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HONEY, YOU'RE NO JUNE CLEAVER: THE POWER OF "DROPPING POP" TO PERSUADE

Victoria S. Salzmann

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HONEY, YOU'RE NO JUNE CLEAVER: THE POWER OF "DROPPING POP" TO PERSUADE

Victoria S. Salzmann*

I. INTRODUCTION

Imagine a contentious child-custody hearing in which the husband is testifying about his wife's behavior. If he were to state "she is no June Cleaver," that testimony would have an immediate impact upon those present. Most people would understand that the husband was making a reference to Mrs. Ward Cleaver, the pearl-clad mother figure from the popular 1950s television show *Leave It to Beaver*.¹ However, the reference does more than simply call to mind 1950s television. It is a vivid popular-culture allusion that immediately taps into the psyche of anyone familiar with the show. It tells the listener that the mother in this case probably does not stay at home with her children during the day. She is not a stellar housekeeper. She likely does not have dinner on the table when the family gets home in the evening. Perhaps she is neither nice to nor understanding of her children. But mostly the reference tells the listener she is not an ideal mother.

How and why is so much information conveyed in such a concise manner? What is the value of using popular culture as a persuasive legal tool? Why do legal audiences respond so significantly to these fragments of not-so-current events? Understanding these questions gives insight into the use of popular culture as a valuable persuasive device. It also, however, raises the issue of whether using popular-culture references is simply good lawyering or manipulation that masks the truth. Learning how to tap into the former while avoiding ethical issues raised by the latter is the purpose of this Article.

Legal scholars are starting to recognize the positive impact of "dropping pop" into persuasive arguments and documents. For example, in rhetorically analyzing one of the most-circulated legal documents of the twentieth century, the *Starr Report*, literary scholars noted that popular-culture references abounded.² The references ranged from popular fiction (the novels *Vox*³ and *Leaves of Grass*⁴), movies (*Titanic*⁵), designer clothing (Hugo Boss, Banana Republic, and The Gap), trendy restaurants (The Black Dog on Martha's Vineyard), and art (Egon Schiele).⁶ While culturally aware, these references added no substance to the factual details—

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1. *Leave It to Beaver* (ABC television broadcast 1957-63).
2. FEDWA MALTI-DOUGLAS, *THE STARR REPORT DISROBED* 169-74 (2000); H.R. DOC. NO. 105-310 (1998).
3. NICHOLSON BAKER, *VOX* (1993).
4. WALT WHITMAN, *LEAVES OF GRASS* (1855).
5. *TITANIC* (Twentieth Century-Fox Film Corp. 1997).
6. Daniel M. Filler, *From Law to Content in the New Media Marketplace*, 90 CAL. L. REV. 1739, 1751 (2002) (reviewing MALTI-DOUGLAS, *THE STARR REPORT DISROBED*).

they appear to be merely gratuitous. Accordingly, their presence raises a question: If the popular-culture references were gratuitous, why were they there?⁷ This Article attempts to answer that question, and the responses put forth further inform the use of popular culture in other areas of legal communication. Part II explores the role that popular culture already plays in our lives. Part III discusses the psychology behind why such references resonate with readers. Part IV explains possible ways to use the references, and Part V shows examples of popular culture infiltrating court documents. Part VI considers the practical issues raised by the references and suggests ways to avoid pitfalls. Finally, Part VII explores whether such references' use is appropriate in legal discourse.

II. THE POWER OF POPULAR CULTURE

To appreciate the power of popular culture as a persuasive tool, we should first understand the psychological impact that popular culture already plays in our lives. Considering just one slice of the popular-culture pie—television—we can see the effect media has on members of a modern industrial society:

With the single exception of the workplace, television is the dominant force in American life today. It is our marketplace, our political forum, our playground, and our school; it is our theater, our recreation, our link to reality, and our escape from it. It is the device through which our assumptions are reflected and a means of assaulting those assumptions.⁸

Television has replaced newspapers, radio, churches, and even our family as the primary force in our lives.⁹ More importantly, it has become *the* information source for many of its viewers.¹⁰ Where knowledge was once acquired through experience, it is now obtained passively by watching the actions of others. In 2006, the A.C. Nielsen Company reported that the average American adult watched more than thirty-two hours of television each week.¹¹ Televisions are turned on in American households for at least fifty-seven hours each week.¹² More than 98 percent of American households own televisions, and 49 percent of people say they watch it too much.¹³ By the time the average person reaches the age of seventy, he has spent between seven and ten years viewing a television.¹⁴

7. *Id.* at 1752 (“If these references were not essential to the *Starr Report*, why did they play such an important role?”).

8. JEFF GREENFIELD, *TELEVISION: THE FIRST FIFTY YEARS* 11 (Lory Frankel ed. 1977).

9. *See id.* *See also id.* at 15 (noting that by the time television was twenty-five-years old, it had driven the four most popular mass-circulation magazines out of business and rendered *TV Guide* the most popular magazine in the country).

10. LARRY A. VISKOCHIL, *FORWARD, TUNED IN: TELEVISION IN AMERICAN LIFE* (University of Illinois Press 1991).

11. Gary Holmes, *Nielsen Media Research Reports Television Popularity is Still Growing*, available at http://www.thinktv.com.au/media/Articles/Nielsen_Media_Reports_TV's_Popularity_Is_Still_Growing.pdf (last visited Sept. 30, 2009).

12. *Id.*

13. TV-Free America, *Television Statistics and Sources*, CATHOLIC EDUCATION RESOURCE CENTER available at <http://www.catholiceducation.org/articles/parenting/pa0025.html> (last visited Sept. 30, 2009).

14. American Academy of Pediatrics: Committee on Communications, *Children, Adolescents, and Television*, 96 *PEDIATRICS* 786, 786 (1995).

More importantly, television has become far more than an entertainment source. Television is a diversion, a companion and a source for our perception of reality. Psychologists have noted that many people use television as a substitute for human companionship.¹⁵ Individuals feel uncomfortable when faced with idle time and, in response, turn on the television to fill the void.¹⁶ The unexpected side-effect of such viewing is a constant stream of information being downloaded into and recorded by the viewer's psyche. What the individual views as entertainment today may well become the reality to which she compares the events of tomorrow.

Social sciences recognize this information gathering side-effect as a necessity. Individuals watch television because they have "media system dependencies": understanding dependency, orientation dependency, and play dependency.¹⁷ Understanding dependency is at the root of all social interaction.¹⁸ Individuals strive to make sense of strange facts and to interact appropriately in unfamiliar situations. We seek to "understand the social environments within which we must act or anticipate acting, because meaningful social action cannot occur in the absence of a definition of situation."¹⁹ To meet these goals, people depend on the media to provide information about unfamiliar situations. We view how others interact, and we conform our behavior to those depictions, thus conquering the unknown. Our personal experiences become secondary to those we see on television.²⁰ This need for contextual information forms the root of the understanding dependency.

The effects of television on children are even greater than the effects on adults. The understanding dependency is often at its height in children because they are just beginning to process the world. A 1993 study indicated that most U.S. children spend more time outside school watching television than doing any other activity.²¹ The television world becomes the real world because it is often a child's primary source of information during the years he creates his societal foundation.²² For a child, television depictions become the norm against which all future information will be judged. If a child sees excessive violence on television, he may come to believe that violence is an acceptable way to deal with conflict.²³ Through

15. Daniel Goleman, *How Viewers Grow Addicted to Television*, N.Y. TIMES, Oct. 16, 1990, at C1, available at <http://www.nytimes.com/1990/10/16/science/how-viewers-grow-addicted-to-television.html> (last visited Sept. 30, 2009). See also Victoria S. Salzmann & Philip T. Dunwoody, *Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think about the Legal Profession?*, 58 SMU L. REV. 411, 416-17 (2005).

16. Goleman, *supra* note 15. See also Salzmann & Dunwoody, *supra* note 15.

17. SANDRA J. BALL-ROKEACH ET AL., *THE GREAT AMERICAN VALUES TEST: INFLUENCING BEHAVIOR AND BELIEF THROUGH TELEVISION* 7 (1984).

18. *Id.* at 7-8. Of the three dependencies, the first, understanding, is relevant here.

19. *Id.* See also Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 246 (2006) ("[People] draw inferences from new data in light of their habits of thinking and feeling, their largely intuitive conceptions of how the world works and how things go.").

