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Honey, You're No June Cleaver: The Power of "Dropping Pop" to Persuade

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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 But 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 not nice or understanding to her children. But mostly it tells the listener she is not an ideal mother.

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1 Leave it to Beaver (ABC television broadcast 1957-63).
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 pieces 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 Vox3 and Leaves of Grass4), movies (Titanic5), 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—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 further inform the use of popular culture in other legal communication. Part II explores the role that popular culture already plays in our lives. Part III discusses the

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4 Walt Whitman, Leaves of Grass (1855).
5 Titanic (Twentieth Century-Fox Film Corp.1997).
7 Id. at 1752 (“If these references were not essential to the Starr Report, why did they play such an important role?”).
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. Finally, Part VI considers the practical issues raised by the references and suggests ways to avoid pitfalls, and Part VII explores whether their 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 transmitted by passively watching the actions of others. In 2006, the A.C. Nielsen Company reported that the average American adult watched more than 32 hours of television each week.11

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9 Id.; see also Id. at 15 (noting that by the time television was 25-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).
hours each week. More than 98 percent of American households own televisions, and 49 percent of people say they watch it too much. By the time a person has reached the age of 70, he would have spent between 7 and 10 years viewing a television.

More importantly, television has become far more than an entertainment source. It is the “central medium of cultural expression.” Television is a diversion, a companion, and a source for our perception of reality. Psychologists have noted that many people use it as a substitute for human companionship. Individuals feel uncomfortable when faced with idle time, and in response, turn on the television to fill the void. 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. Understanding dependency is at the root of all social interaction. Individuals strive to make sense of strange facts and to appropriately interact in unfamiliar situations. We seek to “understand the social environments within which we must act or anticipate

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12 Id.
13 Id.
16 Id.
17 Id.
18 Id.
19 Id. Of the three dependencies, the first, understanding, is relevant here.
acting, because meaningful social action cannot occur in the absence of a definition of situation.”

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. 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. 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. Television depictions become a child’s 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. Through 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

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20 Id. at 8; 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.”).

21 BALL-ROKEACH, supra note 18, at 8.

22 American Academy of Pediatrics, supra note 14, at 786.

23 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.”)

24 American Academy of Pediatrics, supra note 14, at 786 (noting a correlation between television-viewing and adolescent violence, pregnancy, sexually transmitted diseases, and alcohol-related deaths, likely indicating that children are desensitized to things that were once considered societal taboos).
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. These schemas are the conduit for transmitting a great deal of information without elaboration. 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.” 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 publically confused actual

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26 Newberg, supra note 25, at 204.

27 Richard K. Sherwin, Introduction, Symposium: 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 20, 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.”).
historical events with scenes from a movie—scenes he thought had actually occurred.\textsuperscript{28} 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 popular-culture references as a persuasive tool.\textsuperscript{29}

Other popular-culture media such as movies, music, internet resources, and popular literature, though 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.\textsuperscript{30} 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.\textsuperscript{31} 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.\textsuperscript{32}


\textsuperscript{29} Sherwin Introduction, supra note 27, 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?”).

\textsuperscript{30} American Academy of Pediatrics, supra note 14, at 786.

\textsuperscript{31} Sherwin, et al., supra note 20, at 249 (“In contemporary culture, most people get their facts primarily from popular visual media.”).

\textsuperscript{32} Cassandra Sharp, \textit{The “Extreme Makeover” Effect of Law School: Students Being Transformed by Stories}, 12 TEX. WESLEYAN L. Rev. 233, 237 (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, \textit{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.”).
Because a lawyer’s primary job is to analyze issues and convey information, becoming adept at tapping the well of human psyche is a powerful 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.33

When the author taps 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.34 And, because reality may no longer be defined by the experiences we have—but by the experiences we watch others have in television and movies—truth and persuasive authority are granted to references that conform to our shared storehouse of knowledge.35 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.36 The reference taps the schema already

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33 Sherwin Introduction, supra note 27, at 894 (citations omitted).
34 Sherwin, et al., supra note 20, 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) (“[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.”).
35 Sherwin Introduction, supra note 27, 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 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 34, at 147.
36 One scholar noted this effect as it relates to metaphors in legal analysis. See Chad M. Oldfather, The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions, 27 CONN. L. REV. 17, 23 (1994) (“[M]etaphors 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
created in the reader’s mind and summons “a resonate set of understandings, feelings, and judgments and associates them with [the author’s] narrative.” 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. But that 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. For this reason, comparing a victim to Rocky, a defendant to the characters of Natural Born Killers, or a businessman to The Godfather says exponentially more than a mere description alone because the audience applies every characteristic of the referenced character and fills in the unspoken analogies.

