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THE FREEWHEELIN' JUDICIARY: A BOB DYLAN ANTHOLOGY

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THE FREEWHEELIN' JUDICIARY: A BOB DYLAN ANTHOLOGY

*Alex B. Long**

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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.¹ *Sprint Communications Co. v. APCC Services, Inc.* 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.² In dissenting from the majority

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1. Based on my Westlaw research, I deduced that *Sprint Communications Co. v. APCC Services, Inc.* was the first Supreme Court case to mention Bob Dylan. See 554 U.S. 269 (2008).

2. See *id.*

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.”³ However, the firms never had any share in the amount that they collected.⁴ Therefore, Roberts argued, because the operators had no right to substantive recovery, they could not benefit from the judgment and thus lacked standing.⁵ 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.”⁶

Not only was this the first time that the lyrics of Bob Dylan found their way into a Supreme Court opinion, but it also 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.⁷ 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.⁸

Two years later, Justice Antonin Scalia made history for a second time by quoting Dylan. In *City of Ontario v. Quon*, 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.⁹ 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

3. *Id.* at 301 (Roberts, C.J., dissenting).

4. *See id.*

5. *See id.*

6. *Id.* (quoting BOB DYLAN, *Like A Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965)). The actual line is “When you ain’t got nothing/You got nothing to lose.” *See* Adam Liptak, *The Chief Justice, Dylan and the Disappearing Double Negative*, N.Y. TIMES, June 29, 2008, available at <http://www.nytimes.com/2008/06/29/weekinreview/29dylan.html>. However, according to Dylan’s official website, the line is “when you got nothing, you got nothing to lose.” *Like a Rolling Stone*, BOBDYLAN.COM, <http://www.bobdylan.com/songs/like-a-rolling-stone> (last visited Aug. 12, 2011).

7. *See supra* note 1.

8. *Id.* 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. Summum*, 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.

9. *See* 130 S. Ct. 2619, 2624 (2010).

a bright-line rule regarding text messages.¹⁰ 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."¹¹ 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.¹² The logical question then becomes, "why?" Why is Dylan (rather than John Lennon, Woody Guthrie, or some other 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.¹³ A different focus, however—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 seems 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 do little to strengthen a legal argument or clarify a point for a reader. Instead, the judge's inclusion of Dylan's lyrics is arguably as much an attempt at self-expression—a

10. *See id.* at 2629–30.

11. *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'*, on *THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964).

12. *See* 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).

13. *See, e.g.,* Adam Gearey, *Outlaw Blues: Law in the Songs of Bob Dylan*, 20 CARDOZO L. REV. 1401, 1422 (1999).

means of establishing who this judge is as an individual — as it is an attempt to communicate a deeper meaning.

I. WHY DYLAN?

By nature, lawyers and judges are storytellers.¹⁴ Every client has a story to tell, and it is part of the lawyer's job to present a client's story in a manner that makes it more likely that the client will achieve his or her objectives.¹⁵ Legal rules have no power without a set of facts with which to connect, so it is part of the lawyer's job to present facts to the judge or jury in a manner that makes the desired application of the law to the facts seem inevitable.¹⁶ 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.¹⁷ 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 see the desired connection between rule and law. Indeed, one author has concluded that it may not be possible to talk about case law, statutes, and constitutional provisions "without telling stories about them."¹⁸

Judges need to tell stories too, if for no other reason than that they are constrained by the reality that their decisions concerning the law must be tied directly to a given set of facts. But judges also want their opinions to be persuasive. They want other judges and lawyers to ac-

14. See 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.").

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

16. See 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) (quoting KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12 (1951)) ("Developing the story for the court is so important because, as Prof. Llewellyn explains, 'rules *alone*, mere forms of words, are worthless."); Winter, *supra* note 15, 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").

17. See KLAUS JENSEN, *THE SOCIAL SEMIOTICS OF MASS COMMUNICATION* 64 (1995) (noting that storytelling may be designed "to produce an effect on a recipient in a shared context"); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 3, 19–20 (2009) (discussing the ability of narrative to produce understanding and empathy).

