BIG BROTHER, OTHELLO, AND DOGS THAT DON'T BARK: THE USE OF LITERARY ALLUSION IN FEDERAL APPELLATE OPINIONS

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"Nothing teaches us better than literature to see, in ethnic and cultural differences, the richness of the human patrimony, and to prize those differences as a manifestation of humanity's multi-faceted creativity. Reading good literature is an experience of pleasure, of course; but it is also an experience of learning what and how we are, in our human integrity and our human imperfection, with our actions, our dreams, and our ghosts, alone and in relationships that link us to others, in our public image and in the secret recesses of our consciousness."

—Mario Vargas Llosa[1]

"Writing and reading decrease our sense of isolation. They deepen and widen and expand our sense of life: they feed the soul. When writers make us shake our heads with the exactness of their prose and their truths, and even make us laugh about ourselves or life, our buoyancy is restored. We are given a shot at dancing with, or at least clapping along with, the absurdity of life, instead of being squashed by it over and over again. It's like singing on a boat during a terrible storm at sea. You can't stop the raging storm, but singing can change the hearts and spirits of the people who are together on that ship."

—Anne Lamott[2]

"Literature adds to reality, it does not simply describe it. It enriches the necessary competencies that daily life requires and provides; and

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[1] Mario Vargas Llosa, *Why Literature?*, NEW REPUBLIC, May 13, 2001, http://www.newrepublic.com/article/books-and-arts/78238/mario-vargas-llosa-literature.

[2] ANNE LAMOTT, BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE 237 (1994).

in this respect, it irrigates the deserts that our lives have already become."
—C.S. Lewis[3]

"We care about moral issues, nobility, decency, happiness, goodness—the issues that matter in the real world, but which can only be addressed, in their purity, in fiction."
— Orson Scott Card[4]

I. INTRODUCTION

Unlike a fish, in the words of Justice Elena Kagan, a literary[5] allusion is not "a discrete thing that possesses physical form"[6] distinguishable from other expressive devices. Instead, literary allusions can take many forms, be used for many purposes, and have various effects on the reading audience. If the most basic form of a fish is the common goldfish in a bowl, then the most basic judicial literary allusion is a reference to a well-known story in a judicial opinion that is used to make a comparison in a reader's mind. But just as there are many types of fish (and Dr. Seuss introduces us to ever so many of them), there are many types of judicial allusions. And just like fish, those allusions come in different shapes and sizes, with different flavors, colors, and strengths.

Part II will introduce the theory behind literary allusion including a discussion of what such allusions are, how they impact a reader's understanding of a text, and why they can be effective in persuasive writing. Part III will focus specifically on the use of literary allusions in judicial opinions, including the debate over whether such allusions have a role in judicial writing. Part IV summarizes and analyzes the results of an empirical study of federal appellate opinions from 1997-2012 that invoke literary allusions. Part V analyzes several specific literary allusions from federal appellate opinions and critiques their efficacy in furthering the opinion's argument.

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[3] *C.S. Lewis Quotes*, BRAINYQUOTE.COM, https://www.brainyquote.com/quotes/c_s_lewis_115363 (last visited Mar. 25, 2020).

[4] Orson Scott Card, *The Maguffin*, HATRACK.COM (Apr. 26, 2000), http://www.hatrack.com/writingclass/lessons/2000-04-26.shtml.

[5] This article will only refer to allusions to literature, *not* to other cultural works like music, movies, nonfiction works, philosophical texts, or religious texts. A study of such inclusive nature is beyond the scope of a single article.

[6] *See generally* Yates v. United States, 574 U.S. 528 (2015) (Kagan, J., dissenting) (citing DR. SEUSS, ONE FISH TWO FISH RED FISH BLUE FISH (1960)).

II. THEORY OF ALLUSION[7]

At its most basic, an allusion is "a brief reference, explicit or indirect. To a person, place, or event, or to another literary work or passage (sic)."[8] Through these brief references, the author employing an allusion "invokes one or more associations of appropriate cultural material and brings them to bear upon a present context."[9] Allusions differ from mere quotations because mere quotations "invoke[] no particular context associated with the saying—it is just a saying to apply *to* various contexts[;]" yet, it is possible to make an allusion with a quotation as long as it invokes a specific context.[10]

Allusion requires the reader to make "certain unstated associations" in order to have a "correct and complete understanding" of the point that the author intends.[11] Literary allusions rely on the rhetorical concept of "anamnesis," which means "[c]alling to memory past matters."[12] Specifically, anamnesis involves "citing a past author from memory."[13]

Allusions are commonly categorized as "indirect" or "covert" references because they "call[] for associations that go beyond mere substitution of a referent[;]" such substitution comes from the reader's previous experience. [14] This information can range from "terribly esoteric to nearly universal."[15]

Allusions need not be covert but can, in fact, invoke the name of a specific work.[16] Professor Carmela Perri gives the example of three statements, each invoking Shakespeare's play, *Othello*:

"I will not have you misinterpret my handkerchief. I will not have you make me into a Desdemona. I will not have you make us into Desdemona and Othello from Shakespeare's *Othello*."[17]

Each of these statements alludes to *Othello,* and each requires the reader to supply additional information from the play in order to give significance to the author's words.[18] Explaining how each of these statements serves as an allusion and requires additional context from the reader's experience, Professor Perri wrote:

> [T]he character who says to her jealous husband, "I will not have you misinterpret my handkerchief," refers to the play *Othello*, but tacitly specifies the attribute associated with its handkerchief and its

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[7] While it is true that judges may, and often use literary language as a common language experience rather than intentionally invoking an allusion to a particular literary text; for purposes of this article such allusions will be treated as intentional.

[8] William Irwin, *What is Allusion?* 59 J. AESTHETICS & ART CRITICISM 287, 288 (2001) [hereinafter Irwin, *What is Allusion?*] (quoting M. H. ABRAMS, A GLOSSARY OF LITERARY TERMS 8 (1971)). For an in-depth analysis of literary allusions including their limitations, see James H. Coombs, *Allusions Defined and Explained*, 13 POETICS 475 (1984) and Michael Leddy, *Limits of Allusion*, 32 BRITISH J. OF AESTHETICS 110 (1992).

[9] Leddy, *supra* note 8, at 112.

[10] *Id*.

[11] Irwin, *What is Allusion?*, *supra* note 8, at 288.

[12] *Anamnesis*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (citing JOHN SMITH, MYSTERY OF RHETORIC UNVEILED 249 (Scolar Press Limited, 1969)).

[13] Gideon O. Burton, *Anamnesis*, SILVA RHETORICAE, http://rhetoric.byu.edu/ (search "anamnesis").

[14] Irwin, *What is Allusion?*, *supra* note 8, at 289.

[15] *Id*. at 288.

[16] Carmela Perri, *On Alluding*, 7 POETICS 289, 290 (1978).

[17] *Id*.

[18] *Id*.