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.

37 Newberg, supra note 25, at 204.

38 Sherwin, et al, supra note 20, at 251; see also Sherwin Manifesto, supra note 35, 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).

39 ROCKY (United Artists 1976).


41 THE GODFATHER (Paramount Pictures 1972).
More pragmatically, these references entertain the reader and keep the reader interested. “The persuasive value of an argument is often directly linked with the quality of the accompanying writing.” 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. Using techniques that entertain and captivate help make the material more accessible. Accessible writing, in turn, is more likely to reach a larger audience. 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. Knight pointed to the extensive criticism that law review articles are formalistic, formulaic, esoteric, inaccessible, and downright boring. To combat that image, he espoused increased use of humor as a persuasive device. 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.

Thus, the literary device of humor facilitates understanding and persuasion simply because it encourages reading: “The appeal of humor is simple but significant: It helps

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42 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).
43 Oldfather, *supra* note 36, at __ (“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)).
44 Long, *supra* note 42, at 559; *see also* Oldfather, *supra* note 36, 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 (1966)).
46 Id. at 897-98.
47 Id. at 908.
48 Id. (“It can convey succinctly a desired point with a facility that might not otherwise be achieved.”).
people communicate and enjoy communicating." 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.” 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 or Heat to illustrate withdrawal from criminal enterprise and accomplice liability. Scenes from the television sitcom The Office can be used to illustrate any number of tort issues. Estates professors point to the movie Body Heat 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 or The Shield to prompt ethical discussions. 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. And because popular culture is

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49 Id.
50 Long, supra note 42, at 534.
53 The Office (NBC television broadcast 2005-present).
54 BODY HEAT (The Ladd Company 1981).
55 The Practice (ABC television broadcast 1997-2004).
56 The Shield (FX Networks 2002-2008).
57 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).
enormously broad in its subject matter, almost any topic can be enhanced or explained through that material.

But perhaps most importantly, 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. 58 Commentators have long recognized the special power of literary exemplars to illustrate the moral relationships between parties. 59 Smith, however, notes that such references are not only 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. 60 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 is far more impactful than a narrative alone. 61 Accordingly, the psychological force behind the effectiveness of literary references is even greater for popular culture.

59 Minow, *supra* note 32, at 1687.
60 *Smith, supra* note 58, at 13.
61 Johnson, *supra* note 57, at 99-100; Douglas J. Goodman, *Approaches to Law and Popular Culture*, 31 Law & Soc. Inquiry 757, (2006) (“[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 even the greatest novels have had . . . are negligible in contrast to the effects of a television program.”).
The first theory at work in a literary or popular-culture reference is discursive psychology theory.\textsuperscript{62} Under this theory, also known as “shared knowledge theory,” people communicate using bits and pieces of information that they share in common.\textsuperscript{63} Communication becomes a series of “shorthand” references that mean more than they appear on their face.\textsuperscript{64} Discursive psychology explains why the June Cleaver example above paints a broader picture than the words alone. The reference taps into the knowledge bank of the reader and creates an image or hypothetical quickly and effectively.\textsuperscript{65} Tapping that bank, in turn, creates a bond between the author and reader because the reader feels she 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, the persuasive power is born.\textsuperscript{66}

Closely related to discursive psychology theory is the literary theory of intertextuality.\textsuperscript{67} 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. This theory describes why the bread and butter of the lawyer trade—analogies—are effective. New information is categorized and understood by relating it to information already in the reader’s possession. For example, if an organization is compared to “Big Brother,” the reader will connect that reference to the

\textsuperscript{62}SMITH, supra note 58, at 20.
\textsuperscript{63}Id. at 20-21; see also Sherwin, et al, supra note 20, 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.”).
\textsuperscript{64}SMITH, supra note 58, at 21.
\textsuperscript{65}Johnson, supra note 57, at 104 (“What we see and hear is influenced by what we already know.”).
\textsuperscript{66}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. at 104.
\textsuperscript{67}Id.
storehouse of knowledge concerning George Orwell’s novel 1984 and presume the author is inferring the entity is overbearing and has excessive power. In literary theory, intertextuality takes place using literature. Here, the process taps the well of popular-culture information.

