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## References to Aesop's Fables in Judicial Opinions and Written Advocacy

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# REFERENCES TO AESOP'S FABLES IN JUDICIAL OPINIONS AND WRITTEN ADVOCACY

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

IN 2013, FRIENDS OF ANIMALS, AN ENVIRONMENTAL ADVOCACY GROUP, SUBMITTED TWO PETITIONS TO THE U.S. SECRETARY OF THE INTERIOR SEEKING DETERMINATIONS WHETHER THE SPIDER TORTOISE AND THE FLAT-TAILED TORTOISE WERE SPECIES THAT MET THE CRITERIA FOR PROTECTION UNDER THE ENDANGERED SPECIES ACT. AFTER NEARLY TWO YEARS PASSED WITH NO DETERMINATIONS, FOA FILED SUIT AGAINST THE INTERIOR DEPARTMENT IN FEDERAL DISTRICT COURT IN WASHINGTON.

In *Friends of Animals v. Jewell*, the district court dismissed the suit for lack of standing, a dismissal that the D.C. Circuit affirmed.<sup>2</sup>

To underscore the extent of the agency's delay, the district court cited and applied the well-known Aesop Fable, "The Hare and the Tortoise."<sup>3</sup> The court coupled its dismissal order with acknowledgement that the department had "moved with the alacrity of the proverbial tortoise."<sup>4</sup> "[O]ne might say the Department has learned all too well the lesson of the tortoise in Aesop's famous child's tale. Its efforts to respond to FOA's petitions have been '[s]low' and (only arguably) 'steady.'"<sup>5</sup>

The district court specified that "[i]t took almost nine months for the Department to announce its 'positive' 90-day

findings for both tortoise species. . . . And to date, the Department has yet to issue any 12-month findings concerning either species — even though almost 22 months have passed since FOA submitted its petitions."<sup>6</sup>

## A Judicial Tradition

In several "Writing It Right" articles over the past few years, I have described how federal and state judges frequently accent their opinions' substantive or procedural points with careful references to cultural markers familiar to many Americans. The early articles catalogued judicial references to the terminology, rules, and traditions of baseball;<sup>7</sup> football;<sup>8</sup> and other sports such as basketball, golf, and hockey.<sup>9</sup> Later articles focused on judicial references to classic television shows<sup>10</sup> and classic movies.<sup>11</sup> A more recent article turned to popular literature by exploring judicial references to well-known children's stories and fairy tales.<sup>12</sup>

This article continues traveling the literary lane by turning to Aesop's Fables. By invoking a Fable, the *Friends of Animals* district court continued a tradition that began in 1823, when the Pennsylvania Supreme Court cited Aesop in a will contest.<sup>13</sup>

Without specifying a particular Fable, some recent federal and state decisions have invoked Aesop's Fables generally to distinguish between the fables' fictional presentations and the realities faced by courts as they resolve disputes.<sup>14</sup> One state appellate court hearing a libel claim, for example, opened its opinion with the observation that "the facts in this case at first blush almost suggest the innocuous talking animal characters and fictions contained in Aesop's Fables."<sup>15</sup>

Other decisions invoke a specific Fable and relate its tale or moral to the decision's facts and holding. This article describes decisions whose opinions featured three better-known Aesop Fables. The *Friends of Animals* opinion featured the first of the three, "The Hare and the Tortoise."<sup>16</sup> The second is "The Boy Who Cried Wolf," sometimes also known as "The Shepherd's Boy."<sup>17</sup> The third is "The Ant and the Grasshopper."<sup>18</sup>



Douglas E. Abrams

### Advice from Today's Judges

This "Writing It Right" article reiterates the prior articles' conclusion: "[A]dvocates 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>19</sup>

The conclusion remains consistent with advice to advocates delivered by prominent contemporary judges. "Think of the poor judge who is reading . . . hundreds and hundreds of these briefs," says Chief Justice John G. Roberts, Jr. "Liven their life up just a little bit . . . with something interesting."<sup>20</sup>

Justice Antonin Scalia similarly urged brief writers to "[m]ake it interesting."<sup>21</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>22</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>23</sup>

### Three Aesop's Fables

Now for three Fables that figured in recent decisions.

#### *The Hare and the Tortoise*

The story is well known . . . Boasting about his speed afoot, the hare challenged any animal nearby to race him. Only the tortoise accepted the challenge. It looked like a classic mismatch, but the course was set, and the race began. The overconfident hare immediately sped out of sight, but then stopped along the route to rest and nap. The tortoise plodded ahead, slowly but steadily, and crossed the finish line first, before the hare could catch up.

The moral? Slow and steady wins the race.

In *Friends of Animals*, the decision that opened this article, the district court chronicled the Interior Department's delays and held in effect that crossing the Endangered Species Act's "finish line" depended on the department's discretion, and not on a court order in an environmental enforcement suit.

#### *The Boy Who Cried Wolf*

This well-known Aesop Fable concerns a lonely shepherd boy who, tending a flock of sheep at the foot of a mountain, sought companionship and excitement by twice loudly shouting, "Wolf, Wolf," a call designed to bring townspeople to rescue the flock from a predator. Townspeople arrived swiftly both times, only to learn that the boy had set false alarms because there was no wolf.