18. Edwards, *supra* note 14, at 884.

cept the force of their logic.¹⁹ Thus, the judge must present the story in a way that helps the reader see his view of the connection between the law and the facts.²⁰ To accomplish this goal, judges sometimes rely on a variety of narrative devices, including foreshadowing and metaphor.²¹

Therefore, it is hardly surprising that judges are particularly drawn to songwriters with backgrounds in folk music and to Dylan in particular.²² Folk songs are often stories with a point. Historically, folk musicians relied on a narrative structure in their songs, often in an attempt to persuade the listener to (in the words of Dylan) “lend a hand”²³ to whatever struggle the singer happened to be addressing.²⁴ Dylan himself often used a narrative structure in his earlier work,²⁵ sometimes while commenting on the legal system, such as in *Percy's Song*²⁶ and *The Lonesome Death of Hattie Carroll*.²⁷ 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 provide social commentary reemerged. In *Hurricane*, for example, Dylan delivers a critique of the legal system while telling the story of Rubin “Hurricane” Carter, a boxer wrongfully convicted of

19. See 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).

20. 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).

21. See Higdon, *supra* note 19, at 1244–45 (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, 20–24 (1994) (describing the function of metaphor in legal discourse).

22. See Long, *supra* note 12, at 546–48 (discussing the prevalence of folk music lyrics in the writing of legal academics).

23. DYLAN, *The Times They are A-Changin'*, *supra* note 11.

24. See Michael A. Coffino, Comment, *Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases*, 1994 WIS. L. REV. 679, 689 (1994) (“[S]torytelling is a central part of folk musical expression.”).

25. See MIKE MAROUSEE, CHIMES OF FREEDOM: THE POLITICS OF BOB DYLAN'S ART 137 (2003).

26. See BOB DYLAN, *Percy's Song*, on BIOGRAPH (Columbia Records 1985).

27. See BOB DYLAN, *The Lonesome Death of Hattie Carroll*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

murder.²⁸ As lawyers and judges are in the business of telling stories themselves, 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.²⁹ 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."³⁰ 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."³¹

While music critics and scholars have debated whether Dylan's lyrics qualify as poetry,³² there can be no 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.³³ Indeed, given Dylan's extensive use of imagery and metaphor, "one instinctively searches for the 'message'" in his songs.³⁴ Of course, some judicial metaphors fail to accomplish the goal of enlightening the reader and instead serve to confuse or obfuscate.³⁵ 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.

28. See BOB DYLAN, *Hurricane*, on *DESIRE* (Columbia Records 1976).

29. See 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); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010) (noting the use of imagery in corporate law decisions); Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 459 (2011).

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

31. *Id.* at 189.

32. See Robert Christgau, *Rock Lyrics are Poetry (Maybe)*, in *STUDIO A: THE BOB DYLAN READER* 62, 62–63 (Benjamin Hedin ed., 2004).

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

34. SMITH, *supra* note 33, at 24.

35. See Oldfather, *supra* note 21, at 26.

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"³⁶ 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.³⁷ For some, music provides the soundtrack for certain memories or times in their lives,³⁸ 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 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.³⁹ Some judges, however, are willing to allow aspects of their own personalities to

36. See DYLAN, *The Times They Are A-Changin'*, *supra* note 11.

37. *But see* CHUCK KLOSTERMAN, SEX, DRUGS, AND COCOA PUFFS: A LOW CULTURE MANIFESTO 167 (Brant Rumble ed., 2003) ("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.").

38. *See id.* at 41 ("Without a soundtrack, human interaction is meaningless.").

39. *See* Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 194 (2002) (noting the "bland" and "impersonal" style of some Supreme Court decisions); Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1561-62 (1990) (stating that the judge's voice is "impersonal," that "her vantage point is neutral and objective," and that her arguments, whenever possible, "take the form of deductive, syllogistic proofs").

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, does 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*⁴⁰

In *United States v. Bullock*, a federal judge used Dylan's lyrics (as well as others) in a clever manner to signify a legal concept.⁴¹ 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 heroin.⁴² The lower court had imposed the maximum penalty of twenty 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 one-hundred years.⁴³ On appeal, Judge Evans made the insightful observation that "[o]ne hundred years is a

40. DYLAN, *Percy's Song*, *supra* note 26.

41. *See* 454 F.3d 637, 638, 639 n.1 (7th Cir. 2006).

