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REFERENCES TO CLASSIC AMERICAN NOVELS IN ADVOCACY AND JUDICIAL OPINIONS

DOUGLAS E. ABRAMS¹

PUBLISHED IN 1960 AND STILL INSPIRING TO LAWYERS WHO SEEK AN ETHICAL COMPASS TO HELP GUIDE THEIR PROFESSIONAL LIVES, HARPER LEE'S "TO KILL A MOCKINGBIRD" RANKS AS ONE OF AMERICA'S CLASSIC NOVELS.²

The story's hero is principled, small-town Depression-era Alabama solo lawyer Atticus Finch, who risks violence and loss of reputation when he accepts the criminal court's appointment to defend a lynching target, a 25-year-old Black husband and father who is wrongly accused of accosting a young white woman.

After purchasing a rifle, the widowed Finch counsels Scout, his 6-year-old daughter, that it is a sin to kill a mockingbird. An adult neighbor explains to the girl why: "Mockingbirds don't do one thing but make music for us to enjoy. They don't eat up people's gardens, don't nest in corncribs, they don't do one thing but sing their hearts out for us. That's why it's a sin to kill a mockingbird."³

* * *

Fast forward to 2020, when the neighbor's explanation from "To Kill a Mockingbird" appeared in *Natural Resources Defense Council, Inc. v. U.S. Department of the Interior*.⁴ The federal district court struck down a 2017 Interior Department memorandum that sought to renounce the agency's nearly 50-year-old interpretation of the Migratory Bird Treaty Act of 1918.⁵ The congressional act provides that "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill ... any migratory bird, any part, nest, or egg of any such bird ... included in the terms of ... conventions" between the United States and Canada.⁶

According to the Interior Department's 2017 memorandum, "takings" and "killings" under the 1918 act apply only to conduct that is specifically aimed at birds, not to incidental conduct. The district court granted summary judgment for the plaintiff environmental organizations, which had challenged the agency memorandum as promulgated contrary to the federal

Administrative Procedure Act, and thus as an invalid exercise of agency authority.⁷

The federal district court held that despite the 2017 memorandum, the law remained unchanged: "It is not only a sin to kill a mockingbird, it is also a crime," wrote the court in the first sentence of its opinion.⁸ To accent the point, the court's first footnote cited Lee's novel and quoted the neighbor's explanation recited above.⁹

Culture in the courts

By citing and quoting from Lee's Pulitzer Prize-winning novel, the *Natural Resources Defense Council* court joined other federal and state courts that have accented their written opinions with citations or quotes from cultural markers that help define American life. Books and other literary classics have figured prominently in the array of markers. Recently I have surveyed judicial references to two British literary sources, William Shakespeare's plays¹⁰ and Charles Dickens' novels.¹¹

Classic American novels in the courts: A literary sampler

With this *Journal of The Missouri Bar* article, the survey of courts' cultural markers returns to literature – particularly American literature. Besides "To Kill a Mockingbird," federal and state courts in their written opinions have cited and quoted from other classic novels written by American authors, including these three novels:¹²

"Catch-22" (by Joseph Heller, 1961)

Joseph Heller's novel introduced the term "Catch-22" into the American lexicon. The term describes "a frustrating situation in which one is trapped by contradictory regulations or conditions."¹³ More broadly, the term describes "any illogical or paradoxical problem or situation."¹⁴ For example, in the novel, "Yossarian wants to stop serving as a bombardier during World War II. Insanity is a reason for being grounded, and Yossarian tries to convince Doc Daneeka that he is insane – but to ask proves sanity, because an insane person would want to fly more missions."¹⁵

* * *

In 2015, a federal district court reported that since publication of Heller's novel in 1961, the term "Catch-22" had appeared in more than 2,000 opinions or orders issued by federal courts.¹⁶ These appearances



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continue. In 2019, for example, the Maine federal district court cited the novel to help make the central point in *Burnett v. Ocean Properties, Ltd.*¹⁷

Ryan D. Burnett, an employee who was paralyzed and in a wheelchair, sued his employer for failing to accommodate his disability in violation of the Maine Human Rights Act and the Americans with Disabilities Act. The jury awarded him compensatory and punitive damages.

Burnett rejected the employer's motions that sought to overturn the verdict. Citing *Heller's* novel, the district court noted the employer's argument carried "a Catch-22 ring Mr. Burnett could perform his job if he could open the door to the workplace, but because he cannot open the door to his workplace, he cannot perform his job."¹⁸

"*Moby-Dick*" (by Herman Melville, 1851)

Herman Melville's novel tells the saga of Captain Ahab, who sailed the world in the whaling ship *Pequod*, seeking to hunt down and kill the great white whale Moby Dick, which had bitten off the captain's leg at the knee during an earlier voyage. Ahab dies at sea during the search, drowned by his own snagged rope at the end of his quest for revenge against his elusive quarry.

