

SECURITIES LAWS IN SOAP OPERAS AND TELENOVELAS: ARE *ALL MY CHILDREN* ENGAGED IN SECURITIES FRAUD?

ELENA MARTY-NELSON*

ABSTRACT

Securities law images are broadcast to millions worldwide through soap operas and telenovelas. Doctors, and professionals in other fields, have recognized the power of the dramatic serial. They have generated a rich body of scholarship demonstrating how this medium of popular culture imparts health messages or effects social change. This Author describes some of those empirical studies and suggests that legal scholars conduct similar empirical or ethnographic studies, particularly on the impact of portrayals of complex legal issues such as securities fraud in serials. The Author explains differences and similarities between telenovelas and soap operas and compares portrayals of legal issues in those types of dramatic serials to portrayals in other types of popular culture media, such as films. Using content analysis, the Author then examines in-depth an insider trading story arc in the soap opera *All My Children* and a deceptive accounting storyline in the telenovela *La Fea Más Bella*. The Author evaluates the images portrayed and in the process critiques some of those securities laws. The Author submits that soap operas and telenovelas are both social educators and social mirrors and that the images depicted in these popular media about securities laws influence, for better or worse, society's perceptions.

* Professor of Law, Nova Southeastern University Shepard Broad Law Center; J.D., Georgetown University Law Center, 1983; LL.M., Georgetown University Law Center, 1986. The author acknowledges with gratitude Professor Anthony Chase, her colleague and friend, for his insightful comments on an earlier draft of this Article. The author is also grateful for the outstanding research assistance of Patricia Castillo, Natashia Sinckler, and Shanelle Browne.

Erica: Samuel Woods has just dreamt this whole insider trading thing up just so he can keep on getting the publicity he's been getting from me . . .

Jack: Erica, I agree Sam targeted you because of your celebrity, but unfortunately, the guy's got a case. . . . Look, you bought 10,000 shares of Chandler [Enterprises]. The very next day, Adam made the announcement that he was reacquiring his company.

Erica: So?

Jack: So, the stock skyrocketed, you sold your shares, and you made, like, what—a \$500,000 profit?

February 26, 2008,
Episode of *All My Children*¹

I. INTRODUCTION

In the above vignette, Erica Kane, a pivotal character on the long-running soap opera *All My Children*, is talking with her attorney, Jackson Montgomery, about her recent arrest for insider trading spearheaded by ambitious U.S. Attorney Samuel Woods. When this episode aired, Erica was out on bail and in denial about the seriousness of the charges. This storyline's focus on insider trading is illustrative of corporate wrongdoing as a recurring theme in dramatic serials.²

¹ *All My Children* (ABC television broadcast Feb. 26, 2008). *All My Children* is a daytime drama serial of the ABC Television Network, a business within the Media Networks operating segment of The Walt Disney Company. Walt Disney Co., Company Overview, http://corporate.disney.go.com/corporate/overview.html#media_networks (last visited Mar. 15, 2009). According to Disney's 2007 Annual Report, "ABC Daytime marked a full decade as No. 1 in daytime drama among Women 18–49, with a double-digit lead over the nearest competitor." WALT DISNEY CO., 2007 ANNUAL REPORT 36 (2007), available at http://amedia.disney.go.com/investorrelations/annual_reports/WDC-AR-2007.pdf.

Erica Kane, played by Susan Lucci, is an extremely popular character of the daytime drama. Beyond her role as a driving force on the show, the character has served as a catalyst for several money-making ventures tied to the serial. The character was mentioned in Disney's 1997 Annual Report. "ABC's daytime dramas have inspired their own products. One of the most popular characters, Erica Kane from *All My Children*, will lend her special touch to a new collector's doll." WALT DISNEY CO., 1997 ANNUAL REPORT 45 (1997), available at http://corporate.disney.go.com/investors/annual_reports/1997/97Annual.pdf.

The Erica Kane character has had several careers, including successfully running a cosmetics company. In Professor Ellen Goodman's interesting article on stealth advertising, she makes note of Erica Kane's earlier career as a cosmetics mogul. She observes that "Revlon, for example, paid for advertising spots in return for a three-month 'story arc' or 'plot placement' featuring them in an ABC soap opera as a rival to the character Erica Kane's cosmetics company." Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 94 n.60 (2006).

Unofficial transcripts of *All My Children* episodes, written by fans, may be found online. TV MegaSite, *All My Children* Transcripts, <http://tvmegasite.net/day/amc/transcripts.shtml> (last visited Mar. 15, 2009).

² See JENNIFER HAYWARD, CONSUMING PLEASURES: ACTIVE AUDIENCES AND SERIAL FICTIONS FROM DICKENS TO SOAP OPERA 148 (Univ. of Ky. Press 1997). Professor Hayward lists the recurring soap opera themes as involving: family interrelations, romantic triangles, money and its relationship to power, social issues, and, more recently, adventure or mystery and self-reflexivity.

Soap operas and telenovelas,³ two types of televised serials, frequently explore complex legal issues, including securities law issues, in subtle and intriguing ways.⁴ This Article presents a study of how such serials portray financial fraud and securities law violations. The Article also seeks more broadly to encourage legal scholars to conduct empirical or ethnographic studies on the impact of portrayals of such legal issues in serials.⁵ Doctors and professionals in other fields have a rich history of publishing empirical studies demonstrating how dramatic serials can serve to impart health messages and their ability to effect social change.⁶ Recently, U.S. Treasurer Anna Escobedo Cabral suggested that dramatic serials could serve as tools to increase financial literacy.⁷ She indicated that she would like to encourage Telemundo, the Spanish-language television network owned by NBC Universal, and other producers of telenovelas and soap operas, to interweave financial literacy themes into their serials.⁸

In Part II, this Article discusses some of the empirical studies used in medicine and other fields in examining the effects of soap operas and telenovelas. This Part includes a discussion of content analysis and reception analysis. Part III describes the soap operas and telenovelas formats and notes their global impact. This Part also explains some of the similarities and differences between the two formats.⁹ In addition, this Part of the Article explains differences between portrayals of legal issues in

³ Soaps and telenovelas are both televised serials. See *infra* Part III, for a discussion on the similarities and differences between the two media.

⁴ Scholars on melodrama suggest that soap operas must be nuanced in their treatment of issues, even when the characters are writ large and the acting is deliberately flamboyant. See LOUISE SPENCE, WATCHING DAYTIME SOAP OPERAS: THE POWER OF PLEASURE (Wesleyan Univ. Press 2005). “On rereading my work, I have noticed an abundance of qualifiers and subordinate clauses. These are probably indicative of soaps’ resistance to being tied down (and of the commercial necessity for soaps to display some variation).” *Id.* at 12. The resistance to being “tied down” may stem, in part, from the need in serials to preserve a character for further adventures where she may be needed not as a villain but rather as a victim, a pawn, or even as a hero.

⁵ This Article is limited to a subset of television serials—soap operas and telenovelas. There are other serials popular in mass culture. As Professor Hayward explains, a serial can be defined as “an ongoing narrative released in successive parts.” HAYWARD, *supra* note 2, at 3. Her analysis of serials moves fluidly from Charles Dickens’ serial novel *Our Mutual Friend* (1864–65) to the soap opera *All My Children*.

⁶ For example, an interesting study published in 2005 in the British Medical Journal analyzed survival rates of coma patients in daytime dramas as compared to real coma patients. See David Casarett et al., *What’s in a Name?: Epidemiology and Prognosis of Coma in Daytime Television Dramas*, 331 *BMJ* 1537, 1537–39 (2005). Part II of this Article discusses those findings and other studies in some detail.

⁷ Jane L. Levere, *Our Hero, Seduced with a Stock Tip?*, N.Y. TIMES, Oct. 14, 2007, at BU3.2. The N.Y. Times’ piece reported that Cabral had stated in a recent conference that her department was in discussions with producers of English and Spanish language soap operas about including financial literacy issues into storylines. In an interview aired October 19, 2007 on *Marketplace Money*, Lisa Napoli discussed with Cabral the planned use of soaps and telenovelas to help educate the public about financial issues. Cabral explained during the interview that financial literacy education requires finding a myriad of ways for presenting material so that various segments of society can receive it. During the interview, Napoli pondered what could have happened “if there had been a soap opera where one of the characters had gotten a sub-prime mortgage and gotten into trouble.” She noted that in that case “maybe we could have saved some of the crises that we are going through now.” Treasurer Cabral gamely responded to the suggestion by agreeing and explaining that “the thinking is that we can educate by absorbing someone else’s experiences—you don’t have to live the drama yourself.” *Financial Education from Soap Operas?* (Am. Pub. Media Oct. 19, 2007).

⁸ *Financial Education from Soap Operas?*, *supra* note 7.

⁹ The critical and popular success of the prime time show *Ugly Betty* on ABC (which was based on a Columbian telenovela—*Bette La Fea*) is an indication of the fluidity of telenovelas. See discussion *infra*.

serials rather than in other popular culture media, such as films.¹⁰ Part IV examines certain corporate fraud and securities law issues as portrayed in the soap opera *All My Children* and the telenovela *La Fea Más Bella*.¹¹ Part V suggests that research on how legal issues are portrayed in serials should continue, and such research should borrow from, and build on, the empirical work generated in other disciplines. Part V also discusses certain policy implications and ties the various assessments together. In keeping with the serial genre chosen, however, Part V leaves this discussion to be continued.

II. EMPIRICAL AND ETHNOGRAPHIC STUDIES ON THE IMPACT OF DRAMATIC SERIALS

An empirical study, published in 2007, tested the hypothesis that viewers of an HIV-related storyline in the soap opera, *The Bold and the Beautiful*, would report significantly lower levels of HIV-related bias than non-viewers.¹² The survey of viewers and non-viewers was conducted in 2003 in Botswana, a country with an extremely high prevalence of HIV/AIDS.¹³

The authors of the study explained that experts from the Centers for Disease Control and Prevention (“CDC”) had consulted in 2001 with the writers on the soap opera, *The Bold and the Beautiful*, in developing the HIV-related story.¹⁴ After statistically controlling for related factors in the surveys, the authors concluded that the “results suggest that stigma may be reduced after viewing a televised serial drama in which HIV infection is

¹⁰ As discussed in Part III below, there is a very influential body of law and popular culture scholarship that is now almost a generation old. The pioneers of law and popular culture scholarship have written multi-faceted critical commentary exploring a myriad of cultural issues and the law through films, music, and literary works. See, for example, Anthony Chase’s intriguing and influential book, ANTHONY CHASE, *MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN* (The New Press 2002), which is described below. The law and popular culture scholars generally have not sought to include empirical or ethnographic studies of audience reception. This Article suggests that such work may be a helpful addition to their influential critical commentary.

¹¹ Official site of *La Fea Más Bella*: <http://www.esmas.com/lafeamasbella/sinopsis/> (last visited Mar. 15, 2009).

¹² Ann O’Leary et al., *Association between Exposure to an HIV Story Line in The Bold and the Beautiful and HIV-Related Stigma in Botswana*, 19 AIDS EDUC. & PREVENTION 209, 209–17 (2007).

¹³ *Id.* at 211. For a sobering and instructive analysis of the scope of this issue and the desperate need for laws to deal with the HIV/AIDS crises, see FLORENCE SHU-ACQUAYE ET AL., *WOMEN, THE LAW AND HIV/AIDS IN AFRICA: A CONUNDRUM FOR THE LEGISLATURE?* (Vandeplas Publ’g 2008). Chapter Two, in particular, delves into the dangers of and effects of stigmatization. *Id.* at 33–50.

