to limit any effort that might have been made to silence the laments of blues musicians, there is not much evidence of serious effort to silence them.¹¹³ Indeed, the history of the First Amendment’s application to music does *not* focus on protest songs so much as on the use of profanity (including obscenity) and censorship of such language, often for the protection of minors.¹¹⁴ Historically, it appears that the idea of suppressing blues music because of its message simply never came up. While there are some prosecutions targeting the speech of radical political movements, those cases usually focused

109. Michela E. Vershbow, *The Sounds of Resistance: The Role of Music in South Africa’s Anti-Apartheid Movement*, 2 INQUIRIES J. 6 (2010), <http://www.inquiriesjournal.com/a?id=265>.

110. *Music in the Civil Rights Movement*, LIBRARY OF CONG. CIVIL RIGHTS HISTORY PROJECT, <https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/music-in-the-civil-rights-movement/> (last visited Jan. 31, 2021).

111. *Cinevision Corporation v. City of Burbank*, 745 F. 2d 560 (9th Cir. 1984) (holding that plaintiff had a first amendment right to promote concerts, and that the city violated that right by disapproving proposed concerts based on their content).

112. *Yale Broadcasting Co. v. FCC*, 94 S.Ct. 211, 214 (1973) (Douglas, J., dissenting from the denial of cert.).

113. A search of the case law for the censorship of music reveals numerous cases dealing with vulgar, or alleged obscene content, but little to nothing that deals with subversive messages in blues music.

114. Paul Fischer, *Music Censorship*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1132/music-censorship> (last visited Jan. 31, 2021).

on whether the speech incited violence.¹¹⁵ Blues music, as seen in the examples cited above, typically fell well short of that.¹¹⁶

Not so in Nazi Germany, where powerful forces were at play to suppress certain types of “degenerate” music.¹¹⁷ We see it today in China, where Tibetan musicians are jailed for singing songs that lament the plight of the Tibetan people, and the oppression by the Chinese government in that land.¹¹⁸ Eastern bloc nations during the Cold War were similarly harsh with anyone who dared express dissent, through any medium.¹¹⁹ Little wonder that no significant musical genre was generated by Soviet oppression or emerged as the expression of the hardships and sorrows of those victimized.

However, in the U.S., it was precisely the combination of an oppressive denial of fundamental rights, coupled with the guarantees of free speech, that created a hot house environment for the growth and emergence of blues music. While “We Shall Overcome” is not strictly a blues tune, it shares the spiritual roots of the blues and involves a similar repeating pattern.¹²⁰ It is noteworthy that a Supreme Court Justice cited “We Shall Overcome” as a compelling example of protected speech—it became the anthem of the civil rights movement.¹²¹

115. *Id.*; see, e.g., *Whitney v. California*, 274 U.S. 357 (1927).

116. Josh White’s lyrics advocated “kill[ing]” Jim Crow, but as Jim Crow was not a person, this could not be characterized as inciting violence. JOSH WHITE, *supra* note 83 and accompanying text. Nina Simone predicted that “This whole country is full of lies, you’re all gonna die and die like flies,” but never urged anyone to make that happen, NINA SIMONE, *supra* note 75 and accompanying text.

117. Peter Braithwaite, *Songs of Exiles: Rescuing ‘degenerate music’ From the Shadows*, THE GUARDIAN (Nov. 27, 2014), <https://www.theguardian.com/music/2014/nov/27/songs-of-exiles-rescuing-degenerate-music-from-the-shadows>.

118. Lhuboom, *Tibetan Singer Jailed Four Years for Belting Out Patriotic Songs*, RADIO FREE ASIA (Nov. 29, 2014), <https://www.rfa.org/english/news/tibet/singers-11292014130459>.