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.” Readers have to 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. 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.” For example, the fact that the infamous Gap dress was from the Gap, and not couture nor thrift-store, made Monica Lewinski and her plight more understandable to the average reader. Likewise, the fact that Monica’s love note to the President was inspired by the movie Titanic, one of the most-viewed movies ever produced, probably evoked emotions in some readers. “The Starr team may have

68 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.

69 Some popular-culture scholars have already recognized the power of using narrative that conforms with preconceived expectations. Johnson, supra note 57, 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.”).


71 Id. at 1739–40.

72 Sherwin, et al, supra note 20, at 250.

73 Filler, supra note 70, at 1753.
perceived the ubiquity of these intertextual references within American culture and concluded they were essential to the preparation of a convincing narrative.  

Because popular-culture references tap society’s beliefs, discursive psychology theory and intertextuality were used in the Starr Report’s writing.

The final theory, Classic Rhetoric Theory, is based on the art of persuasion. Rhetoric Theory is divided into three distinct functions: logos, pathos, and ethos. The logos function is the substantive portion of an argument. 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. 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. The use of those analogies is part of the logos function. The reader is able to understand the 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 theory involves the pathos function. Pathos involves tapping into the emotional well of the individual as a means to persuade. Emotional arguments powerfully affect readers in two ways: First, through “emotional substance,”

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74 Id.
75 SMITH, supra note 58, at 22.
76 Id.
77 Id.
78 Id.
79 Id. at 22-23.
the author may evoke specific emotions such as anger, pity, sorrow, guilt, or fear to prompt a reader response.\textsuperscript{80} The second way emotional arguments affect a reader involves “medium mood control” where an author uses style to manipulate readers into a particular frame of mind.\textsuperscript{81} 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 makes the reader pleased.\textsuperscript{82} So, too, does the fact that the reference entertains the reader and breaks the monotony of the topic.\textsuperscript{83} 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.”\textsuperscript{84} Thus, controlling the pathos or emotional response is a mechanism of persuasive manipulation.

The final classic rhetoric theory function involves ethos. Ethos is related to the author’s ability to convey credibility and cleverness to the reader.\textsuperscript{85} First, credible and thoughtful advocates are more believable. When an author taps the audience’s storehouse of knowledge, instant credibility is given to the author because he is conveying information the audience member already knows. People tend to lend

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{80} Id. at 23.
    \item \textsuperscript{81} Id.
    \item \textsuperscript{82} Id.
    \item \textsuperscript{83} Id.
    \item \textsuperscript{84} Id.
    \item \textsuperscript{85} Id.
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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.\footnote{Id. at 24.} Third, popular-culture references, like literary references, convey to the reader that the author is educated and diverse in his interests.\footnote{Id.} In effect, the author is not only “one of us,” but he is also cosmopolitan and knowledgable. 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 the reader tap into his own creative ideas.\footnote{Oldfather, supra note 36, at 23.} All of these facts contribute to author’s credibility in making a persuasive argument.

In 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.\footnote{Filler, supra note 70, at 1752.} During the investigation, Kenneth Starr, its chief architect, was accused of being an unsophisticated prude.\footnote{Id. at 1753.} From \textit{Vox} to The Gap, however, the report created a narrative that indicated the authors were hip and in touch.\footnote{Id. at 1753.} As such, they were credible arbitrators of what behavior should and 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.
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 their 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 of reference used is often as important as the substance of the reference itself.

The first kind of literary reference involves straightforward comparisons between events or ideas. The most obvious type of comparison is a metaphor. Metaphors are distinct from other comparisons in that they are figurative instead of literal. 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 indispensible 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.” Using popular culture to enhance a metaphor illuminates even simple points. The June Cleaver reference above is a metaphorical comparison. So, too, is exploring the difficulties of gays and lesbians during adoptions because they do not comply with the “wholesome, nurturing, Ozzie-and-Harriet family that the traditional narrative extols.” 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

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92 Metaphoric comparisons also encompass simile comparisons.
93 Smith, supra note 58, at 16.
94 Oldfather, supra note 36, at 21-22.
up the entire legal proceeding or create an over-all mood in the listener. Instead, it is to quickly and concisely paint 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. When someone says, “I am so hungry I could eat a horse,” she probably does not mean it literally. Instead, she is using an exaggeration to emphasize her appetite. Likewise, popular-culture references may be used for the same exaggerated comparisons. Because popular-culture references, like literary references, are based on exaggerated characters, they naturally fit the hyperbole mold.

