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Douglas E. Abrams

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REFERENCES TO MOVIES IN JUDICIAL OPINIONS AND WRITTEN ADVOCACY, PART 1

DOUGLAS E. ABRAMS¹

EARLY IN 2019, THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT DECIDED *NOVATO HEALTHCARE CENTER V. NATIONAL LABOR RELATIONS BOARD*.²

The decision upheld an NLRB determination that the employer, Novato, had committed an unfair labor practice by firing four union organizers two days before a union election.

The case turned on whether to credit a Novato supervisor’s testimony about the reasons for the firings, and the court of appeals concluded that effective cross-examination of the supervisor provided substantial evidence to support the NLRB order.³ Writing for the unanimous panel, Chief Judge Merrick B. Garland opened his opinion with a nod to the popular 1992 movie comedy, “My Cousin Vinny,” which starred Joe Pesci as lawyer Vincent Gambini.

“In 1992,” the Chief Judge wrote, “Vincent Gambini taught a master class in cross-examination. Trial counsel for the National Labor Relations Board and the National Union of Healthcare Workers apparently paid attention.”⁴ To accent the praise, the *Novato* panel explained the context of, and included a footnote quoting from, “Gambini’s” cross-examination of a key witness in the movie.⁵

Following the Courts’ Example

Chief Judge Garland thus became the latest federal or state judge to spice up a written opinion by drawing from a movie. In opinions in cases with no claims or defenses concerning movies or the movie industry, trial and appellate judges often help explain substantive or procedural points, or help embellish the discussion, with references to themes, scenes, or characters from well-known films that have held Americans’ attention. Sometimes the reference appears in an opinion of the court, and sometimes it appears in a concurring or dissenting opinion.

In civil and criminal cases alike, the courts’ careful use of movie references invites advocates to use movie references carefully in their briefs. The invitation is consistent with advice extended by prominent judges themselves. “Think of the poor judge who is reading . . . hundreds and hundreds of these briefs,” says Chief Justice John G. Roberts Jr. “Liven up their life just a little bit . . . with something interesting.”⁶ In 1942, shortly before

he ascended to the Supreme Court bench, D.C. Circuit Judge Wiley B. Rutledge (a former dean of the Washington University School of Law) similarly advised advocates that “[i]t helps to break the monotony of the printed legal page to add a bit of life now and then.”⁷

Justice Antonin Scalia urged brief writers to “[m]ake it interesting.”⁸ “I don’t think the law has to be dull.”⁹ “Legal briefs are necessarily filled with abstract concepts that are difficult to explain,” Justice Scalia continued.¹⁰ “Nothing clarifies their meaning as well as examples” that “cause the serious legal points you’re making to be more vivid, more lively, and hence more memorable.”¹¹

In the *Journal of the Missouri Bar*, I have written about how lawyers can “liven up” their advocacy, and add “a bit of life now and then,” with examples drawn from cultural markers that judges themselves invoke in appropriate circumstances. Three of my previous *Journal* articles have profiled judicial opinions that draw examples from baseball, football, and other prominent sports whose basic rules, strategies, and terminology are generally well-known to lawyers and judges.¹² More recently, I wrote a *Journal* column about how judges draw examples from iconic television shows.¹³

This two-part article profiles judicial opinions that, like *Novato Healthcare*, cite or discuss movies. This Part I samples recent opinions that draw from movies listed in the American Film Institute (AFI) “100 Greatest American Films of All Time.”¹⁴ In the *Journal’s* next issue, Part II will sample recent opinions that draw from other well-known movies that have captivated American audiences.

Part II will conclude by discussing why brief writers should feel comfortable following the courts’ lead by carefully referencing movies to help sharpen substantive and procedural arguments, or to help embellish the discussion.

To chronicle the breadth of the courts’ use of movie references, the Appendix following Part II will present an array of movies that (not discussed in either part of the article) appear in recent opinions. For economy’s sake, the appendix will be confined to movies cited or discussed in decisions handed down beginning in 2000.

The American Film Institute’s “100 Greatest”

“Writing,” said Sir Ernest Gowers, “is an instrument for conveying ideas from one mind to another; the writer’s job is to make his reader apprehend his meaning readily and precisely.”¹⁵ We turn here to three movies on the AFI’s list of the “100 Greatest American Films of All Time.”