20. BALL-ROKEACH, *supra* note 17, at 8.

21. American Academy of Pediatrics, *supra* note 14, at 786.

22. *Id.* See also GREENFIELD, *supra* note 8, at 15 ("Children may well learn more from television than from their parents, who depend on television as a source of diversion for their children.").

23. American Academy of Pediatrics, *supra* note 14, at 786 (noting a correlation between television-viewing and adolescent violence, pregnancy, sexually transmitted diseases, and alcohol-

this dependency, popular-culture references become part of the fabric of our understanding at a very young age.

The understanding dependency has another benefit. It provides the means by which we form a bank or storehouse of contextual information that we may access at any time. Human narratives (the mechanisms by which we process information) depend on storehouses of knowledge to convey ideas. These pre-existing knowledge structures are called “schemas,” which are essentially categories of information compiled by past experience.²⁴ These schemas are the conduit for transmitting a great deal of information without elaboration.²⁵ As new information comes in, we compare it to our storehouse of knowledge to process and categorize it. When an individual learns to behave in society based on the information he collects through a popular-culture medium, such as television, that medium also becomes the background and fabric (or schema) by which the individual processes information. “The shared elements of popular culture supply the materials out of which we construct self and social realities—they comprise the stories that we live in, and that we live out.”²⁶ Thus, constant comparison to viewed—not real—experiences is the tool used to understand immediate events. Through this understanding dependency, popular culture creates a functional shorthand by which one may transmit thoughts and ideas. And often, that storehouse of information becomes more real than the truth. For example, President Ronald Reagan very publicly confused actual historical events with scenes from a movie—scenes he thought had actually occurred.²⁷ Because we are all influenced by the world created through popular culture, we already have common ground on which to build. Tapping into that storehouse of knowledge is the key to successfully using

related deaths, likely indicating that children are desensitized to things that were once considered societal taboos).

24. Joshua A. Newberg, *The Narrative Construction of Antitrust*, 12 S. CAL. INTERDISC. L.J. 181, 203 (2003) (quoting Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 279 (1989)).

[Schemas] are the mental blueprints that we carry around in our head for quick assessments of what we may or should be seeing or feeling in a given situation. Such blueprints are simplified models of experiences we have had before. They represent a kind of shorthand that transcribes our stored knowledge of the world, describing kinds of situations, problems, and personalities. These models allow us to economize on mental energy: we need not interpret things afresh when there are preexisting categories that cover the experience. . . .

Richard K. Sherwin, *The Narrative Construction of Reality*, 18 VT. L. REV. 681, 700 (1994) (citations omitted).

25. Newberg, *supra* note 24, at 204.

26. Introduction, Symposium, Richard K. Sherwin, *Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891, 899 (1996) [hereinafter *Sherwin Introduction*]. See also Sherwin et al., *supra* note 19, at 250 (“The visual codes that come from popular culture become a part of people’s visual common sense, which is to say, they are unconsciously assimilated.”).

27. Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 534 (citing *60 Minutes: Ronald Reagan: The Movie* (CBS television broadcast Dec. 15, 1985)). See also Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 90 (1995) (“These sorts of [schemas] . . . are necessary for thinking and understanding, but they can also lead to errors when used inappropriately.”).

popular-culture references as a persuasive tool.²⁸

Other popular-culture media such as movies, music, internet resources, and popular literature, though perhaps not as prevalent or widely watched as television, are equally effective as an information source. While the average person watches television 4.5 hours each day, the number of hours spent on *all* media consumption each day jumps to 11.8.²⁹ Therefore, nearly half of any given day is spent downloading and compiling information. In a modern information-driven society, television, music, movies, and popular literature become the common source of shared experience.³⁰ That shared experience is an important mechanism for persuasion.

III. MESSAGE IN A BOTTLE: WHY POPULAR-CULTURE REFERENCES WORK

To tap this collective bank of information, authors must understand how and why popular-culture references are so effective. Lawyers are essentially storytellers.³¹ Because a lawyer's primary job is to analyze issues and convey information, becoming proficient at tapping into the well of the human psyche is both a powerful and necessary tool:

The reality that counts most in this context is the one that people carry around in their heads: the popular images, stock stories and character types, the familiar plot lines and recurring scenarios. With such knowledge in hand, the persuader gains the leverage she needs to mobilize and arrange the mental constituents of reality making.³²

When the author taps into that “fictional reality” created through popular-culture influences, he has already forged a connection with the audience. Familiarity lends credibility. Lawyers have long recognized that communicating in a way their audience understands is more likely to produce a favorable result.³³ And, because reality may no longer be defined by the experiences we have—

28. See *Sherwin Introduction*, *supra* note 26, at 893 (“If persuasion is a matter of tapping into the reality that people carry around in their heads and of emulating the habits of perception and styles of thought that come with extensive exposure to mass-mediated popular culture, where else would one turn but to the screen?”).

29. American Academy of Pediatrics, *supra* note 14, at 786.

30. Sherwin et al., *supra* note 19, at 249 (“In contemporary culture, most people get their facts primarily from popular visual media.”).

31. Cassandra Sharp, *The “Extreme Makeover” Effect of Law School: Students Being Transformed by Stories*, 12 TEX. WESLEYAN L. REV. 233, 238 (2005) (There has developed “a growing recognition that lawyers operate in a predominately narrative culture and can be easily seen as storytellers in their own right.”). See also Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1687 (1990) (“Legal scholars especially interested in issues of racial and sexual oppression have explored the possibilities of storytelling and devise narratives and accounts of the world that diverge from and reconstruct dominant understandings.”).

32. *Sherwin Introduction*, *supra* note 26, at 893 (citations omitted).

33. Sherwin et al., *supra* note 19, at 233 (“Lawyers, as rhetoricians, have always known that effective persuasion requires speaking in terms that their audiences understand.”); Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139, 143 (2002) (reviewing RICHARD K. SHERWIN, *WHEN LAW GOES POP* (2000)) (“[I]f an attorney understands how and why such media images focus and reproduce desire in its audience, she will more successfully convince the trier of fact that her cause is the righteous one.”).

overtaken by the experiences we watch others have on television and in movies—truth and persuasive authority are granted to references that conform to our shared storehouses of knowledge.³⁴ We become simply incapable of distinguishing between fact and what we *think* fact should be.

Perhaps the greatest benefit to a popular-culture reference is its ability to convey a great deal of information quickly and concisely.³⁵ The reference taps the schema already created in the reader's mind and summons "a resonate set of understandings, feelings, and judgments and associates them with [the author's] narrative."³⁶ In essence, it simplifies complex fact patterns. The June Cleaver example above is essentially a detailed comparison between a great mother and one who is allegedly unfit. However, the bulk of information is conveyed promptly and vividly with a single passing reference. It concentrates a very complex fact pattern into one that needs no further explanation. The advocate does not need to elaborate or detail the ways in which the mother is unfit; the comparison taps into the listener's storehouse of knowledge and the subconscious does the work for him. In fact, popular-culture references may do a better job compressing complex fact patterns than a pure explanation would. When an individual stores away the details of a popular-culture event or fictional character, the fictional characteristics of the reference are easily transferred onto the comparison object. If the reader buys the comparison, he will automatically apply all the other fictional characteristics of the popular-culture reference, even without being prompted to do so.³⁷ For this reason, comparing a victim to *Rocky*,³⁸ a defendant to a character in *Natural Born Killers*,³⁹ or a businessman to *The Godfather*⁴⁰ says exponentially more than a mere description alone because the audience applies *every* characteristic of the

34. Sherwin Introduction, *supra* note 26, at 892 ("[Verisimilitude in a given text or story] stems from consistency with well-known linguistic usages in a particular social and cultural context . . ."). See also Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 LOY. L.A. L. REV. 719, 724 (2007) ("Popular communication technologies not only help to produce cultural and cognitive content; they also provide the mental tools we use to think (and feel and judge) with.") [hereinafter *Sherwin Manifesto*]. There is a negative side to this phenomenon: audiences, including lawyers, judges, and juries have expectations for dramatic and fantastic narratives built on popular culture and may turn to those narratives as truth, rather than using facts alone to reach conclusions. Silbey, *supra* note 33, at 147.

35. Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 23-24 (1994) ("[Metaphors have an] ability to express in a few words what in literal language would take several pages [T]he metaphorical reference clearly makes its points more concisely than literal language could."). The same logic applies to popular-culture references, particularly given that they are effectively used as metaphors in their own right. See *infra* Part IV.