¹⁴ O’Leary et al., *supra* note 12, at 210. The authors noted that this collaboration between the experts from the CDC and the writers of the serial took place with assistance from the Hollywood, Health & Society Project in the Annenberg Norman Lear Center at the University of Southern California. *Id.* The same organization is credited for assisting in answering some medical questions raised about the character Robin Scorpio’s pregnancy (airing in 2008) on the soap opera, *General Hospital*. The ABC daytime website provides:

General Hospital heroine Robin Scorpio has lived with HIV for the past thirteen years, and she’s currently expecting a baby. Many viewers have had questions about Robin’s storyline. You’ve asked us how Robin’s HIV-positive status can affect her pregnancy, her romantic life and more. ABC.com got answers from the medical experts at the Centers for Disease Control and Prevention and its affiliate, Hollywood, Health & Society. If you’re concerned about Robin and her baby, we hope you’ll find this Q&A both helpful and informative.

ABC.com, *General Hospital—Robin’s HIV: Your Questions Answered*, <http://abc.go.com/daytime/generalhospital/hivqanda.html> (last visited Mar. 15, 2009).

treated in a nonstigmatized, humane manner.”¹⁵ The HIV/AIDS storyline in *The Bold and the Beautiful*, which unfolds over almost a two-year period, is described as follows:

[A] heterosexual man Antonio (Tony) learns that he has been infected with HIV by a previous girlfriend. His own impulse toward self-stigmatization is countered by supportive friends, his physician, and his fiancée, who is uninfected. His disclosure of his HIV status is rewarded when his fiancée convinces him that she loves him and that they can have a happy, sexually fulfilling life as a serodiscordant couple. They marry and, while honeymooning in an African country, meet a young boy who has been orphaned by AIDS. They visit the orphanage where he stays, hold the babies, and ultimately decide to adopt the boy. They make this decision before learning the boy’s HIV status. Both the boy and the couple are made very happy by this decision: The boy now has a loving family and the couple has the child they thought they would never be able to have.¹⁶

There are several important factors about this study and about the HIV-related storyline execution in the *The Bold and the Beautiful* that require discussion. First, the authors recognize that the results are merely suggestive.¹⁷ They also note that the empirical study does not purport to answer what exactly led to the positive association.

Moreover, the authors admit several possible limitations to their study. They note, for example, that they had no pre-HIV storyline stigma data to compare with the post-exposure storyline data of the viewer groups.¹⁸ Thus, the authors recognize the possibility that viewers of the serial reported a lower bias to HIV/AIDS infected individuals simply because those viewers had a lower HIV/AIDS stigma initially. They posit whether it is possible that such viewers perhaps knew someone who was infected and were, for that reason, drawn to the story and thus elected to view it.¹⁹ The authors, however, reject that conjecture as unlikely. They note that the nature of the soap opera format argues against any self-selection bias. “First, this serial drama[] is largely an entertainment vehicle, and viewers do not watch it for educational content or even socially relevant content; rather they are caught up in the many entertaining stories.”²⁰

The authors note also that because the serial is a typical soap opera, it follows the standard model of portraying “several story lines at once.”²¹ Professor Hayward, when exploring serials, elaborates on the “narrative codes” used by soaps.²² She explains that a typical soap opera has “an episodic structure of six distinct ‘acts,’ each separated by commercial breaks and ending on a note of intermediacy; cutting, within each act, from one to another of three or four scenes involving distinct characters and

¹⁵ O’Leary et al., *supra* note 12, at 213.

¹⁶ *Id.* at 210–11.

¹⁷ *Id.* at 214.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ O’Leary et al., *supra* note 12, at 214.

²² HAYWARD, *supra* note 2, at 148.

storylines; and construction of an interior world and of a complex network of character interrelations.”²³ In the case of *The Bold and the Beautiful*'s HIV-related storyline, Tony's story from his testing, to his fiancée's acceptance, marriage, and their adoption of the child, aired over a span of almost two years. However, as is typical of soap operas, the storyline only aired for a small fraction of each day's show²⁴ while other storylines and characters filled other segments of the show. The researchers reasoned that viewers would thus have been unlikely to tune in for one storyline that would necessitate viewing other unrelated storylines and characters. Thus, the authors concluded that it seemed more reasonable to assume that the viewers were long-term viewers who had watched the same serial for years and were not attracted solely by the HIV-storyline.²⁵

Not all health-related storylines in serials necessarily involve accurate portrayals, however. A study published in the British Medical Journal (“BMJ”) in 2005, *Epidemiology and Prognosis of Coma in Daytime Television Dramas* (the “Coma Study”), concluded that “portrayal of coma in soap operas is overly optimistic” and “may contribute to unrealistic expectations of recovery.”²⁶ The Coma Study analyzed the outcomes and survival rates of coma patients in nine soap operas televised in the United States between January 1, 1995, and May 15, 2005, and compared those to the outcomes and survival rates of real coma patients.²⁷ The methodology used in the Coma Study was different from the one used in *The Bold and the Beautiful* study described above. While both were empirical studies, the Coma Study did not attempt a reception analysis. Rather, the Coma Study compared “survival rates of soap opera [coma] patients” in nine soaps with “pooled data reported in an authoritative meta-analysis” of real coma patients.²⁸

The authors of the Coma Study found significant outcome differences between the patients in the two groups. For example, in terms of mortality, soap opera characters who experienced coma were much less likely to die than real coma patients in the meta-analysis (4% versus 53% for non-traumatic coma; 6% versus 67% for traumatic coma).²⁹ In addition, the authors found that the characters in the soap operas “had a much better than expected chance of returning to normal function” after experiencing a coma than real coma patients (non-traumatic: 91% versus 1%; traumatic: 89% versus 7%).³⁰

The soap opera formula of using long-term characters in slowly developing narratives was perceived to be instrumental by the authors of

²³ *Id.*

²⁴ O'Leary et al., *supra* note 12, at 214.

²⁵ *Id.*

²⁶ Casarett et al., *supra* note 6, at 1537.

²⁷ *Id.*

²⁸ *Id.* at 1538. The authors researched the following nine soap operas, which aired in the United States between January 1, 1995, and May 15, 2005: *Guiding Light*, *General Hospital*, *One Life to Live*, *Days of Our Lives*, *All My Children*, *Passions*, *As the World Turns*, *The Young and the Restless*, and *The Bold and the Beautiful*. *Id.* at 1537.

²⁹ *Id.* at 1537.

³⁰ *Id.*

the *Bold and the Beautiful's* HIV-stigma study in impacting the audiences.³¹ In the case of the Coma Study, the authors reason that it is that same soap opera formula that makes the overly optimistic information about comas troubling. The Coma Study authors recognize that soap operas are commercial ventures and are “not always written to reflect real life,” nor are they “designed with the goal of educating the public about the realities of health and illness, or even about the realities of interpersonal relationships.”³² They note, however, that “the features that promote behaviour change—a compelling story, complex character development, and loyal audience—mean that misinformation can also have a far reaching and pernicious effect.”³³

Some feminist scholars and media scholars have chosen to use ethnographic or quasi-ethnographic studies, instead of, or in addition to, empirical studies. Professor Louise Spence, for example, in her fascinating study of “active” viewers of serials, explains that her study, based on fifteen years of research with over twenty-five viewers of soaps in the New York metropolitan area, “borrowed from the social sciences, especially ethnographic studies that see their efforts as intersubjective engagements” and “empirical research that is aware of and problematizes the *relation* between the scholar and those who are studied.”³⁴ Similarly, Thomas Tufte, in his study of telenovelas aired in Brazil, uses a “qualitative study focusing on the everyday lives of thirteen women, backed up by quantitative information about 105 women in the same neighborhoods.”³⁵ He relies on these case studies to help answer questions such as: “What cultural and generic elements characterize a telenovela? How is their massive presence in everyday life experienced, understood, and used, by the viewers? What constitutes the relation between telenovelas, culture, and everyday life, and how does this relate to the development process in Brazil?”³⁶ Both Spence and Tufte recognize the need for content analysis, but suggest that reception analysis is a necessary corollary.³⁷

³¹ O’Leary et al., *supra* note 12, at 214.

³² Casarett et al., *supra* note 6, at 1539.

³³ *Id.* at 1537.

³⁴ SPENCE, *supra* note 4, at 11.

³⁵ THOMAS TUFTE, *LIVING WITH THE RUBBISH QUEEN: TELENOVELAS, CULTURE AND MODERNITY IN BRAZIL* 6 (Univ. of Luton Press 2000).

³⁶ *Id.* at 2.

³⁷ *Id.* at 234; SPENCE, *supra* note 4, at 10–11. There are numerous other fascinating ways of studying the association of law and popular culture media. As noted above, while this Article does not attempt any reception analysis of what the audience actually perceived, it suggests that such empirical or ethnographic studies of the reception of complex legal issues should be attempted. Part V below recommends such studies. In addition, this Article does not attempt to discern, through interviews or discussions, what the creators of the serials (defined broadly to include the writers, directors, producers, actors, and corporate owners) actually intended to portray in the narrative. See, for example, the piece by Stephanie Francis Ward where she interviews some of the attorneys writing for the popular TV shows *Boston Legal*, *Law & Order*, and *Eli Stone*. See Stephanie Francis Ward, *Making TV Legal*, ABA JOURNAL, June 2008, at 52, available at http://abajournal.com/magazine/making_tv_legal/. See also Richard Catalani, *A CSI Writer on the CSI Effect*, 115 YALE L. J. POCKET PART 76 (2006), <http://yalelawjournal.org/images/pdfs/34.pdf> (for a lively debate on the *CSI* effect on juries). Similar studies of serials are clearly worthwhile. They are not, however, part of this piece. Instead, this Article focuses on an analysis of the content of the narratives of serials. Finally, this Article analyzes certain legal issues in commercial dramatic serials (such as soap operas and telenovelas) and does not address the inclusion of such issues in publicly funded educational programming.

III. TELENOVELAS AND SOAP OPERAS AS DRAMATIC SERIALS

A. DISTINGUISHING FILMS PORTRAYING SECURITIES ISSUES FROM DRAMATIC SERIALS

Telenovelas and soap operas are clearly not the only popular culture media routinely portraying securities law issues. Financial fraud and securities law matters have also appeared with some frequency in films. For example, in the James Bond film *Casino Royale*, the villain's scheme involved short-selling stock in a company and then "forcing the company into bankruptcy by blowing up its prototype" aircraft.³⁸ The short-selling plot was designed to make the villain a \$100 million profit.³⁹ In his wry commentary on the film, Floyd Norris of the New York Times notes that a "generation ago, Bond villains plotted to start nuclear wars or to obtain world domination" but the newer villains "kill just to make a killing in the stock market."⁴⁰

An earlier popular film, *The Big Chill*, includes a famous insider trading scene not unlike the scene with Erica Kane in *All My Children*, excerpted above. In *The Big Chill*, Kevin Kline, in the role of president of a small but growing sneaker company, tips his friend, played by William Hurt, about a pending takeover of his company. The insider trading problem in the film is overt and flagged for the audience. In this scene, Kevin Kline and William Hurt are out running alone and Kline, after first saying that he should not tell Hurt what he is about to divulge, states that "in a few months a large company, a conglomerate, is going to buy our very small company."⁴¹ He goes on to explain that "anybody who has our stock is going to triple their money."⁴² The issue is further highlighted when Kline's character adds, "by telling you this I just violated about sixteen regulations of the Securities and Exchange Commission."⁴³

The facts in *The Big Chill* are unambiguously insider trading, yet the sympathies seem to favor the illegal activity. In the film, the insider/tipper's (Kline's) stated motive for tipping his friend, Hurt, an injured war veteran, who is seen in the movie using drugs and impliedly selling drugs, is to steer

³⁸ Floyd Norris, *Stocks and Bond*, N.Y. TIMES, Nov. 26, 2006, at 3.2.

