A Pox on Vox Pop

Gerald Lebovits
BAT MASTERS vs. BENJAMIN CARDOZO

WILLIAM BARCLAY "BAT" MASTERSON
Born: 1853, Quebec, Canada
Curriculum Vitae Through 1913
Buffalo hunter, army scout, gunfighter, gambler
1876: Deputy Marshal, Dodge City, Kansas (hired by Wyatt Earp)
1877: Sheriff, Ford County, Kansas
1901: Sportswriter, Morning Telegraph

BENJAMIN NATHAN CARDOZO
Born: 1870, New York City
Curriculum Vitae Through 1913
Student, attorney, litigator, "cultured gentleman"
1891: Left Columbia Law School, joined family law firm
1901: Partner in Shapiro Warner & Cardozo of New York City

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A Pox on Vox Pop

BY GERALD LEOVITS

Should judges veto vox populi in opinion writing?

According to one master opinion writer, “Literature, poetry, popular culture and other art forms can be worked effectively into opinion writing.” One example of blending literature with opinion writing comes from the New York Family Court, which relied on Invisible Man, Ralph Ellison’s novel about racism in America, to issue an order the court itself said it had no jurisdiction to issue. Another is from the New York Supreme Court, which drew from Shakespeare’s King Lear to condemn two children who cheated their mother: “How sharper than a serpent’s tooth it is to have a thankless child.”

Many U.S. Supreme Court opinions contain art forms. Often the art over-takes the opinion, as in Flood v. Kuhn, which lists 88 baseball greats and footnotes two baseball verses in exempting baseball from antitrust laws.

This is from one judge of the law-and-economics school: “The Grateful Dead play rock music. . . . Wherever the Dead appear, there is a demand for LSD in the audience. Demand induces the Dead to appear, there is a demand for Dead play rock music. . . . Wherever the Dead appear, there is a demand for Dead play rock music. . . . Wherever the Dead appear, there is a demand for Dead play rock music. . . . Wherever the Dead appear, there is a demand for Dead play rock music. . . . Wherever the Dead appear, there is a demand for Dead play rock music.

One federal judge quoted the entire theme song of the 1960s TV show Gilligan’s Island in footnote one, and began as follows: “‘Just sit right back and you’ll hear a tale’ of what happened when David Reuther, while vacationing in the Cayman Islands at the Pirates Point Resort hotel, decided to go SCUBA diving — ‘a fateful trip that started from this tropic port, aboard this tiny ship.’”

Movies, too, attract opinion writers. One court far, far away from New York, joined the dark side by dwelling on Star Wars:

The study of prisons and the pro se litigants who inhabit them is like the study of astronomy or even science fiction. The explorer of the world of prisons and pro se plaintiffs embarks upon a fantastic voyage into another world, even another galaxy, far, far away. Prisoners protect themselves with the laser-light power of their constitutional rights. Prison officials shield themselves with administrative autonomy. Both sides have power, but both must exercise restraint, lest they give in to the dark side of the force.

This federal opinion opened with a history lesson:

Plutarch, the great biographer, recounts the battle between the foot soldiers of Pyrrhus, king of Epirus, and the Romans at Asculum in 280 B.C. Six thousand Romans were felled that day. Pyrrhus lost three thousand of his own troops. According to Plutarch, when advised that he had won the battle, Pyrrhus reportedly replied in so many words: “Another such victory and I am undone.” In this case, history will recount that, like Pyrrhus, plaintiffs won a battle, but lost the war.

Cinderella is popular with opinion writers who enjoy using literary references for metaphorical comparison. This, from New York, is elegant: “A Judge of this State who crosses a State line instantly undergoes a transformation as dramatic as Cinderella’s midnight metamorphosis.” But this, from the Federal Circuit, is forced: “The language of this statute is as clear as a glass slipper, there is no shoe horn in the legislative history, and the government, just as surely as Cinderella’s step-mother, cannot make the fit.”

Other opinions incorporate fairy tales. From the First Circuit: “In the end, Aoude huffs and puffs, but he fails to blow down the edifice which the district court competently constructed from the facts of record and the applicable law. Cf. The Three Little Pigs 16-18 (E. Blegvad ed. 1980) (house three).”

From the D.C. Circuit: “Like the Emperor’s new clothes, the Sentencing Guidelines are a bit of a farce.”

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Most often, art forms result in banalities, like the federal opinion that irrelevantly, even flippantly, used lines from the Saturday Night Live “Wayne’s World” skits and the 1992 hit movie, Wayne’s World: “In short, Prime Time’s most bogus attempt at removal is ‘not worthy’ and the Defendants must ‘party on’ in state court.”

Or the Ninth Circuit’s Vanna White opinion, which wished they could all be California girls: “[A]n attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in Southern California.”

Or the New Jersey Supreme Court’s Bruce Springsteen “Born to Run” opinion: “Fleming claims that despite the difficulty of working in a prison, she remained the kind of person who ‘at the end of every hard earned day . . . [found] some reason to believe.’”

Springsteen isn’t the only musician lionized in the judicial reports. In United States v. Youts, the Tenth Circuit used four footnotes to venerate John Denver and the Grateful Dead in a criminal prosecution for train wrecking.

Judges should know something about the classics, not merely about popular culture. Here’s why, from Learned Hand: “[A] judge [must] have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant . . .”

Everything turns upon the spirit in which he approaches the questions before him.”

Mores and culture affect decision making. Judge Hand was right: The more learned the judge, the better the opinion. But judges should be wary of airing their erudition. Knowing about pop culture or the classics is different from including them in a judicial opinion.

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written Advanced Judicial Opinion Writing, a handbook for New York’s trial and appellate courts, from which this column is adapted. His e-mail address isGLEbovits@aol.com.

17. 229 F.3d 1312 (10th Cir. 2000) (Seymour, C.J.).