36. Newberg, *supra* note 24, at 204.

37. Sherwin et al., *supra* note 19, at 251. See also *Sherwin Manifesto*, *supra* note 34, at 730 ("If the comparison with the popular media scripts sticks in their minds, jurors may be inclined to fill in the rest of the story, reflecting familiar plot constructs and character traits unmentioned at trial, even if they are fictional."). One scholar calls this the "halo effect" and cautions that it "makes it harder for observers fully to attend to and fairly weigh proffered evidence," presumably because it is so powerful. Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 416 (1996).

38. ROCKY (United Artists 1976).

39. NATURAL BORN KILLERS (Warner Bros. Pictures 1994).

40. THE GODFATHER (Paramount Pictures 1972).

referenced character and fills in the unspoken analogies.

More pragmatically, these references both entertain the reader and keep him interested. “The persuasive value of an argument is often directly linked with the quality of the accompanying writing.”⁴¹ Writing techniques that grab readers’ attention and keep them engaged are more likely to convey the author’s point. Scholars call this the “decorative function” of the literary device and acknowledge that presence alone is often enough to persuade.⁴² Using techniques that entertain and captivate help make the material more accessible. Entertaining writing, in turn, is more likely to reach a larger audience.⁴³ In a 1993 law review article entitled “Humor and the Law,” J.T. Knight argued that liberal use of humor in law review articles may be the mechanism by which the academy is saved.⁴⁴ Knight pointed to the extensive criticism that law review articles are formalistic, formulaic, esoteric, inaccessible, and downright boring.⁴⁵ To combat that image, he espoused increased use of humor as a persuasive device.⁴⁶ In addition to the obvious fact that a humorous article is more interesting to read and, therefore, more likely to be read, he argued that humor can reach readers in ways other techniques cannot.⁴⁷ Thus, the literary device of humor facilitates understanding and persuasion simply because it encourages reading.⁴⁸ Popular-culture references accomplish the same end.

These references are also readily available and diverse enough to make a myriad of different points. Popular music alone is a large enough library of references to analogize to most legal arguments because “[p]opular music, in its many forms, covers the spectrum of human emotions and situations.”⁴⁹ Accordingly, if a point needs to be made, music lyrics are readily available to supplement understanding. Similarly, movies and television are a vast resource for social issues. For example, when teaching criminal law, I often use hypotheticals from movies such as *A Fish Called Wanda*⁵⁰ or *Heat*⁵¹ to illustrate withdrawal from criminal enterprise and accomplice liability. Scenes from the television sitcom *The Office*⁵² can be used to illustrate any number of tort issues. Estates professors point

41. Alex B. Long, *[Insert Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 558-59 (2007).

42. Oldfather, *supra* note 35, at 21 (“An opinion that is well-written and enjoyable to read will doubtless be more persuasive than one that possesses equal logical force yet is not well-written.”) (citing Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 395 (1986)).

43. Long, *supra* note 41, at 559. See also Oldfather, *supra* note 35, at 21 (noting that scholars have realized that style influences the frequency in which opinions are read and cited) (quoting Griffin B. Bell, *Style in Judicial Writing*, 15 J. PUB. L. 214, 214 (1966)).

44. J.T. Knight, Comment, *Humor and the Law*, 1993 WIS. L. REV. 897, 897 (1993).

45. *Id.* at 897-98.

46. *Id.* at 908.

47. *Id.* (“It can convey succinctly a desired point with a facility that might not otherwise be achieved.”).

48. *Id.* (“The appeal of humor is simple but significant: It helps people communicate and enjoy communicating.”).

49. Long, *supra* note 41, at 534.

50. A FISH CALLED WANDA (Metro-Goldwyn-Mayer 1988).

51. HEAT (Warner Bros. Pictures 1995).

52. *The Office* (NBC television broadcast 2005-present).

to the movie *Body Heat*⁵³ to illustrate the importance of the Rule Against Perpetuities (perhaps the only movie in history that has its plot hinge on the infamous rule), and professional responsibility professors may use episodes of the television shows *The Practice*⁵⁴ or *The Shield*⁵⁵ to prompt ethical discussions.⁵⁶ These references work by creating an instant connection between the teacher and the student because they are using the same shorthand to communicate the information. Furthermore, because popular culture is enormously broad in its subject matter, almost any topic can be enhanced or explained through that material.

Perhaps most importantly, however, popular-culture references tap into our psychology in a way few other means can. Professor Michael Smith's book, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, which espouses the psychological impacts of literary references as persuasive tools, greatly informs the discussion here.⁵⁷ Commentators have long recognized the special power of literary exemplars to illustrate the moral relationships between parties.⁵⁸ Smith, however, discusses not only how such references are effective, but *why* they are so. In the process, he taps into other disciplines, "including psychology, classical rhetoric, literary theory, morality theory, and narrative theory," to explain the impact of literary references.⁵⁹ The same forces can be used here to explain the power of popular-culture references. In fact, popular culture, particularly television and film, may have *more* impact than literature under the theories discussed below. Unlike literature, which requires at least some imagination by the reader, visual media use camera angles, lighting, editing, and sound to create "brute perception" that has far more of an impact than a narrative alone.⁶⁰ Accordingly, the psychological force behind the effectiveness of literary references can be even greater for popular culture.

One theory at work in a literary or popular-culture reference is discursive psychology theory.⁶¹ Under this theory, also known as shared knowledge theory, people communicate using bits and pieces of information that they share in

53. *BODY HEAT* (The Ladd Co. 1981).

54. *The Practice* (ABC television broadcast 1997-2004).

55. *The Shield* (FX Networks television broadcast 2002-2008).

56. Other Commentators note that film may be a means to teach other legal theory such as legal pluralism, outsider perspectives, and how to manipulate facts. Rebecca Johnson & Ruth Buchanan, *Getting the Insider's Story Out: What Popular Film Can Tell Us about Legal Method's Dirty Secrets*, 20 WINDSOR Y.B. ACCESS TO JUST. 87, 93 (2001).

57. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 13 (2002).

58. Minow, *supra* note 32, at 1687.

59. SMITH, *supra* note 57, at 13.

60. Johnson & Buchanan, *supra* note 56, at 99-100. See also Douglas J. Goodman, Review Section, *Approaches to Law and Popular Culture*, 31 LAW & SOC. INQUIRY 757, 762 (2006) (book review) ("[L]aw and popular culture is more than law and literature in the sense that popular culture has strong, more obvious, and more persuasive effects . . . than does literature. The effects that even the greatest novels have had . . . are negligible in contrast to the effects of a television program.").

61. SMITH, *supra* note 57, at 20.

common.⁶² Communication becomes a series of “shorthand” references that conveys more meaning than appears on its face.⁶³ Discursive psychology explains why the June Cleaver example above paints a broader picture than words alone. The reference taps into the knowledge bank of the reader and creates an image or hypothetical quickly and effectively.⁶⁴ Tapping into that bank, in turn, creates a bond between the author and reader because the reader feels he is in on the joke or “gets” what the author is saying between the lines. The moment the author uses a familiar popular-culture reference, the reader feels a connection to the author. Connected readers are more willing to accept the author’s view. From this phenomenon, the persuasive power of the popular culture reference is born.⁶⁵

Closely related to discursive psychology theory is a second literary theory of intertextuality.⁶⁶ Intertextuality is the process by which a reader takes new information, compares it to the bank of knowledge he already has, and draws conclusions concerning the new information.⁶⁷ This theory describes why the bread and butter of the lawyer trade—analogies—are effective.⁶⁸ New information is categorized and understood by relating it to information already in the reader’s possession.⁶⁹ For example, if an organization is compared to “Big Brother,” the reader will connect that reference to the storehouse of knowledge concerning George Orwell’s novel *1984* and presume the author is inferring the entity is overbearing and has excessive power.⁷⁰ Here, the process taps the well of popular-culture information.⁷¹

In reviewing the *Starr Report* described above, legal scholars hypothesized that the first reason for the numerous popular-culture references was to “render the *Starr Report* more accessible and seemingly familiar.”⁷² Readers have come to expect that writing will be grounded in references as a means to tie the content to their personal lives. The primary purpose of the *Starr Report* was to persuade Congress to begin impeachment proceedings against President William Jefferson

62. *Id.* at 20-21. See also Sherwin et al., *supra* note 19, at 247 (“Studies in the philosophy of language, linguistics, and cultural anthropology . . . indicate the implicit understandings that people must share in order to make sense of one another’s words.”).