³⁹ A succinct explanation of short selling is found in *Zlotnick v. TIE Communications*, 836 F.2d 818, 820 (3d Cir. 1988). The court explains that a short seller sells stock he does not own and profits when the stock price drops. "Where the traditional investor seeks to profit by trading a stock the value of which he expects to rise, the short seller seeks to profit by trading stocks which he expects to decline in value. A typical short seller expects decline because, based on his view of the underlying strengths and weaknesses of a business, he concludes that the market overvalues the business' stock. . . . [T]hese underlying facts can concern the present—such as the fact that a stock trades at fifty times its earnings—or they can concern the future—such as the fact that a business will face increased competition." *Id.* Of course, in *Casino Royale* the underlying weakness the villain foresaw in the company whose shares he was short-selling was that the company's prototype airplane would fail spectacularly leading to the collapse of the company's shares. In that case, the villain foresaw the failure, because he planned to destroy the prototype himself.

⁴⁰ Norris, *supra* note 38.

⁴¹ THE BIG CHILL (Columbia/Tristar 1983).

⁴² *Id.*

⁴³ *Id.*

him away from drug dealing.⁴⁴ At the end of the movie, the William Hurt character is staying in town and appears to have a chance at a new life.⁴⁵

Scholars in law and popular culture could have a field day contrasting how securities violations are portrayed and received just by analyzing *Casino Royale* and *The Big Chill*. One violator is clearly and unambiguously portrayed as a villain. The other, perhaps, as merely misguided or even justified. Clearly, films on securities law can and should be productively studied both in terms of their content and their reception, and the film medium is a vital part of law and popular culture scholarship.

One of the pioneering scholars on law and popular culture, Professor Anthony Chase,⁴⁶ uses films very effectively. In his intriguing book, *Movies on Trial: The Legal System on the Silver Screen*,⁴⁷ Professor Chase explores interrelationships among cultural, political, economic, historical and legal issues through films. Professor Chase's multifaceted cultural and critical commentary is structured, in part, he explains, on the doctrinal areas common to legal work: constitutional law, criminal law, tort law, international law and comparative law, with a nod to the law of property.⁴⁸ Professor Chase uses all of these doctrinal areas (basically, the first year curriculum at many U.S. law schools) as a platform for legal, cultural, and film criticism.⁴⁹ This Article borrows from Professor Chase's law and films methodology in using a doctrinal area. Unlike Professor Chase's *Movies on Trial*, which explores the first year law curriculum and international law to boot, this Article is limited to an exploration of one doctrinal area—securities laws. Also unlike Professor Chase's *Movies on Trial*, which focused on films of various genres as the medium of popular culture analysis, this Article focuses on two types of dramatic serials—soaps and telenovelas.

⁴⁴ *Id.* William Hurt's character (as the tippee) is also sympathetically portrayed when he discourages his friend from revealing the information. When Kevin Kline first mentions that he is about to divulge something he should not, William Hurt's character tells him not to do it. Kline's character notes that he had already told their friend, Alex, the secret. Hurt's character quips that for Alex (who had just committed suicide and for whose funeral the friends had gathered) the secret did not go very well.

⁴⁵ *Id.* At the end of the film, the Hurt character also gets a chance at a new girlfriend. Other Hollywood films dealing significantly with securities law issues include *Wall Street*, *Boiler Room*, and *Rogue Trader*.

⁴⁶ Rennard Strickland & Taunya Lovell Banks, *Editors' Introduction*, in *SCREENING JUSTICE—THE CINEMA OF LAW: SIGNIFICANT FILMS OF LAW, ORDER AND SOCIAL JUSTICE* xvii (Rennard Strickland et al. eds., William S. Hein & Co. 2006). The *Editors' Introduction* refers to the pioneering scholars in law and popular culture as "Anthony Chase, James Elkins, and Michael Asimow." *Id.* at xviii.

⁴⁷ CHASE, *supra* note 10.

⁴⁸ *Id.*

⁴⁹ One of the fascinating features of *Movies on Trial* is that, while it interweaves academic and philosophical critical analyses of the intersection of law and culture, it also brings to life numerous movies. One particularly captivating discussion found in his criminal law films chapter focuses on *Dirty Harry*. Professor Chase vividly describes how the character of Detective Harry Calahan (played by Clint Eastwood) enters the screen, the gritty dialogue, the camera work, and a chase scene all the while interspersing critical cultural, political, and legal commentary. *Id.* at 70–73. Chillingly, Professor Chase observes that *Dirty Harry* (and *Straw Dogs* and *Little Big Man*) had the "ability to draw the audience into an unambiguous identification with extremely brutal and violent conduct." *Id.* at 72. One wonders if the more recent Fox television series *24* would be analyzed as also fitting in that group.

B. PRIME-TIME TELEVISION SHOWS WITH SECURITIES ISSUES DIFFER FROM DRAMATIC SERIALS

Of course, certain prime time television shows, which are not classified as melodramatic serials, also interweave securities law issues into their dramas. Professors Naomi Mezey and Mark C. Niles recently studied how films and television differ in portraying the law.⁵⁰ After analyzing various scholarly theories on how law is portrayed in popular culture, Mezey and Niles conclude that “while all mass-mediated popular culture serves a pervasive ideology-reinforcing role in our society, the models of ideological production endemic to television and film are decidedly different.”⁵¹ They posit that “television more consistently produces quite crude versions of legal ideology while film is more likely to portray more complex images of law and legal institutions.”⁵² The authors attribute this distinction, in part, to “differences in structuring production, profits and narrative.”⁵³ They note that television is “almost entirely dependent on corporate advertisers.”⁵⁴ The authors surmise that the “unique profit structure of network television . . . helps account for the fairly narrow ideological range in its legal programming” and that dependency on advertising is arguably “the best explanation for why television is so consistently crude ideologically.”⁵⁵ They further determine, however, that notwithstanding

these differences, a strong ideological message about law’s ability to achieve justice in our society is consistently communicated by both media, and neither offers many subversive or counterhegemonic perspectives on law, although film has the greater potential, tantalizingly if rarely realized, to offer truly oppositional messages to at least some viewers.⁵⁶

While the authors’ analysis in *Screening the Law* of the various popular legal culture theories is clearly thoughtful and interesting, one wonders about their conclusions. First, is there actually such an economic differentiation between movie production and television production, especially in light of the economic interdependence of the two media? Also debatable is whether the legal messages are truly cruder in television.⁵⁷ Is it not also possible that long running serials could explore complex narratives in ways not possible within the confines of a two- or even three-hour movie? A popular television program, such as *Law and Order*, with numerous hours of programming in its various permutations, would likely be able to get a more nuanced version of the law into an image than any

⁵⁰ Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005).

⁵¹ *Id.* at 184.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 170.

⁵⁵ *Id.*

⁵⁶ Mezey & Niles, *supra* note 50, at 184.

⁵⁷ Interestingly, *Screening the Law* astutely, and quite hilariously, recognizes the subversive power of *The Simpsons* and that television show’s ability to address legal issues adroitly. *Id.* at 131.

movie.⁵⁸ Perhaps earlier television prime time programming was crude, but more recent programming does not appear to fit that pattern. In a televised interview on Court TV, Professor Chase notes that “the legal dramas of the 1950s,” such as “*The Law and Mr. Jones*, *Perry Mason*, and *The Defenders*” have “plots [that] seem pretty thin” and legal issues that are “simplistic.”⁵⁹ He contrasts those shows with newer shows such as *Law and Order*, which he describes as having raised the bar very high.⁶⁰ Professor Chase remarks that he could not “imagine a show like *Law and Order* being screened in American television in the 1950s” because it “just would have been over people’s heads.” He reasons, though, that “popular legal education,” by which he means “what people have learned about the law from Court TV, the news, and other sources, has made programs like *Law and Order* possible.”⁶¹

A primary reason this Article focuses on televised melodramatic serials, as opposed to films or prime time episodic television shows, is that serials by their nature are designed to attract long-term viewers who are deeply involved with the characters and who consistently follow long-term story arcs. These features suggest that serials’ narratives could have an even more pervasive effect on the audience than the narratives of other media. In addition, as Professor Chase observed, in an earlier influential piece on popular culture, “unlike most motion pictures and prime time television series, the ‘soaps’ tend to feature a range of civil attorneys rather than just criminal lawyers.”⁶² Professor Chase also posits that “soap operas have an even more direct connection to popular conceptions of law and how the legal system functions.”⁶³

C. SOAPS AND TELENOVELAS—DIFFERENCES AND SIMILARITIES

Before exploring the reach of the dramatic serials further, however, it is necessary to describe briefly telenovelas and soaps to the uninitiated.

⁵⁸ Professor Carrie Menkel-Meadow makes the following observation regarding depictions of lawyers in television shows versus movies: “Longer treatments of lawyers’ actions in serialized television shows and longer novels allow more panoramic, less ‘snapshotted’ pictures of lawyers to be painted, than in movies or short stories, which, in turn, can be used effectively to highlight particular decisions.” Carrie Menkel-Meadow, Symposium: Law and Popular Culture, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1309 (2001).

⁵⁹ Court TV News, Transcript: “*Legal Reelism*”—Law Professor Anthony Chase Discusses the Relationship between Movies and Real Life, Feb. 7, 2003, http://www.courtstv.com/talk/chat_transcripts/2003/0207chase.html.

⁶⁰ *Id.*

⁶¹ *Id.* Complex business legal issues appear in various prime time television shows to some degree. Professor Paul Caron’s outstanding tax blog (TaxProf) recently noted that an episode of the popular television show *Bones* (entitled *The Baby in the Bough*, which first aired April 28, 2008) contained a reference to Cayman Island tax shelters. TaxProf Blog, Tax Angle on *Bones*, http://taxprof.typepad.com/taxprof_blog/2008/05/tan-angle-on-bo.html (May 7, 2008). TaxProf Blog also led this Author to a wealth of additional information on law and popular culture. On June 15, 2008, the following post appeared on TaxProf Blog: “Mark DeAngelis (UConn, School of Business) has a wonderful web site (Errors of Law) with songs, music videos, movie clips, video clips, and case-specific clips for use in law school classes.” TaxProf Blog, Music, Movie, and Video Clips for Law School Classes, http://taxprof.typepad.com/taxprof_blog/2008/06/music-movie-and.html (June 15, 2008). This reference, in turn, led to the following site that undoubtedly will prove valuable for my classes. Errors of Law Home Page, <http://blawprof.googlepages.com/home> (last visited Mar. 15, 2009).

⁶² Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 558 (1986).

⁶³ *Id.*

Obviously, both soap operas and telenovelas are multifaceted and this Article can only attempt a rough introduction to the two genres.⁶⁴ In a recent case alleging tortious interference with a contract for exclusive services of a Mexican telenovela actor, the Eleventh Circuit Court of Appeals briefly explained telenovelas.⁶⁵ The court described telenovelas as “short serialized television dramas that are similar to American soap operas.”⁶⁶ By “short serialized dramas,” the court’s shorthand recognizes that, unlike American soap operas which are designed to last indefinitely,⁶⁷ telenovelas have endings allowing for narrative closure.⁶⁸ The typical telenovela ends after 180 to 200 episodes (around eight months of nightly programming).⁶⁹

In distinguishing between telenovelas and soap operas, the Eleventh Circuit Court of Appeals further noted that telenovelas differ from “American soap operas, which attract daytime audiences,” because “telenovelas air during prime-time viewing hours.”⁷⁰ While this statement is essentially correct, in that American soap operas generally first air in daytime when they are broadcast in the United States, several changes in the last decade suggest qualifiers. For example, when broadcast internationally, American soap operas may air during the day or at prime time.⁷¹ Moreover, American soap operas, even when televised in the United

⁶⁴ Moreover, any description is limited in that there are also considerable distinctions among telenovelas from various countries and distinct cultures.

⁶⁵ Grupo Televisa, S.A. v. Telemundo Commc’ns Group, Inc., 485 F.3d 1233, 1236 (11th Cir. 2007).

⁶⁶ *Id.*

⁶⁷ For example, *Guiding Light* has been airing for more than fifty years. TUFTE, *supra* note 35, at 98.

⁶⁸ Antonio C. La Pastina, Cacilda M. Rego & Joseph D. Straubhaar, *The Centrality of Telenovelas in Latin America’s Everyday Life: Past Tendencies, Current Knowledge, and Future Research*, 2 GLOBAL MEDIA J. (2003), available at <http://lass.calumet.purdue.edu/cca/gmj/sp03/gmj-sp03-lapastina-rego-straubhaar.htm> [hereinafter *Centrality of Telenovelas*].

