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Legal Studies Research Paper Series

**Research Paper #152
June 2011**

The Freewheelin' Judiciary: A Bob Dylan Anthology

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THE FREEWHEELIN' JUDICIARY: A BOB DYLAN ANTHOLOGY

Alex B. Long*

INTRODUCTION

In a 2008 decision, Chief Justice John Roberts of the Supreme Court of the United States made history by citing – for the first time in the history of the Court – the lyrics of Bob Dylan in a published opinion. *Sprint Communications Co. v. APCC Services, Inc.*,¹ involved the somewhat dry issue of whether the billing and collection firms used by payphone operators had legal standing to bring suit on behalf of the payphone operators. In dissenting from the majority opinion finding that the firms had standing, Chief Justice Roberts noted that the payphone operators had assigned their legal claims against long-distance carriers to the firms because the firms were willing “to assume the obligation of remitting any recovery to the ... payphone operators.”² However, the firms never had any share in the amount that they collected. Therefore, Roberts argued, because the operators had no right to substantive recovery, they could not benefit from the judgment and thus lacked standing.³ Chief Justice Roberts did not cite any prior opinion of the Court in support of his argument, nor did he cite any legal treatise. Instead, he relied upon the lyrics of Bob Dylan (and misquoted them slightly): “When you got nothing, you got nothing to lose.”⁴

Not only was this the first time that the lyrics of Bob Dylan found their way into a

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¹ 554 U.S. 269 (2008).

² *Id.* at 301 (Roberts, CJ., dissenting).

³ *Id.* at 300 (Roberts, CJ., dissenting).

⁴ *Id.* at 301 (Roberts, CJ., dissenting) (quoting Bob Dylan, *Like A Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965)). The actual line is “When you ain’t got nothin’/You got nothin’ to lose.” Adam Liptak, *The Chief Justice, Dylan and the Disappearing Double Negative*, N.Y. TIMES, June 29, 2008. However, according to Dylan’s official website, the line is “when you got nothing, you got nothing to lose.” <http://www.bobdylan.com/songs/like-a-rolling-stone>

Supreme Court opinion, it was quite likely the first time that the lyrics of any musician who could realistically be described as a “pop” artist were ever used in a Supreme Court opinion to advance a legal argument. Although the names of numerous musicians have made their way into the Supreme Court reporter, before *Sprint Communications Co.*, none had seen his or her lyrics cited to advance a legal argument.⁵

Two years later, Justice Antonin Scalia made history for a second time by quoting Dylan. In *City of Ontario v. Quon*,⁶ the Court declined to decide whether a public employee had a reasonable expectation of privacy in text messages he had sent that had been searched by the employer. Part of the Court’s justification for refusing to decide the issue was its fear that technology and societal attitudes regarding technology were advancing so rapidly that it was unwise to articulate a bright-line rule regarding text messages.⁷ The Court’s refusal prompted a stinging response from Justice Scalia, who complained that the Court had shirked its duty to decide legal issues and that “[t]he-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”⁸ Interestingly, Scalia failed to cite Dylan as the author of the line, presumably because he assumed the line was so well known as to need no attribution.

Judges at all levels in the United States judicial system have cited Bob Dylan far more often than any other popular music artist.⁹ The logical question then becomes, “why?” Why is Dylan (rather than John Lennon, Woody Guthrie, or some other

⁵ A year later, Justice Samuel Alito used the lyrics to John Lennon’s *Imagine* as part of his discussion in *Pleasant Grove City, Utah v. Sumnum*, 129 S.Ct. 1125, 1135 (2009) regarding whether the government’s placement of a monument in a public park was a form of government speech.

⁶ 130 S. Ct. 2619 (2010).

⁷ *Id.* at 2629-30.

⁸ *Id.* at 2635 (Scalia, J. concurring in part and concurring in the judgment). The line is, of course, from Bob Dylan’s *The Times They Are A-Changin’* (Columbia 1964).

⁹ Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 540 (2007).

prominent and socially-conscious songwriter) the preferred songwriter for judges and why do judges feel the need to cite Dylan's lyrics to begin with? What are they hoping to convey to the reader about the legal issue at hand, the legal system in general, or about themselves that causes them to rely on the works of Dylan? What type of connection are they trying to make with the reader and why are Dylan's lyrics the preferred vehicle? Others have written about Dylan's perceptions of the legal system as expressed in his lyrics and what these lyrics say about the United States legal system.¹⁰ However, a different focus, one that explores the question of what these judges are trying to communicate through their use of Dylan's lyrics, may also yield interesting conclusions.

An examination of the imagery developed by Dylan through his lyrics and the imagery judges hope to develop in their opinions through the use of Dylan's lyrics may help answer some of those questions. In some instances, the use of Dylan's lyrics appears to be very much consistent with the judicial process in that the lyrics are used in an attempt to clarify or explain (in a more colorful or thought-provoking manner) a potentially difficult-to-explain idea or legal concept. In other instances, the use of lyrics appears to add little in terms of strengthening a legal argument or clarifying a point for a reader. Instead, the judge's inclusion of Dylan's lyrics is arguably as much of an attempt at self-expression and establishing a sign post as to who this judge is as an individual as it is an attempt to communicate a deeper meaning.

I. WHY DYLAN?

¹⁰ Adam Geary, *Outlaw Blues: Law in the Songs of Bob Dylan*, 20 CARDOZO L. REV. 1401, 1422 (1999).

