

Review Essay

From Law to Content in the New Media Marketplace

The Starr Report Disrobed

By Fedwa Malti-Douglas

New York: Columbia University Press, 2000. Pp. 188. \$16.00 paper.

Reviewed by Daniel M. Fillert†

INTRODUCTION

In 1998, when Special Prosecutor Kenneth Starr released his bestseller, *Communication from Kenneth W. Starr, Independent Counsel Transmitting a Referral to the United States House of Representatives Filed in Conformity with the Requirements of Title 28, United States Code Section 595(c)* ("Starr Report"),¹ unlike most authors of popular literature, he probably did not expect that his work would be subject to literary criticism. Indeed, although it sold well over a million copies² in multiple languages, and despite its lurid, "x-rated"³ content, Starr undoubtedly did not consider his report to be popular literature at all. According to Starr, the report was merely a referral by a prosecutor to Congress, recommending

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1. H.R. Doc. No. 105-310 (1998) [hereinafter Starr Report]. All references to the Starr Report are cited to the U.S. Government Printing Office edition. Because this edition was available in libraries and directly from the U.S. Government Printing Office, rather than from commercial book retailers, it was probably least utilized by the average citizen. Nonetheless, this version is most likely to be consistently available to researchers in libraries over time.

2. Booksellers sold 1.8 million copies of the Starr Report over a two-day period. See Joe Nickell, *Why Buy the Cow?*, WIRED NEWS (Oct. 1, 1998), at <http://www.wired.com/news/topstories/0,1287,15369,00.html>.

3. See, e.g., Helen Kennedy, *Big Story-Dumb Plot: Bill 'n Monica Tale Reads Like a Cheap Paperback*, N.Y. DAILY NEWS, Sept. 12, 1998, at 6.

impeachment of President Clinton for perjury and obstruction of justice.⁴ It was, by far, the most important indictment by a prosecutor in the last fifty years. For Starr, the report was not pulp, but rather the essence of pomp.

The report's raciness, however, undercut Starr's claim. The following sections from the indictment illustrate the document's capacity to tread into stylistic territory normally reserved for pulp fiction:

"We were kissing and he unbuttoned my dress and fondled my breasts with my bra on, and then took them out of my bra . . . And then * * * I wanted to perform oral sex on him * * * and so I did."⁵

...

[T]he President unbuttoned Ms. Lewinsky's blouse and touched her breasts through her bra, but not directly. He also put his hands inside Ms. Lewinsky's pants and stimulated her genitalia . . . Ms. Lewinsky testified that she had multiple orgasms.⁶

...

In the hallway by the study, the President and Ms. Lewinsky kissed. . . . [A]ccording to Ms. Lewinsky, "he focused on me pretty exclusively," kissing her bare breasts and fondling her genitals. At one point, the President inserted a cigar into Ms. Lewinsky's vagina, then put the cigar in his mouth and said: "It tastes good."⁷

The prose, far from a dry, factual recitation, contained rich, erotic details of the sort we expect from a book-club romance⁸ or, at minimum, a Barbara Walters television interview.⁹

4. In an interview, Starr indicated that he did not anticipate that Congress would make the referral public or place it on the Internet. See Ira J. Hadnot, *Interview: Kenneth Starr*, DALLAS MORNING NEWS, Oct. 29, 2000, at 1J. Stephen Bates, who characterizes himself as "a lawyer who helped write the report," expressed surprise that "deconstructionists"—that is, Malti-Douglas—would "bother with publications of the U.S. Government Printing Office." See Stephen Bates, *Review: The Starr Report Disrobed*, TIMES LITERARY SUPPLEMENT, Aug. 10, 2001, at 24. One could reasonably challenge the credibility of both Starr's and Bates's claims that they did not expect the *Report* to receive broad public scrutiny. Starr's choice of Bates, a professional writer and literary editor with two books and many articles under his belt, suggests that Starr wanted the report to be good, readable prose. See David W. Chen & Neil A. Lewis, *The Authors: A Young Protégé of Starr and an Established Nonfiction Writer*, N.Y. TIMES, Sept. 12, 1998, at A8 ("Stephen Bates, a Harvard graduate, is a lawyer and a journalist who has written several nonfiction books. . . . After law school, Mr. Bates wrote for publications as diverse as The Nation, The Weekly Standard, Playboy and The New Republic.").

5. Starr Report, *supra* note 1, at 58-59.

6. *Id.* at 137 & n.44.

7. *Id.* at 39-40.

8. The sexy prose won Starr the attention of the *Literary Review*, which named the Starr Report as a finalist for its annual "Bad Sex Award" presented "for poor or laughable descriptions of sex." See Andrew Hibberd, *Faulks Wins Unwanted Sex Award*, THE LONDON DAILY TELEGRAPH, Nov. 27, 1998, at 15.

9. Indeed, Barbara Walters's interview of Monica Lewinsky proved to be so compelling that it garnered the largest news audience in the history of television. See Toby Miller, *The First Penis Impeached*, in OUR MONICA, OURSELVES: THE CLINTON AFFAIR AND THE NATIONAL INTEREST 123 (Laura Berland & Lisa Duggan eds., 2001) [hereinafter OUR MONICA, OURSELVES]. Even this statistic implicates the ambiguous cultural place of the entire Lewinsky affair. Was the Walters interview a

In light of these salacious stories, one can hardly claim surprise that Fedwa Malti-Douglas engaged in a literary analysis of the *Starr Report* in her insightful and peppy book, *The Starr Report Disrobed*.¹⁰ Although literature scholars rarely focus on government documents, most government documents do not feature explicit sexual scenes or garner top ranking on the *New York Times* bestseller list.¹¹ Given the critical response to *The Starr Report Disrobed*, it appears that some people believed the referral to be an inappropriate subject for such scrutiny.¹² This Review Essay contends that the literary analysis in *The Starr Report Disrobed* is not only an entirely plausible project, but also one worthy of serious attention because it highlights the emergence of a world in which legal documents

news story, in which case the ratings can be called the highest in history, or was it an entertainment event, in which case the ratings would have to be compared to television titans such as the Super Bowl?

10. Apparently book review editors were unsettled by Malti-Douglas's treatment of the *Starr Report*. The *Times Literary Supplement* made the highly unusual decision to allow Stephen Bates, a self-acknowledged author of the *Starr Report*, to review *The Starr Report Disrobed*. See Bates, *supra* note 4. It is difficult to imagine that the editors would have assigned John Updike to review a textual analysis of the *Rabbit* series.

11. The *Starr Report*, in its various versions, was the number-one bestseller in the paperback nonfiction category among both independent and chain bookstores for the weeks of October 4, 11, and 18. See NEW YORK TIMES ON THE WEB, *Best Sellers Plus* (Oct. 4, 1998), at <http://www.nytimes.com/books/98/10/04/bsp/papernonfictioncompare.html>; NEW YORK TIMES ON THE WEB, *Best Sellers Plus* (Oct. 11, 1998), at <http://www.nytimes.com/books/98/10/11/bsp/papernonfictioncompare.html>; NEW YORK TIMES ON THE WEB, *Best Sellers Plus* (Oct. 18, 1998), at <http://www.nytimes.com/books/98/10/18/bsp/papernonfictioncompare.html>. The book also reached the number one position on both Amazon.com and BarnesandNoble.com. See *Bad News for Trees*, THE ECONOMIST, Dec. 19, 1998, at 123. The *Starr Report* was not the first example of a government report containing explicit sexual content for the alleged purpose of criticizing the sexuality itself. In 1986, U.S. Attorney General Edwin Meese issued an extensive report condemning the extent and effects of pornography in America. The report featured hundreds of pages of explicit sexual material. See generally 1986 U.S. DEP'T OF JUST., ATT'Y GEN.'S COMM'n on Pornography, Final Rep. [hereinafter Meese Report]. Unlike the *Starr Report*, however, the Meese Report was passed over by major publishers and reprinted only by a minor publisher, Rutledge Hill Press of Nashville, Tennessee. See Edwin McDowell, *Some Say Meese Report Rates an 'X'*, N.Y. TIMES, Oct. 21, 1986, at C13. See also FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY xxxiv-xxxv (Rutledge Hill 1986) [hereinafter RUTLEDGE]. It does not appear that sales of the Meese Report were particularly brisk. See McDowell, *supra*, at C13. Rutledge Hill's edition may have been less appealing to consumers, however; it contained significantly less explicit sexual content than the U.S. Government Printing Office version because the publisher could not secure copyright permission to reproduce much of the sexual content which remained under the original producers' copyrights. See RUTLEDGE, *supra*, at 434. In any case, it seems a likely guess that, had the Internet existed at the time of the Meese Report, and had it been made available in that format, many citizens would have downloaded it. And had the authors taken full advantage of new technology and included video clips of the material they deemed pornographic, rather than including mere textual descriptions, the Meese Report might have become the most widely read government document in the history of civilization.

12. One particularly harsh critic commented:

Fedwa Malti-Douglas has announced that the material of our politics is now the equivalent of a fictional text. Nothing more important. Nothing to be more respectfully practiced or scrupulously studied . . . Malti-Douglas has written a book-length treatise on the Lewinsky scandal which somehow manages entirely to ignore the law as both an idea and a reality.

See David Tell, *Politics as Fiction: Deconstructing Bill Clinton's Impeachment*, THE WEEKLY STANDARD, Oct. 9, 2000, at 31. See also Bates, *supra* note 4.

are no longer merely legal documents. Targeted to the general public, they transform into salable media content and, ultimately, popular cultural artifacts. *The Starr Report Disrobed* is the logical result of the Starr team's decision to issue a sexy, accessible referral to the U.S. Congress. The *Starr Report* is a complex text that contains—intentionally or not—a series of curious structural and substantive elements. This ostensibly purely instrumental legal document¹³ employs literary techniques we often associate with fiction.

The *Starr Report* is not unique in appropriating fiction techniques to legal work. Judicial opinions, for example, frequently utilize many of these methods as well.¹⁴ These techniques take on special significance, however, when they appear in legal documents that seep from legal proceedings into public circulation. The public at large, including many who may not be concerned with the more instrumental purposes of these materials, consume them as entertainment.

As a result of new technology, and the changing nature of information marketing, the public now has far greater access to functional legal materials, ranging from judicial opinions to court filings to trial arguments to legislative history.¹⁵ In the past, people primarily learned about law through intermediaries (most often journalists).¹⁶ Increasingly, though, nonlawyers seeking news and entertainment can access these legal materials directly, in unmediated form.¹⁷ Lawyers face new opportunities, and new dangers, as

13. In this essay, I treat the *Starr Report* and the efforts of the special prosecutor, generally, as legal matters. In light of the facts that adjudication of President Clinton's alleged legal transgressions ultimately occurred exclusively before Congress, rather than in the courts, and that the *Starr Report* was specifically prepared for this congressional procedure, one could treat it as a political, rather than legal, document. I treat it as a legal document for several reasons. First, it was the product of a prosecutor who maintained, and used, the powers to convene grand juries, file indictments, grant immunity from prosecution, and generally prosecute cases in the courts. See 28 U.S.C. § 594 (a)(1)-(10) (expired June 30, 1999). Second, the special prosecutor's office was, in practice, populated by lawyers and investigators trained in criminal prosecutions. See Richard Willing, *Starr's Team: Tough People, Tough Tactics*, USA TODAY, Feb. 16, 1998, at 6A. Third, the *Starr Report* alleged that President Clinton committed criminal acts such as lying under oath at a deposition and before a grand jury and attempting to obstruct justice. More importantly, however, I believe that by viewing it as a legal document we gain substantial insight about the transformative effects of the new media marketplace.

14. See, e.g., John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447 (2001) (describing how judicial opinions weave together multiple stories and perspectives).

15. See RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM* 122-24, 141-44 (1999) (noting increased access to both state and federal legislative and judicial materials via the Internet).

16. See *infra* text accompanying notes 78-91.

17. See DAVIS, *supra* note 15, at 173. A good example of the shift in the delivery of law-related information occurred upon the release of Frank Sinatra's long-hidden F.B.I. file on December 9, 1998. The national media reported the dissemination of these materials, highlighting particularly "sexy" accusations. The *New York Times*, a publication known for its thorough reporting, prepared an extensive 1100-word story on the Sinatra file. See Irvin Molotsky, *FBI Releases Sinatra File with Tidbits Old and New*, N.Y. TIMES, Dec. 9, 1998, at A21. The website www.apbnews.com offered news

these documents become more accessible. On one hand, they can now speak to larger audiences, attempting to shape public perceptions and opinions, with all the power that follows. On the other, they can expect greater scrutiny of their rhetoric from both critics and lay readers alike.