⁶⁹ *Id.* While telenovelas end, successful telenovelas have at times been resurrected in some form or another. There have been, for example, numerous permutations of the *Ugly Betty* telenovelas. The original *Ugly Betty* telenovela, called *Yo Soy Betty, La Fea*, was produced in 1999 in Columbia by the Colombian Network, RCN. It has since been remade in different languages and different countries. The narrative is basically the same, but some cultural aspects are changed. One very popular alternate version was *La Fea Más Bella*, the Mexican version, was set in Mexico and used Mexican cultural themes. It was produced by Televisa in 2006. *La Fea Más Bella* Producción, <http://www.esmas.com/lafeamasbella/produccion/> (last visited Mar. 15, 2009). The narrative of *Yo Soy Betty, La Fea* has been reproduced in many countries, including Germany, India, and Spain. WorldScreen.com, Profile of Fernando Gaitán,

<http://www.worldscreen.com/executivecurrent.php?filename=gaitan1026.htm> (last visited Mar. 15, 2009). The Chinese version of *Yo Soy Betty, La Fea*, called “Chou Nu Wu Di” or “The Prettiest Ugly Girl” is scheduled to air immediately after the summer 2008 Olympic Games. Normandy Madden, *Unilever Sponsors ‘Ugly Betty’ in China; Branded-Content Deal Includes Dove, Lipton and Clear Shampoo*, ADVER. AGE, Apr. 21, 2008. Similarly, the very popular Brazilian telenovela *El Clon*, which was originally produced in Portuguese, is scheduled to be reincarnated in Spanish for the U.S. Hispanic Market through a partnership between Telemundo and TV Globo. Robyn-Denise Yourse, *Tuning in to TV*, WASH. TIMES, May 20, 2008, at B4. Another qualifier to the statement that telenovelas have definite endings is that, while rare, some telenovelas do actually continue their narratives in sequel form. RCN in conjunction with Telemundo made a sequel of *Yo Soy Betty, La Fea*, entitled *Eco Moda*, which was released in 2001. *Eco Moda*, <http://www.imdb.com/title/tt0301263/> (last visited Mar. 15, 2009). In addition, a Mexican telenovela geared towards teenagers, *Clase 406*, had three sequels and thus lasted four seasons. *Clase 406*, <http://www.esmas.com/clase406/> (last visited Mar. 15, 2009).

⁷⁰ *Grupo Televisa*, 485 F.3d at 1236.

⁷¹ In Iceland, for example, *The Bold and the Beautiful* aired during prime time, at least in the summer of 2007, when this Author was visiting. In Finland, *The Bold and the Beautiful* “is a major hit on the MTV [an independent commercial channel] prime time schedule.” Poul Erik Nielsen, Museum of Broad. Commc’ns, *Nordic Television*, <http://www.museum.tv/archives/etv/N/htmlN/nordictelevi/nordictelevi.htm> (last visited Mar. 15, 2009).

States, can now be viewed at times other than daytime. For example, Disney airs its daytime dramas, *All My Children*, *One Life to Live*, and *General Hospital*, at night on Soap Net, a cable television station.⁷² Also, CBS allows viewers to watch its daytime dramas, *The Young and the Restless*,⁷³ *The Bold and the Beautiful*, *As the World Turns*, and *Guiding Light*, at any time after they have first aired on the network for a full week on the Internet.⁷⁴ The shows are available for viewers to watch on the CBS website the same day they are broadcast starting immediately after they air in California.⁷⁵

Although there continue to be distinctions in terms of the existence of narrative closure and initial broadcasting times, there are also significant similarities between the two media. Both soaps and telenovelas fit the formal characteristics of serials used by Professor Hayward, in her analysis of dramatic serials ranging from Charles Dickens' *Penwick Papers* to soap operas.⁷⁶ Professor Hayward explains that serials share the following five characteristics: (1) they "postpone narrative resolution," (2) they "intertwine multiple subplots," (3) they typically "feature large casts of characters," (4) they "incorporate audience response," and (5) they "incorporate current social issues."⁷⁷

While the two media—telenovelas and soaps—fit those characteristics, the degree to which they invoke the different characteristics varies. As mentioned above, soaps take postponing the "narrative resolution" to an extreme, not seen in telenovelas. There are also certain differences between the target audiences of soaps and telenovelas. Telenovelas, which are designed to be broadcast during prime time, are expected to, and do, attract millions of male and female viewers equally, of all ages and social classes.⁷⁸ By contrast, soap operas, at least in the United States, have traditionally targeted women.⁷⁹

⁷² Disney's Soap Net soap opera cable channel transmits dramatic serials shortly after they air on the broadcast network. THOMAS P. SELZ, MELVIN SIMENSKY, PATRICIA ACTION, & ROBERT LIND, 1 ENTERTAINMENT LAW THIRD EDITION: LEGAL CONCEPTS AND BUSINESS PRACTICES §2.26 (2007 update). Soap Net's "additional use of programming helps offset the production costs of ABC's daytime dramas." *Id.* "Soap Net is also seen as a new way to reach women that work outside the home. Although ABC affiliates initially opposed the introduction of the new cable channel, arguing that ABC would be competing against them, the ratings of the ABC broadcasts have not suffered." *Id.*

⁷³ *The Young and the Restless* has been the highest rated soap for the past five years. CBS Daytime Home Page, <http://www.cbs.com/daytime/> (last visited Mar. 15, 2009).

⁷⁴ Similarly, the widely popular British soap opera *EastEnders* is available for seven days after airing on the BBC iPlayer. BBC—EastEnders—News, Watch EastEnders on the Web, http://www.bbc.co.uk/eastenders/news/news_20071218.shtml (last visited Mar. 15, 2009).

⁷⁵ *Id.* They are available starting at 6 p.m. Pacific Time/3 p.m. Eastern Time of the day they are first broadcast. *Id.* In spite of the time shifting allowed by DVRs and computers, however, the initial afternoon broadcasting times presumably continues to influence advertisers when breaking down demographics for soap operas broadcast in the United States.

⁷⁶ HAYWARD, *supra* note 2, at 4. Professor Spence, in her scholarship on serials, distinguishes serials from television series that have some or more of the serial characteristics. For example, she notes that television series "generally have continuing characters and continuing settings" but that they have "different stories in each episode" and the stories "are usually resolved at the end of each" episode such that "[t]he sequence of episodes in a series is generally interchangeable." SPENCE, *supra* note 4, at 189 n.103.

⁷⁷ HAYWARD, *supra* note 2, at 4. In securities laws parlance one could say that soaps and telenovelas share a family resemblance.

⁷⁸ *Centrality of Telenovelas*, *supra* note 68.

⁷⁹ *Id.*

Perhaps because of the target audiences, researchers have recognized that the soap opera genre in the United States has been “discriminated against primarily due to its association with female audiences.”⁸⁰ Interestingly, when scholars attempt to elevate the relevance of soap operas they sometimes do so by noting that more recent soap opera audiences include “businesspeople, professional athletes, retirees, and college students.”⁸¹ Even when the American Association of Law Schools (“AALS”) Section on Legal Writing put on an otherwise intriguing panel presentation on the value of lawyers using narratives and suggesting increased teaching on the use of narrative, one of the presenters disparaged soap operas and soap opera viewers.⁸² By contrast, Professor Spence, in her ethnographic study of soap opera audiences, refuses to accept what she refers to as such “displays of taste” or “the business of discriminating between approved pleasures and those considered more base” as a “manner of establishing a social distinction, of positioning oneself in a social hierarchy.”⁸³

Regardless of the target audience composition, however, it is clear that audience reaction is important to, and can affect, the narrative of both types of serials. The audience’s power to affect the narrative development of telenovelas is freely acknowledged by their writers and producers. The narrative for a telenovela “undergoes changes based on the response of the audience.”⁸⁴ This audience reaction for telenovelas is “assessed partly through audience polls, and partly through direct response of the viewers in letters and phone calls to the TV networks and especially to the actors.”⁸⁵ When necessary to respond to audience preferences, “more chapters can be written where a popular character gets a more prominent role in the plot” or a telenovela could be “prolonged or cut short.”⁸⁶ This ability to change the story on a dime is available to telenovelas because the typical telenovela author is only fifteen to twenty chapters ahead of his audience.⁸⁷ Often, the telenovela author writes the middle and final episodes of the narrative only after taking into account audience response.⁸⁸

Soap operas in the United States also react to their audiences, but the audience’s power to affect the storyline in soap operas is less clear and certainly less overt. Professor Hayward notes that soap opera producers do, however, “now work actively to determine audience desire, by means of

⁸⁰ *Id.* Telenovelas have also been “devalued” by some. In the case of telenovelas the discrimination is based on “its class association that placed it in the realm of the popular.” *Id.*

⁸¹ Rod Carveth, *Soap Operas*, in *PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE* 181 (Robert M. Jarvis & Paul R. Joseph eds., Carolina Academic Press 1998). That chapter has a terrifically funny description of the professionalism (or lack thereof) of soap opera lawyers, particularly of the lawyers on *The Young and the Restless*.

⁸² Panel Discussion, *Developing the 5th MacCrate Skill—The Art of Storytelling*, 26 *PACE L. REV.* 501, 518–19 (2006).

⁸³ SPENCE, *supra* note 4, at 182 n.14.

⁸⁴ TUFTE, *supra* note 35, at 95.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

focus groups, quantification and analysis of viewer mail, and other strategies.”⁸⁹

The narrative structure of both types of serials also fosters this sense of audience empowerment and interactivity. When the story arc involves legal issues, for example, audiences of melodramatic serials are often privy to flaws in the application or prosecution of the cases while the main characters are kept in the dark.⁹⁰ Also, audiences may be the only ones aware of the complexities of the facts or the laws. In some cases, the audience is aware of the actual culprit and knows the accused is innocent of the charge.⁹¹ In other instances, the audience knows that the accused is conceding guilt in order to protect another, typically a family member, who in turn may also actually be innocent. While sometimes the various characters learn of conflicting facts, often only the audience is given insight into the actual facts, even long after the story arc is over. In this way, the audience is similar to a narrator in a novel. Unlike the narrator, however, the audience learns through dialogue and by being present in various scenes, not generally by being privy to the thoughts of one or more of the characters. Sometimes, however, the soaps or the telenovelas allow the audience to reach almost that level of intimacy with a character by overhearing the character talking to herself or when watching the character’s dreams.

The final factor Professor Hayward used to characterize serials is that they “incorporate social issues.” This characteristic is found in both telenovelas and soap operas, although again in slightly differing degrees. Scholars have varying views as to both the effects of telenovelas and their ability to incorporate social context. On one end of the spectrum is the belief that the “telenovela is a mere showcase for ‘bourgeois society’ with the pernicious effect of mitigating—through the illusion of abundance—the unfilled material aspirations of its audience, all the while legitimating a way of life that takes consumerism to the extreme.”⁹² On the other side of the continuum are scholars who contend that “the telenovela has created the space for critical-realist dramas whose narratives (and controversial issues such as, for instance, women’s liberation, political corruption, and homosexuality), have called attention to actual conflicts and mobilized public opinion for social change.”⁹³ This later group of scholars argues that “within certain limits, the telenovela is a vehicle of innovative, provocative and politically emancipatory popular culture rather than a mere instrument for the reproduction of capitalist ideology and consumer desires.”⁹⁴

⁸⁹ HAYWARD, *supra* note 2, at 20. In a recent interview with the staff of *Soap Opera Digest*, a magazine dedicated to American Soap Operas, ABC Daytime President Brian Fons explained that the character of Dixie in *All My Children* would reappear on the show (in the form of a ghost) to bring closure to a story arc, in part because the soaps’ audience had reacted negatively to the character’s sudden and undignified death. Mara Levinsky, *Heaven Sent: AMC’s Dixie Returns on a Haunting Mission as ABC Seeks to Right a Storyline Wrong*, SOAP OPERA DIGEST, May 6, 2008, at 37.