Douglas E. Abrams

Saving Private Ryan (1998)

“Saving Private Ryan” holds 71st place in the AFI’s “100 Greatest” list.¹⁶ Private James Ryan (Matt Damon) is a young American paratrooper with the 101st Airborne Division somewhere near Normandy in 1944. When Army Chief of Staff General George C. Marshall receives word at the War Department in Washington that three of the four Ryan sons have died in the war, he orders Captain John Miller (Tom Hanks) to lead a small force to find Private Ryan so that the young soldier can rejoin his grieving Iowa family as the surviving son.

Miller’s force searches behind enemy lines in war-ravaged France, and some members are killed before they find Ryan helping guard a key bridge at Ramelle, where fierce fighting between Allied and German forces is expected. Ryan refuses to leave his position. Miller decides to combine forces with the paratroopers, and he dies of wounds suffered in the battle. The movie ends with a poignant scene of the graying veteran Ryan on his knees years later paying homage at Miller’s headstone in the Normandy American Cemetery and Memorial.

In *Dusenbery v. United States* (2002), the Supreme Court cited “Saving Private Ryan” for its portrayal of heroism.¹⁷ *Dusenbery* was a suit by a prisoner who was serving a sentence for federal drug crimes. The dispositive legal issue concerned the constitutional sufficiency of the notice that the FBI gave the prisoner before it administratively forfeited property seized when he was arrested for the crimes. As required by statute, the agency provided notice by newspaper publication and by certified mail. The certified mailing was addressed to the prisoner at the prison, at the residence where he was arrested, and at the address where his mother lived. When the FBI received no response, it declared the property administratively forfeited.¹⁸

Dusenbery applied the due process test set out in *Mullane v. Central Hanover Bank & Trust Co.* (1950).¹⁹ *Mullane* held that notice of adversary proceedings must only be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”²⁰

Writing for *Dusenbery*’s majority, Chief Justice William H. Rehnquist upheld the statutory notice that the FBI gave the prisoner. “Undoubtedly,” wrote the chief justice, “the Govern-

ment could make a special effort in any case (just as it did in the movie ‘Saving Private Ryan’) to assure that a particular piece of mail reaches a particular individual who is in one way or another in the custody of the Government. It could, for example, have allowed petitioner to make an escorted visit to the post office himself in order to sign for his letter. But the Due Process Clause does not require such heroic efforts by the Government.”²¹

12 Angry Men (1957)

“12 Angry Men” ranks as number 87 on the AFI’s “100 Greatest” list, and number 2 on AFI’s list of “Top 10 Courtroom Drama Movies.”²² More than a half century after its release, the film also maintains a solid position on the American Bar Association’s list of the “25 Greatest Legal Movies.”²³

The movie is set in the jury room during taut deliberations after an 18-year-old’s trial for capital murder in the stabbing death of his father in a New York City slum apartment. Throughout much of the drama, the case against the teen facing execution appears convincing and largely uncontested.

Henry Fonda stars as the sole holdout juror, who has reasonable doubt about guilt from the start. As he adheres to his position, he absorbs anger and ridicule from his 11 fellow jurors who expose their ethnic prejudices, personal weakness, and desires for a swift guilty verdict so they can go home.

The jury continues debating the evidence, and reasonable doubt grows as the steadfast Fonda pokes holes in the state’s key evidence. Fonda convinces the other jurors one by one, and the panel acquits the defendant once the state’s evidence appears especially weak.

Courts citing “12 Angry Men” decades later hold up Fonda as the model juror whose resolve displays how juries should move toward a just verdict. *Piedmont Newnan Hospital, Inc. v. Barbour* (2015), for example, was a medical malpractice action that raised a relevant issue about whether one of the plaintiff patient’s arms was warmer than the other after the challenged surgery.²⁴ The parties’ experts disagreed about the answer. The Georgia Court of Appeals held that the trial court did not abuse its discretion by permitting jurors to touch the patient’s arms briefly to help them decide the temperature issue, and perhaps help them weigh the experts’ relative credibility.²⁵

The hospital contended that the trial court’s permission essentially allowed the jurors to make their own medical



