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# "YOGI-ISMS" IN THE COURTS

DOUGLAS E. ABRAMS<sup>1</sup>

IN *SHURTLEFF V. CITY OF BOSTON* (2021), THE U.S. COURT OF APPEALS FOR THE 1ST CIRCUIT UNANIMOUSLY UPHELD THE CITY'S REFUSAL TO FLY THE PLAINTIFFS' RELIGIOUS FLAG FROM A FLAGPOLE AT BOSTON CITY HALL.<sup>2</sup> THE COURT HELD THAT THE CITY'S REFUSAL DID NOT VIOLATE THE PLAINTIFFS' FREE SPEECH RIGHTS OR THEIR RIGHTS UNDER THE FREE EXERCISE OR EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION.<sup>3</sup>

The *Shurtleff* panel was familiar with the underlying facts because the case had been before the court once before, though on a less-developed record. Given this reappearance, Judge Bruce M. Selya opened his 16-page opinion by citing and quoting a saying popularized by National Baseball Hall of Famer Yogi Berra. The issues on the case's return to the docket, wrote Judge Selya, "conjure up what might be described . . . as a sense of 'déjà vu all over again.'"<sup>4</sup>

By citing and quoting "déjà vu all over again," *Shurtleff* joined the ranks of federal and state court opinions that have cited and quoted Berra in cases that raised no claim or defense implicating baseball or any other sport. This article surveys these opinions and their so-called "Yogi-isms."

## The Hall of Fame and American folklore

The versatility of Lawrence Peter (Yogi) Berra, a native of St. Louis,<sup>5</sup> appears unparalleled in the annals of professional sports. His stellar on-the-field performance earned him election to the Hall of Fame in 1972, and his vast collection of off-the-field sayings earned him a secure place in American folklore. The place is so secure that the U.S. Postal Service issued a "Forever" postage stamp in 2021 in his honor.<sup>6</sup>

Berra starred as an active player for 19 seasons, all but the final one with the New York Yankees' storied dynasty. He compiled a .286 career batting average, hit 358 home runs, and drove in 1,430 runs. He won the American League MVP award three times, a feat accomplished by only five other

players, and he was named to the league's all-star team 18 times. He played on 10 world championship teams – the most of any player in major league baseball history – and he earned recognition as one of the greatest catchers of all time.<sup>7</sup>

But there is more to Berra's story than nearly two decades of baseball stardom at the highest level. The Hall of Fame calls Berra "a cultural icon whose fame transcended the baseball diamond."<sup>8</sup> Complementing his record on the field, he is widely known for his "Yogi-isms," sayings that the Hall of Fame observes "have found their way into the vernacular."<sup>9</sup>

## Yogi-isms in the vernacular

Some Yogi-isms are not cited or quoted in court opinions, but are renowned for their folksiness, humor, and irony that Americans find entertaining. Consider this sampler:

- "It's not too far; it just seems like it is."<sup>10</sup>
- "The future ain't what it used to be."<sup>11</sup>
- "Ninety percent of this game [baseball] is half mental."<sup>12</sup>
- "You'd better cut the pizza in four slices, because I'm not hungry enough to eat six."<sup>13</sup>
- "A nickel ain't worth a dime anymore."<sup>14</sup>
- "I really didn't say everything I said."<sup>15</sup>



Douglas E. Abrams

## Yogi-isms in the courts

Some Yogi-isms are cited and quoted in federal and state judicial opinions. Topping the judicial ledger is "It's déjà vu all over again," which appears in *Shurtleff* and a few dozen other decisions.<sup>16</sup> The judicial ledger also emphasizes this trio:

"It ain't over till it's over."<sup>17</sup>

In *In re Barragan-Flores* (2018),<sup>18</sup> for example, the federal district court upheld its jurisdiction to hear an appeal from the bankruptcy court order that, rejecting the appellant credit union's objection, confirmed the debtor's Chapter 13 bankruptcy plan. The district court held that under the Bankruptcy Code, a final (and hence, an appealable) order "need not dispose of the entire case."<sup>19</sup>

The *Barragan-Flores* district court explained the holding this way: "[F]or the purpose of Yogi Berra's celebrated maxim, 'The game isn't over till it's over,' a bankruptcy proceeding is over when an order has been entered that ends a discrete judicial unit in the larger case."<sup>20</sup> The district court held that such a unit existed because the bankruptcy court confirmed the debtor's plan and overruled the creditor's motion to vacate.

