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The Jurisprudence of Yogi Berra

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THE JURISPRUDENCE OF YOGI BERRA

by 39 Authors*

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Professor Siegel, a Bronx native, remembers fondly watching Yogi behind the plate at Yankee Stadium.

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INTRODUCTION

Lawrence Peter "Yogi" Berra was born on May 12, 1925, in St. Louis, Missouri,¹ and grew up to become one of baseball's all-time greats.² Yogi played nineteen years in the Major Leagues, eighteen with the New York Yankees and one with the New York Mets.³ He has been called the greatest Yankee catcher ever.⁴ During his career, Yogi played in a record fourteen World Series⁵ and was elected the American League's Most Valuable Player three times.⁶ Following his playing career, Yogi managed both the Yankees and the New York Mets, and coached the Yankees, Mets, and Houston

¹ THE BASEBALL ENCYCLOPEDIA 785-86 (Macmillan 10th ed. 1996).

² He was rated baseball's greatest catcher for an entire career and fourth best catcher during peak seasons. See BILL JAMES, THE BILL JAMES HISTORICAL BASEBALL ABSTRACT 310-11 (1986). Yogi has also been identified as one of the 50 best players ever, see PAUL ADOMITES & SAUL WISNIA, THE BEST OF BASEBALL 17 (Publications Int'l, Ltd. 1996) [hereinafter THE BEST OF BASEBALL], and has been called "[o]ne of the greatest catchers of all time—and one of the most amusing." DAVID H. MARTINEZ, THE BOOK OF BASEBALL LITERACY 8 (1996).

³ Yogi played from 1946-63 with the Yankees and in 1965 with the Mets. His regular season statistics for those 19 years include a career batting average of .285, 358 home runs, 1175 runs scored, and 1430 runs batted in. BASEBALL ENCYCLOPEDIA, supra note 1, at 785. See *infra* note 5 for Yogi's World Series statistics.

⁴ See JAMES, supra note 2, at 310.

⁵ Yogi played in the World Series in 1947, 1949, 1950, 1951, 1952, 1953, 1955, 1956, 1957, 1958, 1960, 1961, 1962, and 1963. His overall World Series statistics include a batting average of .274, 12 home runs, 41 runs scored, and 39 runs batted in. BASEBALL ENCYCLOPEDIA, supra note 1, at 785-86. See *infra* note 7 for information on Yogi's managing and coaching.

⁶ Yogi won MVP awards in 1951, 1954, and 1955. See DAVID S. NEFT & RICHARD M. COHEN, THE SPORTS ENCYCLOPEDIA: BASEBALL 695 (16th ed. 1996) [hereinafter SPORTS ENCYCLOPEDIA]. Although Yogi was the MVP in 1954, he once commented: "Bobby Avila had a good year. . . He got the MVP that year, I think. 1954? I'm pretty sure. Didn't he?" DAVID H. NATHAN, BASEBALL QUOTATIONS 152 (1993) [hereinafter BASEBALL QUOTATIONS].

Astros.⁷ He received baseball's highest honor in 1972 when he was elected into the Baseball Hall of Fame.⁸

However, Yogi's accomplishments go far beyond the baseball diamond. He is renowned for his wit and wisdom.⁹ For example, Yogi's classic, "It's not over 'til it's over,"¹⁰ has been cited numerous times.¹¹

One commentator said of Yogi:

He never went beyond the eighth grade in school, yet he has a native intelligence, an innate wisdom and a wonderfully simple way of cutting through all the folderol and getting to the heart of a matter. When he says something that seems funny, it really isn't funny at all, it is wise. He expresses himself simply and naturally.¹²

This Essay will examine Yogi's wisdom and demonstrate the parallels between judges' and legislators' comments and what Yogi said;¹³ only Yogi said it better.

Yogi's wisdom relates to more than the law, and therefore exploration of the connections by scholars in other fields is encouraged. To this end, two

⁷ Yogi managed the Yankees in 1964 and again in 1984 and 1985. See TOTAL BASEBALL: THE OFFICIAL ENCYCLOPEDIA OF MAJOR LEAGUE BASEBALL 2332 (John Thom et al., eds., 4th ed. 1995) [hereinafter TOTAL BASEBALL]. He managed the Mets from 1972-75. *Id.* His record as a manager was 484 wins and 444 losses, a winning percentage of .522. *Id.* Yogi coached the Yankees in 1963 and again from 1976-83, the Mets from 1965-71, and the Astros from 1986-89. *Id.* at 2355.

⁸ BASEBALL ENCYCLOPEDIA, *supra* note 1, at 785. See also PHIL PEPE, THE WIT AND WISDOM OF YOGI BERRA at xiii (2d ed. 1988) (noting that election into the Hall of Fame is "baseball's supreme honor").

⁹ See generally PEPE, *supra* note 8 (writing on the *The Wit and Wisdom of Yogi Berra*).

¹⁰ Yogi gave this answer when asked about the Mets' chances for winning the 1973 National League East pennant. BASEBALL QUOTATIONS, *supra* note 6, at 150. See also PEPE, *supra* note 8, at 185 (quoting Yogi Berra); PAUL DICKSON, BASEBALL'S GREATEST QUOTATIONS 43 (1991).

¹¹ A Westlaw search found fourteen law review articles, five state court cases, and eight federal court cases which have cited this Berraism. Westlaw, Aug. 21, 1996.

¹² PEPE, *supra* note 8, at xiii-xiv.

¹³ The impact of baseball on the law has recently been the subject of heated scholarly debate. Compare Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 229 (1994) (extolling "the salutary influence of baseball rules and baseball traditions on the thought processes of legal scholars") with Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 18 (1994) ("The fact that baseball metaphors have not been employed in any systematic fashion does not mean that they can do no harm.").

guest scholars¹⁴ will demonstrate how Yogi's insights relate both to medicine and physics.¹⁵

THE LEGAL WISDOM OF YOGI BERRA

Yogi's sayings may be divided into sixteen categories, from Jurisprudence to Physics, each category having subtopics. Many of Yogi's sayings touch more than one category, showing the universality of Yogi's wisdom.

1. JURISPRUDENCE

Topic: Yogi on the Epistemological Foundations of the Judicial Process

Background:

Yogi Berra long has been regarded as one of this century's preeminent philosophers.¹⁶ His commentaries appear to be merely about baseball. But, like a ballpark hot dog, there are many unexpected things to be discovered beneath the surface of Yogi's observations.¹⁷ Yogi's statements explore the very nature of knowledge and truth. Imparting knowledge and revealing truth to the trier of fact is, of course, a central goal of the judicial process. Hence, Yogi's observations can be as useful in the courtroom as they are on the diamond. Following are but a few illustrations.

Berraism¹⁸ A: "In baseball, you don't know nothing."¹⁹

¹⁴ Paul Horowitz, Professor of Physics at Harvard University, and Kalman S. Eisenberg, M.D., Assistant Clinical Professor of Orthopedic Surgery at UCLA School of Medicine, are the guest scholars.

¹⁵ See *infra* notes 478-93 and accompanying text.

¹⁶ See generally PEPE, *supra* note 8.

¹⁷ See, e.g., *Barghout v. Mayor*, 600 A.2d 841 (Md. 1992) (prosecuting hot dog vendor for selling hot dogs contaminated with nonkosher sausage grease as kosher).

¹⁸ "Berraism" is a phrase used by former Yankee Jerry Coleman when discussing Yogi, see YOGI BERRA WITH TIM HORTON, YOGI 4 (1989), and also by Yogi himself. *Id.* at 16, 18. "Berraism" has also been used by commentators. See, e.g., PEPE, *supra* note 8, at 185-88 (containing a glossary of Berraisms); see also RICHARD LEDERER, *ANGUISHED ENGLISH* 89-91 (1987) (listing Berraisms).

¹⁹ See DICKSON, *supra* note 10, at 43.

Legal Significance:

Lack of bias on the part of the trier of fact is, of course, fundamental to a fair trial.²⁰ Here Yogi extends the same principle to baseball, observing that preconceptions only get in the way of playing the game. Yogi teaches us that preconceptions and biases are not only unfair, but they can also mislead. There obviously is no such thing as *a priori* knowledge when you are squatting behind a guy with a club in his hands. In this respect, a judge is like a catcher, but without a mask.²¹ Some may interpret Yogi's statement as an existentialist denial of objective reality and knowledge itself, an idea that may have been borrowed from Nietzsche.²² It is also possible that Yogi simply was talking to George Steinbrenner.²³

* * *

Berraism B: Why Yogi thought he would be a good manager: "You observe a lot by watching."²⁴

²⁰ See *Murphy v. Florida*, 421 U.S. 794, 799 (1975) ("The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors.") (quoting *Irvin v. Dowd*, 366 U.S. 717 (1961)).

²¹ While it is difficult to find authority for the proposition that a judge is like a catcher, it is well established that a judge is not an umpire. See *United States v. Beaty*, 722 F.2d 1090, 1093 (3d Cir. 1983) (emphasizing that the Supreme Court has long abandoned the adversarial system that views judges as mere umpires). Compare Harvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). The only Judge in Major League history was Joe Judge, who was not a catcher. This Judge played first base during 1915-34, mostly for the Washington Senators (1915-32), but also for the Brooklyn Dodgers (1933) and Boston Red Sox (1933-34). *BASEBALL ENCYCLOPEDIA*, *supra* note 1, at 1204.

²² It is tempting to say that Freddy Nietzsche played center field for the Brooklyn Dodgers in 1913 and that Freddy is famous for being the only player to be ejected from a Major League game for arguing that third base does not exist. However, the Dodgers' center fielder in 1913 was Casey Stengel, see *TOTAL BASEBALL*, *supra* note 7, at 1303, later to become a Hall of Fame manager. *Id.* at 2349. We know that Casey believed in the existence of third base because while managing the New York Mets in 1962, he said: "When one of them guys hits a single to you, throw the ball to third. That way we can hold them to a double." *BASEBALL ENCYCLOPEDIA*, *supra* note 1, at 282, 1629; *BASEBALL QUOTATIONS*, *supra* note 6, at 156. While there was no Freddy Nietzsche in the Major Leagues, there was a Nietzsche who may not have believed in third base. This was Friedrich Wilhelm Nietzsche, who is regarded as a forerunner of existentialism. This Nietzsche believed that the horrors of life, possibly referring to playing third base, could be avoided by drawing an aesthetic veil over reality, then creating an ideal world. See T.Z. LAVINE, *FROM SOCRATES TO SARTRE: THE PHILOSOPHIC QUEST* 324 (1984). See also FREDERICK COPELSTON S.J., *A HISTORY OF PHILOSOPHY* 390, 397 (1994).

²³ George Steinbrenner is the principal owner of the New York Yankees. The 1996 *AMERICAN LEAGUE RED BOOK* 31 (The Sporting News 6th ed. 1996).

²⁴ *BASEBALL QUOTATIONS*, *supra* note 6, at 149; see also BERRA, *supra* note 18, at 7; DICKSON, *supra* note 10, at 45; LEDERER, *supra* note 18, at 89; PEPE, *supra* note 8, at 185.

Legal Significance:

Modern evidence law establishes that no lay witness may testify unless the witness has personal knowledge.²⁵ Here Yogi demonstrates the well-established principle that personal knowledge must be based on perception.²⁶ There are numerous other baseball axioms about perception that have legal counterparts. For example, "keep your eye on the ball" conveys an idea comparable to the maxim "equity aids the vigilant."²⁷ Similarly, the "hidden ball trick" has its counterpart, the "Socratic method."²⁸

* * *

Berraism C: "How can I think and hit at the same time?"²⁹

Legal Significance:

A corollary of the personal knowledge requirement is that lay witnesses usually are precluded from expressing opinions and must restrict their testimony to matters they have perceived.³⁰ Yogi conclusively proves the wisdom of this rule. The witness, represented by Yogi's metaphor of the batter, cannot reliably perceive and relate the facts if the witness tries at the same time to form opinions about the meaning of those facts. It is the job of the jury, not the witness, to draw conclusions about the meaning of the facts.³¹

²⁵ FED. R. EVID. 602.

²⁶ FED. R. EVID. 602 advisory committee's note.

²⁷ The entire maxim is "Equity aids the vigilant, not those who sleep on their rights." DOBBS, LAW OF REMEDIES (2d ed. 1993). Yogi batted on his lefts, although he threw on his rights. BASEBALL ENCYCLOPEDIA, *supra* note 1, at 785.

²⁸ When Socrates was over 70 years old, he was convicted of impiety and corrupting youth by the Athenian Assembly and sentenced to die by drinking hemlock. The Socratic method has led generations of law students to conclude that Socrates richly deserved what he got. ANTONY FLEW, A DICTIONARY OF PHILOSOPHY 329 (2d ed. 1984).

²⁹ BASEBALL QUOTATIONS, *supra* note 6, at 149; *see also* ROSS PETRAS & KATHRYN PETRAS, THE 776 STUPIDEST THINGS EVER SAID 76 (1993).

³⁰ The rule has medieval roots, possibly coinciding with invention of "the wave" during a rather tedious witch trial in the fourteenth century. *See* 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 211 (1926); PHIPSON, EVIDENCE 475 n.2 (10th ed. 1963) (quoting Anon. Lib. Ass'n 1349, at 110, 111).

³¹ *See, e.g.*, CAL. EVID. CODE § 312 (West 1995).

*Topic: Maxims of Jurisprudence**Background:*

The California Legislature, in its Civil Code, has pronounced various legal maxims.³² Yogi has made equivalent statements in words far more illuminating. For example:

Berraism: About the movie, *The Magnificent Seven*,³³ starring Steve McQueen: "He made that picture before he died."³⁴

or

Explaining his variety of sweaters in assorted colors: "The only color I don't have is navy brown."³⁵

Equivalent California Civil Code (§ 1597): "Everything is deemed possible except that which is impossible in the nature of things."³⁶

* * *

Berraism: On the Mets' chances in the 1973 National League East pennant race: "It's not over 'til it's over."³⁷

Equivalent California Civil Code (§ 3547): "A thing continues to exist as long as is usual with things of that nature."³⁸

* * *

³² See CAL. CIV. CODE §§ 1597, 3509-48 (West 1996).

³³ United Artists 1960.

³⁴ BASEBALL QUOTATIONS, *supra* note 6, at 149; BERRA, *supra* note 18, at 6; DICKSON, *supra* note 10, at 42; PEPE, *supra* note 8, at 186.

³⁵ PEPE, *supra* note 8, at 186; see also LEDERER, *supra* note 18, at 134.

³⁶ CAL. CIV. CODE § 1597 (West 1996). Section 1597 was also cited in another article on the cutting edge of legal scholarship. See Paul Horowitz et al., *The Law of Prime Numbers*, 68 N.Y.U. L. REV. 185, 199 n.ii (1993) (quoting CAL. CIVIL CODE § 1597).

³⁷ See *supra* note 10.

³⁸ CAL. CIV. CODE § 3547 (West 1996).

Berraism: On why he thought he would be a good manager: "You observe a lot by watching."³⁹

Equivalent California Civil Code (§ 3527): "The law helps the vigilant."⁴⁰

* * *

Berraism: On his theory of baseball, the thinking person's game: "Baseball is ninety percent mental and the other half is physical."⁴¹

or

When asked by a waitress whether he wanted his pizza cut into four or eight pieces: "Better make it four. I don't think I can eat eight."⁴²

or

"You give 100% in the first half of the game, and if that isn't enough in the second half you give what's left."⁴³

Equivalent California Civil Code (§ 3536): "The greater contains the less."⁴⁴

* * *

Berraism: On the shadows in left field at Yankee Stadium in the fall: "It gets late early out there."⁴⁵

Equivalent California Civil Code (§ 3546): "Things happen according to the ordinary course of nature and the ordinary habits of life."⁴⁶

* * *

³⁹ See *supra* note 24.

⁴⁰ CAL. CIV. CODE § 3527 (West 1996).

⁴¹ BASEBALL QUOTATIONS, *supra* note 6, at 149; BERRA, *supra* note 18, at 7; DICKSON, *supra* note 10, at 41; LEDERER, *supra* note 18, at 91; see also PEPE, *supra* note 8, at 185.

⁴² LEE GREEN, SPORTSWIT 157 (1984). See also DICKSON, *supra* note 10, at 45; LEDERER, *supra* note 18, at 91.

⁴³ DICKSON, *supra* note 10, at 45. See also BERRA, *supra* note 18, at 6; PETRAS & PETRAS, *supra* note 29, at 76.

⁴⁴ CAL. CIV. CODE § 3536 (West 1996).

⁴⁵ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 11; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 91; PEPE, *supra* note 8, at 187.

⁴⁶ CAL. CIV. CODE § 3546 (West 1996).

Berraism: Explaining his variety of sweaters in assorted colors: "The only color I don't have is navy brown."⁴⁷

Equivalent California Civil Code (§ 3530): "That which does not appear to exist is to be regarded as if it did not exist."⁴⁸

* * *

Berraism: When asked by a player for the correct time: "Do you mean now?"⁴⁹

Equivalent California Civil Code (§ 3535): "Contemporaneous exposition is in general the best."⁵⁰

* * *

Topic: Finality of Judgments

Berraism: On the Mets' chances in the 1973 National League East pennant race: "It's not over 'til it's over."⁵¹

Legal Significance:

Much of the stability and certainty of our legal system rely upon the essence of this Berraism and are in fact contained in the Constitution of the United States. Where would our entire system of jurisprudence be without the concept of appellate review? Indeed, if "it was over when it was over" at the trial or legislative level, much of the work of the Supreme Court would cease to exist,⁵² and then so much for our system of checks and balances.

⁴⁷ See *supra* note 35.

⁴⁸ CAL. CIV. CODE § 3530 (West 1996).

⁴⁹ BASEBALL QUOTATIONS, *supra* note 6, at 152; BERRA, *supra* note 18, at 9; PEPE, *supra* note 8, at 187.

⁵⁰ CAL. CIV. CODE § 3535 (West 1996).

⁵¹ See *supra* note 10.

