

# Music and Emotion in Victim-Impact Evidence

## ABSTRACT

*Aristotle famously said that the “law is reason free from passion,” and nothing arouses passion better than music. Thus when victim-impact evidence evolved from simple oral statements to include photographs, video footage, and musical clips, scholars and judges alike expressed concern that music might be too emotional and may make it difficult for the jury to make a rational decision based on logic rather than feeling. Recent scholarship in the field of law and emotion, however, notes that emotions are inevitable in law and further suggests that these emotions can be used constructively in the legal system. Thus, musically induced emotions may also have a role in the courtroom. By carefully considering current music-and-emotion research and analyzing the possible uses of music in victim-impact evidence, this Note concludes that under the current standard, music can have probative value to the jury, and suggests a framework for evaluating music in victim-impact evidence on a case-by-case basis.*

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Traditionally, during the sentencing phase of a capital trial, a member of the victim’s family would go before the court and read aloud into the record a written statement of victim-impact evidence “to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim’s family.”<sup>1</sup> But with the increasing availability of technology in courtrooms, the presentation of victim-impact evidence has evolved to include photographs, home-video footage, and now background music.<sup>2</sup> Scholars and judges alike have expressed concern that permitting the use of music in victim-impact evidence is unfair to the defendant because music is too emotional and subjective and may make it difficult for the jury members to make their decisions based on rational judgments rather than their feelings.<sup>3</sup>

The current standard governing the admissibility of victim-impact evidence restricts any evidence that would unduly prejudice the jury and lead to an unfair trial.<sup>4</sup> Thus, when determining

1. BLACK’S LAW DICTIONARY (9th ed. 2009).

2. See, e.g., *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007), cert. denied, 555 U.S. 1020 (2008).

3. See, e.g., Alicia N. Harden, Note, *Drawing the Line at Pushing “Play”: Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials*, 99 KY. L.J. 845, 876 (2011) (“Recent scholarship has advocated for a bright-line rule barring musical accompaniment to victim impact videos as the music is ‘irrelevant and highly prejudicial’ and results in prejudiced decision-making and a fundamentally unfair trial.”); Christine M. Kennedy, Note, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC L. REV. 1069, 1101 (2008) (“Adding musical soundtracks to victim impact videos only exacerbates the arguably inappropriate influence of emotions on capital sentencing. Music heightens the emotional influence of the visuals generally and introduces more factors that ought to be irrelevant to the sentencing decision.” (citing John Booth Davies, *The Psychology of Music* 69–70 (1978))); Erica A. Schroeder, Comment, *Sounds of Prejudice: Background Music During Victim Impact Statements*, 58 U. KAN. L. REV. 473, 473 (2010) (“Music’s powerful effect on emotion makes it a dangerous addition to the supposedly logic-and-reason-based setting of a courtroom. This added emotion makes it even more difficult for jurors to set aside their feelings and make rational decisions.”).

4. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). It should be noted that victim-impact evidence is subject to the same Federal Rules of Evidence as any other evidence. Fed. R. Evid. 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). Given the striking similarity between Rule 403 and the *Payne* standard, this Note focuses exclusively on the judicial interpretation of the *Payne* standard. Fed. R. Evid. 403; see also Kennedy, *supra* note 3 at 1081–82 (“Rule 403 is very favorable to admissibility; evidence, although relevant, may be excluded only if the probative value of the evidence is substantially outweighed by the risk of unfair prejudice.”).

whether to permit the use of music in victim-impact evidence, courts must determine whether emotionally evocative music reaches a prejudicial level of emotion that would render the trial unfair.<sup>5</sup> Historically, Western civilizations considered emotions irrational and uncontrollable responses that contaminated the pragmatism and fairness of reason.<sup>6</sup> In an effort to ensure fair and non-arbitrary decisions, the US legal system idealized the emotionless judge—one unaffected by the sentiments of the parties, the public, or herself—making decisions based solely on facts.<sup>7</sup>

Because music evokes and intensifies emotion,<sup>8</sup> courts must consider how the use of music in victim-impact evidence introduces emotional elements into juries' decisions.<sup>9</sup> However, critiques of music in victim-impact evidence as an ill-advised deviation from proper legal objectivity typically rely on the flawed assumption that emotions have no role in law.<sup>10</sup> On the contrary, current scholarship recognizes that “emotions are ubiquitous in law” and suggests that emotions can be used constructively in the legal system.<sup>11</sup> If emotions are necessarily and effectively a part of the courtroom experience, musically induced emotions may also have a role to play in victim-impact evidence.<sup>12</sup>

Part I of this Note presents the history of victim-impact evidence and outlines the current standard for evaluating the admissibility of victim-impact evidence. Part II examines recent challenges to the underlying assumption that emotion, and by extension music, has no role in law. Part III examines recent music-and-emotion scholarship

5. See *id.*; Kelly v. California, 555 U.S. 1020, 1027 (2008) (Breyer, J., dissenting) (arguing that victim-impact videos can render a strong “*purely emotional* impact that may call due process protections into play”).

6. See, e.g., Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2003 (2009); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 634–36 (2011) [hereinafter Maroney, *Judicial Dispassion*].

7. See Maroney, *Judicial Dispassion*, *supra* note 6, at 635–36.

8. E.g. Leonard B. Meyer, *Emotion and Meaning in Music*, in MUSICAL PERCEPTIONS 3, 10 (Rita Aiello & John A. Sloboda eds., 1994); Ian Cross & Elizabeth Tolbert, *Music and Meaning*, in THE OXFORD HANDBOOK OF MUSIC PSYCHOLOGY 24, 26–28 (Susan Hallam et al. eds., 2009).

9. See, e.g., Kelly v. California, 555 U.S. at 1025 (Stevens, J., dissenting) (“[W]hen victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming.”).

10. See, e.g., Maroney, *Judicial Dispassion*, *supra* note 6, at 643–45; see also Regina Austin, *Documentation, Documentary, and the Law: What Should be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 1015 (2010) (reasoning that sometimes music should be allowed in victim-impact evidence, but “only if it has a factual basis in the victim’s tastes, preferences, activities, hobbies, or behavior, or in the relationship between the victim and her or his survivors”).

11. Maroney, *Judicial Dispassion*, *supra* note 6, at 642–43; see discussion *infra* Part III.

12. See *infra* Part IV.

and presents a framework for analyzing music's emotional impact. Part IV considers when the use of music in victim-impact evidence—as background music, victim-created music, or victim-specific music—may be appropriate under the controlling standard. Finally, Part V concludes that courts should not ban music from victim-impact evidence simply because it is emotional. Rather, in evaluating whether the victim-impact evidence is “unduly prejudicial,” courts should consider whether specific musical components of victim-impact evidence help demonstrate the uniqueness of the victim or the blameworthiness of the defendant.

### I. THE *PAYNE* STANDARD FOR VICTIM-IMPACT EVIDENCE

The Supreme Court established the current standard for admissibility of victim-impact evidence in *Payne v. Tennessee*, holding that states may permit victim-impact evidence during a criminal trial if it is relevant to the jury's verdict.<sup>13</sup> The first prong of the *Payne* standard requires that victim-impact evidence “inform the sentencing authority about the specific harm caused by the crime in question,”<sup>14</sup> either by (1) portraying the victim as “an individual whose death represents a unique loss to society and in particular to [the victim's] family” or (2) providing the jury with information about the defendant's “moral culpability and blameworthiness.”<sup>15</sup> If victim-impact evidence can satisfy either of these qualifications, the second prong of *Payne* involves a due process inquiry that would preclude victim-impact evidence “in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair.”<sup>16</sup> Despite these seemingly straightforward steps, the *Payne* standard is notably broad.<sup>17</sup>

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13. *Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991) (6-3 decision).

14. *Id.* at 825.

15. *See id.* (“We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”).

16. *Id.* (citation omitted). It should be noted that the Due Process Clause of the Fourteenth Amendment is the only other limitation on the use of victim-impact evidence recognized in *Payne*. *See id.* at 827 (holding that the Eighth Amendment “erects no per se bar” to the admittance of victim-impact evidence).