63. SMITH, *supra* note 57, at 21.

64. Johnson & Buchanan, *supra* note 56, at 104 (“What we see and hear is influenced by what we already know.”).

65. Some might argue that including information with which the reader is familiar is not only beneficial but a necessity. People do not believe what they are presented; they only believe what they already know to be true. See *id.*

66. SMITH, *supra* note 57, at 21.

67. *Id.*

68. *Id.*

69. *Id.*

70. GEORGE ORWELL, *1984* (1949). Of course, it is also likely the audience might associate the reference with the reality television show *Big Brother* and assume the author only points to a lack of privacy. *Big Brother* (CBS television broadcast 2000-present). This possible confusion is discussed later in this Article. See *infra* Part VI.

71. Some popular-culture scholars have already recognized the power of using narrative that conforms with preconceived expectations. Johnson & Buchanan, *supra* note 56, at 98 (“[T]he better the story, the one that ties up the most loose ends, the one that makes sense to the decision makers and that conforms with narrative expectations, is the one most likely to be believed.”).

72. Filler, *supra* note 6, at 1752.

Clinton.⁷³ To a lesser extent, the *Starr Report* was also designed to sway public opinion against President Clinton. To accomplish both goals, the authors seemingly chose to pepper popular-culture references (or use an intertextual narrative) to make the material more accessible and persuasive. “When people understand something they are inclined to believe it.”⁷⁴ For example, the fact that the infamous dress worn by Monica Lewinski was from The Gap, and neither couture nor thrift-store, made Lewinski and her plight more understandable to the average reader.⁷⁵ Likewise, the fact that Lewinski’s love note to the president was inspired by the movie *Titanic*,⁷⁶ one of the most-viewed movies ever produced, probably evoked emotions in some readers. “The Starr team may have perceived the ubiquity of these intertextual references within American culture and concluded they were essential to the preparation of a convincing narrative.”⁷⁷ Because popular-culture references tap society’s beliefs, discursive psychology theory and intertextuality were used in the *Starr Report*’s writing.

Additionally, in a scholarly analysis of the *Starr Report*, the second hypothesis as to its author’s liberal use of popular culture references is the possibility that their presence lent the report credibility.⁷⁸ During the investigation, Kenneth Starr, its chief architect, was accused of being an unsophisticated prude.⁷⁹ From *Vox* to The Gap, however, the report created a narrative that indicated the authors were hip and in-touch.⁸⁰ As such, they were more likely to be credible arbitrators of what presidential behavior should or should not have been acceptable to the American people—people who were just like them. On a different level, the inclusion of the more highbrow references, such as Walt Whitman and Hugo Boss, told the reader that the author was well-read and a sophisticated consumer, thus lending credibility of position to the narrative.

The final theory, classic rhetoric theory, is based on the art of persuasion.⁸¹ Rhetoric theory is divided into three distinct functions: *logos*, *pathos*, and *ethos*.⁸² The *logos* function is the substantive portion of an argument.⁸³ For a lawyer, these arguments are the foundation of the legal process. Application of statutes, common-law rules, and policy considerations are based on the *logos* function.⁸⁴ When the application of the rule or the reason for the rule cannot be explained directly, an analogy to existing law helps inform the argument.⁸⁵ The use of these analogies is part of the *logos* function. The reader is better able to understand the

73. *Id.* at 1739-40.

74. Sherwin et al., *supra* note 19, at 250.

75. Filler, *supra* note 6, at 1753.

76. Peter Baker, *Monica’s Story: ‘I Never Expected to Fall in Love’*, WASH. POST, Sept. 13, 1998, at A01, available at <http://www.washingtonpost.com/wp-srv/politics/special/Clinton/stories/monica091398.htm> (last visited Sept. 30, 2009).

77. *Id.*

78. Filler, *supra* note 6, at 1752.

79. *Id.* at 1753.

80. *Id.*

81. SMITH, *supra* note 57, at 22.

82. *Id.* at 22-24.

83. *Id.*

84. *Id.*

85. *Id.*

information because he can connect it to something with which he is already familiar (usually the schemas discussed above). When the analogies come from the storehouse of popular-culture information, the logos function may be satisfied more quickly than by other mechanisms. In other words, the *substance* of the information is readily understood because the reader is already relating it to something stored in his mental bank of knowledge.

The second classical rhetoric function involves the concept of pathos. Pathos involves tapping into the emotional well of the individual as a means to persuade.⁸⁶ Emotional arguments powerfully affect readers in two ways: first, through “emotional substance,” the author may evoke specific emotions such as anger, pity, sorrow, guilt, or fear to prompt a reader response;⁸⁷ and, second, through “medium mood control,” where an author uses style to manipulate readers into a particular frame of mind.⁸⁸ For example, the reference to “Big Brother” above invokes feelings of oppression, darkness, and fear, or, at the very least, lack of privacy. If a company is compared to “Big Brother,” the reader has a natural impulse to cast the company as a villain. The author has then manipulated the reader’s emotions and influenced his thinking. Similarly, when the reader understands the reference, he has connected to the author by getting the inside joke, and this connection pleases the reader.⁸⁹ The fact that the reference entertains the reader and breaks the monotony of the topic also pleases the reader.⁹⁰ Consequently, that pleased reader is more willing to accept the author’s point of view because he has been manipulated into feeling positively about the subject matter. “Once the reader falls into this positive and receptive mood, the writer’s substantive point will be more welcome.”⁹¹ Thus, controlling the pathos (or emotional response) is a mechanism of persuasive manipulation.

The third and final classic rhetoric function involves ethos. Ethos is related to the author’s ability to convey credibility and cleverness to the reader.⁹² First, credible and thoughtful advocates are more believable. When an author taps into the audience’s storehouse of knowledge, he gains instant credibility because he conveys information the audience member already knows. People tend to lend credibility to the familiar and feel connected to someone who is describing reality as they perceive it to be. Second, the reader feels he is sharing an inside joke with the author. That inside joke is a bond between the two, also boosting the author’s credibility.⁹³ Third, popular-culture references, like literary references, convey to the reader that the author is educated and diverse in his interests.⁹⁴ In effect, the author is not only “one of us,” but he is also cosmopolitan and knowledgeable. Therefore, his worldly experience is great and he should be believed. Finally, a popular-culture reference, particularly in its metaphorical form, has the ability to let

86. *Id.* at 22-23.

87. SMITH, *supra* note 57, at 23.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. SMITH, *supra* note 57, at 24.

94. *Id.*

the reader tap into his own creative ideas.⁹⁵ The above psychological effects contribute to author's credibility in making a persuasive argument.

IV. TOOLS OF THE TRADE

Once an author understands why popular-culture references are so powerful, he should understand the best way to use them to his full advantage. Popping a reference into a legal document does not always bring about the desired result. Instead, careful deliberate use of the reference will invoke the psychology discussed above. Therefore, the type and place of the reference used is often as important as the substance of the article itself.

The first kind of literary reference involves straightforward comparisons between events or ideas. The most obvious type of comparison is a metaphor.⁹⁶ Metaphors are distinct from other comparisons in that they are figurative instead of literal.⁹⁷ In the law, metaphors are often used to show a simple application of a rule or a comparison between fact patterns. In fact, metaphors are often the primary means by which a legal concept is communicated: "Sometimes the sheer complexity of a concept makes metaphor an almost indispensable aid to comprehension [T]his effect tends to be more pronounced in more complex areas of the law . . . because judges and lawyers will often feel more comfortable working with . . . [its] concreteness."⁹⁸ Using popular culture to enhance a metaphor illuminates even simple points. The June Cleaver reference above is a metaphorical comparison as is exploring the difficulties gays and lesbians face during adoptions because they do not comply with the "wholesome, nurturing, Ozzie-and-Harriet family that the traditional narrative extols."⁹⁹ The authors are making direct, although figurative, comparisons between fictional television characters and real individuals. The point is neither to inform the judge of a literal comparison, nor to sum up the entire legal proceeding or create an overall mood in the listener. Instead, the point is to quickly and concisely draw a distinction between the popular-culture reference and the analogized object.