⁵² The appellate jurisdiction of the Supreme Court is found in Article III, section 2 of the United States Constitution. U.S. CONST., art. III, § 2. The Supreme Court's original jurisdiction is limited to cases involving Ambassadors, other public Ministers and Consuls, and some cases involving States. *Id.* Also, it is the Supreme Court which ultimately decides if acts of Congress have exceeded the bounds permitted under the Constitution. See *United States v. Lopez*, 115 S. Ct. 1624, 1626-30 (1995).

In addition to our appellate system, there are other areas where this Berraism applies. For example, the notions of *res judicata* and collateral estoppel⁵³ are predicated upon an understanding of when "over" is. Similarly, in the arena of criminal law, by Constitutional decree, there is a guarantee against double jeopardy,⁵⁴ so that a defendant in a criminal matter can know with certainty that "it is over when it's over." However, in some cases, while it might be over from a criminal standpoint, it may not be over from a civil one, and it may never be over in the courtroom of public opinion.⁵⁵

2. COURTS

Topic: U.S. Supreme Court Justices

Berraism: "How can I think and hit at the same time?"⁵⁶

Background:

From *The New York Times, Your Law-Baseball Quiz*⁵⁷

The names of four major league baseball personalities appear after the name of a Supreme Court Justice. Circle the name of the baseball figure who bears the same relationship to baseball as the Justice bears to law.

Question: Earl Warren

- (a) Yogi Berra
- (b) Roberto Clemente
- (c) Tris Speaker
- (d) Willie Mays

. . . .

Answer: (a) Yogi Berra

⁵³ The concepts involved in *res judicata* and collateral estoppel are discussed in *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 326-33 nn. 4-5 (1979).

⁵⁴ See U.S. CONST. amend. V.

⁵⁵ See, e.g., FRANK SCHMALLEGER, PH.D., TRIAL OF THE CENTURY: PEOPLE OF THE STATE OF CALIFORNIA VS. ORENTHAL JAMES SIMPSON (1996).

⁵⁶ See *supra* note 29.

⁵⁷ Robert M. Cover, *Your Law-Baseball Quiz*, N.Y. TIMES, Apr. 5, 1979, reprinted in SPENCER WEBER WALLER ET AL., BASEBALL AND THE AMERICAN LEGAL MIND 431-33 (1995).

Both Warren and Berra were enormously effective performers on teams with many stars. Despite the presence of players such as Mantle, Maris, Frankfurter, Douglas and Black in the same lineup—all of whom appeared to have a more elegant swing or style, Berra and Warren were the truly most valuable players. Both would frequently swing at bad pitches, but both were capable of hitting them for extra bases, especially in the clutch. Both saw through excessive thought to the true essence of their game.

Theorists beset us with other definitions of law But the idea of justice survives all such myopic views, for as Cicero said, “We are born to it,” said Warren.⁵⁸

Or as Yogi said more succinctly, “How can [you] think and hit at the same time?”

* * *

Topic: Res Judicata; Institutional Role of the Supreme Court

Berraism: On the Mets’ chances in the 1973 National League East pennant race: “It’s not over ’til it’s over.”⁵⁹

Legal Application:

Two central features of our law were neatly captured in this phrase, one directly and the other indirectly.

Directly, Yogi expressed the basic principle of *res judicata*. Compare the subtlety of the recognition that when it’s over, it’s over, with the more ponderous expressions of the Supreme Court: “[T]he *res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum*.”⁶⁰

Indirectly, he captured the institutional role of the Supreme Court. Once the Supreme Court has spoken, it is over. Here he has a closer rival—if not the whole Court, at least Justice Jackson: “We are not final because we are infallible, but we are infallible only because we are final.”⁶¹

⁵⁸ *Id.* at 431-33.

⁵⁹ See *supra* note 10.

⁶⁰ *Jeter v. Hewitt*, 63 U.S. (1 How.) 352, 364 (1859).

⁶¹ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

* * *

Topic: Abstention

Berraism: Yogi to a radio broadcaster before an interview: "If you ask me anything I don't know, I'm not going to answer."⁶²

Legal Application:

The United States Supreme Court put Yogi's idea into effect in *Gilligan v. Morgan*.⁶³ Plaintiffs filed the case on behalf of all students at Kent State University in Ohio.⁶⁴ The essence of the complaint was that during a period of civil unrest on the campus, the National Guard, having been called by the Governor of Ohio to preserve civil order, violated students' rights of speech and assembly and caused injury and death to students.⁶⁵

Plaintiffs sought, among other things, a judicial evaluation of the "training, weaponry and orders" of the Ohio National Guard and also asked the courts to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard."⁶⁶

The Court declined to regulate the National Guard, partly because:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.⁶⁷

⁶² PETRAS & PETRAS, *supra* note 29, at 151.

⁶³ 413 U.S. 1 (1973).

⁶⁴ *Id.* at 3.

⁶⁵ *Id.*

⁶⁶ *Id.* at 5-6.

⁶⁷ *Id.* at 10. The Court also noted that responsibility for decisions involving regulation of the military are appropriately vested in branches of government which are subject to electoral accountability. *Id.*

Legal Significance:

Just as Yogi would not answer a sportscaster's question if Yogi did not know the answer, the Court refused to answer the question of how the military should be regulated, partly because the Court did not know the answer to the question.

* * *

Topic: Precedent

Berraism: Disputing the veracity of many of the Berraisms: "I really didn't say everything I said."⁶⁸

Legal Application:

The United States and California Supreme Courts agree. In 1972, the United States Supreme Court declared that the First Amendment absolutely precludes any regulation of expressive activity predicated in whole or in part on the content of the communication.⁶⁹ Just four years later plaintiffs relied on this declaration in challenging a law that regulated adult movie theaters based on content.⁷⁰ The Supreme Court upheld the law.⁷¹ In explaining this seeming contradiction, the Court declared: "But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached."⁷²

The California Supreme Court has proven similarly deft with words, explaining that the California Legislature really did not say everything it said. In *Mass v. Board of Education*,⁷³ the court ordered a teacher reinstated.⁷⁴ Then-current section 13516.5 of the California Education Code⁷⁵ declared

⁶⁸ BASEBALL QUOTATIONS, *supra* note 6, at 151; *see also* PEPE, *supra* note 8, at 188.

⁶⁹ *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

⁷⁰ *See* Young v. American Mini Theaters, 427 U.S. 50 (1976).

⁷¹ *Id.* at 72-73.

⁷² *Id.* at 65.

⁷³ 394 P.2d 579 (Cal. 1964).

⁷⁴ *Id.* at 591.

⁷⁵ CAL. EDUC. CODE § 13516.5 (renumbered as § 87811 (repealed West 1981) and § 45037 (repealed West 1994)).

that past salary *may* be paid to a teacher reinstated by a court order.⁷⁶ The Board of Education argued it should not be required to give the teacher back pay.⁷⁷ The California Supreme Court rejected the Board's argument, explaining:

Finally, the board contends that although section 13516.5 *permits* it to compensate petitioner, the statute does not *require* it to do so. Although the word "may" customarily implies permissiveness . . . , words must be construed in their textual context. The word "may" here occurs in a statute defining a public duty. "Words permissive in form, when a public duty is involved, are considered as mandatory."⁷⁸

Legal Significance:

When commenting on what previously had been said, Yogi and the U.S. and California Supreme Courts made the same point, except Yogi said it shorter and better.

* * *

Topic: Precedent

Berraism: "I really didn't say everything I said."⁷⁹

Legal Application:

This refrain can often be heard by court of appeal judges in California. Published opinions of the court of appeal first appear in the advance sheets of the *California Appellate Reports*.⁸⁰ However, appearance of an opinion in the official advance sheets does not constitute "official" publication. They may miraculously "disappear" even though they are still in print.

⁷⁶ *Mass.* 394 P.2d at 585.

⁷⁷ *Id.*

⁷⁸ *Id.* at 586.

⁷⁹ See *supra* note 68.

⁸⁰ Not all opinions of the court of appeal are published. Publication occurs only if a majority of the court rendering the opinion certifies that it meets certain standards, such as establishing a new rule of law, resolving an apparent conflict in the law, involving a legal issue of continuing public interest, or making a significant contribution to legal literature. See, e.g., CAL. RULES OF COURT R. 976(b).

There are several ways that opinions appearing in the official advance sheets become nullities and cannot be cited. First, if the California Supreme Court grants a review or rehearing of the case, the court of appeal opinion published in the official advance sheets is considered to be superseded and without precedential value.⁸¹ Also, an opinion can simply be decertified (or depublished) by an order of the California Supreme Court even if the supreme court declines to accept the case on review or to grant a rehearing.⁸² Of course, this creates quite a problem for researchers in California, who must determine the current status of a court of appeal decision.

Therefore, a court of appeal judge may think she is saying something when she writes an opinion. The opinion may even be certified for publication and make its way into the official advance sheets. However, if the California Supreme Court grants a hearing or orders depublication of the opinion, the opinion ceases to exist for precedential value,⁸³ even though it still can be found in the official advance sheets.

Legal Significance:

Because such opinions are not citable and have no precedential effect, the judge really did not say what she thought she said.

* * *

Topic: Stare Decisis

Berraism: "It's not over 'til it's over."⁸⁴

Legal Application #1:

In 1979, President Jimmy Carter appointed Judge Robert M. Parker to the federal bench in the Eastern District of Texas, where he soon discovered that almost his entire docket—and his life's work—consisted of asbestos litigation. In 1980, seeking to streamline the litigation of thousands of repetitive claims, Judge Parker invoked the doctrine of stare decisis to grant Widow

⁸¹ See CAL. RULES OF COURT R. 976(d).

⁸² See CAL. RULES OF COURT R. 979.

⁸³ See CAL. RULES OF COURT R. 977.

⁸⁴ See *supra* note 10.

Migues's partial summary judgment motion to eliminate the issue whether asbestos products cause lung cancer.⁸⁵ On the defendant Fibreboard's outraged appeal, the Fifth Circuit agreed with the defendant, judicially recognizing the concept, "It's not over til it's over."⁸⁶

Legal Application #2:

In its order granting plaintiff's motion for partial summary judgment, the district court construed *Borel v. Fibreboard Paper Products*⁸⁷ as establishing "as a matter of law" that asbestos products cause lung cancer, and that such products are unreasonably dangerous to consumers or other users under Texas standards of strict product liability.⁸⁸ This "holding of law" was found to control all product liability actions involving asbestos through the operation of stare decisis principles.⁸⁹ Accordingly, the district court held that insofar as the unreasonably dangerous nature of asbestos already had been established as a matter of law, that issue need not be tried to the jury in the case.⁹⁰ The Fifth Circuit found that the district court's interpretation of *Borel* was erroneous.⁹¹ The district court may have thought that *Borel* stood for the proposition that all asbestos products are unreasonably dangerous as a matter of law, but upon reviewing *Borel*, the Fifth Circuit concluded that there was "no such *decisis* in *Borel* to *stare*."⁹²

* * *

Topic: Ripeness

Berraism: "When you come to the fork in the road, take it."⁹³

Meaning: As with so many of Yogi's sayings, there is more than one level of meaning. The obvious meaning of "when you come to a fork in the road, take it" puts the emphasis on "take it," meaning when forced with a choice, make it. A more subtle meaning places the

⁸⁵ See *Migues v. Nicolet Indus.*, 493 F. Supp. 61, 64 (E.D. Tex. 1980).

⁸⁶ *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1187 (5th Cir. 1981).

⁸⁷ 493 F.2d 1076 (5th Cir. 1973).

⁸⁸ *Migues*, 662 F.2d at 1187.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 7.

emphasis on "when," meaning do not make premature decisions. This subtle meaning has legal significance.

Legal Application:

The United States Supreme Court focused on "when" in *Barry Goldwater v. Carter*.⁹⁴ In this case, various members of Congress filed suit alleging that President Carter had violated his sworn duty to uphold the laws of the United States by terminating a treaty with Taiwan.⁹⁵ The suit sought declaratory and injunctive relief to prevent termination of the treaty, asserting that only Congress, not the President, may terminate treaties.⁹⁶ The Supreme Court granted certiorari, and ordered the complaint dismissed.⁹⁷ Justice Powell filed a statement which summarized the posture of the case. He said "a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches."⁹⁸

Justice Powell further elaborated:

This Court has recognized that an issue should not be decided if it is not ripe for judicial review. Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of is-

⁹⁴ 444 U.S. 996 (1979).

⁹⁵ These facts come from the lower court opinion. *Goldwater v. Carter*, 617 F.2d 697, 701 (1979), vacated, 444 U.S. 996 (1979).

⁹⁶ *Id.*

⁹⁷ *Goldwater*, 444 U.S. at 996.

⁹⁸ *Id.* at 997-98 (Powell, J., concurring).

sues before the normal political process has the opportunity to resolve the conflict.⁹⁹

Legal Significance:

Thus, Justice Powell agreed with Yogi: take the fork in the road when it is reached, not before.

* * *

Topic: Law of the Case

Berraism: "It's déjà vu all over again."¹⁰⁰

Legal Application:

Under the doctrine of the law of the case, a determination made at an earlier stage of a proceeding will be treated as correct in all subsequent stages of the proceeding before the same tribunal.¹⁰¹ A trial court will treat its earlier rulings as conclusive in later trial proceedings, and an appellate court will likewise treat its earlier decision on a legal issue as conclusive on a subsequent appeal in the same case.¹⁰² Application of the law of the case is a matter of judicial practice rather than a limit on the power of courts.¹⁰³ The doctrine conserves judicial resources by eliminating repetitive hearings, provides consistency in successive stages of an action, and promotes public confidence in the judicial system by adherence to decisions already made.¹⁰⁴

Although serving institutional administration of justice interests, the doctrine sometimes operates at the expense of the merits of an individual case. Thus, in *Lincoln National Life Insurance Company v. Roosth*,¹⁰⁵ the Fifth

⁹⁹ *Id.* at 997 (citation omitted).

¹⁰⁰ DICKSON, *supra* note 10, at 44. Although this saying is widely attributed to Berra, *see, e.g.*, *United States v. Manni*, 810 F.2d 80, 81 (6th Cir. 1987) (quoting Yogi Berra as saying "déjà vu all over again"); *Claussen v. Aetna Casualty & Sur. Co.*, 754 F. Supp. 1576, 1577 (S.D. Ga. 1990) (relating that Yogi Berra once said, "it's like déjà vu all over again"), Yogi denies he said it. BERRA, *supra* note 18, at 15. On the other hand, Yogi did say, "I really didn't say everything I said," *see supra* note 68, so go figure.

¹⁰¹ FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* 535-36 (2d ed. 1977).

¹⁰² *Id.*

¹⁰³ *See Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

¹⁰⁴ *See Allan D. Vestal, Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1.

¹⁰⁵ 306 F.2d 110 (5th Cir. 1962) (en banc).

Circuit applied the law of the case on a successive appeal, even though both the second panel of the court and the full court (to which the case was ordered resubmitted prior to decision of the second panel) disagreed with the decision of the first panel.¹⁰⁶

The court was concerned about encouraging multiple appeals in order to find a receptive panel¹⁰⁷ and about procedural variations resulting in the availability of successive appeals in some instances but not in others.¹⁰⁸ Perhaps with Yogi's jurisprudential wisdom in mind, the court employed a baseball analogy to express its concern:

One of the vices is that whether a litigant gets a second, or a third time *at bat* likewise depends so much on chance, or at least on factors making it most unfair that in one situation a second trial and appeal is available while in another one it is lacking.¹⁰⁹

Accordingly, the court concluded:

[N]othing about this case warrants our exercising the undoubted power to overrule the prior decision reached by the Court on the first appeal. On the contrary, any effort to re-examine the merits and now declare a result—either the same or a different one—independent of the former decision leads to consequences much more serious to the permanent, objective, administration of justice under law than any supposed individualized injustice to one or all of the litigants.¹¹⁰

Legal Significance:

When the doctrine of the law of the case is applied, “[i]t’s déjà vu all over again”—for the court as well as the parties.

¹⁰⁶ *Id.* at 112. The disagreement was not on the controlling standard, whether the evidence was sufficient to make a jury case (a question of law), but only on whether the evidence satisfied that standard. *Id.*

¹⁰⁷ *Id.* at 114.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.*

3. CONSTITUTIONAL LAW

Topic: *Federal War Powers*

Berraism: On the Mets' chances in the 1973 National League East pennant race: "It's not over 'til it's over."¹¹¹

Legal Application:

Under the war powers conferred on the federal government by the Constitution,¹¹² Congress and the President may be able to act in areas that normally are reserved to the states. Local matters that fall within the scope of the states' police power and which Congress could not reach even under a broad reading of its power to regulate interstate commerce¹¹³ may become subject to federal regulation through the war powers.

On various occasions, the federal government has sought to enact and/or enforce war powers legislation after the war has ended.¹¹⁴ When these measures were challenged in court, the question arose as to when a war is over for purposes of the government's ability to exercise its war powers. The Supreme Court's consistent answer has been: "it's not over 'til it's over."

Thus, in *Hamilton v. Kentucky Distilleries Co.*¹¹⁵ and *Ruppert v. Caffey*,¹¹⁶ the Court upheld the government's authority to adopt and enforce "war-time prohibition" after the World War I armistice.¹¹⁷ In *Hamilton*, the Court explained that the war powers still could be invoked because "the treaty of peace has not yet been concluded, . . . other war activities have not been brought to a close, and . . . it . . . can not even be said that the manpower of the nation has been restored to a peace footing"¹¹⁸

¹¹¹ See *supra* note 10.

¹¹² See U.S. CONST. art. I, § 8, cls. 1, 11-16; U.S. CONST. art. II, § 2, cl. 1.

¹¹³ See U.S. CONST. art. I, § 8, cl. 3.

¹¹⁴ See CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918 (1989).

¹¹⁵ 251 U.S. 146 (1919).

¹¹⁶ 251 U.S. 264 (1920).

¹¹⁷ *Hamilton*, 251 U.S. at 163.

¹¹⁸ *Id.*

Similarly in the wake of World War II, the Court sustained a federal rent control law that was adopted under authority of the war powers two years after the war had ended.¹¹⁹ According to the Court, “the war power includes the power ‘to remedy the evils which have arisen from its rise and progress’ and continues for the duration of that emergency.”¹²⁰

Legal Significance:

In war as in baseball, “it’s not over ’til it’s over.”