* * *

In 2021, "*Moby-Dick*" appeared in *State v. Timbs*,¹⁹ a civil in rem forfeiture action brought by Indiana. The state sought to seize the Land Rover vehicle owned by the defendant, who pled guilty to drug charges and felony theft. The Supreme Court of Indiana described the action's pedigree this way: "Reminiscent of Captain Ahab's chase of the white whale Moby Dick, this case has wound its way from the trial court all the way to the United States Supreme Court and back again."²⁰

"*The Grapes of Wrath*" (by John Steinbeck, 1939)

John Steinbeck's Pulitzer Prize-winning novel was a predicate for his Nobel Prize in Literature in 1962. The novel tells the story of desperately poor tenant farmers who, evicted from the land by banks after crop failures, sought to survive the Depression and the Dust Bowl by leaving Oklahoma for California. Arriving in California in their flimsy trucks laden with all their personal belongings, the migrants found struggles anew.

* * *

In 2016, Steinbeck's novel appeared in *In re Moore*,²¹ a Kansas bankruptcy proceeding filed by a husband and wife who were in their 70s with poor health histories. The federal bankruptcy court's opinion recited that the Moores "live on social security ... and their very limited savings."²² Because the couple could not afford to pay their lawyer's Chapter 7 retainer in advance, they filed instead for Chapter 13 relief and proposed a plan to pay their attorney's fees and expenses plus a small dividend to their unsecured creditors over 36 months.²³

The bankruptcy court observed that "the Moores' case seems less dire than some of the other cases. But nothing in the [Bankruptcy] Code requires that the debtors' situation resemble *The Grapes of Wrath*. All the Code asks is that they proceed in good faith."²⁴ The court found that

the Moores proceeded in good faith, and it confirmed their Chapter 13 plan.

A unified message

By highlighting classic American novels that are cited or quoted in judicial opinions, this Journal of The Missouri Bar article continues a message that I have presented in several prior "Writing It Right" articles: Courts in recent years have accented their written opinions' substantive or procedural rulings by citing or quoting well-known cultural markers.²⁵

The message continues that the federal and state courts' use of cultural markers in their written opinions should encourage advocates likewise to accent their briefs with similar carefully applied cultural markers.

Carefully referencing well-known cultural markers, including classic literature, in submitted briefs and other court filings heeds advice from 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."²⁶

Justice Antonin Scalia similarly urged brief writers "[m]ake it interesting."²⁷ "I don't think the law has to be dull." "Legal briefs are necessarily filled with abstract concepts that are difficult to explain," Scalia continued.²⁸ "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."²⁹

The Supreme Court of Missouri recognizes that "[l]iterature ... reflects human values,"³⁰ and thus helps shape the national culture. A brief's careful references to American literary classics can offer, in the U.S. Supreme Court justices' words, excellent "examples" that "liven up" written advocacy and "make [advocacy] interesting" and "more memorable."³¹

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 46,000 times (in 153 countries). His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic 2d ed. 2021)

2 See, e.g., *The Great American Novel*, Goodreads, https://www.goodreads.com/list/show/730.The_Great_American_Novel; *The Greatest American Novels*, Ranker (Dec. 14, 2021), <https://www.ranker.com/list/best-american-novels/ranker-books> (both visited Nov. 23, 2022).

3 See Harper Lee, *To Kill a Mockingbird* 103 (Harper Perennial 2002) (1960); 478 F. Supp.3d 469, 471 n.1 (S.D.N.Y. 2020).

4 478 F. Supp.3d 469 (S.D.N.Y. 2020).

5 P.L. 65-186, 40 Stat. 755 (1918).

6 16 U.S.C. § 703(a).

7 478 F. Supp.3d at 471-72.

8 *Id.* at 471.

9 *Id.* n.1 (as recounted by Scout, the novel's narrator as an adult).

Other recent decisions that cite or quote from "*To Kill a Mockingbird*" include *Barrow v. Church*, 2016 WL 3964605 * 2 (S.D. Ohio July 25, 2016); *Markowitz v. United Parcel Service, Inc.*, 2016 WL 3598728 (C.D. Calif. July 1, 2016); *35 Bar & Grille, LLC v. City of San Antonio*, 943 F. Supp. 706, 712 n.8 (W.D. Tex. 2013); *People v. Batticks*, 159 N.E.3d 758, 764 (N.Y. 2020) (Wilson, J., dissenting); *Hagopian v. Justice Administrative Comm'n*, 18 So.3d 625, 642 (Fla. Dist. Ct. App. 2009).