By nature, lawyers and judges are storytellers.¹¹ Every client has a story to tell, and it is part of the job of a lawyer to present a client's story in a manner that makes it more likely that the client will achieve his or her objectives.¹² Legal rules have no power without a set of facts with which to connect, and it is part of the job of a lawyer to present facts to the judge or jury in a manner that makes the desired application of the law to the facts seem inevitable.¹³ Narratives are a particularly persuasive tool in this regard given their ability to help judges and jurors find common ground and understand the experience of a client.¹⁴ Lawyers are taught from their first year of law school to develop a compelling narrative when presenting a client's case to a jury and in their writing to enable the fact finder to understand a client's behavior and to see the desired connection between rule and law. Indeed, one author has concluded that it may not be possible to talk about caselaw, statutes, and constitutional provisions "without telling stories about them."¹⁵

Judges need to tell stories too. Judges need to tell stories if, again, for no other reason than that the law has no force without a given set of facts to which to apply. But

¹¹ See generally Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 884 (2010) ("Lawyers and judges hear, transform, and re-present those stories in fact statements of briefs and judicial opinions.").

¹² Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2272 (1989).

¹³ See Winter, *supra* note 12, at 2272 (stating that it is a lawyer's job "to structure for the legal decisionmaker a sense of the situation that suggests only one specific outcome"); Elyse Pepper, *The Case for "Thinking Like a Filmmaker": Using Lars Von Trier's Dogville as a Model for Writing a Statement of Facts*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 171, 174 (2008) ("Developing the story for the court is so important because, as Prof. Llewellyn explains, 'rules alone, mere forms of words, are worthless.'") (quoting KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12 (Oceana Publications, Inc. 1960)).

¹⁴ See Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 3, 19 (2009) (discussing the ability of narrative to produce understanding and empathy); KLAUS JENSEN, *THE SOCIAL SEMIOTICS OF MASS COMMUNICATION* 64 (Thousand Oaks: Sage Publications 1995) (noting that storytelling may be designed "to produce an effect on a recipient in a shared context").

¹⁵ Edwards, *supra* note 11, at 884.

judges also want their opinions to be persuasive. They want other judges and lawyers to accept the force of their logic.¹⁶ Thus, the story that a judge tells must be presented in a way that helps the reader see the connection between law and facts that the judge wishes the reader to see.¹⁷ To accomplish this, judges sometimes rely on a variety of narrative devices, including the use of foreshadowing and metaphor.¹⁸

In light of this, it is hardly surprising that judges are particularly drawn to songwriters with backgrounds in folk music and to Dylan in particular.¹⁹ Folk songs are often stories with a point. Historically, folk musicians have relied on a narrative structure in their songs, often in an attempt to persuade the listener (in the words of Dylan) to “lend a hand”²⁰ to whatever struggle the singer happened to be addressing in the song. Dylan himself often used a narrative structure in his earlier work,²¹ sometimes while commenting on the legal system, such as in *Percy’s Song*²² and *The Lonesome Death of Hattie Carroll*.²³ Even after Dylan severed his ties to the folk scene and entered the rock mainstream, he would sometimes revert to a narrative structure when the old urge to

¹⁶ Michael J. Higdon, *Something Judicious This Way Comes ... The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213, 1242 (2010); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling By Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267, 292 (2008).

¹⁷ See Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 3, 6 (2008) (stating that “stories ... are there to guide the logic and reasoning” of judicial decisions).

¹⁸ See Higdon, *supra* note 16, at 1244 (discussing the use of foreshadowing); Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 20 (1994).

¹⁹ See Long, *supra* note 9, at 546-48 (discussing the prevalence of lyrics from artists with folk backgrounds in judicial decisions).

²⁰ BOB DYLAN, *The Times They are A-Changin’*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia 1964).

²¹ MIKE MARQUESEE, *CHIMES OF FREEDOM: THE POLITICS OF BOB DYLAN’S ART 137* (The New Press 2003).

²² *Percy’s Song*, on *BIOGRAPH* (Columbia 1985).

²³ *The Lonesome Death of Hattie Carroll*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia 1964).

provide social commentary reemerged. In *Hurricane*,²⁴ for example, Dylan delivers a critique of the legal system while telling the story of Ruben “Hurricane” Carter, a boxer wrongfully convicted of murder. As lawyers and judges are in the business of telling stories, they can appreciate a skilled practitioner.

Perhaps more than any other popular artist, Dylan’s lyrics are well-suited for the task of legal persuasion. The use of metaphor and vivid imagery is a common technique in judicial opinion writing.²⁵ From the fruit of the poisonous tree to unclean hands to the marketplace of ideas, metaphors populate the legal lexicon. When used efficiently, metaphors enable readers “to understand one phenomenon in relationship to another” and to assist in understanding.²⁶ They can, in the words of one author, “trigger[] powerful, recurring frameworks of meaning and patterns of belief, and set[] in motion deeply rooted folk images, archetypes, and story lines.”²⁷

While music critics and scholars have debated whether Dylan’s lyrics qualify as poetry,²⁸ there can be not doubt that Dylan’s songs contain a wealth of imagery. To take just one example, *A Hard Rain’s A-Gonna Fall* conjures images of “twelve misty mountains, “six crooked highways,” “seven sad forests,” and a “dozen dead oceans,” all in the space of one verse.²⁹ Indeed, given Dylan’s extensive use of imagery and

²⁴ *Hurricane*, on *DESIRE* (Columbia 1976).