* * *

Topic: Libel/First Amendment

Berraism: Disputing the veracity of many of the Berraisms: “I really didn’t say everything I said.”¹²¹

Legal Application:

In *Masson v. New Yorker Magazine*,¹²² the Supreme Court held that the intentional fabrication of quotations in an article was not enough, by itself, to establish liability for libel if the statements were substantially accurate in reflecting what was said.¹²³ *Masson* concerned a libel suit brought by Jeffrey Masson, a psychoanalyst, against Janet Malcolm, a writer for *The New Yorker*.¹²⁴ The article was based on more than 40 hours of interviews and contained many quotations; however, none of the quotes were actual statements made during the interviews.¹²⁵

The Court, in an opinion by Justice Kennedy, said that quotation marks do not convey that what is within them is a word-for-word transcription of an actual statement. Rather, the Court said that a quotation implies a substantially accurate representation of a person’s statement. The issue, therefore, is not whether the quotation published is a verbatim reflection of what was said,

¹¹⁹ See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

¹²⁰ *Id.* at 141.

¹²¹ See *supra* note 68.

¹²² 501 U.S. 496 (1991).

¹²³ *Id.* at 517.

¹²⁴ *Id.* at 499-502.

¹²⁵ *Id.* at 502.

but whether it is substantially accurate. Falsely attributing a statement to a person can be the basis for defamation liability, but there has to be proof that the statements substantially change the meaning of what was said.¹²⁶

Legal Significance:

Like Yogi claiming false attribution, Jeffrey Masson did not say everything that Janet Malcolm attributed to him. But the Supreme Court says it does not matter so long as the quotation reflects the "spirit" of what was said.

* * *

Topic: Obscenity/First Amendment

Berraism: When asked about the 1984 Yankees' dismal record: "I wish I had an answer to that because I'm getting tired of answering that question."¹²⁷

Legal Application:

The United States Supreme Court has had difficulty in defining "obscenity." In fact, in *Jacobellis v. Ohio*,¹²⁸ a case dealing with prosecution for exhibition of an obscene film,¹²⁹ Justice Stewart, concurring in the reversal of the conviction, said the Court may be trying to define the undefinable.¹³⁰

Later in *Miller v. California*,¹³¹ the Court listed what must be proven to obtain a conviction for an offense involving "obscene" material. The basic guidelines for the trier of fact are:

- (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual contact specifically defined by the applicable state

¹²⁶ *Id.* at 499, 517-18.

¹²⁷ DICKSON, *supra* note 10, at 42; PETRAS & PETRAS, *supra* note 29, at 76.

¹²⁸ 378 U.S. 184 (1964).

¹²⁹ *Id.* at 185-86.

¹³⁰ *Id.* at 197 (Stewart, J., concurring).

¹³¹ 413 U.S. 15 (1973).

law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹³²

One year later, concurring in *Jenkins v. Georgia*¹³³ that the movie *Carnal Knowledge* was not obscene, Justice Brennan said the obscenity standard still was vague. He wrote:

[I]t is clear that as long as the *Miller* test remains in effect “one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.”¹³⁴

Legal Significance:

Yogi’s wish that people would stop asking him a question to which he has no answer seemingly is the same wish as that of some of the Justices in obscenity cases. Because the Court, according to Justice Brennan, is unable to say what “obscenity” means, many members of the Court, no doubt, wish litigants would stop asking.

* * *

Topic: Equal Protection/Gender Discrimination

Berraism: When a Yankee player walked into the hotel bar and said he was waiting for Bo Derek¹³⁵ to meet him, Yogi responded: “I haven’t seen him.”¹³⁶

Legal Application:

In *Geduldig v. Aiello*,¹³⁷ the Supreme Court ruled that discrimination based on pregnancy was not gender-based discrimination. Specifically, the

¹³² *Id.* at 24 (citation omitted).

¹³³ 418 U.S. 153 (1974).

¹³⁴ *Id.* at 164-65 (Brennan, J., dissenting) (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 92 (1973)).

¹³⁵ Actress Bo Derek starred, with actor Dudley Moore, in the 1979 movie *10*. Helen Sierra, *The Check’s in the Mail*, CHI. TRIB., Apr. 9, 1992, available in 1992 WL 4470958; Bruce Westbrook, *Moore Has Made Some Forgettable Films*, HOUS. CHRON., Apr. 11, 1993, available in 1993 WL 9546939.

¹³⁶ BERRA, *supra* note 18, at 15; PEPE, *supra* note 8, at 152.

¹³⁷ 417 U.S. 484 (1974).

Supreme Court held that it was not a denial of equal protection for a state's disability insurance system to exclude pregnancy-related disabilities, but include disabilities affecting only men. California's disability law provided payments for disabilities lasting more than eight days and less than twenty-six weeks, but denied any coverage for disabilities caused by pregnancy.¹³⁸

In a footnote, the Court elaborated: "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."¹³⁹

Legal Significance:

The Supreme Court amazingly held that discrimination based on pregnancy is not gender discrimination. The entire burden from the exclusion of pregnancy is borne by women, making the discriminatory nature of the exclusion obvious. Like Yogi, the Court failed to recognize basic gender differences.

Congress, by statute, effectively overruled *Geduldig* when it enacted the Pregnancy Discrimination Act, which defines sex discrimination to include pregnancy discrimination¹⁴⁰ and prohibits discrimination on that basis.¹⁴¹

* * *

Topic: Equal Protection/Economic Regulation

Berraism: When Yogi's son Dale Berra was playing shortstop for the Pittsburgh Pirates, the younger Berra was asked to compare himself to his father. Dale responded: "Our similarities are different."¹⁴²

¹³⁸ *Id.* at 487-88, 494-95, 496 n.20.

¹³⁹ *Id.* at 496 n.20.

¹⁴⁰ 42 U.S.C. § 2000e (k) (1994).

¹⁴¹ 42 U.S.C. § 2000e-2(a) (1994).

¹⁴² BASEBALL QUOTATIONS, *supra* note 6, at 153; LEDERER, *supra* note 18, at 135. This Dale Berraism qualifies for inclusion in this Essay under the compelling doctrines of "like father, like son" and "the apple doesn't fall far from the tree." GREGORY Y. TITELMAN, *DICTIONARY OF POPULAR PROVERBS* 15, 218 (1996).

Legal Application:

The United States Supreme Court also has recognized that what may appear to be similar may in fact be different. For example, in *City of New Orleans v. Dukes*,¹⁴³ the city passed an ordinance prohibiting vendors from selling food from pushcarts in the French Quarter. The ordinance, however, permitted vendors who had operated continuously in that area for eight or more years to continue operating.¹⁴⁴ Nancy Dukes, who had operated a pushcart business in the French Quarter for only two years, challenged the ordinance on equal protection grounds.¹⁴⁵

The Court said that the city had decided "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists."¹⁴⁶ The Court reasoned that this objective could be met by banning peddlers and hawkers who interfered with its charm and beauty and disturbed tourists, thereby causing a deleterious effect on the city's economy.¹⁴⁷ The Court also found that the two vendors who qualified under the "grandfather clause" had themselves become part of the distinctive character and charm that distinguish the French Quarter. The Court concluded that the city's judgments were rational, and did not constitute a constitutionally impermissible denial of equal protection.¹⁴⁸

Legal Significance:

Yogi's son Dale Berra recognized that what might appear on the surface to be similar really has differences, an observation shared by the Court when it recognized that all pushcart vendors were not the same.

* * *

¹⁴³ 427 U.S. 297 (1976).

¹⁴⁴ *Id.* at 298.

¹⁴⁵ *Id.* at 298-99.

¹⁴⁶ *Id.* at 304 (quoting *Dukes v. City of New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974)).

¹⁴⁷ *Id.* at 304-05.

¹⁴⁸ *Id.* at 305.

Topic: Separation of Powers

Berraism: Once while playing the game Twenty Questions, Yogi asked: "Is he living?" Then without thinking, asked, "Is he living now?"¹⁴⁹

Legal Application:

This comment reflects a sensitive understanding of the Supreme Court's separation of powers jurisprudence. In *Plaut v. Spendthrift Farm, Inc.*,¹⁵⁰ the Court considered the constitutionality of a federal statute that purported to allow reinstatement of any securities fraud lawsuit that had been dismissed based on a particular statute of limitations determination the Court had made during the pendency of the suit. The Court held the statute unconstitutional, as an attempt to resurrect suits that were "dead." On the other hand, the Court acknowledged that Congress could change the law governing a lawsuit and make the new rule retroactive to all suits that were still "living" on appeal.¹⁵¹ Thus, the Court found the key constitutional distinction to lie in whether the lawsuit was "living now," i.e., at the time the new rule became law.

* * *

Topic: Civil Rights

Berraism: One day the great catcher and coach was told about the visit to the United States of Robert Briscoe, the first Jewish mayor of Dublin. Yogi commented: "It could only happen in America."¹⁵²

Legal Application:

In his comment, Yogi expressed a belief, widely held among Americans, that the nation is exceptional in many ways,¹⁵³ and especially so with regard

¹⁴⁹ BERRA, *supra* note 18, at 17.

¹⁵⁰ 115 S. Ct. 1447 (1995).

¹⁵¹ *Id.* at 1457.

¹⁵² DICKSON, *supra* note 10, at 43.

¹⁵³ Historians and sociologists talk about "American exceptionalism" to refer to a variety of beliefs and

to individual rights. But the humorous side of Yogi's "only in America" comment also deserves note, as it reflects a significant shortcoming in the nation's commitment to civil rights.

Yogi is right that the idea of ensuring equal opportunity, regardless of status, is dear to American hearts, including those beating in legal chests. The nation was founded on the premise that "all men are created equal."¹⁵⁴ Courts have often regarded the protection of civil rights as central to national values and identity. Thus a nineteenth-century jurist struck down a San Francisco ordinance aimed at Chinese residents as not only a violation of the Fourteenth Amendment, but "unworthy of a brave and manly people."¹⁵⁵ In this century, Justice Frankfurter linked America's commitment to civil rights to a larger Western tradition, holding that fundamental due process depends on "those canons of decency and fairness which express the notions of justice of English-speaking peoples."¹⁵⁶ And throughout our history, legal advocates have used the epithet "un-American" to attack proposals that may infringe civil rights.¹⁵⁷

practices which distinguish, and appear to distinguish, the United States from the rest of the world. *See, e.g.*, SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996); DAVID M. WROBEL, *THE END OF AMERICAN EXCEPTIONALISM: FRONTIER ANXIETY FROM THE OLD WEST TO THE NEW DEAL* (1993); *IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM* (Byron E. Shafer ed., 1991).

¹⁵⁴ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). These words have certainly grown in meaning since that day. *See* GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 121-47 (1992).

¹⁵⁵ *Ho Ah Kow v. Nunan*, 12 Fed. 252, 256-57 (Cir. Cal. 1879) (striking down so-called "queue ordinance" in San Francisco which required that all jail inmates have their hair cut to a length of one inch, an ordinance aimed at Chinese men who wore their hair in a traditional queue).

¹⁵⁶ *Rochin v. California*, 342 U.S. 165, 169 (1952) (establishing a constitutional right to substantive due process). *See also* *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) ("The knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.") Nevertheless, the Court in *Wolf* held that evidence obtained in such an unauthorized search need not be excluded from a criminal trial. *Id.* at 33.

¹⁵⁷ *See, e.g.*, *State v. Williams*, 674 A.2d 1372, 1382 (Conn. App. 1996) (Foti, J., dissenting) (quoting defense attorney's jury argument on insufficient evidence presented by prosecution: "[A]s good citizens like I know you are, you could never convict a man on such a shabby case. . . . You couldn't do that as a good person or as a good citizen. You know, it sounds corny, but, it would be un-American."); *Meyers v. Town of Westport*, 570 A.2d 249, 252 (Conn. Supp. 1989) (quoting argument that ban on certain municipal employees running for office was un-American); *United States v. Louisiana*, 225 F. Supp. 353, 372 n.46 (E.D. La. 1963) (quoting nineteenth-century attacks on Louisiana constitutional proposal to place numerous restrictions on the right to vote; one state constitutional delegate considered it an "un-American doctrine that a man shall be a voter because his father or grandfather once possessed that right"; another called the proposal "glaringly unconstitutional, undemocratic and un-American.") *aff'd*, 380 U.S. 145 (1965).

Alas, Yogi's comment also illustrates that American pride in civil rights is often both parochial and exaggerated. Ours is hardly the only nation in the world in which a Jew could become mayor after all. Worse, denials of individual freedoms have a long legal tradition in America. The United States was founded in part on slavery;¹⁵⁸ its highest court permitted a system of racial segregation to flourish for nearly a century following emancipation;¹⁵⁹ and during this century the law did little to curb the civil liberties oppressions of the ironically named Committee on Un-American Activities,¹⁶⁰ to cite but a few of the more prominent examples of legal lapses in American civil rights.

Legal Significance:

In his quip Yogi identified America with civil rights, and indeed such rights remain the glory of the nation's legal system, but Yogi's comment also revealed the unfortunate gap between American ideal and reality.

* * *

Topic: Civil Rights

Berraism: Explaining declining attendance in Kansas City: "If people don't want to come to the ballpark, nobody's going to stop them."¹⁶¹

¹⁵⁸ U.S. CONST. art. 1, §§ 2, 9; art. IV, § 2. See DONALD ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820* (1982).

¹⁵⁹ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898). Racial segregation of course extended to major league baseball until after World War II. It is difficult to say exactly when major league baseball began. However, it might be said that the modern era began in 1903 when the winners of the American and National Leagues first met in the World Series. Boston (American League) beat Pittsburgh (National League) five games to three. It was not until 1947 that the first African-American, Jackie Robinson, played in the major leagues. Robinson played for the Brooklyn Dodgers, winning National League Rookie of the Year honors in 1947. He was elected to the Baseball Hall of Fame in 1962. *SPORTS ENCYCLOPEDIA*, *supra* note 6, at 20, 270, 662.

¹⁶⁰ See, e.g., *Braden v. United States*, 365 U.S. 431 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959). See generally DAVID CAUTE, *THE GREAT FEAR* (1978); GRIFFIN FARIELLO, *RED SCARE: MEMORIES OF THE AMERICAN INQUISITION* (1995); STANLEY I. KUTLER, *THE AMERICAN INQUISITION* (1982).

¹⁶¹ *BASEBALL QUOTATIONS*, *supra* note 6, at 150; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 134; PEPE, *supra* note 8, at 185.

Legal Application:

In *United States v. Charlottesville Redevelopment and Housing Authority*,¹⁶² the city of Charlottesville, Virginia, was challenged by the federal government because of the city's method of assigning tenants to public housing. Charlottesville attempted to integrate the housing with a "50/50 mix of black and white residents."¹⁶³ However, as a result of this policy, black applicants had to wait considerably longer than white applicants for spaces. The court found that, although Charlottesville was to be commended for attempting to integrate housing, the plan used by the city resulted in unjustified discrimination against blacks. The city had argued that the white community had great needs for public housing. The court, however, found that the absence of whites on the waiting list demonstrated that whites did not perceive this need. The court stated:

Even if, in abstract terms, this need for public housing among the white population of Charlottesville is real, CRHA has yet to demonstrate how its plans will convince the white community of its own public housing needs and then, short of some sort of coercive feature, induce them to act upon those needs. The problem of inducing them to act upon this need and seek public housing is akin to the problem of a lack of interest among certain baseball fans, a problem so acutely described by Yogi Berra when he said, "If the people don't want to come out to the ballpark, nobody's going to stop them." If the white community in Charlottesville who formally meet the criteria for eligibility for public housing do not perceive public housing as a need or as an option which is viable to them, and if they do not want to put their name on the list of applicants for public housing, "Nobody's going to stop them."¹⁶⁴

Legal Significance:

Yogi had great insight into the difficult legal area of civil rights when he said, "Nobody's going to stop them."

* * *

¹⁶² 718 F. Supp. 461 (W.D. Va. 1989).

¹⁶³ *Id.* at 462.

¹⁶⁴ *Id.* at 470 n.14.

Topic: Due Process and Corporal Punishment in Schools

Berraism: "How can I [you] think and hit at the same time?"¹⁶⁵

Legal Application:

In the good old days, teachers didn't have to do much thinking before exercising their common law privilege of corporal punishment.¹⁶⁶ But in *Goss v. Lopez*,¹⁶⁷ the United States Supreme Court ruled that, under the Due Process Clause of the Fourteenth Amendment, public school students are entitled to notice and a hearing prior to a suspension of up to ten days.¹⁶⁸ This informal prior hearing could be conducted by the teacher simultaneously acting as prosecutor and decisionmaker, need only take seconds, and was described by the Court itself as "rudimentary."¹⁶⁹

Still, *Goss* struck fear into the hearts of public school administrators and teachers. If a student was entitled to an informal hearing before a suspension as short as part of one day, what greater due process protections would surely be required before a student could be struck by a teacher? In *Ingraham v. Wright*,¹⁷⁰ the Supreme Court assuaged those fears. It held that no notice or prior hearing at all was required before a student was corporally punished.¹⁷¹ The due process rights of students were fully protected by the availability of a remedy at tort should the teacher exceed the scope of the common law privilege to use reasonable, nonexcessive force.¹⁷²

The *Ingraham* majority reasoned that a prior hearing would delay the punishment. Further, depending upon the information obtained in the hearing,

¹⁶⁵ BASEBALL QUOTATIONS, *supra* note 6, at 149; PETRAS & PETRAS, *supra* note 29, at 76.

¹⁶⁶ "Readin' and writin' and 'rithmetic, taught to the tune of a hickory stick" is not a Berraism, but well sums up the nostalgic view of such days.

¹⁶⁷ 419 U.S. 565 (1975).

¹⁶⁸ *Id.* at 581.

¹⁶⁹ *Id.* at 581-84.

¹⁷⁰ 430 U.S. 651 (1977).

¹⁷¹ *Id.* at 674-75. In the immortal (or infamous) footnote 44, the majority acknowledged that, were the state seeking to physically punish an adult, or even a minor in a nonschool context, the Due Process Clause would require a full criminal or juvenile court trial. But because, happily, corporal punishment in schools was traditional and privileged at common law, it could be regarded as a less serious deprivation of liberty.

