

## Homer Simpson Meets the Rule Against Perpetuities: The Controversial Use of Pop Culture in Legal Writing Pedagogy

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Imagine that you have returned to your first year of law school. In your legal writing course, you are required to finish the year with an extensive brief analyzing a legal problem. After months in your doctrinal courses dealing with mind-bending legal issues such as liquidated damages, substantive due process, felony murder, personal jurisdiction, and shifting executory interests, you are ready to sink your teeth into a challenging legal writing assignment. You want to show your stuff and prove that your writing is law review caliber. Your assignment starts as follows:

Greenacre is a parcel of land bounded on three of its sides by Redacre. James Green, your client, owns Greenacre. Steve Red owns Redacre. Red and Green have been disputing the rights of Green to maintain a dirt road leading from Greenacre through Redacre, which leads to Highway 109. ...

Fascinating stuff, no? This problem, while possibly viable as a device for inculcating legal writing skills, could nonetheless use some zest. One way to improve its readability and interest level might be to use familiar or humorous character names from pop culture.

The claim has been made, however, that the use of such names in legal research and writing (LRW)

pedagogy is inappropriate. The argument is that students should take these assignments seriously, and populating one's writing problem with characters from pop culture makes it less likely that they will do so.

But is this position truly defensible? Do students really take these assignments less seriously if a challenging legal issue happens to be in an amusing context? On the other hand, are there any justifications for the use of pop-culture references in legal writing pedagogy? If so, does the upside outweigh the downside? This article analyzes the issue whether teachers of legal research and writing should dare to go where our sisters and brothers of the doctrinal faculty have gone for years—into the realm of designing writing assignments using pop-culture references as characters as a means by which to balance doctrinal learning with heightened interest. Put quite simply: does a little sugar indeed help the medicine go down?

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### A. The Upside: The Arguments in Favor of the Use of Pop Culture in Legal Writing Pedagogy

The first justification for the use of a well-known or humorous context for LRW problems is the infusion of interest, thus avoiding the Greenacre/Redacre problem. The learning opportunity is obvious in that subjects otherwise possibly too bland, but nonetheless frequently encountered in practice, can be explored in legal writing exercises in a manner more engaging to students. This prepares students for practice, while at the same time adding a component of interest otherwise potentially unattainable. Additionally, if students feel like they are solving real-world legal problems that could actually arise, they feel a connection to their work.

For instance, a problem I designed included an alleged breach of contract by “Ronald Crump,” host of the reality television show *The Intern*. The legal issue arose when, seemingly in contravention of a contractual warranty to the contrary, Crump fired a contestant despite the fact that she had “immunity.” Another contractual clause giving Crump full discretion to fire anyone at any time implicated the more specific issue of the covenant of good faith and fair dealing. Additionally, students had to confront a personal jurisdiction issue because the plaintiff sued Crump International, Inc. (a New York-based business, incorporated in Delaware), in a federal court in Florida. The substance of these two issues might have been a bit boring for students, but with the use of the obvious pop-culture references I was able to reinforce two of the trickier concepts my students faced on their mid-year exams.

The second justification for using pop-culture references in legal writing problems is the humanization of the relationship between faculty and students. The dominant mode of legal education posits the professor as the authority figure and the student as the subordinate.<sup>2</sup> This

relationship stifles the potential of mentoring relationships that would provide students with even better learning opportunities. Consciously eschewing the use of humor in legal education, for the sake of appearing “serious,” reinforces the hierarchical structure of student as subordinate and professor as superior, and thus undermines learning opportunities.<sup>3</sup>

Open-mindedness to alternative teaching methods, on the other hand, both fosters learning opportunities and challenges the often destructive hierarchical norms of legal education.<sup>4</sup> One of the greatest assets of most law schools is the more personal connection between LRW faculty and their students. Legal writing faculty often have more personal contact with law students due to the smaller size of LRW classes. This inherently cultivates a more mentor-like relationship.<sup>5</sup> Using pop culture in LRW assignments further challenges the norm that law professors must present stuffy, lifeless problems as a means to display the loftiness of their intellect. In other words, pop-culture-based writing problems simply make law professors more human.<sup>6</sup>

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<sup>3</sup> By this, I do not mean to imply that those who choose not to use humor in legal writing pedagogy are guilty of any failure. For some, this methodology just does not work. I do mean to suggest, however, that conscious rejection of nontraditional methodologies on a systemic or normative level, for the sake of “seriousness,” ultimately adds to the protection and proliferation of the hierarchical status quo.

