# Those Who Play With Cats

West Publishing
*Blackie the Talking Cat & Other Favorite Judicial Opinions*
West 1996

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Several years ago I thought I had reached the height of slavish attention to reporter volume qua reporter volume, when I reviewed 750 F.2d for the *Legal Reference Services Quarterly*.[1] But recently I happened upon William Domnarski's *In the Opinion of the Court* (University of Illinois Press, 1996). In a chapter on lower federal court opinions, Domnarski examines not just one *Federal Reporter* volume, but every hundredth volume of the series back to 1880.[2] He looks at the subject of the opinions, calculates average opinion length and number of footnotes per opinion, and comments on the writing style of leading jurists.

Having fallen hopelessly behind, I immediately began looking for another reporter volume to review. What a stroke of luck that I happened upon *Blackie the Talking Cat and Other Favorite Judicial Opinions* (West Publishing, 1996). West wrote to judges and law professors, asking them to submit their favorites for consideration. 317 contributors replied, and the resulting volume contains a total of 85 opinions arranged roughly by subject.

*Blackie the Talking Cat* lends itself easily to a Domnarskiesque statistical analysis. Just as in many of the volumes Domnarski examined, criminal law is the most prevalent subject. In the *Federal Reporter* this was frequently followed by topics such as civil rights and labor relations; in *Blackie* animals and poetry are among those tied for second. The jurist with the most appearances is Michael Musmanno

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1 *Book Review of 750 F.2d*, Legal Reference Services Q., Fall/Winter 1986, at 199.

2 Domnarski is an attorney in Minneapolis, near where I grew up. Perhaps it is local pride that makes one focus so intently on the role of Minnesota's West Publishing Company in disseminating federal court opinions. Do residents of Midland, Mich. buy new electronic equipment just to admire the Styrofoam® in which it is packed?

of the Pennsylvania Supreme Court, with four opinions, followed closely by John R. Brown of the Fifth Circuit at three. Five justices of the Supreme Court are represented, with one opinion each. The average opinion length is just under five pages, but this has been achieved by editing opinions "for readability and length."[3] These edited opinions are a real find for footnotephobes, with an average of just 0.56 footnotes apiece. Most opinions have no footnotes at all. Word has it that West is watching *Blackie* sales closely to see whether it should edit *Federal Reporter* opinions for readability and length as well.

*Blackie the Talking Cat*'s title, and its dust jacket cartoon of a cat and a judge conversing, lead one to hope that it will be a delightfully witty volume. Would that this were possible. "Judicial humor" may not be an oxymoron, but it is a precious elixir best sipped in tiny doses. A touch of humor in a judicial opinion succeeds because it is a rare flower blooming in a desert of dry legal prose. It takes a very short opinion to be humorous *in toto*. John H. Gillis, judge on the Michigan Court of Appeals from its inception in 1965 until he retired in 1992, manages it in two of the most succinct contributions to the collection.[4]

The drollest opinions in the collection are those in which judges have been handed truly incredible cases, such as a man suing the devil[5] or himself,[6] or an accident caused by a released brake pedal striking a homemade spittoon and spraying its contents into a mechanic's face.[7] In such cases the judge can write with appropriate gravity yet make us gasp at the absurdity of the situation. More ostentatious attempts at humor, such as filling an opinion with laundry detergent brand names,[8] may appeal to some.

But focusing simply on humor, or the deficiency thereof, sells *Blackie* short. The preface indicates that there is more here than wit. The collection includes cases that are favorites because they are well written or "because they deal eloquently or perceptively with our liberties, or because of their pedagogical value."[9] The two opinions in *Palsgraf v. Long Island R.R.*[10] may be models of prose, but they are hardly side-splitting. Justice Musmanno's description of an elderly man's plight at the hands of a young woman who promises to marry him is rather touching.[11] On the other hand, the inclusion of a brief opinion denying a prisoner conjugal visitation rights[12] seems simply mean-spirited.

Almost every opinion is preceded by a brief editorial introduction, but throughout there is not a single West headnote. This might be seen as a small loss, except on those very rare occasions when West editors got caught up in the infectious spirit of judicial play. For *Fisher v. Lowe*,[13] Judge Gillis's takeoff on Joyce Kilmer's "Trees" ("We never thought that we

3 Editor's Note, *Blackie the Talking Cat* (hereinafter cited as Black. T.C.) at v. "Black. T.C." is my *Bluebook* approximation for citing this reporter volume. If, as the preface intimates, a sequel is published, citations to material in this volume would of course change to "1 Black. T.C."

4 *Denny v. Radar Industries, Inc.*, 184 N.W.2d 289, Black. T.C. 265 (Mich. App. 1970); *Fisher v. Lowe*, 333 N.W.2d 67, Black. T.C. 356 (Mich. App. 1983).

5 *U.S. ex rel. Mayo v. Satan and his Staff*, 54 F.R.D. 282, Black. T.C. 136 (W.D. Pa. 1971).