119. Amei Wallach, *Censorship in the Soviet Bloc*, 50 ART J. 75 (1991), <https://doi.org/10.2307/777221>.

120. David A. Graham, *The Surprising History of ‘We Shall Overcome’*, ATLANTIC (May 9, 2015) <https://www.theatlantic.com/entertainment/archive/2015/05/we-shall-overcome/392837/> (“[T]he AABA structure, like a blues song, is straightforward, and it leaves long pauses for a leader to queue a group.”); *We Shall Overcome: The Story Behind the Song*, THE KENNEDY CENTER, <https://www.kennedy-center.org/education/resources-for-educators/classroom-resources/media-and-interactives/media/music/story-behind-the-song/the-story-behind-the-song/we-shall-overcome/> (last visited Dec. 27, 2020).

121. See *Yale Broadcasting Co. v. FCC*, 94 S.Ct. 211, 214 (1973) (Douglas, J., dissenting from the denial of cert.).

Ultimately, the civil rights movement bore some fruit. We celebrated the fiftieth anniversary of the Civil Rights Act of 1964 just a few years ago.¹²² Furthermore, the Supreme Court issued a series of opinions during that same period supporting the cause and easing the plight of Black Americans.¹²³ In time, the rights articulated by Blackstone, to petition the courts for redress of injuries and to petition the government for redress of grievances, became effective for Black Americans, even in a majoritarian society.

The straightforward operation of legal institutions did not precipitate change. Rather, the change in the law was driven by a profound change in public opinion, change brought about through the exercise of speech rights highlighting the injustices and the hardships: the very thing that blues music did so very effectively. The protest was extra-legal—fighting the battle not within the legal system but outside it, and in the case of civil disobedience, despite it. First Amendment protections made that possible, and the messages of the blues ultimately effected one of the most critical reversals in American legal history. It might be said that the failure of the rule of law for Black America inspired the development of the blues. At the same time, the vitality of the First Amendment emboldened the blues and protected its emergence and dissemination. Ultimately, the blues played a role in remedying the very rule of law failures that inspired it.

V. CONCLUSION: THE BLUES' LEGACY AND THE FUTURE RULE OF LAW

Following the civil rights movement of the 1950s, 1960s, and 1970s, where statutes and court decisions vindicated a number of

122. Barack Obama, *Presidential Proclamation—50th Anniversary of the Civil Rights Act* (June 30, 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/presidential-proclamation-50th-anniversary-civil-rights-act> (“Few achievements have defined our national identity as distinctly or as powerfully as the passage of the Civil Rights Act. It transformed our understanding of justice, equality, and democracy and advanced our long journey toward a more perfect Union. It helped bring an end to the Jim Crow era, banning discrimination in public places; prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin; and providing a long-awaited enforcement mechanism for the integration of schools.”).

123. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (banning racially restrictive covenants in property deeds); *Brown v. Board of Education*, 347 U.S. 483 (1954) (banning school segregation); *Bailey v. Patterson*, 369 U.S. 31 (1962) (banning racial segregation in transportation facilities is unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (state laws prohibiting interracial marriage are unconstitutional); and *Jones v. Alfred H. Mayer Co.*, 392 US 409 (1968) (banning discrimination in the sale or rental of property).

long-neglected rights of Black Americans, musicians continued to press for change to the less overt but still persistent legacy of racial discrimination.¹²⁴ Thus, the link between music from the Black community and meaningful progress towards equal application of rule of law principles continues.

Developments in the late twentieth and early twenty-first century suggest that the social justice torch passed from blues musicians to funk and soul artists, and then to modern day hip-hop artists.¹²⁵ This “hip-hop generation,” raised on socially conscious hip-hop music, follows a trail blazed by the blues generation, and we see many of the same issues playing out all over again.¹²⁶

Foreshadowed by the blues generation, the hip-hop generation rallies around issues of racial justice, more commonly focused on the troubled relationship between law enforcement and Black America. Like the pattern we see in many blues tunes, hip-hop glorifies those who resist corrupt authority, and lionizes martyrs incarcerated by that authority.¹²⁷ Moreover, like the blues, hip-hop has reached white audiences, albeit young ones.¹²⁸ Professor andré cummings projects that as this young audience, the “hip-hop nation” (which includes “white American suburban youth”), matures, “some of its members will become leaders, including legislators, educators, lawyers, scholars, and philosophers; and . . . these leaders and educators will bring the images, lessons, and stark critiques that accompany all authentic members of this generation into their

124. Kevin Lang and Ariella-Kahn Lang Spitzer, *Race Discrimination: An Economic Perspective*, 34 J. OF ECON. PERSPECTIVES 68 (2020).