42. *Id.* at 638.

43. *See id.*

long time—one year longer, in fact, than the standard lyrical shorthand for an unimaginably long sentence.”⁴⁴ In the accompanying footnote, Judge Evans provides several examples:

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, “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.”).⁴⁵

Based on its concerns about how the trial judge had calculated the sentence, the court remanded the case for resentencing.⁴⁶

B. “You Don’t Need a Weatherman to Know Which Way the Wind Blows”⁴⁷

The Dylan lyric cited most frequently in judicial decisions comes from the song *Subterranean Homesick Blues*.⁴⁸ The song is, in the words of one author, a “lyrical masterpiece” set to a “circus-honky-tonk-barrelhouse” soundtrack.⁴⁹ 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.”⁵⁰ Another concludes that “[s]ymbolically, a line here or there may grab

44. *Id.* at 639.

45. *Id.* at 639 n.1 (emphasis added).

46. *See id.* at 642.

47. BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

48. *Id.* This conclusion is based on Westlaw research.

49. SMITH, *supra* note 33, at 79.

50. ANTHONY VARESI, *THE BOB DYLAN ALBUMS: A CRITICAL STUDY* 50 (Antonio D’Alfonso ed., 2002).

you, but when taken in its totality, the song is a musical Rorschach test; make of it what you will.”⁵¹

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 phone’s 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 tiptoes
 Don’t try “No-Doz”⁵²
 Better stay away from those
 That carry around a fire hose
 Keep a clean nose
 Watch the⁵³ plain clothes
You don’t need a weatherman
*To know which way the wind blows.*⁵⁴

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).

51. SMITH, *supra* note 33, at 80.

52. According to Dylan’s official website, the line here is “Don’t try ‘No-Doz.’” *Subterranean Homesick Blues*, BOBDYLAN.COM, <http://www.bobdylan.com/songs/subterranean-homesick-blues> (last visited Aug. 10, 2011). In the famous video for the song from the movie “Don’t Look Back,” Dylan holds up a card reading “No Dose.” DON’T LOOK BACK (Leacock-Pennebaker 1967). If one listens to the song carefully, however, it sounds as if Dylan is saying “don’t tie no bows.” Make of it what you will.

53. Again, the official website indicates that the line here is “Watch *the* plain clothes.” *Subterranean Homesick Blues*, BOBDYLAN.COM, <http://www.bobdylan.com/songs/subterranean-homesick-blues> (last visited Aug. 10, 2011). 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.” See VARESI, *supra* note 49, at 50.

54. DYLAN, *Subterranean Homesick Blues*, *supra* note 47 (emphasis added).

In *Subterranean Homesick Blues*, Dylan seems to use the image of a weatherman in the latter manner.⁵⁵ The song as a whole, and this verse in particular, warns the listener (“Look out, kid”) about various authority figures: 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.⁵⁶ Dylan may be expressing his distrust of “the system” and the authority figures of the 1960s or playfully mocking the paranoia of the very counter-culture movement of which he was supposedly (and quite reluctantly) a leader.⁵⁷ Regardless, 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.⁵⁸

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.*,⁵⁹ 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.” The California courts, although in harmony, express the rule somewhat less colorfully and hold expert tes-

55. *See id.*

56. *Id.* Dylan announces in the first verse that he is “thinking about the government” and advises the listener in the third verse not to “follow leaders” (and to “watch the parkin’ meters”). *Id.*

57. *See* VARESI, *supra* note 50, at 50.

58. *See* RON JACOBS, *THE WAY THE WIND BLEW: A HISTORY OF THE WEATHER UNDERGROUND* 24–25 (1997).

59. 177 Cal. Rptr. 882 (Ct. App. 1981).

timony is not required where a question is “resolvable by common knowledge.”⁶⁰

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 on the subject of the necessity of expert testimony.⁶¹

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.⁶² 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 (“[y]e shall know them by their fruits”), the district attorney eventually abandoned its reliance on the Bible and instead relied on *Subterranean Homesick Blues*.⁶³ Perhaps recognizing the irony in *the District Attorney*, of all people, attempting to rely on these particular lyrics, the court attempted to put the weatherman line in context by quoting the entire verse of the song (including the lines about wire-tapping and the “orders from the D.A.”) before rejecting the government’s argument.⁶⁴

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

60. *Id.* at 887 (citation omitted).