¹⁷² *Id.* at 679 n.47. That remedy, the dissent pointed out, was only available to a student beaten excessively. An innocent student who was wrongly punished, but whose teacher used reasonable, nonexcessive force, had no remedy at all at tort. *Id.* at 694 n.11.

the decision to corporally punish might even be reversed. Burdened by delay and fearing the loss of authority a reversed decision connotes, “[t]eachers, properly concerned with maintaining authority in the classroom, may well prefer to rely on other disciplinary measures—which they may view as less effective.”¹⁷³ In other words, they might have to stop and think; and then, of course, they could not hit.

Legal Significance:

Yogi has never gone on record on the issue of corporal punishment in or out of school. But he brilliantly summed up the teacher’s dilemma to which the *Ingraham* majority was sensitive.

* * *

Topic: Due Process and Pretrial Detention in Juvenile Court

Berraisms: (1) “How can you say this and that when this and that hasn’t happened yet?”¹⁷⁴

(2) “Foresight is always better, afterward.”¹⁷⁵

Legal Application:

Adults charged with crimes have, with very rare exceptions, a right to bail pending trial. Minors charged with delinquency, however, are routinely “detained,” in the juvenile equivalent of a jail, for days or even weeks pending their juvenile court trials. In *Schall v. Martin*,¹⁷⁶ the Court heard a challenge to this practice on due process grounds.

A class of juveniles argued that it violated fundamental fairness for a judge to hold them based solely on the judge’s prediction that they were likely to commit a crime against a person or property if released.¹⁷⁷ They presented at trial statistics showing that of the detained juveniles, one-third eventually had the charges against them dismissed, and a second third, after trial, were

¹⁷³ *Id.* at 680.

¹⁷⁴ PETRAS & PETRAS, *supra* note 29, at 76.

¹⁷⁵ *Quoted in* *Gerbers, Ltd. v. Wells County Drainage Bd.*, 608 N.E. 2d 997, 999 (Ind. App. 1993).

¹⁷⁶ 467 U.S. 253 (1984).

¹⁷⁷ *Id.* at 262, 278.

given a "non-secure disposition": that is, were found by the judge not to require placement in a locked facility.¹⁷⁸ They argued that this showed that in two-thirds of the cases the decision to detain before trial was wrong.¹⁷⁹

They also argued that "it is virtually impossible to predict future criminal conduct with any degree of accuracy."¹⁸⁰ Based on expert testimony and a review of the scientific research, the trial court found that, "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime."¹⁸¹ The juveniles argued that it must violate the Due Process Clause to deprive them of liberty by a judge's decision which, statistically speaking, was extremely likely to be wrong.¹⁸²

Both the trial court and the Second Circuit concluded that the juveniles' due process rights had been violated. The Supreme Court, however, reversed and upheld the pretrial detention law. The majority reasoned that dismissing the charges in one-third of the cases and giving another one-third nonsecure dispositions did not mean that the initial decisions to detain were wrong. It just showed leniency consistent with the rehabilitative purpose of the juvenile court.¹⁸³

The *Schall* Court was well aware of the research showing that it is not possible, given the current state of psychiatric or psychological knowledge, to accurately predict dangerous behavior.¹⁸⁴ The Court did not dispute the juveniles' or the trial court's characterization of the scientific research. It simply said that, "From a legal point of view there is nothing inherently unat-

¹⁷⁸ *Id.* at 262.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 278. Research has consistently demonstrated that such predictions are frequently, indeed, usually wrong, and that the error is on the side of false positives (i.e. predicting dangerous acts which do not occur). See discussion of *Barefoot v. Estelle*, *infra* note 184.

¹⁸¹ *Schall*, 467 U.S. at 261 n.12 (quoting U.S. *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 708 (S.D.N.Y. 1981)).

¹⁸² *Id.* at 262.

¹⁸³ *Id.* at 273.

¹⁸⁴ In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court considered whether due process was violated by psychiatric predictions of dangerousness in the death penalty phase of a criminal trial. Amicus curiae American Psychiatric Association, among other professional groups, informed the Court of "the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right." *Id.* at 921. It had heard and rejected similar arguments with respect to predictions by lay people in *Jurek v. Texas*, 428 U.S. 262 (1976).

tainable about a prediction of future criminal conduct."¹⁸⁵ Such predictions may be wrong, but the law requires them to be made, and so they can be made. And because such predictions are made so often and at so many stages of the criminal justice system, this cannot violate fundamental fairness.

Legal Significance:

A neophyte juvenile court judge, asked to make pretrial detention decisions and familiar with the professional consensus, might well ask, "How can I say this and that when this and that hasn't happened yet?" A senior judge, reassuring the newcomer that she or he can always rectify error by "leniency" at disposition time, could say, "Foresight is always better, afterward."

4. TORTS

Topic: Negligence

Berraism: On why the Yankees lost the 1960 World Series to the Pittsburgh Pirates: "We made too many wrong mistakes."¹⁸⁶

Legal Application:

While Yogi's words at first might seem redundant, they are not. As any student of the law of negligence knows, there are right mistakes and wrong mistakes. The reasonable person is not perfect. "To hold that a person does every voluntary act at his peril, and must insure others against all of the consequences that may occur would, in most instances, be an intolerably heavy burden upon human activity."¹⁸⁷ Before a person can be held liable for negligence, we must conclude that the harm she caused resulted from a mistake that a reasonable person, exercising reasonable foresight, would not have made.¹⁸⁸ As Holmes wrote:

¹⁸⁵ *Schall*, 467 U.S. at 254.

¹⁸⁶ BASEBALL QUOTATIONS, *supra* note 6, at 151; BERRA, *supra* note 18, at 8; DICKSON, *supra* note 10, at 44; PETRAS & PETRAS, *supra* note 29, at 151.

¹⁸⁷ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 29 at 163 (5th ed. 1984).

¹⁸⁸ Reasonably prudent people do not make the wrong kind of mistakes. As one scholar wrote, "A motorist who did not watch the road would hardly think of arguing that he or she used the care of a reasonably-prudent-person-not-keeping-a-proper-lookout—a-reasonably-prudent-person-not-keeping-a-proper-look-

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid.¹⁸⁹

Take the well-known case of *Brown v. Kendall*.¹⁹⁰ A dog belonging to the defendant was involved in a fight with a dog belonging to the plaintiff. To break up the fight, defendant picked up a stick and began beating the dogs. The defendant raised the stick above his shoulder and accidentally struck and injured the plaintiff. Clearly, defendant hurt the plaintiff, and in doing so made a mistake. But unless this was the *wrong* kind of mistake, defendant could not be held responsible. If defendant was exercising "ordinary care," plaintiff could not recover.¹⁹¹

Legal Significance:

A person acting reasonably makes the right kind of mistakes; one acting unreasonably makes the wrong kind. Apparently, Mr. Kendall made the former kind; at least in the judgment of Yogi Berra, the 1960 Yankees made too many of the latter type.

* * *

Topic: Negligence/Litigation

Berraism: "Foresight is always better, afterward."¹⁹²

Legal Application # 1:

A fundamental principle of the law of negligence holds that the reasonableness of a person's conduct is to be judged from the perspective of foresight, not hindsight.¹⁹³ Yogi Berra put it best. Baron Bramwell perhaps stated it

out is a contradiction in terms." CLARENCE MORRIS & C. ROBERT MORRIS, JR., *MORRIS ON TORTS* 49 (2d ed. 1980).

¹⁸⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 76 (Mark DeWolfe Howe ed., 1963) (1881).

¹⁹⁰ 60 Mass. (6 Cush.) 292 (1850).

¹⁹¹ *Id.* at 296.

¹⁹² *Quoted in* *Gerbers, Ltd. v. Wells County Drainage Bd.*, 608 N.E. 2d 997, 999 (Ind. App. 1993).

¹⁹³ "The actor's conduct must be judged in the light of the possibilities apparent to him at the time,

second best when he wrote, "Nothing is so easy as to be wise after the event."¹⁹⁴ Or, somewhat less elegantly and in a slightly different context, it has been written that "no court should strike down a reasonable liquidated damage agreement based on foresight that has proved on hindsight to have contained an inaccurate estimation of the probable loss"¹⁹⁵

Legal Significance:

Assume a victim of accidental injury claims the defendant failed to use reasonable care in preventing the accident. We judge the defendant's conduct from the perspective of what a reasonable person looking forward would have considered safe, and not what we can determine with the benefit of hindsight.

Legal Application # 2:

Sometimes an issue argued is not reached by the court. A case in point: in *Gerbers, Ltd. v. Wells County Drainage Board*,¹⁹⁶ plaintiff's property was damaged by flood waters from a massive rainstorm (characterized by an expert witness as a "100-year storm"). Plaintiffs claimed that had the County Drainage Board not approved a third party's request to fill a drainage ditch to create a parking lot, the flood would not have occurred. The Board moved for summary judgment on the ground that when it granted the third party's petition, it was exercising a discretionary function as to which it was statutorily immune.¹⁹⁷

The court granted the Board's motion for summary judgment. This meant it did not have to decide whether the Drainage Board should have taken into account the possibility that in a "100-year flood," the absence of the drainage ditch might prove disastrous to surrounding property owners. The court would have had to decide that question only if it had first concluded that the

and not by looking backward 'with the wisdom born of the event.'" KEETON ET AL., *supra* note 187, at 170, (quoting *Greene v. Sibley, Lindsay & Curr Co.*, 177 N.E. 416, 417 (N.Y. 1931) (Cardozo, C.J.)).

¹⁹⁴ *Comman v. Eastern Counties Ry.*, 157 Eng. Rep. 1050, 1052 (1859).

¹⁹⁵ 3A WILLIAM D. HAWKLAND & FREDERICK H. MILLER, UNIFORM COMMERCIAL CODE SERIES § 2A-504:02 (Art. 2A) (1982).

¹⁹⁶ 608 N.E. 2d 997 (Ind. App. 1993).

¹⁹⁷ *Id.* at 998.

Board was not immune. But as the court made clear, the Board's decision was, indeed, discretionary, rendering it immune from liability.¹⁹⁸

Legal Significance:

Yogi was right. Foresight is always better, afterward. Or, to put it in a far less elegant way, if plaintiff's lawyers possessed the wisdom of hindsight, they would have realized it was unnecessary to discuss the "100-year flood," and that doing so was a waste of time. But neither they nor other litigators can be blamed for lacking hindsight beforehand. Still, good luck explaining the bill to the client.

* * *

Topic: Assault

Berraism: After a 1973 playoff game between the Mets, managed by Yogi, and the Reds, Yogi was asked whether he had been apprehensive in the twelfth inning. Yogi answered, "No, but I was scared."¹⁹⁹

Legal Application:

The tort of assault is committed when an actor "acts intending to cause a harmful or offensive contact with the person of another or of a third person, or an imminent apprehension of such a contact, and . . . the other is thereby put in such imminent apprehension."²⁰⁰ The term "apprehension," in turn, is defined as follows:

In order that the other may be put in the apprehension necessary to make the actor liable for an assault, the other must believe that the act may result in imminent contact unless prevented from so resulting by the other's self-defensive action or by his flight or by the intervention of some outside force.²⁰¹

¹⁹⁸ 608 N.E. 2d at 999-1000.

¹⁹⁹ BERRA, *supra* note 18, at 11; ROSS PETRAS & KATHRYN PETRAS, PAGE-A-DAY CALENDAR, THE 365 STUPIDEST THINGS EVER SAID, Aug. 19, 1996 (1996 ed.) (The Reds won the game on a Pete Rose home run.). As the discussion to follow will demonstrate, Yogi's statement was anything but stupid. Perhaps we can forgive the collectors of calendar trivia, who, unlike baseball philosophers, are not expected to understand the intricacies of the law.

²⁰⁰ RESTATEMENT (SECOND) OF TORTS § 21 (1965).

²⁰¹ *Id.* § 24.

As a close reading of the above will demonstrate, “apprehension” is not the same as “fear.” The drafters of the Restatement explain:

It is not necessary that the other believe that the act done by the actor will be effective in inflicting the intended contact upon him. It is enough that he believes that the act is capable of immediately inflicting the contact upon him unless something further occurs.²⁰²

Thus, if White Sox second baseman Ray Durham,²⁰³ who stands five feet eight, drops his bat and rushes the mound after a brushback pitch by six foot ten inch Randy Johnson,²⁰⁴ Johnson is not likely to fear that the little guy will be able to do him any harm. But Johnson might well be *apprehensive* nonetheless, because he knows that unless he does something to defend himself, or unless his teammates intervene in time, he might suffer imminent contact—more likely offensive than harmful.

Legal Significance:

Yogi Berra understood the essence²⁰⁵ of the distinction between fear and apprehension. In the twelfth inning of a baseball game as in many situations in life, almost anything can happen. There is plenty to fear when it’s the twelfth inning, particularly if the other team has its big guys coming up and your pitchers haven’t had much luck getting them out lately.

* * *

²⁰² *Id.* at cmt. b.

²⁰³ Ray Durham weighs 170 pounds. In 1995, he started 118 games at second base, hit .257, and had 51 runs batted in. He tied for sixth place in the balloting for American League Rookie of the Year. *Official Site of Major League Baseball*, at <<http://www.majorleaguebaseball.com/bios/600097.shtml>>.

²⁰⁴ Randy Johnson is a southpaw pitcher for the Seattle Mariners. He stands 6 feet 10 inches and weighs 225. In 1995, he was the American League Cy Young Award Winner after posting an 18-2 record and leading the league with 294 strikeouts. *Id.*

²⁰⁵ Mr. Berra missed just one limited aspect of the legal distinction between fear and apprehension. Under the definition, fear is in fact a subset of apprehension, meaning that if one is fearful, one is necessarily apprehensive, but not vice versa. Thus, to be completely accurate from a legal perspective, perhaps Mr. Berra should have answered the question by saying, “Yeah, I’m apprehensive, and I’m scared, too.”

Topic: Comparative Negligence, Joint and Several Liability, and Good Faith Settlements

Berraism: Yogi's theory of baseball, a thinking person's game: "Ninety percent of the game is half mental."²⁰⁶

Legal Application:

Yogi's math was not erroneous. Rather, when he was equating ninety percent with half, he was illustrating how a settlement between the plaintiff and one joint tortfeasor will affect the ultimate amount that the settling tortfeasor is required to pay.

Assume that plaintiff is injured in the amount of \$100,000 by joint tortfeasors A and B, and A is found to be ninety percent at fault and B is found to be ten percent at fault. Under the doctrine of joint and several liability, each joint tortfeasor is personally liable for the total amount of damages sustained by the plaintiff, at least as far as economic losses are concerned. As a result, the plaintiff may recover the entire amount of his damages from any joint tortfeasor found liable, regardless of the percentage of fault of that particular tortfeasor.²⁰⁷ Thus, if plaintiff chose, he could recover the entire \$100,000 or any part of it from defendant B. Then B, through a lawsuit for partial indemnity, could obtain reimbursement from the other tortfeasor in proportion to the fault attributable to each.²⁰⁸ As an example, if plaintiff collected the entire \$100,000 from B, who was ten percent at fault, B could assert a claim for partial indemnity against defendant A and could recover from A the amount of the judgment that B paid in excess of A's percentage of fault. Therefore, defendant B could recover \$90,000 from defendant A.

However, one important roadblock exists for the joint tortfeasor who has paid more than her proportionate share of plaintiff's damages and seeks to reapportion the loss among the other tortfeasors by a suit for partial indemnity. This hurdle is a good faith settlement. If one joint tortfeasor settles with the plaintiff prior to trial, and that settlement is found to be in good faith, the other joint tortfeasors are prohibited from seeking partial indemnity from the

²⁰⁶ DICKSON, *supra* note 10, at 44; PEPE, *supra* note 8, at 185.

²⁰⁷ See *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 904 (Cal. 1978).

²⁰⁸ *Id.* at 907.

settling joint tortfeasor.²⁰⁹ Instead, the dollar amount of the settlement is simply deducted from the amount the plaintiff may recover from the non-settling joint tortfeasor. Assume, in our example, that before trial, defendant A settled with the plaintiff for \$50,000. If the settlement is found to be in good faith and the jury entered the same judgment of \$100,000 in the trial against nonsettling defendant B, the \$50,000 settlement would be subtracted from the amount that plaintiff could recover from B. Under the rule of joint and several liability, B would be required to pay the entire remaining \$50,000 to the plaintiff. However, B would have no claims for partial indemnity to redistribute any of the \$50,000 loss back to A.

Therefore, because of A's good faith settlement with the plaintiff, tortfeasor A who was ninety percent at fault, would end up paying only \$50,000, or half, of plaintiff's judgment.

Legal Significance:

If a defendant who is ninety percent at fault can end up having to pay only half of plaintiff's damages, ninety percent of the game can equal half.

* * *

Topic: False Imprisonment

Berraism: Explaining declining attendance in Kansas City: "If people don't want to come to the ballpark, how are you going to stop them?"²¹⁰

Background:

Yogi's rhetorical question captures the essence of the law which says that an individual may not by unlawful compulsion be restricted in his freedom of movement.²¹¹ His question relates not only to Kansas City attendance, but also to what has been called the greatest pennant race in baseball history.²¹² In the race for the 1908 National League pennant, a game between the New

²⁰⁹ CAL. CIV. PROC. CODE § 877 (West 1980); CAL. CIV. PROC. CODE § 877.6(c) (West 1985).

²¹⁰ BASEBALL QUOTATIONS, *supra* note 6, at 150; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 134; PETRAS & PETRAS, *supra* note 29, at 151.

²¹¹ RESTATEMENT (SECOND) OF TORTS §§ 35-45 (1965).

²¹² JAMES, *supra* note 2, at 66.