Although scholars have spent considerable effort studying the interrelationship between law and culture, one significant issue—the nature and consequences of how the public learns about law—has received little scrutiny.¹⁸ The *Starr Report*'s mass distribution, however, surfaces these issues. The public was presented with a sexy document linked to a high-profile scandal. News media hyped the sexual content of the *Starr Report*.¹⁹ Not surprisingly, content consumers responded in droves. Through a variety of channels, from the Internet to newspapers to books (published almost instantly), millions of Americans reviewed portions of the *Starr Report*. Websites with links to the *Starr Report* received increased numbers of hits;²⁰ newspapers reprinting the *Starr Report* boosted their circulation;²¹ publishers of book versions sold thousands of copies without paying any royalties to the authors.²² This wide distribution changed the essential nature of the document. As *The Starr Report Disrobed* demonstrates, wide distribution opens the door for nonlegal scrutiny and criticism far removed from an author's apparent original purpose.

The *Starr Report* used far more than just evidence to make its case; it used artifice. Malti-Douglas's critical reading of the *Starr Report* provides insights into how an advocate makes a compelling case. She reveals the mechanics of the document's showmanship. Malti-Douglas explains how the *Starr Report* works as an effective and alluring popular text. Her

coverage and links to the complete 1300-page F.B.I. report. See JOHN V. PAVLIK, JOURNALISM AND NEW MEDIA 16-17 (2001).

18. M. ETHAN KATSH, LAW IN A DIGITAL WORLD 9 (1995).

19. Of course, the commercial media also helped assure this popularity by promoting the material. One critic noted that "a number of key material details from the Starr Report acquired a fetishistic status in the media." See Ann Cvetkovich, *Sexuality's Archive*, in OUR MONICA, OURSELVES, *supra* note 9, at 273.

20. According to one source, almost 25 million people viewed the *Starr Report* online on September 11, 1998 (the day of its release). News websites CNN.com, MSNBC.com, and WashingtonPost.com all reported sizable spikes in website "hits" after they posted the *Starr Report*. See Courtney Macavinta, *News Sites Weather Starr Storm*, CNET News.com (Sept. 14, 1998), at <http://news.cnet.com/news/0,10000,0-1004-200-333173,00.html> (last visited Nov. 10, 2001). For precise figures, see Thomas E. Weber, *Starr Report Clicks on Web, but with How Many?*, WALL ST. J., Sept. 15, 1998, at A3.

21. At least thirty-six daily newspapers reproduced the *Starr Report*. See *Starr Report May Prove to be Key in Media Revolution*, 10 NEWS INC. 19 (Sept. 28, 1998), available at <http://www.colegroup.com/newsinc/980928SA.html>. Although I did not obtain specific circulation figures for the particular editions that included the *Starr Report*, the *Chicago Tribune* reported that "the September publication of the report . . . reprinted either in full or in excerpts, led to dramatically increased [newspaper] sales." See Tim Jones, *Newspaper Circulation Stays Level, in General*, CHICAGO TRIBUNE, Nov. 3, 1998, at Business 3.

22. The *Starr Report*, a government document, may not be copyrighted. See 17 U.S.C. § 105 (2001).

insights can benefit lawyers hoping to capture the popular imagination: in *The Starr Report Disrobed*, law-and-literature scholarship actually provides helpful hints to lawyers looking to construct, and decode, legal arguments as they are experienced by the public outside the courtroom.²³

Far from being culturally anomalous, *The Starr Report Disrobed* deserves critical study because it foreshadows future popular criticism of legal documents. In Part I, this Review Essay analyzes and critiques Malti-Douglas's interpretation of the *Starr Report*. Part II demonstrates that both the entertaining and the popular tone of the *Starr Report*, and Malti-Douglas's literary analysis of it, are a function of the direct marketing of law to the public made possible through technological innovations such as increased television content capacity and the Internet. Part III investigates the consequences of this new mass-marketing of law, arguing that in this reshaped world, textual analysis—formerly exclusively the domain of law-and-literature scholars—is now an important tool for effective lawyering.

I

UNDRESSING THE STARR REPORT

Fedwa Malti-Douglas approaches the *Starr Report* as a scholar of literature.²⁴ Malti-Douglas emphasizes that a text's meaning is indeterminate and highly dependent on context (pp. xviii, 1-2, 17). One of the most remarkable aspects of the *Starr Report* was its detail: Malti-Douglas's close reading unearths some nuggets that the popular press largely ignored.²⁵ Beginning with its cover, she dissects the text, bringing to the surface important thematic and structural elements not immediately apparent. This Review Essay reviews four aspects of her analysis of the *Starr Report*: (1) the covers of published versions of the referral; (2) its

23. Some techniques used in the *Starr Report* and highlighted by Malti-Douglas, such as the intertextual weave of popular culture into the specific facts of a case, might prove useful in shaping juror opinions inside the courtroom as well. One commentator has noted critically the increased use of popular cultural references in the jury-trial setting. See RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 24 (2000) (describing Johnny Cochran's references to Spike Lee's *Do the Right Thing* and PBS's *Eyes on the Prize* during the O.J. Simpson case closing argument).

24. According to the Columbia University Press website, "Fedwa Malti-Douglas is The Martha C. Kraft Professor of Humanities in the College of Arts and Sciences at Indiana University, where she is also professor of gender studies and comparative literature. She has published numerous scholarly books, as well as a satirical novel, *Hisland: Adventures in Ac-Ac-ademe*." COLUMBIA UNIVERSITY PRESS, THE STARR REPORT DISROBED, FEDWA MALTI-DOUGLAS, at <http://www.columbia.edu/cu/cup/catalog/data/023111/0231119321.htm> (last visited Feb. 7, 2002).

25. For example, Malti-Douglas points out that the couple engaged in oral-anal contact (pp. 19, 34). This detail received remarkably little attention, particularly given the media's extensive and explicit cataloguing of the couple's Oval Office exploits. But see Adam Gopnik, *American Studies*, THE NEW YORKER, Sept. 28, 1998, at 39 (noting that "oral-anal encounters are 'saved' for the footnotes").

organization; (3) its shifting narrator; and (4) the ways in which the *Starr Report* is a repository of cultural artifacts.

A. Reading the Report by Its Cover

Malti-Douglas argues that the *Starr Report* is a story of masquerades (p. 23); she notes that throughout the report, "all is not as it would appear" (p. 22). Masquerades often begin with a mask; in the case of a book, presumably that mask is its cover. In her first chapter, "The Mighty Morphin Report," Malti-Douglas explores the various covers of published editions of the *Starr Report* (pp. 1-17).²⁶ She does not focus on the *Starr Report* as a marketing event even though this seems to explain the various covers on different editions of the volume. Because the *Starr Report* itself was identical from edition to edition,²⁷ it functioned as a commodity.²⁸ Like marketers of salt and gasoline, publishers of the *Starr Report* sought to distinguish their particular "brand" of the *Starr Report*.²⁹ They presumably designed covers with the twin goals of selling the *Starr Report* generally and selling their particular edition specifically. Packaging, an essential part of selling any commodity, thus served a critical function in selling particular editions of the *Starr Report*.

Malti-Douglas offers detailed descriptions and analyses of the covers of English-language editions published by the U.S. Government Printing

26. Malti-Douglas also discusses the *Starr Report* as reprinted in newspaper supplements, its most disposable form, and as distributed in electronic form via the Internet. She seems most intrigued, however, by the book version; she places particular emphasis on the books' covers (pp. 4-17).

27. Different editions often contained additional textual material designed, presumably, to add value and to distinguish the particular edition. The Pocket Books edition, for instance, included an introduction by Phil Kuntz of the *Wall Street Journal*. See THE STARR REPORT: THE EVIDENCE xi-xv (Pocket Books 1998) [hereinafter STARR REPORT, POCKET BOOKS EDITION]. The PublicAffairs version, on the other hand, included "analysis by the Staff of the *Washington Post*." See THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR ix-iii (PublicAffairs 1998) [hereinafter STARR REPORT, PUBLICAFFAIRS EDITION]. In each case, however, the principal content of the book, as well as the content principally marketed on the books' covers, was the referral itself.

28. In the world of marketing, commodities are typically primary products or raw materials—such as salt—that are only minimally processed prior to sale. See Joe Pope et al., *Commodity Branding, in BRANDS: THE NEW WEALTH CREATORS* 161 (Susannah Hart & John Murphy eds. 1998). Classic commodities also include gasoline, wheat, and milk. *Id.*

29. Because multiple producers sell virtually identical products, and because consumers are often indifferent as between producers, commodities tend to be sold at low profit margins. One way to drive up the sale price of commodities is to emphasize product differences. Producers achieve this by offering value-enhancing benefits—in this case, perhaps supplemental text, alliance with an established brand (*Washington Post*), and most basically, permanence. Producers also develop unique and alluring packaging to attract consumers. See *id.* at 161-67. One publisher, PublicAffairs, built its brand identity on its successful debut publication of the *Starr Report*. See *PublicAffairs Proves You Can Be Serious and Sexy*, BOOK PUBLISHING, June 4, 2001 (cited in LEXIS).

Office,³⁰ Forum,³¹ Pocket Books,³² PublicAffairs Reports,³³ and toExcel.³⁴ The plain brown cover of the U.S. Government Printing Office's edition, not designed for bookstore sales,³⁵ offered only the most basic information in a spartan visual environment.³⁶ Other domestic versions, however, sheathed the referral in more complex text and graphics. For instance, the PublicAffairs edition contains the title *The Starr Report* with "Starr" featured in red, uppercase letters.³⁷ Malti-Douglas sees a reference to Nathaniel Hawthorne's *Scarlet Letter* in this (pp. 8-9). In this version, the other letters are black, with gold trim separating the next section of text which reads, "*The Findings of Independent Counsel Kenneth W. Starr on President Clinton and the Lewinsky Affair.*" (p. 9). Below this text, separated by additional gold marking, it promises, "With Analysis by the Staff of the *Washington Post.*" Malti-Douglas makes much of this. She whimsically writes, "[W]ith its black letters on a white background dressed in gold trim . . . it reads like a wedding invitation. Starr invites you to the wedding of President Clinton and Monica Lewinsky, which will take place at the *Washington Post.*" (pp. 9-10).

She also explores how publishers tried to establish the validity (and presumably veracity) of their versions by characterizing them as "official" (pp. 5-8). They used tactics ranging from the symbolic (including official seals of the Department of Justice and of the U.S. President) (pp. 6-8), to the explicit (employing the word "official" in the books' descriptive text) (pp. 6-7), to the persuasive (claiming that the *Starr Report* was published "without editorial censure or comment") (pp. 11-12).

Publishers also used covers to suggest the importance, more generally, of purchasing one's own, personal copy of Starr's referral (pp. 6-7). One edition boasted that its readers, for the first time, have "the opportunity to review, for [themselves], all of the evidence against the President" (pp. 6-7). The cover then notes that "the report will have a profound effect on the Clinton presidency as well as on the country and the world as a whole" (p. 7). Another cover billed itself as an "historic document," essential

30. Start Report, *supra* note 1.

31. THE STARR REPORT: THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT (Prima 1998).

32. STARR REPORT, POCKET BOOKS EDITION, *supra* note 27.

33. STARR REPORT, PUBLICAFFAIRS EDITION, *supra* note 27.

34. THE STARR REPORT: COMPLETE WITH THE PRESIDENT'S REBUTTALS, SEPTEMBER 10-12, 1998 (toExcel 1998).

35. The U.S. Government Printing Office sold each volume for fourteen dollars, via telephone and twenty-four U.S. Government Bookstores. See Press Release, U.S. Government Information, Independent Counsel Kenneth Starr's Report to Congress Available for Sale from Superintendent of Documents (Sept. 11, 1998), at <http://bookstore.gpo.gov/market/98-39.html> (last visited July 2, 2002).

36. See Start Report, *supra* note 1, at cover.

37. STARR REPORT, PUBLICAFFAIRS EDITION, *supra* note 27, at cover.

reading for those concerned with the fate of the presidency and our nation (p. 10).

American publishers of the *Starr Report* apparently relied on relatively low-power sales tactics with their covers, focusing on colors, graphics, and patriotic text (pp. 6-13). Given the powerfully sexual, voyeuristic content of the referral, American publishers plainly exercised considerable discretion.³⁸ They made little use of photos or drawings; they also did not characterize the *Starr Report* as a story of sex in the White House.³⁹ If a reader doubts that American publishers could have done more, Malti-Douglas shows the notable differences evident on covers of French and German editions. The German volume billed itself as an insight on "the 'scandal' in the White House" (p. 14). The cover featured pictures of Lewinsky, staring frankly at the camera, and Clinton covering his face (p. 13). The French edition took the scandal concept one step further, featuring photos of leading characters followed by individual descriptions: Linda Tripp as "the spy," Vernon Jordan as "the negotiator," and Betty Curry as "the faithful one" (p. 15). This version also included juicy quotes such as Lewinsky claiming, "I have lied all my life," and Clinton confessing, "I have cheated people, including my wife." (p. 16). Indeed, Malti-Douglas overlooked a particularly sexy cover: an Arabic version of the *Starr Report*, entitled *Red Nights at the White House*, featuring Monica Lewinsky clad in lingerie.⁴⁰

Malti-Douglas's analysis of the various covers endeavors to demonstrate how the packaging transforms the *Starr Report's* meaning (p. 17). While she provides an interesting discussion of the content of these covers, she never fully establishes how the jackets alter the meaning of the *Starr Report* itself. Her analysis of extratextual material is plainly incomplete: she fails to consider the impact, for instance, of commentaries added by the publishers. To the extent that the referral's meaning depends on its context, the commentaries seem essential to understanding the *Starr Report* as commercially sold. Nevertheless, her analysis serves a more basic purpose: it illustrates how marketers transformed a government document into a highly desired consumer good. While suggesting that American

38. By contrast, Columbia University Press cannot be said to have exercised such discretion with the cover of *The Starr Report Disrobed*. The paperback edition features a partially exposed human midsection and two bare arms. Most of the body is obscured by drawings of paper covered in snippets of text, presumably from the referral. These quotes include "those stains were the President's," "performed oral," and "unzipped his pants and sort of." Less sexually suggestive quotes include "substantial and credible information," "in her folder was a gift," and "3. Steps to Avoid Being Seen or Heard."