"When you come to a fork in the road, take it."<sup>21</sup>

In *Billups v. City of Charleston* (2016),<sup>22</sup> the plaintiffs were

applicants for tour guide positions licensed by the city. Unlicensed persons were not permitted to serve. In federal district court on removal, the plaintiffs alleged the city's licensing regulations impermissibly burdened their First Amendment speech rights. The plaintiffs sought a preliminary injunction against enforcement of the regulations, and the city moved to dismiss.

After the parties presented their arguments, the district court wrote that it was “faced with a fork in the road — on the one hand, the City has failed to meet its burden to show that strict scrutiny should not be applied for motion to dismiss purposes, and on the other, plaintiffs have failed to meet their burden to show that strict scrutiny is required under the preliminary injunction analysis.”<sup>23</sup>

In this circumstance, the district court cited and quoted Berra: “As the late great philosopher Yogi Berra once said, ‘if you come to a fork in the road — take it.’”<sup>24</sup> The court held that the plaintiffs stated a claim that the city's licensing regulations violated their speech rights but did not show likelihood of success on the merits necessary to sustain their motion for a preliminary injunction.

*“It's difficult to make predictions, especially about the future.”*<sup>25</sup>

In *Xia Bi v. McAuliffe* (2019), 27 investors alleged in state court that the defendants defrauded them into investing \$500,000 each in a limited partnership that would produce hybrid and electric vehicles. After removal, the federal district court dismissed the complaint.

The U.S. Court of Appeals for the 4th Circuit unanimously affirmed on the ground that the plaintiffs failed to plead their fraud claims with particularity.<sup>26</sup> Concerning allegations that the defendants fraudulently predicted indicators of the partnership's future success, Judge J. Harvie Wilkinson III wrote this for the panel:

“Forward-looking statements provide valuable information for investors in the securities marketplace, and they allow contracting parties to make better-informed judgments. But as Yogi Berra observed, ‘It's tough to make predictions, especially about the future.’ Even the most careful projections will sometimes prove wrong. Pinning liability on forward-looking statements would risk an influx of lawsuits concerning every major event, and would shut valuable projections entirely out of the market.”<sup>27</sup>

### A unifying theme

By highlighting references to Yogi-isms in judicial opinions, this article continues a unifying theme that I have explored in eight prior “Writing It Right” articles. The theme begins in the federal and state courts themselves, which in recent years often accent their opinions' substantive and procedural rulings by citing or quoting well-known cultural markers from sports, popular entertainment, or literature.

Some courts have referenced terminologies, rules, and traditions of baseball;<sup>28</sup> football;<sup>29</sup> and other participation and spectator sports that help shape American life, including basketball, golf, and hockey.<sup>30</sup> Other courts have referenced classic television shows and movies.<sup>31</sup> Still other courts have

turned to literature by referencing classic children's stories, fairy tales, and Aesop's Fables.<sup>32</sup> Most recently, I chronicled judicial references to William Shakespeare's plays.<sup>33</sup> In future articles, I will chronicle judicial references to Charles Dickens' novels and Robert Frost's poems.

Berra is not in the class of Shakespeare, Dickens, or Frost, of course, but Yogi-isms invoked by the courts nonetheless qualify as cultural markers — grist for citation and quotation — because sports and celebrities remain bedrocks of our national culture. The U.S. Court of Appeals for the 4th Circuit is right that sports hold “a special significance in our culture.”<sup>34</sup> The U.S. Court of Appeals for the 6th Circuit is right that “sports celebrities . . . have become valuable means of expression in our culture.”<sup>35</sup>

More specifically, the National Baseball Hall of Fame is right that Berra is a “cultural icon” whose sayings have “found their way into the vernacular.”<sup>36</sup> By citing and quoting these sayings, federal and state courts themselves attest to Berra's continuing cultural imprint.

### Advice from judges

The message of my prior “Writing It Right” articles is that the courts' willingness to invoke a wide range of cultural references in their written opinions invites advocates likewise to enhance their briefs with references to similar well-known cultural markers. To reiterate what I wrote three years ago, “advocates should feel comfortable following the courts' lead by carefully referencing [cultural markers] to help sharpen substantive and procedural arguments in the filings they submit.”<sup>37</sup>

Lest advocates remain reluctant, carefully referencing well-known cultural markers in their court filings remains consistent with advice delivered by leading judges. “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 bit . . . with something interesting.”<sup>38</sup>


Justice Antonin Scalia similarly urged brief writers to “[m]ake it interesting.”<sup>39</sup> “I don't think the law has to be dull.” “Legal briefs are necessarily filled with abstract concepts that are difficult to explain,” Justice Scalia continued.<sup>40</sup> “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.”<sup>41</sup>

Because cultural markers, including ones drawn from the world of sports, help define the American experience, they can offer excellent “examples” that “liven up” written advocacy and “make it interesting” and “more memorable.”