York Giants and the Chicago Cubs ended in a 1-1 tie because the Giants' Fred Merkle pulled his famous "bonehead play." This forced a playoff game for the National League pennant between the two clubs, which gave rise to this false imprisonment case.²¹³

Legal Application:

In *Talcott v. National Exhibition Co.*,²¹⁴ plaintiff on the morning of an afternoon playoff game went to the ballpark to buy a ticket. He entered an enclosure within the park where there were ticket booths. He found that the game was sold out. He and others in the same situation sought to leave the park through the enclosure's ingress and egress gates. However, the game was of such intense interest to the fans that they arrived early at the park, literally by the thousands. Apparently because of the flow of the arriving crowd through the gates to the enclosure, the ballpark police restrained plaintiff and others from leaving the park through those gates and failed to show them alternate means of leaving. After more than an hour of being forced to remain in the ballpark, plaintiff and his friends finally were led through the clubhouse and out to the street through the clubhouse door. Plaintiff sued for false imprisonment and won both at trial and on appeal.²¹⁵

²¹³ L. RITTER, *THE GLORY OF THEIR TIMES*, 98-100, 124-218 (1966). "Merkle's boner" happened this way. The first-place Giants were playing the second-place Cubs near the end of the season. The score was one to one when the Giants came to bat in the bottom of the ninth inning. There were two outs with runners on first and third, Merkle being on first. The Giants' batter, Al Bridwell, lashed the ball to centerfield for an apparent game-winning single. The runner on third came home, but Merkle, halfway to second, immediately raced into the clubhouse without bothering to touch second base. Merkle followed the common practice of the time. The jubilant Giant fans piled onto the field. Meanwhile, Cubs second baseman Johnny Evers called for the ball and touched second base, forcing out Merkle for the third out, nullifying the apparent game-winning run. Umpire Hank O'Day called Merkle out, disallowing the run, and called the game a tie because darkness precluded continuing. The game grew in importance when the teams ended the season tied for first place. The tie game was rescheduled for the Giants' park, the Polo Grounds, and a record 35,000 spectators crammed into the stadium and watched Cubs pitcher Three-Finger Brown best the Giants' Christy Mathewson four to two to give the Cubs their third consecutive National League crown. It was this playoff game that inspired our use of the present Berraism. Incidentally, the Cubs went on to defeat the Detroit Tigers in the World Series, four games to one. The reason the run did not score on Merkle's boner was that a run may not score when the third out in an inning is made by a force out. *Id.* 1996 OFFICIAL RULES OF MAJOR LEAGUE BASEBALL [hereinafter 1996 OFFICIAL RULES], Rule 4.09(a)(2), at 32; *THE BEST OF BASEBALL*, *supra* note 2, at 81; DAN GUTMAN, *BASEBALL'S BIGGEST BLOOPERS 2-13* (Puffin Books 1995); *SPORTS ENCYCLOPEDIA*, *supra* note 6, at 40, 43; *THE ULTIMATE BASEBALL BOOK 73* (Houghton Mifflin Co. 1991).

²¹⁴ 128 N.Y.S. 1059 (App. Div. 1911).

²¹⁵ *Id.* at 1059-60.

Legal Significance:

This case answers Yogi's question "If people don't want to come to the ballpark, how are you going to stop them?" You imprison them at the ballpark.

* * *

Topic: Right to Publicity

Berraism: On his recognizability: "Most everybody knows me by my face."²¹⁶

Legal Application:

Yogi's statement reflects his awareness that celebrities have a commercial interest in their faces, along with other recognizable characteristics. In Yogi's case, not only is he recognized by his face, but he is also known for his walk, his wit, and his wisdom.²¹⁷ Under the common law right to publicity, the value of an individual's name,²¹⁸ likeness,²¹⁹ achievements,²²⁰ identifying characteristics,²²¹ and identity,²²² is protected, and courts permit celebrities to recover damages for the misappropriation of their images.

The Sixth Circuit Court of Appeals articulated this common law right to publicity in a case in which Johnny Carson, the host and star of *The Tonight Show*, sought damages and an injunction prohibiting a Michigan corporation, Here's Johnny Portable Toilets, Inc., from using the phrase, "Here's Johnny" as a corporate name in connection with the sale or rental of portable toilets.²²³ In that case, the defendant's founder was aware at the time he formed the corporation that "Here's Johnny" was the introductory slogan for

²¹⁶ PETRAS & PETRAS, *supra* note 29, at 154.

²¹⁷ See, e.g., *id.*

²¹⁸ See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969).

²¹⁹ See, e.g., *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

²²⁰ See, e.g., *Palmer v. Schonhorn Enters.*, 232 A.2d 458 (N.J. Super. Ct. 1967).

²²¹ See, e.g., *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S. 2d 661 (App. Div. 1977); *Prudhomme v. Proctor & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992).

²²² See, e.g., *White v. Samsung Elect. Am., Inc.*, 971 F. 2d 1395 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F. 2d 460 (9th Cir. 1988).

²²³ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831 (6th Cir. 1983).

Carson on *The Tonight Show*.²²⁴ He also indicated that he coupled the phrase, "Here's Johnny," with a second phrase, "The World's Foremost Comedian," because it was a good play on words.²²⁵ In upholding Carson's right to publicity claim, the Sixth Circuit noted that even though defendant had not appropriated Carson's identity by using Carson's name, it was the misappropriation of Carson's identifying phrase that constituted an invasion of Carson's right to publicity.²²⁶ As the Sixth Circuit explained, "[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that . . . the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity. . . . If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."²²⁷

Legal Significance:

Far more succinctly than the Sixth Circuit, Yogi has captured the essence of the common law right to publicity. Not only does Yogi's face have a protected value, but so does his wit and wisdom. In fact, some may argue that it is priceless.

5. CONTRACTS

Topic: Contract Interpretation

Berraism: A friend came to Yogi's house with a dog in the back of his car. He asked Yogi, "What do you think of my daughter's Afghan?" Yogi said, "Looks nice. I am thinking about a Vega."²²⁸

²²⁴ *Id.* at 833.

²²⁵ *Id.*

²²⁶ *Id.* at 837.

²²⁷ *Id.* at 835.

²²⁸ BERRA, *supra* note 18, at 11-12.

Legal Application:

Yogi's conversation with his friend demonstrates nicely the doctrine of misunderstanding in contract law. A misunderstanding regarding the meaning of a material term may result in no contract being formed.²²⁹ If party A, however, is aware of the meaning attached by party B, while party B is unaware of the meaning attached by party A, the meaning attached by party B will control.²³⁰ In Yogi's conversation, it would appear that Yogi was unaware of the meaning that his friend attached to the word "Afghan," while presumably the friend was aware of Yogi's understanding. If this were a contract, the friend would be bound to Yogi's interpretation. Parol evidence should be admissible to sort things out.

Legal Significance:

Yogi's conversation demonstrates the folly of attempting to interpret a contract according to its "plain meaning." What may seem to be a "plain meaning" to you or me is not necessarily the meaning attached by the parties to a contract.

6. PROPERTY

*Topic: The Rule Against Perpetuities*²³¹

Berraisms: After seeing the Steve McQueen movie, *The Magnificent Seven*:²³² "He made that picture before he died."²³³

²²⁹ RESTATEMENT (SECOND) OF CONTRACTS § 20. For examples of cases involving misunderstandings, see *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (1864) (the *Peerless* case); *Frigalimint Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) ("what is chicken?") (for a new perspective on the "chicken" case, see *Horowitz et al.*, *supra* note 36, at 195 n.37).

²³⁰ RESTATEMENT (SECOND) OF CONTRACTS § 20(2)(a).

²³¹ The Rule is discussed in another scholarly legal essay. See *Horowitz et al.*, *supra* note 35, at 191 n.5. For an illustrated critique of the use of more traditional authority (from which one can conclude that a gratuitous, self-referential footnote such as this one is no worse), see Keith Aoki & Garret Epps, *Dead Lines, Break Downs & Troubling the Legal Subject or "Anything You Can Do, I Can Do Meta,"* 73 OR. L. REV. 551 (1994); see also Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 168 n.6 (1990) ("And so here I was all of a sudden, reduced to a supporting role. This was *my* text and somehow I had landed in the footnote. How awful.").

²³² United Artists 1960.

²³³ BASEBALL QUOTATIONS, *supra* note 6, at 149; BERRA, *supra* note 18, at 6; DICKSON, *supra* note

or

Discussing his relief pitchers as the Mets' manager in 1973: "If you ain't got a bullpen, you ain't got nothin'."²³⁴

Legal Application:

The parallels between the logic of Yogi Berra and the logic of the Rule Against Perpetuities are uncanny. The Rule Against Perpetuities is supposed to limit the control of the dead hand over property, and more specifically, over future interests. The key to creating a transfer that could take effect long into the future and yet still be valid under the Rule is to use a long-lived class of measuring lives. For according to the Rule, an interest is valid if it vests or fails to vest within a life (or lives) in being plus 21 years. If the life in being is already elderly, one's ability to control the future will last little more than 21 years. But if the life is young and strong, one's ability to control the future possession of the property may extend for decades beyond the transferor's death ("*He made that picture before he died*"). Designating a class of measuring lives, rather than hoping that no illness or accident ever overtakes one measuring life, maximizes the chances that the valid perpetuities period will extend well beyond 21 years. As Yogi said, "*if you ain't got a bullpen, you ain't got nothin'.*"

In applying the Rule Against Perpetuities, one is supposed to assume that a woman, no matter her age, is capable of bearing children. Lord Kenyon first stated this assumption in *Jee v. Audley*,²³⁵ a case in which a transfer to the daughters of John and Elizabeth Jee was declared invalid because Kenyon assumed that Elizabeth Jee, then 70 years old, might have a daughter sometime in the future whose interest would vest beyond the perpetuities period. Despite this case, Lord Kenyon became Lord Chief Justice of England in 1788. The assumption made law in *Jee* is now referred to as the Rule of the Fertile Octogenarian, but it might as well be called the "*it's not over 'til it's over*"²³⁶ rule. Of course, it should be noted that in recent years, procreative technology use has enabled postmenopausal women to bear children. So the

10, at 42; PEPE, *supra* note 8, at 152.

²³⁴ DICKSON, *supra* note 10, at 43.

²³⁵ 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

²³⁶ Yogi on the Mets' chances in the 1973 National League East pennant race. BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 5; DICKSON, *supra* note 10, at 43; PEPE, *supra* note 8, at 151.

Rule of the Fertile Octogenarian may seem a bit less absurd these days. On the other hand, one still could have said to Lord Kenyon, "*How can you say this and that when this and that hasn't happened yet?*"²³⁷

Kenyon's response would be that one is supposed to imagine all possibilities under the Rule. For example, under the Rule, an interest that follows a transfer "to X for life, then to X's widow, if any, for life," will fail. In applying the Rule, you first look for a measuring life, and then determine whether the future interest will certainly vest or not vest within that person's life and 21 years. Further, in applying the Rule, *you must say this and that even if this and that haven't happened yet* (although many agree that Lord Kenyon took this a bit too far). If it's possible that the interest might vest after a period longer than the measuring life and 21 years, the interest is invalid at law. In this transfer, the law says that even if X is currently married, one cannot use X's spouse as a measuring life. In other words, it is possible, within the world one must imagine under the Rule, that X might remarry some time in the future, and that X's future spouse will be someone not yet born. The measuring life must be someone alive at the time of the transfer. (*Do you mean now?*²³⁸ Yes.) That means that only X can be used as the measuring life. The interest following the life estate in X's widow is invalid because of the following possibility: X might remarry someone born after this transfer, then X's widow might live more than 21 years after X's death. Any interest following X's widow's life estate would then vest beyond X's life and 21 years. That possibility is called the Rule of the Unborn Widow.

* * *

Topic: Finders Keepers

Berraism: "When you come to the fork in the road, take it."²³⁹

Legal Application:

This summary of the law crudely known as "finders keepers" is less elegant than Yogi's usual standard. It fails to distinguish between public and

²³⁷ PETRAS & PETRAS, *supra* note 29, at 76.

²³⁸ Yogi said this when he was asked by another player for the correct time. BASEBALL QUOTATIONS, *supra* note 6, at 152; PEPE, *supra* note 8, at 153; BERRA, *supra* note 18, at 9.

²³⁹ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 7.

private roads and the incidents of a finder's rights that derive from the distinction.²⁴⁰ A careless student might assume that it applies alike to knives and spoons, little realizing the decreasing probabilities that a knife, fork, or spoon may have been an instrument of homicide and thus forfeit as deodand.²⁴¹ And it completely overlooks the prospect that an outdoor fork sculpture is a fixture, defined as realty,²⁴² with a chattel past and the fear of a chattel future when Paul Bunyan wanders by in search of a snack.

7. BUSINESS LAW

Topic: Choosing a Corporate Name

Berraism: "Little League baseball is a very good thing because it keeps the parents off the streets"²⁴³ and "the kids out of the house."²⁴⁴

or

"If you can't imitate him, don't copy him."²⁴⁵

Legal Application:

Corporations are statutorily created entities. They exist only pursuant to the terms stated in the jurisdiction in which a corporation is formed. The terms set out in these statutes include rules by which a corporation can choose its name. Traditionally, such rules do not allow a new corporation to choose a name that is "so similar to any [name of an existing corporation] as to tend to confuse or deceive."²⁴⁶

²⁴⁰ *Bridges v. Hawkesworth*, 21 L.J.R. 75 (Q.B. 1851), as reinterpreted in *South Staffordshire Water Co. v. Sharman*, 2 Q.B. 44 (Q.B. 1896).

²⁴¹ See *Austin v. United States*, 509 U.S. 602, 611 (1993).

²⁴² But see Ronald W. Polston, *The Fixtures Doctrine: Was It Ever Really the Law?*, 16 WHITTIER L. REV. 455 (1995).

²⁴³ DICKSON, *supra* note 10, at 44.

²⁴⁴ BASEBALL QUOTATIONS, *supra* note 6, at 150; PEPE, *supra* note 8, at 187.

²⁴⁵ Yogi said this when Ron Swoboda told Yogi, then a Mets' coach, that he liked to crowd the plate like Frank Robinson. BASEBALL QUOTATIONS, *supra* note 6, at 150; DICKSON, *supra* note 10, at 43; PETRAS & PETRAS, *supra* note 29, at 76.

²⁴⁶ N.Y. BUS. CORP. § 301(a)(2) (McKinney 1996). More modern formulations of statutes governing corporate names merely provide that a new corporation's name "must be distinguishable upon the records of the secretary of state" from the name of a currently incorporated entity. See, e.g., MODEL BUS. CORP. ACT

In 1959 a would-be corporation in New York submitted its certificate of incorporation. The corporation's stated purpose was "to stimulate interest in the American institution known as 'baseball' among boys between the ages of 13 to 20 years."²⁴⁷ The proposed name of this entity was the New York Braves Baseball Club, Inc.²⁴⁸ Although lauding the stated purposes of the proposed corporation, the court rejected the application because the proposed name would lead to confusion both from the use of "New York . . . Baseball Club" (given the existence of the New York Yankees) and the use of "Braves" (given the existence of the Milwaukee Braves).²⁴⁹

Legal Significance:

Like the New York Supreme Court, Yogi saw merit in Little League-type organizations, but he also cautioned against inappropriate imitation.

* * *

Topic: *Fiduciary Duty of a Corporate Board Member*

Berraism: On why the Yankees lost the 1960 World Series to the Pittsburgh Pirates: "We made too many wrong mistakes."²⁵⁰

Legal Application:

As noted earlier in this Essay,²⁵¹ there can be right mistakes and wrong mistakes. Members of a corporate board of directors are regularly required to make decisions in the best interests of the corporation. When the decisions they make turn out badly, directors are often sued. However, most courts give directors' decisions the benefit of the business judgment rule, which is a presumption that the directors have acted informedly, in good faith, and in the best interests of the company.²⁵² The standard used to measure their

§ 4.01(b)(1) (1991).

²⁴⁷ Application of New York Braves Baseball Club, Inc., 195 N.Y.S.2d 80, 80-81 (Sup. Ct. 1959).

²⁴⁸ *Id.* at 80.

²⁴⁹ *Id.* at 81-82.

²⁵⁰ BASEBALL QUOTATIONS, *supra* note 6, at 151; BERRA, *supra* note 18, at 8; DICKSON, *supra* note 10, at 44; PEPE, *supra* note 8, at 151.

²⁵¹ See *supra* notes 186-91 and accompanying text. See also *infra* notes 345-51, 356-57 and accompanying texts.

²⁵² See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 871-72 (Del. 1985); *Shlensky v. Wrigley*, 237

decisionmaking is one of gross negligence or a showing of some other seriously improper basis such as fraud or illegality.²⁵³ Thus, a director will not be held personally liable for mere negligent decisionmaking.

In *Shlensky v. Wrigley*,²⁵⁴ the plaintiff was a minority shareholder in the Chicago National League Ball Club (Inc.). The Club owned and operated the Chicago Cubs and Wrigley Field, the Cubs' home park. The plaintiff brought a shareholder derivative action against the Club and its directors seeking damages and an order to require the directors to install lights at Wrigley Field and hold night games. The plaintiff alleged that director-defendant Philip K. Wrigley dominated the board of directors and had refused to install lights for personal reasons, rather than reasons related to the interests of the corporation.²⁵⁵ The trial court's dismissal of the plaintiff's complaint was upheld on appeal because the decision was a proper one for the directors, and plaintiff had made no showing that the directors' conduct even bordered on fraud, illegality, or conflict of interest.²⁵⁶

Legal Significance:

Unless directors' decisions are blatantly contrary to a corporation's best interests, courts are unwilling to interfere with the directors' judgment of what is best for their company even when those decisions cause the company to operate in the red. As the *Shlensky* court said, "mere failure to 'follow the crowd' is not . . . a dereliction [of duty]"²⁵⁷ or, as Yogi would have put it, "is not a wrong mistake."

* * *

N.E.2d 776, 778-79 (Ill. App. Ct. 1968).

²⁵³ See, e.g., *Van Gorkom*, 488 A.2d at 873; *Shlensky*, 237 N.E.2d at 780.

²⁵⁴ 237 N.E.2d 776.

²⁵⁵ At the time of this shareholder derivative suit, 19 of the 20 major league teams were holding night games. The Cubs, holding only day games, had sustained operating losses in the previous four years. Plaintiff asserted that night games would increase attendance and revenues at home games. *Id.* at 777. Wrigley, however, personally believed "that baseball is a 'daytime sport' and that the installation of lights and night baseball games [would] have a deteriorating effect upon the surrounding neighborhood." *Id.* at 778.