²⁵ Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 459 (2011); see Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010) (noting the use of imagery in corporate law decisions); Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 951-52 (2010) (noting the use of metaphor and “rich imagery” in civil procedure decisions).

²⁶ Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 188 (2004).

²⁷ *Id.* at 189.

²⁸ Robert Christgau, *Rock Lyrics are Poetry (Maybe)*, in *STUDIO A: THE BOB DYLAN READER* 62-63 (ed. Benjamin Hedin) (W.W. Norton & Company 2004).

²⁹ *A Hard Rain’s A-Gonna Fall*, on *THE FREEWHEELIN’ BOB DYLAN* (Columbia 1963); see also LARRY DAVID SMITH, *WRITING DYLAN: THE SONGS OF A LONESOME TRAVELER* 29 (Praeger Publishers 2005) (discussing imagery in the song).

metaphor, “one instinctively searches for ‘the message’ in his songs.”³⁰ Of course, some judicial metaphors fail to accomplish the goal of enlightening the reader and instead serve to confuse or obfuscate.³¹ Some of Dylan’s metaphors might be subject to the same criticism. But in other instances, it is difficult to miss their meaning, and for a judge seeking to explain a legal concept, Dylan’s lyrics may be an attractive resource.

A related reason why Dylan’s lyrics may be particularly attractive for judges is the fact that many of the images and phrases in Dylan’s songs are highly memorable. Simply stated, Dylan can turn a phrase. A well-constructed metaphor is likely to be particularly illuminating, and a memorable phrase is more likely to evoke a positive emotional response. Both are useful in terms of persuading a reader. So, it stands to reason that judges would be attracted to the lyrics of the man who warned that “you’d better start swimmin’ or you’ll sink like a stone” and who has a plethora of similarly-memorable lines at his command.

A final reason why Dylan’s lyrics may be cited more frequently than any other artist relates to the nature of music and the highly personal responses it can generate. Music can evoke intense personal connections. We at least like to believe that the kind of music we like says something about us as individuals.³² For some, music provides the soundtrack for certain memories or times in their lives,³³ and the music that often resonates with us the most is from what we see as a particularly meaningful time in our lives. Although Dylan’s music may be timeless, his best known music is of a particular

³⁰ SMITH, *supra* note 29, at 24.

³¹ Oldfather, *supra* note 18, at 26.

³² *But see* CHUCK KLOSTERNAN, SEX, DRUGS, AND COCOA PUFFS: A LOW CULTURE MANIFESTO __ () (“Contrary to what you may have heard from Henry Rollins or/and Ian MacKaye and/or anyone else who joined a band after working in an ice cream shop, you can’t really learn much about a person based on what kind of music they happen to like. As a personality test, it doesn’t work even half the time.”).

³³ *See generally id.* at __ (“Without a soundtrack, human interaction is meaningless.”).

time. His music helped provide the soundtrack for a particular time. And that time happens to be the same time when many of the judges who have sat on the bench over the last twenty-five years were coming of age.

Being a judge can be an isolating experience. The process of writing judicial opinions can often be formulaic, and the application of law to facts can sometimes be almost dehumanizing. Judges often assume the role of detached, impersonal adjudicator and intentionally write in the voice of one who has no distinctive voice. Some judges, however, are willing to allow aspects of their own personalities to creep into their decisions. For example, one may perhaps gain some insight into Justice Antonin Scalia's personality based upon his colorful opinions. But, by and large, judicial decisions are characterized by their impersonal nature.

Judges can hardly be blamed for occasionally chafing at these imposed standards of professional conduct. Many judges undoubtedly long to express their individuality in their professional work. For a judge who wishes to let his or her freak flag fly, including lyrics from the judge's favorite musical artist in an opinion might be a way to express the judge's individuality while still potentially furthering the persuasive value of the opinion. In light of the fact that Dylan helped form the soundtrack for the lives of many sitting judges, it stands to reason that Dylan would be the preferred choice of many judges who wish to do so.

II. A DYLAN LEGAL ANTHOLOGY

The fact that judges frequently cite Dylan's lyrics does not necessarily mean that they always do so in interesting or effective ways. Sometimes the inclusion of Dylan's lyrics

– while mildly amusing – do relatively little to convey deeper meaning or produce greater understanding among the members of the judge’s intended audience. Occasionally, however, judges use the imagery and narrative of Dylan’s songs in an effective manner. The following sections catalog the various ways in which courts have used Dylan’s lyrics in their opinions.

A. *Percy’s Song*

In *United States v. Bullock*,³⁴ a federal judge used Dylan’s lyrics (as well as others) in a clever manner to signify a legal concept. In *Bullock*, a criminal defendant challenged the reasonableness of what Judge Terence T. Evans of the United States Court of Appeals for the Seventh Circuit referred to as “a whopper of a sentence” for distributing heroin³⁵ The lower court had imposed the maximum penalty of 20 years for each of the five counts of distributing heroin to which the defendant had pleaded guilty. Strung together, the sentences amounted to a total of 100 years. On appeal, Judge Evans made the insightful observation that

[o]ne hundred years is a long time--one year longer, in fact, than the standard lyrical shorthand for an unimaginably long sentence. n1

n1 See, e.g., Bruce Springsteen, "Johnny 99" ("Well the evidence is clear, gonna let the sentence, son, fit the crime / Prison for 98 and a year and we'll call it even, Johnny 99."); Bob Dylan, "Percy's Song" ("It may be true he's got a sentence to serve / But ninety-nine years, he just don't deserve."); Johnny Cash, "Cocaine Blues" ("The judge he smiled as he picked up his pen / Ninety-nine years in the Folsom pen / Ninety-nine years underneath that ground / I can't forget the day I shot that bad bitch down."); Ed Bruce, "Ninety-Seven More To Go" ("Ninety-nine years go so slow / When you still got ninety-seven more to go."); Bill Anderson, "Ninety-Nine" ("The picture's still in front of my eyes, the echo in my ears / When the jury said he's guilty and the judge said ninety-nine years."); Chloe Bain, "Ninety-Nine Years" ("The sentence was sharp, folks, it cut like a knife / For ninety-nine years, folks, is almost for life."); Guy Mitchell,

³⁴ 454 F.3d 637 (7th Cir. Ill. 2006).