The third use of popular-culture references involves using the reference for “borrowed eloquence.” In a borrowed-eloquence reference, the writer adopts language from the source to explain his point. 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 so directly on point, the author could not say it better himself. The biggest benefit to a borrowed eloquence reference is that the reader need not be familiar with the language—it speaks for itself. 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 its thematic comparison. Literary references accomplish this goal readily. For

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96 SMITH, supra note 58, at 30.
97 Id. at 31 (“Literary works often involve exaggerated characters and scenes. Consequently, comparisons to literary works often involve exaggeration—hence, hyperbole.”).
98 Id. at 39.
99 Id.
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.” Similarly, movie references can create the same type of thematic comparisons. Films such as The Devil’s Advocate, Class Action, or The Rainmaker establish the themes of corruption of the legal and insurance professions. Comparing an accident victim to the fictional character of Rocky Balboa will paint a theme of overcoming insurmountable odds and exhibiting perseverance. Comparing a failed business venture to the Titanic indicates that the rationale for the venture was doomed from the start. Reference to the movies Unforgiven or Thelma and Louise 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 might be an even better means by which to paint a theme. Using a song lyric as a title can create a theme for an entire piece. 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.

100 MARY SHELLEY, FRANKENSTEIN (1831).
102 CLASS ACTION (Interscope Communications 1991).
103 THE RAINMAKER (American Zoetrope, 1997).
109 Long, supra note 42, 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.”).
with the reader.\textsuperscript{110} Song lyrics can also be used to create a 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.\textsuperscript{111} 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.”\textsuperscript{112} For example, the soundtrack from the movie \textit{The Big Chill} is readily identifiable as related to the baby-boomers and the social issues of their generation.\textsuperscript{113} Quoting songs by certain artists creates both a mental picture of the song message and a particular place and time. Jefferson Airplane’s \textit{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.\textsuperscript{114} A law review article titled \textit{Losing Our Religion} used lyrics from the R.E.M. song \textit{Losing My Religion}\textsuperscript{115} in the title and section headings to paint a theme of how school vouchers should not be used for religious schools.\textsuperscript{116} 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.\textsuperscript{117}

\textsuperscript{110} \textsc{Paul Simon, Still Crazy After All These Years}, on \textsc{Still Crazy After All These Years} (Columbia 1975).
\textsuperscript{111} Long, \textit{supra} note 42, at 548.
\textsuperscript{112} \textit{Id.} at 543.
\textsuperscript{113} \textsc{The Big Chill} (Carson Productions 1983).
\textsuperscript{114} \textsc{Jefferson Airplane, White Rabbit}, on \textsc{Surrealistic Pillow} (RCA Victor 1967).
\textsuperscript{117} Interestingly, unlike other more obvious popular-culture 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.
V. Judicial Use

Judges, the most visual of legal writers, formulate or interpret, in part, on external forces in their articulation of the law. Since the 1920s, the legal-realist movement has taught us that judicial opinion is composed of more than mere interpretations of what judges find in statutes and codes.\footnote{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).} Judges assimilate the same information from newspapers, books, television, and movies that the rest of society sees, and in turn, 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.\footnote{Id. at 34. Secondary sources can be divided into two types: legal and non-legal. Id. First, courts began to rely on legal secondary sources, or law reviews, as authority. For instance, commentators have tracked the increase in law review citations throughout U.S. Supreme Court cases, finding significant increases. W. Daniels, Far Beyond the Law Reports: Secondary Source Citations in the United States Supreme Court opinions October Terms 1990, 1940, and 1978, 76 Law Library Journal 1-47 (1983) (noting while only one case in 1900 cited a law review article, by 1978, nearly sixty percent of Supreme Court cases relied on such authority). But see David Hricik & Victoria S. Salzmann, 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 (2005) (surveying every United States Supreme Court opinion from the 2003-2004 term and finding only 3% of the 3,998 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 begun to appear with equal regularity in Supreme Court opinions. HAFEMEISTER, supra note 118, at 53. But see HRICIK & SALZMANN, supra, (finding that only 18% of all citations in the 2003-2004 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. Id. at 38.} As a result, the law itself consists of “variant principles shaped by social needs and not of hard rules applicable through purely formal logic.”\footnote{HAFEMEISTER, supra note 118, at 38.} And 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.\textsuperscript{122} 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 the constitutional scholars’ pride that the field is “the most rigorous of intellectual pursuits.”\textsuperscript{123} Both are intellectual analyses into various social issues, though one focuses on appealing to viewers while the other seeks legal solutions to concrete problems.\textsuperscript{124} Movies are often designed to tell stories for entertainment, but those stories are derived from reality.\textsuperscript{125} Much like an ancient fable still provides a basis for moral lessons, modern movies and television provide examples of social issues that otherwise might not have any impact. “[F]ilm can reorient [legal] theory to attend to problems that its abstract categories have ignored.”\textsuperscript{126}