125. Eddy Lim, *From Blues to Hip Hop: The Pursuit of Freedom Through Music*, MIXDOWN MAG, <https://mixdownmag.com.au/blues-hip-hop-pursuit-freedom-through-music> (last visited Dec. 27, 2020).

126. See generally BAKARI KITWANA, *THE HIP HOP GENERATION: YOUNG BLACKS AND THE CRISIS IN AFRICAN AMERICAN CULTURE* (2008). Professor andré douglas pond cummings distinguishes between socially conscious hip-hop music, “which is positive and uplifts the black and inner city community,” and “bling” or “gangsta” hip-hop music, “which is negative and serves to degrade women, perpetuate violence, maintain stereotypes, and injure the black and inner city community.” andré douglas pond cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515, 526 (2010). The line is not a bright one, and some hip-hop artists produce work on both sides of the line, but it is a useful distinction for discussion purposes. *Id.*

127. andré douglas pond cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515, 526 (2010).

128. Carl Bialik, *Is the Conventional Wisdom Correct In Measuring Hip-Hop Audience?*, WALL STREET J., (May 5, 2005), <https://wsj.com/articles/SB111521814339424546>.

leadership roles.”¹²⁹ The outrage expressed in the Black Lives Matter protests of June 2020—protests featuring large numbers of white participants¹³⁰—is evidence that the messages and values of the hip-hop community, in decrying police abuse of power, have been embraced far more broadly.¹³¹

Yet, the blues generation did not merely foreshadow the hip-hop generation; rather, it appears that the blues music and message directly influenced and inspired the hip-hop music and message.¹³² The influence is readily seen in the socially conscious lyrics of modern musicians like Childish Gambino and Kendrick Lamar.¹³³ These artists—and many others—are strongly rooted in the traditions of the blues, both by sampling the blues tunes in their own music,¹³⁴ and in terms of their socially conscious message.¹³⁵

129. cummings, *Thug Life*, *supra* note 127, at 521, 525.

130. Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES, (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/george-floyd-white-protesters.html>.

131. See andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 500 (2010) (“Critical Race Theory and hip hop [both] include the use of narrative in response to racism and injustice in a post-civil rights era, a fundamental desire to give voice to a discontent brewed by silence, and a dedication to the continuing struggle for race equality in the United States.”); see also cummings, *supra* note 127.

132. Attempts to censor the voices of hip-hop have resulted in more litigation than was seen for blues musicians. Most of the hip-hop cases have focused on profane and, arguably, obscene lyrics (obscenity being unprotected by the First Amendment); but in the end, the bulk of these cases ultimately vindicated the artists’ rights to express themselves. David L. Hudson, Jr., *Rap Music and the First Amendment*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1582/rap-music-and-the-first-amendment> (last visited Dec. 27, 2020).

133. Bryan Rolli, *Childish Gambino’s ‘This Is America’ And Kendrick Lamar’s ‘Alright’ See Massive Spotify Gains Amid George Floyd Protests*, FORBES (June 3, 2020), <https://forbes.com/sites/bryanrolli/2020/06/03/childish-gambino-kendrick-lamar-spotify-george-floyd-protests/#6ab85cd84869>. Lamar was awarded a Pulitzer Prize in 2018 for his album *DAMN*, “a virtuosic song collection unified by its vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing the complexity of modern African-American life.” *DAMN*, by Kendrick Lamar, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/kendrick-lamar> (last visited Jan. 31, 2021).

134. WHO SAMPLED, <https://www.whosampled.com/sample/188472/Kendrick-Lamar-MC-Eiht-m.A.A.d-City-B.B.-King-Chains-and-Things/> (last visited Dec. 27, 2020).