<sup>4</sup> See Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 *Clinical L. Rev.* 15, 15 (2004) (extolling nontraditional pedagogy focusing on narrative, interpersonal, and intrapersonal skills); Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 *Ind. L. Rev.* 737, 750 (2000) (criticizing traditional legal education’s hierarchical structure as exacerbating “frustration, or alienation, or both, because of law schools’ failure to engage and develop the full range of intellectual capacities necessary to successful and responsible practice”).

<sup>5</sup> Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 1 *J. Ass’n Legal Writing Directors* 259, 262–263 (2002).

<sup>6</sup> See generally Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 *J. Legal Educ.* 367, 367 (1999) (asserting that meaningful student-faculty contact is an essential element of effective law teaching).

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<sup>2</sup> Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 *S. Tex. L. Rev.* 753, 759–60 (2004) (examining the relationship between law professors and students and concluding that the hierarchical structure of the status quo undermines learning and mentoring opportunities).

“ [P]op-culture-based writing problems simply make law professors more human. ”

“Life as a first-year law student traditionally has included fierce competition, unflinching expectations, and a few hours each day subjected to the Socratic method in front of one’s peers.”

A third justification for infusing pop culture, somewhat related to the second, is the humanization of the law school environment for students. Life as a first-year law student traditionally has included fierce competition, unflinching expectations, and a few hours each day subjected to the Socratic method in front of one’s peers. A large portion of a law student’s existence is spent fretting about the consequences of examinations, the likelihood of obtaining post-graduate employment, and paying off dauntingly large educational loans.<sup>7</sup> While many of the difficult aspects of legal education are unavoidable and even justifiable (such as competition and expectations), other aspects of legal education are not so immutable. Solving those negative yet changeable aspects, by means of simply including a less drastically formal context, could go a long way to improving law students’ mental health, forestalling the seemingly inevitable disenchantment with life as a lawyer, and generally improving the law school environment.

In this respect, the use of pop culture in legal writing exercises, far from being detrimental, can create learning experiences in unexpected ways. For instance, one student reported that he and other members of my class were dining late one Friday night with their non-law student significant others. The conversation turned to the assigned trial brief, and the students shared with their significant others the facts of the case, all of which were set in the context of *The Simpsons*. Intrigued (or at least, so I am told) that a law professor would set a problem within *The Simpsons*, the significant others asked follow-up questions regarding the facts, the analysis, and the students’ predictions on the likely outcome of the case. The students, some of whom represented the plaintiff and some who represented the defendant, then entered into an

extensive debate (which included the significant others) about the legal analysis of the problem. All of this occurred late one Friday night, and the problem included perhaps some of the most mundane legal issues conceivable: a claim of intentional interference with contractual relations based upon the filing of a dubiously motivated *lis pendens* to prevent the sale of commercial real property. Whether this discussion, which no doubt enhanced the students’ understanding of the law and their arguments, would have happened but for the pop-culture context of the problem is doubtful. Thus, the inclusion of pop culture made the students’ law school environment a bit more entertaining and humane and created a learning experience from which they otherwise would not have benefited.

The fourth justification for using pop-culture references in legal writing problems focuses not on students, but on faculty. Specifically, the use of pop culture has multiple effects on the problem-creation process. First, using popular character names creates an easy source for party and nonparty names in the legal writing problem. Rather than struggling to think of yet another hypothetical name or place, the use of characters from television, movies, or literature offers an ample source for prefabricated names. Additionally, this provides a source for faculty to infuse a surrounding context into the facts of the problem as well: the use of these characters, and the nonlegally dispositive fictional environments they inhabit, gives life and a surrounding medium to the problem.