There is support for this theory in actual court opinions. Popular-culture references are starting to appear in case opinions just as literary references once abounded. For example, John Grisham’s novels have become integrated into the actual

\textsuperscript{122} Law is not only the rules in concrete form, but also what we as society believe the law to be. 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. Kimberlianne Podlas, \textit{The Tales Television Tells: Understanding the Nomos Through Television}, 13 \textit{TEX. WESLEYAN L. REV.} 31, 33 (2006).


\textsuperscript{124} \textit{Id.} (comparing Chief Justice Rehnquist’s opinion about state duty to the movie \textit{It’s a Wonderful Life} to “enlarge our perspective on the same case”).

\textsuperscript{125} \textit{Id.} at 122.

\textsuperscript{126} \textit{Id.}.
Not only is Grisham’s work referenced in legal opinions, but some cases have actually hinged on the use of Grisham’s works at trial. In State v. Saez, the Connecticut Court of Appeals held that references to Grisham during closing argument did not constitute reversible error, and in United States v. Sabbagh, the defendants used Grisham’s novel The Firm to argue that trial counsel had a conflict of interest. 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. Several other cases have referred to The Rainmaker’s plot “when discussing the distasteful reimbursement policies...
of certain insurance companies," or to *The Runaway Jury* when describing the particularities of tobacco litigation.\(^{134}\)

The same phenomenon is born out in reported song references. People tend to identify most profoundly with music that they listened to during their adolescence.\(^{135}\) 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.\(^{136}\) In a survey of song lyrics quoted in judicial opinions, folk singers such as Bob Dylan appear the most.\(^{137}\) In fact, some of Dylan’s lyrics have become almost boilerplate in court opinions.\(^{138}\) Judges use song references that are familiar to them 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, and in turn, how popular culture affects the formation of the law, but 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: *Law/Media/Culture: Legal Meaning in the Age*
“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.” 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. 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.” Jurors expect an understandable story with characters, settings, and plots, just like they see at the movies. So, too, does the general public, as 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, they may distract the reader from the important

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140 Id. at 654.
141 Id. at 653.
142 Id.
legal message, pollute the subject matter, or lose their effect if 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 both myself and perhaps a minute population of people who both read my article and happened to know about The Young Ones laugh.\textsuperscript{144} 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.\textsuperscript{145} 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.\textsuperscript{146} 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.\textsuperscript{147} 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.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{144} The Young Ones (BBC 1982-1984).
  \item \textsuperscript{145} Long, supra note 42, at 563-64; see also SMITH, supra note 58, at 25 (“If the reference is obscure or pretentious, the writer risks confusing, alienating—or worse, offending—the reader.”).
  \item \textsuperscript{146} Friends (NBC television broadcast 1994-2004).
  \item \textsuperscript{147} 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.
  \item \textsuperscript{148} Big Brother (CBS television broadcast 2000-present).
\end{itemize}
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. Likewise, a piece of legal scholarship might not be deemed serious enough to persuade, 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. The very traits that likely were included to spur interest were the ones that undermined credibility and diluted the document’s seriousness. In his article espousing the use of humor to increase accessibility of law review articles, Knight admits that judicial humor might “undermine reverence for legal institutions,” 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, they still give the positive impact of entertaining the reader and breaking the dullness. Accordingly, “dropping pop” into a legal writing may be a more conservative and safer way to shake up the literary style.

Another possible problem with using popular-culture references is that it may pollute the subject matter. This pitfall occurs when the reference irritates or annoys the reader, rather than drawing her in. If the reference is particularly vivid, that irritation

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149 Long, supra note 42, at 559; see also Filler, supra note 70, at 1770 (“When a court’s language is evidentially unserious, it is unlikely that readers will take the opinion seriously.”).
150 Long, supra note 42, at 559-60.
151 Filler, supra note 70, at 1771.
152 Knight, supra note 45, at 908.
153 Long, supra note 42, at 561.
and annoyance will follow the subject matter each time the reader considers it.\textsuperscript{154} 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 her. 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 may have lost its meaning. As more people use popular-culture references, those references may take on a life of their own. Other people’s 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 \textit{against} clarity and persuasiveness.