17. *See, e.g.*, John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 266–67 (2003) (“What other evidence may the sentence hear? Are there any procedural safeguards necessary to safeguard a capital defendant's right to a reliable sentencing determination?”).

Specifically, *Payne*'s lack of clear direction left many unanswered questions for courts about how to apply *Payne* and what procedural safeguards—if any—might be needed to protect defendants.<sup>18</sup> *Payne* permits victim-impact evidence to give the jury a “quick glimpse of the [victim’s] life,” but courts have yet to define what constitutes a “quick glimpse.”<sup>19</sup> Although *Payne* does not require states to admit victim-impact evidence during sentencing, the majority of states do allow it and few impose any substantive or procedural limits regarding what can be admitted.<sup>20</sup> Further, while *Payne* only dealt with the admission of oral statements by victims’ family members,<sup>21</sup> subsequent cases have interpreted *Payne* broadly and permitted videos, photographs, and even background music in victim-impact evidence.<sup>22</sup>

#### A. Applying *Payne* to Music: *People v. Kelly*

In *People v. Kelly*, the California Supreme Court upheld the admission of a victim-impact video during sentencing after a jury convicted Douglas Oliver Kelly for the murder of nineteen-year-old Sara Weir.<sup>23</sup> The victim-impact video featured photographs and film footage of “Sara” throughout her life with soft music by Enya playing in the background and her mother narrating.<sup>24</sup> After the jury sentenced him to death, Kelly appealed, contending that the trial court should not have admitted the videotape as victim-impact evidence.<sup>25</sup>

Upholding the admission of the video, the California Supreme Court noted that under *Payne*, victim-impact evidence is only barred if

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18. *Id.*

19. *Payne*, 501 U.S. at 822; *see id.* at 830 (O’Connor, J., concurring); *see also* *Kelly v. California*, 555 U.S. 1020, 1024 (2008) (Stevens, J., dissenting); Blume, *supra* note 17, at 267.

20. *See* Blume, *supra* note 17, at 267–68 (noting that of the thirty-eight states with capital punishment, thirty-three states along with the federal government and military permit victim-impact evidence in capital trials).

21. *See Payne*, 501 U.S. at 814–15.

22. *E.g.*, *People v. Bramit*, 210 P.3d 1171, 1187 (Cal. 2009) (permitting a videotape as victim-impact evidence); *People v. Dykes*, 209 P.3d 1, 48 (Cal. 2009) (permitting a video as victim-impact evidence); *People v. Kelly*, 171 P.3d 548, 570–72 (Cal. 2007) (permitting a video with background music as victim-impact evidence); *State v. Leon*, 132 P.3d 462, 466–67 (Idaho Ct. App. 2006) (permitting a DVD presentation of video and photographic images with background music as victim-impact evidence).

23. *People v. Kelly*, 171 P.3d at 567–72 (Cal. 2007).

24. *Id.* at 570; *see* Ben Winograd, *Petition Preview: Enya, the Death Penalty, and Video Victim Impact Evidence*, SCOTUSBLOG (Aug. 20, 2008, 1:11 AM), [www.scotusblog.com/wp-content/uploads/2008/08/kellyvideo.mpg](http://www.scotusblog.com/wp-content/uploads/2008/08/kellyvideo.mpg).

25. *People v. Kelly*, 171 P.3d at 552, 568.

it is so prejudicial that it renders the trial “fundamentally unfair.”<sup>26</sup> The court dismissed the idea that videos are inherently prejudicial, emphasizing that problems arise from factors such as the length of the video, an extensive focus on an adult victim’s childhood, or the use of “stirring music.”<sup>27</sup> In such situations, courts “must strictly analyze” the victim-impact evidence and “monitor the jurors’ reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion.”<sup>28</sup>

After concluding that the general emotional content in the victim-impact video was not “unduly prejudicial” and that the video was permissible, the California Supreme Court went on to address serious reservations about the use of music in such videos.<sup>29</sup> The court conceded that music is not automatically barred from use in victim-impact evidence, especially when it “factually and realistically portray[s] the victim’s life and character.”<sup>30</sup> Background music, however, is problematic because it may “enhance the emotion of the factual presentation” without adding any relevant facts.<sup>31</sup>

This question of music’s appropriateness in victim-impact evidence has not been resolved in the cases following *Kelly*.<sup>32</sup> Although courts have tended to err on the side of excluding music due to its emotional content, little uniformity has been achieved beyond the consistent acknowledgment of music as emotional and therefore troubling.<sup>33</sup>

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26. *Id.* at 568 (quoting *People v. Lewis*, 140 P.3d 775, 840 (Cal. 2006) (quoting *Payne*, 501 US at 825)).

27. *See id.* at 569 (reasoning that these factors in particular risk “creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim’s bereaved parents” (quoting *People v. Prince*, 156 P.3d 1015, 1093 (2007))).

28. *Id.* at 570 (quoting *Prince*, 156 P.3d at 1093).

29. *See id.* at 571–72 (acknowledging that the background music in the video “may have added an irrelevant factor to the videotape,” given that it had no relevance to the case aside from it being some of the victim’s favorite music).

30. *Id.* at 571.

31. *See id.*

32. *Compare id.* (allowing the use of a victim-impact video with background music), *with* *People v. Zamudio*, 181 P.3d 105, 134, 136 (Cal. 2008) (allowing the use of photographic images in a victim-impact video, but finding that the audio portion, which consisted of music and narration, was “unduly prejudicial” and could not be played during the sentencing).

33. *See, e.g.,* *United States v. Sampson*, 335 F. Supp. 2d 166, 191–93 (D. Mass. 2004) (denying admittance of a victim-impact video set to the “poignant music” of The Beatles and James Taylor, reasoning that the twenty-seven minute video was better suited for its original purpose as a memorial film); *Salazar v. State*, 90 S.W.3d 330, 333–34 (Tex. Crim. App. 2002) (finding the trial court erred in admitting a victim-impact video featuring Celine Dion’s “My Heart Will Go On”

### B. The Supreme Court Responds

Despite the controversy surrounding victim-impact evidence and the ambiguity regarding *Payne's* scope and limits, the Supreme Court denied certiorari in *Kelly*.<sup>34</sup> In his dissent from the denial of certiorari, Justice Stevens argued that victim-impact videos are far from what the Court contemplated in *Payne*.<sup>35</sup> The addition of video and music to victim-impact evidence, he contended, adds “nothing relevant” to assist the jury’s decision making and only serves to increase the risk that the jury’s decision will be based on emotions rather than reason.<sup>36</sup>

Justice Breyer also dissented from the denial of certiorari.<sup>37</sup> Although he conceded that some videos are useful to the jury in determining the blameworthiness of the defendant, Justice Breyer agreed with Justice Stevens that certain emotional elements are simply too risky and cautioned against the “personal, emotional, and artistic attributes” of a victim-impact video.<sup>38</sup> He continued, noting that emotional elements, such as music, only enhance the “purely emotional” impact of the video and “tell the jury little or nothing about the crime’s ‘circumstances.’”<sup>39</sup> However, a closer examination of musically-induced emotions reveals that music can, at times, reveal something.<sup>40</sup>

## II. CHALLENGING ASSUMPTIONS: LAW AND EMOTION

Central to both Justice Stevens’s and Justice Breyer’s dissenting opinions in *Kelly* is the assumption that emotion has little or no role in the legal system.<sup>41</sup> Because certain media, including music, can affect emotions, some critics have gone so far as to call for a bright-line ban against victim-impact videos, arguing that by permitting the

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because of its “extraordinarily emotional” quality and the music’s amplification of that effect). *But see* State v. Leon, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (permitting a victim-impact video with background music, reasoning that the music was not “unduly inflammatory or manifestly unjust”).

34. Kelly v. California, 555 U.S. 1020, 1020 (2008).

35. See *id.* at 1025–26 (Stevens, J., dissenting).

36. *Id.* at 1025.

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

38. *Id.*

39. *Id.* at 1026–27.