³⁵ *Id.* at 638.

“Ninety-Nine Years” (“Ninety-nine years in the penitentiary, baby, baby, wait for me, around twenty-fifty-five we’ll get together dead or alive.”).³⁶

Based on its concerns about how the trial judge had calculated the sentence, the court remanded the case for resentencing.

B. You Don’t Need A Weatherman to Know Which Way the Wind Blows

The most-frequently used Dylan lyric comes from his song *Subterranean Homesick Blues*.³⁷ The song is, in the words of one author, a “lyrical masterpiece” set to a “circus-honky-tonk-barrelhouse” soundtrack.³⁸ One author divines from the avalanche of words Dylan strings together a narrative in the song’s lyrics “about a kid looking for drugs while trying to avoid the law.”³⁹ Another concludes that “[s]ymbolically, a line here or there may grab you, but when taken in its totality, the song is a musical Rorschach test; make of it what you will.”⁴⁰

The relevant passage appears in the second verse of the song:

Maggie comes fleet foot
Face full of black soot
Talkin’ that the heat put
Plants in the bed but
The phones tapped anyway
Maggie says that many say
They must bust in early May
Orders from the D.A.
Look out kid
Don’t matter what you did
Walk on your tip toes
Don’t try No Doz⁴¹

³⁶ *Id.* at 638-39 n.1 (emphasis added).

³⁷ *Subterranean Homesick Blues*. on BRINGING IT ALL BACK HOME (Columbia 1965).

³⁸ SMITH, *supra* note 29, at 79.

³⁹ ANTHONY VARESI, THE BOB DYLAN ALBUMS: A CRITICAL STUDY 50 (Guernica 2002).

⁴⁰ SMITH, *supra* note 29, at 80.

⁴¹ According to Dylan’s official website, the line here is “Don’t try ‘No Doz.’” <http://www.bobdylan.com/#/songs/subterranean-homesick-blues>. In the famous video for the song from the movie “Don’t Look Back,” Dylan holds up a card reading “No Dose.” However, if one listens to the

Better stay away from those
That carry around a fire hose
Keep a clean nose
Watch the⁴² plain clothes
*You don't need a weatherman
To know which way the wind blows.* (emphasis added)

The final couplet conjures the image of a weatherman (or, in more modern parlance, a meteorologist). In turn, a weatherman produces possibly two distinct, but related images. One is of a person who predicts future events (it will rain tomorrow). The other is of a person who explains things (why it rained today) that are outside the understanding of lay people. Sometimes this may involve predicting future events as well (why it will rain tomorrow).

In *Subterranean Homesick Blues*, Dylan seems to use the image of a weatherman in the latter manner. The song as a whole, and this verse in particular, warns the listener (“Look out, kid”) about various authority figures:⁴³ the district attorney who is engaged in wire tapping in order to bring about a conviction; the police officers (“those that carry around a fire hose”) used to overwhelm protesters; and the plain clothes police officers on the lookout for a reason to arrest. Regardless of whether Dylan is expressing his distrust of “the system” and the authority figures of the 1960s or playfully mocking the paranoia of the very counter-culture movement he was supposedly (and quite reluctantly) a leader

song carefully, it sounds as if Dylan is saying “don't tie no bows.” Make of it what you will.

⁴² Again, the official website indicates that the line here is “Watch *the* plain clothes.” <http://www.bobdylan.com/#/songs/subterranean-homesick-blues>. It is difficult to make out exactly what Dylan says in the actual song, but (to my ears) it sounds like “watch *for* plain clothes,” as in “keep a watch for plain-clothes police officers.” In my opinion, this would make more sense than “watch the plain clothes,” particularly if one believes that the song is ultimately “about a kid looking for drugs while trying to avoid the law.”

⁴³ Dylan announces in the first verse that he's “thinking about the government” and advises the listener in the third verse not to “follow leaders” (and to watch the parking meters). *Subterranean Homesick Blues*. on BRINGING IT ALL BACK HOME (Columbia 1965).

of,⁴⁴ the weatherman in *Subterranean Homesick Blues* signifies an individual who can make sense of things that are occurring that the ordinary person could not. And in the climate Dylan describes, in which danger from the authorities is present at every turn, his services are not needed. The dangers are obvious. This is clearly how the Weather Underground, the radical leftist organization from the late 1960s and 1970s that took its name from the song, interpreted Dylan's reference to the weatherman.⁴⁵

Judges have used Dylan's observation about weathermen in numerous opinions and have done so in several ways.