On a related note, this ready-made source for names and places in the legal writing problem also makes their creation more interesting. Decades into teaching legal writing and forced to create new problems each year, one might get tired of the process. With the ever-evolving source of pop culture, however, writing such a problem becomes at least a bit more palatable.

The fifth and final justification is that the use of pop-culture references in creating a legal writing problem creates a heightened focus upon the names used. This focus lessens the likelihood that the writer will unintentionally rely on racial, ethnic, sexual

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<sup>7</sup> Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. Legal Educ. 112, 113 (2002) (reporting the law school phenomenon of “the walking wounded”: demoralized, dispirited, and profoundly disengaged from the law school experience”).

orientation, or class stereotypes in populating the legal writing problem.

An anecdote best elucidates this assertion. A former colleague of mine related a rather extreme story from her first year of law school. Her legal writing professor handed out the course's spring problem, which was in the context of criminal law. The students read the problem in class and discovered that there were three main characters. Two were police officers: Officer McFadden and Officer O'Sullivan. The third main character, the defendant who was accused of burglary, bore the surname "Rodriguez." For obvious reasons, the students in the class were offended; and rightfully so. The problem blatantly relied on invidious stereotypes that have no place in the legal academy. Obviously, the problem should have been written with closer attention paid to the writer's subjective, and hopefully unintentional, ethnic biases.<sup>8</sup>

The use of pop culture in problem creation can prevent this situation. Because character names are purposefully considered and are not a mere afterthought, as they might be with the use of mere hypothetical names, greater focus ensures attention to these issues, thus avoiding problems. In other words, if one gives serious consideration to the names used, the chances are better that this consideration will foster a wider consciousness of the propriety of the characters' names.

## **B. The Downsides: The Arguments Against the Use of Pop Culture in Legal Writing Pedagogy and the Solutions Thereto**

While justifications exist for the use of pop culture in legal writing problems, there are problems involved as well. However, these problems are not without solutions, or adjustments. Although I conclude in this article that the positives outweigh

the negatives, those considering employing this methodology should independently analyze these downsides (and the climate of their own institution) to ensure that they reach the same conclusion.

First, and seemingly foremost, some argue that the use of pop-culture references in legal writing problems undermines the seriousness with which students approach the problem.<sup>9</sup> Thus, the argument continues, if students take the problem less seriously, they will not learn the subject matter of the course.

This conclusion is inaccurate. My experience has been that students do not take the problem less seriously due to its humorous context. Having taught legal writing both with problems using hypothetical names and with pop-culture-based names, I have noticed no difference in terms of the seriousness with which students approach the problem. To the contrary, my students have expressed (both personally and by means of anonymous course evaluations) that they appreciate the effort and creativity I have put into the problems. If anything, students have seen that I take the creation of the problem seriously, and they react in kind.

A related objection asserts that students will take the class less seriously as well. The proponents of this argument assert that LRW courses already face perceived hierarchical issues in the curriculum. Why exacerbate this struggle with seemingly self-denigrating methodologies? This argument, however, ignores several important points. First,

“While justifications exist for the use of pop culture in legal writing problems, there are problems involved as well.”

<sup>8</sup> This is not an isolated incident, and certainly not one constrained to teachers of legal writing. See Sandra J. Polin, *The Alchemy of Race and Rights: Diary of a Law Professor* by Patricia Williams, Book Review, 22 N.C. Cent. L.J. 83, 92 n.36 (1996) (relating a story about a white criminal law professor who gave the two criminals on her criminal law exam the same first names of the only two black males in her class).