61. *See* *Esteem v. City of Pasadena*, No. CV 04-662-GHK (MANx), 2007 WL 4270360, at *21 (C.D. Cal. Sept. 11, 2007); *Flowers v. Torrance Mem’l Hosp. Med. Ctr.*, 884 P.2d 142, 147 n.4 (Cal. 1994); *United Television Broad. Sys., Inc. v. Rancho Palos Verdes Broadcasters, Inc.*, Nos. B191091, B192896, 2008 WL 4194493, at *4 n.5 (Cal. Ct. App. Sept. 15, 2008); *People v. Davison*, No. A115603, 2008 WL 3919421, at *6 n.4 (Cal. Ct. App. Aug. 27, 2008); *Evans v. Camp*, No. A102835, 2005 WL 352144, at *9 (Cal. Ct. App. Feb. 15, 2005); *People v. Miller*, No. D039032, 2003 WL 22089447, at *4 (Cal. Ct. App. Sept. 10, 2003); *In re Marriage of Rosen*, 130 Cal. Rptr. 2d 1, 8 (Ct. App. 2002); *Oregel v. Am. Isuzu Motors, Inc.*, 109 Cal. Rptr. 2d 583, 589 n.8 (Ct. App. 2001); *Ball v. Posey*, 222 Cal. Rptr. 746, 749, 750 n.6 (Ct. App. 1986); *Easton v. Strassburger*, 199 Cal. Rptr. 383, 392 (Ct. App. 1984); *Godfrey v. Steinpress*, 180 Cal. Rptr. 95, 112 (Ct. App. 1982).

62. *See* *Commonwealth v. Dube*, 796 N.E.2d 859, 865–66 (Mass. App. Ct. 2003).

63. *See id.* at 866.

64. *See id.* at 866 n.15.

conclusion or a future event that anyone could predict.⁶⁵ Although not as sophisticated as the California courts' use, these decisions nonetheless make effective use of Dylan's weatherman image. One of the more interesting uses of the phrase comes from *McKesson Corp. v. Islamic Republic of Iran*.⁶⁶ 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. A corporation, McKesson, was suing Iran for failing to distribute dividends the corporation was owed.⁶⁷ 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."⁶⁸

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 was proper to instruct jurors that if anyone on the jury indicated an unwillingness to follow the law (i.e., to engage in jury nullification), they should inform the judge.⁶⁹ The court's review of dicta from another California 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.⁷⁰ Again, while the Supreme Court has not yet ruled on [whether such an instruction is permissible], as

65. See, e.g., *Moothart Chrysler Plymouth, Inc. v. Universal Underwriters Ins. Co.*, No. G030440, 2003 WL 21235529, at *6 (Cal. Ct. App. May 29, 2003); *In re Jerrell C.J.*, 699 N.W.2d 110, 147 (Wis. 2005) (Prosser, J., concurring).

66. 520 F. Supp. 2d 38 (D.D.C. 2007).

67. *Id.* at 40.

68. *Id.* at 50 (quoting DYLAN, *Subterranean Homesick Blues*, *supra* note 47).

69. See *People v. Reveles*, No. F034902, 2001 WL 1647172, at *1 (Cal. Ct. App. Dec. 21, 2001).

70. *Id.* at *2 (quoting *People v. Williams*, 25 Cal. 4th 441, 463 (2001)).

it relates to jury nullification, “you don’t need a weatherman to know which way the wind blows.”⁷¹

In *Bass v. Board of County Commissioners*, 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.⁷² 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.”).⁷³

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

The fact that weathermen *can* predict future events does not mean that they always should, however. In *United States v. Greer*,⁷⁴ 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)).⁷⁵

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 repeatedly told us not to do it.⁷⁶

71. *Id.* (quoting DYLAN, *Subterranean Homesick Blues*, *supra* note 47).

72. 256 F.3d 1095, 1114–15 (11th Cir. 2001).

73. *Id.* at 1115 (citation omitted).