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diagnosis. The court of appeals rejected the contention because “the process of deciding facts and making decisions by a jury is a dynamic process, as so aptly demonstrated by actor Henry Fonda in the movie *12 Angry Men*.”²⁶

In *Nash v. State* (2014), the Maryland Court of Appeals affirmed the defendant’s first-degree murder conviction.²⁷ The majority rejected the defendant’s contention that the trial court abused its discretion by refusing to question the jurors or declare a mistrial when the foreman reported that one juror remarked that she would change her vote from “not guilty” if the change would enable her to go home and not have to return to the courthouse for further deliberations. The majority reasoned that “the reputed statement of the Subject Juror constituted but the possibility of future misconduct. . . . [T]he judge had the ability to prevent prejudice from occurring.”²⁸

The *Nash* dissent would have found reversible error: “We like to think that our juries approach their task like the one in *Twelve Angry Men* ultimately did – where an earnest examination of the evidence prevails over the desire for an early exit from a civic obligation, overcomes whatever prejudices and predispositions we individually bring to the jury room, and enables a jury to work toward a consensus that is a just result. . . . But . . . when a jury foreman reports that one of the jurors is ready to concede his or her vote for reasons unrelated to the evidence or the law, a trial judge should do more than simply hope that it is not true.”²⁹

Rocky (1976)

“*Rocky*” weighs in as number 57 on the AFI’s “100 Greatest” list, and number 2 on the institute’s list of the “Top 10 Sports Movies.”³⁰ Rocky Balboa (Sylvester Stallone) is a nearly washed-up young club boxer in a hardscrabble Philadelphia working-class neighborhood. In 1975, he gets an improbable shot at the World Heavyweight Championship when Apollo Creed (Carl Weathers), the reigning world champion, needs an unexpected fill-in for a title fight he wants to have in Philadelphia on the nation’s bicentennial.

Observers expect Creed to win a one-sided bout, but Balboa trains hard for his lifetime opportunity and, with legs that refuse to buckle, becomes the first opponent to go the 15-round distance with the champ. Rocky loses a split decision and leaves the ring with his eyelids swollen shut and his face puffed and bloody, but with ambition, stardom, and travail that await seven future Rocky films.

In *Hand v. Scott* (2018), the federal district court cited “*Rocky*” when it permanently enjoined Florida’s governor and the state’s Executive Clemency Board from exercising unfettered discretion in granting or denying voting rights under the state’s current formula for re-enfranchising convicted felons who had served their sentences.³¹ The district court rejected the state’s position that the current formula was already working in everyone’s best interests: “‘The world ain’t all sunshine and rainbows.’ **ROCKY BALBOA** The same goes for Florida’s current vote-restoration scheme.”³²

In *Sullivan v. State* (1992), the Texas Court of Appeals affirmed the defendant’s conviction for driving while intoxicated.³³ The appellate court rejected the defendant’s contention that the state harmed his ability to prepare a defense because the information failed to allege the method of intoxication, which was relevant to which of two statutory definitions of intoxication would be the basis of the prosecution. The dissenter countered that the majority “tiptoes around the open and obvious harm, and with footwork that would dazzle Rocky Balboa, hints that the [defendant] created the problem, is at fault, and therefore is not harmed.”³⁴

Next issue: Judges’ references to movies below the American Film Institute’s “100 Greatest American Films of All Time.”

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 20 editions. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic Publishing 2016). Thank you to Matthew Neuman (MU Class of 2019) for his skilled research on this article.

2 916 F.3d 1095 (D.C. Cir. Mar. 5, 2019). See Debra Cassens Weiss, “*My Cousin Vinny*” Plays Big Role in Merrick Garland Opinion, A.B.A.J. (Mar. 7, 2019).

3 *Novato Healthcare*, *supra* note 2 at 1098.

4 *Id.*

5 *Id.* at 1103 & n.5. See also *Doe v. Baum*, 903 F.3d 575, 581 n.1 (6th Cir. 2018) (citing “*My Cousin Vinny*”); *United States v. Bronstein*, 849 F.3d 1101, 1111 (D.C. Cir. 2017) (same).

6 Bryan A. Garner, *Interviews with Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 J. LEGAL WRITING 5, 18 (2010).

7 Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A.J. 251, 254–55 (1942).