> interpreter: the false evidence of a husband's blinding jealousy. A similar connotation is meant by the sentence, "I will not have you make me into a Desdemona." It is not Desdemona the acknowledged beauty, the inhabiter of Venice, the disobedient daughter, etc., that is meant by the allusion, but merely one of her qualities: the innocent victim of her husband's jealousy. Likewise, in the third sentence, in which both characters are named as well as the play, we are not to activate all their attributes to comprehend the allusion. It is not necessary, for instance, to apply the property, that Othello is a moor; or that Desdemona is the daughter of Brabantio; or that *Othello* was probably written in 1604. The meaning of the novel's character concerns only her victimization by a jealous husband—although any allusion may tap (and frequently does) many more of its source text's attributes than the examples I have used.[19]

Although allusions can call upon common literary sources, like fairy tales and children's stories such as Goldilocks and the Three Bears or Cinderella, authors often "draw on information not readily available to every member of a cultural or linguistic community . . .."[20]

Markers within the allusion point the reader to the specific ideas from the literary text alluded to that the author desires. According to Professor Perri, "the alluding text directs [the reader's] attention to one of more attributes of the source text necessary to comprehend the meaning of the allusion. These attributes or associated meanings are 'recoverable' for the given audience . . . ."[21] Thus, successfully understanding an allusion requires a reader to: recognize the allusion as an allusion; remember the literary source from which the allusion is drawn; realize the attributes of the literary work that are important to the author's context; and then connect those attributes and the lessons they evoke to the author's context.[22]

Allusion "assum[es] a sophisticated, knowledgeable reading public . . . not merely because the referent of the allusion-marker must be recognized; the difficulty of allusion involves its requirement of the reader's knowledge of its source text's intension sufficient to enable him—actively and comprehensively—to complete the allusion's unstated significance."[23]

In addition to helping a reader connect her previous literary experiences and the lessons learned therefrom to a current context, allusions also allow authors to "play" with their readers. The world allusion comes from the Latin word *alludere* meaning "to jest, mock, play with," "and there is indeed something ludic and gamelike in the nature of allusion. We are asked to fill in the missing piece of a puzzle, to draw on some knowledge to complete the written and spoken word in our own minds."[24] Thus allusions can provide the reader with "a welcome break in an otherwise serious and straightforward

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[19] *Id*. at 292.
[20] Irwin, *What is Allusion?*, *supra* note 8, at 289.
[21] Perri, *supra* note 16, at 296.
[22] *Id*. at 301.
[23] *Id*. at 299.
[24] Irwin, *What is Allusion?*, *supra* note 8, at 292.

account, allowing us to break the pattern of passive reception and engage in more active understanding. Just as an anecdote or joke may be a welcome break within a lecture, so may an allusion be a welcome break within whatever context it occurs."[25]

Through the use of literary allusions, an author can communicate information to her reader that may not be possible with a "straightforward statement[]."[26] Allusions have a different "perlocutionary effect on their audience"[27]—in other words, allusions impact the thoughts and feelings on the audience in a different way than straightforward statements do. Because of the different impact allusions have on audiences, they may be more persuasive, may invoke deeper emotional reactions, or may "offer something for aesthetic consideration, cultivating intimacy and forging a community, actively involving the audience in a way that straightforward statement does not."[28]

Scholar John Campbell aptly explains that the success of an allusion depends on the reader's ability to bring material to the text that is not explicitly contained therein: "Allusions invite us to select from our mental library, knowledge which is not in the text itself and without which the writer's intention will not be fully communicated."[29] Why such allusions are possible is explained by "shared knowledge theory"—an aspect of discursive psychology.[30] In order to be successful, literary allusions must be "based upon shared knowledge"[31] between the author and the reader. In other words, an allusion will not succeed if the author alludes to a literary work with which the reader is unfamiliar—a source that is outside of her base of knowledge and hence, not "shared."

The bank of shared knowledge accessed by literary allusions is "the reality that people carry around in their heads: the popular images, stock stories and character types, the familiar plot lines and recurring scenarios."[32] By connecting with that bank of shared knowledge, an author "gains the leverage she needs to mobilize and arrange the mental constituents"[33] into applications and arguments that the reader is now more likely to accept.

Shared Knowledge theory is similar to cognitive psychology's Schema Theory. The word "schema" comes from the Greek word meaning shape or plan. As explained by Immanuel Kant, "This formal and pure condition of sensibility to which the employment of the concept of understanding is restricted, we shall entitle the schema of the concept . . . ."[34] Kant explained

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[25] William Irwin, *The Aesthetics of Allusion*, 36 J. VALUE INQUIRY 521, 524 (2002) [hereinafter Irwin, *Aesthetics*].

[26] *Id*. at 522 (citations omitted).

[27] *Id*.

[28] *Id*.

[29] Irwin, *What is Allusion?*, *supra* note 8, at 293 (quoting John Campbell, *Allusions and Illusions*, 1994 FRENCH STUDIES BULLETIN 19 (1994)).

[30] MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 251–307 (2d ed. 2008).

[31] Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEG. COMM. & RHETORIC: JALWD 229, 262–63 (2012).

[32] Richard K. Sherwin, *Introduction: Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891, 893 (1996).

[33] *Id*.

[34] IMMANUEL KANT, CRITIQUE OF PURE REASON 88 (J. M. D. Meiklejohn trans., Infomotions, Inc. 2000).

that we create a schema based on a concrete example—like the four-legged dog based on the single Pomeranian we first experience—but are then able to apply that concrete concept to other instances that fit the concept—like the neighbor's Springer Spaniel.[35]

Thus, a schema is a mental construct made up of facts, ideas, and images that the person associates with one another and which are stored in long-term memory as a single unit.[36] Grounded in the work of Jean Piaget, schema theory rests on the premise that "[a]ny piece of knowledge is connected with an action . . .. [T]o know an object or a happening is to make use of it by assimilation into an action schema . . . [namely] whatever there is in common between various repetitions or superpositions of the same action."[37] Piaget observed the learning would occur by "assimilation," which is the ability to make sense of a situation in terms of a stock of schema derived from the person's experience, and by "accommodation," whereby the stock of schema would evolve over time.[38]

According to schema theory, people make sense of and interpret new experiences and ideas that they encounter by activating schema stored in their memory. New experiences and information are interpreted according to how they fit into the person's existing schema. If the person is exposed to new information that does not fit with her existing schema, she may misunderstand or miscomprehend it.

Professor Sherwin explained schema theory more simply:

> [Schema] are the mental blueprints that we carry around in our head for quick assessments of what we may or should be seeing or feeling in a given situation. Such blueprints are simplified models of experiences we have had before. They represent a kind of shorthand that transcribes our stored knowledge of the world, describing kinds of situations, problems, and personalities. These models allow us to economize on mental energy: we need not interpret things afresh when there are pre-existing categories that cover the experience or condition in question.[39]

Because of shared knowledge between author and reader and because of the schema that each of us as readers have created, literary references can communicate large amounts of information in very few words because they allow the reader to "conjure up relevant preexisting knowledge [and schema] . . . which the reader can then use in considering the matter at hand."[40] In this way, the author is able to "communicate an idea in a very immediate way by tapping into the reader's own prior experiences, in this case, literary ones."[41]

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[35] *Id*.

[36] Robert S. Wyer, Jr. & Dolores Albarracín, *Belief Formation, Organization, and Change: Cognitive and Motivational Influences*, in THE HANDBOOK OF ATTITUDES 273, 280 (Dolores Albarracín, Blair T. Johnson & Mark P. Zanna eds., 2005).

[37] JEAN PIAGET, BIOLOGY AND KNOWLEDGE 6–7 (1971).

[38] *Id*.

[39] Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 88, 104–05 (1994).

[40] SMITH, *supra* note 30, at 258.

[41] *Id*.

Information is understood and judgments are made about both the argument and the author as the reader processes new information through her existing schema.[42] When a new message is received, the reader first recognizes it either by name or by fitting it into a category of knowledge she already has.[43] Next, she determines if there is already an interpretation of this information in her stored schema.[44] If there is and the new information fits the interpretation satisfactorily, then the reader can adopt that interpretation, apply it to the new information, and adapt the interpretation if necessary.[45] In so doing, the source of the new information gains credibility and the reader increases her confidence in the stored interpretation.[46] If the new information does not fit satisfactorily within a stored interpretation, then the reader will "affix blame by comparing source credibility to interpretation confidence."[47] In other words, the reader will decide which is more trustworthy—the source of the new information or her own understanding and interpretation based on her previous experiences. If the reader decides that her interpretation is more trustworthy than the source of the new information, the credibility of the source of that information decreases.[48] On the other hand, if the source of the new information is sufficiently credible that it outweighs the reader's confidence in the existing interpretation, the reader will abandon the old interpretation, downgrade the credibility of the source of that original interpretation, and assimilate a new interpretation into her schema.[49]

Applied to literary allusions, the stories, poems, novels, and other literary works that a person reads throughout her life create a series of schema, both general (otherwise known as "stock stories") and specific (knowledge of specific characters, settings, plot lines, etc.). When an author alludes to that knowledge, the reader will attempt to assimilate the new information into the existing schema for that literary reference. So, the reader will attempt to apply the interpretation of that literary reference from her stored knowledge to the point for which the author is making the allusion. If the application of that stored interpretation is satisfactory to the reader—it makes logical sense, common sense, and emotional sense—then the reader will accept the interpretation and the credibility of the allusion's author will increase. However, if the application is unsatisfactory, the reader will discard it, and the author's credibility will suffer.