74. 440 F.3d 1267 (11th Cir. 2006).

75. *Id.* at 1275.

76. *Id.* (citations omitted).

C. “When You Ain’t Got Nothin’, You Got Nothin’ to Lose”⁷⁷

Chief Justice Roberts was not the first federal judge to use the “when you ain’t got nothin’, you got nothin’ to lose” line from *Like a Rolling Stone*.⁷⁸ In *Mountain States Legal Foundation v. Glickman*,⁷⁹ 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).⁸⁰ One of the issues in this case was whether several non-profit environmental groups had standing to sue.⁸¹ 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.⁸² 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 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).⁸³

Judge Williams’ use of this line from *Like a Rolling Stone*,⁸⁴ like Chief Justice Roberts’, is somewhat helpful to the reader in understanding the judge’s point 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

77. BOB DYLAN, *Like a Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965).

78. *Id.*

79. 92 F.3d 1228 (D.C. Cir. 1996).

80. *Id.* at 1237.

81. *Id.* at 1232.

82. *See id.* at 1232, 1236.

83. *Id.* at 1236–37 (citations omitted).

84. BOB DYLAN, *Like a Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965).

Dylan suggested that “when you ain’t got nothin’, you got nothin’ to lose,” he likely meant to evoke the idea of freedom.⁸⁵ Dylan suggests that having nothing 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”⁸⁶

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*.⁸⁷ 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 had not taken.⁸⁸ His argument was “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.”⁸⁹

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 Tag use of claimant’s vehicles including photographs of the cars passing through toll booths at some of the facilities.⁹⁰

Ultimately, the court concluded that there was no credible evidence to establish that the claimant was improperly billed.⁹¹

85. *Id.*

86. BOB DYLAN, *It Ain’t Me Babe*, on ANOTHER SIDE OF BOB DYLAN (Columbia Records 1964).

87. 764 N.Y.S.2d 549 (Civ. Ct. 2003), *rev’d*, 792 N.Y.S.2d 291 (App. Term 2004).

88. *See Kinkopf*, 764 N.Y.S.2d at 550.

89. *Id.* at 558.

90. *Id.*

91. *See id.*

E. You're Gonna Have to Serve Somebody⁹²

Sometimes the inclusion of song lyrics in a judicial opinion feels more like a judge's attempt at humor or to express individuality than it does an attempt to advance a legal argument. An apparent example of this phenomenon appears in *Robertson v. State*, a second-degree murder case.⁹³ The court held that the defendant was entitled to a new trial because evidence of an earlier incident in which the defendant brandished a weapon at his ex-wife and daughter was inadmissible.⁹⁴ In his dissent, Judge Gersten wrote:

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 reprovved.

^{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).⁹⁵

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*.)

F. The Times They are A-Changin'⁹⁶

In *Roache v. AmeriFirst Bank*, 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.⁹⁷ 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.⁹⁸ In a prior case, Judge Glickstein had voted to overrule a trial judge's decision to dismiss the plaintiff's complaint due to the plain-

92. BOB DYLAN, *Gotta Serve Somebody*, on *SLOW TRAIN COMING* (Columbia Records 1979).

93. 780 So. 2d 94 (Fla. Dist. Ct. App. 2000).

94. *See id.* at 102 (Gersten, J., dissenting).

95. *Id.* at 102–03, 103 n.8.

96. BOB DYLAN, *The Times They Are A-Changin'*, on *THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964).

97. *See* 596 So. 2d 1240, 1240 (Fla. Dist. Ct. App. 1992).

98. *See id.* at 1243 (Glickstein, J., dissenting).

tiff's discovery violations.⁹⁹ In *Roache*, however, Judge Glickstein found himself in support of the trial judge's decision.¹⁰⁰ 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 [two prior decisions] . . . 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 gruelling [sic] 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.¹⁰¹

Perhaps a more natural use of *The Times They Are A-Changin'*¹⁰² can be found in *Erickson v. Bartell Drug Co.*, a sex discrimination case.¹⁰³ 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 legislation.¹⁰⁴ 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

99. See *id.* at 1242 (citing *United Services Auto. Ass'n v. Strasser*, 492 So. 2d 399 (Fla. Dist. Ct. App. 1986)).

100. See *id.* at 1242–43.

101. *Id.* at 1243.