135. Henry Adaso, *How Jazz Influenced Hip-Hop*, LIVEABOUTDOTCOM (Apr. 27, 2019), <https://www.liveabout.com/how-jazz-influenced-hip-hop-2857332> (tracing musical influence, as well as social justice messages from “slave songs and southern blues” right through to hip-hop); Andrew Limbong, *Both Party And Protest, ‘Alright’ Is*

The year 2020 brought new iterations of police violence against Black Americans and sparked new protests.¹³⁶ The willingness of the public—including large numbers of white Americans¹³⁷—to take to the streets to protest the violence is part of the legacy of the musical messages of the blues musicians of the mid-twentieth century, and by the musicians they inspired to take up the mantle, and continue the fight.¹³⁸ Indeed, young white

The Sound Of Black Life's Duality, NPR: MORNING EDITION (Aug. 26, 2019), <https://www.npr.org/2019/08/26/753511135/kendrick-lamar-alright-american-anthem-party-protest>; see also AKALA, FIND NO ENEMY (Illa State Records 2011); *Akala, Find No Enemy*, GENIUS, <https://genius.com/Akala-find-no-enemy-lyrics> (last visited Dec. 27, 2020) (directly referencing the influence of the jazz, blues, and rock, naming artists including blues musicians Billie Holiday and Ella Fitzgerald, but also explicitly referencing lynchings, whippings, and Black “pain”:

Calling it black radio, don't make laugh
 So is black music all about tits and arse?
 You don't represent nothing, you're just pretending
 When was the last time you ever played Hendrix?
 Or Miles Davis or John Coltrane?
 Or Ella Fitzgerald or Billie Holiday?
 We can call it urban to me that's cool
 If urban means street, that includes jazz too
 And rock for that matter
 Go ask Mick Jagger or Jimmy Page what they were listening to - the blues
 Not discrediting, love Zeppelin too, just giving credit where credit is due
 That blood soaked word rappers still use
 All it really shows is that we still self abuse
 That was the word that was used to kill Kelso Cochrane and Emmett Till
 That was the word that the conscience eased
 And made people pleased to hung you from trees
 That was the word that let the whips crack
 No matter what you say you can't take it back
 And I can say they're black so I feel their pain easier.);

A TRIBE CALLED QUEST, EXCURSIONS (Jive, 1991); *A Tribe Called Quest, Excursions*, GENIUS, <https://genius.com/A-tribe-called-quest-excursions-lyrics> (last visited Dec. 27, 2020) (acknowledging the influence of jazz and bebop, and highlighting the cyclical nature of music:

Back in the days when I was a teenager
 Before I had status and before I had a pager
 You could find the Abstract listenin' to hip-hop
 My pops used to say, it reminded him of Bebop
 I said, “Well, Daddy, don't you know that things go in cycles?
 Way that Bobby Brown is just amping like Michael.)

136. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

137. *Id.*

138. Brittany Spanos & Sarah Grant, *Songs of Black Lives Matter: 22 New Protest Anthems*, ROLLING STONE (July 13, 2016), <https://www.rollingstone.com/music/music-lists/songs-of-black-lives-matter-22-new-protest-anthems-15256/>.

Americans who were raised on hip-hop music have joined in the effort.¹³⁹ Perhaps the progress society makes on this issue in the coming years and decades will be linked to the musical expressions of artists who have spoken to the issues, or who will speak to them in new music. The music, be it blues or blues' progeny, has the capacity to reach across racial and other lines that divide our society, and bring us together.

The relationship between the blues and the rule of law continues to have powerful effects to this day, even as America continues to grapple with its racially thorny past, present, and future. The voices of blues musicians, including their echoes in more modern musical traditions, continue to press for the extension of Blackstone's basic rights and the rule of law to all Americans. Realization of this objective has depended not so much on constitutional or democratic constructs, as on the raw talent and expressions of Black musicians—starting with early twentieth century blues. If the denial of justice helped motivate the emergence of the blues, the blues and its legacy appear to have played a key role in motivating the reforms that break down those injustices.

139. cummings, *supra* note 131.