1 Of Weathermen, Expert Witnesses, and Obvious Conclusions

Some courts have used Dylan's observation about the need for weathermen in the manner Dylan seems to have intended. One frequently recurring legal issue is whether expert witness testimony should be allowed or required in a given case. In *Jorgensen v. Beach 'N' Bay Realty, Inc.*,⁴⁶ a California appellate court addressed this issue:

The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: "You don't need a weatherman to know which way the wind blows."FN2 The California courts, although in harmony, express the rule somewhat less colorfully and hold expert testimony is not required where a question is "resolvable by common knowledge."

FN2 Bob Dylan, "Subterranean Homesick Blues" from *Bringing It All Back Home*.⁴⁷

Since then, courts in California have cited these lyrics for the same proposition on numerous occasions to the point that the language from *Jorgensen* is almost boilerplate

⁴⁴ VARESI, *supra* note 39, at 50.

⁴⁵ RON JACOBS, *THE WAY THE WIND BLEW* 24-25 (Verso 1997).

⁴⁶ (Cal. Ct. App. 1981).

⁴⁷ *Id.* at 164.

on the subject of the necessity of expert testimony.⁴⁸

In a criminal case from Massachusetts, the government argued that it was not required to introduce expert testimony on the dangerousness of a particular defendant.⁴⁹ After initially relying on the New Testament in support of its position that the defendant's dangerousness was so obvious as to obviate the need for expert testimony ("Ye shall know them by their fruits,"), the district attorney eventually abandoned its reliance on the Bible and instead relied on *Subterranean Homesick Blues*.⁵⁰ The court, perhaps recognizing the irony in the *D.A. of all people* attempting to rely on these particular lyrics, attempted to put the weatherman line in context by quoting the entire verse of the song before rejecting the government's argument.⁵¹

Dylan's weatherman image functions effectively in this context, in part, because of the legal profession's ability to recognize it as the vehicle of a relevant legal concept. In this respect, use of the weatherman image is an effective communicative and persuasive device on the part of judges. There have also been several judicial opinions in which judges have similarly used the "You don't need a weatherman to know which way the wind blows" idea in reference to an obvious conclusion or a future event that anyone could predict.⁵² Although not as sophisticated as the California courts' use, these

⁴⁸ *Esteem v. City of Pasadena*, NO. CV04-662-GHK (MANX), 2007 WL 4270360, (C.D. Cal., September 11, 2007); *United Television Broadcasting Systems, Inc. v. Rancho Palos Verdes Broadcasters, Inc.*, 2008 WL 4194493, *4 n.5 (Cal. Ct. App. Sept. 15, 2008); *People v. Davison*, 2008 WL 3919421, *6 n.4 (Cal. Ct. App. Aug. 27, 2008) *Evans v. Camp*, No. A102835, 2005 WL 352144 (Cal. Ct. App., Feb. 15, 2005); *People v. Miller*, No. D039032, 2003 WL 22089447 (Cal. Ct. App., Sep. 10, 2003); *In re Marriage of Rosen*, 105 Cal.App.4th 808 (Cal. Ct. App. 2002); *Oregel v. American Isuzu Motors, Inc.*, 90 Cal.App.4th 1094 (Cal. Ct. App. 2001); *Flowers v. Torrance Memorial Hosp. Med. Ctr.*, 884 P.2d 142, 147 n.4 (Cal. 1994); *Ball v. Posey*, 176 Cal.App.3d 1209 (Cal. Ct. App. 1986); *Easton v. Strassburger*, 152 Cal.App.3d 90 (Cal. Ct. App. 1984); *Godfrey v. Steinpress*, 128 Cal.App.3d 154 (Cal. Ct. App. 1982).

⁴⁹ *Commonwealth v. Dube*, 796 N.E.2d 859, 865 (Mass. Ct. App. 2003).

⁵⁰ *Id.* at 866.

⁵¹ *Id.* at 866 n.15.

⁵² *In re Jerrell C.J.*, 699 N.W.2d 110, 147 n.3 (Wis. 2005) (Prosser, J., concurring); *Moothart Chrysler Plymouth, Inc. v. Universal Underwriters Ins. Co.*, No. G030440, 2003 WL 21235529, *6 (Cal. Ct. App.

decisions nonetheless make effective use of Dylan's weatherman image. One of the more interesting comes from *McKesson Corp. v. Islamic Republic of Iran*.⁵³ There, the court used the weatherman metaphor to signify the idea that some future events are so likely to occur that they do not require an expert to predict. In the case, a corporation (McKesson) was suing Iran for failing to distribute dividends the corporation was owed. The corporation made at least three failed attempts to obtain payment.

In this Court's judgment, the only reasonable conclusion that can be drawn about Iran's intentions from these three unsuccessful attempts by McKesson is that nothing McKesson would, or could, do would result in the payment of their dividends. To put it in 1960's vernacular: "you don't need a weatherman to know which way the wind blows." FN16

FN16. B. Dylan, *Subterranean Homesick Blues*, on *BRINGING IT ALL BACK HOME* (Columbia Records 1965).⁵⁴

2. *Of Weathermen and the Role of Judges*

Other judges have similarly used Dylan's image of a weatherman as one who predicts future events in discussing their role as judges. In a California case, an intermediate appellate court had to decide whether it is proper to instruct jurors that if anyone on the jury indicates an unwillingness to follow the law (i.e., to engage in jury nullification) that they should inform the judge. The court's review of dicta from another Supreme Court decision, however, led it to believe that predicting the Supreme Court's likely resolution of the issue was an easy matter:

In a unanimous ruling, the Supreme Court, after a lengthy discussion of the historical antecedents and case authority on the matter, concluded that a 'nullifying jury is essentially a lawless jury,' and affirmed the dismissal of the juror. Again, while the Supreme Court has not yet ruled on [whether such an instruction is permissible], as it relates to jury nullification, 'you don't need a

May 29, 2003).