39. We cannot know whether publishers limited these claims for commercial reasons (fear that purple prose would reduce sales of the edition, or reduce sales by the publisher generally, over time, due to dilution of its credibility), aesthetic reasons, or some socially responsible conception of good taste.

40. See *Monica Goes Global*, NEWSWEEK, Dec. 28, 1999, at 6.

publishers did not fully exploit the *Starr Report's* tawdry content (p. 14), she provides us with a hint of how future legal materials might be hawked to the masses.

B. Obsessive Organization

The *Starr Report* is an obsessive text, according to Malti-Douglas (p. 19). She defines obsession as "something showing the marks of being dominated by an inordinate fixation that escapes rational control" (p. 20).⁴¹ The *Starr Report's* hyper-organization manifests itself in a highly repetitive text paired with an extensively outlined and titled superstructure. These techniques, she contends, are consequential (pp. 19-36). The referral uses repetition as a primary argumentative tool; indeed, it tells the story as many as six different times. The *Starr Report* first tells the story through a short chronology, entitled "Key Dates" (p. 20). The narrative then obliquely repeats in the "Table of Names" (p. 20). It then moves to its first summation in the form of an introduction (p. 20). This is followed by the "Narrative," and then another retelling in "Grounds" (p. 20).⁴² Finally, the story is retold again in about 1500 footnotes marbled throughout the text (p. 34).⁴³

The *Starr Report's* authors repeat the story in these various structures, but sometimes they change details in the retelling (pp. 32-34). At times the differences are minor, but the disparities subtly shift the settings, relationships, and power dynamics that drive these encounters. In one chapter, Malti-Douglas focuses on the February 28, 1997, sexual incident that produced the famous semen-stained dress (pp. 115-24). In the *Starr Report's*

41. One of the problems with Malti-Douglas's definition of obsession is that it suggests that the organizational choices were irrational. They may have been very rational from the point of view of a team of trial lawyers. See *infra* notes 48-49 and accompanying text.

42. Malti-Douglas does not mention the "Table of Contents," which recounts the story (through section headings) more thoroughly than does the "Key Dates" section. See *Starr Report*, *supra* note 1, at III-IV.

43. Malti-Douglas is focused on the *Starr Report* itself but, in toto, the document includes appendices, including statements by both Clinton and Lewinsky, which retell the story yet again. See generally *Appendices to the Referral to the United States House of Representatives Pursuant to Title 28, United States Code, Section 595(c) Submitted by the Office of the Independent Counsel, Sept. 9, 1998, Parts I and II*, H.R. Doc. No. 105-311 (1998) and *Supplemental Materials to the Referral to the United States House of Representatives Pursuant to Title 28, United States Code, Section 595(c) Submitted by the Office of the Independent Counsel, Sept. 9, 1998 Parts I, II, and III*, H.R. Doc. No. 105-316 (1998). While these materials were not in the same physical volume as the *Starr Report*, and were not part of most downloadable versions of it, they were easily available to the true *Starr Report* aficionado, from both the government and commercial publishers. Like the *Starr Report*, these supplemental materials are available at any library that is a Government Document Depository. Commercial publishers made some of this material available as well. See, e.g., THE STARR REPORT, POCKET BOOKS EDITION, *supra* note 27; THE STARR EVIDENCE (PublicAffairs 1998). Much of the material is also available (albeit inconveniently, page by page) on the web. See, e.g., United States Congress, Independent Counsel's Report, at <http://icreport.access.gpo.gov/hdoc311.html> (last visited Apr.24, 2002).

"Grounds," we read that Clinton touched Lewinsky's genitals through her clothes (pp. 115-16).⁴⁴ In the "Narrative," however, the characters' roles are reversed: Lewinsky touched Clinton's genitals through his pants (pp. 117-18).⁴⁵ The distinction may not affect Clinton's legal culpability, but it surely casts the story in a somewhat different light (pp. 118-19). The narrative also suggests that this was the couple's first encounter in over eleven months (p. 122).⁴⁶ The footnotes to the "Grounds" section complicate this claim: they had engaged in phone sex several times in the interim (pp. 122-23).⁴⁷ This information refutes claims about any suspension of their relationship and, Malti-Douglas argues, further implies the mutuality of their affair (pp. 115-24). She effectively reconstructs the *Starr Report* as the story of lost control: Lewinsky and Clinton careen wildly through their illicit relationship while the report's authors, with their overgrown organizational structure—packed with apparent errors—careen wildly through the text.

In some ways, Malti-Douglas appears a bit unfamiliar with the ways of trial lawyers.⁴⁸ While Malti-Douglas sees repetition as an obsession that "escapes rational control" (p. 19-20), a trial lawyer (and as a former public defender, I count myself among those ranks) might see the authors' duplications as an effort to apply standard-issue trial-skills techniques to the preparation of an impeachment referral. Trial lawyers are often told to repeat terms, phrases, and ideas to insure that the jury notices and recalls important details and points.⁴⁹ The Starr team was replete with trial lawyers,⁵⁰ and it seems entirely possible that they felt very comfortable with what Malti-Douglas perceived as a strictly irrational rhetorical approach. This is not to suggest that repetition was successful in this context. While it may have implied the existence of overwhelming evidence of President Clinton's guilt, the inconsistencies between the different retellings may have simultaneously undermined this benefit by undermining the narrator's credibility. With so many details stated (slightly differently) so many times, a reader is left to wonder which facts are truly relevant, and which version is accurate.

44. See Starr Report, *supra* note 1, at 136.

45. *Id.* at 59.

46. *Id.* at 57.

47. *Id.* at 136 n.40.

48. Malti-Douglas can probably be excused for her lack of awareness about trial techniques. A prolific scholar, though not a lawyer, she appears to have produced limited law-related literature. See Fedwa Malti-Douglas: The Martha C. Kraft Professor of Humanities in the College of Arts and Sciences, at <http://www.indiana.edu/%7Eealldrp/members/malti.html> (last visited June 25, 2002) (describing her educational background); Fedwa Malti-Douglas: Publications, at <http://www.indiana.edu/~ksuchard/publications.html> (last visited June 25, 2002).

49. See, e.g., STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 26, 103, 155 (1993) (discussing value of repetition in direct and cross examination).

50. See Willing, *supra* note 13.

Malti-Douglas also attributes more meaning to errors than may make sense in the actual world of lawyering. If a publisher produces a novel with an outline that proceeds "A,B,C,D,E,E,D,E" (as was the case in chapter 12 of the referral),⁵¹ one would probably assume this quirk reflects an author's artifice. A novel, after all, undergoes extensive editorial review and revisions. Lawyers, on the other hand, work more quickly and less accurately; that was certainly true of the Starr team.⁵² Malti-Douglas shows that the "Table of Names" includes Yitzhak Rabin, who is absent from the *Starr Report*, and it excludes Yasser Arafat, who is present (p. 22). Was this a meaningful decision⁵³ or shoddy editorial work? Although fair game for literary critics, to a harried lawyer, this detail may appear trifling.

C. *The Shifting Narrator*

The Starr Report Disrobed also considers the fluidly shifting narrative viewpoint employed by the authors of the *Starr Report*. The masquerade continues here, Malti-Douglas argues, as the narrator masks his or her identity, subjective posture, and techniques that function to draw a reader into compelling prose (pp. 24-36). She points out, for instance, that the author shifts from an objective and distant third-person voice to a first-person, plural voice where "this office" offers its opinion, to the first-person voice of the characters (pp. 23-25). Malti-Douglas adds that "[t]he legal corporation behind the *Starr Report* then remains largely nameless" and consequently, genderless (p. 24).

In one glaring example of the shifting narrator, the *Starr Report's* authors neutrally recount Clinton-aide Sidney Blumenthal's testimony that Clinton told him that "the call [Clinton] made to Ms. Lewinsky relating to Betty's brother was the 'only one he could remember'" (p. 25).⁵⁴ Then, Malti-Douglas tells us, the narrator strikes back, asserting, "That was

51. Starr Report, *supra* note 1, at 96-105.

52. See Bates, *supra* note 4 (suggesting that Malti-Douglas spent more time studying the report than the Starr team had to prepare it, and calling errors "haste-induced"). See also John C. Henry, *Lewinsky Set to Testify Today About Clinton*, HOUS. CHRON., Aug. 6, 1998, at A1 (discussing pressure on Starr to conclude work quickly).

53. Malti-Douglas asks whether "an Israeli Prime Minister" would "be a more damning reference than the much more controversial head of the PLO" (p. 22). Other aspects of the *Starr Report*, such as its use of the term "vagina" but the absence of "penis" (p. 149-50) (the President sports only "genitals") seem more likely the product of conscious (or subconscious) choices rather than error. Still, Malti-Douglas's discussion about whether they are errors—indeed her claim that the *Starr Report* demonstrates "that the adage [no one is perfect] is absolutely correct"—seems misplaced for a woman self-consciously deconstructing the text, rather than its authors (p. 26). Indeed, given that the *Starr Report* has multiple narrators and (apparently) multiple authors, it is difficult to identify exactly who can legitimately lay claim to praise or blame for anything that occurs within the *Starr Report*. Whether or not one agrees generally with the notion that "the author has disappeared," this particular author is about as hard to find as the chronically unlocatable children's character, Waldo. See Michel Foucault, *What Is an Author* (Josué V. Harari trans.), in *THE FOUCAULT READER* 105 (Paul Rabinow ed., 1984).

54. See Starr Report, *supra* note 1, at 200.

false: The President and Ms. Lewinsky talked often on the phone, and the subject matter of the calls was memorable.” (p. 25). The memorability of any event is not an objective fact. It depends on a variety of contingencies, including the identity and life experiences of the person remembering. Surely, for instance, the average citizen would be more likely to recall talking to the President than would the President’s secretary. Yet the Starr Report’s claim was not attributed to any person, least of all the person alleged to have recalled these conversations. In this section, then, it is the unseen, unidentified narrator, rather than the words of any identifiable speaker, that makes the bold assertion that the President lied about these calls (p. 25). The Starr team thus empowers the omniscient narrator to expose the “truth.”

Kenneth Starr himself never appears in the text as a narrator or a character (p. 36), though readers probably presume he played a central role in decisions about both the content and viewpoint of the *Starr Report*.⁵⁵ When the authors shift the narrator to the third person, they imply his or her status as objective and outside the story (p. 24). This is strategically helpful, of course, because it signals to the reader that the narrator is a neutral party. But Malti-Douglas argues that “narrators are never innocent participants or observers in a text. Rather, they can manipulate or hijack a text to their own end” (p. 24). Thus the *Starr Report* intermingles evidence and opinion in quick succession, changing voices as it moves. When the text speaks with authority, the identity of that authority figure is often obscured.

D. A Repository of Cultural Artifacts

Malti-Douglas also explores the extensive inclusion of cultural artifacts throughout the *Starr Report* (pp. 169-74). Beginning with the Black Dog Restaurant on Martha’s Vineyard, she notes that the *Starr Report* is peppered with references to art and pop culture (pp. 169-72). Monica Lewinsky gives Clinton a Hugo Boss necktie one day and a Banana Republic shirt another (p. 170). He, in turn, gives Lewinsky clothing from the Black Dog (p. 57). Lewinsky quotes *Romeo and Juliet* and prepares an intimate note inspired by the movie *Titanic* (pp. 58, 101-02, 157); Clinton presents her with an edition of Walt Whitman’s *Leaves of Grass* (pp. 98-99). Perhaps most provocatively, Lewinsky presents Clinton with her own “pre-enjoyed” copy of the novel *Vox* and a postcard featuring an erotic drawing by Egon Schiele (p. 170).