In addition to tapping into a reader's existing schema and thereby increasing credibility for both the interpretation and the author, literary allusions add value to persuasive writing, including judicial opinions, by invoking all three of Aristotle's rhetorical modes: logos, ethos, and pathos.

First, literary citations invoke the power of logos (logic and reason) by providing readers with concrete examples of abstract principles. Further, the fact that the literary work is cited adds logical appeal by supporting the point

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[42] *See generally* Robert Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POLI. SCI. REV. 1248 (1973).
[43] *Id.* at 1251.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

with concrete "authority." Judges have historically called upon literature as authority in their opinions—invoking the logos function.[50] Such use of literary allusions is especially effective "when the argument or point is difficult to explain in literal terms and can more effectively and efficiently be explained through a metaphoric analogy."[51]

Second, literary citations invoke the power of ethos (credibility) by showing the author's creativity and knowledge and by creating connection between author and reader.[52]

Professor Melissa Weresh's work on the power of persuasive ethos addresses the role of literary allusion in evoking credibility and creating a relationship between author and reader: "An advocate's use of literary references establishes her intellect and may ingratiate herself to the audience sharing knowledge of those sources."[53] Literary allusions may "convey ethos by demonstrating that the advocate is knowledgeable, clever, and intelligent—source-characteristic attributes of ethos."[54]

Literary allusions contribute to an author's ethos "by demonstrating his or her creativity and resourcefulness."[55] Such allusions "demonstrate that the writer is educated and well-read."[56] Hence, literary allusions "can also reinforce the creativity and cleverness of the writer."[57] As Professor Weresh observes that "[b]ecause [covert literary allusions] require creativity, they can 'seem particularly impressive to readers,' and 'their use can affect positively the reader's impression of the writer.'"[58]

But creativity and cleverness are not the only ways that literary allusions impact an author's ethos. Such allusions "evoke ethos at a deeper level as well, creating a bond between advocate and reader."[59] If the author alludes to a literary work "to which an audience is positively disposed, an author may influence the audience to be more positively disposed towards her and her text. . . . A straightforward mention or ordinary reference might also work, but perhaps not as well . . . ."[60] Because these allusions require common knowledge and operate as "inside information" to which both parties are privy, "readers who make the connection will often feel a sense of kinship with the writer," which enhances ethos.[61] Professor Smith explains, "[b]ecause the reader can appreciate the shorthand represented by the literary reference, the literary allusion helps to create a positive bond that

[50] SMITH, *supra* note 30, at 259; *see* John M. DeStefano III, *On Literature as Legal Authority*, 49 ARIZ. L. REV. 521, 521–22 (2007). It should be noted that Professor Smith calls the use of literary references as authority "ineffective" and something to be avoided. *See* SMITH, *supra* note 30, at 259. However, Professor Smith is advising advocates writing *to* judicial audiences rather than judicial audiences themselves.

[51] SMITH, *supra* note 30, at 259.

[52] There is, however, a very definite flip-side to this ethos for judges; it makes them appear arrogant and creates outgroups, and it appears as though they are playing games with lawyers and with clients' lives.

[53] Weresh, *supra* note 31, at 256.

[54] *Id*. at 262.

[55] *Id*. at 264 (citing SMITH, *supra* note 30, at 261).

[56] *Id*. (citing SMITH, *supra* note 30, at 261).

[57] *Id*.

[58] *Id*. (citing SMITH, *supra* note 30, at 284).

[59] *Id*.

[60] Irwin, *Aesthetics*, *supra* note 25, at 522 (citations omitted).

[61] Weresh, *supra* note 31, at 264 (citing SMITH, *supra* note 30, at 284).

will often encourage the reader to trust the writer."[62] Allusions can also create "in groups" and "out groups"—those who do and do not understand the author's reference. When a reader recognizes herself as an "insider" by recognizing the author's allusion, "[t]he comfort and intimacy derived from understanding [the] allusion is not unlike that of hearing our native tongue in a foreign land."[63]

Finally, authors increase their ethos by calling on the authority of the literary author and imbuing the author with additional authority by the mere fact the judicial author is citing her; such citations may also elevate the credibility of the judicial author with certain readers.[64] If the literary source alluded to carries weight with the reader, the alluding author can gain credibility and good will with her audience: "[T]he name of a classic author or work changes the attitude of some readers, slowing the eye or opening the mind. Robert Frost, Amy Lowell, or William Butler Yeats carry ethos if we believe they joined their literary talent with good sense and moral character . . . ."[65] Thus, the use of literary allusions increase the author's ethos and strengthen the rhetorical power of their work.

Third, literary citations invoke the power of pathos (emotional appeal) by "endow[ing] the logical machinery of the law with much-needed human context."[66] Any time an author seeks to "arouse emotions such as pity, hate, anger, fear, compassion, regret, guilt, patriotism, and the like [the author employs] emotional substance" or pathos.[67] Literary allusions that aid in arousing such emotions are particularly effective.

Working together, a literary reference "combines the appeal of ethos and pathos; it can enrich the judicial narrative as an inductive representation of moral life; it provides some basis for invoking the 'unwritten laws' of society; and it can serve up maxims on the right occasion."[68] Literature also provides a source of reference and allusion where other authorities may fail: "Literature goes places where economics, history, philosophy, statistics, and other disciplines cannot. In these places, literature becomes a necessary crutch for both judge and reader to reckon with the ineffable."[69] Indeed, Judge Richard Posner, often a critic of the use of literary citations in judicial opinions, has written: "[In] areas not yet conquered by logic or science, we are open to persuasion by all sorts of methods, some remote from logic and science."[70]

Allusions are particularly effective when they are able to build on shared knowledge, evoke all three rhetorical modes, and provide the reader with a sense of understanding without requiring significant additional effort—rather, they provide at least a perceived "break" from mental exertion.

Effective allusions stand on their own without the need for commentary or explanation from the author to make them clear. In fact, "an allusion which

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[62] *E.g.*, SMITH, *supra* note 30, at 261.
[63] Irwin, *Aesthetics*, *supra* note 25, at 526.
[64] DeStefano, *supra* note 50, at 528.
[65] *E.g.*, *id.*
[66] *Id.* at 531 (citing Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1881–82 (2005)).
[67] SMITH, *supra* note 30, at 260.
[68] DeStefano, *supra* note 50, at 537–38.
[69] *Id.* at 539.
[70] RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 276 (1998).

must be explained is not fully appreciated."[71] Literary allusions are less likely to be effective, and may even be detrimental, when they are obscure such that the work may not be well known to the audience,[72] or if the connection between a familiar work and the interpretation the author wishes to employ is unclear or strained. To be effective, the allusion should appear natural, even simple. Readers "should not be pushed past a certain point of expending effort in understanding."[73] And perhaps contrary to what is expected of the analysis underlying the allusion, "the author must not appear to have exerted himself in producing the allusion."[74] Professor Sherwin gives this advice to authors wishing to craft effective allusions:

> The allusion must appear spontaneous and creative, virtually effortless, as with wit in conversation. The allusion must give the appearance of flowing easily, even if in reality it was difficult and painstaking to craft. . . . The author of the allusion must not say too much or too little. He must know his audience, and give them just what they need to understand with the proper amount of effort. . . . [T]he author should place her allusion not at the point of surface level awareness but at a depth just far enough beneath the surface so as to cause an aesthetic experience in its discovery by the intended audience.[75]

Effective allusions also avoid the appearance of preaching: "The allusion should remind and re-order but not preach or condescend."[76] Readers who are particularly educated—like those reading judicial opinions—don't want to feel like they are being lectured or instructed, instead they "want[] to feel as though [they are] collaborating with an author, not receiving a lesson in what is valuable but nearly forgotten."[77]

Moreover, in order to be effective—especially in a context where the allusion adds to important analysis as in a judicial opinion—allusions need to span cultures. Allusions often fail when they are "culture specific and hence unknown to a reader from a different culture."[78] As the legal community becomes more diverse and even international, assumptions that all readers of judicial opinions share the same cultural and literary heritage fail, leaving a greater possibility that key members of the audience will not understand or appreciate the allusion.