40. See *infra* Part IV.

41. See Kelly v. California, 555 U.S. at 1025–26. (Stevens, J., dissenting); *id.* at 1026–27 (Breyer, J., dissenting).

combination of the film and the background music, “courts are permitting jurors to befriend the victim in emotionally charged ways.”<sup>42</sup>

The idea that emotions are “more primitive, less intelligent, more bestial, less dependable, and more dangerous than reason,”<sup>43</sup> is so embedded in the US legal system that most judges do not even question the premise that emotion has no role in law and that judges and juries’ decisions should be based solely on reason.<sup>44</sup> The subsequent cases interpreting the *Payne* standard highlight this presumption.<sup>45</sup>

Recent law and emotion scholarship, however, suggests that far from detracting from reason, emotions are useful, even necessary, to rational decision making.<sup>46</sup> In contrast to the traditional theory that law should be free from emotions, which are “unthinking” and contrary to reason, cognitive theory suggests that every emotion is based on an individual’s “underlying belief structure” about the world and “embodies thought, often complex thought,” about that individual’s beliefs, which can be analyzed like any other thought.<sup>47</sup>

Understanding an emotional response, such as anger towards a defendant in a murder trial, can reveal the thought processes and belief

42. *E.g.*, Harden, *supra* note 3, at 848, 866–67 (“This Note advocates for the adoption a bright-line rule against video montages as victim impact evidence in capital punishment sentencing trials because victim impact videos result in fundamentally unfair trials, are outside the scope of the Court’s holding in *Payne* [sic], and are irrelevant and unduly prejudicial under Federal Rules of Evidence 401 and 403.”).

43. Robert C. Solomon, *The Philosophy of Emotion*, in THE HANDBOOK OF EMOTION 3, 3 (Michael Lewis et al. eds., 2010).

44. *See* Maroney, *Judicial Dispassion*, *supra* note 6, at 632; *see also, e.g.*, *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007).

45. *See, e.g.*, *Prince*, 156 P.3d at 1093 (reasoning that courts must ensure victim-impact evidence does not involve a “legally impermissible level of emotion” thereby becoming unduly prejudicial).

46. *See* Abrams & Keren, *supra* note 6, at 2004 (“Law and emotions scholars challenged this entrenched understanding with two kinds of arguments. The first was a descriptive claim: emotions already infuse decision making whether or not they are recognized by legal actors. The second, and perhaps more central, argument was normative. Legal decision making is enriched and refined by the operation of emotions because they direct attention to particular dimensions of a case, or shape decision makers’ ability to understand the perspective of, or the stakes of a decision for, a particular party.”); Maroney, *Judicial Dispassion*, *supra* note 6, at 642 (“First, emotions are ubiquitous in law. Second, and more importantly, emotion is not necessarily—or even usually—a pernicious influence. Emotion reveals reasons, motivates action in service of reasons, enables reason, and is educable.”).

47. Maroney, *Judicial Dispassion*, *supra* note 6, at 643–44 (“If the traditional legal view is that emotions are ‘unthinking, opposed to reason in some very strong and primitive way,’ just ‘mindless surges of affect,’ the cognitive theory responds that emotions embody beliefs about its objects.” (quoting Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN’S L. REV. 23, 24 (1996))).



structure that shapes an individual's decision making.<sup>48</sup> Perhaps a juror's anger stems from racial prejudice, or memories of a personal experience, or the defendant's behavior, or a particular belief about how justice should be exacted.<sup>49</sup> Once that emotional response is understood, the individual experiencing the emotion can evaluate it and respond appropriately to the triggering stimulus and the legal context.<sup>50</sup> Thus, emotions are a part of rational decision making and are present in law, even if they remain underexamined.<sup>51</sup>

This developing understanding of the roles that emotion necessarily plays in trials weighs against a crude blanket ban on music as a component of victim-impact testimony.<sup>52</sup> If emotions have a role in law, emotionally evocative music may also have a place because it too can reflect underlying beliefs and reveal complex thought patterns.<sup>53</sup> A bright-line rule barring music from victim-impact evidence is not a satisfying solution because it fails to recognize the instances where music conforms to the *Payne* standard.<sup>54</sup> Rather, examining how music elicits and informs emotions creates a foundation for analyzing the use of music in victim-impact evidence under the standard set forth in *Payne*.<sup>55</sup>

### III. THE EMOTIONS OF MUSIC

Music is renown for its ability to shape emotions.<sup>56</sup> Yet despite music's unquestioned emotional impact, scholars have experienced considerable difficulty seriously investigating the relationship between

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48. *See id.* at 644–45.

49. *See id.* at 644.

50. *See id.*

51. *See id.*

52. *See id.* at 649.

53. *See infra* Part IV.

54. *Cf.* Harden, *supra* note 3, at 876 (arguing that a bright-line rule barring both musical accompaniment in victim-impact evidence and the use of a video format is necessary to prevent the “emotional impact factor of individual components” and “ensure[] rational and even-handed decision making”).

55. *See infra* Parts III.B, IV.

56. *See* Meyer, *supra* note 8, at 10 (“From Plato down to the most recent discussions of aesthetics and the meaning of music, philosophers and critics have, with few exceptions, affirmed their belief in the ability of music to evoke emotional responses in listeners.”); Patrik N. Juslin & John A. Sloboda, *Music and Emotion: Introduction*, in *MUSIC AND EMOTION: THEORY AND RESEARCH* 3, 3 (Patrik N. Juslin & John A. Sloboda eds., 2001) [hereinafter Juslin & Sloboda, *Introduction*] (noting that most people, regardless of culture or age, experience music and its emotional effects every day).

music and emotion.<sup>57</sup> This is a challenging topic, not only because emotions are difficult to study scientifically, but also because the field still lacks a unifying theoretical framework.<sup>58</sup> For example, some suggest that music can induce emotion by the sheer force of its presence, similar to how a “snake might induce fear in someone . . . independently of whether or not the person concerned had it in mind to feel fear.”<sup>59</sup> Others argue that music is simply a tool the listener can use to “generate an emotional experience,” and without the listener’s decision to feel a particular emotion, the music would have no emotional effect at all.<sup>60</sup>

This dichotomy is particularly relevant to the questions of law-and-emotion scholarship and music’s role in victim-impact evidence because it presents two possible ways of understanding musically-induced emotions.<sup>61</sup> If an individual hearing music has no control over the emotional effects, then critics are correct to view music’s emotional power as uncontrollable and prejudicial.<sup>62</sup> If, however, an individual is even partially in control of emotionally interpreting the music she hears, then recent law-and-emotion scholarship suggests that those emotions could be analyzed and controlled by the listener, thus creating an appropriate place for music in victim-impact evidence.<sup>63</sup>

#### *A. Challenges in Understanding Music-Induced Emotions*

These theories of music-induced emotions represent two distinct approaches to understanding music and emotions: the traditional “receptive” model involving a passive listener sitting quietly experiencing involuntary emotions in the concert hall and a

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57. Juslin & Sloboda, *Introduction*, *supra* note 56, at 3–5 (“The most authoritative handbook of music psychology to appear thus far, *The psychology of music* (Deutsch 1999) [sic], does not include a chapter on emotion. Similarly, the most extensive handbook on emotion yet to appear, *Handbook of emotions* (Lewis & Haviland-Jones 2000) [sic], also does not contain a chapter on music.”).

58. *See id.* at 4–5 (“[T]here has been a tendency for many researchers to think that the problem of music and emotion is so complex that they would prefer to avoid it altogether—rather than dealing with the problem inadequately, it is better not dealing with it at all.”).

59. *See* Patrik N. Juslin & John A. Sloboda, *Music and Emotion: Commentary*, in MUSIC AND EMOTION: THEORY AND RESEARCH 453 (Patrik N. Juslin & John A. Sloboda eds., 2001) [hereinafter Juslin & Sloboda, *Commentary*].