### Conclusion: “A bit of life”

Consistent with the Roberts-Scalia advice are these perceptive words to advocates delivered more than 75 years ago by D.C. Circuit Judge Wiley B. Rutledge shortly before he joined the U.S. Supreme Court: “It helps to break the monotony of the printed legal page to add a bit of life now and then. A dull brief may be good law. An interesting one will make the judge aware of this.”<sup>42</sup>

Advocates may glean advice similar to Justice Rutledge's from the familiar Yogi-ism presented above: “When you come to a fork in the road, take it.” When an advocate com-

posing at the keyboard comes to the stylistic fork of “dull” and “interesting,” the advocate serves the client or cause best by taking the road toward “interesting.” 

## 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 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded more than 38,000 times (in 153 countries). His latest book is EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS (West Academic 2d ed. 2021).

2 986 F.3d 78 (1st Cir. 2021), *cert. granted*, --- S. Ct. --- (2021).

3 986 F.3d at 82.

4 *Id.* & n.1. Like *Shurtleff*, some courts express a measure of uncertainty about whether Berra actually said some of the sayings credited to him. *See, e.g., Atieh v. Riordan*, 797 F.3d 135, 136 (1st Cir. 2015); *Paka v. U.S. Citizenship and Immigration Servs.*, 2021 WL 875087 \* 2 (N.D. Tex. Mar. 8, 2021); *Falcone Global Solutions, LLC v. Forbo Flooring, B.V.*, 2020 WL 10142190 \* 1 (N.D. Ga. Nov. 16, 2020); *State v. Strudwick*, 849 S.E.2d 891, 894 (N.C. Ct. App. Oct. 6, 2020).

Most federal and state courts that cite and quote Berra, however, find or assume credit to him. *See, e.g., United States v. Lee*, 966 F.3d 310, 323 (5th Cir. 2020); *Xia Bi v. McAuliffe*, 927 F.3d 177 (4th Cir. 2019); *United States v. Wiles*, 721 Fed.Appx. 806, 807 (10th Cir. 2018); *United States v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 792 F.3d 821, 828 (7th Cir. 2015); *United States v. Waweru*, 628 Fed.Appx. 608, 610 (10th Cir. 2015); *Russo v. Eastwood Constr. Partners, LLC*, 2021 WL 1059023 \* 3 (D.S.C. Mar. 18, 2021); *Gamble v. S.C. Dep't of Corrections*, 2020 WL 54249223 \* 10 n.8 (D.S.C. Sept. 3, 2020); *Patterson v. Wal-mart Stores East LP*, 2020 WL 3056084 \* 3 n.4 (D.S.C. June 9, 2020); *TrueNorth Cos. v. TrueNorth Warranty Plans of N. Am.*, 353 F. Supp.3d 788, 791 (N.D. Iowa 2018); *White v. State*, 239 A.3d 837, 860 n.5 (Md. Ct. Spec. App. 2020); *Chavez v. Tower Hill Signature Ins. Co.*, 278 So.3d 231, 233 (Fla. Dist. Ct. App. 2019); *Podolec v. Blatterman*, 2018 WL 1461692 \* 1 n.1 (N.J. Super. Ct. Mar. 26, 2018).

5 *See, e.g., Historic Missourians: Yogi Berra*, STATE HISTORICAL SOCIETY OF MISSOURI, <https://historicmissourians.shsmo.org/yogi-berra> (visited Sept. 25, 2021).

6 *All-Star Baseball Player Yogi Berra Celebrated on Forever Stamp*, U.S. POSTAL SERV. (May 12, 2021), <https://about.usps.com/newsroom/national-releases/2021/0512ma-usps-will-celebrate-all-star-baseball-player-yogi-berra-with-a-forever-stamp.htm>; Kevin Paul Dupont, *Putting a Stamp on Berra's Fabled Career*, BOSTON GLOBE, June 27, 2021.