A second means of using these references is to create a hyperbole, or an exaggeration of the reference to help explain the concept. Like metaphors and similes, hyperboles are comparisons—but unlike the former examples, they use exaggerations to make a point.¹⁰⁰ When someone says, "I am so hungry I could eat a horse," he probably does not mean it literally. Instead, he is using an exaggeration to emphasize his appetite. Likewise, popular-culture references may be used for similar exaggerated effect. Because popular-culture references, like literary references, are based on exaggerated characters, they naturally fit the hyperbole mold.¹⁰¹

95. Oldfather, *supra* note 35, at 23.

96. Metaphoric comparisons also encompass simile comparisons.

97. SMITH, *supra* note 57, at 16-17.

98. Oldfather, *supra* note 35, at 21-22.

99. Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 742-43 (1999).

100. SMITH, *supra* note 57, at 31.

101. *Id.* at 31 ("Literary works often involve exaggerated characters and scenes. Consequently, comparisons to literary works often involve exaggeration—hence, hyperbole.").

A third use of popular-culture references involves using the reference for “borrowed eloquence.”¹⁰² In a borrowed eloquence reference, the writer adopts language from the source to explain his point.¹⁰³ Unlike other references, borrowed eloquence is not used to create a mood or draw a comparison. Instead, it is an indication that the referenced words are directly on point; the author could not say it better himself. The greatest benefit to a borrowed-eloquence reference is that the reader need not be familiar with the language—it speaks for itself.¹⁰⁴ Thus, the author gets the benefit of the eloquent language without the possible danger that the reference would be lost in translation.

Finally, perhaps the easiest and quickest way to use a popular-culture reference is for thematic comparison. Literary references readily accomplish this goal. For example, the “Big Brother” reference invokes the theme of oppressive government action. If a rule of law is compared to *Frankenstein’s* monster, the reader will understand it is being “raised from the dead.”¹⁰⁵ Similarly, movie references can create the same type of thematic comparisons. Films such as *The Devil’s Advocate*,¹⁰⁶ *Class Action*,¹⁰⁷ or *The Rainmaker*¹⁰⁸ establish the themes of corruption of the legal and insurance professions. Comparing an accident victim to the fictional character Rocky Balboa will paint a theme of overcoming insurmountable odds and exhibiting perseverance.¹⁰⁹ Comparing a failed business venture to the *Titanic* indicates that the venture was doomed from the start.¹¹⁰ References to the movies *Unforgiven*¹¹¹ or *Thelma and Louise*¹¹² will summon the idea that the law is incapable of promoting true justice. The emotions evoked by these references create an overall impression of the issue not to make a single small comparison between two sets of circumstances, but to put the reader in a particular frame of mind.

Songs may even be a better means by which to paint a theme.¹¹³ Using a song lyric as a title can create a theme for an entire piece.¹¹⁴ For example, using the title of Paul Simon’s song *Still Crazy After All These Years* to describe recent changes in the *McNaughten* rule on admissibility of the insanity defense would create a particular mood with the reader.¹¹⁵ Song lyrics can also be used to create a

102. *Id.* at 39.

103. *Id.*

104. *Id.*

105. MARY SHELLY, *FRANKENSTEIN* (1831).

106. *THE DEVIL’S ADVOCATE* (Warner Bros. Pictures et al. 1997).

107. *CLASS ACTION* (Interscope Communications 1991).

108. *THE RAINMAKER* (American Zoetrope 1997).

109. Feigenson, *supra* note 27, at 142-143.

110. *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 359 (Ariz. Ct. App. 1996).

111. *UNFORGIVEN* (Malpaso Productions 1992).

112. *THELMA AND LOUISE* (Metro-Goldwyn-Mayer 1991).

113. David S. Caudill, *Fabricating Authenticity: Law Students as Country Music Stars*, 20 CARDOZO L. REV. 1573, 1574 (1999) (“Law-music interpretational analogists . . . draw a strong distinction between the law and literature enterprise, where literary/textual analogies predominate, and the law and music enterprise, which emphasizes performance/textual analogies.”).

114. Long, *supra* note 41, at 532-33, 534 (“[L]awyers and judges will use the words of popular music artists in an attempt to grab a reader’s attention or advance the writer’s thesis.”).

115. PAUL SIMON, *Still Crazy After All These Years*, on *STILL CRAZY AFTER ALL THESE YEARS* (Columbia Records 1975).

narrative, as most songs, particularly folk songs, are basically stories set to music. Because storytelling is a powerful persuasive tool for lawyers, using song lyrics to accomplish the same goal is natural.¹¹⁶ The song can also tap into our subconscious and invoke powerful feelings in a way no other popular-culture reference can. “Music, as the saying goes, is the soundtrack for our lives.”¹¹⁷ For example, the soundtrack from the movie *The Big Chill* is readily identifiable as related to the baby-boomers and the social issues of their generation.¹¹⁸ Quoting songs by certain artists creates both a mental picture of the song message and a particular place and time. Likewise, Jefferson Airplane’s “White Rabbit” not only tells a literal story about drug use in the 1960s (using its own literary references), but the melody itself stirs emotions about that decade.¹¹⁹ Similarly, a law review article entitled *Losing Our Religion* used lyrics from the R.E.M. song “Losing My Religion”¹²⁰ in the title and section headings to paint a theme of how school vouchers should not be used for religious schools.¹²¹ The effect of these references is a deeper understanding of the issue to anyone familiar with the song—much deeper than had the author merely made his point without the references.¹²²

V. JUDICIAL USE

Judges, the most visual of legal writers, formulate or interpret, in part, from external forces in their articulation of the law. Since the 1920s, the legal realist movement has taught us that judicial opinion comprises more than mere interpretations of what judges find in statutes and codes.¹²³ Judges assimilate the same information from newspapers, books, television, and movies that the rest of society sees. And in turn, judges use that information, coupled with their own personal beliefs, to make decisions. Often this “external” influence is obvious. For example, judges today turn to secondary sources such as accounting, social science, foreign affairs, psychology, and other disciplines as support for their opinions.¹²⁴

116. Long, *supra* note 41, at 548.

117. *Id.* at 544.

118. THE BIG CHILL (Carson Productions 1983).

119. JEFFERSON AIRPLANE, *White Rabbit*, on SURREALISTIC PILLOW (RCA Victor 1967).

120. R.E.M., *Losing My Religion*, on OUT OF TIME (Warner Bros. 1991).

121. Jeremy Paul, *Losing Our Religion*, 28 CONN. L. REV. 269 (1996).

122. Interestingly, unlike other more obvious references, the title and headings in this article are subtle enough to make the point to those who “get” the reference, but do not distract or alienate those who do not.

123. Thomas L. Hafemeister & Gary B. Melton, *The Impact of Social Science Research on the Judiciary*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 27, 30-31 (Gary B. Melton ed., 1987).

124. *Id.* at 34-35. Secondary sources can be divided into two types: legal and non-legal. *Id.* at 35. First, courts began to rely on legal secondary sources, or law reviews, as authority. *Id.* For instance, Commentators have tracked the increase in law review citations throughout U.S. Supreme Court cases, finding significant increases. Wes Daniels, “Far Beyond the Law Reports”: *Secondary Source Citations in the United States Supreme Court Opinions October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1, 5 (1983) (noting while only one case in 1900 cited a law review article, by 1978, nearly 60 percent of Supreme Court cases relied on such authority). *But see* David Hricik & Victoria S. Salzman, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK L. REV. 761, 778 (2005) (surveying every United States Supreme Court opinion from the 2003-04 term and finding only 3 percent of the 3,998

These sources provide a basis for decisions in the absence of established legal precedents.¹²⁵ As a result, the law itself consists of “variant principles shaped by *social needs* and not of hard rules applicable through purely formal logic.”¹²⁶ This is necessarily so, for the law cannot be a living, ever-changing reflection of society’s ideals if its crafters cannot reinterpret legal principles to serve justice today. Pop-culture legal realists believe—because television, movies, and popular literature shape and influence personal ideologies, and those personal beliefs, in turn, influence legal decision-making—popular-culture references have a significant effect on the law.¹²⁷ Judges and legislators are influenced, just as other popular-culture viewers are, because they are simply people bringing their own personal perspective to the bar.