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

contemporary “constructive” model in which the listener is now the “agent who *makes* emotion happen” by managing the nexus of influences.<sup>64</sup> Aligning with the receptive model, classical Greek philosophy believed that music could move people’s passions by its rousing beauty, sharing reason’s ability to “bend human minds and actions to the purposes of the orator.”<sup>65</sup> More recently, however, musicologists and sociologists have embraced the constructive idea of music—that musical meaning varies across cultures and depends on social context.<sup>66</sup> Yet while the constructive model has transformed the contemporary approach to understanding music and emotion, scholars must still contend with the longstanding belief that musically induced emotions are irrational, illustrating the difficulties of creating a uniform theoretical framework.<sup>67</sup>

Another difficulty for scholars examining emotion in music is that even within the same framework, the experience of music is subjective. Indeed, the specific emotion felt, the level of emotion, and the understanding of the emotion will vary from person to person depending on different contextual factors that influence and control an individual.<sup>68</sup> Even something as slight as a person’s general mood can determine how much emotion that individual will experience when listening to music.<sup>69</sup> Thus, at the core of any discussion regarding potential roles for music in victim-impact evidence, fully understanding the relationship between music and emotion remains a challenge.<sup>70</sup>

### *B. Analyzing Emotional Responses to Music*

Despite the lack of a uniform theoretical framework and the inherently subjective nature of experiencing emotionally evocative music, scholars have identified intrinsic and extrinsic musical factors that, when compiled and refined, shed considerable light on the experience of music and emotion in the context of victim-impact

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64. See *id.* at 453–54.

65. See Cross & Tolbert, *supra* note 8, at 26.

66. See *id.* at 29 (suggesting that music’s meaning emerges from the “processes and conditions that pertain to the contexts within which music is produced and received”).

67. See Juslin & Sloboda, *Commentary*, *supra* note 59, at 453–54.

68. See JAMES L. MURSELL, *THE PSYCHOLOGY OF MUSIC* 201 (1st ed., 1937).

69. See JOHN SLOBODA, *EXPLORING THE MUSICAL MIND: COGNITION, EMOTION, ABILITY, FUNCTION* 208 (2005).

70. See *infra* Part III.

evidence.<sup>71</sup> Studies have found that the intrinsic musical elements of tempo, volume, and timbre are the most effective at consistently conveying emotions.<sup>72</sup> The most significant extrinsic factors that shape the listener's perception of music include conditioning, visual association, anticipation, and social context.<sup>73</sup>

### 1. Emotion-Inducing Elements Intrinsic to Music

Within any piece of music, any given musical element can affect the listener's emotional experience and can evoke many different emotions depending on the context and on the element's relationship to the other musical elements.<sup>74</sup> For example, while musical mode<sup>75</sup> is often perceived as either happy or sad, tempo can overrule this set of associations, exerting a greater emotional impact on most listeners.<sup>76</sup>

Although measuring the effect of internal musical elements is extremely difficult and subjective, scholars have identified that tempo, volume, and timbre generally have the clearest and most consistent emotional effects—an increase in any of these factors, making the music faster, louder, or higher in pitch, resulted in an increase in emotional activation and the perception of happiness or excitement.<sup>77</sup> Interestingly, these internal elements highlight similarities between music, which uses changes in pitch, tempo, and volume to express emotion, and the human voice, which expresses emotion by “modulations of the tone.”<sup>78</sup> This has led some scholars to suggest that

71. See, e.g., Patrik N. Juslin & Daniel Västfjäll, *Emotional Responses to Music: The Need to Consider Underlying Mechanisms*, 31 BEHAV. & BRAIN SCI. 559, 563–68 (2008); MURSELL, *supra* note 68, at 201–16.

72. See Alf Gabrielsson, *The Relationship Between Musical Structure and Perceived Expression*, in THE OXFORD HANDBOOK OF MUSIC PSYCHOLOGY 145 (Susan Hallam et al. eds., 2009).

73. See MURSELL, *supra* note 68, at 201–10; Juslin & Västfjäll, *supra* note 71, at 563–67.

74. See Gabrielsson, *supra* note 72, at 143–45.

75. “Mode” defines a particular set of notes at specified tonal intervals upon which melodies and harmonies are built. THE OXFORD DICTIONARY OF MUSIC, (Michael Kennedy ed., 2nd ed. rev. 2006), available at <http://www.oxfordmusiconline.com>.

76. See Gabrielsson, *supra* note 72, at 143–45. In other words, if a minor mode piece, which is often perceived as sad, is set to a quick tempo, which is often perceived as happy, the heightened pulse of the music may shift the perception from one of sadness to one of happiness. See *id.*

77. See *id.* at 145.

78. Isabelle Peretz, *Listen to the Brain: A Biological Perspective on Musical Emotions*, in MUSIC AND EMOTION: THEORY AND RESEARCH 122, at 122 (Patrik N. Juslin & John A. Sloboda, eds., 2001).

certain vocal expression cues used to convey emotion can be mimicked in music and similarly used to convey emotion.<sup>79</sup> Others, however, dispute the extent to which this claim can be applied, citing the highly specialized and complex neural organization humans use to understand verbal cues.<sup>80</sup> Still, the theory that certain aspects of vocal communication translate to music does help explain the relatively consistent emotional response to specific musical elements such as tempo and loudness.<sup>81</sup>

These internal musical elements provide a general understanding of how the musical structure of a song can affect individuals in the context of victim-impact evidence.<sup>82</sup> But in isolation, the internal elements do not reveal much because the listener's emotional experience depends on interaction with external factors.<sup>83</sup>

## 2. Emotion-Inducing Factors External to Music

While intrinsic, sonic features of music tend to produce certain consistent (if variable) reactions in most listeners, other extrinsic factors also influence listeners' emotional reactions.<sup>84</sup> These factors include (1) emotional conditioning, (2) visual association, (3) anticipation, and (4) social context.<sup>85</sup>

The first external factor, emotional conditioning, is the process by which "an emotion is induced by a piece of music simply because this stimulus has been paired repeatedly with other positive or negative stimuli."<sup>86</sup> For example, if a particular song often plays contemporaneously with times when the listener meets her boyfriend, the repeated pairings of the song and her love for her boyfriend may become associated with the happiness derived from the relationship.<sup>87</sup>

Conditioning also takes place at a cultural level as general styles of music, such as soft, slow, and melodic music, serve as a shorthand for specific emotion, such as sadness.<sup>88</sup> This process, known as

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79. *See id.* at 124.

80. *See id.*

81. *See id.*; Gabrielsson, *supra* note 72, at 145.

82. *See* Gabrielsson, *supra* note 72, at 143–45.

83. *See id.* at 141.

84. *See* Gabrielsson, *supra* note 72, at 143–45.

85. *See id.*

86. *See* Juslin & Västfjäll, *supra* note 71, at 564.

87. *See id.*

88. *See* JOHN BOOTH DAVIES, *THE PSYCHOLOGY OF MUSIC* 70 (1978).

“generalization,” can cause a listener to “experience an emotion to a piece of music which he has not heard before.”<sup>89</sup> Unlike most forms of classic conditioning, generalization often happens without the listener’s awareness and is particularly resistant to extinction.<sup>90</sup> Emotional conditioning, especially generalization, may be particularly relevant to the analysis of background music in victim-impact evidence that is being used to set the mood for the video.<sup>91</sup>

The second external factor, visual association, applies when a listener imagines any given image while listening to music and experiences an emotion associated with that image.<sup>92</sup> Studies have indicated that different individuals associate different types of images with different types of emotions, making it possible for mental images to function as “internal triggers” to emotions.<sup>93</sup> Listeners tend to have the same emotional responses to these imagined mental images as they would to similar “real-world” visual stimuli.<sup>94</sup> While musical conditioning is often unconscious, listeners can control visual associations by summoning and dismissing images at will, thereby enabling the listener to control the music-induced emotions.<sup>95</sup>

Yet studies have shown that imagined visual images are “strongly influenced or shaped by the unfolding structure of the music.”<sup>96</sup> For example, one study revealed that twenty-four subjects listening to various musical selections imagined extremely varied visual images but experienced “comparatively constant” moods when listening to each musical selection.<sup>97</sup> Thus, the relationship between the music and the listener’s imagined image raises a chicken-or-the-egg question about the relationship between the imagined images and the experienced emotion.<sup>98</sup> Scholars still debate whether the imagined image enables the listener to constructively manipulate her emotions by purposefully evoking particular mental

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89. *See id.* at 69–70.

90. *See Juslin & Västfjäll, supra* note 71, at 564–65.