10 Douglas E. Abrams, *Shakespeare In the Courts*, 77 J. Mo. Bar 132 (May-June 2021).

11 Douglas E. Abrams, *Charles Dickens' Novels In the Courts*, 78 J. Mo. Bar 29 (Jan.-Feb, 2022).

12 In addition to the four decisions profiled in this article, recent decisions that cite or quote from classic American novels include *Prynn v. Settle*, 848 Fed.Appx. 93, 109 n.2 (4th Cir. 2021) (“The Scarlet Letter” by Nathaniel Hawthorne (1850)); *Ass’n of Am. R.Rs v. U.S. Dep’t of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016) (“East of Eden” by John Steinbeck (1952)); *U.S. v. Contreras*, 739 F.3d 592, 596 (11th Cir. 2014) (“Beloved” by Toni Morrison (1987)); *Crawford v. Barr*, 2019 WL 6525652 * 1 (D.D.C. Dec. 4, 2019) (“Tender Is the Night” by F. Scott Fitzgerald (1934)); *Ray Capital Inc. v. M/V Newlead Castellano*, 2018 WL 1627818 (S.D. Ga. Sept. 1, 2017) (“The Old Man and the Sea” by Ernest Hemingway (1952)); *Espedito Realty, LLC v. Nat’l Fire Ins. Co. of Hartford*, 849 F. Supp.2d 179, 180 (D. Mass. 2012) (“For Whom the Bell Tolls” by Ernest Hemingway (1940)); *Aleman v. Texas Med. Bd.*, 573 S.W.3d 796, 813 (Tex. 2019) (Boyd, J., dissenting) (“The Great Gatsby” by F. Scott Fitzgerald (1925)); *Morris v. Spectra Energy Partners (DE) GP, LP*, 2018 WL 2095241 * 1 (Del. Ct. Chan. May 7, 2018) (“The Adventures of Huckleberry Finn” by Mark Twain (1884)); *In re Miguel A.*, 990 A.2d 1216, 1220 (R.I. 2010) (“Gone With the Wind” by Margaret Mitchell (1939)); *State v. Bratina*, 73 S.W.3d 625, 626 (Mo. banc 2002) (“The Adventures of Huckleberry Finn” by Mark Twain (1884)); *Hogan v. State*, 205 A.3d 101, 111 (Md. Ct. Spec. App. 2019) (“The Caine Mutiny” by Herman Wouk (1951)).

13 See *The Random House Dictionary of the English Language* 327 (2d ed. 1987).

14 *Id.*

15 *Davis v. Humphreys*, 747 F.3d 497, 498 (7th Cir. 2014).

16 *J.E.F.M. v. Holder*, 107 F. Supp.3d 1119, 1126 n.6 (W.D. Wash. 2015), *aff’d in part, rev’d in part on other grounds sub nom. J.E.F.M. v. Lynch* (9th Cir. 2016).

17 422 F. Supp.3d 369 (D. Me. 2019).

18 *Id.* at 382 n.6. Other recent decisions that cite or quote from “Catch-22” include *True the Vote, Inc. v. IRS*, 831 F.3d 551, 562 (D.C. Cir. 2016); *United States v. Crowder*, 313 F. Supp.3d 135, 146 (D.D.C. 2018); *State v. Armstrong*, 2017 WL 690973 (Ohio Ct. App. Feb. 21, 2017).

19 169 N.E.3d 361, 365 (Ind. 2021). Other recent decisions that cite or quote from “Moby-Dick” include *Anderson v. Evans*, 314 F.3d 1006, 1008 (9th Cir. 2002); *OCTAL Inc. v. United States*, 539 F. Supp.3d 1291, 1319 & n.17 (U.S. Ct. Int’l Trade 2021); *Conservation Law Found. v. Ross*, 422 F. Supp.3d 12, 15 (D.D.C. 2019); *Grant v. Entertainment Cruises, Inc.*, 308 F. Supp.3d 338, 342 (D.D.C. 2018); *Pucci v. Carnival Corp.*, 160 F. Supp.3d 1329, 1335 (S.D. Fla. 2016).

20 *Timbs*, *supra* note 19, 169 N.E.3d at 365.

21 2016 WL 4247041 (Bankr. D. Kan. Aug. 5, 2016). Other recent decisions that cite or quote from “The Grapes of Wrath” include *SFF-TIR, LLC v. Stephenson*, 250 F. Supp.3d 856, 1067 (N.D. Okla. 2017); *Woods v. Flagstar Bank, FSB*, 2013 WL 4008880 (D. Md. Aug. 1, 2013); *U.S. v. Dudley*, 854 F. Supp. 570 (S.D. Ind. 1994); *Alexander v. Mississippi Dep’t of Emp. Sec.*, 998 So.2d 419 (Miss. 2008).

22 *Moore*, *supra* note 21, 2016 WL 4247041 at * 1.

23 *Id.*

24 *Id.* * 6.

25 See, e.g., Douglas E. Abrams, *Charles Dickens' Novels In the Courts*, 78 J. Mo. Bar 29, 29 (Jan.-Feb, 2022) (enumerating cultural markers cited and quoted by the courts).

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

27 Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 112 (2018).

28 *Id.* at 111, 122.

29 *Id.*

30 *State v. Bratina*, 73 S.W.3d 625, 628 (Mo.).

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