For the literary critic, these intertextual developments provide a rich basis for interpretation.⁵⁶ A reader of the *Starr Report* will inevitably bring

55. Starr’s name does appear in one significant place: the signature line. *Id.* at 211.

56. For those businesses and authors mentioned in it, the likes of The Gap, Hugo Boss, and Nicholson Baker, the *Starr Report* might have functioned as free advertising. At minimum, the business

her own understanding of these cultural markers to the text. For example, for some readers, the mere mention of *Vox* connotes the pleasures and dangers of phone sex.⁵⁷ Only a sexually and culturally sophisticated woman, one might conclude, would "share her personal copy" of *Vox*. Similarly, the variety of cultural markers, ranging from the accessible *Titanic* to the highbrow Whitman, from the popular Gap to the exclusive Hugo Boss, offers some point of reference for virtually everyone.

The postmodern⁵⁸ *Starr Report* evokes the feeling of Don DeLillo and Bret Easton Ellis. But we can hardly assume that such intertextuality was inevitable. Was the tie's brand essential to the referral? Was the identity of the books, and particularly Lewinsky's assertion that one must read *Leaves of Grass* as one would savor a cigar,⁵⁹ necessary to establish Clinton's culpability? The Starr team argued that the details were designed to establish the report's veracity, but these particular tidbits do not seem strictly necessary to the task. Since the fundamental questions addressed by the Starr team related to very specific questions of deceit about sex and obstruction of the special prosecutor's investigation, the detailed accounting of these artifacts shed little light on the questions in dispute.⁶⁰

If these references were not essential to the *Starr Report*, why did they play such an important role? The authors might have included these artifacts and intertextual references within the document for at least two reasons. First, they may have hoped that these references would render the *Starr Report* more accessible and seemingly familiar. Second, they may have lent the authors increased credibility.

Modern narratives, in books and movies for instance, often mention cultural material extrinsic to the stories themselves. In his controversial novel *American Psycho*,⁶¹ for instance, Bret Easton Ellis features fashion-designer brands as a recurring theme. Brand names are front and center in movies and on television because the sale and promotion of product

press thought the marketing implications of these commercial placements worthy of discussion. See, e.g., James Poniewozik, *As Seen in the Starr Report!*, *FORTUNE*, Oct. 12, 1998, at 40.

57. See NICHOLSON BAKER, *VOX* (1992) (depicting single phone conversations between strangers that feature extensive phone sex).

58. Malti-Douglas argues that:

[T]he nature of the Report as a depository of Western cultural values and artifacts permits it to glide through music . . . high literature, and popular culture. The exploitation and evocation of these cultural substrata add another level of meaning With its panoply of discourses, with its multileveled, constructed, fragmented, and repetitive narrative, *The Starr Report* is symptomatic of the postmodern age that gave it birth.

(p. 165).

59. "[T]ake it, roll it in your mouth, and savor it . . ." *Starr Report*, *supra* note 1, at 58 n.437.

60. President Clinton did not ultimately deny, for instance, that he and Monica Lewinsky exchanged gifts and shared intimacies.

61. See BRET EASTON ELLIS, *AMERICAN PSYCHO* (1991) (describing the exploits of a trendy serial killer in Manhattan).

placements has become de rigueur within the entertainment industry.⁶² One remarkable high point in the interweaving of brands and narratives occurred in the television show *Dawson's Creek*, in which the characters all wore J. Crew clothes. The dialogue included lines like, "he looked like he stepped out of a J. Crew catalog" and, in an intertextual coup unavailable to the Starr team, the cast all appeared on the cover of a J. Crew catalog.⁶³ Americans have come to expect, and perhaps even desire, the cross-referencing of texts and products within other texts. Certainly the reader's understanding of Monica Lewinsky's phone sex might be enriched if she understood that Monica's own personal experience was mediated, in part, by the experiences of *Vox*'s characters, Abby and Jim.⁶⁴ And equally certainly, many readers better understood Monica Lewinsky upon hearing that she wore a Gap dress to meet the President, rather than a DKNY, or perhaps a JC Penney model. The Starr team may have perceived the ubiquity of these intertextual references within American culture and concluded that they were essential to the preparation of a convincing narrative.

By providing a pop-culture context, these artifacts may also have made the authors seem more credible. Kenneth Starr was pilloried in the press for being an out-of-touch prude.⁶⁵ Readers might have expected that any report prepared by Starr would condemn the President's sexual hijinx for those reasons alone. By producing a fragmented, intertextual narrative, the authors make a claim of cultural awareness. Both the choice of such a fragmented, postmodern style, and the contents of the text—references to the popular mega brands such as Gap and Banana Republic—suggest that the authors are not uptight and out of touch. Instead, these literary moves establish that the authors are just like so many other Americans: thoroughly postmodern.⁶⁶

The Starr Report Disrobed offers insight into the future of law in our new media world by providing a concrete analysis of how a legal document

62. See Rosemary J. Avery & Rosselina Ferraro, *Verisimilitude or Advertising?: Brand Appearances on Prime-Time Television*, 34 J. OF CONSUMER AFF. 217, 217 (2000) (discussing extensive sale of product placements in movies and the more subtle promotion of placements for the alleged purpose of "verisimilitude" on television).

63. See NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES 42 (1999).

64. See generally BAKER, *supra* note 57.

65. See, e.g., Ruth Marcus & Susan Schmidt, *Odd Alliance: The Rocky Road to Lewinsky's Testimony*, WASH. POST, Sept. 28, 1998, at A9 (calling Starr "the prudish, middle-aged son of a conservative minister, who sings hymns while jogging"); Michael Winerip, *Ken Starr Would Not Be Denied*, N.Y. TIMES MAG., Sept. 6, 1998, at 36 (saying that childhood friends recall him as "bright, bookish, religious, a little nerdy").

66. Postmodernism is difficult to define. See Amy Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1363 (1990). In part this is because scholars in different fields use the term to mean different things. One commentator suggested that postmodernism often includes traits such as fragmentation, self-conscious appropriation of cultural material, and a lack of an irreducible foundation of identity or truth. See Douglas Litowitz, *In Defense of Post-Modernism*, 4 GREEN BAG 2d 39, 41-45 (2000).

may succeed (or, potentially, fail) in the mass-media marketplace. Malti-Douglas suggests ways in which producers of these materials can design accessible, compelling texts. Their success, in this respect, will depend on, among other things, packaging, organization, narration, and inter-textual content. Once legal materials become part of our popular culture, we must anticipate that critics will view them as literature, art, or entertainment; once they lose their privileged status as instrumental legal materials, they may no longer receive deferential treatment. *The Starr Report Disrobed* serves as a warning to every lawyer: once a legal document becomes content, it becomes fair game for scrutiny, critique, and ridicule.⁶⁷

The next Part will explore the ways in which legal materials, generally, have been transformed from instruments of a legal system into saleable, entertaining content. It begins by showing how public access to law has been radically expanded. It then suggests ways in which lawyers, and particularly judges, now work harder to be entertaining. Finally, it discusses the new public profile of judges.

II

THE STARR REPORT DISROBED AND THE NEW ERA OF RETAIL LAW

The Starr Report Disrobed stands out more for what it is than for what it says, given its historical context. Such an analysis probably would have been unthinkable even twenty-five years ago. It is difficult to conceive of an author even attempting a deconstruction or textual analysis of either the House Judiciary Committee's *The Constitutional Grounds for Presidential Impeachment of President Nixon* or the Warren Report on President Kennedy's assassination. The critical tools necessary for such an analysis had not yet crept into legal scholarship⁶⁸ and, in any case, law had not yet gone pop, in the parlance of Richard Sherwin.⁶⁹

Much has changed in the passing years. Critical legal studies, law and literature, the study of rhetoric and law, and postmodern theory have all taken root in the legal academy.⁷⁰ Even scholars not typically associated with these movements, law-and-economics scholars Richard Posner and

67. For example, given the scrutiny of the *Starr Report*, it was perhaps inevitable that somebody—and that somebody turns out to be Malti-Douglas—would discover that inside *Oy Vey! The Things They Say! A Book of Jewish Wit* (a gift from Lewinsky to Clinton) is Chico Marx's quote "I wasn't kissing her. I was whispering in her mouth" (p. 172).

68. The conceptual tools a critic might have used to engage in such analysis had not yet made their way into legal scholarship at the time of the Watergate Report. See GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 292, 378 (2000) (dating rhetorical and deconstructive criticism of law to the late 1970s and early 1980s). Indeed, the deconstructive analytical approach expounded by Jacques Derrida (who coined the phrase "deconstruction" in his 1973 book *Speech and Phenomena*) made its greatest impact across universities beginning in the late 1970s. See *id.* at 378.

69. See SHERWIN, *supra* note 23, at 5.

70. See generally BINDER & WEISBERG, *supra* note 68.

Cass Sunstein for instance, now engage these legal topics.⁷¹ Still, until *The Starr Report Disrobed*, law-and-literature scholarship often lacked traction. Many practicing lawyers, and practical scholars, view rhetorical analysis as “fluff.”⁷² To the lawyer in the trenches, judicial opinions are instrumental documents to effectuate a ruling; legislative debate fleshes out the details of a statute, not the contours of a culture.⁷³

One need not be a law-and-literature scholar to appreciate *The Starr Report Disrobed*, however. Most readers instantly would have recognized the *Starr Report*’s uncomfortable dual identity as instrumental legal material and entertaining cultural material. What made Starr’s indictment so unique? For one thing, it was one of the first significant legal documents so widely distributed in its full, unmediated form. It was available in multiple commercial editions, free on the Internet, and widely disseminated as a supplement to many newspapers. As a result, virtually every American enjoyed easy access to the *Starr Report*. In addition, it was a document with mass appeal, written in a storyteller’s voice, larded with racy details—the epitome of voyeuristic delight. Rather than downplaying the erotic information that provided substantive grounds for Starr’s accusations, the authors emphasized this sexual material at every opportunity. In an Internet and cable-television-driven world, where law is now entertainment, *The Starr Report Disrobed* makes perfect sense. The *Starr Report* and *The Starr Report Disrobed* are products of a new era in which the public receives law directly, in unedited form. This Part explores the role of communications technology in changing the way law is delivered to the public.

A. *New Technology Delivers Legal Materials Directly to the Public*

For most of the nation’s history, the “law” (in the form of trials, judicial opinions, statutes, court filings, and the like) was available only at great inconvenience to the average citizen.⁷⁴ Trials were typically open to

71. Richard Posner published an entire book dedicated to the potential and the limitations of the law-and-literature field. See generally RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). Of course, Posner can hardly be called a wholehearted supporter of the project. See, e.g., *id.* at 356-57 (expressing concern that it not “be oversold as a field of interdisciplinary study”). Cass Sunstein, who focuses extensively on behavioral law and economics, emphasizes the important role of rhetoric in shaping public understanding of issues. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 703-11 (1999) (analyzing how the rhetorical framing of issues, in combination with human cognitive processes, results in irrational policies).

72. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (criticizing law professors for producing too much impractical law-and-literature, and similar interdisciplinary, scholarship).

73. Several former colleagues of mine from my days as a public defender have commented that they see nondoctrinal scholarship as nearly useless. For these practitioners, only doctrinal work is likely to offer insights—and, in practical terms, ammunition—that assist them in court.

74. The public has enjoyed greater access to more explicitly political documents. For instance, commercial publishers republished the testimony of Oliver North in the Iran-Contra case, the Nixon

the public, but before television, they could only be enjoyed first-hand in the courtroom itself. Thus, most citizens had little experience watching actual trials unless they were themselves litigants or jurors.⁷⁵ Judicial opinions were often published in reporters, but these volumes were typically housed in specialized law libraries.⁷⁶ Statutes were equally obscure.⁷⁷ Court filings were buried in the courthouse where a given case was actually litigated.⁷⁸

As a result of this limited access to legal materials, nonlawyers typically learned about the law through accounts by others.⁷⁹ Much of this information flowed through the news media.⁸⁰ Journalists provided stories

Watergate tapes, and U.S. Senate hearings in the aftermath of the sinking of the Titanic. See Patrick M. Reilly, *Publishing: Some Publishers Rush to Cash in on Starr Report*, WALL ST. J., Sept. 10, 1998, at B1. Television networks covered such high-profile legislative events as the McCarthy, Iran-Contra, and Watergate hearings. See Jeff Greenfield, *Greenfield at Large*, (CNN television broadcast, Jan. 11, 2002). (noting that most memorable televised Congressional investigations include scandals such as McCarthy hearings, Watergate hearings, and Iran-Contra hearings).

75. See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 57 (1984) (arguing that most people, other than jurors, have not seen a trial live).

76. See F. Dennis Hale, *Court Decisions as Information Sources for Journalists: How Journalists Can Better Cover Appellate Decisions*, 23 U. ARK. LITTLE ROCK L. REV. 111, 113 (2000) (discussing inaccessibility of reporters); see also Barbara Bonge, *Public Access to Legal Information*, 78 MICH. BAR J. 1130 (Oct. 1999) (discussing difficulties encountered by nonlawyers doing research). One commentator noted that "more nonlawyers have probably read legal materials on the Cornell Law School Legal Information Institute Gopher and World-Wide Web servers during the last two years than have entered the Cornell Law School reading room in all the years since its founding." KATSH, *supra* note 18, at 86. This is surely a gross understatement.

77. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2050 (1996) (noting that "statute books are rarely read and are barely intelligible when they are read"). See also Bonge, *supra* note 76.

78. See Rebecca Fairley Raney, *Jury is Out on Online Court Records*, ONLINE JOURNALISM REV., at <http://www.ojr.usc.edu/content/story.cfm?request=689> (discussing attempts to improve eumbersome process of researching court filings) (posted Jan. 25, 2002).

79. See, e.g., Ronald L. Rotunda, *Epilogue*, in PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE 265 (Robert M. Jarvis & Paul R. Joseph eds., 1998) (describing essential role of television lawyers in shaping public perception of attorneys); FRIEDMAN, *supra* note 75, at 57.

80. See, e.g., Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1538 (1996) (courts speak to public through press because opinions are hard to obtain and understand); Sunstein, *supra* note 77, at 2050 (noting that at best, public learns of court decisions through newspapers and magazines). Courts and scholars routinely assume that the public somehow learns about law. Despite the controversial nature of this assumption, see, e.g., John M. Darley, et al., *The Ex-Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 181-83 (2001) (demonstrating that citizens are unaware or mistaken about content of substantive criminal law); Steven Garber & Anthony Bower, *Newspaper Coverage of Automotive Product Liability Verdicts*, 33 LAW & SOC'Y REV. 93, 119-20 (1999) (showing misleading newspaper coverage of jury verdicts), criminal law typically rejects ignorance of the law as a defense to a crime, see WAYNE LAFAVE, CRIMINAL LAW 441 (3d ed. 2000) (noting that ignorance of law is rarely a defense, even though assumption that all know the law is farfetched). Similarly, social-norms scholars discuss the law's expressive function, offering only a passing nod to the complicating question of whether, and how, citizens learn the law's message. See, e.g., Sunstein, *supra* note 77 (dedicating a minor paragraph at the end of his article to this issue). There has been a remarkable paucity of scholarship on the links between media coverage and the law. See KATSH, *supra* note 18, at 9 (noting that these links "have received negligible attention"). Katsh points out that books about communication and society rarely focus on

about important trials and decisions. Major newspapers, like the *New York Times*, occasionally published excerpts of important Supreme Court opinions⁸¹ but these excerpts were the exception. Most newspapers published few if any excerpted opinions.⁸² One staple of trial coverage was the courtroom artist's sketch.⁸³ These images—which I learned, as a trial lawyer, wildly distort courtroom geography⁸⁴—were often the closest an average citizen came to a real courtroom. Except on the rare occasion that a lawsuit had at least superficial importance for parties other than the litigants, complaints and briefs were rarely the subject of coverage.⁸⁵

People also learned about the law through the entertainment media.⁸⁶ Courtroom novels, movies, and television shows consistently garnered popular attention.⁸⁷ From the earthshaking work of Harper Lee⁸⁸ to the mass-produced novels of John Grisham,⁸⁹ from the hard-edged Perry Mason⁹⁰ to the whimsical *Ally McBeal*,⁹¹ Americans enjoyed fictional versions of the legal process.⁹² But Americans did not see first hand the actual making and effect of law. Despite the officially public nature of the

law, while books about law focus on speech regulation and free expression, but little else. "Scholars seem to view the powerful realms of law and media as distinct and independent, each having an impact on behavior and attitudes, but having little influence on each other." *Id.*

81. For instance, on the occasion of *Bakke v. California*, a case the *New York Times* termed the most significant civil-rights decision since *Brown v. Board*, the *Times* provided mere excerpts of the Court's decision. See N.Y. TIMES, *Excerpts from Opinions by Supreme Court Justices in the Allan P. Bakke Case*, June 29, 1978, at A20-21.

82. A 1968 study of newspaper coverage of the Supreme Court, focused on one particularly busy day, noted that both the *New York Times* and *Washington Post* included extensive excerpts of Court opinions—"a practice that is obviously a source of pride to both papers." Other papers from around the country provided distinctly less coverage of these opinions, often based on wire-service reports. See DAVID L. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* 113-17 (1968).

83. Although Canon 35 of the American Bar Association's Code of Ethics prohibited courtroom sketching, virtually all states ignored this dictate and allowed this procedure. Similarly, no court prohibited the publication of these depictions. See *United States v. Columbia Broad. Sys.*, 497 F.2d 102, 106 & n.6 (5th Cir. 1974).

84. Because the artist must compress all the relevant players into a small image, sketches typically represent all important persons in a courtroom—judge, lawyers, parties, and even the jury—as if they are all next to each other. A person looking at these images might never know that the entire affair is taking place in a cavernous old courtroom, and that the various parties are kept far apart.

85. Cf. MARK FISHMAN, *MANUFACTURING THE NEWS*, 70-73 (1980) (noting that journalists, when reporting about criminal prosecutions, focus on major dispositional events and do not routinely report background legal and administrative processes).

86. See, e.g., Rotunda, *supra* note 79.

87. See David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 471-78 (1999) (noting that while few citizens have ever seen a real trial, virtually all have seen one depicted in the "courthouses of popular culture").

88. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

89. See, e.g., JOHN GRISHAM, *THE RUNAWAY JURY* (1996); JOHN GRISHAM, *THE RAINMAKER* (1995); JOHN GRISHAM, *A TIME TO KILL* (1989).

90. See Papke, *supra* note 87, at 486.

91. See *Ally McBeal* (Fox Television Network).

92. For the public at large, criminal law may be the most familiar area of law. See FRIEDMAN, *supra* note 75, at 154.

law, primary legal materials were left to lawyers, and the average citizen experienced the law in highly mediated forms.

New technology has helped to change the relationship between Americans and their law. The technology made its first mark within the legal profession itself. For many years, lawyers researched caselaw manually, pulling indices and reporter volumes to discover relevant cases. With the development of LEXIS and Westlaw, lawyers could for the first time find cases quickly through the use of word searches.⁹³ These database services were helpful to practicing lawyers as well as to students and legal scholars. They also provided a way for lawyers and law students to share and enjoy quirky judicial opinions.⁹⁴ But given the expense of accessing these databases, and the need for a computer and specialized software, database services did not provide much content to the public at large.⁹⁵

In the last decade, the accessibility of legal information has been transformed. The typical American can now enjoy legal materials directly as never before. The expansion has occurred in two principal areas: television and the Internet. Television's new role as direct provider of legal content is due, in part, to deregulation. In recent years, both Congress and many state courts have opened their doors to television cameras.⁹⁶ As a consequence, a casual television viewer can now watch complete trials, from cross-examination to jury charge, as well as legislative activity, from the hearing room to the House floor.

Expanded television coverage of law is also a direct result of innovations in broadcasting. In the past, a typical market maintained five or six local broadcast stations.⁹⁷ Now, however, most households subscribe to

93. For a discussion of a history of the legal database services, see Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 654-57 (1996).

94. This early entertainment function would have been most appealing to law students, judicial law clerks, and law professors, all of whom enjoyed unlimited database use at a fixed rate. For lawyers paying by the hour, or by the search, the search for funny opinions would have been quite costly. I have often sensed that many quirky opinions, ranging from those with explicit humor to others with coy references to popular culture, are written by judicial law clerks (with, or perhaps without, the assent of the judges) to be read by the clerks' friends.

95. See Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 622 (2000) (discussing how both cost and explicit access policies make Westlaw and LEXIS inaccessible to the general public).

96. Television cameras were allowed in the House for particular committee hearings as early as 1947 but were banned in 1955. They reappeared in the early 1970s. The House began regular public telecast of its sessions in 1979, and the Senate followed suit in 1986. See STEPHEN FRANTZICH & JOHN SULLIVAN, *THE C-SPAN REVOLUTION* 30-32, 43 (1996). For a discussion of the evolution of television coverage in state courts, see RONALD L. GOLDFARB, *TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS* 64-84 (1998).

97. In 1973, for instance, moderate to large television markets such as Cleveland, Dayton, Nashville, and Salt Lake City all had six or fewer television stations. See *Mr. Whitehead's VHS Gifts to 43 TV Markets*, BROADCASTING, Oct. 29, 1973, at 17 (showing current, projected, and reserved station numbers within forty-three television markets).

cable television.⁹⁸ Unlike broadcast-television and cable companies of the past, today's digital-cable provider (and its Doppelgänger, satellite TV) offers well over 100 television stations.⁹⁹ A typical cable subscriber receives as the five major news-oriented stations: CNN, CNN Headline News, MSNBC, CNBC, and Fox News. In addition, most general-interest networks—ABC, CBS, NBC, and PBS—offer news programming several times each day.

With so many outlets, cable networks are hungry for content. Legal materials fill that need. For instance, CSPAN and CSPAN-2 offer the dull (though important) hum of legislative debates.¹⁰⁰ CourtTV broadcasts scores of actual trials, some famous for reasons extrinsic to CourtTV, others famous by virtue of CourtTV's decision to cover them.¹⁰¹ Much of CourtTV's evening programming is dedicated to law-oriented fictional shows often being rerun years after their original air dates.¹⁰² General-interest networks also now feature legal programming. Syndicated shows such as *America's Most Wanted* and *Cops* provide a grim look at real crime and policing. *Judge Judy*, *People's Court*, and similar shows, allow real litigants to settle their genuine disputes in a TV courthouse.¹⁰³ Reality-based television shows take viewers behind the scenes of actual cases, transforming prosecutors, defenders, jurors—and, necessarily, defendants and victims—into entertainers.¹⁰⁴ And when breaking legal news occurs—as it did in *Bush v. Gore*,¹⁰⁵ in the O.J. Simpson trial,¹⁰⁶ and more recently

98. According to the cable industry, 69.4% of all American homes receive cable television. See Nat'l Cable and Telecomm. Ass'n, *Industry Statistics*, at http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (posted Feb. 2002).

99. In 2001, over 25 million American homes received digital television; by 2005, that number is expected to exceed 70 million. See *Entertain Me: Television Viewers Just Want to Have Fun*, THE ECONOMIST, Apr. 13, 2002, at 5.

100. For a discussion of the important role of C-SPAN coverage, see Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 324-25; FRANTZICH & SULLIVAN, *supra* note 96, at 255-327.

101. For a discussion of the development of CourtTV, see GOLDFARB, *supra* note 96, at 124-153 (1998).

102. For a discussion of the various examples of law-related television programming, see Laura Nicole Robinson, Comment, *Professional Athletes-Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1333-34 nn.162, 164 (1998).

103. Viewers are always gently reminded, via the small print, that parties agreed to let the network pay them for appearing. There is some basis to believe that some members of the public are not aware that these are anything other than officially sanctioned trials. See Lawrence M. Friedman, *Lexitainment: Legal Process as Theater*, 50 DEPAUL L. REV. 539, 551-52 (2000).

104. See Gail Pennington, *New Reality Shows Take Audience Behind the Scenes in Criminal Cases*, ST. LOUIS POST-DISPATCH, June 18, 2002, at F1 (describing ABC's *State v.* and NBC's *Crime and Punishment* series).

105. 531 U.S. 98 (2000).

106. For a description of the O.J. Simpson case, see generally JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* (1996).

in the Andrea Yates child-murder trial¹⁰⁷—many stations, including the news networks, bumped other content and dedicated extensive time to these legal proceedings.

Television is not the only newly expanded source of informational content, however. The Internet, virtually nonexistent a decade ago, offers thousands of different sites for learning about the law.¹⁰⁸ For example, Westlaw operates a free legal-research site—Findlaw.com—which offers extensive, though by no means complete, access to federal legal materials.¹⁰⁹ Cornell Law School operates a similar site.¹¹⁰ And both the federal and state governments make a variety of legal materials available on the web.¹¹¹ The number of news, and news-related, Internet sites is impossible to calculate. The web houses web-only sites¹¹² as well as many sites linked to non-Internet content providers such as newspapers, magazines, television stations, and advocacy groups.¹¹³ Internet portals such as Yahoo! and America Online offer standard news summaries.¹¹⁴ Some sites survive simply by linking with other news sites.¹¹⁵ One particularly intriguing site is The Smoking Gun.¹¹⁶ This site presents otherwise obscure cultural artifacts, often legal material, as entertainment. Just for fun, The Smoking Gun offers links to the criminal complaints against actor Robert Iler¹¹⁷ (of *The Sopranos*) and comedienne Paula Poundstone;¹¹⁸ excerpts from the parole hearing of Mark Chapman, who murdered John Lennon;¹¹⁹ a humorous venue-transfer opinion issued by Sam Kent, a Galveston, Texas, federal judge who reassured the defendant that “this humble courthouse . . . has got lights, indoor plummin’, ‘lectric doors, and all sorts of new stuff almost

107. For a description of the Andrea Yates matter, see Timothy Roche, *The Yates Odyssey*, TIME, Jan. 28, 2002, at 45-50; Timothy Roche, *Andrea Yates: More to the Story*, Mar. 18, 2002, TIME.com, at <http://www.time.com/time/nation/article/0,8599,218445,00.html> (last visited July 3, 2002).