91. *Compare* United States v. Sampson, 335 F. Supp. 2d 166, 191–93 (D. Mass. 2004) (finding a victim-impact video with “poignant” background music to be unduly prejudicial), *with* State v. Leon, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (reasoning that the background music in this victim-impact video was not unduly prejudicial).

92. *See Juslin & Västfjäll, supra* note 71, at 566; MURSELL, *supra* note 68, at 206.

93. *See Juslin & Västfjäll, supra* note 71, at 566.

94. *See id.*

95. *See id.* at 567.

96. *See id.*

97. *See* MURSELL, *supra* note 68, at 207–08.

98. *See id.*

images or whether the experienced emotion prompts the listener to respond reflectively to music's emotional force by imagining a particular kind of image.<sup>99</sup> Regardless of whether images induce the emotion experienced while listening to music or whether the music-induced emotion prompts the imagined image, visual association is an important external factor because it recognizes the powerful interplay between visual and aural stimulation—a relationship that is often present in victim-impact videos that include both photos of the victim and music.<sup>100</sup>

The third external factor, anticipation, is a highly constructive factor premised on the assumption that music has no inherent meaning and that the listener derives musical meaning largely from personal expectations, experiences, prejudices, or beliefs.<sup>101</sup> Once a listener has particular expectations about a musical experience, whether those expectations are derived from personal history or cultural norms, nearly every musical phrase will appear to have meaning precisely because the listener may interpret the music in a way that fits within the listener's anticipated framework.<sup>102</sup> Anticipation is a critical factor for understanding music's legal implications because jurors' expectations of victim-impact videos may shape their experience of the actual videos, leading them to interpret any music to emotionally reinforce those expectations.<sup>103</sup>

Finally, scholars and historians have long acknowledged music's ability to coordinate the emotions of a group and intensify the individual listener's emotions.<sup>104</sup> Consequently, the fourth external factor, social context, is one of the most significant musical factors because jurors will view victim-impact evidence in a group context, which can even alter and intensify the emotion a listener experiences.<sup>105</sup> Indeed, the social context of a musical experience can shape the

99. See *infra* Part IV.

100. See Juslin & Västfjäll, *supra* note 71, at 566–67; MURSELL, *supra* note 68, at 207–08.

101. See Peter Vuust & Chris D. Frith, *Anticipation is the Key to Understanding Music and the Effects of Music on Emotion*, 31 BEHAV. & BRAIN SCI. 599, 599–600 (2008) (advocating for a theoretical framework “with music anticipation as the guiding mechanism”).

102. See DAVIES, *supra* note 88, at 62, 79.

103. See *id.*

104. See SLOBODA, *supra* note 69, at 358; ANTHONY STORR, MUSIC AND THE MIND 24, 30–31, 41–46 (1992) (observing that the ancient Greeks used music to boost the morale of men during war and Adolf Hitler used music to rouse crowds into excitement before his speeches).

105. See, e.g., W. Ray Crozier, *Music and Social Influence*, in THE SOCIAL PSYCHOLOGY OF MUSIC 68–73 (David J. Hargreaves & Adrian C. North eds., 1997); STORR, *supra* note 104, at 24.

listener's anticipated emotional responses through the disposition of others nearby or the particular private or public environment.<sup>106</sup> The power of context can be so strong that the listener might try to override a personal predisposition in order to match what is deemed appropriate.<sup>107</sup>

In addition to the influence of social context on a listener's emotional experience, a collective listening environment often causes listeners to experience strong emotions at the same moments, guided by the music.<sup>108</sup> This collective musical experience can also pressure an individual listener to conform to the group.<sup>109</sup> From a young age, humans look to others for social cues about how to respond, ready to catch the contagious emotions seen in others.<sup>110</sup> Because individuals often look to a social group for approval, an individual may suppress or keep private a personal opinion or emotional experience "to appear neutral concerning a majority view."<sup>111</sup> Thus, the social context of music can have profound influence on individual listeners' emotional experiences, either by heightening their emotions in a group context or by pressuring them to conform or conceal their true emotions to align with the group's expectations.<sup>112</sup>

In sum, a survey of music-and-emotion scholarship affirms that music can powerfully affect emotions through factors such as harmonic structure, emotional conditioning, visual association, and social context to name a few.<sup>113</sup> But the inclination to automatically prohibit music from victim-impact evidence on the grounds that it affects emotions is too hasty because it is based on the assumption that emotions cannot be useful or regulated in law and because it fails to consider the benefits that music offers victim-impact evidence.<sup>114</sup>

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106. See Crozier, *supra* note 105, at 68; DAVIES, *supra* note 88, at 62; STORR, *supra* note 104, at 24.

107. Crozier, *supra* note 105, at 68.

108. See SLOBODA, *supra* note 69, at 358; STORR, *supra* note 104, at 30–31.

109. See Crozier, *supra* note 105, at 68.

110. See Patrik N. Juslin & John A. Sloboda, *Psychological Perspectives on Music and Emotion*, in *MUSIC AND EMOTION: THEORY AND RESEARCH* 86 (Patrik N. Juslin & John A. Sloboda eds., 2001).

111. See Crozier, *supra* note 105, at 71.

112. See DAVIES, *supra* note 88, at 71–72; Cross & Tolbert, *supra* note 8, at 29.

113. See DAVIES, *supra* note 88, at 79; Cross & Tolbert, *supra* note 8, at 30–31.

114. See *infra* Part IV.



## IV. MUSIC IN VICTIM-IMPACT EVIDENCE: AN ASSESSMENT

Critics of music in victim-impact evidence worry that music heightens the jurors' emotional experience, making it "even more difficult for jurors to set aside their feelings," which in turn both decreases their collective capacity to make a rational judgment and introduces an unfair degree of subjectivity into the proceedings.<sup>115</sup> For example, a particular song playing in the background of a victim-impact video might have special emotional salience to one juror that could taint that juror's judgment, either by introducing an inappropriate and irrelevant emotion to the juror's consciousness or by increasing the illusory perception of similarity between the juror and the victim.<sup>116</sup>

While critics are correct to observe that music can be highly emotional,<sup>117</sup> they are wrong to assume that "[m]usic has no probative value [or that] it provides no relevant information regarding the victim's uniqueness or the harm caused that cannot be expressed through spoken testimony."<sup>118</sup> This assumption is axiomatic of the tendency to treat all possible uses of music in victim-impact evidence as having the same degree of relevance.<sup>119</sup> But this is an oversimplified approach that fails to recognize that emotionally evocative music may be relevant to victim-impact evidence at certain times.<sup>120</sup> By examining the uses of music in victim-impact evidence and categorically evaluating the appropriateness of these uses under the *Payne* standard, courts will be better able to determine when music should not be permitted in victim-impact evidence and when music has probative value and can be equitably used in victim-impact evidence.<sup>121</sup>

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115. Schroeder, *supra* note 3, at 473, 478; *see, e.g.*, Harden, *supra* note 3, at 863 ("[W]hen musical accompaniment is added, the effect of the visual images is exacerbated; particular songs can arouse emotional memories in jurors to the detriment of their rational decision-making capability."); Kennedy, *supra* note 3, at 1102 ("Adding a musical soundtrack to a victim impact movie, therefore, poses a substantial risk that the specific tune used will elicit in the jurors a memory of the last time they heard the particular song or one like it, and/or may lead them to associate the song with the event in which it is usually used.").

116. *See* Kennedy, *supra* note 3, at 1102 ("Adding a musical soundtrack to a victim impact movie, therefore, poses a substantial risk that the specific tune used will elicit in the jurors a memory of the last time they heard the particular song or one like it, and/or may lead them to associate the song with the event in which it is usually used.").

117. *See supra* Part III.

118. Schroeder, *supra* note 3, at 503.

119. *See, e.g., id.*

120. *See infra* Part IV.B–C.

121. *See infra* Part IV.A–C.

