

<http://mobile.nytimes.com/2016/02/23/us/politics/bob-dylan-lyrics-judicial-opinion-examples.html?referer=http://www.nytimes.com/interactive/2016/02/19/us/politics/10000004220801.embedded.html>

Several observant members of the Posse passed this Adam Liptak piece on to me. Because my recent (2015) radio show on the subject coincided with the death of Justice Scalia, I thought I would pass it on, inasmuch as I mentioned him here. The Class is copyrighted, and not for distribution

Michael

## Class 30: Rock Lyrics and Judicial Opinions

How judges use language is among our most practiced and nuanced forms of narrative, with serious consequences and high stakes. And the United States Supreme Court, the highest court in the land, is the apex of our constitutional system, so its opinions are read carefully—almost Talmudically—and so SCOTUS justices fashion their arguments carefully and then publish them so we can all discuss and study them. With their formal rituals and strict protocols, and no televised proceedings, they are a serious and learned group.

So when an important criminal law case involving rap lyrics posted on social media sites was heard and decided (*Elonis v. US*), many musicians and entertainment law specialists both watched and listened. And they were rewarded when Chief Justice John Roberts held for the bad-boy rapper who had recited, posted, published, and embellished very harsh and derogatory—some would say hateful—lyrics and then argued that his criminal conviction for uttering “threats” was a violation of his constitutional rights. In a very narrow opinion, the majority held for *Elonis* and sent the case back to a lower court to apply the higher standard: “*Elonis*’s conviction, however, was premised solely on how his posts would be understood by a reasonable

inconsistent with “the conventional requirement for criminal conduct— awareness of some wrongdoing.” Although the majority opinions cite liberally from the vile lyrics, no hip hop or rap musicians were cited—presumably due to the sheer indecorous image they project. However, we were all thrilled when the SCOTUS oral arguments did refer to Eminem, and Justice Roberts had already broken through the rock and roll membrane in 2008 when he cited Dylan in a dissent: “When you got nothing, you got nothing to lose,” auto-correcting the actual lyrics (“When you ain’t got nothing, you got nothing to lose”). [Bob Dylan, "Like A Rolling Stone"] Two years later, the more colorful Justice Antonin Scalia also cited Dylan, uncorrected, in a concurring opinion, when he cribbed a snatch of "The times they are a-changin.’”

And not only do lyrics representing legal concepts abound (imagine all the potential uses of Dylan’s iconic “weatherman” metaphor or The Talking Heads’ “same as it ever was” to uphold precedents) [Talking Heads, “Once in a Lifetime”], but judicial opinions can hide other cultural and musical artifacts, such as the influential Circuit Judge Richard Posner incorporating a picture of the magnificently-dreadlocked Bob Marley in an opinion about prisoner hairstyle choices and safety policies. [Bob Marley, "Natty Dread"] Increasingly, of course, the various music copyright cases cite extensively from the specific musicological expertise evident in the trials.

And while there is that nagging problem of how to cite the exact language of a rock lyric—such as Chief Justice Roberts’ cleaning up the contractions in the Dylan reference, a bigger problem is how to clean up the language and to delete the expletives in more modern and transgressive music, such as figured in the *Elonis* case.

While he was not an accomplished performer, many of the most talented use language that would, in the words of Professor Henry Higgins from “My Fair Lady,” make a sailor blush. My favorite rap reference in the vernacular argot was by the late Circuit Judge Terence Evans, who passed away in 2011, and who is missed for his puckish sense of humor. In *United States v. Murphy*, a 2005 criminal procedure opinion, he wrote my favorite footnote in this entire genre:

“The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch “hoe.” A “hoe,” of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden’s response. We have taken the liberty of changing “hoe” to “ho,” a staple of rap music vernacular as, for example, when Ludacris raps “You doin’ ho activities with ho tendencies.” [Ludacris, “Ho”]

Who can argue with such erudition and attention to detail in the service of criminal justice?

This is Michael Olivas, your Rock and Roll Law Professor, same as I ever was, also appearing on the Gardening Channel, with the Law of Rock and Roll, on KANW, your NPR station in Albuquerque, New Mexico.

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