⁹⁰ SPENCE, *supra* note 4, at 111–13.

⁹¹ *Id.*

⁹² *Centrality of Telenovelas*, *supra* note 68.

⁹³ *Id.* (citations omitted).

⁹⁴ *Id.*

With regard to soap operas, Professor Hayward found that serial history “from Dickens onward inscribes a narrative of the absence, elision, stereotypical inclusion, and gradual visibility of populations marginalized not only by gender but also by race, class, and sexual preference.”⁹⁵ She then reasons that the soap opera version of serials with their “refusal of closure, recycling of characters and plots, and fluid construction of temporality allow them to explore shifting identities in ways not possible in more traditional narrative spaces.”⁹⁶ Some, but not all, of those features, can be found in telenovelas, thus allowing telenovelas some of the same opportunities to explore social issues as soap operas.

Another, albeit more superficial, similarity between both types of serials is that they undeniably have a global reach. For more than thirty years, the United States and Latin American countries have exported their soap operas and telenovelas.⁹⁷ More than two billion people around the world are estimated to watch serials regularly.⁹⁸ For example, the soap opera, *The Bold and the Beautiful*, which is produced in the United States, is televised internationally and is estimated to reach 350 million households in over 100 countries.⁹⁹ Similarly, Latin American telenovelas are exported and viewed worldwide. When exported to Russia, the Mexican hit *Los Ricos Tambien Lloran (The Rich Also Cry)* became the country’s top-rated show with more than 100 million fans.¹⁰⁰ In the United States, Latin American telenovelas have become top sellers on Spanish-language networks, which on occasion have even surpassed English-language networks in ratings in some major markets, such as Miami and Los Angeles.¹⁰¹ In the Baltic countries, Mexican telenovelas (such as *Simply Maria*) are very popular, second only to entertainment shows made in the United States.¹⁰² Soap operas and telenovelas are no longer developed solely in North and South America.¹⁰³ In Asia, both Japan and South Korea are currently producing widely successful soap operas.¹⁰⁴ And, Syria and Jordan have produced various soap operas, which have been broadly watched in Saudi Arabia, the Gulf States, and Iraq.¹⁰⁵

⁹⁵ HAYWARD, *supra* note 2, at 191.

⁹⁶ *Id.*

⁹⁷ Ibsen Martínez, *Romancing the Globe*, FOREIGN POL’Y, Nov./Dec. 2005, at 48.

⁹⁸ *Id.*

⁹⁹ O’Leary et al., *supra* note 12, at 210.

¹⁰⁰ Martínez, *supra* note 97.

¹⁰¹ *Id.*

¹⁰² KEVIN O’CONNOR, CULTURE AND CUSTOMS OF EUROPE: CULTURE AND CUSTOMS OF THE BALTIC STATES 158 (Greenwood Press 2006).

¹⁰³ Martínez, *supra* note 97.

¹⁰⁴ LEIPING BAO, *China*, in TEEN LIFE AROUND THE WORLD: TEEN LIFE IN ASIA 19, 29 (Judith J. Slater ed., Greenwood Press 2004).

¹⁰⁵ JOHN A. SHOUP, CULTURE AND CUSTOMS OF THE MIDDLE EAST: CULTURE AND CUSTOMS OF JORDAN 51 (Greenwood Press 2007).

IV. FINANCIAL FRAUD IN SERIALS

A. INSIDER TRADING AND *ALL MY CHILDREN*

Securities issues, when they arise in soap operas and telenovelas, are often handled inventively in the story arcs. Unlike certain legal issues which are inherently melodramatic—such as murders and courtroom trials—securities law issues tend to demand more nuanced storylines and character development in order to engage the audience. Accordingly, securities issues are often well developed in the narratives.

Erica Kane's securities law story arc is illustrative. In Erica's insider trading case, the audience is aware of most of the basic facts. Through dialogue, the audience discovers that Adam Chandler, the former CEO and founder of Chandler Enterprises, has tipped off Erica, one of his ex-wives, that he is about to reacquire Chandler Enterprises. Armed with that information, Erica purchases shares in Chandler Enterprises. Shortly after her purchase, Adam reacquires the company and its stock price surges. Erica later sells her newly acquired shares and makes a profit of about \$500,000. Ambivalence towards these insider trading laws, however, is evident in much of the way the soap opera develops the story.

For example, Erica is arrested in front of a live audience while she is hosting a charity fundraiser for women's heart health.¹⁰⁶ She is not offered the opportunity to turn herself in or to be arrested in her office or home. In addition, the audience is well aware that the U.S. Attorney spearheading Erica's criminal prosecution is seeking to become a U.S. Senator and thus may be politically motivated. Also, the tipper, Adam Chandler, is not charged or, it appears, even seriously investigated.¹⁰⁷ In fact, when Erica confronts Adam about this irony, his disregard for the legal system in this area is exposed. The following exchange between the two business moguls, Erica, the tippee, and Adam, the tipper, which occurs shortly after Erica's arrest, is telling.

Erica: This is all your fault.

Adam: Wha—well, I don't know how you can say that. I'm not the one who got arrested for insider trading.

Erica: Of Chandler stock.

Adam: Well, of course, that's just a technicality. It had to be somebody's.

Erica: Adam, you told me that you were going to get back Chandler Enterprises.

¹⁰⁶ Interestingly, this charity function is part of a product placement story arc involving Campbell's Soup and Prego's spaghetti sauce.

¹⁰⁷ Very generally, the person transferring the material nonpublic information is referred to as the tipper. The recipient is referred to as the tippee.

Adam: Well, I was— it was a friendly conversation. I didn't tell you to go out and buy some.

Erica: I know. I know— that's what I told them. Well, what was I supposed to do with that information?

Adam: Darling, you should've done what I would've done in that situation. What you do is find a third party. One of your worker bees or some distant relative who can funnel it back to you later on, you see. That's—that's Business 101, Erica, my dear.

Erica: That is—that is shady business.

Adam: Well, I'm not the one who got arrested.

Erica: Adam, this is serious. This is my life we're talking about. I could go to prison for five years or more. So what are you going to do about it?¹⁰⁸

Adam Chandler's quip about "Business 101" in this excerpt suggests that he believes that Erica's true failure was having her trades discovered. He also cynically implies that she only got caught because she bought the stocks herself after his tip. He appears surprised that she did not engage in what he suggests is a typical subterfuge and use an accomplice to purchase the shares on her behalf. This cynicism is somewhat countered during Erica's arrest when two supporting characters, Ava and Amanda, are overheard discussing Erica's plight. Ava suggests that Erica will get away with it because she is rich and rich people can buy their "way out of anything."¹⁰⁹ Amanda, in a nod to current events, responds quickly: "Not necessarily. Hello? Does the name Martha Stewart mean anything to you?"¹¹⁰

Shortly after this scene, Erica decides not to fight the charges and instead decides to plead guilty to one count of insider trading in exchange for the U.S. Attorney's recommendation of a six month prison term. Her son-in-law, Zach Slatter, questions her motives. He asks whether she is pleading guilty solely to deny the U.S. Attorney a chance to obtain publicity through her high profile trial. Erica hides her fears and blithely states of her upcoming prison stint: "Actually, what I think is this is going to be a really fascinating experience. I mean, think of all the stories I'm going to come away with—I'm going to a federal prison for women. Imagine—imagine the interesting stories I'm going to hear."¹¹¹

Despite Erica's casualness in that scene and the tipper, Adam Chandler's, cynicism, insider trading is not portrayed as a victimless crime in the *All My Children* story arc. There is a disquieting scene shortly after Erica is released on bail and before she pleads guilty. Erica is seen leaving

¹⁰⁸ *All My Children* (ABC television broadcast Feb. 28, 2008).

¹⁰⁹ *All My Children* (ABC television broadcast Feb. 19, 2008).

¹¹⁰ *Id.*

¹¹¹ *All My Children* (ABC television broadcast Mar. 5, 2008).

a restaurant with her son-in-law, when she is stopped by a stranger, a woman. The stranger, who looks very distressed, calls out to Erica. When the son-in-law protectively steps in and asks if he can help, the stranger says with contempt, “Maybe you can tell your friend there what she did really stinks. She should get six years, not six months.”¹¹² This outburst clearly unnerves Erica who starts to comprehend the gravity of her situation. The audience learns how this is affecting Erica by being privy to one of her nightmares.¹¹³

Moreover, the government’s concerns regarding the ramifications of insider trading are developed further in the following exchange between the U.S. Attorney, Samuel Woods, and Erica’s attorney, Jack Montgomery. Jack is trying to convince Samuel to reduce the prison time in Erica’s plea agreement:

Samuel: *Erica Kane committed a crime, Jack.*

Jack: *Yes, she did, and nobody denies that, including Erica.*

Samuel: *But she’s not admitting to the fallout, the effect of it, the residuals. When Erica Kane makes an inside trade and makes a lot of money, you know what happens? People lose money. People that don’t have lot of money are losing college funds, losing their life savings—all of it, gone.*

Jack: *Sam, Sam, you know what? I wasn’t born yesterday, and I’ve heard your speeches.*

Samuel: *This is real life, it’s not a speech.*

Jack: *I understand you’re all for the little guy. And you know what? Good for you. I’m behind you 100 percent, but here’s what you can’t do, what you must not do, and that’s set yourself up to play God.*

Samuel: *And I would never do that. And I take that accusation seriously.*

Jack: *Good, you should, because I’m being serious. I see what you do, Sam. I see what you do. You look at the crime, you look at who committed it. By God, if that person is rich and powerful, whoa, the price goes up, doesn’t it?*

Samuel: *And if they’re rich and powerful, you know what? They can afford a guy like you and a guy like me.¹¹⁴*

The drama is further heightened, and the seriousness of her plight emphasized, in the next episode when Erica is in the courtroom to plead guilty. The Judge admonishes that violation of the securities laws must

¹¹² *Id.*

¹¹³ As mentioned above, allowing the audience into the character’s thoughts through dreams is a tool used in serials to empower the audience.

¹¹⁴ *All My Children* (ABC television broadcast Mar. 13, 2008).

have significant consequences. He states that he is not pleased with, and might not accept, the six months plea bargain arrangement between the prosecutor's office and Erica's attorney. Upon hearing outcry from both sides, the Judge reminds the parties that he is not bound by the prosecutor's recommendations and suggests that perhaps an eighteen months prison sentence might be more appropriate than a six months sentence in these circumstances.¹¹⁵ Only after Erica's detailed and contrite statement accepting responsibility does the Judge agree to accept the six months plea bargain.¹¹⁶ The sentence imposed is a "five million dollar fine, two years of community service, and six months in prison," with "time to be served in a federal penitentiary."¹¹⁷

Viewers learn, for better or worse, from these images in serials. These images influence how viewers think and act in relation to the legal system, including the part of the legal system which is the culture of securities laws. What are these images of Erica's insider trading story depicting about the securities laws? How accurate are the portrayals of the securities issues? What are they demonstrating about how those laws are enforced? When, for example, the prosecutor admonishes Erica's defense attorney and states that Erica's insider trading causes people to lose money and that "people," including those "[who] don't have lot of money, are losing college funds, losing their life savings—all of it, gone,"¹¹⁸ which "people" is he referring to? And, when Erica's defense attorney retorts that the prosecutor need not make self-righteous speeches and suggests that the prosecution was driven by a desire for publicity, which version resonates?