An analysis of the three major categories of music found in victim-impact evidence under the *Payne* standard reveals that generic background music with no particular relevance to the victim most likely fails under both prongs of *Payne*.<sup>122</sup> Victim-created music, however, should be allowed in victim-impact evidence as it clearly reflects the uniqueness of the victim and is not “unduly prejudicial.”<sup>123</sup> Finally, music that has special significance or relevance to the victim or the victim’s family should be evaluated on a case-by-case basis, because it illustrates the victim’s personality and life, and because it is not necessarily “unduly prejudicial.”<sup>124</sup>

### A. Background Music

The most common form of music in victim-impact evidence is background music—a song playing softly while the jury views pictures of the victim and listens to a narrated statement.<sup>125</sup> Courts have wrestled with whether background music is “unduly prejudicial” and whether it even serves an appropriate function under the *Payne* standard without reaching a consistent conclusion.<sup>126</sup>

One of the major problems with background music under the *Payne* standard is the subjectivity surrounding each individual’s emotional experience of music.<sup>127</sup> Jurors are human beings with complex emotional histories, and each may have previous emotional experiences with a song presented in a victim-impact video, regardless of the appropriateness of that response in the courtroom proceedings or its connection to the victim-impact evidence being presented.<sup>128</sup> Alternatively, jurors might associate real or imagined visual stimuli

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122. See *infra* Part IV.A.

123. See *infra* Part IV.B.

124. See *infra* Part IV.C.

125. See, e.g., *People v. Kelly*, 171 P.3d 548, 571–72 (Cal. 2007).

126. See, e.g., *United States v. Sampson*, 335 F. Supp. 2d 166, 192–93 (D. Mass. 2004) (finding a victim-impact video with “poignant” background music to be unduly prejudicial); see also *People v. Kelly*, 171 P.3d at 571–72 (permitting background music in a victim-impact video, but cautioning that background music might add an “irrelevant factor” that only enhances emotions and does not contribute to a fair factual presentation); *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (reasoning that the background music in this victim-impact video was not unduly inflammatory); *Salazar v. State*, 90 S.W.3d 330, 338–39 (Tex. Crim. App. 2002) (prohibiting a victim-impact video with background music because the music “greatly amplifies the prejudicial effect” of the video).

127. See Cross & Tolbert, *supra* note 8, at 24.

128. See DAVIES, *supra* note 88, at 70; Juslin & Västfjäll, *supra* note 71, at 564; see discussion *supra* Part III.B.

with the musical presentation and experience emotions related to those associations, rather than the victim-impact evidence at hand.<sup>129</sup> Such potential scenarios make the possible emotional impact of music in victim-impact evidence highly unpredictable and quite risky.<sup>130</sup>

One potential way to limit the emotional effects of background music is through emotional regulation.<sup>131</sup> Originally developed for judges, this approach may be adaptable to juror-specific circumstances.<sup>132</sup> Emotional regulation suggests that by actively engaging with emotions rather than suppressing them, legal actors can “foster the desired emotional state.”<sup>133</sup> They can use anticipatory cognitive reappraisal to mentally prepare themselves for encountering emotional stimuli, such as gruesome photos during evidence or a particularly dramatic witness.<sup>134</sup>

Evidence already suggests that even without formal legal training, jurors might be able to engage in anticipatory cognitive reappraisal, much like judges.<sup>135</sup> In one study, participants were alerted to the probable impact of “emotionally provocative film clips or slides” and instructed to “try [their] best to adopt a neutral attitude” and “to think about [the slides] objectively and analytically rather than

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129. See *supra* Part III.B.

130. See Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 15 (1997) (raising the concern that emotions are too subjective and “irrational and unpredictable” to yield consistent results).

131. See Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1504–10 (2011) [hereinafter Maroney, *Emotional Regulation*] (discussing suppression and engagement strategies for emotional regulation). It should be noted that the effectiveness of emotional regulation as a solution to the risk that musical emotions may be “unduly prejudicial” is conditional on jurors being able to regulate musical emotions in a fashion similar to nonmusical emotions.

132. See *id.* at 1514. The emotional regulation model was specifically developed for judges, who cannot avoid interacting with emotional material and are responsible for screening the material presented to the jury to ensure the jury only sees appropriate emotional stimuli. See *id.*

133. See *id.* at 1514, 1519.

134. See *id.*

135. See *id.* at 1518. Maroney draws a parallel between the legal and medical professions, pointing out that doctors, like judges, must deal with strong emotional stimuli such as injured bodies or bodily fluids. See *id.* at 1517. Studies have shown that when instructed to approach a potentially emotional, perhaps even gruesome, situation as a doctor would, untrained laypersons appear to be able to effectively maintain a neutral and controlled emotional state for at least a short duration. See *id.* at 1518. The fact that “laypersons appear able temporarily” to engage in anticipatory cognitive reappraisal because they have “at least a basic sense of what is important to a doctor” raises the possibility that jurors might also be able to engage in anticipatory cognitive reappraisal because they have a sense of what is important to judges and the legal system. See *id.* It should be noted, however, that there are still many questions about other potential problems with applying emotional regulation to jurors. See *infra* note 145.

as personally, or in any way, emotionally relevant to [them].”<sup>136</sup> As a result, the untrained participants were able to maintain a neutral emotional response, even while viewing images of serious injuries.<sup>137</sup> This study suggests that simple instructions alerting the jurors to the anticipated emotional content and reminding them to view the material objectively may offset any “unduly prejudicial” emotional responses.<sup>138</sup>

Arguably, the elements intrinsic to music are capable of being filtered through an emotional-regulation model.<sup>139</sup> Although it is impossible to instruct the jurors on every potential emotion-inducing musical element, making the jurors aware that they will hear “sad” or “reflective” music during the victim-impact evidence may be enough to enable jurors to maintain a neutral emotional response.<sup>140</sup> Indeed, the external factors of anticipation and social context may even support the possibility of emotional regulation as an effective means of moderating the other extrinsic risks posed by background music.<sup>141</sup> Research on anticipation indicates that when a listener anticipates a specific emotional response, such as neutrality, that listener’s experience of music simply reinforces that predetermined emotion.<sup>142</sup>

Furthermore, other research suggests that experiencing music in a group both heightens the emotional response and pressures the individuals to conform to the majority’s expectation.<sup>143</sup> Thus, in a situation where jurors have been advised in advance about the potential emotional effect of the music used in victim-impact evidence and have been instructed to remain neutral and objective, the group context may assist in cultivating an atmosphere of emotional neutrality.<sup>144</sup>

But background music may still fail the *Payne* standard. Even if instructing jurors to engage in anticipatory cognitive reappraisal successfully eliminated undue prejudice concerns,<sup>145</sup> background

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136. See Maroney, *Emotional Regulation*, *supra* note 131, at 1515.

137. See *id.*

138. See *id.*

139. See DAVIES, *supra* note 88, at 68; Cross & Tolbert, *supra* note 8, at 30–31.

140. See Maroney, *Emotional Regulation*, *supra* note 131, at 1518–19.

141. See Patrik N. Juslin, *Emotional Responses to Music*, in *The Oxford Handbook of Music Psychology* 134–35 (Susan Hallman et al. eds, 2009).

142. See DAVIES, *supra* note 88, at 71–72.

143. See SLOBODA, *supra* note 69, at 358; STORR, *supra* note 4, at 24, 30–31.

144. See SLOBODA, *supra* note 69, at 358; STORR, *supra* note 104, at 24, 30–31; Maroney, *Emotional Regulation*, *supra* note 131, at 1518–19.

