

## Legally Speaking

By John G. Browning

### “Lyrical Law”

Judge Learned Hand, one of the greatest figures in American jurisprudence, once lamented, “A judge’s life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and all times almost drive him from that bench where like any other workman he must do his work.” So how do judges relieve this boredom? They liven up their opinions and orders with everything from poetry and movie references to song lyrics. While we’ll be taking a look at this phenomenon in greater detail in future articles, this week’s column gives center stage to those judges who let the music move them.

While former U.S. Supreme Court Chief Justice William Rehnquist was strictly old school (he once cited light opera lyrics from Gilbert and Sullivan in one of his opinions), current Chief Justice John Roberts is decidedly more modern in his tastes. In what legal experts believe is the first time rock lyrics have been invoked in a Supreme Court decision, Chief Justice Roberts cited Bob Dylan to illustrate a legal proposition this term in a dispute between pay phone companies and long distance carriers. In an otherwise crushingly boring dissenting opinion, Roberts wrote “The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing. ‘When you’ve got nothing, you got nothing to lose.’ Bob Dylan, *Like a Rolling Stone*, on *Highway 61 Revisited* (Columbia Records 1965).” I hate to quibble with the Chief Justice, but the exact line is a double negative—“When you ain’t got nothing, you got nothing to lose.” Accuracy aside, kudos to Chief Justice Roberts for his nod to an influential songwriter like Dylan. After all, who has Gilbert & Sullivan on his iPod, anyway?

Not to be outdone, in July U.S. District of Columbia Court of Appeals Judge Janice Rogers Brown (a conservative whose name has been mentioned as a potential Supreme court nominee) spiced up an opinion on a False Claims Act case by referencing Jimi Hendrix. Writing about a mortgage subsidy program rife with allegations of fraud, Justice Brown observed, “Forty years ago, Jimi Hendrix trilled his plaintive query: ‘Is this love, baby, or is it...[just] confusion?’ Jimi Hendrix, *Love or Confusion*, on *Are You Experienced* (Reprise Records, 1967). In this...case, we face a similar question....Is this fraud, or is it...just confusion?”

Montana Judge Gregory R. Todd might deservedly be called a Beatlemaniac. How else would you explain his 2007 reaction to a burglary defendant who filled out a pre-sentence investigation report with a request for leniency, asking that the court, like “the Beatles,” just “Let it Be.” Judge Todd took issue with both the misspelling and the plea for leniency, and wrote a sentencing memorandum that managed to work in the titles

to 39 Beatles songs, including “*Come Together*,” “*Day in the Life*,” “*Hard Day’s Night*,” “*Help*,” “*Hey Jude*,” “*Long and Winding Road*,” and “*Nowhere Man*.” Here’s a sample of Judge Todd’s Fab Four inspired wisdom:

“Later, when you thought about what you did you may have said, I’ll Cry Instead. Now you’re Let It Be instead of I’m A Loser. As a result of your Hard Day’s Night, you are looking at a Ticket to Ride that Long and Winding Road to Deer Lodge. Hopefully you can say both now and When I’m 64 that I Should Have Known Better.”

Moving from Beatlemaniacs to Parrotheads, we have federal judge James M. Burns. In a 1990 federal bribery case, *U.S. vs. McDonald*, Judge Burns granted a motion to change venue for the trial from Fairbanks, Alaska to Tacoma, Washington. The reason? There were concerns that the unpredictable Alaskan volcano, Mt. Redoubt, might erupt and disrupt the trial. Judge Burns didn’t hesitate to send the parties to Tacoma, quoting the Jimmy Buffett song “*Volcano*” and its line “ I don’t know I don’t know where I’m a-gonna go when the volcano blow.” I guess Judge Burns knew.

In the 2003 case of *U.S. v. McPhee*, the 11<sup>th</sup> Circuit Court of Appeals took up a drug smuggling case that revolved around the question of whether the Coast Guard’s interception of the boat took place on the open seas or in the territorial waters of the Bahamas - by an outcropping that was either a rock, or an actual island. The court quoted extensively from the Simon & Garfunkel song “*I Am a Rock*”(from the 1966 album *Sounds of Silence*), with its refrain “I am a rock, I am an island.” However, after devoting considerable space to the song, the court conceded, “Of course, neither Simon nor Garfunkel has been identified as a nautical expert.”

In fact, it’s not uncommon for the lyrics quoted by judges to be less than enlightening or a decent substitute for judicial precedent. It’s a subject bemoaned by University of Tennessee law professor Alex Long, author of a 2007 article in the *Washington & Lee Law Review* “[Insert Song Lyrics Here] The Uses and Misuses of Popular Music Lyrics in Legal Writing.” (Yes, that’s right- when I write a topic like this, it’s “amusing journalism.” Tack on a hundred or so footnotes and publish it in a law review, and it becomes a “contribution to academia.”) Professor Long’s survey of the most-cited artists in judicial opinions reveals that judges rely heavily on a baby boomer-influenced playlist. Bob Dylan has been cited in 26 opinions, while other frequently-quoted songwriters include the Beatles, Paul Simon (both individually and with Art Garfunkel), and Bruce Springsteen. Of course, occasionally the song references are not just misplaced- they’re actually unintended by the judge. In *U.S. v. Abner*, a 1987 case, unbeknownst to the 5<sup>th</sup> Circuit Justice Reynaldo Garza, a law clerk who had drafted the opinion managed to work in 25 references to the names of albums and songs by the Talking Heads. Supposedly, the David Byrne-obsessed judicial clerk was trying to win concert tickets. While he may have lost the contest, he did make it into the law books for posterity.

Sometimes, the musical homage is not only appropriate for the facts of the case, but is entertaining as well. In 2003, Michigan Circuit Judge Deborah Servitto handed

down a decision in a defamation case brought against rapper Eminem (real name: Marshall Mathers) by a former classmate, DeAngelo Bailey, who said that Eminem had unfairly portrayed him in a song as a school bully. Judge Servitto decided to rap her ruling in the case, saying in part:

“Mr. Bailey complains that his rap is trash  
So he’s seeking compensation in the form of cash.  
Bailey thinks he’s entitled to some monetary gain  
Because Eminem used his name in vain...  
Eminem says Bailey used to throw him around  
Beat him up in the john, shoved his face in the ground.  
Eminem contends that his rap is protected  
By the rights guaranteed by the First Amendment...  
So highly objectionable it could not be-  
Bailey was happy to hear his name on a CD.  
Bailey also admitted he was a bully in youth  
Which makes what Marshall said substantial truth.  
This doctrine is a defense well known  
And renders Bailey’s case substantially blown...”

Way to keep it real, Judge Servitto. Peace out.

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