The prosecutor could be suggesting that the "people" who are harmed by Erica's insider trading are those who sold their shares to Erica (albeit indirectly in the market) at a lower price than the shares fetched immediately after the takeover. Presumably, since Erica was purchasing her shares on the open market, her substantial purchases were driving up, at least slightly, the price for the shares of the target company. Those shareholders who were induced to sell and who only sold their shares because of the slight uptick in price from Erica's purchases, and who otherwise would not have sold their shares that day, were harmed. Those selling shareholders did not get to benefit from the huge surge in value attributable to Adam Chandler's takeover of the company.¹¹⁹ Are these people "losing college funds," as suggested by the prosecutor? That part may well be a stretch. However, those sellers do lose the opportunity to profit from the takeover of the company whose shares they had held until Erica started purchasing shares while armed with the inside information of Adam's impending takeover. Also, the acquiring company would presumably have to pay a slightly higher price for the shares of the target

¹¹⁵ *All My Children* (ABC television broadcast Mar. 14, 2008).

¹¹⁶ Her contrition is clear from the statement. However, it is unlikely that her allocation would have been accepted, because she does not admit to scienter. See discussion of the elements of insider trading below.

¹¹⁷ *All My Children* (ABC television broadcast Mar. 14, 2008).

¹¹⁸ *All My Children* (ABC television broadcast Mar. 13, 2008).

¹¹⁹ The audience is told of the surge in the stocks after Adam Chandler's takeover in a scene between Erica and her attorney. *All My Children* (ABC television broadcast Feb. 26, 2008).

company—if Erica’s pre-public purchases in the stock caused an uptick in their price.

Another reading of the “people” who the prosecutor suggests are harmed is much more expansive. The prosecutor might well be referring not just to those harmed directly by Erica’s insider trading, or even by generic insider trading, but also to all those investors who suffer losses due to securities fraud in general. The popular culture has, of course, absorbed the Enron debacle. Enron brought home the idea that securities fraud could wipe out retirement accounts and, as the prosecutor in the story arc states, “college funds” and “life savings.” The serial’s use of insider trading, which is relatively easier to explain to the public than massive accounting fraud, may simply be a mechanism to conjure up visions of how securities fraud can devastate lives of regular “people.” Perhaps these are then the “people” whose investments, either directly or through retirement accounts, are lost or diminished by securities fraud and illegal informational asymmetry. The prosecutor in the scene might also be referring generally to the drops in value due to diminished investor confidence in the integrity of the system when securities fraud goes unpunished.

Rather than exploring further the ramifications of Erica’s insider trading on the markets and on the selling shareholders, it is helpful to examine whether the facts in the storyline add up to insider trading. There are two theories of insider trading deemed to be prohibited by Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder. The classical theory of insider trading prohibits the purchase or sale of a security of a company on the basis of material nonpublic information about that security or company, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the *company* or the *shareholders* of that company.¹²⁰ Thus, under the classical theory, a corporate insider or temporary insider (i.e., underwriter, attorney, or accountant working on behalf of the company) cannot trade while in possession of material nonpublic information regarding that company or its securities.¹²¹ The other theory of insider trading is referred to as the misappropriation theory.¹²² The misappropriation theory prohibits the purchase or sale of a security of a company on the basis of material nonpublic information, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the *source of the information*.¹²³

In the movie *The Big Chill*, referred to above, the tipper, played by Kevin Kline, was the president of the target company whose shares were purchased on the basis of material nonpublic information about an impending takeover of his company. Kline’s character, as the president of the company, was clearly an insider of the company and his tip and the subsequent trades based on that information were violations of the classical insider trading theory.¹²⁴ By contrast, in Erica Kane’s *All My Children*

¹²⁰ United States v. O’Hagan, 521 U.S. 642, 643 (1997).

¹²¹ Chiarella v. United States, 445 U.S. 222, 228–30 (1980).

¹²² O’Hagan, 521 U.S. at 643.

¹²³ *Id.*

¹²⁴ See below for a discussion of tipper/tippee liability.

storyline, the tipper, Adam, is not an insider, or a temporary insider of the company whose shares are purchased.¹²⁵ Rather, Adam appears to own the acquiring company. Since he is not an insider of the company whose shares Erica purchased, the classical theory does not apply. Instead, the misappropriation theory would be the applicable theory.

Unfortunately for this Article (but perhaps not for the soap opera audiences in terms of the pace of the story), Erica pled guilty to insider trading instead of mounting a defense. Thus, the story arc never required the government to develop all the elements of tippee liability under a misappropriation based insider trading case. Would the prosecutor have been able to make the case?

It appears that if the government had gone to trial, it would have been able to prove that the nonpublic information about the takeover was “material.” The Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*,¹²⁶ explained that information is “material” when there is a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”¹²⁷ In *Basic Inc. v. Levinson*, the Supreme Court cited the *TSC Industries* formulation of materiality in the context of a takeover.¹²⁸ In the *All My Children* storyline, the target company, Chandler Enterprises, which had been moribund without Adam in charge, was about to be reacquired by Adam, the one person who had run it very successfully for decades. In addition, the share price of the target company stock sharply increased after the takeover. Materiality of the information can be demonstrated by market reaction following public disclosure of the information.¹²⁹ While the audience is not apprised of the price of the shares before and after the acquisition, it is clear that Erica’s purchase and quick sale of the shares shortly after the takeover netted her a profit of \$500,000. Thus, the government would most likely have been able to demonstrate the materiality of the nonpublic information.

Also, the government would likely have been able to show that Erica purchased the securities of the target company “on the basis of” the material nonpublic information she received about Adam’s impending takeover. Rule 10b5-1 provides that an individual’s purchase is “on the basis of” material nonpublic information when the individual was “aware of the material nonpublic information when the person made the purchase.”¹³⁰ Adam, the source of the information, who was not charged by the prosecutor, appeared to be somewhat cooperating with the government

¹²⁵ The story is slightly vague on how Adam is taking over the target company, Chandler Enterprises. It is clear, however, that Adam is, at the time of the takeover, no longer an officer, director, or otherwise involved in the target company. Adam had been the original founder of the target and was a former director and officer. If his nonpublic material information had been acquired while he was an insider, even if he had already left at the time of the trades, the trades would still be deemed a violation of the classical theory of insider trading. In this case, however, Adam’s information was not obtained while he was an insider.

¹²⁶ 426 U.S. 438 (1976).

¹²⁷ *Id.* at 449.

¹²⁸ 485 U.S. 224, 231–32 (1988).

¹²⁹ *Id.*

¹³⁰ 17 C.F.R. § 240.10b5-1.

and may even have been willing to testify as to his conversation with Erica before the takeover. Also, in insider trading cases, circumstantial evidence such as timing and opportunity for such communications between the tipper and tippee could suffice to show awareness.¹³¹

In addition, the government would also have to prove that Erica, the individual charged, acted with the requisite scienter. *All My Children* takes place in the fictional town of Pine Valley, located in Pennsylvania. The Third Circuit has found that recklessness amounts to scienter.¹³² Generally, when dealing with tippee liability, the requisite mental state may be found when the tippee “knew,” or “should have known,” or perhaps even “consciously avoided” knowing that she was trading on improperly divulged nonpublic information.¹³³ In light of the circumstances developed in the storyline, it would probably have been relatively easy for the prosecution to show that Erica “knew” or at the least “should have known” that Adam’s information was nonpublic when she traded. Here, however, the images portrayed on the show regarding her mental state are somewhat problematic. Recall that Erica did not plead innocent and challenge the prosecutor’s insider trading case against her. Rather, in the storyline, Erica pled guilty to insider trading. In Erica’s allocution, where she convinced the judge that she felt remorse for her actions, she failed to acknowledge that she had acted with scienter. Erica stated that it was “important to me that you know how truly sorry I am for my seemingly cavalier *but completely unintentional advantage* that I took of the market system for financial gain.”¹³⁴ Would a judge accept such an allocution? Or, would the judge have insisted on some acknowledgment of at the least a “conscience avoidance” that she had traded on the material nonpublic information?

The rest of the case is slightly more challenging, not because of any failings in the soap opera’s portrayal, but rather because of the fact that some of the securities laws here have been unnecessarily muddled.¹³⁵ Beyond “materiality,” “on the basis of,” and “scienter,” what additional elements are required in a misappropriation case when the source of the information is not liable? Two issues need to be addressed. First, under the misappropriation theory, must a tippee’s liability be “derivative”?¹³⁶ If it must, and if Erica is a tippee, in order for her to be liable would the prosecution also have to show that Adam, the tipper, was liable for insider trading? Or could Erica, as the tippee, be liable, even if the tipper is not? In other words, what does the term “derivative” mean in this context?

¹³¹ SEC v. Warde, 151 F.3d 42, 47–48 (2d Cir. 1998).

¹³² SEC v. Infinity Group Co., 212 F.3d 191, 192 (3d Cir. 2000).

¹³³ SEC v. Musella, 678 F. Supp. 1060, 1062–63 (S.D.N.Y. 1988) (finding tippee liability where the defendants made a conscious and deliberate choice not to find out whether the source was divulging material nonpublic information in breach of a fiduciary duty).

¹³⁴ *All My Children* (ABC television broadcast Mar. 14, 2008).

¹³⁵ Admittedly, there can be a stealth aspect to combining securities law and popular culture analysis. Critical evaluation interspersed within popular culture study may be more palatable than more direct critiques of the law. Covertness is not intended in this Article, however.

¹³⁶ *Dirks v. SEC*, 463 U.S. 646, 659 (1983) (involving the classical theory, the Supreme Court stating that a tippee’s liability is derivative).

A second but related issue in misappropriation-based tippee cases is whether the tipper must have personally benefited from the tip.¹³⁷ One reason for the confusion on both these issues is a practical one. In most cases of tippee liability, the tipper is also liable. Thus, when assessing the liability of the tippee, the issue of whether the tipper is liable is rarely developed.¹³⁸ The cases usually only note in passing that the tipper breached a fiduciary duty to the source of the information and then go on to analyze the tippee's liability based on the "knew" or "should have known" requirements. Similarly, the "personal benefit" analysis is relatively easily met in light of the Supreme Court's recognition in *Dirks v. SEC* that a gift of a tip is also a personal benefit.¹³⁹ The Court noted that a gift of a tip is substantively equivalent to a direct trade by the tipper followed by a gift of the proceeds to the tippee.¹⁴⁰ Thus, the personal benefit element, while often discussed, is rarely an impediment to the government's case.

With regard to the issue of derivative liability, what happens when the tipper is not liable? Could the tippee still be liable? One way to analyze this question is to examine, under the facts in the storyline, what the result would have been if the government had charged Adam, the tipper. Would Adam have been liable? Adam was not an insider, or temporary insider, of the target company whose shares were traded. Thus, he owed no duty to the target company or to its shareholders. As noted though, the theory involved in the storyline is not the classical theory of insider trading, but rather the misappropriation theory. To be liable under the misappropriation theory, Adam must have misappropriated the information by breaching a fiduciary duty to the "source of the information." Although the storyline is somewhat unclear as to how precisely Adam is acquiring the target, Adam appears to be the chief executive officer and major shareholder of an unnamed acquiring corporation. Thus, Adam would appear to be breaching a fiduciary duty to the acquiring corporation, the "source of the information," by tipping Erica.

What if, however, Adam had been charged as the tipper, but somehow had not been found liable, because, for example, a jury did not believe he had acted with scienter? For example, what if Adam did not believe that Erica would trade or tip based on his sharing confidential nonpublic information with her and he was instead just negligent in confiding in her? In that case, could Erica, as his tippee, be liable if a tippee's liability is "derivative" of the tipper's? Guidance on this can be found in the Seventh Circuit case of *U.S. v. Evans*, albeit a case involving the classical theory.¹⁴¹ In that case, the court analyzes *Dirks* in some depth, instead of simply quoting its more famous passages, and, in so doing, provides a refreshingly clear explanation of tippee liability.

¹³⁷ *Id.* at 662.

¹³⁸ *United States v. Evans*, 486 F.3d 315, 323 (7th Cir. 2007) ("It may be the rare case where the tipper is acquitted and yet the relationship between the tipper and the tippee is such that the tippee may yet be prosecuted for acting upon the tipper's breach.").

¹³⁹ *Dirks*, 463 U.S. at 664.