145. It should be noted that there are still substantial issues with the argument that emotional regulation could be effectively implemented by jurors. Cf. Maroney, *Emotional Regulation*, *supra* note 131, at 1490–94 (suggesting that judges may be able to effectively regulate

music may not satisfy the first prong of the *Payne* standard, which requires that victim-impact evidence reflect the uniqueness of the victim or the blameworthiness of the defendant.<sup>146</sup> This dilemma highlights the issue with which courts have long struggled—determining what function background music really serves in victim-impact evidence.<sup>147</sup>

One of the criticisms against the use of background music in victim-impact evidence is that it promotes the cultural trend of memorialization, which is not the appropriate legal purpose of victim-impact evidence.<sup>148</sup> This raises an important legal question: as cultural mourning rituals and technology evolve and victim-impact evidence begins to mirror memorial videos, complete with photographs of the victim and soft background music, how should courts respond?<sup>149</sup>

If the social evolution of memorial videos has influenced victim-impact videos, courts face the risk that victim-impact evidence will idealize the victim, potentially distorting reality and biasing the jury.<sup>150</sup> Some critics argue that music contributes to this idealization because the music is used primarily to “accentuate and underscore” key emotional points.<sup>151</sup> While it could be argued that background music actually reflects the victim’s uniqueness by reinforcing aspects of the victim’s character or personality, or the feelings of the victim’s family,

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emotions, but not addressing the viability of jurors engaging in this same emotional regulation). Most notably, there is no current research to affirm that such a neutral-observer instruction to jurors would work with exposure to music as it has worked with exposure to visual images. *Id.* Further, the fact that such de-biasing instructions are often ineffective for many mental processes raises the question of whether emotional regulation would effectively work for musical emotions. *Id.*

146. See *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

147. See *People v. Kelly*, 171 P.3d 548, 571–72 (Cal. 2007) (“[T]he background music by Enya may have added an irrelevant factor to the videotape. It had no connection to Sara other than that her mother said it was some of Sara’s favorite music. The Enya background music seems unrelated to the images it accompanied and may have only added an emotional element to the videotape.”).

148. See Austin, *supra* note 10, at 987.

149. See *id.* at 985–86.

150. See *id.* at 988. For example, in the *Kelly* video the jurors saw pictures of a “fresh-faced . . . reserved, modest and shy” young woman who grew up in a loving home and whose seemingly happy life was ended by the defendant now before the jury for sentencing. *People v. Kelly*, 171 P.3d at 571. But “if there were a less rosy or dark side” to the victim’s life, it likely would not have been featured in family photos or the video being played before the jury. Austin, *supra* note 10, at 990 (quoting *People v. Kelly*, 171 P.3d at 558).

151. *Id.*; see, e.g., *Salazar v. State*, 90 S.W.3d 330, 334 (Tex. Crim. App. 2002) (describing how music is frequently used to reinforce the victim’s story and can be “keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus”).

the line between music intended to manipulate the listener's emotions and music intended to reflect on the character of the victim is blurry.<sup>152</sup>

Thus, background music faces serious obstacles to satisfying the *Payne* standard.<sup>153</sup> Without some sort of mechanism to neutralize the emotional effects, background music consistently runs the risk of being "unduly prejudicial."<sup>154</sup> But even if it were possible to successfully argue that background music contributes to the overall reflection of the victim's uniqueness or the defendant's blameworthiness by humanizing the victim, the necessity of presenting the background music in a way that is not "unduly prejudicial" strips the music of its relevance.<sup>155</sup> This is precisely because any of the background music's relevance to the victim-impact evidence is heavily dependent on the highly emotional nature of the music.<sup>156</sup> For these reasons, any music that simply functions as background music risks violating the *Payne* standard.<sup>157</sup>

### B. Victim-Created Music

Victim-created music shown to the jury in a video of the victim actively performing presents a different situation from background music.<sup>158</sup> The main point of showing the victim creating music is to reflect something unique and relevant about the victim—a skill, a personal interest, a way of interacting with the world.<sup>159</sup> This deviates sharply from background music because the music and any emotions experienced as a result of victim-created music would be incidental to the primary focus: demonstrating that, prior to the defendant's crime, the victim made music.<sup>160</sup>

In direct contrast to background music, victim-created music clearly reflects the uniqueness of the victim.<sup>161</sup> In *Kelly*, the California

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152. See Austin, *supra* note 10, at 994.

153. See DAVIES, *supra* note 88, at 69–70 (discussing the emotional power of music); Cross & Tolbert, *supra* note 8, at 31.

154. See DAVIES, *supra* note 88, at 69–70; Cross & Tolbert, *supra* note 8, at 30–31.

155. See Austin, *supra* note 10, at 985–86.

156. See *id.*

157. See *Payne v. Tennessee*, 501 U.S. 808, 809 (1991) (acknowledging constitutional bar to victim impact evidence that unduly prejudices the jury).

158. See Austin, *supra* note 10, at 994.

159. See, e.g., *Whittlesey v. State*, 665 A.2d 223, 250 (Md. 1995) (describing the State's attempt to humanize the victim by introducing a ninety-second video of the victim playing the piano).

160. See Austin, *supra* note 10, at 994.

161. See *id.*

Supreme Court differentiated general background music from victim-created music, reasoning that although background music may be irrelevant to the jury's evaluation of the victim's uniqueness or the defendant's blameworthiness, victim-created music "seems relevant to the purpose of demonstrating what she was like."<sup>162</sup> Other courts have similarly found that victim-created music serves a legitimate purpose in victim-impact evidence.<sup>163</sup> In *Whittlesey v. State*, the Maryland Court of Appeals upheld the admission of a brief ninety-second video of the victim playing the piano.<sup>164</sup> The court reasoned that this clip gave the victim, a well-known pianist, a "human dimension . . . that was ostensibly lacking in the other evidence."<sup>165</sup> In such situations, a videotape captures this part of the victim's life in a way that still photographs cannot.<sup>166</sup> Thus, victim-created music clearly satisfies the first prong of *Payne*.<sup>167</sup>

Even under the second prong of *Payne*, victim-created music clearly deviates from the more emotion-centric purpose of background music and arguably does not "unduly prejudice" the jury.<sup>168</sup> Certainly, victim-created music will contain intrinsic musical factors that could affect jurors' emotions.<sup>169</sup> But, as previously discussed, the full implication of these elements is highly variable, depending on what music is created and whether music alone has the power to affect emotions, as the receptive model suggests.<sup>170</sup> Current theorists of music and emotions have adopted the constructive model, which instead suggests that the full emotional impact of victim-created music will depend on the "contexts within which music is produced and received."<sup>171</sup>

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162. *People v. Kelly*, 171 P.3d 548, 571 (Cal. 2007). The clip in *Kelly* illustrated to the jury facts about the victim's life—how she was a shy young girl who sang a solo in front of her classmates. *Id.* The court even observed that the "choice of song to sing at that age and in those circumstances also seems relevant to forming an impression of the victim." *Id.*

163. *E.g.*, *Whittlesey*, 665 A.2d at 250–51 (upholding the trial court's admission of victim-created music as relevant evidence).

164. *Id.* at 250.

165. *Id.*

166. *See id.* at 251.

167. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (allowing victim-impact evidence that provides information about the victim and the impact of the victim's loss on family).

168. *See Cross & Tolbert*, *supra* note 8, at 31 (exploring the link between music and identity), *see also Whittlesey*, 665 A.2d at 250 (discussing the ability of victim-created music to satisfy the *Payne* standard, as acknowledged by the Appellant); *cf. DAVIES*, *supra* note 88, at 62.

169. *See Gabriellson*, *supra* note 72, at 143–45.

170. *See supra* Part III.

171. *Cross & Tolbert*, *supra* note 8, at 29.

Because jurors will be hearing victim-created music in the very specific context of victim-impact evidence shown during the sentencing phase of the defendant's trial, the jury's likely response to victim-created music will be very different from its response to background music.<sup>172</sup> Most notably, jurors will not anticipate victim-created music moving them in the same way that jurors might anticipate background music affecting them.<sup>173</sup> Background music serves cultural expectations of emotionality and is normally not integral to the substantive content of victim-impact evidence aside from the emotional energy it reflects.<sup>174</sup> On the other hand, victim-created music has no preconceived emotional role.<sup>175</sup> Even if victims or their families choose musical excerpts to elicit certain emotional responses from jurors, those selections would be limited by the musical choices the victim made as a musician prior to the crime; they would necessarily communicate a "human dimension" unique to that victim.<sup>176</sup> Moreover, jurors will anticipate that the photographs and videos relate to the purpose of victim-impact evidence—highlighting the victim's uniqueness or the harm the defendant caused—and will interpret the emotional meaning of victim-created music within this context.<sup>177</sup>

Any prior conditioning or visual associations unique to individual jurors are less problematic here, given the weight of social and group contexts surrounding the proceedings, which are likely to reinforce the anticipated emotional framework and purpose of victim-impact evidence.<sup>178</sup> Unlike background music, victim-created music is expressly linked to the victim performing the music, not abstractly related to the content of the victim-impact evidence or a popular recording that the jurors may have heard before in a different context.<sup>179</sup> Even if the music being performed by the victim is familiar to a juror, it is still distinct because the victim's unique performance

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172. See *supra* notes 101–12 and accompanying text.