108. While the Internet provides remarkable service to those already with access, there remains a disparity in Internet access. Affluent citizens, as well as Whites and Asian Americans, have more extensive web access than those with lower incomes and Latinas/os and African Americans. The gap, however, is shrinking as groups historically excluded from the Internet obtain access at faster rates than do others. See Robert J. Samuelson, *Debunking the Digital Divide*, WASH. POST, March 20, 2002, at A33 (citing recent U.S. Census data).

109. Findlaw, at <http://www.findlaw.com> (last visited Apr. 24, 2002).

110. Cornell Legal Information Institute, at <http://www.law.cornell.edu> (last visited Apr. 24, 2002).

111. See Hale, *supra* note 76, at 113.

112. See, e.g., Slate, at <http://www.slate.com> (last visited Apr. 24, 2002); Salon, at <http://www.salon.com> (last visited Apr. 24, 2002).

113. Although most people may not think of advocacy groups as content providers, the vast amount of junk mail from these organizations suggests the contrary.

114. See THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL 209 (2002) (arguing that these gateways treat news simply as commodity).

115. See, e.g., The Drudge Report, at <http://www.drudgereport.com> (last visited Apr. 24, 2002).

116. The Smoking Gun, at <http://www.thesmokinggun.com> (last visited Apr. 24, 2002).

117. <http://www.thesmokinggun.com/archive/iler1.shtml> (last visited Apr. 24, 2002).

118. <http://www.thesmokinggun.com/archive/poundstone1.shtml> (last visited Apr. 24, 2002).

119. <http://www.thesmokinggun.com/archive/chapscrip1.shtml> (last visited Apr. 24, 2002).

like them big courthouses back east.”¹²⁰ While Thesmokinggun.com offers quirkier materials, even a major site—the CNN website—maintains a (currently small) library of unedited documents including the indictments in *United States v. Moussaoui* and *United States v. Osama Bin Laden*.¹²¹

Although Internet commerce is still a fledgling economy,¹²² its capacity to deliver information will undoubtedly continue to expand. At the same time, public demand for legal materials¹²³ suggests that the Internet will be an increasingly important conduit for such materials. This is true for two reasons. First, individuals and organizations that advocate particular viewpoints will find the Internet an easy way to reach large numbers of citizens.¹²⁴ During the Microsoft antitrust litigation, for example, both sides posted routine court filings on their respective websites;¹²⁵ providing actual copies of briefs apparently became a method of spin control. Microsoft is hardly alone. Several companies have now posted briefs in active legal matters on their websites.¹²⁶ In the future, we can expect parties attempting to control the public perception of litigation, or legislation, to distribute any legal documents that help their cause.

120. *Smith v. Colonial Penn Ins. Co.*, No. G-96-503, slip op. at 4 (S.D. Tex., Nov. 6, 1996), available at <http://www.thesmokinggun.com/archive/skent1.shtml> (last visited Apr. 24, 2002). Judge Buchmeyer, a federal district judge in Dallas, Texas, extends his humorous approach beyond his legal opinions to his courtroom rules and procedures.

Judge Buchmeyer feels strongly that criticism of judges need not be trite and/or hackneyed (such as “the judge is stupid,” or “that ruling was asinine”). He expects criticisms that are creative and imaginative, like these: If a little knowledge is a dangerous thing, then Judge is living life on the edge[.] I don’t think they could really put Judge in a mental institution. But if he were already in, I don’t think they’d let him out[.] During trial, Judge did the work of three men: *Moe . . . Larry . . . and Curly*.

Judge Jerry Buchmeyer, *Judge Specific Procedures*, available at <http://www.txnd.uscourts.gov/judgreg/Buchreg.htm> (last visited Apr. 24, 2002) (emphasis original).

121. CNN.com, at <http://www.cnn.com/LAW/library/> (last visited Apr. 24, 2002).

122. See Leslie Walker, *Growing Invisibility Is Internet’s Utility*, [washingtonpost.com](http://www.washingtonpost.com) (May 16, 2001) (discussing the jerky, but progressive, development of the Internet), at <http://www.washtech.com/news/media/9785-1.html>.

123. The co-director of the Cornell Legal Information Institute unexpectedly discovered that the site’s audience included many nonlawyers. KATSH, *supra* note 18, at 86.

124. One of the most remarkable aspects of the Internet is that, unlike most entertainment media, it effectively reaches people during office hours. Few people can enjoy television at work, but this year fifty-eight million American workers will surf the web for personal reasons. See Katarzyna Dawidowska, *Surfing 9-to-5*, AMERICAN DEMOGRAPHICS, May 2002, at 20. These people are likely to be particularly empowered within communities; seventy percent have a college degree and 45% earn more than \$75,000 per year. *Id.*

125. See U.S. DEP’T OF JUSTICE, ANTITRUST DIV., *UNITED STATES V. MICROSOFT*, available at http://www.usdoj.gov/at/cases/ms_index.htm; MICROSOFT INC., PRESS PASS: LEGAL NEWS, at <http://www.microsoft.com/presspass/legahnews.asp> (last visited Apr. 24, 2002).

126. See, e.g., Rosetta Books: Legal, at <http://www.rosettabooks.com/pages/legal.html> (last visited Apr. 22, 2002); Napster Legal Documents, <http://www.napster.com/pressroom/legal.html> (last visited Apr. 22, 2002); Wolfram Legal Documents, <http://mathworld.wolfram.com/docs/legal.html> (last visited Apr. 22, 2002). Not all providers are individual corporations. The Electronic Frontier Foundation posts legal documents from a variety of cases the organization considers important. See Electronic Frontier Foundation, at <http://www.eff.org> (last visited Apr. 22, 2002).

Second, the Internet also provides a cheap means for the widespread distribution of legal materials;¹²⁷ the only cost of these paperless transactions is the price of maintaining a website. Sites can post materials—documents, videos, and the like—or simply enrich their sites with links to content posted elsewhere. The Internet is also an inexpensive outlet for news providers; by publishing in cyberspace, they save money on paper, ink, and labor. Delivery of full, unedited legal material, rather than a story about the underlying document, is even more inexpensive because providing a complete text costs less than paying an employee to excerpt or summarize it.

Competition will also play a role in ensuring the broad distribution of these materials. As websites battle for visitors, particularly if they charge for access, they will likely offer more links to legal materials. Sites such as CNN.com promptly posted links to the *Starr Report*, the Microsoft anti-trust decision, and the Supreme Court's decision in *Bush v. Gore*. As people begin to read unedited legal materials more routinely, demand for these links will likely increase.

Thirty years ago, we would have experienced the 2000 Florida-election debacle differently. We could not have watched lawyers carefully and strategically litigate absentee-ballot disputes, judges hand down critical legal rulings, or commissioners count ballots; we would not have received our own, personal copies of the Supreme Court's decision hours after its release. We would have relied entirely on journalists' repackaging of these events and materials. In this new era, however, the public receives direct access to the legal process.

B. *Lawyers and Judges Now Produce Entertainment*

Modern media now market and distribute legal materials in a manner unimaginable only a few decades ago. As a consequence, wise judges and lawyers already know that their written product may not simply gather dust in an obscure library; it may now zip across the globe in a matter of minutes, available to anyone with Internet access. For the lawyer or judge who writes in an inviting and entertaining style, a ready audience of readers now awaits. Not surprisingly, then, lawyers and judges are increasingly tempted to prepare more accessible, and entertaining, written materials. The *Starr Report*, a particularly salient example of legal writing designed for a mass audience, includes a pulsing narrative, a raft of pop-culture references, and remarkably graphic sex. The *Starr Report* might not have

127. See Michael J. Gerhardt, *Privacy, Cyberspace and Democracy: A Case Study*, 32 CONN. L. REV. 907, 909 (2000) (noting that Internet is attractive to 'norm entrepreneurs' because of its low cost and easy access).

lived up to the more artistic aspirations of Anne Rampling,¹²⁸ but it wasted no time delivering hot details. Within the first two hundred fifty words of the narrative, the authors zoom in on the semen-stained navy-blue dress.¹²⁹ Only a few pages later we hear that the President fondled and kissed Ms. Lewinsky's bare breasts, "bringing her to orgasm on two occasions."¹³⁰ Much as the *Starr Report's* authors may insist that a detailed accounting of the affair was essential to the *Starr Report's* objectives,¹³¹ this narrative ultimately transforms a detailed record into an accessible sex story.

Historically, authors of legal documents targeted their materials to a narrow legal audience. Typically, these materials have been rather inaccessible, shaped for a narrow readership.¹³² Judicial opinions have not usually been designed to entertain.¹³³ Judges certainly attempted to craft convincing, understandable, pellucid prose. Justice Holmes, widely seen as a powerful judicial writer, authored several opinions that have garnered lasting reputations for their "distinctively arresting style."¹³⁴ With nuggets like "great cases like hard cases make bad law"¹³⁵ and "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"¹³⁶ Holmes' turns of phrase live on in American jurisprudence. Holmes' prose was more than quick-witted, however; he was also a compelling storyteller.¹³⁷ Justice Cardozo also gained a reputation for his prose.¹³⁸ Still, when Cardozo's opinions spoke, they spoke to lawyers.¹³⁹

Justice Blackmun, more recently, produced passionate pleas seemingly designed to address non-lawyers. His call to protect a woman's right to choose abortion—"I fear for the future. I fear for the liberty and equality

128. See, e.g., ANNE RAMPLING, *EXIT TO EDEN* (1985); see also ANNE RAMPLING, *BELINDA* (1986).

129. See *Starr Report*, *supra* note 1, at 11.

130. *Id.* at 18.

131. See *Starr Report*, *supra* note 1, at 9 ("It is the view of this Office that the details are crucial to an informed evaluation of the testimony, the credibility of witnesses, and the reliability of other evidence.").

132. See Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 178 (1985) (arguing that the Supreme Court's opinion style is designed to address lawyers, not the general public).

133. On occasion, judges have weaved humor into their opinions. See Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 179-86 (1989).

134. G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 666 (1982).

135. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

136. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

137. In *Frank v. Magnum*, 237 U.S. 309 (1915), for instance, he argued that the defendant had not received a fair trial. Writing as a story, Holmes played the storyteller, painting a picture of the explosive courtroom in which the jury was forced to operate. "In a court packed with spectators and surrounded by a crowd outside . . . the Solicitor General . . . was greeted with applause, stamping of feet, and clapping of hands . . . When the verdict was rendered . . . there was such a roar of applause that the polling could not go on until order was restored." *Id.* at 345-46 (Holmes, J., dissenting).

138. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 126-28 (1990) (suggesting that Cardozo's reputation for opinion writing was based partly on drama, clarity, brevity, and verve).

139. See *id.*

of the millions of women"¹⁴⁰ and "for today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows"¹⁴¹—were accessible and melodramatic.¹⁴² Still, Blackmun's language, talking of liberty and equality, remained a bit highfalutin for mass consumption. Justice Scalia has now taken on the mantle of the Court's most cutting author.¹⁴³ He has even ventured, toe-in-water, into intertextualism, albeit with a somewhat outdated referent: *West Side Story*. In *Chicago v. Morales*, dissenting from a majority striking down an anti-gang ordinance, he retold the Morales story using characters from the 1950's musical:

Tony, a member of the Jets criminal street gang, is standing alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are deprived because they are deprived, Tony and the other gang members break off further conversation with the statement—not entirely coherent, but evidently intended to be rude—"Gee, Officer Krupke, krup you."¹⁴⁴

Although he brings in a familiar outside text, it is clearly done instrumentally. Scalia's dissent may be more entertaining than the average Supreme Court opinion, but the public is unlikely to seek out this opinion as a bedtime reading. As Robert Nagel suggests, Supreme Court writing—even at its most accessible—is directed at a legal audience.¹⁴⁵

If Supreme Court Justices talk to other lawyers, a few judges have taken entertaining intertextualism to much greater lengths. These jurists drop plain hints that they are regular people who enjoy popular culture as much as the next person. In the Fifth Circuit's opinion in *United States v. Abner*,¹⁴⁶ for instance, Judge Garza's decision on an issue of counsel ineffectiveness might have been entitled "Stop Making Sense." The judge (or

140. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

141. *Id.* at 560.

142. Melodrama is often seen as a particularly effective rhetorical weapon in stoking public fears. See Elayne Rapping, *Legal Meaning in the Age of Images: Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 675-681 (2000). The words were sufficiently compelling that a few weeks after the Court rendered its decision in *Webster*, I saw the phrase "a chill wind blows" posted on the sign of a (presumably pro-choice) church.

143. See, e.g., Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 863 (1997) ("Seemingly alone among the justices, Scalia is the master of the eminently quotable turn-of-phrase, the arresting quip, the provocatively expressed legal argument.").