<sup>9</sup> See Jan Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing*, 3 Perspectives: Teaching Legal Res. & Writing 58, 59 (1995) (stating that “[a]lthough many legal writing teachers go through a period of creating assignments with puns and ridiculous names, more experienced teachers generally abandon this approach”). I disagree with the conclusion that dispensing with this methodology is a mere matter of experience. I am aware of a number of senior LRW professors who employ this technique with great success. However, I appreciate the substance of his argument, analyzed herein, asserting that the use of references is deleterious to the learning process.

“Humorous characters should not be used in conjunction with difficult subject matters, but such references can nonetheless serve as an effective tool in problems that are less controversial.”

teachers of doctrinal courses also use pop culture in their pedagogy, mostly in exam hypotheticals.<sup>10</sup> Thus, the use of this methodology brings us into conformity with our doctrinal colleagues.<sup>11</sup> Second, as noted above, students actually take the class more seriously when they realize that their professor puts effort into her or his problem creation. Thus, this objection also carries little weight.

A second objection to the proposed methodology is that infusing humorous pop-culture references in controversial or touchy subject matters is inappropriate and insensitive. For instance, if an LRW professor constructed a writing project addressing issues of domestic violence, having the Brady Bunch as the central characters of such a hypothetical could easily be construed as trivializing the serious subject matter. I agree with this assertion, but I disagree with drawing the conclusion that pop-culture references are inappropriate in all contexts. Humorous characters should not be used in conjunction with difficult subject matters, but such references can nonetheless serve as an effective tool in problems that are less controversial. Rejecting the use of pop-culture references in legal writing problems based on this objection, therefore, seems akin to throwing the baby out with the bathwater.

The third consideration that leads many to reject the use of humorous names in LRW problems centers on the fact that students often use the finished product as a writing sample when seeking legal employment. Many LRW professors fear

that potential employers will glean a negative impression from the writing sample and will impart this negative impression onto the student/applicant. To prevent this, LRW professors construct problems with strictly hypothetical names, to appear more “serious.”

Simple solutions to this problem exist, however. On the occasions in which I have used a pop-culture background for an LRW problem, I have told the students on multiple occasions that, prior to submitting their briefs as writing samples, they should change the names of the characters to hypothetical ones. This generally eliminates the problem, as most of this generation’s law students are well aware of the find/replace function of most word-processing software. As an additional mechanism to undermine the likelihood of “offending” potential employers, I also omit from the problems the most blatant or absurd names. Thus, one might omit Homer Simpson from a hypothetical, but instead use the somewhat lesser-known Montgomery Burns.<sup>12</sup>

The fourth argument represents the inverse of one of the arguments in favor of inclusion of pop culture. Some posit that the use of references might actually create problems if the writer unintentionally uses characters whose race, ethnicity, sexual orientation, or class identification can connote an inappropriate stereotype.

This criticism is well-taken, and actually should be a significant consideration for any legal writing

<sup>10</sup> See Thomas D. Crandall & Douglas J. Whaley, *Cases, Problems, and Materials on Contracts* (4th ed. 2004) (using hypothetical examples with references to: *Psycho*; *The Three Little Pigs*; *Paul Bunyan*; *Lord of the Rings*; *Romeo & Juliet*; *West Side Story*; *Sherlock Holmes*; *King Arthur*; and *Gone with the Wind*). In fact, the use of pop culture in LRW assignments is even more justifiable than in doctrinal course examinations because in a time-limited exam setting, students do not want to be distracted by humor. In LRW courses, where the assignments are spread over time, however, this is not so.

<sup>11</sup> In fact, disavowing the use of pop culture in legal writing problems actually exacerbates the hierarchical inequities between LRW and doctrinal faculties. In other words, if they can do it, why shouldn’t we? In this respect, therefore, the use of pop culture in the LRW classroom serves to level the playing field in that it shows LRW faculties’ confidence in their place in academia and their right to use controversial methodologies if they prove effective.