7 *Yogi Berra*, NATIONAL BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/berra-yogi>; Kevin Paul Dupont, *supra* note 6.

8 HALL OF FAME, *supra* note 7.

9 *Id.* For an interesting analysis of the relationship of Yogi-isms to various areas of the law, see William D. Araiza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697 (1997). *See also, e.g.,* Robert Knapel, *Yogi Berra: 'It's Deja Vu All Over Again' and His 25 Greatest Quotes*, BLEACHER REPORT (Apr. 7, 2011), <https://bleacherreport.com/articles/657044-yogi-berra-its-deja-vu-all-over-again-and-his-25-greatest-quotes>; Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY SPORTS (Sept. 23, 2015), <https://ftw.usatoday.com/2015/09/the-50-greatest-yogi-berra-quotes> (visited Sept. 25, 2021).

10 YOGI BERRA, THE YOGI BOOK 100 (1999).

11 *Id.* at 118-19.

12 Bill Chuck, *Don't Strike Out: Swing Away at Our Latest Baseball Quiz*, CHICAGO SUN-TIMES, June 12, 2021; YOGI BOOK, *supra* note 10 at 69.

13 YOGI BOOK, *supra* note 10 at 80; Daniel Neman, *Loving Food Not Wisely But Too Well*, ST. LOUIS POST-DISPATCH, June 3, 2015.

14 HALL OF FAME, *supra* note 7; YOGI BOOK, *supra* note 10 at 19.

15 YOGI BOOK, *supra* note 10 at 9.

16 Other recent federal and state decisions that cite and quote Berra's “It's déjà vu all over again” saying include *United States v. Lee*, 966 F.3d 310, 323 (5th Cir. 2020); *United States v. Wiles*, 721 Fed.Appx. 806, 807 (10th Cir. 2018); *United States v. Dominguez*, 804 F.3d 702, 703 (5th Cir. 2015); *Atieh v. Riordan*, 797 F.3d 135, 136 (1st Cir. 2015); *United States v. Waweru*, 628 Fed. Appx. 608, 610 (10th Cir. 2015); *Air Evac EMS v. Dodrill*, 523 F. Supp.3d 859 (S.D. W. Va. 2021); *Paka v. U.S. Citizenship and Immigration Servs.*, 2021 WL 875087 \* 2 (N.D. Tex. Mar. 8, 2021); *Falcone Global Solutions, LLC v. Forbo Flooring, B.V.*, 2020 WL 10142190 \* 1 (N.D. Ga. Nov. 16, 2020); *Hodge v. Blount County, Tenn.*, 2020 WL 2355631 (E.D. Tenn. May 11, 2020); *Patterson v. Wal-mart Stores East LP.*, 2020 WL 3056084 \* 3 n.4 (D.S.C. June 9, 2020); *In re Copeland*, 2019 WL 651594 \* 1 (Bankr. W.D. Okla. Feb. 14, 2019); *Smith*

*v. Rosebud Farm*, 2018 WL 4030591 \* 17 (N.D. Ill. Aug. 23, 2018); *Coury v. Air & Liquid Sys. Corp.*, 2018 WL 702685 \* 1 (D. Or. Feb. 2, 2018); *Freedom Watch v. U.S. Dep't of State*, 179 F. Supp.3d 121 (D.D.C. 2016); *Chavez v. Tower Hill Signature Ins. Co.*, 278 So.3d 231, 233 (Fla. Dist. Ct. App. 2019); *Baltimore County v. Fraternal Order of Police*, 144 A.3d 1213, 1216 n.1 (Md. 2016); *Gamco Asset Mgmt., Inc. v. iHeartMedia Inc.*, 2016 WL 6892802 \* 1 n.1 (Del. Ct. Chancery Nov. 29, 2016).

17 HALL OF FAME, *supra* note 7. Other recent federal and state decisions that cite and quote Berra's “It ain't over 'till it's over” saying include *TrueNorth Cos. v. TrueNorth Warranty Plans of N. Am.*, 353 F. Supp.3d 788, 791 (N.D. Iowa 2018) (Fisher, J., dissenting); *Keiser v. Borough of Carlisle*, 2017 WL 736851 \* 10 n.2 (M.D. Pa. Feb. 24, 2017); *West Va. Dep't of Health & Human Resources v. V.P.*, 825 S.E.2d 806, 816 n.2 (W. Va. Sup. Ct. App. 2019) (Hutchison, J., concurring); *Podolec v. Blatterman*, 2018 WL 1461692 \* 1 n.1 (N.J. Super. Ct. Mar. 26, 2018); *Davis v. Husain*, 2013 WL 949496 \* 11 (N.J. Super. Ct. Mar. 13, 2013) (Fisher, J., dissenting); *State v. Oliver*, 2002 WL 35657470 \* 1 (Kan. Ct. App. May 7, 2002); *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 723 A.2d 1138, 1139 n.5 (R.I. 1999).