8 ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 112 (2008).

9 *Id.*

10 *Id.* at 111, 112.

11 *Id.* See also Justice Antonin Scalia: *In His Own Words*, BBC News, Feb. 14, 2016 (quoting Justice Scalia: “The main business of a lawyer is to take the romance, the mystery, the irony, the ambiguity out of everything he touches.”).

12 Douglas E. Abrams, *References to Baseball in Judicial Opinions and Written Advocacy*, 72 J. MO. BAR 268 (Sept.-Oct. 2016); Douglas E. Abrams, *References to Football in Judicial Opinions and Written Advocacy*, 73 J. MO. BAR 34 (Jan.-Feb. 2017); Douglas E. Abrams, *References to Spring’s Championship Sports in Judicial Opinions and Written Advocacy*, 73 J. MO. BAR 168 (May-June 2017).

13 Douglas E. Abrams, *References to Television Shows in Judicial Opinions and Written Advocacy (Part I)*, 75 J. MO. BAR 25 (Jan.-Feb. 2019); Douglas E. Abrams, *References to Television Shows in Judicial Opinions and Written Advocacy (Part II)*, 75 J. MO. BAR 85 (Mar.-Apr. 2019).

14 American Film Inst., *AFI’s 100 Greatest American Films of All Time* (2007), <https://www.afi.com/100Years/movies10.aspx>.

15 SIR ERNEST GOWERS, *THE COMPLETE PLAIN WORDS, Prologue* (1954).

16 American Film Inst., *supra* note 14.

17 534 U.S. 161 (2002). See also, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring) (citing “*Groundhog Day*” (1993)); *Virginia v. Black*, 538 U.S. 343, 366 (2003) (citing “*Mississippi Burning*” (1988)).

18 *Id.* at 164.

19 339 U.S. 306 (1950).

20 *Id.* at 314-15.

21 534 U.S. at 170-71. See also, e.g., *Rodriguez-Villareal v. United States*, 2018 WL 1041585, at *3 (E.D. Tex. Jan. 16, 2018) (magistrate judge’s op.), *report and recommendation adopted*, 2018 WL 1035852 (E.D. Tex. Feb. 23, 2018) (quoting *Dusenbery* and its sentence about “*Saving Private Ryan*”); *Lawson v. Mgmt. Activities, Inc.*, 81 CAL. RPT.R.2d 745, 749 (1999) (citing “*Saving Private Ryan*”).

22 American Film Inst., *supra* note 14; AFI, *Top 10 Courtroom Drama Movies*, <https://www.listchallenges.com/american-film-institute-top-10-courtroom-drama> (2019) (Number 1 is *To Kill a Mockingbird*, 1962).

23 Kevin Davis, *The 25 Greatest Legal Movies: Expanding the Boundaries*, 104 A.B.A. J. 38, 41 (Aug. 2018).

24 774 S.E.2d 822 (Ga. Ct. App. 2015).

25 *Id.* at 828-29.

26 *Id.* at 829 n.9.

27 94 A.3d 23 (Md. 2014).

28 *Id.* at 37.

29 *Id.* at 49-50 & n.2 (McDonald, J., dissenting). See also, e.g., *United States v. Jimison*, 493 F.3d 1148, 1150 (9th Cir. 2007) (citing “*12 Angry Men*”); *Weaver v. Thompson*, 197 F.3d 359, 366 (9th Cir. 1999) (same); *United States v. Newmark*, 2011 WL 6412117 *2 (E.D. Pa. Dec. 21, 2011) (same); *United States v. Nippon Paper Indus. Co.*, 17 F.Supp.2d 38, 42-43 & n.9 (D. Mass. 1998) (same).

30 American Film Inst., *supra* note 14; AFI, *Top 10 Sports*, <http://www.afi.com/10top10/category.aspx?cat=4> (2019) (Number 1 is *Raging Bull*, 1980).

31 315 F.Supp.3d 1244 (N.D. Fla. 2018), *stay granted*, 888 F.3d 1206 (11th Cir. 2018).

32 *Id.* at 1248 n.2.

33 831 S.W.2d 533 (Tex. Ct. App. 1992).

34 *Id.* at 536.