The shepherd boy cried, "Wolf," a third time when a wolf actually threatened, but the townspeople ignored the boy because they assumed it was another false alarm. The result: the wolf "made a good meal off the boy's flock."<sup>24</sup>

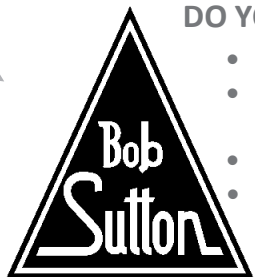
In 1998, one federal district court opinion cited, "The Boy Who Cried Wolf," and said this about its moral: "[M]any learn in the hardest way that 'a liar, even though he occasionally speaks the truth, will not be believed' in time of true peril."<sup>25</sup>

The U.S. Court of Appeals for the Ninth Circuit sounded a similar warning in *Sivak v. Murphy*. Sivak was an Idaho state prison inmate who had flooded the federal court for several years with lawsuits (all dismissed) that alleged trivial violations by prison authorities.<sup>26</sup> *Sivak* dismissed the latest suit, which alleged that the defendant prison authorities had violated the prisoner's Eighth Amendment rights against cruel and unusual punishments by depriving him of necessary vitamin pills during a search of his cell.

Citing "The Boy Who Cried Wolf," the Ninth Circuit punctuated its order affirming summary judgment for the defendants with this forecast: "If Sivak suffers a serious deprivation of his constitutional rights in prison some day, he may not be able to convince the magistrate, the district court or this court of this fact because of his incessant litigation over relatively trivial matters."<sup>27</sup>

#### *The Ant and the Grasshopper*

This Aesop Fable concerns an ant who, one warm summer day, was dragging an ear of corn to store it for winter



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food. The ant passed a grasshopper who said he could not be bothered with storage because “we have got plenty of food at present.” When winter came, the grasshopper was starving but the stored corn enabled the well-prepared ants to eat well. The moral: “It is best to prepare for the days of necessity.”<sup>28</sup>

In *Lanfear v. Home Depot, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit affirmed dismissal of the employees’ class action complaint which alleged that fiduciaries violated the Employee Retirement Income Security Act (ERISA) by mismanaging the defendant company’s retirement plan.<sup>29</sup> Citing Aesop, the court of appeals opened its opinion by focusing on the employees themselves:

“People build many things over the course of their lives,” the court wrote. “Throughout the time allotted them, they build houses and homes, character and careers, relationships and reputations. And if they’re wise like Aesop’s ant, during the summer and autumn of their lives they store up something for the winter. Although the ant in the fable did well enough without its saving plan being protected by ERISA, the plaintiffs in this case seek the protections of that statute.”<sup>30</sup>

### Conclusion: “Add a Bit of Life”

This survey of Aesop’s Fables demonstrates yet again that careful recitation of literary or other cultural markers can invigorate both judicial opinions and lawyers’ written advocacy. More than 75 years ago, Justice Wiley B. Rutledge advised advocates that “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>31</sup> Decades later, former Arizona Supreme Court Chief Justice William A. Holohan concurred: “There is no reason that a brief shouldn’t be good literature.”<sup>32</sup> 

### 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 worldwide more than 32,000 times. His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic Publishing 2d ed. 2020).

Thank you to James Sanders (Mizzou Law School Class of 2020) for his excellent research on this article.

2 115 F. Supp.3d 107, 111-19 (D.D.C. 2015), *aff’d*, 828 F.3d 989 (D.C. Cir. 2016).

3 Aesop, *The Hare and the Tortoise* 39 (17 Harvard Classics 1909).

4 115 F. Supp.3d at 108.

5 *Id.* at 110.

6 *Id.*

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

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

9 Douglas E. Abrams, *References to Spring’s Championship Sports In Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 168 (May-June 2017).

10 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).

11 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).



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12 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).

13 *Dornick v. Reichenback*, 1823 WL 2207 \* 7 (Pa. 1823) (quoting from treatise).

14 *See, e.g., State v. Buch*, 926 P.2d 599, 616 (Haw. 1996) (“It is at this point that the canons of statutory construction begin to take on the qualities of *Aesop’s Fables*”); *Kithcart v. Metropolitan Life Ins. Co.*, 55 F. Supp. 200, 200 (W.D. Mo. 1944) (rejecting plaintiff’s contention that the removal statute, 28 U.S.C. § 71, violated the 9th, 10th, and 14th amendments; “the amendments . . . have no more relevancy to the validity of the statute than do *Aesop’s Fables*”).

15 *Brooks v. Stone*, 317 S.E.2d 277, 278 (Ga. Ct. App. 1984).

16 Aesop, *The Hare and the Tortoise* 39 (17 Harvard Classics 1909).

17 Aesop, *The Shepherd’s Boy* 28 (17 Harvard Classics 1909).

18 Aesop, *The Ant and the Grasshopper* 25 (17 Harvard Classics 1909).

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

20 Bryan A. Garner, *Interviews With Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 *Scribes J. Legal Writing* 5, 18 (2010).

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

22 *Id.* at 111, 122.

23 *Id.*

24 Aesop, *The Shepherd’s Boy*, *supra* note 17 at 28.

25 *Greffey v. State of Ala. Dep’t of Corrections*, 996 F. Supp. 1368, 1383 n.27 (N.D. Ala. 1998).

26 995 F.2d 233 (9th Cir. 1993) (unpublished opinion).

27 *Id.* \* 1 n.1.

28 Aesop, *The Ant and the Grasshopper*, *supra* note 18 at 25.

29 679 F.3d 1267 (11th Cir. 2012).

30 *Id.* at 1270.

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

32 Mark Rust, *Mistakes to Avoid on Appeal*, 74 A.B.A. J. 78, 79 (Sept. 1988) (quoting Chief Justice Holohan).