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[71] Irwin, *Aesthetics*, *supra* note 25, at 525.

[72] SMITH, *supra* note 30, at 262. Familiarity with the underlying literary work is key to the reader's understanding of the reference, but unfamiliarity may actually increase the persuasive value of the reference. DeStefano asserts that while "a reader who has not read a literary work will not understand or accept a reference to it . . . the name of the author coupled with the gist of the reference might have a dangerously profound impact on just such a reader." DeStefano, *supra* note 50, at 527 n. 40.

[73] Irwin, *Aesthetics*, *supra* note 25, at 529.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 530 (*quoting* E. E. KELLETT, LITERARY QUOTATION AND ALLUSION 21 (1933)).

[77] *Id*. (*quoting* E. E. KELLETT, LITERARY QUOTATION AND ALLUSION 21 (1933)).

[78] SMITH, *supra* note 30, at 263.

III. LITERARY ALLUSIONS IN JUDICIAL OPINIONS

A. TO USE OR NOT TO USE: THAT IS THE QUESTION—AND THE DEBATE

In 1976, Professor Charles Alan Wright noted a literary allusion by Judge Henry Friendly in *I.I.T. v. Vencap, Ltd*.[79] Judge Friendly compared a section of the U.S. Code to Lohengrin, the Arthurian Knight of the Swan popularized by the Wagner opera, saying that while the section of the Code had been in place since 1789, "no one seems to know whence it came."[80]

Judge Haynsworth's reply acknowledged the hesitation that many judges, much less lawyers, feel when invoking literary allusion in legal documents:

> I rather envy him, though I have been persuaded to avoid classical references which would not be understood by a large portion of the readers. Some among us will know that Lohengrin could dwell with his bride only so long as she and others knew not his name nor whence he came, but are there not many more of us who would simply be perplexed? Should a judge write for the Charlie Wrights or for young law clerks preparing legal memoranda for the use of junior partners in advising clients?[81]

While acknowledging that younger, less-experienced lawyers were the primary audience for many judicial opinions, Professor Wright nonetheless opined that literary allusions have a place in judicial writing.[82] Even if serving no other purpose, he argued that they at least make the writing more interesting:

> [A]s long as the essential message of the opinion is clear . . . some literary grace and use of obscure allusions is not a bad thing. It adds to the pleasure of those of us whose daily work is the reading of [judicial opinions] and it might contribute to the education of the young law clerk who will not understand the reference and who will then ask or look up to find out the [source of the allusion].[83]

But Professor Wright added the caveat that the allusions he found particularly effective were "vivid and clear," and "their basic thrust [would] be understood even by readers who are not familiar with [the underlying literary text]."[84] Further, effective allusions are subtle—"if it requires a footnote to make the point clear, things have become too complicated."[85]

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[79] I.I.T. v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 19); Charles Alan Wright, *Literary Allusion in Legal Writing: The Haynsworth-Wright Letters*, *in* SCRIBES J. LEGAL WRITING 1, 1 (1990).
[80] Wright, *supra* note 79, at 3.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*. at 4.
[85] *Id*. at 6.

However, there are downsides to using literary allusions as well. Some readers, even attorneys, find judges who invoke literary allusions to be arrogant or condescending. It may even appear as though judges are trying to flaunt their superior knowledge to their readers.[86] Another potential danger inherent to using literary allusions is creating in-groups and out-groups—those who will understand the allusions and those who will not—which by definition alienates a portion of the opinion's audience.

Finally, some readers find allusions to literature too trivial for serious endeavors like appellate lawmaking. Keith cited Australian legal scholars who believe that "literary allusions [are] too frivolous to be appropriate to the serious task of legal judgment" and that "such allusions detract from the clarity or rigour [sic] of legal reasoning or of the resulting judgment."[87]

However, Chief Judge Monterey Campbell of the Florida Second District Court of Appeal disagrees:

> Perhaps it is the frustrations of the law, as it is sometimes interpreted and often applied, that leads us as jurists to the field of literature, not only in an attempt to more eloquently or fervently express our concern and respect for the law, but also to find some solution and solace in the writing of other authors who have considered those same or similar frustrations and vagaries in its application.[88]

Professor Peter Brooks encourages the increased use of narrative in legal writing, which arguably includes the increased use of literary allusions and references.[89] He argues that narratives are "a form of explanation and argument deployed for kinds of meanings that are time dependent and sequential, that do not lend themselves to other kinds of statement."[90]

Judicial opinions are truly "excellent" when they are memorable—as artfully put by Professor James Boyd White when he wrote, "[t]he excellence of the opinion is . . . an excellence of thought, represented and enacted in language in such a way as to live in the minds of others."[91]

Legal writing scholar Bryan Garner believes that literary allusions, "if not too arcane, can add substantially to the subtlety and effectiveness of writing."[92] Garner asserts that "[i]t is perhaps easier for judges than for practicing lawyers to use literary allusions, for judges have a guaranteed readership and do not suffer directly if anyone (of everyone) fails to appreciate their allusions."[93] He rightly points out, however, that not all literary allusions are effective, especially those that are hyperbolic or

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[86] At a CLE where I presented the results of my research, several attorneys in the audience commented that their reactions to literary allusions in judicial opinions is to initially feel that the judge included the allusions simply to "appear smarter than the reader" or to "show how well-versed they are" in literature, not to make any meaningful substantive point.

[87] Ben Keith, *Seeing the World Whole: Understanding the Citation of External Sources in Judicial Reasoning*, 6 N.Z. J. PUB. & INT'L L. 95, 108 (2008).

[88] Patten v. State, 531 So. 2d 203, 208 (Fla. Ct. App. 1988) (Campbell, J., dissenting).

[89] Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J. L. & HUMAN. 1, 5 (2006).

[90] *Id*. at 5.

[91] James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995).

[92] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 342 (2d ed. 1995).

[93] *Id*.

contrived because they "invariably detract from the message to be conveyed."[94]

B. ANALYSIS OF THE USE OF LITERARY ALLUSIONS IN JUDICIAL OPINIONS

Judges use literary allusions for a variety of purposes "including to instruct an audience, to generate an aesthetic experience in an audience, and to link or connect the author with a tradition by activating themes, motifs, and symbols."[95] For example, as noted by the Massachusetts Supreme Court when it upheld a trial court's use of Tennyson's *Ullyses*: "[T]he literary reference was the judge's stylistic way of stating the theme of her decision, based on the facts she had found."[96]

In his groundbreaking text on advanced legal writing, Professor Michael R. Smith examines the roles that literary allusions play in persuasive writing.[97] Professor Smith categorizes literary allusion in legal writing into two major groups. First, those used for "nonthematic comparison," meaning that the allusion is either to a part of a literary work that "is minor or incidental aspect of the work, not a major theme of the work" or that "the literary allusion is being used by the legal writer to support a minor or incidental point in the writer's document, not a major theme of the document."[98] Within the nonthematic category are literary allusions used for comparison (metaphoric use), those used as hyperbole (comparisons to an exaggerated character or scene in literature), and those that are used for "direct borrowed eloquence" or "creative variation." This third type involves the author "borrow[ing] a well-known or eloquent passage from a literary work or creatively alter[ing] such a passage to enhance or punctuate the borrower's own writing."[99] Smith's second category of literary allusions are "thematic comparisons," which are "designed to evoke a theme or value represented in the referenced literary work." In other words, "the reference is designed to force the reader to compare the societal value at issue in the legal matter at hand to a literary work involving the same societal value or theme."[100]