More overtly, legal realists believe the analysis of popular culture can influence legal theory. For example, celluloid images can shed light on constitutional theory, despite constitutional scholars’ pride that the field is “the most rigorous of intellectual pursuits.”¹²⁸ Both approaches are intellectual analyses into various social issues, though one focuses on appealing to viewers while the other seeks legal solutions to concrete problems.¹²⁹ Movies are often designed to tell stories for entertainment, but those stories usually are derived from reality.¹³⁰ Much like an ancient fable still provides a basis for today’s moral lessons, modern movies and television provide examples of social issues that might not have any impact otherwise. “[F]ilm can reorient [legal] theory to attend to problems that its abstract categories have ignored.”¹³¹

There is support for this theory in actual court opinions. Popular-culture references are starting to appear in legal arguments and judicial opinions just as literary references once abounded. For example, John Grisham’s novels have become integrated into actual courtroom litigation.¹³² Not only is Grisham’s work referenced in legal opinions,¹³³ but some cases have actually hinged on the use of

citations were to law review articles). Second, other disciplines, including “accounting, anthropology, business, foreign affairs, history, insurance, optometry, political science, psychiatry, psychology, and sociology” have to begin to appear with equal regularity in Supreme Court opinions. Hafemeister & Melton, *supra* note 123, at 35. *But see* Hricik & Salzmann, *supra*, (finding that only 18 percent of all citations in the 2003-04 United States Supreme Court opinions were to any secondary authority). These changes “coincided with postrealist expansion in legal doctrines,” and have become the norm in most legal opinions. Hafemeister & Melton, *supra* note 123, at 38.

125. *See* Hafemeister & Melton, *supra* note 123, at 38.

126. *Id.* at 28 (emphasis added).

127. Law is not only the rules in concrete form, but also what we as society believe the law to be. Kimberlianne Podlas, *The Tales Television Tells: Understanding the Nomos through Television*, 13 TEX. WESLEYAN L. REV. 31, 33 (2006). The narratives of law that make up that understanding are referred to as *nomos*, or the normative universe of law, derived from the Greek word for law. *Id.*

128. John Denvir, *Capra’s Constitution*, in LEGAL REELISM, 118, 118 (John Denvir ed., 1996).

129. *Id.* (comparing Chief Justice Rehnquist’s opinion about state duty to the movie *It’s a Wonderful Life* to “enlarge our perspective on the same case”).

130. *Id.* at 122.

131. *Id.*

132. John B. Owens, *Grisham’s Legal Tales: A Moral Compass for the Young Lawyer*, 48 UCLA L. REV. 1431, 1433 (2001).

133. *See, e.g.,* Campbell v. Citizens for an Honest Gov’t, Inc., 255 F.3d 560, 563 (8th Cir. 2001) (“The record in this case reads like a John Grisham novel. However, unlike *The Pelican Brief* or *The Firm*, here the lines between fact and fiction are blurred.”); Figueroa v. Rivera, 147 F.3d 77, 79 (1st Cir.

Grisham's works at trial.¹³⁴ In *State v. Saez*, the Connecticut Court of Appeals held that references to Grisham during closing argument did not constitute reversible error,¹³⁵ and in *United States v. Sabbagh*, the defendants used Grisham's novel *The Firm* to argue that trial counsel had a conflict of interest.¹³⁶ In those cases, the attorneys used Grisham's characters as metaphors for the opposing side.

Even more interesting are the instances when courts have adopted Grisham's language to explain a legal concept, or engaged in borrowed eloquence of the popular literature. For example, in *Herring v. Bocquet*, the Texas Court of Appeals quoted an entire paragraph from *The Rainmaker* to explain the art of over-billing.¹³⁷ Several other cases have referred to *The Rainmaker*'s plot "when discussing the distasteful reimbursement policies of certain insurance companies,"¹³⁸ or to *The Runaway Jury* when describing the particularities of tobacco litigation.¹³⁹

1998) ("If recited here in full flower, the averments in the complaint would seem to have been lifted from the pages of a John Grisham thriller."); *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1086 (D. Ariz. 1999) ("As the Fifth Circuit noted in response to hypothetical overbreadth arguments, '[if] John Grisham reads one of his novels in the nude . . . courts can evaluate whether these activities fall within the scope of the exception.'"); *United States v. Kouri-Perez*, 992 F. Supp. 511, 512 (D.P.R. 1997) ("[The] motion builds on the quicksand of distortion to present a portrait of deviousness that recalls a John Grisham novel, rather than the facts of this case."); *Burge v. Parish of St. Tammany*, No. 91-2321, 1997 U.S. Dist. LEXIS 114, at *4 (E.D. La. Jan. 8, 1997) ("The relevant material facts bear some resemblance to a John Grisham novel . . ."); *Kreiger v. Adler, Kaplan & Begy*, No. 94 C 7809, 1996 U.S. Dist. LEXIS 113, at *1 (N.D. Ill. Jan. 4, 1996) ("Finding that Krieger's complaint read more like a John Grisham novel than an acceptable initial pleading, the court dismissed the complaint with leave to refile."); *Kirchoff v. Selby*, 686 N.E.2d 121, 123, 123 & n.1 (Ind. Ct. App. (1997) ("The John-Grisham-like facts are very much in dispute. . . . Undoubtedly, the parties were referring to noted attorney/author John Grisham, whose numerous books have involved issues of legal intrigue and deception.").

134. Owens, *supra* note 132, at 1433.

135. 758 A.2d 894, 897 (Conn. App. Ct. 2000).

136. 98 F. Supp. 2d 680, 685 n.5 (D. Md. 2000) ("[The plaintiff's] brief repeatedly labels their partnership 'The Firm,' apparently a reference to the John Grisham book and film by the same name about a corrupt law firm which launders money for organized crime and will do just about anything for a fee, regardless of legality or ethics. If such innuendo is intended, it is not appropriate, and will be disregarded.").

137. 933 S.W.2d 611, 614 (Tex. Ct. App. 1996) (quoting extensively from Chapter One of *The Rainmaker* and noting "Grisham's quote implies potential abuse of conferences, and no doubt it happens").

138. See, e.g., *Vining v. Enter. Fin. Group, Inc.*, 148 F.3d 1206, 1212 n.4 (10th Cir. 1998) ("Enterprise's rescission conduct and loss ratios bear some resemblance to those of the fictional insurance company portrayed in John Grisham's novel *The Rainmaker* and in the motion picture of the same name."); *Charles M. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 14 P.3d 234, 241 (Cal. 2001) ("Reminiscent of the methods used by Great Benefit Insurance Company, the villain in the John Grisham thriller, *The Rainmaker*, defendants developed procedures for delaying or avoiding payment to plaintiffs using 'false, fraudulent and frivolous objections.'" (citations omitted)).

139. *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1059 n.2 (Ala. 1996) ("This opinion deals with a subject of great current interest, both in fact, . . . and in fiction (see, e.g., John Grisham, *The Runaway Jury* (Doubleday, June 1996)."). See also Amendments to Rules Regulating The Florida Bar—Advertising Rules, 762 So. 2d 392, 406 (Fla. 1999) (noting that although the court could not "control the content of television programs such as *Judge Judy* or *Ally McBeal*," it did have the authority to regulate its practicing attorneys.); *State v. Papisavvas*, 751 A.2d 40, 53 (N.J. 2000) ("[O]ne [juror] who watched the series *Ally McBeal* observed that 'lawyers looked better on TV.'"); *Luckett v. Panos*, No. G027149, 2002 WL 80640, at *2 n.2 (Cal. App. 4 Dist. Jan. 22, 2002) (noting the use of *Ally McBeal* references in a hearing).

The same phenomenon is played out in reported song references. People tend to identify most profoundly with music that they listened to during their adolescence.¹⁴⁰ The recording artists most often cited in court opinions are those who were most popular during the formative adolescent years of the baby-boomers, the generation now occupying most judicial seats.¹⁴¹ In a survey of song lyrics quoted in judicial opinions, folk singers such as Bob Dylan appear the most.¹⁴² In fact, some of Dylan's lyrics have become almost boilerplate in court opinions.¹⁴³ Judges use familiar song references to make specific points.