144. *City of Chicago v. Morales*, 527 U.S. 41, 81-82 (Scalia, J., dissenting).

145. See Nagel, *supra* note 132.

146. 825 F.2d 835 (5th Cir. 1987).

perhaps his clerk¹⁴⁷) sprinkled twenty-five references to the Talking Heads throughout his decision. Section headings included "True Stories,"¹⁴⁸ "Fear of Music,"¹⁴⁹ "Speaking in Tongues,"¹⁵⁰ and "Remain in Light."¹⁵¹ While including references to a pop band may not seem appropriate for a judicial opinion, at least the Talking Heads appealed to a slightly intellectual side of the music community.¹⁵²

In *Noble v. Bradford Marine, Inc.*,¹⁵³ Judge Paine of the Southern District of Florida took it lowbrow. Considering whether to remove a civil case to state court, the Judge, in a most excellent opinion, assembled a living testament to the movie (and *Saturday Night Live* television feature) *Wayne's World*. One would be hard pressed to identify how sections titled "A Schwing and a Miss" or "Not" furthered the court's instrumental agenda. While plain enough, the Court's holding—"in short, Prime Time's most bogus attempt at removal is 'not worthy' and the Defendants must 'party on' in state court"—offered intertextual references that appeared to serve no legal purpose whatsoever.¹⁵⁴ Still, for the clerks who presumably penned the opinion, their friends, and perhaps the Judge's children, the opinion was good fun. And by virtue of its pop twist, it remains famous, at least within law-as-entertainment circles.

For all the humorous qualities of *Abner* and *Bradford Marine*, Judge Buchmeyer of the Northern District of Texas shows how a judicial opinion can explode out of the genre of instrumental legal document and into the land of entertainment. In *Rimes v. Curb Records, Inc.*,¹⁵⁵ the defendant Curb Records moved to dismiss (or in the alternative, transfer venue) plaintiff and musician LeAnn Rimes's lawsuit.¹⁵⁶ Per the court's order, the court's statement of facts, written in verse, is to be sung to the tune of Rimes's *How Do I Live*.¹⁵⁷ The legal analysis, also in verse, is to be sung to the tune of Rimes's *I Need You*.¹⁵⁸ In a sweet coda, the conclusion returns

147. One lawyer who clerked on the Fifth Circuit shortly after the court issued this opinion told me that he understood that Judge Garza was not aware of the providence of these section headings at the time he released this opinion. For obvious reasons, this lawyer is unwilling to be named here.

148. *Abner*, 825 F.2d at 836.

149. *Id.* at 838.

150. *Id.* at 841.

151. *Id.* at 846.

152. See generally Ken Emerson, *David Byrne: Thinking Man's Rock Star*, N.Y. TIMES MAG., May 5, 1985, at 54 (discussing sophistication of Talking Heads and band-leader David Byrne).

153. 789 F. Supp. 395 (S.D. Fla. 1992).

154. *Id.* at 397.

155. 129 F. Supp. 2d 984 (N.D. Tex. 2001). Note that this opinion, unlike the vast majority of opinions by district-court judges on procedural matters, was published in a federal reporter.

156. *Id.* at 985.

157. *Id.* at 985. See also LeAnn Rimes, *How Do I Live* (Curb Records 1997).

158. *Rimes*, 129 F. Supp. 2d at 986. See also LeAnn Rimes, *I Need You* (Curb Records 2000).

to the tune of *How Do I Live*.¹⁵⁹ This is law gone pop; it may also be law gone mad.

C. Judges Take Center Stage

As lawyers and judges experience the development of a direct link between the legal establishment and citizens at large, they may also deliberately pursue the spotlight available through modern mass media. For example, Judge Thomas Penfield Jackson, the federal judge who originally heard the Microsoft antitrust litigation,¹⁶⁰ made himself available to reporters during the course of the litigation. He offered interviews to the *New York Times* and to writer Ken Auletta.¹⁶¹ Judge Jackson's interviews with Auletta formed an important component of Auletta's recent book, *World War 3.0*.¹⁶² As Auletta explained in his acknowledgements, "such interaction between reporter and judge is extremely rare."¹⁶³ Auletta managed to obtain ten full hours of taped interviews with Judge Jackson.¹⁶⁴ This sort of interaction is not only rare, it is dangerous: as a result of granting extensive interviews, the U.S. Court of Appeals stripped Judge Jackson of jurisdiction over the Microsoft matter on remand.¹⁶⁵

Jackson agreed to speak on the record, presumably, to explain his ruling to the public at large. Since the public was watching the case closely,¹⁶⁶ Jackson surely expected that his comments would be noticed. This is not to suggest that Jackson was acting out of hubris. Indeed, his comments to Auletta suggest an apparently socially conscious reason for his highly unusual behavior: Auletta reports that "[Jackson] knew this was a historically important trial, and he felt an obligation to comment for an account that would appear on bookshelves."¹⁶⁷ While Jackson's interview is not an example of direct marketing of the law, per se, it is part and parcel of this new reality.

159. *Rimes*, 129 F. Supp. 2d at 987.

160. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 34 (2000), *rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

161. *See United States v. Microsoft Corp.*, 253 F.3d 34, 108 (D.C. Cir. 2001).

162. *See generally* KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* (2001) (including periodic discussions of trial characters and events from Judge Jackson's perspective).

163. *Id.* at 405.

164. *Id.*

165. *Microsoft*, 253 F.3d at 107-17. Another judge involved in the matter who served as a mediator, Judge Richard Posner of the Seventh Circuit, was somewhat more discrete and uncomfortable in his contacts with Auletta. Though he declined to be interviewed for the book—and Auletta desperately wanted his input for fear his was being "spinned" by both sides—Posner did agree to point out factual inaccuracies in Auletta's early manuscript. His discomfort at talking with a writer was clear. Posner's note to Auletta stated, "[P]lease make clear that I am not a source for your book and was not interviewed by you." AULETTA, *supra* note 162, at 406.

166. Indeed, the parties assisted in this new direct-marketing-by-Internet economy by posting actual court filing on their websites. *See supra* notes 125-26 and accompanying text.

167. AULETTA, *supra* note 162 at 405.

Throughout this country's history, hundreds or thousands of judges have presided over "historically important" cases and have not found such interviews necessary or appropriate.¹⁶⁸ Jackson's decision to participate in the public shaping of this particular trial comes at a time when it seems only logical that a judge targets, engages, and perhaps even entertains a mass audience. In the main, members of the Supreme Court have not succumbed to the lure of the limelight. That may be changing, however. Recently, Sandra Day O'Connor authored an autobiography, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest*.¹⁶⁹ Rather than the more typical volume authored by a sitting Justice—a rumination on legal history for instance¹⁷⁰—O'Connor's book is a personal profile. Not only did she produce a book, O'Connor also conducted an interview with *Today Show* host Katie Couric on NBC's *Dateline*, promoting the book and addressing, obliquely, and somewhat uncomfortably, the criticism received by the Court after its decision in *Bush v. Gore*.¹⁷¹ For years, the Supreme Court successfully deflected press attention from the individual Justices.¹⁷² Times have changed, however. As O'Connor led Couric on a tour of her dramatic Court offices, a star was born.

In the next section, I consider how this new direct-marketing of law and lawyers will unfold in the future. Legal materials are changing, and lawyers are behaving differently than before. With law delivered directly to the public, lawyers and judges can expect greater scrutiny of their work. This attention will mean new opportunities and new pressures on lawyers, and it may implicate the role of law within American culture. In any event, lawyers may discover the growing importance of legal critics in this new media environment.

168. Judge Posner declined to talk with Ken Auletta for *World War 3.0*. *Id.* at 405. In one notable exception to this usual judicial reserve, Justice Brennan assisted reporter Bob Woodward in his preparation of *The Brethren*. *Id.* Judges do commonly speak to reporters off the record, however. See Greenhouse, *supra* note 80, at 1544.

169. SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002) (consisting of the life recollections of O'Connor and her brother).

170. See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

171. See *Her Honor: Supreme Court Justice Sandra Day O'Connor Discusses Being the First Female Supreme Court Justice* (NBC News *Dateline* television broadcast, Jan. 25, 2002) [hereinafter *Dateline Interview*]. Showing the power of intertextuality, Couric referenced the recently revived Broadway musical, suggesting that O'Connor "was like 'Annie Get Your Gun,' 'Anything he can do, I can do better.'" *Id.*

172. See RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* 134-35 (1994). In a rare exception to this effort, Hugo Black gave an interview to CBS's Eric Severeid in 1968. See *id.* at 40. Yet even the identity of the interviewers is instructive. While Severeid was a hard-news reporter for CBS, Couric works the more entertainment-oriented *Today* show at NBC.

III ASSESSING THE FUTURE

As the general public begins to consume unmediated legal materials, and to look toward the law as a source of entertainment, we can assume that this cultural trend will exert fresh pressures on lawyers and judges. Aware of this growing audience, members of the legal profession will have to make decisions about the ways they practice law and write opinions. The possibility of a wide readership (or viewership) will present alluring opportunities: the chance to promote a client's agenda, the opportunity to shape public perceptions of lawyers and the law, the possibility of tainting a jury pool, and even the attractive potential of personal gain. In order to take advantage of these opportunities, lawyers may be pushed to produce a more accessible, entertaining work product.

For lawyers seeking to produce more accessible and compelling work, literary analyses like *The Starr Report Disrobed* may prove particularly helpful. By exposing the way a narrative functions, literary analysis provides guidance to other writers. For instance, a judge seeking to tell a good story, or a lawyer writing a compelling statement of facts, can benefit from learning about the way the Starr team utilized a shifting narrator. A lawyer writing her closing will think about incorporating references to well-known cultural markers into the argument. In this way, law-and-literature, and law-and-rhetoric, scholarship offers surprisingly practical insight to lawyers. No longer simply academic ruminations, studies like *The Starr Report Disrobed* can actually expose of the methods of the effective pop lawyer.

One benefit of this increased accessibility of law is that lawyers and clients can seek more popular support for their legal positions. Microsoft, Napster, and other corporations, for instance, used their Internet links to generate public support as they fought high-profile legal battles. These companies simply could have issued press releases and position papers. Instead, they publicized actual court filings. This suggests, at least, that they believed that these "official" documents might be particularly persuasive. In the past, they were designed only to sway a judge. In this new media world, however, clients may insist that their attorneys craft briefs designed for wide public consumption. The bureaucratic, self-referential language of the law may no longer suffice; briefs will have to be entertaining as well.¹⁷³

173. Trials, perhaps the most entertaining moment in the production of law, may even need to be tweaked to assure maximum viewer pleasure. For example, Dick Wolf, producer of NBC's reality trial show, *Crime & Punishment*, adds ominous background music to its episodes, and consciously adopts a prosecutorial perspective. See *Hollywood Winning Courtroom Reality Battle: 'Crime & Punishment' Versus 'State v.'*, Cnn.com, July 5, 2002, at <http://www.cnn.com/2002/SHOWBIZ/TV/07/05/tv.courtroom.drama.ap/index.html> (last visited July 5, 2002). Wolf explained that "[t]his is much more viewer-friendly in terms of what viewers are used to seeing at 9 or 10 p.m. . . . It takes you along on a

These new possibilities come with the risk of closer public scrutiny of legal texts and legal processes. When legal materials reach a wide readership, more people will examine these works closely. Recently, in a case alleging sexual abuse by a priest, a plaintiff's attorney held a press conference to highlight the defendant's answer to the complaint. The defendant, in what was probably boilerplate language, asserted plaintiff's negligence as a defense. In a world where court filings are read only by lawyers, this assertion would have been viewed as a pro forma preservation of an (unlikely) defense. To the audience who learned about this document on *CNN Newsnight*, however, this claim was a further indictment of the Catholic Church.¹⁷⁴ Just as Malti-Douglas noted a number of quirks in the *Starr Report*—from apparently botched section headings¹⁷⁵ to the exclusion of Yasser Arafat (and inclusion of Yitzhak Rabin), from the Table of Names¹⁷⁶ to the authors' use of 'vagina,' but never 'penis'¹⁷⁷—future legal critics may closely study mass-marketed briefs. Lawyers, and all writers, make errors; in the future, however, critics of these publicized works will question whether apparent mistakes were actually artifice. They may, like Malti-Douglas, question and criticize the message implicit in the artifice. Lawyers are notorious for preparing materials on tight deadline, and even the crack Starr team made evident mistakes. But if legal materials come to occupy the same cultural space as movies, novels, and other highly polished products, lawyers may be forced to step up the scrutiny of their own work, under threat of critical and public backlash. For instance, the attorneys portrayed in NBC's reality show, *Crime & Punishment*, have been criticized by a television reviewer as focusing too little on "justice" and "'talk[ing] only of winning.'" ¹⁷⁸ In future reality trial shows, savvy lawyers might be advised to better shape their language or case theory to satisfy viewers. Of course, lawyers may face a conundrum if the approach that garners critical approval does not best serve clients.