6 *Lodi v. Lodi*, 219 Cal. Rptr. 116, Black. T.C. 168 (Cal. App. 1985).

7 *Peevey v. Burgess*, 596 N.Y.S.2d 250, Black. T.C. 395 (App. Div. 1993).

8 *Chemical Specialties Manufacturers Association, Inc. v. Clark*, 482 F.2d 325, Black. T.C. 209 (5th Cir. 1973).

9 Preface, Black. T.C. at iii.

10 162 N.E. 99, Black. T.C. 380 (N.Y. 1928).

11 *Pavlicic v. Vogtsberger*, 136 A.2d 127, Black. T.C. 296 (Pa. 1957).

12 *In re Flowers*, 292 F. Supp. 390, Black. T.C. 96 (E.D. Wis. 1968).

13 333 N.W.2d 67, Black. T.C. 356 (Mich. App. 1983).

would see / A suit to compensate a tree"), the synopsis and two headnotes in *North Western Reporter* are also in verse. Consider how far up West's corporate ladder it must have been necessary to go before deciding to forgo the traditional gray monotone.[14]

In addition to editorial introductions, several opinions are preceded by comments from the judges and professors who recommended them. These comments, however, are identified by the contributors' titles rather than their names, "in order to respect the wishes of those who did not want to be identified with a particular case."[15] What is the danger of being identified with a favorite case? Could liking *Palsgraf* be grounds for a recusal motion?

At times this anonymity just seems sad, as it would have been interesting to know the suggestions of contributors such as Albert Blaustein (1921-94), Erwin N. Griswold (1904-94), or George E. MacKinnon (1906-95). In one instance it's downright absurd. The most interesting quotation comes from Peter T. Fay, who wrote the district court opinion reversed by *Chemical Specialties Manufacturers Association, Inc. v. Clark*.[16] Fay writes of his wife's outrage when he ruled that Dade County, Florida could ban detergents with phosphates and other pollutants, since it meant she would have to drive fifty miles to buy her favorite detergent. Yet he is identified here only as "Judge, United States Court of Appeals."

Perhaps comments are so vaguely attributed due to the substantial overlap between the names of the judges represented and those of the contributors who submitted favorite opinions. Could the author of *Redfearn v. State*[17] be the "Judge, Texas State Court" who recommends it? Or the author of *City of New York v. New York Yankees*[18] now be an "Adjunct Professor, Seton Hall University School of Law"?

At first this may seem like judicial ego run amok. But who has actually set this petard into motion? West asked judges for their favorite opinions and deliberately avoided being more specific.[19] Ask Kirby Puckett to name his favorite home run, and chances are that he would mention his blast that won game six of the 1991 World Series. No one would fault him for choosing his own work over Bill Mazeroski's series-ending home run in 1960, or Joe Carter's in 1992. It would certainly be reasonable for a judge to interpret West's inquiry as a request to name the favorite opinion she had written during her career.

The resulting ambiguity is just made worse by the seemingly coy anonymity of the comments. If West wouldn't define "favorite," it was only fair to give its contributors a chance to explain their choices. This is the approach taken by the *Texas Law Review* in a recent symposium with a similar mission but dramatically different results.[20] In the Texas symposium, twenty law professors and two judges wrote brief (two- to six-page) explana-

14 Despite the lack of headnotes, the volume has some small touches for West Publishing aficionados. One of the cases bears the name of the company's final two presidents before its sale to Thomson Corporation in 1996. *State v. Opperman*, 247 N.W.2d 673, Black. T.C. 341 (S.D. 1976). This Opperman is the defendant in a drug case that helped established the role of state constitutions in protecting individual rights.

15 Editor's Note, Black. T.C. at v.

16 482 F.2d 325, Black. T.C. 209 (5th Cir. 1973).

17 738 S.W.2d 28, Black. T.C. 138 (Tex. App. 1987).

18 458 N.Y.S.2d 486, Black. T.C. 172 (Sup. Ct. 1983).

19 "The definition of favorite was left to the individual, but we explained that we were looking for cases that they enjoyed reading time and again, and cases that they enjoyed sharing with others." Preface, Black. T.C. at iii.

20 *Favorite Case Symposium*, 74 Tex. L. Rev. 1195 (1996).

tions of why a case was their favorite. The focus is predominantly – but by no means exclusively – on constitutional issues and the Supreme Court, cases that are favorites because they provide inspiration. Even though two contributors (Bruce M. Selya and Charles Alan Wright) appear in both sources, there is no overlap between *Blackie* and the Texas cases. For the symposium Judge Selya nominates his own case, for the simple reason that it contains absolutely no citations.[21]

While *Blackie the Talking Cat* contains some fun reading, it is never quite clear what sort of book it wants to be. Its primary function may be to sit on the bedside table and aid in the transition from wakefulness to sleep. This it can do admirably, night after night after night.

21 Bruce M. Selya, *In Search of Less*, 74 Tex. L. Rev. 1277 (1996) (discussing *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1st Cir. 1987)).