<sup>12</sup> A related objection concerns the use of pop-culture sources that require legal analysis of factual scenarios that are not possible in the real world. For instance, what if an LRW problem required students to analyze whether George Jetson was negligent when piloting his flying car? In my opinion, LRW professors should reject this sort of pop-culture usage. First, students should learn legal analysis in the context of problems they might actually face in practice. Analysis of other-worldly scenarios fails to accomplish this goal. Second, unlike redacting pop-culture names for purposes of submitting writing samples, students would be unable to redact these scenarios for this purpose because the facts pervade the writing. Accordingly, using this method would harm students’ chances with employers because hiring attorneys could glean that the student has never had the experience of analyzing real-world legal problems. However, rejection of this extreme example does not require rejection of more subtle usage of pop culture. The two methodologies are vastly different.

professor considering the use of pop-culture references for pedagogical purposes. However, the rebuttal to this argument, if it is posed as a means by which to eliminate the use of pop culture from LRW pedagogy altogether, is that these sorts of mistakes can be made even when one is not using pop-culture references. For instance, I came across an LRW problem in which the author repeatedly referred to the police vehicle used to transport the defendant as a “paddy wagon.” Even though this reference was included in a problem using hypothetical (non-pop culture) names, it nonetheless relied (although clearly unintentionally) on a term whose origin was pejorative.<sup>13</sup> Thus, even those not using pop-culture references face the problem of unintentional inappropriate usages. Simple conscientious scrutiny of one’s LRW hypothetical obviates this problem both for those who use pop culture in their problems and for those who do not.

Finally, the last argument against pop characters is the assertion that this approach alienates those not “in the know.” In other words, students unfamiliar with the context of the problem will feel left out and that they might be missing something. The solution to this problem, however, is to recognize that these students are no worse off than they would have been if the hypothetical was not in the pop-culture context. Although their experience is not augmented as other students’ experience may be, they lose nothing. Furthermore, several countermeasures can negate this alienation problem. First, I rarely discuss the pop-culture issues of the problem in class—the entertainment effect, therefore, is really only for students while reading the problem. Therefore, students not in the know do not experience this alienation effect

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<sup>13</sup> See <[en.wikipedia.org/wiki/Paddywagon](http://en.wikipedia.org/wiki/Paddywagon)> (discussing the pejorative origins of the term “paddy-wagon”).

<sup>14</sup> Another countermeasure I employ makes sure that students do not use the pop-culture references as substantive evidence. For instance, if one used a Seinfeld scenario a student might argue that knowledge of Kremer’s general idiocy makes it more likely that Jerry Seinfeld was negligent in loaning his car to Kremer. In the problem packet, however, I explicitly tell students they may not employ this approach and tell them they may only use facts stated in the problem.

in the classroom. Second, I also make it clear to all students that if they are not familiar with the context of the problem, their grades will not suffer. This is a seemingly obvious statement, but many students report that they nonetheless appreciate the assurance. Thus, this argument should not stand in the way of implementing pop culture into LRW problems.<sup>14</sup>

### C. Conclusion

Using pop-culture references as the context of one’s legal writing problems may not be a viable approach for everyone. This article is not normative; it does not argue that all LRW professors *should* use this approach. To the contrary, it merely posits that the wholesale rejection of this methodology is unwarranted. Some LRW professors may simply feel uncomfortable using this method; others might benefit greatly. Accordingly, because there are many arguments in support of this approach and few compelling arguments against it, faculty members should consider employing these ideas.

I am particularly compelled by the argument that refusal to use pop culture in LRW evidences a capitulation to the traditional subordination of LRW faculty and to the status quo. If we want to be taken seriously, we need to take our subject—and not ourselves—seriously. The best way to accomplish this is by pursuing successful methodologies and defending our right to use them. Failure to do so, for the sake of being perceived as “serious” and thus competent and successful, demonstrates a collective low self-esteem in the LRW community that can only be overcome by means of doing what the individual professor feels to be right. We should take the opportunity, both to further the cause of legal writing in the academy and to further the learning experience of our students, to develop and defend effective, energizing, and even controversial pedagogies.

In other words—“carpe diem”—seize the “D’oh!”

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