173. See Austin, *supra* note 10, at 984–85 (discussing trend of using particularly poignant background music in memorial and victim impact videos); Cross & Tolbert, *supra* note 8, at 31.

174. See Austin, *supra* note 10, at 984–85.

175. See *id.* at 994.

176. *Whittlesey v. State*, 665 A.2d 223, 250 (Md. 1995) (describing the State's attempt to humanize the victim by introducing a ninety-second video of the victim playing the piano).

177. See Cross & Tolbert, *supra* note 8, at 31 (pointing out that once a listener has formed expectations about a musical experience, the listener will interpret any musical emotions or cues to fit within the anticipated framework).

178. See *supra* Part III.B.2.

179. See Austin, *supra* note 10, at 994.



will necessarily differ from other performances of the music.<sup>180</sup> Finally, in the case of video footage, the direct link between the jurors hearing victim-created music and seeing the visual image of the victim in the act of creating the music will serve as a strong reminder of the purpose of the music within the context.<sup>181</sup> Thus, most victim-created music likely falls within the *Payne* standard, as it reflects the uniqueness of the victim and is not “unduly prejudicial.”<sup>182</sup>

### C. Victim-Specific Music

While background music typically fails the *Payne* standard and victim-created music usually satisfies the *Payne* standard, music that has some special significance to the victim but is not performed by the victim falls somewhere in the murky middle.<sup>183</sup> Victim-specific music may say something relevant about the victim by showing the jury what kind of music the victim enjoyed or highlighting the victim’s relationship with others, but it also contains some of the risks associated with background music.<sup>184</sup>

The main concern underlying victim-specific music under *Payne*’s first prong is that its contribution to showing the victim’s uniqueness may not be clearly discernible, making the risk too great that music-induced emotions would be prejudicial.<sup>185</sup> This is a fair concern given that victim-specific music will function much the same as background music.<sup>186</sup> The only difference is that the music playing in the background allegedly has some specific connection to the victim.<sup>187</sup> Thus, many of the concerns raised about background music—such as the fear that external factors like conditioning or visual association will influence the jurors’ emotions—apply to victim-specific music as well.<sup>188</sup>

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180. See *supra* notes 172–75 and accompanying text.

181. See *supra* Part III.B.2. Jurors viewing victim-impact evidence anticipate that the presented information relates to the victim’s uniqueness or the defendant’s blameworthiness. See *supra* notes 101–07 and accompanying text. The combination of that anticipated emotional response to the content presented, which arguably includes music, with the direct visual link provided through a video clip of the victim creating music and the social context of the courtroom distinguishes victim-created music from background music. See *supra* Part IV.B.

182. See *Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991).

183. See *Austin*, *supra* note 10, at 994–95.

184. See *id.*

185. See, e.g., *People v. Kelly*, 171 P.3d 548, 571 (Cal. 2007).

186. See *Austin*, *supra* note 10, at 994–95.

187. See *id.*

188. See *supra* Part IV.A.

One possible distinction in victim-specific music that strengthens its relevance is the difference between the victim's favorite music and music that meaningfully reflects a relationship the victim had with others in her life.<sup>189</sup> Although the victim's mother in *Kelly* said that Enya was some of the victim's favorite music, the court remained concerned about the relevance of the music balanced against the added emotional risk.<sup>190</sup> Even if the music was a particular favorite of the victim, it is unclear what exact emotional message is conveyed to the jury and whether the song is merely an additional emotional ploy.<sup>191</sup> But music that reflects a particular relationship between the victim and a family member or friend may be more relevant as it is concretely tied to the story being conveyed in the victim-impact evidence.<sup>192</sup> Notably, however, the connection between victim-specific music and the story conveyed in victim-impact evidence through photographs and narration is still not as clear as it is with victim-created music.<sup>193</sup>

Emotional regulation might be a viable solution to mitigate risks that victim-specific music would "unduly prejudice" the victim, particularly given that victim-specific music shares the same risks as background music.<sup>194</sup> Where background music failed under the *Payne* standard, victim-specific music succeeds.<sup>195</sup> Emotional regulation stripped background music of its relevance, which was largely wrapped up in its emotional content.<sup>196</sup> In contrast, emotional regulation here would simply highlight the relevance of victim-specific music by taking the focus off of jurors' subjective emotional associations and refocusing it on the musical selection's relevance to the victim's uniqueness, personality, and life.<sup>197</sup>

Even if victim-specific music reflects the victim's uniqueness, however, it still must not be "unduly prejudicial" under *Payne's* second prong.<sup>198</sup> In *Kelly*, the Supreme Court of California attributed no probative significance to the fact that Enya was one of the victim's

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189. See Austin, *supra* note 10, at 995.

190. See *People v. Kelly*, 171 P.3d at 571.

191. See *id.* at 571–72.

192. See Austin, *supra* note 10, at 995.

193. See *id.* at 994–95.

194. See *supra* Part IV.A.

195. See *People v. Kelly*, 171 P.3d at 571–72.

196. See *supra* Part IV.A.

197. See Maroney, *Emotional Regulation*, *supra* note 131, at 1515.

198. See *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

favorite artists.<sup>199</sup> Other scholars, however, have argued that music reflecting “the victim’s musical tastes, musical appreciation, or performance activities” should be permitted in victim-impact evidence because it can have “genuine probative value.”<sup>200</sup> To ensure the relevance of victim-specific music, Professor Regina Austin advocates that courts should make “[t]he link between the victim’s individuality and character and her or his choice of music . . . explicit.”<sup>201</sup> Expressly acknowledging the source of the victim-specific music will mitigate, though not eliminate, the risks associated with subjective musical material.<sup>202</sup>

Thus, while victim-specific music has a higher risk of becoming “unduly prejudicial” than victim-created music, it is not necessarily “unduly prejudicial” and should be evaluated on a case-by-case basis.<sup>203</sup> If a court finds that victim-specific music is prejudicial or that jurors would not be able to effectively regulate their emotions, that court can strike the music from victim-impact evidence under the *Payne* standard.<sup>204</sup> But a per se ban against victim-specific music goes too far, given that music can reflect the uniqueness of the victim in a myriad of constitutionally appropriate ways.<sup>205</sup>

## V. CONCLUSION

Judges should not exclude music from victim-impact evidence simply because it can be emotional. Rather, the current music-and-emotion literature and an analysis of the various uses of music in victim-impact evidence under the *Payne* standard reveal that some music has probative value to the jury. While background music of no particular relevance to the victim should not satisfy the *Payne*

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199. *People v. Kelly*, 171 P.3d at 571–72 (Cal. 2007) (reasoning that it would be unlikely that the music held any probative value because it “seems unrelated to the images it accompanied and may have only added an emotional element to the videotape”).

200. *See Austin*, *supra* note 10, at 994.

201. *Id.* at 994–95.

202. *See id.* at 995.

203. *See id.* at 1015 (recommending case-by-case evaluations of victim impact evidence in pre-admissibility hearings).

204. *See Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991).

205. *See People v. Kelly*, 171 P.3d 548, 571–72 (Cal. 2007) (recognizing that the video clip of the victim performing music in the victim-impact video added relevant, probative content); *Austin*, *supra* note 10, at 994 (reasoning that music reflecting “the victim’s musical tastes, musical appreciation, or performance activities” can have probative value). *But see Harden*, *supra* note 3, at 876 (arguing that a bright-line rule is necessary).

standard, victim-created music should satisfy it because it clearly reflects the uniqueness of the victim and is not “unduly prejudicial.” Judges should evaluate victim-specific music on a case-by-case basis given that it illustrates the victim’s personality and life and it is not necessarily “unduly prejudicial.” By carefully examining the function of music in victim-impact evidence, a court can protect a defendant from facing an improperly prejudiced jury while still ensuring that victim-impact evidence honestly and fairly reflects a victim’s character and life.<sup>206</sup>

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206. Cf. *People v. Kelly*, 171 P.3d at 571; DAVIES, *supra* note 88, at 62.

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