18 585 B.R. 397 (W.D. Tex. 2018).

19 *Id.* at 399 (citation omitted).

20 *Id.* (citation omitted).

21 YOGI BOOK, *supra* note 10 at 48. Other recent federal and state decisions that cite and quote Berra's “fork in the road” saying include *United States v. Laney*, 189 F.3d 954, 967 (9th Cir. 1999) (Nelson, J., concurring); *Russo v. Eastwood Constr. Partners, LLC*, 2021 WL 1059023 \* 3 (D.S.C. Mar. 18, 2021); *Rogers v. Commissioner of Int. Rev.*, 157 Tax Ct. No. 3 \* 9 (U.S. Tax Ct. 2021); *Gamble v. S.C. Dep't of Corrections*, 2020 WL 4249223 \* 10 n.8 (D.S.C. Sept. 3, 2020); *Native Ecosys. Council v. Weldon*, 2012 WL 1142699 \* 2 (D. Mont. Apr. 4, 2012); *Zimmer v. Travelers Ins. Co.*, 454 F. Supp.2d 839, 870 n.18 (S.D. Iowa 2006); *Boone v. Youngbar*, 170 A.3d 912, 918 (Md. Ct. Spec. App. 2017); *Spring v. Edward*, 2009 WL 5213870 \* 3 (La. Ct. App. Dec. 7, 2009) (McDonald, J., dissenting).

22 194 F. Supp.3d 452 (D.S.C. 2016).

23 *Id.* at 467.

24 *Id.* at 467 n.15.

25 *Why You Listen to Liars*, NEW ZEALAND HERALD, Aug. 29, 2021. Other recent federal and state decisions that cite and quote Berra's “predictions” saying include *United States v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 792 F.3d 821, 828 (7th Cir. 2015); *State v. Strudwick*, 849 S.E.2d 891, 894 (N.C. Ct. App. Oct. 6, 2020); *White v. State*, 239 A.3d 837, 860 n.5 (Md. Ct. Spec. App. 2020).

26 927 F.3d 177 (4th Cir. 2019).

27 *Id.* at 183.

28 Douglas E. Abrams, *References to Baseball In Judicial Opinions and Written Advocacy*, 72 J. MO. BAR 268 (Sept.-Oct. 2016).

29 Douglas E. Abrams, *References to Football In Judicial Opinions and Written Advocacy*, 73 J. MO. BAR 34 (Jan.-Feb. 2017).

30 Douglas E. Abrams, *References to Spring's Championship Sports In Judicial Opinions and Written Advocacy*, 73 J. MO. BAR 168 (May-June 2017).

31 Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. MO. BAR 25 (Jan.-Feb. 2019); Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 2)*, 75 J. MO. BAR 85 (Mar.-Apr. 2019); Douglas E. Abrams, *References to Movies In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. MO. BAR 222 (Sept.-Oct. 2019); Douglas E. Abrams, *References to Movies In Judicial Opinions and Written Advocacy (Part 2)*, 75 J. MO. BAR 297 (Nov.-Dec. 2019).

32 Douglas E. Abrams, *References to Children's Stories and Fairy Tales In Judicial Opinions and Written Advocacy*, 76 J. MO. BAR 212 (Sept.-Oct. 2020); Douglas E. Abrams, *References to Aesop's Fables In Judicial Opinions and Written Advocacy*, 77 J. MO. BAR 24 (Jan.-Feb. 2021).

33 Douglas E. Abrams, *Shakespeare In the Courts*, 77 J. MO. BAR 132 (May-June 2021).

34 *United States v. Shortt*, 485 F.3d 243, 250 (4th Cir. 2007).

35 *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003).

36 *See supra* notes 8-9 and accompanying text.

37 Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. MO. BAR 25, 25 (Jan.-Feb. 2019).

38 Bryan A. Garner, *Interview With Supreme Court Justice: Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 18 (2010).

39 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 112 (2018).

40 *Id.* at 111, 122.

41 *Id.*

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