¹⁴⁰ *Id.*

¹⁴¹ *Evans*, 486 F.3d 315.

In *Evans*, the source of the information, Paul Gianamore, was a financial analyst working for Credit Suisse First Boston.¹⁴² Gianamore gave nonpublic information about three tender offers and a proposed merger he had obtained in the course of his work for Credit Suisse to his friend, Ryan Evans, who, in turn, traded on that information.¹⁴³ Although both Gianamore and Evans were charged with insider trading and conspiracy, Gianamore was acquitted by a jury.¹⁴⁴ Evans, however, although acquitted on conspiracy with Gianamore, was convicted of insider trading.¹⁴⁵ In his appeal to the Seventh Circuit, Evans argued that “following the acquittal of Gianamore, the alleged tipper, and his own acquittal for conspiring with Gianamore,” he could not possibly be guilty as a tippee.¹⁴⁶

In analyzing *Dirks*' requirements for tippee liability, the *Evans* court recognized that significantly for Evans' case, *Dirks* held that “the tippee's duty to disclose or abstain is derivative from that of the insider's duty” and that, accordingly, “before tippee liability can exist, there must have been a breach of the insider's fiduciary duty.”¹⁴⁷ Unfortunately for Evans, however, the Seventh Circuit's careful reading of *Dirks* revealed that an insider can breach a “fiduciary duty” without being found liable of insider trading.¹⁴⁸ Quoting from *Dirks*, the Seventh Circuit explains that the test of whether the insider has breached a fiduciary duty is “whether the insider personally will benefit, directly or indirectly, from his disclosure,” which could be a pecuniary gain, reputational benefit, or gift.¹⁴⁹ The test is not (as Evans hoped) whether the insider was actually guilty of insider trading because of his tip.

With regard to the jury's acquittal of Gianamore, the insider, on the insider trading charges, the Seventh Circuit explained that to have found him guilty

the jury was required to find (1) that Gianamore had a relationship of trust with Credit Suisse or its clients, (2) that he breached it by communicating material nonpublic information to Evans in violation of his duty of confidentiality, . . . (3) that he received a direct or indirect personal benefit, including even a gift [and (4) that] . . . Gianamore acted willfully.¹⁵⁰

The court then posited that it “is possible that Gianamore acted without the requisite level of intent to hold him responsible under the criminal laws and yet that he nevertheless breached the duty of confidentiality he had to Credit Suisse and its clients.”¹⁵¹

In other words, the court recognized from

¹⁴² *Id.* at 318.

¹⁴³ *Id.* at 318–19.

¹⁴⁴ *Id.* at 318.

¹⁴⁵ *Id.* at 320.

¹⁴⁶ *Id.*

¹⁴⁷ *Evans*, 486 F.3d at 321 (quoting *Dirks*, 463 U.S. at 659).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting *Dirks*, 463 U.S. at 662).

¹⁵⁰ *Id.* at 323.

¹⁵¹ *Id.*

[r]eviewing the jury's verdict and the evidence at trial, one possibility is that the jury concluded that Gianamore had a duty of confidentiality as a corporate insider (derivatively through Credit Suisse), breached it by giving Evans the information as a gift, but did not act with the requisite level of intent nor enter into an actual agreement with Evans.¹⁵²

The court further noted that from "the victim's perspective, the breach is equally damaging whether Gianamore acted willfully or negligently."¹⁵³

While acknowledging that Evans' situation was unusual, the court explains that "the relationship between the tipper and the tippee is such that the tippee may yet be prosecuted for acting upon the tipper's breach."¹⁵⁴ Moreover, the court explains that "it is not essential that the tipper know that his disclosure was improper."¹⁵⁵ Once the insider breaches his fiduciary duty and obtains the benefit (pecuniary, reputational, or gift) from the tip, the analysis then turns to the tippee's knowledge. With regard to the tippee, the court explains that even if the tipper is acquitted, where "the tippee has a relationship with the insider and the tippee knows the breach to be improper, the tippee may be liable for trading on the ill-gotten information."¹⁵⁶ Moreover, the court notes that "where a tippee, for example, induces a tipper to breach her corporate duty, even if the tipper does not do so knowingly or willfully, the tippee can still be liable for trading on the improperly provided information."¹⁵⁷

Under this analysis, in the *All My Children* storyline, even though Adam, the tipper, may not be liable for insider trading because of a lack of scienter, Erica, the tippee, could still be liable as long as there is evidence that Adam breached a duty to the source and that he personally benefitted from the tip. As noted in *Dirks*, a case under the classical theory, the insider/tipper would be deemed to have breached his duty if he had obtained a "personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit" or if he had made "a gift of confidential information to a trading relative or friend."¹⁵⁸ The Supreme Court explained that the tip in the later case would meet the "personal benefit" requirement because it would resemble "trading by the insider himself followed by a gift of the profits to the recipient."¹⁵⁹

In the *All My Children* storyline, the "personal benefit" requirement would appear to be met. Admittedly, the tipper, Adam, did not himself trade nor obtain a direct personal pecuniary gain from the disclosure. However, he may well have been trying to obtain a reputational benefit, since Erica is one of the most powerful business persons in the town. Erica is even friendly with Warren Buffett, the Chairman of Berkshire Hathaway, who was recently referred to in *Forbes* as "America's most beloved investor"

¹⁵² *Id.*

¹⁵³ *Evans*, 486 F.3d at 323.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 323–24.

¹⁵⁸ *Dirks*, 463 U.S. at 663–64.

¹⁵⁹ *Id.* at 664.

and as “the world’s richest man.”¹⁶⁰ Buffett, playing himself, appeared in a cameo during May sweeps.¹⁶¹ He visited Erica at the prison in order to lift her spirits.¹⁶² In addition, Adam had recently asked Erica to remarry him, therefore at the least, his tip could have been characterized as a gift to a friend.

What if, however unlikely, Adam was somehow deemed not to have obtained a personal benefit from his tip to Erica? Could Erica still be held liable for insider trading? *U.S. v. Evans* involved the classical theory. Would the same analysis apply in a misappropriation-based tippee case? Some courts in misappropriation-based cases do not seem to require the tipper to have “personally benefitted.”¹⁶³ Does that mean that those courts do not require the tippee’s liability to be “derivative?” Or is the analysis in such misappropriation cases more readily explained by viewing the recipient of information obtained from a transferor who did not personally benefit, not as a tippee at all, but rather as the one who misappropriates? In the latter analysis, if Adam did not personally benefit, then Erica’s liability is not that of a tippee, but rather as the one who misappropriated. Viewing the relationship in this light, Adam was simply confiding in a trusted confidant and Erica breached a “duty of trust or confidence” to Adam by trading in the nonpublic information he had confided in her. This reading of the storyline is similar to the facts in the First Circuit’s decision in *SEC v. Rocklage*.¹⁶⁴

In *Rocklage*, the wife of the CEO of a pharmaceuticals company learned from her husband that one of the company’s major drugs had failed in a clinical trial.¹⁶⁵ The husband told his wife (1) that the company would shortly make public the failure of the drug trial, (2) that the company’s stock was sure to drop precipitously once the information became public, and (3) that she had to keep the information he was disclosing to her completely confidential until it was made public.¹⁶⁶ The husband, who was the source of the information, had a “reasonable expectation that [his wife] would not disclose” the drug trial’s results.¹⁶⁷ After the husband disclosed the material nonpublic information to his wife, however, the wife informed her husband that she was going to tip her brother.¹⁶⁸ Despite her husband’s entreaties to his wife to keep his confidence, the wife tipped her brother about the drug’s failure, and the brother sold his shares in the company prior to the public announcement.¹⁶⁹

¹⁶⁰ *The World’s Billionaires: #1 Warren Buffett*, FORBES.COM, Mar. 5, 2008, http://www.forbes.com/lists/2008/10/billionaires08_Warren-Buffett_COR3.html (last visited Mar. 15, 2009).

¹⁶¹ Alex Crippen, *Warren Buffett Returns to Daytime TV with ‘All My Children’ Cameo*, CNBC.COM, Mar. 20 2008, <http://www.cnbc.com/id/23718625> (last visited Mar. 15, 2009).

¹⁶² *Id.*

¹⁶³ See *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (discussing the Second Circuit’s implication that there was no need to make an affirmative showing of benefit in cases of misappropriation in *United States v. Libera*, 989 F.2d 596, 600 (2d Cir. 1993)).

¹⁶⁴ 470 F.3d 1 (1st Cir. 2006).

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

In that case, the husband was deemed to have not personally benefitted from giving the information to his wife and accordingly was not charged with violating a duty of trust and confidence by confiding in his wife. The wife, however, was charged as having breached a duty of trust or confidence when she deceptively obtained the information from her husband and then tipped her brother who traded on it.

Focusing on the Supreme Court's *O'Hagan* case, the First Circuit in *Rocklage* explained that in misappropriation cases, liability "is based on deception of the source of the information, rather than on deception of the shareholders; it is that deception which brings this trading within the statutory language" of Section 10(b).¹⁷⁰ In analyzing the wife's liability, the court noted, and the wife did not challenge, the assertion that she had "breached a duty she owed to her spouse" under Rule 10b5-2(b)(3).¹⁷¹ The court did, however, have to grapple with two issues that were contested. "First, we identify exactly what 'manipulative or deceptive devices' [the wife] was alleged to have engaged in and we assess whether they were sufficiently 'in connection with' a securities transaction. Second, we examine [the wife's] pre-tip disclosure to her husband to determine whether that disclosure eliminated the deception from her actions."¹⁷²

In terms of the wife's deception, the First Circuit Court explained that under the *O'Hagan* analysis, clearly if the wife had "never made any disclosure of her intent to tip her brother, there would have been deception in connection with a securities transaction when she did tip her brother, without her husband's consent, to enable her brother to trade in securities."¹⁷³ Unfortunately for the wife, the *Rocklage* court also found that there was deception at the moment the wife acquired the information from her husband.¹⁷⁴ In determining if her deception met the requirement of "in connection with" the purchase or sale of a security, the court noted that this "deceptive acquisition of the information is fairly regarded as an act that was part of a broader scheme of deception in connection with the sale of securities."¹⁷⁵ Accordingly, the only issue remaining was whether the wife's disclosure to her husband that she was going to tip vitiated her deception. The court explained that the wife's disclosure that she was going to tip may have served to render her tip non-deceptive but it did not render her acquisition of the information by deceptive means non-deceptive.¹⁷⁶

¹⁷⁰ *Rocklage*, 470 F.3d at 6.

¹⁷¹ *Id.* at 7. Rule 10b5-2(b)(3) provides that a duty of trust or confidence arises, in addition to other circumstances, "[w]hen a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; provided, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information." 17 C.F.R. 240.10b5-2(b)(3).

¹⁷² *Rocklage*, 470 F.3d at 8.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 10.

¹⁷⁶ *Id.* Unfortunately for the wife, the *Rocklage* court found that there were two instances of deception. First, the wife engaged in deception when she acquired the information from her husband and second, she engaged in deception when she tipped her brother. The court then reasoned that her disclosure that she was going to tip only cleared her second deception (i.e., the tip). Her disclosure that she would tip after she had already acquired the information did not render her deceptive acquisition of the information non-deceptive. While this analysis closes for the most part the irksome "blatant misappropriation" loophole, it seems to be an unnecessary stretch. Admittedly, in *Rocklage* there was

Accordingly, the court found that an insider trading case against the wife was stated.

How do Erica's actions compare to the wife's in *SEC v. Rocklage*? In the soap opera, Erica does not tip another. Rather she herself trades on the information she obtained from Adam. That eliminates a step in the analysis and thus makes the case against her easier for the government. Moreover, Erica does not disclose to Adam that she is going to trade on his confidential information. Again, this makes the case easier for the government. On the other hand, unlike the facts in *Rocklage*, at the time Adam confides in Erica, Adam and Erica are no longer spouses. She is his ex-wife. And, even though this is a soap opera, Adam and Erica do not neatly fit within the other family relationships listed in Rule 10b5-2(b)(3). Thus, the government would have had to otherwise demonstrate the "duty of trust or confidence" between the two in order to find that she breached a duty. In light of the characters' decades-long relationship, it may have been possible for the government to demonstrate that the two shared a history or practice of sharing confidences. Unfortunately, as mentioned above, the storyline was not developed to this degree because Erica pled guilty to the insider trading charge.