Perhaps the most important aspect of this topic is the idea that not only does popular culture affect the way both lawyers and laypersons perceive the law, but also how lawyers can harness this knowledge in such a way to better communicate in legal discourse. Richard K. Sherwin noted this phenomenon in his foreword to *Law/Media/Culture: Legal Meaning in the Age of Images*.¹⁴⁴ "Increasingly, lawyers are realizing that effective persuasion requires not only tapping into that reality people carry in their heads, but also emulating the habits of perception and styles of thought that extensive exposure to mass-mediated popular culture has produced."¹⁴⁵ It is no surprise that Hollywood has long used the cinematic courtroom as a tool to make social and political statements. Not only are lawyers turning to fancy electronic media to explain their cases to the MTV-generation jurors, but cinematic and television-styled presentations have become the norm in explaining the law to laypersons.¹⁴⁶ Juries not only appreciate, but have come to expect, "accident and crime reenactments, computer graphics, video depositions, documentary-style day-in-the-life videos, [and] video summations that visually emulate popular television shows and commercials."¹⁴⁷ Jurors expect an understandable story with characters, settings, and plots, just like they see at the movies¹⁴⁸ as the general public does, evidenced by the attempts to make the *Starr Report*—first and foremost a legal document—more entertaining and prurient. But more importantly, other *lawyers* expect this same sort of structure. Accordingly, the use of such references is equally effective in discourse with other lawyers, and we should expect to see more entertaining and accessible legal writings become the norm.

VI. PRACTICAL CONSIDERATIONS

Of course, the dangers in using popular-culture references are that they may not be understood by the target audience. Such references may distract the reader from important legal messages, pollute the subject matter, or lose their effect if

140. Long, *supra* note 41, at 545.

141. *Id.*

142. *Id.* at 540.

143. *Id.*

144. Richard K. Sherwin, *Law/Media/Culture: Legal Meaning in the Age of Images*, Forward, 43 N.Y.L. SCH. L. REV. 653 (1999-2000) [hereinafter *Sherwin Foreword*].

145. *Id.* at 654.

146. *Id.* at 653-54.

147. *Id.* at 654.

148. Patricia J. McEvoy et al., *Telling the Story Right in Opening Statements*, 17 JAN CBA REC. 25, 25 (2003).

over-used. Thus, legal authors should use care to avoid the following pitfalls.

First, there is a very real danger that the reader may have no idea to what the author is referring. If I were to quote the brilliance of Rik Mayal during an episode of *The Young Ones*, chances are I would make only myself and perhaps a minute population of people who both read my article and happen to know about *The Young Ones* laugh.¹⁴⁹ But more likely, I would alienate my reader. The entire point of a popular-culture reference is to create quick shorthand for the reader, or to create a sense of shared history. Using an obscure reference is likely to make the reader feel farther removed and less persuaded by the author.¹⁵⁰ Perhaps this result is the reason why many literary references are losing their impact on today's youth. As practicing lawyers get younger and less emphasis is placed on literature in our classrooms, the MTV generation is more likely to connect with an episode of *Friends* than it is to the Greek classics.¹⁵¹ I have found that as my students get younger, some of my own references become lost. For example, my students confused Marilyn Manson with Charles Manson in a hypothetical about criminal activity, which led to an interesting discussion, but certainly took us off-track.¹⁵² Similarly, the "Big Brother" references mentioned above, while clearly alluding to oppressive government in my mind, might be confused with the reality television show *Big Brother* by anyone familiar with that show.¹⁵³

Popular-culture references also may dilute the seriousness of the issue. For example, if a court opinion relies heavily on song lyrics to make its legal point, the substance of that opinion may not have the weight of a more serious draft.¹⁵⁴ Likewise, a piece of legal scholarship may not be deemed serious enough to persuade,¹⁵⁵ or a classroom professor may not be taken seriously by his students. One criticism of the *Starr Report* was the over-inclusiveness of sexual detail, including the numerous references to sexually-charged popular-culture items.¹⁵⁶ The very traits that likely were included to spur interest were the ones that could undermine credibility and dilute the document's seriousness. In his article espousing the use of humor to increase accessibility of law review articles, one Commentator worries that judicial humor might "undermine reverence for legal institutions,"¹⁵⁷ a danger equally applicable to inclusion of popular-culture references. But the latter may be a safer middle ground. Popular-culture references are not as overt a departure from traditional formal legal writing as humor is. Yet, these references still give the positive impact of entertaining the reader and breaking the dullness. Accordingly, "dropping pop" into a legal writing

149. *The Young Ones* (BBC television broadcast 1982-84).

150. Long, *supra* note 41, at 563-64. See also SMITH, *supra* note 57, at 25 ("If the reference is obscure or pretentious, the writer risks confusing, alienating—or worse, offending—the reader.").

151. *Friends* (NBC television broadcast 1994-2004).

152. It is important to note that even a bad reference might produce a teachable moment in the classroom. In this example, my class ended up comparing the reasonableness of shooting the two Mansons in self defense.

153. *Big Brother* (CBS television broadcast 2000-present).

154. Long, *supra* note 41, at 559. See also Filler, *supra* note 6, at 1770 ("When a court's language is evidentially unserious, it is unlikely that readers will take the opinion seriously.").

155. Long, *supra* note 41, at 559-60.

156. Filler, *supra* note 6, at 1771.

157. Knight, *supra* note 44, at 908.

may be a more conservative and safer way to shake-up the literary style than using humor.

Another possible problem with using a popular-culture reference is that it may pollute the subject matter. This pitfall occurs when the reference irritates or annoys the reader, rather than drawing him in.¹⁵⁸ If the reference is particularly vivid, that irritation and annoyance will follow the subject matter each time the reader considers it.¹⁵⁹ As noted above, these references often have powerful psychological impact on the reader. That psychological impact may not always be positive. Pushing the reader away with an offensive or ill-fitting reference is probably more harmful than merely boring the reader without one. If the reference is gratuitous or over-reaching, it may confuse the reader or annoy him. Trying to force a reference just for the sake of having one, without care as to whether it is apt for the purpose detracts from the overall message.

Likewise, if the reference is too well-known, it may appear trite or without meaning. As more people use popular-culture references, those references may take on a life of their own. Others' interpretations of the reference may change its impact on a reader, even if the author still believes it means something else. The possible confusion created by the "Big Brother" example above demonstrates this problem. When author and audience no longer associate the same meaning to a reference, the power of the reference actually works *against* clarity and persuasiveness.

Similarly, too many references can dilute the impact of the technique. One fabulous popular-culture reference in an appellate brief or a scholarly article may have a powerful effect on the rest of the document. Ten, however, will not create the same desired effect. Part of the effect of these references is to break the rhythm of the document or to make it more memorable. Readers faced with a barrage of references will quickly become numb to their effects.

Finally, a distinct consideration applies to legal documents. As they become more entertaining and accessible to lay audiences, authors need to keep in mind the constituencies affected. Some scholars have noted that there is "acoustic separation" between writings targeting laypersons and those targeting the legal profession.¹⁶⁰ For example, "decision rules," which are designed to define legal principles for lawyers, are different from "conduct rules," which are designed to govern and inform general behavior.¹⁶¹ If court opinions are suddenly a source of entertainment, the layperson, with no formal legal training, may not grasp or appreciate what was supposed to be a clarification of a legal principle. In essence, legal writers might lose track of who they are communicating to, or they might send the wrong sort of message inadvertently. Therefore, even while employing popular culture to spice things up, an author must remember the cardinal rule of writing: Know your audience.

158. Long, *supra* note 41, at 561.

159. See, e.g., Oldfather, *supra* note 35, at 25 (noting a similar effect for metaphors that draw strong associations).

160. Filler, *supra* note 6, at 1770 (quoting Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 635, 626-27 (1984)).

161. *Id.*

VII. COLLATERAL DAMAGE—THE TRUTH?

In addition to the practical considerations that may bar inclusion of popular culture in a more formal legal document, the power of these references as a persuasive tool raises issues about how far a lawyer should go to influence the audience's thoughts, particularly when such references are working somewhat subliminally. Similar to diluting the seriousness of the subject matter, including popular-culture references may distract the reader from considering more abstract legal concepts that are masked by the analogy.¹⁶² For example, in the June Cleaver reference above, the listener might disregard other relevant facts, or consider those facts in a different framework than he would have had the reference not been used. Using psychology, the author colors all further perceptions because the listener will constantly compare new information to the metaphor. If this works in the author's favor, the reference is a success. But if the author desires further critical thinking about the subject matter—for example, if a professor wants students to give further critical thought to a legal doctrine—the popular-culture reference may stifle that deeper analysis. The student may permanently equate that concept only to the original popular-culture analogy. Similarly, juries, and perhaps even judges and other lawyers, may have expectations for popular-culture narratives and analogies based on their storehouses of information. If those expectations are satisfied, they may substitute the expected outcome for the truth and make decisions on fiction—as they perceive it—rather than fact.¹⁶³

Related to this idea is the danger that the use of popular-culture references, because of their very effectiveness, may dilute the ultimate purpose of the law: truth and justice applied in an orderly manner. Richard Sherwin, in his book *When Law Goes Pop*, expressed real concern that the symbiotic relationship of law and popular culture is diluting the legitimacy of the former.¹⁶⁴ Another critic summarized:

Popular culture may entertain, he says, but the prosecution of criminal defendants is serious business. [Sherwin's] book is meant to be a primer on knowing the ins and outs of the alchemy of popular culture and legal practice, a combination that he describes as potentially poisonous.¹⁶⁵

Sherwin's concern is that the artificial reality created through popular-culture media will cause the average person to make erroneous snap judgments based on emotion alone. For example, Sherwin suggests that jurors will be confused by a defense attorney's comparison of mob hit men to the characters of the movie *Pulp Fiction* and acquit obviously guilty individuals on their emotional response.¹⁶⁶

162. See, e.g., Oldfather, *supra* note 35, at 26 (noting that metaphors “can lead to inattention to other considerations that should rightly factor into the analysis”).