²⁵⁶ *Id.* at 780.

²⁵⁷ *Id.* at 781.

Topic: Avoidance of Material Misstatements by a Company in Merger Talks

Berraism: "Listen up, because I've got nothing to say and I'm only going to say it once."²⁵⁸

or

"I wish I had an answer to that because I'm getting tired of answering that question."²⁵⁹

Legal Application:

A corporation whose stock is publicly traded must be very careful about the statements its agents make during merger negotiations. This is because federal securities statutes and rules prohibit fraud in connection with stock trading. Fraud is defined broadly and includes "any untrue statement of a material fact" or the omission of "a material fact necessary in order to make the statements made . . . not misleading."²⁶⁰ The fact that a company has initiated merger talks is of great interest to the trading public because traders know that typically a premium will be offered above the normal trading price for the stock of the company to be acquired.²⁶¹ If rumors develop that a company may be acquired, trading will increase in its shares as people try to get "on board" in an attempt to share in the ultimate premium price.

However, it is in the company's best interest not to reveal information about merger negotiations, so that increased trading will not occur. Such trading might increase the price and possibly even cause the deal to fall through.²⁶² Thus, if rumors develop and the company is questioned, it will

²⁵⁸ BASEBALL QUOTATIONS, *supra* note 6, at 151.

²⁵⁹ As Yankee manager in 1984, this was Yogi's response when asked why the team was losing. BASEBALL QUOTATIONS, *supra* note 6, at 150; DICKSON, *supra* note 10, at 42; PETRAS & PETRAS, *supra* note 29, at 76.

²⁶⁰ 17 C.F.R. § 240.10b-5(b) (1996). See 15 U.S.C. § 78(c) (1989).

²⁶¹ See *Basic, Inc. v. Levinson*, 485 U.S. 224, 227-28 & n.4 (1988) (announcement of acquiring company's offer of \$46 per share, when two months earlier shares were valued at only \$25).

²⁶² See *Levinson*, 485 U.S. at 233 (petitioner arguing that not requiring corporate disclosure of the existence of merger negotiation until after an agreement in principle was reached would "help[] preserve the confidentiality of merger discussions where earlier disclosure might prejudice the negotiations"); *Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir. 1987) (noting that "premature disclosure may frustrate the achievement of the firm's objective, destroying the source of the value sought to be disclosed"); *Greenfield v. Heublein*,

want to deny that negotiations are in progress. However, such a denial could be a violation of the federal antifraud laws. The United States Supreme Court has, therefore, suggested that "no comment" would be the appropriate response by a company whenever it is asked a question concerning the existence of merger talks.²⁶³

Legal Significance:

Given the Supreme Court's ruling, either of Yogi's statements would seem to be appropriate examples of responses a corporate agent could provide to a merger talk inquiry and still avoid violation of the federal securities antifraud rules.

* * *

Topic: The Enforceability of Agreements Between Corporate Shareholders

Berraism: "You've got to be very careful if you don't know where you are going, because you might not get there."²⁶⁴

Legal Application:

Under the traditional structure created by most states' corporate legislation, shareholders elect the directors and directors appoint the officers.²⁶⁵ If corporate participants try to vary this structure, they may not get the results they expect.

In 1919, three men entered into an agreement whereby they would achieve control of the National Exhibition Company, whose business was to operate a National League baseball club in New York City, popularly called "the Giants" and playing at the Polo Grounds.²⁶⁶ Under this agreement, Charles A.

Inc., 742 F.2d 751, 757 (3d Cir. 1984) ("considering the delicate nature of most merger discussions, [early disclosure] might seriously inhibit such acquisitive ventures").

²⁶³ See *Levinson*, 485 U.S. at 239 n.17.

²⁶⁴ BASEBALL QUOTATIONS, *supra* note 6, at 152; DICKSON, *supra* note 10, at 45.

²⁶⁵ See N.Y. BUS. CORP. §§ 614(a), 715(a) (McKinney 1996); MODEL BUS. CORP. ACT §§ 7.28(a), 8.40(a) (1991).

²⁶⁶ See *McQuade v. Stoneham*, 189 N.E. 234, 235 (N.Y. 1934).

Stoneham became the majority shareholder, and John J. McGraw and Francis X. McQuade each bought a portion of Stoneham's interest.²⁶⁷ The three men further agreed that each would "use their best endeavors" to continue each other as both directors and officers of the corporation.²⁶⁸

All went well pursuant to the agreement until Stoneham and McQuade had a falling out. Stoneham caused substantial funds to be loaned to himself from the corporate treasury, which led McQuade to insist on security and interest.²⁶⁹ In 1928, McQuade was ousted as treasurer when Stoneham and McGraw abstained from voting and the other four directors, all Stoneham nominees, voted for a replacement treasurer.²⁷⁰ McQuade was also dropped as director at the 1928 shareholder meeting as a result of Stoneham's and McGraw's lack of support.²⁷¹

McQuade sued to enforce the shareholder agreement. New York's highest court ruled that corporate shareholders could combine their votes to elect directors.²⁷² However, because McQuade had not asked for damages arising from the loss of his directorship, he was given no remedy for the breach of that part of the agreement.²⁷³ As for the shareholder agreement's provision to retain McQuade as treasurer, the New York Court of Appeals found the agreement invalid because it interfered with the directors' duty to exercise independent judgment by inhibiting them in removing or changing officers, salaries, or policies.²⁷⁴

²⁶⁷ *Id.* McGraw was the Giants' manager, *id.*, while McQuade brought the parties together to buy the controlling interest. *McQuade v. Stoneham*, 256 N.Y.S. 431, 436 (1932), *rev'd* 189 N.E. 234 (N.Y. 1934).

²⁶⁸ *Id.* (quoting section VIII of the agreement, which specified that Stoneham was to be president; McGraw, vice president; and McQuade, treasurer, as well as their salaries).

²⁶⁹ *McQuade*, 242 N.Y.S. at 551.

²⁷⁰ *McQuade*, 189 N.E. at 235.

²⁷¹ *Id.*

²⁷² *Id.* at 236 (citing *Brightman v. Bates*, 55 N.E. 809, 811 (Mass. 1900)). *See also* N.Y. BUS. CORP. § 620(a) (McKinney 1996); MODEL BUS. CORP. ACT § 7.31 (1991).

²⁷³ *See McQuade*, 256 N.Y.S. at 441. The lower court awarded McQuade damages for his removal as treasurer, but the award was reversed when the Court of Appeals ruled that part of the agreement invalid. *See infra* note 274 and accompanying text.

²⁷⁴ *McQuade*, 189 N.E. at 236. Later rulings by the New York Court of Appeals upheld shareholder agreements that went beyond combining to elect directors if the agreements involved all of the shareholders and their terms caused only a slight impingement on the directors' powers. *See, e.g., Clark v. Dodge*, 199 N.E. 641, 642-43 (N.Y. 1936). Since the *McQuade* case, the New York legislature has amended its corporation code to allow, under certain circumstances, shareholder agreements of the type Stoneham, McGraw, and McQuade attempted to form. *See* N.Y. BUS. CORP. § 620(b)-(g) (McKinney 1996); MODEL BUS. CORP. ACT § 7.32 (1991).

Legal Significance:

Mr. McQuade learned the hard way that simply having a contract doesn't assure you the results you'd hoped for. As Yogi said: "You've got to be very careful if you don't know where you are going, because you might not get there."

* * *

Topic: Banking

Berraism: On the shadows in left field at Yankee Stadium in the fall: "It gets late early out there."²⁷⁵

Legal Application:

Yogi was, of course, referring to the so-called "midnight deadline" rule for collecting banks.²⁷⁶ When it learns that a check has not been paid, a collecting bank should normally send a notice of dishonor to the bank's transferor before midnight of the next banking day following the banking day it received the check. A collecting bank does not usually have more time to effect this notice.

Legal Significance:

It does get late early out there in the world of checks, drafts, and collecting banks.

8. INSURANCE LAW

Topic: Statutory Interpretation/Bad Faith

Berraism: "It's not over 'til it's over."²⁷⁷

²⁷⁵ BASEBALL QUOTATIONS, *supra* note 6, at 1501; BERRA, *supra* note 18, at 11; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 134; PEPE, *supra* note 8, at 185.

²⁷⁶ See U.C.C. §§ 4-104(1)(b), 4-202.

²⁷⁷ Yogi was describing the Mets' chances in the 1973 National League East pennant race. BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 7; DICKSON, *supra* note 10, at 43; PEPE, *supra*

or

“You’re never out of it ’til you’re out of it.”²⁷⁸

Legal Application:

Commencing in 1979, the California Supreme Court’s four to three decision in *Royal Globe Insurance Co. v. Superior Court of Butte County*,²⁷⁹ interpreting the state Insurance Code, permitted a private litigant to bring an action to impose civil liability on an insurance company for engaging in unfair claims settlement practices.²⁸⁰ The majority opinion was authored by Justice Stanley Mosk. In 1988, *Royal Globe* was overruled by a 5-2 majority.

In *Moradi-Shalal v. Fireman’s Fund*,²⁸¹ the court held that the Insurance Code was not intended to create a private civil cause of action in third parties against insurers who commit certain acts listed in the Code.

Justice Mosk led off his dissent with these words: “*Royal Globe* (1979-1988), may it Rest in Peace.”²⁸²

Legal Significance:

Justice Mosk seems to have grasped a corollary of Yogi’s boundless optimism by firmly and plainly acknowledging when it was, in fact, over.

9. TAXATION

Topic: *Annual Accounting*

Berraism: “It’s not over ’til it’s over.”²⁸³

note 8, at 151.

²⁷⁸ This is a variation on Yogi’s “It’s not over ’til it’s over.” DICKSON, *supra* note 10, at 45.

²⁷⁹ 592 P.2d 329 (Cal. 1979) (en banc), *overruled by* 758 P.2d 58 (Cal. 1988) (en banc).

²⁸⁰ *Id.* at 332-35.

²⁸¹ 758 P.2d 58 (Cal. 1988) (en banc).

²⁸² *Id.* at 75 (citations omitted).

²⁸³ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 7; DICKSON, *supra* note 10, at 43; PEPE, *supra* note 8, at 151.

Legal Application:

Yogi would have made a great tax nerd; his words capture the essence of a group of special transactional accounting rules that often perplex students in the basic federal income tax course. Our federal income tax system requires taxpayers to report income and loss on an annual basis; once a specific year ends, it is "over" for tax purposes.²⁸⁴ However, some transactions span different tax years, and the rigid use of an annual accounting period can result in unfairness to taxpayers.²⁸⁵ Consistent with Yogi's observation that "[i]t's not over 'til it's over," Congress and the courts have fashioned a number of special transactional accounting rules that ameliorate some of the harsh effects of the annual accounting rule.²⁸⁶

Suppose²⁸⁷ that, in year one, Emma and Claire wrote a computer program but could not sell it. In year three, Claire modified the program and sold it. Claire received \$60,000 in royalties on the program during year three and, believing that she was entitled to all of the royalties, did not give any of the money to Emma. Claire, who paid federal income tax at a 40% rate in year three, reported the royalties as income on her tax return for year three and paid \$24,000 (40% of \$60,000) of federal income tax on that income. In year four, Emma sued Claire, and a jury awarded Emma \$30,000 (half of the \$60,000 of royalties Claire received in year three) and half of all future royalties from the program.

²⁸⁴ I.R.C. § 441 (West 1986 & West Supp. 1996).

²⁸⁵ For example, in *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359 (1931) (simplifying the facts of the case), the taxpayer reported net losses on a dredging contract for the years 1913 through 1916 of \$175,000. In 1920, the taxpayer recovered \$175,000 in a lawsuit related to the dredging contract. The taxpayer excluded the \$175,000 from income, reasoning that there was no income from the entire transaction. The Supreme Court held that a taxpayer's income and loss must be determined separately for each year, so that the \$175,000 recovery in 1920 was income even though the taxpayer had \$175,000 of related losses in the earlier years for which it received no tax benefit. In effect, the Court held that tax years 1913 through 1916 were "over," and the losses from those years could not offset the income received in 1920. *Id.*

²⁸⁶ For example, after the decision in the *Burnet* case, Congress enacted Internal Revenue Code § 172. This section provides that, if a taxpayer has a net loss for a tax year, the taxpayer can "carry" the loss back three years and forward fifteen years. The loss carryback and carryforward can offset net income in other years, reducing the taxpayer's tax liability in profitable years. If § 172 had applied at the time of the *Burnet* case, the taxpayer would have had no net income in 1920; instead, the \$175,000 received in 1920 would have been offset by the taxpayer's losses from the years 1913 through 1916.

²⁸⁷ This example is loosely based on an example in JOSEPH BANKMAN ET AL., *FEDERAL INCOME TAX: EXAMPLES AND EXPLANATIONS* 95 (1996).

Can Claire amend her tax return for year three, showing \$30,000 less of income, and get a refund of the \$12,000 in tax she paid on the \$30,000 of income that she had to give Emma? No, because tax year three is “over”; Claire claimed entitlement to all of the royalties she received in year three, so she had to include all of the royalties on her year three return.²⁸⁸ Is Claire then left paying \$12,000 of tax on \$30,000 of “income” that she did not get to keep? No, she can, in effect, recover the \$12,000 of tax she paid in year three by taking a tax deduction in year four for the \$30,000 she has to pay Emma in year four.²⁸⁹ If Claire pays tax in year four at a 40% rate, the \$30,000 deduction in year four will save her \$12,000 of tax in year four. Put another way, using Yogi’s words, year three is not “over ’til it’s over” in year four.

What if Claire pays tax at only a 30% rate in year four? She paid \$12,000 of tax (at a 40% tax rate) on the \$30,000 of year three royalties that she has to give Emma, but a \$30,000 deduction in year four will save her only \$9,000 of tax in year four (\$30,000 deduction multiplied by her 30% tax rate). Although Claire cannot amend her year three return because year three is “over,” a special rule permits her to do the next best thing. Instead of taking a \$30,000 deduction in year four, which would save her \$9,000 in tax, she can simply reduce her year four tax bill by the \$12,000 in tax she paid in year three on the \$30,000 of royalties that she has to give Emma.²⁹⁰ Again, year three is not “over ’til it’s over” in year four.

Legal Significance:

Although our federal income tax system requires the use of an annual accounting period, a tax year that appears to be “over” is sometimes not “over” until a transaction reported in that year is completed in a later tax year.

* * *

Topic: Gender Bias in the Tax Code

Berraism: “[She] can run anytime [she] wants. I’m giving [her] the red light.”²⁹¹

²⁸⁸ See *North American Oil Consol. v. Burnet*, 286 U.S. 417 (1932).

²⁸⁹ See *United States v. Lewis*, 340 U.S. 590 (1951); I.R.C. § 1341 (West 1986 & West Supp. 1996).

²⁹⁰ I.R.C. § 1341.

²⁹¹ As Yankee manager, commenting on the acquisition of Rickey Henderson. DICKSON, *supra* note 10,

Legal Application:

This Berraism captures the way in which laws can send mixed messages. For example, federal law prohibits employment discrimination on the basis of gender,²⁹² but the tax code provides numerous incentives for a secondary wage earner (the spouse with lower earnings, typically the wife²⁹³) to work for no pay in the home instead of working in a paying job outside the home, especially if the couple has children.²⁹⁴

In one of his articles on gender bias in the tax code, Professor McCaffery includes several examples to illustrate the “red light” the tax code gives secondary wage earners who are considering working for pay.²⁹⁵ In one of these examples, the “Uppers” (named for being an upper income earning couple) are trying to decide whether Ms. Upper should take a job that pays \$30,000 a year or stay home and take care of their child. Mr. Upper earns \$60,000 a year.²⁹⁶ After taking into account the expenses that the Uppers will incur to enable Ms. Upper to work (e.g., the costs of child care) and various tax provisions, McCaffery concludes that Ms. Upper’s \$30,000 a year job will actually net the family just \$5,250!²⁹⁷ On the other hand, if Mr. Upper could figure out how to increase his pay by \$30,000 (e.g., by billing a few hundred extra hours at a law firm), the Uppers would net \$16,625!²⁹⁸ McCaffery argues that the tax code thus discourages secondary wage earners from working outside the home²⁹⁹ and, because secondary wage earners are

at 42.

²⁹² 42 U.S.C. § 2000e-2(a) (1994).

²⁹³ Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 985 (1993).

²⁹⁴ *Id.* at 988. Professor McCaffery discusses five factors that encourage secondary wage earners to work in the home for no pay instead of working outside the home for pay: (1) taxing the income of the secondary wage earner at a rate at least equal to the highest tax rate applicable to the income of the primary wage earner; (2) requiring each wage earner to pay Social Security tax, but partially aggregating the Social Security benefits of the spouses; (3) excluding from the income tax base the imputed income of a spouse who works in the home for no pay; (4) limiting the credit or exclusion for the costs of child care that enable the secondary wage earner to work outside the home; and (5) the tax rules governing noncash employee fringe benefits (rules that encourage employers to furnish noncash fringe benefits to employees despite the fact that many secondary wage earners would prefer cash wages to the noncash fringe benefits). *Id.* at 988-1013.

²⁹⁵ *Id.* at 1014-29.

²⁹⁶ *Id.* at 1025.

²⁹⁷ *Id.* at 1026-27.

²⁹⁸ *Id.* at 1027.

²⁹⁹ *Id.*

disproportionately women, the tax code marginalizes women in the workplace.³⁰⁰

Legal Significance:

Although a secondary wage earner can work outside the home for pay “anytime [s]he wants,” the tax code gives her a “red light,” encouraging her to stay at home and care for the children.

* * *

Topic: Tax Policy

Berraism: Ordering a drink on a hot day, Berra said, “Hey, Nick, get me a diet Tab.”³⁰¹

Legal Application:

“Diet” seems redundant because “Tab” is a brand of diet soda. However, Yogi may just have been thinking expansively; he may have assumed that it would be possible for Nick to serve him a Tab that was not a “diet” Tab (for example, a Tab in an ice cream float), in which case his seemingly redundant request makes perfect sense.