In addition to the use of literary allusions, judges use literary sources as quasi-authority in their opinions. New Zealand legal scholar Ben Keith examined the use of "external sources," including literary sources, in judicial opinions.[101] He observed that often judicial citations to literary sources "are really not much more than substitutes for or supplements to dictionary definitions" or sources of "pithy or elegant turn[s] of phrase."[102] Another study reportedly surveyed more than 2 million federal appellate opinions since the early 20th Century.[103] That study revealed only "543 identifiable

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[94] *Id*. at 343.
[95] Irwin, *Aesthetics*, *supra* note 25, at 521.
[96] Demoulas v. Demoulas Super Markets Inc., 677 N.E.2d 159, 177–78 (Mass. 1997).
[97] SMITH, *supra* note 30, at 251–307.
[98] *Id*. at 253.
[99] *Id*. at 275.
[100] *Id*. at 287.
[101] Keith, *supra* note 87, at 108.
[102] *Id*.
[103] M. Todd Henderson, *Citing Fiction*, 11 GREEN BAG 171, 171 (2008).

citations or references to works of fiction," of which the author claimed less than half (236) "were employed rhetorically to evoke an emotional response in the reader."[104]

When I read the latter study I immediately recalled opinions that I have read over the years and questioned the author's conclusions. In numerous opinions, the authors had invoked literary themes and quotations, and remarkably the numbers in the previous study were accurate. So I embarked on my own analysis, the results of which are reported in the following section.

To conduct the study I focused on a fifteen-year period from 1997 to 2012 and limited the study to opinions of the federal appellate courts. Using both Lexis and Westlaw databases and lists of the most significant literary works of the nineteenth, twentieth, and twenty-first centuries, as well as lists of significant authors, characters, and literary settings, I developed search queries to uncover both the explicit and implicit literary allusions in the studied cases. Unlike the previous study, I found the use of literary allusions to be extensive.

IV. EMPIRICAL RESULTS

Between 1997 and 2012, 470 federal appellate cases had opinions making use of literary references and allusions.[105] Consistently about thirty cases each year—from a low of twenty in 2005 to a high of thirty-five in both 2003 and 2008.

Both the Eighth and Federal Circuits employed the fewest literary references over the last fifteen years with only nine each. The Ninth Circuit employed the most with references appearing in ninety-nine cases, followed by the First Circuit with fifty and the Seventh Circuit with forty-five. The United States Supreme Court, which decided the fewest total cases of any of the courts surveyed, used literary references in thirty-four cases during the surveyed time period. Literary references are found most frequently in majority opinions (329) but are also used in dissents (106) and concurrences (29).

Between 1997 and 2012, 167 different federal appellate court judges and justices employed literary references and allusions in their opinions. While nearly half (82) of them invoked a single reference, and another twenty-nine only two such references, thirty-one judges used five or more references, with eight employing ten or more. The judges and justices using the most literary references during the survey period were Judge Bruce Selya, of the First Circuit, with thirty-five references; Judge Sidney R. Thomas, of the Ninth Circuit, with sixteen; Supreme Court Justice Antonin Scalia, Judge Stephen Trott of the Ninth Circuit, Judge Richard Cardamone of the Second Circuit, Judge Diane P. Wood of the Seventh Circuit, and Judge Edward Carnes of the Eleventh Circuit, with eleven literary references apiece.

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[104] *Id*.

[105] For the sake of simplicity, both references and allusions will be referred to as "references" in this section of the article.

Federal judges referred to the works of sixty-eight different authors during the survey period.[106] From Isabel Allende to J.K. Rowling, Fyodor Dostoyevsky to Rudyard Kipling, and John Milton to Dr. Seuss, the literary sources run the gamut of classics, children's stories, poetry, and modern fiction. The most frequently referenced author was, not surprisingly, William Shakespeare, with 96 occurrences. Twenty-six different Shakespearean works were referenced, with *Hamlet* (16), *Romeo and Juliet* (13), *Othello* (11), and *Macbeth* (10) garnering the most references. Other common authors were George Orwell (46), Sir Arthur Conan Doyle (36),[107] Charles Dickens (36), Franz Kafka (35), and Lewis Carroll (31).

The name of the literary work's author appears in 239 of the judicial references. Characters and settings from the literary work appear 183 times.[108] The name of a literary work is included sixty-three times.[109] A complete citation to the literary work referenced is used frequently but not universally when a judge employs a literary reference. The citation to the literary work appears in the text 140 times, while it is presented in a footnote 143 times. Perhaps surprisingly, no citation to the literary work itself (except perhaps to the author's name, a character name, or the work's title) is pervasive with 243 references.

V. ANALYSIS OF JUDICIAL LITERARY ALLUSIONS

This section will examine several literary allusions from federal judicial opinions. After setting forth the text of the opinion including the allusion, the context of the allusion both in the case and in the literary work will be explained. With this background, the effectiveness of the allusion will then be critiqued.

A. INCOMPLETE FACTUAL COMPARISON

The Ninth Circuit in Boyer v. Belleque[110] compared a convicted murderer to Edmond Dantes, the Count of Monte Cristo.[111] The court examined the prisoner's appeal of the district court's denial of his petition for habeas corpus wherein the defendant challenged the sufficiency of the evidence leading to his conviction for attempted aggravated murder. In the opinion authored by Judge Gould, the court directly stated its comparison on the facts of the case to the literary story of Dantes:

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[106] For a complete list of all authors referenced during the survey period, see Appendix A *infra*.

[107] Opinions alluding to the works of Sir Arthur Conan Doyle included twenty-seven references to "the dog that did not bark" from *The Silver Blaze* and twenty-one general references to Sherlock Holmes himself.

[108] The most frequently referenced characters and settings came from Sherlock Holmes. Following the Doyle characters are Dickens's fictional case of *Jarndyce v. Jarndyce* from *Bleak House* (15), Hawthorne's "scarlet letter" (14), Carroll's Wonderland (10, plus an additional 4 references to Alice, 2 to the looking glass, and 4 for the villainous Queen of Hearts), the fairy tale characters Goldilocks and Cinderella (with 8 each), and Orwell's Big Brother (7).

[109] Nearly half of the sixty-three references were to the same five works: Carroll's *Alice in Wonderland* (7), Baum's *Wizard of Oz* (5), Homer's *The Odyssey* (5), Orwell's *1984* (5), and Shakespeare's *Othello* (4).

[110] Boyer v. Belleque, 659 F.3d 957, 965 (9th Cir. 2011).

[111] *Id*.

> To add perspective on the claim before us, we borrow a literary allusion. Boyer is certainly no innocent Edmond Dantes, wrongfully imprisoned, though innocent of crime, because of a conspiratorial prosecution with witnesses lying to advance their self-interest. Boyer is undoubtedly guilty of many heinous sexual offenses, and he does not here challenge those convictions. But still the question presented in his federal habeas petition is whether he was wrongly convicted of attempted aggravated murder and that question requires evaluating whether the evidence submitted to the jury was sufficient for it to find all elements of *that* crime, as it has been defined and interpreted by the state of Oregon, beyond a reasonable doubt. For among the hallmarks of the American judicial system is this premise: Even a bad person who has committed many crimes should not be imprisoned for a crime that he did not commit. With this in mind, we turn to a consideration of whether, under the restricting lenses of *Jackson* and of AEDPA, this appeal presents such a case.[112]

While the court's comparison is certainly clear—the defendant, Boyer, is not the innocent victim of conspiracy that Dantes was in the classic Dumas novel—the allusion falls short because it does not take into account the full context of the story of the Count of Monte Cristo.