163. Silbey, *supra* note 33, at 153. See also Newberg, *supra* note 24, at 203 (noting that reliance on schemas to communicate information “suggest conclusions and trigger judgments”).

164. RICHARD SHERWIN, *WHEN LAW GOES POP* 242 (2000). See also Silbey, *supra* note 33, at 141 (“[Sherwin's] hope is based on, in part, the ability to keep law, as conceived and practiced, separate from popular culture influence.”).

165. Silbey, *supra* note 33, at 143.

166. SHERWIN, *supra* note 164, at 30-31. But see Silbey, *supra* note 33, at 163 (calling Sherwin's lack of trust in juries to discern fact from cinema into question).

Rather than evaluating the facts in an objective manner, as instructed, the jury members may constantly compare the facts against their memories of the movie characters and equate more positive characteristics than the objective facts warranted. When information is vague or facts are missing, we take the schemas we already have in place and assume that the characters or events happened in reality the way it happened in our fictional world.¹⁶⁷

Sherwin explores this concept in a parallel consideration—the use of narrative in a criminal case. Sherwin argues that because individuals expect a particular kind of visual linear media to enhance their understanding and fill in missing facts, authors can manipulate the truth by presenting alternative realities in this expected narrative.¹⁶⁸ Sherwin points to the movie *The Thin Blue Line*¹⁶⁹ as an example of how truth has been manipulated through media and inadvertently affected the outcome of the legal process.¹⁷⁰ The movie is a docu-drama written about the conviction of a man for the murder of a Dallas police officer.¹⁷¹ Through its unique editing, the filmmaker showed alternative “truths” to the events leading up to the officer’s murder. Historically, the movie is important because it ultimately reopened the real case and ended in an eventual acquittal of the defendant twelve years after his conviction.¹⁷² Many considered this reversal a victory for justice.

Sherwin argues, however, that we can never really know whether the truth has been served.¹⁷³ Perhaps, the power of the visual medium—presenting the facts in an MTV-style edit with numerous film and television clips interjected into the confessions and testimony—may be more responsible for the outcome than reality. For example, many of the film clips presented in the film represented popular-culture stereotypes of criminals and police, used purposefully to influence the audience’s view on whether the defendant and eyewitnesses had the same traits.¹⁷⁴ Sherwin argued that because people make judgments based on beliefs they already possess, tapping into those preconceived stereotypes and coloring the audience’s perception of the events as they actually happened is a distortion of the truth.¹⁷⁵ In essence, the audience is more swayed by the narrative, or *how* the story is presented, than by the facts in objective format.

In a similar vein, women’s studies scholars have noted the danger of popular-culture references to rape victims during trial. For example, one scholar argued that the prosecution’s comparison of a rape victim to the main characters of the movie *Lolita*¹⁷⁶ had the potential to unfairly cast the victim as the aggressor.¹⁷⁷

167. *Sherwin Manifesto*, *supra* note 34, at 723 (“Fiction, it turns out, will do as nicely as non-fiction when it comes to assimilating categories for thinking and talking about the real.”).

168. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) [hereinafter Sherwin, *Law Frames*].

169. THE THIN BLUE LINE (American Playhouse 1988).

170. Sherwin, *Law Frames*, *supra* note 168, at 41.

171. *Id.* at 41.

172. *Id.*

173. *Id.* at 75.

174. *Id.* at 70.

175. *Id.* at 75 (“[The filmmaker] draws upon popular images of caricatured reality to communicate the absurdity of the prosecution’s case against [the convicted defendant].”).

176. LOLITA (Samual Goldwyn Pathe 1997).

177. Taslitz, *supra* note 37, at 488-89.

Recognizing that jurors not only believe that which is familiar, but also import all characteristics of the reference, that scholar argued that their inclusion had the potential to unfairly taint the victim's image and result in erroneous acquittals.¹⁷⁸ Despite evidentiary safeguards designed to prevent these associations, popular-culture references accomplish what the attorney cannot—an attack on the victim. As a result, justice remains elusive in light of the power of popular culture.

All of these points are important to the consideration of popular culture as a persuasive tool. However, at least two scholars have noted the warning against sacrificing truth for the sake of persuasion is easier said than done.¹⁷⁹ Even Sherwin recognizes that while an ethical dilemma exists as to whether lawyers should persuade with *their* version of reality, “culturally attuned lawyers probably have an edge over those who are not.”¹⁸⁰ Simply put, because these references are effective, they are going to be present in legal discourse. For lawyers to adequately communicate and serve their clients, they must be in tune with their audience's expectations. Using popular culture and popular narratives to connect to legal audiences is a reality—much like the reality of using visual media has become the norm in the courtroom. Fighting its application will not change the fact that others will use it and will do so effectively. Throwing away the tools for the higher ground of promoting legitimacy just puts the advocate at a competitive disadvantage.

In truth, manipulative persuasion has always been the hallmark of a successful advocate for application of the law to the facts is simply a matter of perspective. Despite the negative connotation of the word manipulate, successful advocates must be able to do it to some degree. Persuasion necessarily involves convincing your audience to believe concepts that conflict with their original position. Doing so is a manipulation, albeit subtle, of that person's belief system. All advocates attempt to manipulate thinking, whether it is from coloring the facts to support a particular view, appealing to the emotions of the audience, or employing psychology to sway an outcome. Using popular culture is simply another effective tool to reach the same end. We should not ignore the power of such persuasion—and more importantly, a history of ethical manipulative persuasion—simply because it now involves more contemporary means.

Instead, we should employ two approaches. First, we should apply the ethical framework already in place to the use of the narrative device. In other words, if it is not proper to explain a point outright, the advocate should not use popular-culture references to circumvent those same rules. For example, in the rape trials discussed above, if an attorney is not permitted to introduce evidence concerning a victim's sexual past, he should not be able to accomplish the same goal by making

178. *Id.* at 416 (noting the “halo effect” of importing peripheral characteristics and cautioning that it “makes it harder for observers fully to attend to and fairly weigh proffered evidence”).

179. Robert F. Blomquist, *A Fascination Without Scruples: American Popular Culture and Its Corrosive Impact on the Law*, 32 CUMB. L. REV. 165, 183 (2002) (reviewing SHERWIN, *supra* note 164) (“It is difficult, however, to find a clear explanation of how Sherwin would specifically change things.”). *But see* Silbey, *supra* note 33, at 166 (“Despite Sherwin's attempt, I remain unconvinced . . . that an audience will inevitably lose its critical capacity as a consequence of the diverse ways a story can be told and given meaning.”).

180. Sherwin, *Law Frames*, *supra* note 168, at 78.

a popular-culture comparison. In short, courts should treat the power of popular-culture references the same as any other persuasive device.

Second, as legal audiences we should critically consider that such mechanisms may be used against us just as we use them against others. In other words, carefully consider the manipulative effect such references may have on you as a recipient. Sherwin argues, “[W]e must learn to discern and guard against the more repugnant forms of narrative manipulation.”¹⁸¹ Similarly, the use of popular culture as a persuasive device must be carefully considered in light of its persuasive power. Learning to harness that effectiveness and recognize its impact will make us better advocates in the long run. That said, balancing the references in an effective format and still showing appropriate restraint in the interest of reality will be the key to success. Accordingly, we—whose weapons are our words—should recognize the power of popular culture, and in the words from an iconic comic book movie remember that “with great power comes great responsibility.”¹⁸²

181. *Id.* at 80.

182. SPIDERMAN (Sony Pictures Entertainment 2002).