Yogi’s request is reminiscent of one of the views expressed in a jurisprudential debate in the tax policy literature: how do we determine whether a tax system is equitable? Traditionally, tax policy commentators have asserted that a tax proposal is equitable if it satisfies both the norms of “horizontal equity” and “vertical equity.”³⁰² The horizontal equity norm stands for the proposition that equally situated taxpayers (taxpayers with equal economic income) should be treated equally.³⁰³ The vertical equity norm stands for the proposition that we should apply an appropriate pattern for differentiating among taxpayers who are not equally situated (taxpayers with different amounts of economic income).³⁰⁴

³⁰⁰ *Id.* at 987.

³⁰¹ PEPE, *supra* note 8, at 185.

³⁰² Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT’L TAX J. 113 (1990).

³⁰³ Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607 (1993).

³⁰⁴ *Id.* Tax policymakers usually assume that money has declining marginal utility, so they take the

Professor Kaplow has argued that the horizontal equity norm should not be considered a norm independent of the vertical equity norm, in part because any appropriate pattern of differentiating between unequals must treat equals consistently, so the horizontal equity norm is subsumed within the vertical equity norm.³⁰⁵ Professor Musgrave however, maintains that horizontal equity is an independent norm; in his view, considering horizontal equity in real world settings (as opposed to ideal "first best" settings) can tell us something that a vertical equity inquiry does not.³⁰⁶

Legal Significance:

Professor Kaplow, taking the position that the horizontal equity norm is subsumed within the vertical equity norm, would simply advise Congress to give us a tax code that satisfies the vertical equity norm. On the other hand, Professor Musgrave would advise Congress to give us a tax code that satisfies the horizontal equity norm and the vertical equity norm, just as Yogi asked Nick for a "diet Tab."

* * *

position that a progressive income tax (with tax rates increasing as income increases) is the most appropriate pattern for differentiating between taxpayers with different amounts of income. *See, e.g.*, Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139, 143, 147 (1989). However, Professors McDaniel and Repetti have cautioned that the vertical equity norm is meaningful only if infused with a specific theory of distributive justice. McDaniel & Repetti, *supra* note 303, at 611. For a discussion of theories of justice that could provide an appropriate standard for differentiating between unequally situated taxpayers, see Joseph Bankman & Thomas D. Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1915 (1987).

³⁰⁵ Kaplow, *supra* note 304; Louis Kaplow, *A Note on Horizontal Equity*, 1 FLA. TAX REV. 191 (1992). Professors Griffith, McDaniel, and Repetti agree with Professor Kaplow that horizontal equity should not be treated as an independent norm. Thomas D. Griffith, *Should "Tax Norms" Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115, 1155-59; McDaniel & Repetti, *supra* note 303, at 613.

³⁰⁶ Musgrave, *supra* note 302; Richard A. Musgrave, *Horizontal Equity, A Further Note*, 1 FLA. TAX REV. 354 (1993). Although a number of commentators have sided with Professor Kaplow and rejected the horizontal equity norm, other commentators have continued to apply it. *See, e.g.*, C. EUGENE STEUERLE & JON M. BAKIJA, *RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM 20-21* (1994) ("One beauty of the horizontal equity principle is its lack of conflict with other principles . . . You and I may disagree on how progressive we would like government to be, but we can still agree that, whatever the level of progressivity, two persons in equal circumstances should be treated equally under the law.").

Topic: Inflation Adjustments for Rate Brackets

Berraism: "A nickel ain't worth a dime any more."³⁰⁷

Legal Application:

Yogi understood the effects of inflation. Assuming a modest annual inflation rate, a dime in 1955 (the year in which Yogi was elected the American League's Most Valuable Player³⁰⁸) bought less than a nickel in 1925 (the year in which Yogi was born).³⁰⁹

Simplifying somewhat, a taxpayer's federal income tax liability for a given tax year equals the taxpayer's taxable income for the year, multiplied by the tax rates that apply to that income, less any tax withheld during the year.³¹⁰ The income tax rates for individuals are set forth in § 1 of the Internal Revenue Code. The rates are progressive, meaning that the rate of tax increases as the taxpayer's income increases. For example, an individual taxpayer with \$24,650 of taxable income pays tax at a 15% rate and owes \$3,697.50 of tax.³¹¹ If that taxpayer's taxable income increases to \$34,650, the taxpayer pays tax at a 15% rate on the first \$24,650 of income (\$3,697.50 of tax) and a 28% rate on the next \$10,000 of income (\$2,800 of tax), for total tax due of \$6,497.50 (\$3,697.50 plus \$2,800).³¹²

If a taxpayer's wages are increased annually just to keep up with inflation, the taxpayer's spending power does not increase but her taxable income does. Unless the tax rate brackets in § 1 are adjusted for inflation, the increase in taxable income may drive the taxpayer into a higher rate bracket and increase the tax rate on that income. This increase in tax rate without any corresponding increase in spending power is sometimes referred to as "bracket creep."

Yogi comprehended the effects of inflation many years before Congress figured it out. Congress waited until 1981 to add § 1(f) to the Internal Reve-

³⁰⁷ DICKSON, *supra* note 10, at 41.

³⁰⁸ SPORTS ENCYCLOPEDIA, *supra* note 6, at 302-05.

³⁰⁹ THE BASEBALL ENCYCLOPEDIA, *supra* note 1, at 785.

³¹⁰ I.R.C. §§ 1, 31 (West 1986 & West Supp. 1996).

³¹¹ I.R.C. § 1(c); Rev. Proc. 96-59, 1996-53 I.R.B. 1 (Dec. 30, 1996).

³¹² I.R.C. § 1(c); Rev. Proc. 96-59, 1996-53 I.R.B. 1.

nue Code.³¹³ Section 1(f) increases the minimum and maximum dollar amounts in each rate bracket in § 1 to account for inflation and to eliminate bracket creep.

Legal Significance:

Increases in a taxpayer's taxable income that are attributable to inflation do not increase the taxpayer's spending power and should not drive the taxpayer into a higher tax rate bracket.

* * *

Topic: Federal Tax Policy and Legislation

Berraism: "If you don't know where you're going, you might end up somewhere else."³¹⁴

or

"Foresight is always better, afterward."³¹⁵

Legal Application:

In the summer of 1990, President George Bush and the Democrat-controlled Congress had reached an impasse in budget negotiations.³¹⁶ There existed a strong sentiment in the country that the national priority was to reduce the deficit and balance the budget.³¹⁷ It became increasingly apparent to all parties involved in the negotiations that, in spite of President Bush's 1988 campaign promise,³¹⁸ there would have to be some form of tax in-

³¹³ Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).

³¹⁴ *Tirheimer v. Commissioner*, 63 T.C.M. (CCH) 2307 (1992). Variations on this theme are found elsewhere in the literature. *See, e.g.*, DICKSON, *supra* note 10, at 45 ("You've got to be very careful if you don't know where you're going, because you might not get there.").

³¹⁵ Quoted by the Indiana Court of Appeals in *Gerbers, Ltd. v. Wells County Drainage Bd.*, 608 N.E.2d 997, 999 (Ind. Ct. App. 1993).

³¹⁶ In a special report prepared for Tax Analysts, Joel S. Newman traces the history of the enactment of the luxury tax, chronicling the responses of the affected industry groups as directed to Congress, the IRS, and the marketplace. Joel S. Newman, *Ex Lux*, 55 TAX NOTES 253 (Apr. 13, 1992).

³¹⁷ Sheldon Pollack, in his retrospective on the enactment of the luxury tax, acknowledged that "[b]y 1990, with the economy beginning to slide into recession, the federal deficit became an ever greater concern." Sheldon D. Pollack, *Farewell to Tax Reform: The 1993 Tax Act in Historical Perspective*, 64 TAX NOTES 1081, 1085 (Aug. 22, 1994).

³¹⁸ The "read my lips, no new taxes" pledge became an increasingly difficult one for President Bush to

crease in order to raise the necessary revenue.³¹⁹ Toward that end, at a secret budget "summit" held at Andrews Air Force Base, a proposal calling for a new tax on luxury items³²⁰ was agreed upon. This so-called "luxury tax" was aimed at raising revenue from those deemed most able to pay, by imposing a ten percent tax on the purchase of luxury items such as cars, yachts, private planes, jewelry, and furs.³²¹ It was estimated that the luxury tax would raise \$1.5 billion in revenue over a five-year period.³²²

The luxury tax was viewed by a number of the summiters,³²³ many of whom would be facing reelection in the fall, as a way of raising revenue from the "rich" without further burdening the middle class and working poor.³²⁴ Moreover, this tax increase could be accomplished without necessi-

keep. Tom Redburn & William J. Eaton, *Bush, Top Lawmakers Reach Agreement on Deficit Package*, L.A. TIMES, Oct. 1, 1990, at A1 ("At first, shortly after the talks started, Bush dismayed conservative Republicans when he reneged on his famous 'no new taxes' campaign pledge by acknowledging, at Democratic insistence, that revenue increases would have to be part of any deficit-cutting agreement.").

³¹⁹ Lane Davenport, *Bush Acknowledges Need for New Taxes*, 48 TAX NOTES 7 (July 2, 1990) (coverage of June 26, 1990, announcement). See also Redburn & Eaton, *supra* note 318.

³²⁰ A luxury is "something that some people think other people should do without." Norman B. Ture, *Social Policy and Excise Taxes*, 40 TAX NOTES 737, 739 (Aug. 15, 1988) (quoting Henry C. Simons).

³²¹ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11,211, 104 Stat. 1388 (1990) (codified at 26 U.S.C. §§ 4000-4007). The Act imposed new taxes on certain luxury items. Sections 4001, 4002, 4003, 4006, and 4007 of the Internal Revenue Code imposed taxes on sales of passenger vehicles with a price exceeding \$30,000, boats with a price exceeding \$100,000, aircraft with a price exceeding \$250,000, and furs and jewelry with a price exceeding \$10,000. Each tax was equal to 10% of the amount by which the sales price exceeded the threshold amount. Furthermore, each tax was imposed upon the first retail sale of a taxable article and was to be paid by the seller of the taxable article.

³²² The Joint Committee on Taxation estimated that the entire set of luxury taxes would raise \$1.5 billion over five years, including \$300 million in 1991 alone. See F. R. Nagle, *Can the U.S. Afford the Luxury Tax?*, 52 TAX NOTES 878 (Aug. 19, 1991).

³²³ This group, dubbed the "super summit" on Capitol Hill, consisted of Speaker of the House Thomas S. Foley, D-Wash., House Majority Leader Richard A. Gephardt, D-Mo., House Minority Leader Bob Michel, R-Ill., Senate Majority Leader George J. Mitchell, D-Maine, Senate Minority Leader Robert Dole, R-Kans., Treasury Secretary Nicholas F. Brady, Budget Director Richard G. Darman, and White House Chief of Staff John Sununu. Tim Gray, *Summit Week in Review: Negotiators Try 'Super Summit' to Bridge Tax and Spending Gaps*, 48 TAX NOTES 1583 (Sept. 24, 1990).

³²⁴ Well into 1991, many Democrats still supported the measure and believed that the luxury tax could be repealed only if the Republicans were willing to soak the rich some other way, preferably through higher income tax rates. Among those who continued to view the luxury tax as a counterweight to the increase in the "middle class" sin taxes was Rep. Gephardt, who, reiterating a theme repeatedly raised in the summit negotiations, said:

So, I say to my Republican colleagues, if you must repeal the luxury tax, let's replace it with a millionaire's surtax. Trickle down shouldn't leave the middle class holding the bag.

tating an increase in the marginal rates, deemed to be a politically unpalatable alternative.³²⁵

Unfortunately for all involved, the luxury tax did not have the intended consequences.³²⁶ Instead of raising revenue from the rich, the net effect of the luxury tax was to further cripple domestic manufacturing industries already reeling from the impact of a recession and to put thousands of blue-collar tradespeople on the unemployment rolls.³²⁷ Ultimately, estimates placed the cost of the luxury tax to the government at \$20 million in its first year, or roughly a cost of \$6 in lost tax revenue and unemployment benefits for every \$1 of tax collected.³²⁸

Almost as soon as the provision became law, calls for its repeal were being heard from industry representatives, academics, and members of both political parties.³²⁹ In 1993, after devastating many of the "luxury" industries indirectly targeted by these provisions and permanently eliminating thousands of jobs from the economy, the tax was repealed.³³⁰

³²⁵ See generally Newman, *supra* note 316.

³²⁶ Shortly after the enactment of the tax, Representative Byron L. Dorgan, Democrat of North Dakota and a member of the House Ways and Means Committee, who participated in the budget negotiations, reluctantly defended the tax:

It is safe to say nobody likes any tax any more. We all know that. But we had to construct some revenues and one item on a long list was a luxury tax.

Mr. Dorgan conceded that the closed budget process did not permit a study of the consequences of any revenue-raising plan. The luxury tax, like most other elements of the package, "was plugged in the middle of the process without hearings," he said. "We do not have much information on what the compliance costs will be." Philip Shabecoff, *New Luxury Tax May Cost More Than It Can Bring In*, N.Y. TIMES, Jan. 22, 1991, at D1.

³²⁷ Diane Culbertson, *Shooting at the Rich but Hitting the Workers*, USA TODAY, Oct. 22, 1991, at 12A; Linda M. Harrington, *Luxury Tax on Boats Sinks Jobs, U.S. Revenue, Critics Say*, CHI. TRIB., June 13, 1991, at C1; David Treadwell, *Luxury Tax May Scuttle Boat Makers; Builders Blame the New Levy for Decimating Sales and Forcing the Loss of 19,000 Jobs*, L.A. TIMES, June 26, 1991, at A5. See also *Miscellaneous Tax Bills: Hearing Before the Subcomm. on Taxation of the Senate Comm. on Finance*, 102d Cong. 389-95 (1991) (prepared statement of Dennis Zimmerman); *The Cost of Tax-Related Job Loss Versus Projected Revenue Gain from Luxury Taxes in Fiscal 1991* (prepared by Republican staff of the Joint Economic Committee, July 1991). But see Michael Kinsley, *Phoney Case Against the Luxury Tax*, WASH. POST, Oct. 18, 1991, at A21, reprinted in THE NEW REPUBLIC, Nov. 4, 1991, at 4.

³²⁸ *The Cost of Tax-Related Job Loss Versus Projected Revenue Gain from Luxury Taxes in Fiscal 1991*, *supra* note 327. While this may not be the most objective assessment of the impact of the luxury tax, it does provide an analytical framework which finds support elsewhere in the literature. See generally Newman, *supra* note 316. See also Karen Koff, *News Briefs: Republicans Release Luxury Tax Study, Call For Repeal*, 52 TAX NOTES 392 (July 22, 1991).

³²⁹ See generally Nagle, *supra* note 322.

³³⁰ The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13,161, 107 Stat. 312

Legal Significance:

There is a place for Yogi in Congress.³³¹ As the enactment and subsequent repeal of the “luxury tax” demonstrates, congressional leaders and their executive branch counterparts clearly did not know where they were going when they enacted the luxury tax in 1990. Consequently, Congress did not wind up where it wanted to be, as the immediate torrent of criticism proved. But then, foresight is always better—afterward.³³²

10. CRIMINAL LAW AND PROCEDURE

Topic: Habeas Corpus

Berraism: On the shadows in left field at Yankee Stadium in the fall: “It gets late early out there.”³³³

Legal Significance:

Yogi’s maxim certainly is shared now by every prisoner waiting for his turn at bat before the federal courts on a habeas corpus petition. Under the new habeas corpus reform law, prisoners have only one year after ending

(1993), repealed the luxury taxes on aircraft, boats, furs, and jewelry effective for sales or uses occurring after December 31, 1992. The demand for luxury items such as jewelry, furs, yachts, and private planes proved to be far more inelastic than the summitteers imagined it to be. See comments of Rep. Dorgan in Shabecoff, *supra* note 326. See also Pollack, *supra* note 317.

³³¹ Yogi has also become an established figure in tax law. For an example of Yogi’s prior appearance in the literature, see Joseph V. Sliskovich, *More on the Schnepfer-Leimberg Joint Purchase*, 33 TAX NOTES 1071 (Dec. 15, 1986).

³³² For a particularly appropriate application of this Berraism in the context of the luxury tax fiasco, consider the statement of a former summitteer who said:

Fundamental reform almost always runs the risk of making things worse.

— Dan Rostenkowski, chairman, House Ways and Means Committee (1993)

Quoted in Seldon D. Pollack, Prepared Testimony Before the Senate Finance Comm., May 18, 1995, at 18 available in 1995 WL 306766.

Apparently, someone in Congress knew where he was going.

³³³ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 11; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 134; PEPE, *supra* note 8, at 185.

their appeals to file a federal petition for writ of habeas corpus. Once their time is up, they're "out-of-there."³³⁴

* * *

Topic: Search and Seizure

Berraism: When asked why he thought he would be a good manager, Yogi responded: "You observe a lot by watching."³³⁵

Legal Application:

In *People v. Triggs*,³³⁶ three Los Angeles police officers were on plain-clothes patrol at a park. The officers suspected that illegal sexual activity was occurring in a restroom at the park and went into the "plumbing access area" of the park's restroom building. This area gave the officers access to plumbing going to both the men's and women's restrooms and also provided a vantage point from which the officers could observe activities in both restrooms. The officers were able to observe the sexual activities from this plumbing access area. The defendant claimed that this evidence should have been suppressed because it was the result of an illegal search. The California

³³⁴ The 1996 Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d) (1996), provides in part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

³³⁵ BASEBALL QUOTATIONS, *supra* note 6, at 149; BERRA, *supra* note 18, at 7; DICKSON, *supra* note 10, at 45; LEDERER, *supra* note 18, at 132; PEPE, *supra* note 8, at 185.

³³⁶ 506 P.2d 232 (Cal. 1973).

Supreme Court agreed, saying that the defendant's reasonable expectation of privacy in the restroom had been invaded.³³⁷

Legal Significance:

The Los Angeles police proved Yogi's point that "[y]ou observe a lot by watching." But in this case, the California Supreme Court held that the police should not have been watching.