Of course, this entire depiction and analysis leads to further questions. What messages are these images sending? Why did the storyline use the criminal sanctions? And what message is sent when central characters, such as the incomparable Erica Kane of *All My Children*, are shown as guilty of securities law violations without being irretrievably damaged to their audiences? On the other hand, Erica is sentenced to six months in a federal prison. Does this portrayal suggest that violations of securities laws are, or are not, significant offenses?

In other story arcs, corporate law violators in serials may escape punishment by the legal system altogether, leaving beloved characters (in the roles of shareholders, customers, or employees) harmed and without legal redress.¹⁷⁷ Do those narratives portray the securities laws as not extensive enough to capture the guilty? In some serial narratives, relatively less culpable characters in securities fraud schemes may be prosecuted,

evidence that at the moment of acquisition, the wife already had a secret plan with her brother to divulge nonpublic information, if she acquired it. Thus, in that case, deceptive acquisition is plausible. In other instances, however, this analysis seems to require some sort of mind reading on the part of the court as to the intent of the recipient at the split second of acquisition. There is a different analysis that reaches the same result and requires fewer gymnastics. If the government, for some reason, did not want to assert that the husband "personally benefitted" from his disclosure to his wife even in the form of a gift, could not the government in *Rocklage* have alleged that he was at the least negligent in doing so? If so, then he would not be liable for insider trading (for lack of scienter) but the husband would have (as in the case of the tipper in *Evans*) breached a fiduciary duty. Using this analysis, the wife would then have likely been liable because her liability would be derivative. The wife's disclosure of her intent to tip to her husband in that case would be irrelevant, because the breach of fiduciary duty of concern would be the husband's to the pharmaceutical company, not just the wife's to the husband.

¹⁷⁷ Even if the legal system fails the victims, as is often the case in serials, typically the corporate villain does get punished for his wrongdoing through some actions of family members or by luck. Professor Spence notes that in soap operas "[w]hen corporate crime is punished, it is generally not by the official law, but by family law." SPENCE, *supra* note 4, at 109.

while other more egregious offenders avoid liability. Do such serials portray the enforcement of the securities laws as uneven or unfair?¹⁷⁸

B. ACCOUNTING FRAUD IN THE TELENVELLA *LA FEA MÁS BELLA*

La Fea Más Bella is the Mexican version of the popular Colombian telenovela *Yo Soy Betty, La Fea*.¹⁷⁹ The financial fraud storyline is a plot device through which a love story develops between the characters of Fernando Mendiola and Leticia (Lety) Padilla, his earnest, bright, but not initially attractive, assistant. In an early episode Fernando is elected president of Conceptos, an advertising corporation.¹⁸⁰ Fernando's short term goal, as president, is to increase immediately Conceptos profits by four million dollars.¹⁸¹ Fernando, Marcia Villaroel, and Omar Carvajal are the only shareholders who hold administrative positions in Conceptos.¹⁸² Fernando hires Lety, a bright economist, as his secretary.¹⁸³

Unfortunately, soon after Fernando takes control of the company and despite his significant efforts, Conceptos' liabilities grow quickly.¹⁸⁴ Fernando, Lety, and Omar misrepresent to the rest of the board the real status of the company by altering the periodic reports.¹⁸⁵ Fernando fears that he might lose the company, so he and Omar formulate an emergency plan to save it.¹⁸⁶ Fernando invests ninety thousand dollars in a new corporation,¹⁸⁷ which he calls Filmo Imagen.¹⁸⁸ Since Fernando did not want the other Conceptos' shareholders to know about his plan, he asked Lety to appear as the sole shareholder of Filmo Imagen.¹⁸⁹ Lety did not really understand why her boss wanted her to pretend she owned this

¹⁷⁸ An agency, such as the SEC, with aspirations of promoting investor education in various segments, may be interested in how segments of the media portray securities laws and how such laws may, in turn, be perceived by millions of viewers.

¹⁷⁹ *La Fea Más Bella* Producción, <http://www.esmas.com/lafeamasbella/produccion/> (last visited Mar. 15, 2009).

¹⁸⁰ Conceptos only has seven shareholders: Fernando, Fernando's parents (Teresita and Humberto Mendiola), the Villaroel siblings (Marcia, Ariel, and Ana Leticia), and Omar Carvajal. *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 1, Side 1, Track 2; *Un Plan de Negocios* (Televisa Home Entm't 2007).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Lety is a brilliant economist with a master in finance. *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 1, Side 1, Track 1: *La Entrevista* (Televisa Home Entm't 2007).

¹⁸⁴ *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 1, Side 1, Track 3: *Asistente de Presidencia* [Assistant to Executive Board] & Track 4: *La Empresa de Leticia* [Leticia's Company] (Televisa Home Entm't 2007).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *La Fea Más Bella*: Episode 166 (U.S. television broadcast Dec. 13, 2007). The ninety thousand dollars came from a commission that was offered to Leticia Padilla, which she rejected. Nevertheless, Fernando accepted the commission to fund Filmo Imagen without disclosing to Lety the source of the money.

¹⁸⁸ *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 1, Side 1, Track 4: *La Empresa de Leticia* [Leticia's Company] (Televisa Home Entm't 2007).

¹⁸⁹ *Id.*

company.¹⁹⁰ Nevertheless, she was falling in love with him so she agreed to the subterfuge.¹⁹¹

At one pivotal point of the story, Conceptos owes over six and a half million dollars to creditors, and Fernando concludes that in order to prevent the banks from garnishing Conceptos, Filmo Imagen has to garnish Conceptos first.¹⁹² In order to carry out Fernando's plan through "legitimate means," Filmo Imagen lends some money to Conceptos and puts a lien on Conceptos to secure payment.¹⁹³ A couple of weeks later, Filmo Imagen starts garnishment proceedings against Conceptos. Filmo Imagen asks the court for a provisional attachment.¹⁹⁴ Neither the attorneys for Conceptos nor the attorneys for Filmo Imagen realize that they have been hired to work on a fraudulent transaction, or know that they are deceiving the court.¹⁹⁵

During the following months, Conceptos is able to close some advertising deals, and the possibility that Conceptos may be able to pay its debts becomes feasible.¹⁹⁶ Nevertheless, the next shareholders meeting is approaching and Fernando, Omar, and Lety decide that they need to falsify Conceptos' financial status one more time.¹⁹⁷ The day of the shareholders meeting, a heartbroken Lety, who believes Fernando does not care for her, decides that she will no longer cover for Fernando, so she discloses to the other shareholders Conceptos' real economic status.¹⁹⁸ It is a disaster. The other shareholders could not believe that Fernando, Omar, and Lety had used fraudulent means to "save" Conceptos.¹⁹⁹ One of the shareholders describes their actions as a "*teatro de ratas de cuello blanco*" (a theatrical performance by white collar rats).²⁰⁰ Fernando, Lety, and Omar are humiliated by the rest of the shareholders.²⁰¹ Lety quits Conceptos, but before leaving she hands the board a power of attorney transferring Filmo Imagen to Fernando.²⁰² She vows never to return.²⁰³

¹⁹⁰ *Id.*

¹⁹¹ The main part of the story is Fernando and Lety's love story, but it will not be discussed in any detail in this Article.

¹⁹² *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 1, Side 2, Track 6: *El Embargo Secreto* [The Secret Garnishment] (Televisa Home Entm't 2007).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 2, Side 2, Track 15: *El Embargo Revelado* [The Revealed Garnishment] (Televisa Home Entm't 2007). Fernando had reluctantly begun the romance with Lety right after the creation of Filmo Imagen, because Omar had convinced him that Lety would betray him if she fell in love with somebody else. As time went on, however, and Fernando worked closely with Lety, he actually fell in love with her too. But on the day of the general shareholders meeting, Lety discovered that Fernando had initiated their romance for economic reasons and not for love.

¹⁹⁹ *Id.*

²⁰⁰ Episode 166, *supra* note 187.

²⁰¹ *El Embargo Revelado*, *supra* note 198.

²⁰² *Id.*

²⁰³ *Id.*

After the fraud is discovered by the other shareholders, the shareholders begin to study their alternatives to save Conceptos.²⁰⁴ They first learned that the document that Lety had left did not meet with all the requisite legal formalities.²⁰⁵ They try desperately to reach Lety, but without success.²⁰⁶ The shareholders also study the possibility of selling all their own personal assets to pay Conceptos' debt, but they cannot agree.²⁰⁷ After many days of discussion, they decide to continue with Fernando's fraudulent plan, but they need Lety, since she is the sole shareholder of Filmo Imagen. Lety agrees to return, and she is immediately named president of Conceptos and Filmo Imagen.²⁰⁸

For the following months, Fernando and Lety work hard to save Conceptos and Fernando proves to Lety that he deserves her love.²⁰⁹ At the end of the story, Conceptos is saved.²¹⁰ And, Lety and Fernando get married and live happily ever after.²¹¹

This storyline involved a closely held corporation, not a publicly traded one. And, of course, it involved a Mexican corporation with no ties to the U.S. securities markets. If, however, Conceptos had been a public company subject to reporting under the Securities Act of 1933 ("Securities Act"), the fraudulent periodic reports would have been securities violations. In light of the company's near insolvency and the other shareholder's shock when the true figures are disclosed, those periodic financial statements (quarterly and annual reports) undoubtedly would have been deemed "materially" false and misleading under the *TSC Industries* standard.²¹²

What messages regarding financial fraud are conveyed by this telenovela narrative? Is accounting or financial fraud justified? Interestingly, this storyline was based on the Colombian version produced in 1999 several years before Enron's fiascos involving massive hidden losses through shell companies came to light. Can we learn from serials?

V. CALL FOR CONTINUING RESEARCH

This Article submits that soap operas and telenovelas are both social educators and social mirrors. The images depicted in these popular media about securities laws influence, for better or worse, society's perceptions. This Article shows similarities and differences between soap operas and telenovelas in how they teach about the world and how they influence the culture of securities laws. The Article also analyzed certain securities issues in such serials through content analysis.

²⁰⁴ *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 3, Side 1, Track 17: *La Conversacion entre Cabballeros* (A Conversation between Gentlemen) (Televisa Home Entm't 2007).

²⁰⁵ *Id.* The Power of Attorney was not notarized.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *La Conversacion entre Cabballeros*, *supra* note 204.

²¹¹ *Telenovelas de Gran Éxito: La Fea Más Bella* [Successful Soap Operas: The Prettiest Ugly Girl], Disc 4 (Televisa Home Entm't 2007).

²¹² *TSC Indus.*, 426 U.S. at 449. See discussion *supra* on materiality.

The analysis used in this Article can also serve a practical purpose beyond the theoretical. An examination of how difficult securities law issues are portrayed, intertwined with a story, and ultimately understood by soaps' and telenovelas' audiences could assist a lawyer grappling with how to present such seemingly complex issues persuasively to a client or even to a jury.

In addition to the educational or ideological track, however, there is also an aspect in which soap operas and telenovelas are social mirrors. In researching popular legal culture as depicted in serials, we can learn from what filmmakers, television producers, their advertisers, their audiences, and the public think about law, including securities laws. We can do this by looking into the mirror that these serials constitute.

Thus, this Article recommends that research continue in this area. It would be helpful to develop research on what the producers of the narratives (using that term broadly to include the writers, actors, directors, producers, etc.) intend to portray. It would also be beneficial to engage in the types of reception analysis used by doctors and scholars in other fields to attempt to discern what the audience has received about the law through these media.

On that note, this Article ends with the expected "*to be continued*" close.