⁵³ 520 F. Supp. 2d 38 (D.D.C. 2007).

⁵⁴ *Id.* at 50 n.16.

weatherman to know which way the wind blows.’ (Bob Dylan, “Subterranean Homesick Blues.”)⁵⁵

In *Bass v. Board of County Commissioners*,⁵⁶ the Eleventh Circuit Court of Appeals engaged in a similar exercise when deciding whether the plaintiff, who was alleging that an employer’s affirmative action plan violated Title VII, bore the burden of establishing the invalidity of the plan or whether the defendant, who was defending the use of the plan, had the burden of establishing its validity. In reviewing Supreme Court precedent, the Eleventh Circuit saw a clear trend in favor of placing the burden on a plaintiff:

Failing to place the burden of showing that an affirmative action plan is valid on a Title VII defendant is also contrary to the trend since *Johnson* towards heightened, rather than relaxed, scrutiny of affirmative action plans. Cf. Bob Dylan, Subterranean Homesick Blues, on Bringing it All Back Home (Columbia 1965) (‘You don't need a weatherman to know which way the wind blows.’)⁵⁷

As in California, Dylan subsequently became legal authority in the Eleventh Circuit.

The fact that weathermen *can* predict future events doesn’t mean that they always should, however. In *United States v. Greer*,⁵⁸ the Eleventh Circuit scolded the trial court for basing its ruling on the prediction that the Supreme Court would eventually overrule one of its precedents:

That prediction probably is correct; the Supreme Court may well overrule *Almendarez-Torres*. See *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring) (counting noses to come up with a majority of justices ready to overrule the *Almendarez-Torres* decision); cf. *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1115 (11th Cir.2001) (“You don't need a weatherman to know which way the wind blows.”) (quoting Bob Dylan, *Subterranean Homesick Blues, on Bringing it All Back Home* (Columbia 1965)).

The problem with lower courts basing decisions on predictions that the Supreme Court will overturn one of its own decisions is that the Supreme Court has

⁵⁵ *People v. Reveles*, No. F034902, 2001 WL 1647172, *2 (Cal. Ct. App. December 21, 2001).

⁵⁶ 256 F.3d 1095 (11th Cir. 2001).

⁵⁷ *Id.* at 1115.

⁵⁸ 440 F.3d 1267 (11th Cir. 2006).

repeatedly told us not to do it.⁵⁹

C. *When You Ain't Got Nothin', You Got Nothin' to Lose*

Chief Justice Roberts wasn't the first federal judge to use the "when you ain't got nothin', you got nothin' to lose" line from *Like a Rolling Stone*. In *Mountain States Legal Foundation v. Glickman*,⁶⁰ Roberts' former colleague on the United States Court of Appeals for the D.C. Circuit, Judge Stephen F. Williams, used the same line for the same purpose Roberts would use it years later (and misquoted it too). One of the issues in this case was whether several non-profit environmental groups had standing to sue. Specifically, the non-profits alleged that their members had suffered an injury because the defendant's actions created a heightened risk of wildfires, which would threaten the habitat of grizzly bears, which would thereby deny them the pleasure of observing the bears. The court was not persuaded:

The closest [the plaintiffs] have come to asserting a concrete interest in the grizzly are expressions of members' desires to observe wildlife generally. In the absence of any reference to past (and anticipated future) enjoyment of the grizzly bear's presence, a mere expression of enjoyment of all things sylvan is inadequate to show a "directly" affected interest with adequate specificity to survive dismissal on the pleadings, much less summary judgment. Indeed, at one point below the plaintiffs asserted that there was "no evidence that grizzly bear habitat exists in the Decision Area." Plaintiffs' Motion for Summary Judgment at 28 (June 24, 1994). Plaintiffs cannot claim an injury to their grizzly-viewing interests if they do not think there are grizzlies in the area to begin with. "If you've got nothing, you've got nothing to lose." B. Dylan, "Like a Rolling Stone," Highway 61 Revisited (Columbia Records 1965)."⁶¹

Judge Williams' use of this line from *Like a Rolling Stone*, like Chief Justice Roberts', is somewhat helpful to the reader in understanding the judge's point

⁵⁹ *Id.* at 1275.

⁶⁰ 92 F.3d 1228 (D.C. Cir. 1996).

⁶¹ *Id.* at 1236-37.

concerning standing. It is also at least mildly amusing. The problem with the judge's inclusion of the line, however, is that it is inconsistent with Dylan's likely intended use. When Dylan suggested that "when you ain't got nothin', you got nothin' to lose," he clearly seems to have meant to evoke the idea of freedom. Having nothing, Dylan suggests, signifies (among other things) the freedom to do whatever one wants to do. Thus, while helpful to communicate the point that both Judge Williams and Chief Justice Roberts sought to make, the inclusion of this line ultimately communicates a different and more limited idea than Dylan himself probably intended.