102. DYLAN, *The Times They Are A-Changin'*, *supra* note 96.

103. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

104. See *id.* at 1268–69.

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, 1964.¹⁰⁵

Judge Robert S. Lasnik's inclusion of *The Times They Are A-Changin'*¹⁰⁶ 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 a 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 1951.¹⁰⁷ This places him (as well as many other judges) squarely within the baby boomer generation for whom Dylan's songs may resonate particularly strongly.

G. *Ballad of a Thin Man*¹⁰⁸

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 Mutual Insurance Co.*,¹⁰⁹ two pro se plaintiffs alleged a variety of wrongs. Their complaint was forty pages long and "and purport[ed] to allege a complicated series of wrongdoings by numerous businesses, law firms, and individuals."¹¹⁰ The defendant moved to dismiss the complaint.¹¹¹

In his written opinion, the judge noted that he had "struggled and strained to decipher plaintiff's mountain of papers," but that his effort "ha[d] been a total failure."¹¹² Although the judge was "cognizant of the liberality with which *pro se* pleadings must be construed, the plaintiffs' complaint simply [could not] be understood."¹¹³ In keeping with that conclusion, the judge began his opinion with the following lines from Dylan's *Ballad of a Thin Man*:

105. *Id.* at 1269 n.4.

106. DYLAN, *The Times They Are A-Changin'*, *supra* note 96.

107. See 1 ALMANAC OF THE FEDERAL JUDICIARY (9th Cir.) 213 (Megan Rosen ed., 2011), available at Westlaw 2011 WL 123678.

108. BOB DYLAN, *Ballad of a Thin Man*, on HIGHWAY 61 REVISITED (Columbia Records 1965).

109. See 142 F.R.D. 502 (S.D. Fla. 1992).

110. *Id.* at 503.

111. *Id.*

112. *Id.* at 504 (citation omitted) (internal quotation marks omitted).

113. *Id.* (citation omitted).

Something is happening
But you don't know what it is
Do you, Mr. Jones?¹¹⁴

H. *Blowin' in the Wind*¹¹⁵

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.¹¹⁶ That process was at issue in *Richmond Pain Management, P.C. ex rel. Bevel v. State Farm Mutual Automobile Insurance Co.*¹¹⁷

The opinion began in a somewhat unusual fashion:

"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.¹¹⁸

The court then spent much of the remainder of the opinion bemoaning New York's process as "a waste of judicial and legal resources [that] imperils the rights of diligent defendants."¹¹⁹

I. Of Pig Circuses and Children's Faces¹²⁰

Kirk v. Kirk,¹²¹ 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.¹²² After the trial court awarded custody of the child to the mother, the father responded by creating an anonymous

114. *Id.* at 503 (quoting DYLAN, *Ballad of a Thin Man*, *supra* note 108). Regrettably, the judge's last name was Garber, not Jones. *See id.*

115. BOB DYLAN, *Blowin' in the Wind*, on THE FREEWHEELIN' BOB DYLAN (Columbia Records 1963).

116. *See* Richmond Pain Mgmt., P.C. *ex rel.* Bevel v. State Farm Mut. Auto. Ins. Co., 2 Misc. 3d 1011(A), at *2 (N.Y. Civ. Ct. Mar. 23, 2004).

117. *Id.*

118. *Id.* at *1.

119. *Id.* at *2.

120. *See* DYLAN, *Hurricane*, *supra* note 28.

121. 770 N.E.2d 304 (Ind. 2002).

122. *See id.* at 305.

web site to disparage the trial judge.¹²³ On the web site, the father analogized the quality of justice rendered in his case to that received by Rubin "Hurricane" Carter in Dylan's ballad, *Hurricane*: "All of Rubin's cards were marked in advance/The trial was a pig-circus, he never had a chance."¹²⁴

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 to signify 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 Gone."¹²⁵

The court ultimately affirmed the trial court's decision to grant custody to the mother.¹²⁶

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.

123. See *id.* at 306 n.3.

124. *Id.* (quoting DYLAN, *Hurricane*, *supra* note 28).

125. *Id.*

126. *Id.* at 308.