More is at stake than public perceptions of individual lawyers and their clients, however. As law becomes more physically and intellectually accessible, law's instrumental functions may come under fire. For instance, social norms scholars argue that law has an expressive function: to signal to the public a particular set of expected norms.¹⁷⁹ When judges and law-makers state rules, they seek not only to coercively control individual

story with a beginning, a middle and an end." *Id.* In addition, *Crime & Punishment* is cross-marketed with Wolf's fictional show, *Law & Order*, presumably reflecting the power of intertextuality within the law-as-entertainment marketplace.

174. *CNN Newsnight Aaron Brown* (CNN television broadcast, Apr. 29, 2002).

175. See *supra* note 51 and accompanying text.

176. See *supra* note 53 and accompanying text.

177. *Id.*

178. See Ron Wertheimer, *Television Review: Making a Reality Show from Real-Life Trials*, N.Y. TIMES, June 15, 2002, at A26.

179. See, e.g., Sunstein, *supra* note 80, at 2031.

conduct, but also to make statements to society at large about what society sees as good and bad choices. To the extent that entertaining legal writing causes more people to hear these messages, the shift I have been describing may amplify law's expressive voice. On the other hand, it may also undermine the efficacy of this function. When a court's language is evidently unserious, it is unlikely that readers will take the opinion seriously. An opinion written in rhyme does not look like authoritative judicial action and we should not be surprised if people do not see it as such. More specifically, however, by eliding legal and nonlegal audiences,¹⁸⁰ entertaining legal writing may undermine what Meir Dan-Cohen calls "acoustic separation" between decision rules (designed to be conveyed to lawyers and judges) and conduct rules (designed to guide citizen behavior).¹⁸¹ For example, when a court exonerates a defendant based on a defense of duress, it applies a rule of fairness to a particular fact pattern, concluding that the defendant faced such pressure that criminal sanction would be unjust. But the court's decision, if heard by the public at large, might be heard as "bad conduct done under pressure is excusable"—not a message the court wishes to express.¹⁸² In a world where lawyers alone read cases, judges can resolve the matter in favor of one defendant without expressing an opinion to the public at large. In a world where everyone reads cases because they are designed to be widely disseminated and read, the judge's decision in one case necessarily speaks to the general public.

Even where courts seek not to express social norms, but merely to enforce the law, their power is ultimately fragile and intangible.¹⁸³ Courts do not, after all, employ police and armies. Rather, they rely on rhetoric to enforce their decisions.¹⁸⁴ If citizens and other government officials do not

180. Because courts have traditionally directed their arguments to lawyers, judicial rhetoric has typically been thick with doctrine, rules, and reason-based analysis. See Nagel, *supra* note 132, at 169; Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1408-09 (1997). An entertaining opinion bridges both audiences. For instance, the court in the LeAnn Rimes matter placed rhymes front and center, and controlling law in footnotes. See *Rimes v. Curb Records, Inc.*, 129 F. Supp. 2d 984, 985-88 (N.D. Tex. 2001).

181. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 635, 626-27 (1984).

182. See *id.* at 632-33.

183. See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (opinion of O'Connor, Kennedy, and Souter):

[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

Id.

184. Lacking direct control over the most powerful coercive functions, courts rely on rhetoric to enforce their decisions. See Michael D. Daneker, *Moral Reasoning and the Quest for Legitimacy*, 43 AM. U. L. REV. 49, 50 n.6 (1993).

take courts seriously, their decisions may become unenforceable.¹⁸⁵ The sexy nature of the *Starr Report* presumably accounts for much of its popularity, yet it was this very trait that many used to undermine its legitimacy.¹⁸⁶ When judges try to write fun, rather than instrumental, opinions, they may open themselves up to similar attacks on their legitimacy.

As Malti-Douglas demonstrates through her own reading of the *Starr Report*, when legal actors mass market their work, the public will treat legal documents as mere popular entertainment. Malti-Douglas handles the *Starr Report* as literature, focusing on how it functions as a compelling story, rather than how effectively it makes the case for Presidential impeachment. But she is an esoteric critic. More mainstream critics also stepped into the fray.¹⁸⁷ By virtue of the *Starr Report*'s easy accessibility (and its blatant sexiness), it became the subject of ridicule in newspaper columns¹⁸⁸ and cartoons.¹⁸⁹ The Internet also hosted irreverent spoofs such as *The Stark Report*,¹⁹⁰ and a "Mad Lib," you-fill-in-the-blanks version.¹⁹¹

185. As the Court's opinion in *Planned Parenthood v. Casey* suggests, judicial power depends on the public's sense that that a court is fit for the job. 505 U.S. at 833.

186. See, e.g., John Nichols, *UW's Scandal Expert: Report Is All Just Sex*, CAPITAL TIMES (WISCONSIN), Sept. 12, 1998, at 1A (dismissing *Starr Report* "as a sex-drenched political screed rather than a serious case for impeachment"). The White House promoted that message, arguing that the *Starr Report* was "so loaded with irrelevant and unnecessary graphic and salacious allegations that only one conclusion is possible: its principal purpose is to damage the president." See Brian McGrory & Ann Scales, *President's Lawyers Hit Starr Report: Rebuttal Cites a 'Smear Campaign'*, BOSTON GLOBE, Sept. 13, 1998, at A1.

187. Several critics reviewed the *Starr Report* as if it were fiction. See, e.g., Gopnik, *supra* note 25 ("What we had been promised—and what the authors received a forty-million-dollar advance to deliver—was a work in the spirit of DeLillo or Ellroy, or even Melville: an epic study in evil and its pursuit."); L.S. Klepp, *Under Cover: A Review*, ENTERTAINMENT WEEKLY, Sept. 25, 1998, at 17 ("Starr and his co-authors . . . have come up with a genre-bending narrative guaranteed to keep readers guessing. . . A-"); James Wood, *Madame Lewinsky*, NEW REPUBLIC, Oct. 5, 1998, at 18 ("The *Starr Report* is disappointingly derivative."). In a similar vein, *New York Times* film and television critic, Caryn James, published reviews of both President Clinton's televised grand-jury testimony and Starr's televised testimony before the House Judiciary Committee. See Caryn James, *A Self-Proclaimed Joe Friday Just Plays it Straight*, N.Y. TIMES, Nov. 20, 1998, at A27 (criticizing Starr's self-reference to Dragnet character Joe Friday because "Joe Friday is a camp figure of fun, and choosing him as a role model reveals how out-of-touch the Starr approach to public relations has been"); Caryn James, *Clinton's Role of Lifetime Break's Cinema's Rules*, N.Y. TIMES, Sept. 22, 1998, at A16 (comparing video to film *My Dinner with Andre* and concluding that it "offered revealing details and unrehearsed moments all too often left on the cutting-room floor").

188. See, e.g., *Starr Pupils: Q: Which of These Items Did Monica Not Give Bill . . .*, THE GUARDIAN, Sept. 15, 1998, at 2.

189. See, e.g., STARR REPORT, at <http://www.amusingpics.com/viewimage.php?id=131> (last visited Apr. 24, 2002).

190. See STARK REPORT: FUNNY STARR REPORT PARODY, at <http://www.humorspace.com/humor/Stories/stark.htm> (last visited Nov. 14, 2001).

191. MAKE YOUR OWN NEW AND IMPROVED INDEPENDENT COUNSEL REPORT, at <http://www.maddogproductions.com/starr.htm> (last visited Apr. 24, 2002).

For the prurient reader in a hurry, *The Porn Starr Report* provided a convenient abridgment, reprinting only the dirty parts.¹⁹²

What if more judges decided to play to the potentially large law audience that now exists? Using already available technology, the court could begin to integrate images and video into its decisions. With a certain degree of imagination, one can foresee a day when the Supreme Court decides to overturn *Roe v. Wade*, and its progeny, with a compelling opinion prepared by Justice Scalia. The opinion might feature Scalia's sharp, compelling prose, arguing that the Constitution has nothing to say about a woman's right to an abortion. Then, attached via hypertext link, Scalia might include a video tape of a tearful woman who had an abortion, and later regretted her decision. Finally, and controversially, he might attach—again via hyperlink—a video (no doubt introduced at trial, and now attached as part of the Court's record) of an actual late-stage abortion. In response, Justice Souter might prepare a dissent in a similar multi-media vein. And days after issuing the opinion, Scalia and Souter might appear on CNN's *Crossfire*, facing hot questions from Tucker Carlson and James Carville. In a world where technology makes such multi-media texts possible, and where Supreme Court Justices conduct vanity interviews (which include, among other things, intriguing details about the dating history of two sitting Justices),¹⁹³ this scenario is entirely conceivable.

The *Starr Report* does not go so far, yet it takes a bold step forward onto this dangerous road. With its breathy discussion of Bill's lips on Monica's bare breasts,¹⁹⁴ it takes the lexicon of a special prosecutor in an entirely new direction. Without question, a more mundane report would still have garnered extensive attention; the Presidency was at stake, after all. Nonetheless, if the authors had chosen a more magisterial approach, it seems doubtful that the *Starr Report* would have achieved as much notoriety or sold as many copies. If titillating sex is fair game for this high-ranking prosecutor's referral, why not for judicial opinions as well?

From this point forward, we must assume that the law's documents will be more accessible than they have ever been before. People who work in the legal field must make their own decisions about how to use this new accessibility. They will have an opportunity to utilize this public attention for strategic gain. At times they may have a chance to increase their own wealth or fame. But doing so may incur costs, including a harsh and very public critical reception. They must realize that their work may be scrutinized by people outside the closed social, professional, and linguistic world of the law. From lay readers to newspaper critics, lawyers and judges must

192. THE PORN STARR REPORT, at <http://www.treefort.org/~rgrogan/web/starr5.htm> (last visited Apr. 24, 2002).

193. See Dateline Interview, *supra* note 171.

194. Starr Report, *supra* note 1, at 39-40.

understand that they can no longer claim "mere error" or argue that racist or sexist language was just boilerplate. With fresh eyes and ears focused on the legal profession, this new era will put more pressure on the bar. While ethical restrictions¹⁹⁵ and court sanctions¹⁹⁶ may minimally restrain lawyers and judges, they cannot stop law's march into a new century.

As scholars, we must constantly consider whether the power of law is being compromised through this cultural development. Can law create and enforce important social norms, for instance, if law becomes just another entertainment outlet: a reality-based network located somewhere around Channel 3000? Alternatively, did Judge Jackson have the right idea? Perhaps by using this new access to the public, lawyers and judges can sell the public on the importance and unique value of our legal system. This new era of retail law may pose a challenge to those scholars and policymakers who fight to protect law from popular opinion. For example, for those seeking to impose a law-and-economics approach upon our legal system, bureaucratizing legal processes to eliminate the irrational decisions and preferences of common-person voters and jurors, this scrutiny may make their policy objectives more difficult.¹⁹⁷ Similarly, judges—particularly those popularly elected—may find it more difficult to protect minority interests.¹⁹⁸ In any case, it becomes essential for legal scholars to look closely at language and literary analysis to understand how these newly popularized texts and materials work to shape public understanding of legal matters.

CONCLUSION

It would be easy to dismiss *The Starr Report Disrobed* as an academic fantasy. Several reviewers did just that. But the legal establishment must begin to take works like this seriously, because they are the logical result of the transformation of law into marketable, entertaining content. When the public receives its understanding of the law directly—no longer mediated by the "sophisticated journalist"—legal writers' marketing style and

195. See, e.g., MODEL CODE OF JUD. CONDUCT Canon 2 (1990) (requiring that a judge "shall act at all times in a manner that promotes public confidence in the integrity . . . of the judiciary").

196. See, e.g., FED. R. CIV. P. 11 (requiring court filings to have evidentiary support, be nonfrivolous, and not presented for improper purpose).

197. See David Hoffman & Michael O'Shea, *Can Law and Economics Be Both Practical and Principled*, 53 ALA. L. REV. 335, 414-15 (2002) (arguing that recent law-and-economics commentators, confronting a general public that opposes law and economics, propose to push important legal decisions down to bureaucrats who, out of public sight, will apply law-and-economics principles).

198. To the extent that protection of minorities is the particular bailiwick of the judiciary, loss of credibility, and the resulting loss of judicial power, might uniquely burden members of these groups. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 86 (1980) (arguing that judicial intervention is appropriate when political processes exclude minorities). But see Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1550-76 (arguing that judicial protection of minorities is overstated while legislative protection of minorities is understated).

literary approach become essential to understanding how law will gain (or lose) its legitimacy. Lawyers and scholars must both recognize that law no longer resides only in the dusty reaches of law libraries, or in aging inaccessible courthouses. Law has entered the modern media age and has moved into millions of living rooms. We do not yet know the consequences of this shift for the power or legitimacy of law, lawyers and law-makers. One thing is clear, however. Malti-Douglas's volume, a smart and intricate monograph, is a very dignified—and uniquely valuable—version of the "law reviews" we can expect from future critics.