D. It Ain't Me, Babe

An example of a humorous, yet otherwise unremarkable use of Dylan's lyrics occurred in the New York case of *Kinkopf v. Triborough Bridge & Tunnel Authority*.⁶² In that case, a commuter brought a small claims action against the Triborough Bridge and Tunnel Authority (TBTA), alleging that the TBTA had wrongfully charged his E-Z Pass account for trips he hadn't taken. His argument was that "that neither he nor any member of his family used either of the two E-Z Pass devices issued to him on the days and times set forth in the bills [TBTA] sent him."⁶³

The court was not impressed with the claimant's legal argument:

Rather than provide any documentation to support his contention such as showing that his vehicles were elsewhere at those times and places, claimant offers the Bob Dylan "It Ain't Me, Babe" plea. Claimant has no proof that defendant's equipment was operating incorrectly. He has no proof his vehicles were inoperable on the dates in question. In an effort to disprove claimant's contentions, defendant provided, in addition to testimony, detailed records of the

⁶² 764 N.Y.S.2d 549 (N.Y. City Civ. Ct. 2003).

⁶³ *Id.* at 558.

Tag use of claimant's vehicles including photographs of the cars passing through toll booths at some of the facilities.⁶⁴

Ultimately, the court concluded that there was no credible evidence to establish that the claimant was improperly billed.

E. You're Gonna Have to Serve Somebody

Sometimes the inclusion of a line from a song in a judicial opinion feels more like an attempt by the judge to express his or her individuality or to make an attempt at humor than it does an attempt to advance a legal argument. An apparent example of this phenomenon appears in *Robertson v. State*.⁶⁵ The dissenting judge in *Robertson* disagreed with the majority's conclusion in a second-degree murder case that evidence of an earlier incident in which the defendant brandished a weapon at his ex-wife and daughter was inadmissible and that, therefore, the defendant was entitled to a new trial.

Our trial judges struggle daily with the numerous difficult aftereffects of the increasing domestic violence epidemic within our communities. Their duty as judges is to serve both the law and justice. FN8. In that regard, their difficult discretionary decisions should be commended in the absence of a showing of abuse-not reproved.

FN8. "You're gonna have to serve somebody." Bob Dylan, "Gotta Serve Somebody", on *The Sopranos* (Sony Music Entertainment, Inc. and Home Box Office 1999).⁶⁶

The inclusion of the *Gotta Serve Somebody* reference adds little to the judge's point about a judge's conflicting duties. (And there is something kind of off-putting about the fact that the judge cited the song in reference to its appearance on the *Sopranos* soundtrack rather than *Slow Train Coming*.)

⁶⁴ *Id.*

⁶⁵ 780 So. 2d 94 (Fla. Dist. Ct. App. 2000).

⁶⁶ *Id.* at 103 n.8 (Gersten, J., dissenting).

F. *The Times They are A-Changin'*

In *Roache v. AmeriFirst Bank*,⁶⁷ a Florida appellate court reviewed a trial judge's decision to dismiss the plaintiff's complaint as a sanction for failing to comply with discovery rules. The trial court's decision to dismiss stemmed from the fact that the defendant had filed what Judge Hugh Glickstein termed a "protesting motion" – a motion seeking to compel the other side to comply with the discovery rules. In a prior case, Judge Glickstein had voted to overrule a trial judge's decision to dismiss the plaintiff's complaint due to the plaintiff's discovery violations. In *Roache*, however, Judge Glickstein found himself in support of the trial judge's decision. Judge Glickstein used Dylan to help explain his apparent change of heart.

[I]t is discomfoting to be on this side of the argument It was a positive feeling to write [the prior decision], because it was preserving a party's day in court. Yet, perhaps as Bob Dylan observed "The Times They Are A-Changing"; and the "protesting" motions upon which trial and appellate courts must presently rule seem to be substantial. ... Trial courts, unlike appellate courts, have the wearisome task of "hearing" the protesting motions, whereas we have the luxury of just reading and ruling on them. It has to be grueling for a trial court to hear, repeatedly in a case, how one party is not abiding by the rules or the trial court's orders. The lawyers abiding by them must wonder "Why bother?" if the repeated protests are fruitless.

FN31. See Bob Dylan "The Times They Are A-Changin'" (Album Released: Feb. 10, 1964).⁶⁸

Perhaps a more natural use of *The Times They Are A-Changin'* can be found in *Erickson v. Bartell Drug Co.*,⁶⁹ a sex discrimination case. In discussing the legislative history of Title VII of the Civil Rights Act of 1964, the court made the observation that concern over race discrimination, not sex discrimination, was the driving force behind the

⁶⁷ 596 So. 2d 1240 (Fla. Dist. Ct. App. 1992).

⁶⁸ *Id.* at 1242-43 n.31 (Glickstein, C.J., dissenting).

⁶⁹ 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

legislation. The court placed Dylan's lyrics within this broader context.

The Civil Rights Act of 1964 was the culmination of decades of debate and political maneuvering over various civil rights proposals. In the end, it took three momentous events to finally propel the bill to the top of the agenda of Congress and the Administration. The first was the August 1963 march on Washington during which Dr. Martin Luther King, Jr., gave his famous "I have a dream" speech. The second was the September 1963 bombing of a black church in Birmingham, Alabama, in which four little girls were killed. The third was the assassination of President Kennedy, whose support for the bill carried even more weight in Congress and with the public after his untimely death. It was in this time that Bob Dylan warned, "Come Senators, Congressmen, please heed the call. Don't stand in the doorway, don't block up the hall" Bob Dylan, *The Times They Are A-Changin'*, on *The Times They Are A-Changin'* (Sony Music Entertainment/Columbia Records 1964). After months of debate and a seventy-five day filibuster in the Senate, the bill finally passed and was signed into law by President Johnson on July 2, 1964.⁷⁰

Judge Robert S. Lasnik's inclusion of *The Times They Are A-Changin'* almost as part of the legislative history of Title VII is interesting for at least two reasons. First, Judge Lasnik uses the song, not as metaphor, but in an attempt to help readers place Title VII in context and to understand the driving forces behind the legislation. Second, the inclusion of Dylan in the opinion again illustrates the role that a judge's background may have in how the judge crafts an opinion. According to his biography, Judge Lasnik was born in 1951,⁷¹ thus placing him squarely within the baby boomer generation that has a substantial number of judges and for whom Dylan's songs may resonate particularly strongly.