A reader familiar enough to recognize the character Edmond Dantes and see the allusion will know that Dantes was a young and successful sailor who finds himself wrongfully imprisoned as a result of a conspiracy. The conspiracy went so far as to lead the prosecutor to destroy evidence that would have proved Dantes's innocence and sentences him to life imprisonment without trial. After fourteen years in prison, Dantes ultimately escapes and dedicates himself to vengeance against those who wronged him.

The potential problem with the court's comparison of the guilty Boyer with the innocent Dantes is that the reader isn't sure where the allusion is meant to end. Is the court simply saying that Boyer, unlike Dantes, had sufficient evidence to convict him—evidence that was not tampered with or trumped up by unscrupulous prosecutors—or is the allusion meant to go further? If the allusion doesn't depend on the reader's knowledge that Dantes goes on to be the vengeful Count of Monte Cristo, then the reader may at best be confused and, at worst, may read more into the Boyer facts than are actually there. While it could be argued that the court's allusion is clear enough in its point of comparison—that Boyer is NOT the innocent accused that Dantes was—the potential for confusion is serious enough that the allusion ultimately fails.

1. Comparison to Facts with Unnecessary Explanation

Similar to the problem created when an author makes a comparison that brings in unnecessary context from a literary source, allusions can be

[112] *Id*. (citation omitted).

ineffective when the author adds unnecessary explanation rather than letting the allusion rest on its own merits.

In *Village of San Jose v. McWilliams*,[113] the Seventh Circuit, in an opinion authored by Judge Bauer, compared the Village of San Jose, a lien creditor that opposed a debtor's bankruptcy, to Shylock, the infamous Merchant of Venice:

> The debtors filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. The Village of San Jose, a lien creditor, opposed the discharge on the ground that within one year of filing the petition the debtors hindered, delayed, or defrauded the Village by transferring or concealing property. . . . The bankruptcy judge granted the discharge, finding the debtors' subsequent remedial conduct of disclosing and recovering the properties negated the pre-petition conduct. The Village then appealed to the district court, which affirmed the bankruptcy judge's ruling. Though the Village stated that the debtors have no discernable method to pay the amount owed, bankruptcy or not, the Village nevertheless seeks its "pound of flesh" in this court. After a thorough review, we find that the bankruptcy court erred, and reverse and remand for further proceedings not inconsistent with this opinion.[114]

According to the Village's attorney this appeal is not about the debt (bond); it is a "matter of principle." Similarly, in The Merchant of Venice, Shylock, the money lender, when offered several times the debt (bond) refused stating the bond was forfeit and he wanted his "pound of flesh."115 It was only through the rather creative reading of the law by Balthasar (a doctor of laws, who was in fact Portia in disguise) that the result was avoided.116 Portia read the contract as allowing the taking of the pound of flesh, but not the drawing of any blood (because it was not mentioned).117 As we shall see, no such creative reading of the law was available here to save the debtors' petition.[118]

If the allusion is clear enough the explanatory footnote should not be necessary. The court should not need to explain that the Village's unwillingness to forgive the debt is "a matter of principle"—that should be clear from the allusion to the "pound of flesh," which Shylock also sought out of principle. The allusion should stand on its own. The need for explanation renders it essentially ineffective. Further, it is questionable whether the allusion holds up. Like the allusion to Edmond Dantes above, does extensive knowledge of the Shakespearean source undercut the effectiveness of the comparison? In The Merchant of Venice, Shylock was ultimately unable to collect his "pound of flesh"—but, as the court found,

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[113] Village of San Jose v. McWilliams, 284 F.3d 785 (7th Cir. 2002).
[114] *Id*. at 787–88.
[115] *See generally* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE.
[116] *See generally id*.
[117] *See generally id*.
[118] 284 F.3d at 795.

the Village was arguably able to collect its debt. Thus, the differences in the facts between the two situations leads the reader to question, if not completely disregard, the comparison, rendering the allusion ineffective.

2. Borrowed Eloquence/Creative Variation

While allusions employing factual comparisons are frequently problematic, courts are often able to use literary language to effectively add eloquence or variation to their opinions, and these allusions are often very effective.

In a case examining the constitutionality of the Endangered Species Act of 1973,[119] Judge Barksdale quoted a famous line from Rudyard Kipling's *Second Jungle Book* to not only add eloquence to his point about federal separation of powers, but also to comment on the importance of that separation:

> This division of powers was thought necessary "to ensure protection of our fundamental liberties." Justice Kennedy summarized this point in his *Lopez* concurrence:
>
> Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.
>
> In keeping with the subject at hand, the strength of this governmental system is aptly described by Kipling: "For the strength of the pack is the wolf and the strength of the wolf is the pack."[120]

This allusion, while seemingly just a simple quote added to the end of the court's own analysis, is extremely effective. First, it adds an eloquence and variation to the explanation that does not require knowledge of the source text. But, when the reader actually knows and understands the source text and can bring that knowledge into the court's analysis, the quotation adds depth to the allusion. The quotation is drawn from Kipling's poem, *The Law of the Jungle,* in The Second Jungle Book.[121]

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[119] GDF Reality Investments, LTD v. Norton, 326 F.3d 622, 624 (5th Cir. 2003). The court summarized the issue in the case and its decision as follows:

The Endangered Species Act of 1973, 16 U.S.C. § 1531, et seq. (ESA), contains a "take" provision, 16 U.S.C. § 1538(a)(1)(B). For this challenge to Congress's Commerce Clause power, U.S. Const. art. I, § 8, cl. 3, at issue is whether ESA's take provision is unconstitutional as applied to six species of subterranean invertebrates found only within two counties in Texas (Cave Species). Central to this question is whether, to demonstrate the requisite substantial effect on interstate commerce, Cave Species "takes" may be aggregated with those of all other endangered species. They can be; the judgment is AFFIRMED. *Id*. at 628.

[120] *Id*. (internal citations omitted).

[121] In its entirety the poem reads:

Now this is the Law of the Jungle --

as old and as true as the sky;
And the Wolf that shall keep it may prosper,
but the Wolf that shall break it must die.
As the creeper that girdles the tree-trunk
the Law runneth forward and back --
For the strength of the Pack is the Wolf,
and the strength of the Wolf is the Pack.
Wash daily from nose-tip to tail-tip;
drink deeply, but never too deep;
And remember the night is for hunting,
and forget not the day is for sleep.

The Jackal may follow the Tiger,
but, Cub, when thy whiskers are grown,
Remember the Wolf is a Hunter --
go forth and get food of thine own.
Keep peace withe Lords of the Jungle --
the Tiger, the Panther, and Bear.
And trouble not Hathi the Silent,
and mock not the Boar in his lair.
When Pack meets with Pack in the Jungle,
and neither will go from the trail,
Lie down till the leaders have spoken --
it may be fair words shall prevail.
When ye fight with a Wolf of the Pack,
ye must fight him alone and afar,
Lest others take part in the quarrel,
and the Pack be diminished by war.
The Lair of the Wolf is his refuge,
and where he has made him his home,
Not even the Head Wolf may enter,
not even the Council may come.
The Lair of the Wolf is his refuge,
but where he has digged it too plain,
The Council shall send him a message,
and so he shall change it again.
If ye kill before midnight, be silent,
and wake not the woods with your bay,
Lest ye frighten the deer from the crop,
and your brothers go empty away.
Ye may kill for yourselves, and your mates,
and your cubs as they need, and ye can;
But kill not for pleasure of killing,
and seven times never kill Man!
If ye plunder his Kill from a weaker,
devour not all in thy pride;
Pack-Right is the right of the meanest;
so leave him the head and the hide.
The Kill of the Pack is the meat of the Pack.
Ye must eat where it lies;
And no one may carry away of that meat to his lair,
or he dies.
The Kill of the Wolf is the meat of the Wolf.
He may do what he will;
But, till he has given permission,
the Pack may not eat of that Kill.
Cub-Right is the right of the Yearling.
From all of his Pack he may claim
Full-gorge when the killer has eaten;
and none may refuse him the same.
Lair-Right is the right of the Mother.
From all of her year she may claim
One haunch of each kill for her litter,
and none may deny her the same.
Cave-Right is the right of the Father --
to hunt by himself for his own:

For a reader who recognizes the allusion and knows that the source poem outlines the rules of the pack and the social/governmental system inherent therein, the court's point about separation of powers is even more powerful. The reader will likely also appreciate the creativity employed by using this particular poem in a case about the Endangered Species Act as wolves were at least for a time protected by that very Act.