Similarly, too many references also dilute the impact of the technique. One fabulous popular-culture reference in an appellate brief or a scholarly article might create an impactful theme 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

\textsuperscript{154} See, e.g., Oldfather, \textit{supra} note 36, at 25 (noting a similar effect for metaphors that draw strong associations).
constituencies affected. Some scholars have noted that there is “acoustic separation” between writings targeting laypersons and those targeting the legal profession.\textsuperscript{155} 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.\textsuperscript{156} 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.

\textbf{VII. \textit{Collateral Damage—The Truth?}}

In addition to the practical considerations that might 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.\textsuperscript{157} 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

\begin{footnotesize}
\textsuperscript{155} Filler, \textit{supra} note 70, at 1770
\textsuperscript{157} See, \textit{e.g.}, Oldfather, \textit{supra} note 36, at 25-26 (noting that metaphors “can lead to inattention to other considerations that should rightly factor into the analysis”).
\end{footnotesize}
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 forevermore 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.\footnote{158}

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
expressed real concern that the symbiotic relationship of law and popular culture is
diluting the legitimacy of the former.\footnote{159} “Popular culture may entertain, he says, but the
prosecution of criminal defendants is serious business. His 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.”\footnote{160} 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

\begin{footnotes}
\footnote{158} Silbey, \textit{supra} note 34, at 153; Newberg, \textit{supra} note 25, at 203 (noting that reliance on schemas to
communicate information “suggest conclusions and trigger judgments”).
\footnote{159} \textsc{Richard Sherwin, When Law Goes Pop} 242 (2000); see also Silbey, \textit{supra} note 34, at 142
(“[Sherwin’s] hope is based on, in part, the ability to keep law, as conceived and practiced, separate from
popular culture influence.”).
\footnote{160} Silbey, \textit{supra} note 34, at 143.
\end{footnotes}
characters of the movie *Pulp Fiction* and acquit obviously guilty individuals on their emotional response.  

Rather than evaluating the facts in an objective manner, as instructed in their capacity to do, the jury members may, instead, 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.

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. Sherwin points to the movie *The Thin Blue Line* as an example of how truth has been manipulated through media and inadvertently affected the outcome of the legal process. The movie is a docu-drama written about the conviction of a man for the murder of a Dallas police officer. 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 re-opened the real case and ended in an eventual acquittal of the defendant 12 years after his conviction. Many considered this reversal a victory for justice. Sherwin argues, however, that we can never really know whether

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162 Sherwin Manifesto, *supra* note 35, at 722 (“Fiction, it turns out, will do as nicely as non-fiction when it comes to assimilating categories for thinking and talking about the real.”).
165 *Id.* at 41.
166 *Id.*
the truth has been served. 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.\textsuperscript{167} 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.\textsuperscript{168} In essence, the audience is more swayed by the narrative, or \textit{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 movies \textit{Fatal Attraction}\textsuperscript{169} or \textit{Lolita}\textsuperscript{170} had the potential to unfairly cast the victim as the aggressor.\textsuperscript{171} Recognizing that jurors not only believe that which is familiar, but also import all characteristics of the reference, he argued that their inclusion had the potential to unfairly taint the victim’s image and result in erroneous acquittals.\textsuperscript{172} 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.

\textsuperscript{167} \textit{Id.} at 70.
\textsuperscript{168} \textit{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].”).
\textsuperscript{169} \textit{FATAL ATTRACTION} (Paramount Pictures 1987).
\textsuperscript{170} \textit{LOLITA} (Samual Goldwyn Pathe 1997).
\textsuperscript{171} Taslitz, \textit{supra} note 38, at 488-89.
\textsuperscript{172} \textit{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”).
All of these points are important to the consideration of popular culture as a persuasive tool. But as at least two scholars have noted the warning against sacrificing truth for the sake of persuasion is easier said than done.\textsuperscript{173} 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.” \textsuperscript{174}

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.

And in truth, manipulative persuasion has always been the hallmark of a successful advocate for application of law to 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

\textsuperscript{173} Robert F. Blomquist, ‘A Fascination Without Scruples’: American Popular Culture and Its Corrosive Impact on the Law, 32 CUMB. L. REV. 165, 183 (2002) (“It is difficult, however, to find a clear explanation of how Sherwin would specifically change things.”); Silbey, supra note 34, 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.”).

\textsuperscript{174} \textit{Id}. at 78.
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 do two things: 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 end-run around 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 a popular-culture comparison. In short, 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, “We must learn to discern and guard against the more repugnant forms of narrative manipulation.” 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. But 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.”

175 SPIDERMAN (Sony Pictures Entertainment 2002).