G. *Ballad of a Thin Man*

One of the more interesting uses of a Dylan lyric involved a judge's inability to understand a plaintiff's allegations. In *Kleinschmidt v. Liberty Mut. Ins. Co.*,⁷² two *pro se*

⁷⁰ *Id.* at 1269 n.4.

⁷¹ Almanac of the Federal Judiciary 2011, 2011 WL 123678.

⁷² 142 F.R.D. 502 (S.D. Fla. 1992).

plaintiffs alleged a variety of wrongs. Their complaint was 40 pages long and “and purport[ed] to allege a complicated series of wrongdoings by numerous businesses, law firms, and individuals.”⁷³ The defendant moved to dismiss the complaint.

In his written opinion, the judge noted that he had “struggled and strained to decipher plaintiff’s mountain of papers,” but that his effort “has been a total failure. Although the undersigned is cognizant of the liberality with which pro se pleadings must be construed, the plaintiffs’ complaint simply cannot be understood.”⁷⁴ In keeping with that conclusion, the judge began his opinion with the following lines from Dylan’s *Ballad of Thin Man*:

Something is happening
But you don’t know what it is
Do you, Mr. Jones? FN1

FN1. Bob Dylan, *Ballad of a Thin Man*, on *Highway 61 Revisited* (Columbia Records 1965).⁷⁵

H. *Blowin’ in the Wind*

The New York City civil courts apparently have a fairly confusing process in place that sometimes makes it extremely difficult for the clerk of a court to determine whether a defendant has filed a timely answer to a plaintiff’s complaint. As a result, it is possible for a default judgment to be entered against a defendant despite the fact the defendant filed an answer in a timely manner. That process was at issue in *Richmond Pain Management, P.C. ex rel. Bevel v. State Farm Mut. Auto. Ins. Co.*⁷⁶

The opinion began in a somewhat unusual fashion:

⁷³ *Id.* at 503.

⁷⁴ *Id.* at 504.

⁷⁵ *Id.* at 503. Regrettably, the judge’s last name was Garber, not Jones.

⁷⁶ No. 40049/03, 2004 WL 834483 (N.Y. City Civ. Ct., March 23, 2004).

'The answer my friend is blowin' in the wind. The answer is blowin' in the wind.'

We all are familiar with this refrain from Bob Dylan's 1960's protest song. Unfortunately it has become the cry of too many litigants in New York City's Civil Court.⁷⁷

The Court then spent much of the remainder of the opinion bemoaning New York's process as "a waste of judicial and legal resources and imperils the rights of diligent defendants."⁷⁸

I. Of Pig Circuses and Children's Faces

Kirk v. Kirk,⁷⁹ an Indiana case, involves an interesting use of the imagery in Dylan's songs. In the case, the judge and one of the litigants found themselves in a war of Dylan's words. The case involved an ugly custody battle. After the trial court awarded custody of the child to the mother, the father responded by creating an anonymous web site to disparage the trial judge. The father analogized the quality of justice rendered in his case with that received by Ruben "Hurricane" Carter in Dylan's ballad, *Hurricane*: "All of Ruben's cards were marked in advance/The trial was a pig-circus, he never had a chance."⁸⁰

The Indiana Supreme Court took a different view of the trial judge's actions. The court used the visual image of a child's face as signifying innocence and an individual in need of protection:

On the contrary, we commend Judge Bonaventura for staying the course for five years to do her best for a child torn between warring parents. A family court judge's task is not easy, but it is terribly important, and at the end of the day those judges "remember children's faces best." See Bob Dylan, "Long Time

⁷⁷ *Id.* at *1.

⁷⁸ *Id.* at *2.

⁷⁹ 770 N.E.2d 304 (Ind. 2002).

⁸⁰ *Hurricane*, on *DESIRE* (Columbia 1976).

Gone.”⁸¹

Noting that the father’s actions undermined his claim to be the more responsible guardian, the court ultimately affirmed the trial court’s decision to grant custody to the mother.

CONCLUSION

Judges use the lyrics of popular musicians for any number of reasons. Sometimes, the inclusion of popular music lyrics adds little to the persuasive effect of the judge’s argument. Sometimes, the image created in a lyric fails to serve as a vehicle for a judge’s broader point. Dylan’s lyrics are no different than those of other artists in that respect. Yet, judges are more inclined to attempt to use Dylan’s lyrics as a vehicle than they are the lyrics of any other popular musician. And sometimes they actually succeed. Given their identity as members of a specific group (the legal profession), the legal community is sometimes able to recognize the images conveyed in Dylan’s songs as the vehicle for legal concepts. When this occurs, a judge’s inclusion of Dylan’s lyrics moves beyond the realm of novelty and into the realm of argument and persuasion.

⁸¹ *Id.* at 306 n.3.