While not as directly related to the subject matter of the case as the Kipling poem, Judge Boyce of the Sixth Circuit effectively employs borrowed eloquence and a meaningful allusion with his use of Charles Dickens's *Oliver Twist* in his dissent in *United States v. Sanders*, a case examining whether re-arresting a defendant who had served his court-imposed sentence when that sentence was later found to have been insufficient violated the defendant's due process rights[122]:

> When I think about this case, as I have done so often as of late, it makes me sick to my stomach. To imagine the emotional and psychological turmoil Mr. Sanders has been forced to endure as a result of the government's action and inaction in this case shocks and angers me to no end. Sanders woke up every day for six years believing that he was a free man. That's 2,190 mornings. And, in this case, it appears that Lummie Sanders used each of those days to make something out of his life. I cannot imagine any more settled expectations than those. I would order Sanders released from prison immediately. If we as a federal court cannot remedy the truly fundamentally unfair result that exists here, I don't know what good we are. And the law, well, if the law truly requires Lummie Sanders to go back to prison-the law is a [sic] ass.[123]

Again, the allusion works as mere borrowed eloquence—even if the reader was unfamiliar with the famous quotation by Mr. Bumble in *Oliver*

He is freed of all calls to the Pack;
he is judged by the Council alone.
Because of his age and his cunning,
because of his gripe and his paw,
In all that the Law leaveth open,
the word of your Head Wolf is Law.
Now these are the Laws of the Jungle,
and many and mighty are they;
But the head and the hoof of the Law
and the haunch and the hump is -- Obey!

[122] United States v. Sanders, 452 F.3d 572, 593 (6th Cir. 2006) (Boyce, J., dissenting). The majority summarized the issues in the case and its decision as follows:

The case before us originated in 1993, when defendant-appellant Lummie Sanders was convicted of two firearm offenses and sentenced to 37 months imprisonment. Seven years later, following two direct appeals and one appeal of a motion under 28 U.S.C. § 2255, this court determined that Sanders should be sentenced to the 180-month minimum mandated by the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). By this time, however, Sanders had been released from custody because the 37-month sentence the district court imposed in granting the § 2255 motion, the same sentence imposed in Sanders' first sentencing, had been completed. Four more years passed before the district court issued a warrant for Sanders' arrest and imposed the longer sentence. Sanders claims that this delay violated his constitutional right to due process. As we find no due process violation, we affirm the sentence imposed by the district court. *Id*. at 573–74.

[123] *Id*. at 593.

Twist,[124] the language is appealing and the tone, obvious. But when the reader recognizes the allusion, the point is even more powerful.

The phrase "the law is an ass" was spoken by Mr. Bumble in Charles Dickens's *Oliver Twist*, when he is told that "the law supposes that your wife acts under your direction." Exasperated, Mr. Bumble replies, "if the law supposes that ... the law is a [*sic*] ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience—by experience."[125]

Again, this allusion works well; the reader can understand the point without understanding the source text. The language is creative and points out how ridiculous the ruling would be; but understanding the source and its context renders the dissent's exasperation with the majority's ruling even more powerful.

B. THEMATIC INTRODUCTIONS

Several of the literary allusions employed by courts in the study were set out as introductions to the opinions or sections thereof. These introductions often set the tone and theme for the coming analysis, and frequently are hyperbolic.

Among the most powerful of such introductory hyperbole is the quotation and follow-up paragraph written by Chief Justice John Roberts in *Stern v. Marshall*.[126] At the outset of the opinion the Chief Justice wrote:

> This "suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."
>
> Those words were not written about this case, see C. Dickens, Bleak House, in 1 Works of Charles Dickens 4–5 (1891), but they could have been. This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way through state and federal courts in Louisiana, Texas, and California, and two of those courts—a Texas state probate court and the Bankruptcy Court for the Central District of California—have reached contrary decisions on its merits. The Court

[124] CHARLES DICKENS, OLIVER TWIST 560 (Peter Fairclough eds., 1970).
[125] *Id*.
[126] Stern v. Marshall, 564 U.S. 462 (2011).

> of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding. To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.
>
> Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, § 1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. Those requirements of Article III were not honored here. The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so.[127]

Justice Roberts's invocation of the case of *Jarndyce v. Jarndyce* from Charles Dickens's *Bleak House* allows him to make a biting commentary about the state of the *Stern* case without directly attacking the parties or courts involved. While clearly over-the-top, the *Jarndyce* case provides a perfect example of a case that has gone on for too long, consumed far too many resources, and which, in the eyes of the Justice, needs to be concluded once and for all.

In the Dickens classic a member of the Jarndyce family made several wills, all dealing with a large estate of personal and real property. The case involved several claimants who all laid claim on the same valuable property in the Court of Chancery—the court responsible for sorting out such competing claims. Throughout the novel, Dickens takes aim at the Court of Chancery and aligns it with unnecessary and prolonged legal delay, leading the reader to conclude that such a court is incapable of producing justice.

Of course the comparisons to Chancery are overstated, but anyone familiar with the novel knows immediately what Justice Roberts is saying

[127] *Id*. at 468–69 (internal citations omitted).

about the *Stern* case. Thus, the quotation works well both as hyperbole and as a thematic introduction to the opinion.

Another example of thematic introduction was employed by Judge Fisher of the Ninth Circuit in his dissent to *Cramer v. Consolidated Freightways, Inc*.[128] Employing the words of George Orwell's *1984*, Fisher clearly sets out his reasons for disagreeing with the majority's analysis:

> There was . . . no way of knowing whether you were being watched at any given moment. . . . It was even conceivable that they watched everybody all the time. . . . You had to live-did live, from habit that became instinct-in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.[129]

> In this era of diminished privacy, where television transforms to reality what used to be considered fiction, . . . perhaps one should not be troubled by the blatant invasion of privacy at issue in this case. But I simply cannot agree that federal labor law intends to preempt states from protecting their citizens-even those working under collective bargaining agreements-from the kind of bathroom spying secretly and unilaterally employed by Consolidated Freightways, Inc.[130]

Just like the *Jarndyce* introduction in *Stern,* this introductory quotation succeeds because even if all the reader knew about the source was what was in the quoted passage, it serves as a vivid introduction to paint the picture thematically that Judge Fisher desires—that citizens should be free from intrusive and surreptitious surveillance in the workplace. Yet, readers familiar with the invasive tactics of Orwell's Big Brother can add even more to the theme.

One final thematic introduction example draws on Shakespeare's *Othello* and its famous lines on the worth of reputation. Invoked by Judge Bea of the Ninth Circuit in dissent to *Knievel v. ESPN*,[131] the quote sets the tone for the dissent's disagreement that an inflammatory photo of the legendary daredevil would be defamatory—but readers familiar with the play may be distracted:

Shakespeare's Iago said it best:

> Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;

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[128] Cramer v. Consolidated Freightways, Inc., 209 F.3d 1122, 1135–36 (9th Cir. 2000) (Fisher, J., dissenting in part).

[129] *Id*. at 1135 (citing GEORGE ORWELL, 1984 6–7 (Signet Classic ed. 1992, 1949)).

[130] *Id*. at 1135–36 (citing Edmund L. Andrews, *Europe's 'Reality' TV: Chains and Big Brother,* N.Y. TIMES, April 11, 2000, at A4 (describing a television game show called "Big Brother" for which contestants "are sealed for 100 days in a house where cameras and microphones record them 24 hours a day")).

[131] Knievel v. ESPN, 393 F.3d 1068, 1079 (9th Cir. 2005) (Bea, J., dissenting).

'Tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him,

And makes me poor indeed.[132]

> With considerable less lilt than Iago, but with perhaps the same desire to poison the mind not of a Moor—but of millions—defendant ESPN wrote below a photograph of Knievel, his attractive wife and a younger woman: "Evel Knievel proves you are never too old to be a pimp." In a classic example of ipse dixit, the Majority here concludes that no reasonable person could view that photo of Evel and Krystal Knievel, and the unidentified young woman, captioned with the phrase quoted, and believe a longtime daredevil now seeks money by living less on motorcycles and more off of women. Because I believe that a reasonable person could view this photo and its caption as defamatory of the Knievels, I respectfully dissent.[133]

The allusion to Iago's warning to Othello is clear, and seemingly apropos: reputation is valuable and he whose reputation is tarnished suffers greatly. On its face the allusion works. However, for readers more intimately familiar with *Othello* and the devious aims of the villain Iago, the quotation may raise confusion. First, these readers may recall that Iago tells Cassio that "reputation is an idle and most false imposition; oft got without merit and lost without deserving."[134] Yet here he describes it as a "jewel of [a man's] soul."[135] The contrast leads the reader to question which view Iago really holds. Further, readers familiar with the play will certainly recall that it is Iago himself that is plotting to ruin Othello's reputation—the very reputation he seems to protect in the quoted passage. Thus, while the quotation alone does provide an artful introduction and seems to set out a sympathetic theme, it can cause problems for those with an understanding of the source literature by causing the reader to question what the judge really meant or whether he realized the possible misinterpretation of the Bard's quote.[136] So, literary quotations can provide interesting and artful thematic introductions, but must be used carefully in order to avoid confusion.

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[132] *Id*. (citing WILLIAM SHAKESPEARE, OTHELLO act 2, sc. 3).
[133] *Id*. (internal citations omitted).
[134] WILLIAM SHAKESPEARE, OTHELLO act 2, sc. 3
[135] *Id*.
[136] For an interesting and in-depth analysis of reputation and good name in *Othello* and other Shakespearean works, see generally Madeleine Doran, *Good Name in Othello,* 7 STUD. ENG. LITERATURE 195 (1967).

C. COVERT ALLUSION FOR REASONING

Sometimes the literary allusion is employed more covertly and simply furthers the court's reasoning. Yet, even then, a deeper knowledge of the literary source can aid in furthering the impact of the allusion. For example, in *Perry v. Brown*,[137] the Ninth Circuit case invalidating California's Proposition 8, Judge Reinhardt quotes (without attribution) Juliet's famous injunction that Romeo denounce his name as it is her enemy and without substance.[138] In this scene, Juliet tells Romeo that a name is merely a convention—a meaningless label—and that who she loves is the man and not the name—hence,

> 'Tis but thy name that is my enemy;
>
> Thou art thyself though, not a Montague.
>
> What's Montague? it is nor hand, nor foot,
>
> Nor arm, nor face, nor any other part
>
> Belonging to a man. O! be some other name:
>
> What's in a name? that which we call a rose
>
> By any other name would smell as sweet;
>
> So Romeo would, were he not Romeo call'd,
>
> Retain that dear perfection which he owes
>
> Without that title. Romeo, doff thy name;
>
> And for that name, which is no part of thee,
>
> Take all myself.[139]

However, the court clearly does not share Juliet's sentiment that a name is merely a social convention devoid of real meaning. Holding that domestic partnerships are not the equivalent of conventionally named "marriage," the court opined:

> By emphasizing Proposition 8's limited effect, we do not mean to minimize the harm that this change in the law caused to same-sex couples and their families. To the contrary, we emphasize the extraordinary significance of the official designation of 'marriage.' That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple

[137] Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012).
[138] *Id*.
[139] WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

> desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not.[140]

For readers unable to place Juliet's metaphor, the passage still conveys the meaning the court desires: while some things like roses may not change their fragrance if called by another name, in other situations the label does matter. For readers who are familiar with the allusion, the tragic end to the star-crossed lovers, who try to disregard the social convention of name for the more meaningful aim of love, is hard to miss and adds weight to the court's reasoning.

D. LITERATURE USED FOR AUTHORITY

While not technically literary allusions, courts routinely use citations to literature as a type of authority to support their positions.[141] Writing for the Court in *National Archives and Records Admin. v. Favish*,[142] Justice Kennedy cites to the Greek tragedy *Antigone* as authority for burial customs and the rights of family members to assert those privacy rights on behalf of the deceased. *Favish* dealt with a Freedom of Information Act request for death-scene photographs of Clinton deputy counsel Vincent Foster.[143] In upholding the denial of the request, the Court concluded that "personal privacy" also included permitting "family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions."[144] The Court concluded that both "case law and traditions [support] the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes."[145]

Illustrating those "cultural traditions," Justice Kennedy wrote:

> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. . . . They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother. . . . The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect

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[140] 671 F.3d at 1078.
[141] For an analysis of such use, see generally DeStefano, *supra* note 50.
[142] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004).
[143] *Id*. at 161.
[144] *Id*. at 167.
[145] *Id*. at 167–68.

> they seek to accord to the deceased person who was once their own.146

VI. CONCLUSION

Judges refer to literature in their opinions and will likely continue to do so. These references, or allusions, can be very effective, but they are not without their drawbacks. When used consciously and conscientiously, they can help the reader make connections that would otherwise prove more difficult, make writing more eloquent, and provide a dramatic theme that draws an opinion together and gives it power. Judges and lawyers alike would be well served to better understand the theory behind and practice involved in the use of literary allusions. Because, ultimately, literary allusions and the literature that stands behind them enable us to "experience . . . what and how we are, in our human integrity and our human imperfection, with our actions, our dreams, and our ghosts, alone and in relationships that link us to others."[147]

[146] *Id*. (internal citations omitted).
[147] Vargas Llosa, *supra* note 1.

Appendix A

Literary Authors Referenced in Federal Appellate Opinions from 1997 to 2012

1. Aesop
2. Alighieri, Dante
3. Allende, Isabel
4. Andersen, Hans Christian
5. Baum, L. Frank
6. Blake, William
7. Browning, Robert
8. Byron, Lord
9. Camus, Albert
10. Carlyle, Thomas
11. Carroll, Lewis
12. Chaucer, Geoffrey
13. Christie, Agatha
14. Clark, Eleanor
15. Coleridge, Samuel Taylor
16. Defoe, Daniel
17. Dickens, Charles
18. Dostoyevsky, Fyodor
19. Doyle, Arthur Conan
20. Dumas, Alexandre
21. Eliot, George
22. Eliot, T.S.
23. Emerson, Ralph Waldo
24. Euripides
25. Faulkner, William
26. Frost, Robert
27. Goethe, Johann Wolfgang von
28. Goldsmith, Oliver
29. Grimm, The Brothers
30. Hawthorne, Nathaniel
31. Hemingway, Ernest
32. Henry, O.
33. Homer
34. Horace
35. Hugo, Victor

36. James, Henry
37. Kafka, Franz
38. Kipling, Rudyard
39. Lewis, C.S.
40. Marquez, Gabriel Garcia
41. Melville, Herman
42. Milton, John
43. Orwell, George
44. Perrault, Charles
45. Poe, Edgar Allen
46. Pope, Alexander
47. Proust, Marcel
48. Rowling, J. K.
49. Sandburg, Carl
50. Scott, Sir Walter
51. Seuss, Dr.
52. Shakespeare, William
53. Shaw, George Bernard
54. Shelley, Mary
55. Sinclair, Upton
56. Sophocles
57. Southey, Robert
58. Steinbeck, John
59. Swift, Jonathon
60. Thoreau, Henry David
61. Tolstoy, Leo
62. Twain, Mark
63. Viorst, Judith
64. Voltaire
65. Wells, H.G.
66. Whitman, Walt
67. Wilde, Oscar
68. Williams, Tennessee