* * *

Topic: Eyewitness Identification

Berraism: On his recognizability: "Most everybody knows me by my face."³³⁸

Legal Application:

This Berraism expresses the problems inherent in the use of eyewitness identification in criminal trials. Like Yogi, most of us are influenced by the power of recognition. Thus, eyewitness identification is a potent type of evidence at trial. "In cases where an eyewitness selects someone from a lineup and then testifies that this is the person who committed the offense in question, belief of the eyewitness is tantamount to believing that the defendant is guilty."³³⁹ Juries attach great weight to the testimony of the witness who points a trembling, identifying finger at the defendant while stating, "I'll never forget that face."³⁴⁰

There is, however, significant research showing that eyewitness identification is not only fallible but is, in fact, less reliable than other types of evidence.³⁴¹ The Supreme Court itself has wrestled with the problem of eyewit-

³³⁷ *Id.* at 235, 237.

³³⁸ PEPE, *supra* note 8, at 154.

³³⁹ Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy* 1 PSYCHOL. PUB. POL'Y & L. 726, 728 (1995).

³⁴⁰ ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979).

³⁴¹ "Studies of proven cases of wrongful conviction indicate that about 3% are attributable to 'frame ups,' 8% to coerced confessions, and 52% to false identifications." *Id.* See also Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L. REV. 237 (1996); James P. Murphy, *An Evaluation of the Arguments Against the Use of Expert Testimony on Eyewitness Identification*, 8 U. BRIDGEPORT L. REV. 21, 48 (1987) (warning that "eyewitness testimony, not

ness identification, expressing discomfort with its associated problems³⁴² and finding a Sixth Amendment right to counsel at all pretrial identification parades,³⁴³ only to later limit this right to those confrontations between the witness and the accused that occurred prior to indictment or arraignment.³⁴⁴

* * *

Topic: Harmless Error

Berraism: On the Yankees losing the 1960 World Series to the Pirates: "We made too many wrong mistakes."³⁴⁵

Legal Application #1:

In *Chapman v. California*,³⁴⁶ the Supreme Court recognized that errors committed by a trial judge in a criminal case can be categorized as harmful (those that require reversal) or harmless (those that can be ignored on appellate review).³⁴⁷ The court explained that harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."³⁴⁸

The Court in *Chapman* merely reiterated what Yogi had observed seven years earlier. In the course of a ball game, or series of ball games, errors are inevitably made. These errors run the gamut from missing a steal sign, to overthrowing first base, to hanging a curve ball over the middle of the plate,

sufficiently understood by the jury, is dangerous evidence which may easily result in miscarriages of justice"); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 975-88 (1977) (arguing that eyewitness testimony is necessarily unreliable because "perception . . . is a constructive process by which people consciously and unconsciously use decisional strategies to attend selectively to only a minimal number of environmental stimuli").

³⁴² See *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

³⁴³ *Id.* at 236-37.

³⁴⁴ *Kirby v. Illinois*, 406 U.S. 682 (1972) (refusing to extend the *Wade-Gilbert* per se exclusionary rule to identification testimony based upon a police station show-up that took place before formal charges had been filed). *Kirby* effectively eviscerates the right since the investigating officer can avoid the involvement of defense counsel simply by carrying out the identification procedure prior to indictment.

³⁴⁵ BASEBALL QUOTATIONS, *supra* note 6, at 151; BERRA, *supra* note 18, at 8; DICKSON, *supra* note 10, at 44; PEPE, *supra* note 8, at 185.

³⁴⁶ 386 U.S. 18 (1967).

³⁴⁷ *Id.* at 21-22.

³⁴⁸ *Id.* at 22.

resulting in a game-winning home run. Some of these mistakes have no effect on the outcome of the game, while others are outcome determinative. This latter class of mistakes, denominated by Yogi as “wrong mistakes,” is clearly distinguishable from the former category of “harmless errors.”

Legal Application #2:

As Yogi aptly noted, only mistakes that matter, matter.³⁴⁹ Courts and scholars have spilled veritable oceans of ink over the problem of harmless error.³⁵⁰ Perhaps most famous, but nevertheless typical, is Justice Traynor’s seminal essay which introduced the problem in the following terms:

Errors are the insects in the world of law, travelling through it in swarms, often unnoticed in their endless procession. . . . The well-being of the law encompasses a tolerance for harmless errors adrift in an imperfect world. . . . So an inquiry into what makes an error harmless, though one of philosophical tenor, is also an intensely practical inquiry into the health and sanitation of the law.³⁵¹

Yogi certainly said it more succinctly.

* * *

Topic: Perjury

Berraism: Disputing the veracity of many of the Berraisms: “I really didn’t say everything I said.”³⁵²

³⁴⁹ The rules of baseball require that harm result before a player be charged with an error. See *Errors*, Rules 10.13, 10.14, in 1996 OFFICIAL RULES, *supra* note 213, at 90-93.

³⁵⁰ Compare *Crease v. Barrett*, 149 Eng. Rep. 1353 (Ex. 1835), with *Doe v. Tyler*, 168 Eng. Rep. 1353 (Ex. 1835). For more modern discussions, see ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970); Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995); Craig Goldblatt, *Harmless Error as Constitutional Common Law: Congress’s Power to Reverse Arizona v. Fulminante*, 60 U. CHI. L. REV. 985 (1993); Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

³⁵¹ TRAYNOR, *supra* note 350, at *Foreword*.

³⁵² BASEBALL QUOTATIONS, *supra* note 6, at 151; PEPE, *supra* note 8, at 185.

Legal Application:

Courts have narrowly construed the definition of perjury and put the burden on the questioner to pin down the witness. "Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry."³⁵³ The Court noted that it is entirely proper for a wily witness to derail an attorney as long as the witness speaks the literal truth.³⁵⁴

In addition, the courts have emphasized the importance of the context in which a statement is made in determining whether a statement is perjurious. "The practice of lifting statements uttered by a witness out of context can serve no useful purpose in advancing the truth-seeking role of the perjury statutes."³⁵⁵ Consequently, courts will consider whether the terms used in the question were clear and whether the question called for a discrete answer.

Legal Significance:

The courts concur with Yogi's insight into the difficulty of determining whether a statement was, in fact, made. Without knowing the context and the exact question, it is impossible to determine in retrospect what a witness (or Yogi) really said or meant.

* * *

Topic: Trial Tactics

Berraism: Why the Yankees lost the 1960 World Series to the Pittsburgh Pirates: "We made too many wrong mistakes."³⁵⁶

³⁵³ *Bronston v. United States*, 409 U.S. 352, 358 (1973).

³⁵⁴ *Id.* at 360.

³⁵⁵ *United States v. Sainz*, 772 F.2d 559, 562 (9th Cir. 1985).

³⁵⁶ BASEBALL QUOTATIONS, *supra* note 6, at 151; BERRA, *supra* note 18, at 8; DICKSON, *supra* note 10, at 44; PEPE, *supra* note 8, at 185.

Legal Significance:

See "Trial of the Century," *People v. O.J. Simpson*.³⁵⁷

11. IMMIGRATION LAW

Topic: The Concept of "Entry": Fact and Fiction

Berraism: As Yankee manager on the acquisition of Rickey Henderson: "He can run anytime he wants. I'm giving him the red light."³⁵⁸

Legal Application:

Immigration law is full of paradoxes. One of the most glaring paradoxes is that an alien who tries to come into the United States legally has *fewer* rights than an alien who enters the country illegally.

Section 236(b) of the Immigration and Nationality Act (INA) states that "Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained³⁵⁹ for further inquiry to be conducted by a special inquiry officer."³⁶⁰ This is known as an "exclusion hearing." Therein, aliens have only the rights given to them by the statute and do not enjoy any constitutional rights. However, strange as it may sound, aliens who have managed to enter the United States illegally (that is, crossed into the territorial limits by intentionally evading the nearest inspection point and being free from restraint) are placed in "deportation" proceedings and are entitled to constitutional protections.

³⁵⁷ L.A. Super. Ct. (No. BA097211) (1994).

³⁵⁸ DICKSON, *supra* note 10, at 42.

³⁵⁹ There is no statutory provision for aliens detained following exclusion hearings. However, the authority of the Attorney General to detain excluded aliens for an indefinite period has been well established. *Gisbert v. United States Attorney General*, 988 F.2d 1437,1442 (5th Cir.), *modified sub nom.*, *United States v. Arce*, 997 F.2d 1123 (5th Cir. 1993). On the other hand, aliens detained after an order of deportation must generally be released after six months if the removal cannot be accomplished by that time. *See* 8 U.S.C. § 1252(c) (1997) (INA, § 242(c)).

³⁶⁰ 8 U.S.C. § 1225(b) (1994).

The United States Supreme Court recognized this anomaly in 1953 when in *Shaughnessy v. United States ex rel. Mezer*³⁶¹ the Court said, "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law, . . . [b]ut an alien on the threshold of initial entry stands on a different footing . . ." ³⁶² The Eleventh Circuit Court of Appeals reiterated this anomaly in 1984 when it declared that "[a]liens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress."³⁶³

Legal Significance:

If our Supreme Court can sanction a paradox, then Yogi can have his saying.

* * *

Topic: Aliens and the Fourth Amendment

Berraism: Yogi on his recognizability: "Most everybody knows me by my face."³⁶⁴

Legal Application:

This Berraism relates to the danger of judging by appearances. The danger is particularly present in the area of immigration law, in which people's Fourth Amendment rights tend to be violated merely because of their appearance.

Section 287(a)(1) of the INA authorizes any officer or employee of the Immigration and Naturalization Service (INS) to "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States."³⁶⁵ There is no geographical limitation to this authority, and the Government has contended that, at least in areas adjacent to the Mexican

³⁶¹ 345 U.S. 206, 212 (1953) (citations omitted).

³⁶² *Id.*

³⁶³ *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

³⁶⁴ PEPE, *supra* note 8, at 188.

³⁶⁵ 8 U.S.C. 1357(a)(1) (1994).

border, a person's apparent ancestry alone justifies the assumption that he or she is an alien and satisfies the requirement of the statute.³⁶⁶ However, in *United States v. Brignoni-Ponce*,³⁶⁷ a case in which officers relied solely upon respondent's Mexican ancestry to justify stopping his car, the Supreme Court said:

We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, *this factor alone* would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.³⁶⁸

Legal Significance:

Fame can allow someone to be "recognized" by his or her face, but that is no claim to "know" someone. In the field of immigration, "knowing by a face" leads to discrimination.

* * *

Topic: Admission of Aliens into the United States

Berraism: "You've got to be very careful if you don't know where you're going, because you might not get there."³⁶⁹

Legal Application:

Aliens coming to the United States who have had the foresight to first obtain a visa from the United States consul in their home country may be very surprised when, upon arriving in the United States, they are not admitted into the country.

³⁶⁶ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975).

³⁶⁷ 422 U.S. 873.

³⁶⁸ *Id.* at 886 (emphasis added).

³⁶⁹ DICKSON, *supra* note 10, at 45.

The Supreme Court has made it very clear that admission into the United States is a privilege and not a right. In *United States ex rel. Knauff v. Shaughnessy*,³⁷⁰ while deciding whether an alien could be excluded without a hearing upon a finding by the Attorney General that admission would be prejudicial to the interests of the United States, the Court said, "At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government."³⁷¹ These words are not simply a consequence of the time in which this opinion was rendered (1950). In 1982, when deciding whether a lawful permanent resident had any due process rights when returning to the United States, the Court reiterated: "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."³⁷²

Legal Significance:

Although the United States Supreme Court has proclaimed the death of the right versus privilege distinction in other areas of the law,³⁷³ it is still alive and well in immigration law. Thus, this Berraism, for better or worse, should be kept in mind by all those coming to the United States, even if only for a short visit.

12. EVIDENCE

Topic: Jury Instructions

Berraism: Once, when Joe Garagiola³⁷⁴ got lost on his way to Yogi's house

³⁷⁰ 338 U.S. 537, 542 (1950).

³⁷¹ *Id.*

³⁷² *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

³⁷³ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

³⁷⁴ Joe Garagiola and Yogi were boyhood friends in St. Louis. Garagiola played nine seasons in the major leagues, split among the St. Louis Cardinals, Chicago Cubs, and Pittsburgh Pirates. Garagiola played in the 1946 World Series as a member of the Cardinals. On playing in the World Series, Garagiola said, "It's the same as any other ballgame you'll remember as long as you live." BERRA, *supra* note 18, at 84; BASEBALL ENCYCLOPEDIA, *supra* note 1, at 1046; THE BEST OF BASEBALL, *supra* note 2, at 205; PEPE,

and called for directions, Yogi instructed him, "You ain't too far, just a couple of blocks. Only don't go that way, come this way."³⁷⁵

Legal Application:

In saying this, Yogi was making a wry observation about the nature of jury instructions. The goal of the instructions is to inform the jury about the legal standards by which it is to decide the case. However, too often the instructions are hopelessly complex. It is not simply that the law is itself complex, but that courts have failed to frame intelligible instructions. It has been suggested that a "fundamental reason for the difficulty that jurors have in comprehending jury instructions is the linguistic nature of the instructions themselves."³⁷⁶ And comprehensibility makes a difference. The authors of one empirical study concluded that "there is a real world relationship between levels of comprehensibility of legal instructions and jury deliberations and trial outcomes."³⁷⁷

Anyone who has ever gone to law school will appreciate the precision and clarity of the following jury instruction template:

If you find that defendant [X] was negligent and that such negligence was a substantial factor in bringing about an injury to the plaintiff but that the immediate cause of the injury was the negligent conduct of defendant [Y], the defendant [X] is not relieved of liability for such injury if:

1. At the time of such conduct defendant [X] realized or reasonably should have realized that defendant [Y] might so act; or
2. A reasonable person knowing the situation existing at the time of the conduct of defendant [Y] would not have regarded it as highly extraordinary that defendant [Y] had so acted; or
3. The conduct of defendant [Y] was not extraordinarily negligent and was a normal consequence of the situation created by defendant [X].

supra note 8, at 1-2.

³⁷⁵ PEPE, *supra* note 8, at 188.

³⁷⁶ Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 46 (1993).

³⁷⁷ AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 17 (1982).

[Extraordinary means unforeseeable, unpredictable, and statistically extremely improbable.]³⁷⁸

If the law of "proximate cause" is a "tangle and a jungle, a palace of mirrors and a maze . . . ," and the term "covers a multitude of sins [and] is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried . . . ,"³⁷⁹ then this jury instruction does not go far to clarify it. Yet we assume that jury instructions are intelligible and are followed by juries. As one author stated:

Fundamental to the Anglo-American process of trial by jury is the assumption that after the presentation of evidence and argument by counsel, the judge can instruct the jury on the applicable law, and the jury will then apply those instructions to the facts of the case and return a reasoned verdict.³⁸⁰

If the proximate cause instruction noted above is any indication, then our faith is misplaced.

Legal Significance:

We don't know whether Joe Garagiola found Yogi's home that day. Yogi may or may not have believed he would. In either case, Yogi's instructions illustrate that in everyday life, as in law, the help we receive in getting from here to there often leaves us somewhere in between.

* * *

Topic: Use of Statistics

Berraism: Yogi's theory of baseball, a thinking person's game: "Ninety percent of this game is half mental."³⁸¹

Meaning: In baseball, as in law, a balance of mental acuity as well as physical dexterity is essential for success. But occasionally, neither mental acuity nor physical dexterity is apparent.

³⁷⁸ I COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CAL., CALIFORNIA JURY INSTRUCTIONS: CIVIL § 3.79 (1994).

³⁷⁹ William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 369, 374 (1950).

³⁸⁰ Tiersma, *supra* note 376, at 39.

³⁸¹ DICKSON, *supra* note 10, at 44; PEPE, *supra* note 8, at 185.

Legal Application:

One might be tempted to apply the product rule to Yogi's equation and abbreviate his formula to say baseball is forty-five percent mental ($.90 \times .50 = .45$). However, that is saying something completely different from what Yogi intended. He was absolutely correct to separate the proportion of the game and the proportion of mental acuity, because they are not independent variables. Which ninety percent of the game is half mental may depend on the ballpark one is playing in, the team one is up against, and even the time of day or night. Similarly, the brain power to be applied, whether it be half, more than half, or less than half, will often turn on the same factors.

Judicial agreement with Yogi came in *People v. Collins*.³⁸² The California Supreme Court declared that the proportion of women who were blonde and the proportion of women who wore ponytails could not be multiplied, because the independence of these two factors had not been established.³⁸³ Thus, a witness could not testify that, if one-third of women are blonde, and one-tenth wear ponytails, then the probability of a woman being blonde with a ponytail was one in thirty.³⁸⁴ One could only say that ninety percent of the women who wear ponytails are blonde one-third of the time.³⁸⁵ One might say that one-third of all women wear ponytails every tenth day if they are blondes, but those are the kinds of statements that are likely to be challenged, like "blondes have more fun."³⁸⁶

As the California Supreme Court declared, in a frequently quoted observation:

By subtracting the probability that C will occur in *exactly one* couple from the probability that C will occur in *at least one* couple, one obtains the probability that C will occur in *more than one* couple: $[1 - (1 - \text{Pr})N] - [(N) \times (\text{Pr}) \times (1 - \text{Pr})^{N-1}]$. Dividing this difference by the probability that C will occur in *at least one couple* (i.e., dividing the difference by $[1 - (1 - \text{Pr})N]$) then yields *the probability that C will occur more than once in a group of N couples in which C occurs at least once*.³⁸⁷

³⁸² 68 Cal. 2d 319 (1968).

³⁸³ *Id.* at 328.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ See, e.g., *Gentlemen Prefer Blondes*. But see *Dagwood and Blondie Meet Frankenstein*; *Abbott and Costello Meet Frankenstein*. Cf. *Dagwood and Blondie Meet Abbott and Costello*.

³⁸⁷ *Collins*, 68 Cal. 2d at 334.

Legal Significance:

Thus, it is far safer to say that ninety percent of blondes are half mental.

13. CIVIL PROCEDURE

Topic: Late Filing of Notice of Claim

Berraism: On the shadows in left field at Yankee Stadium in the fall: "It gets late early out there."³⁸⁸

Legal Application:

One aspiring New York Yankee, Andre Robertson,³⁸⁹ learned what Yogi meant after an auto accident in New York in August 1983. In the early hours of the morning, Robertson was driving with a college friend, Shenikwa Dawn Nowlin.³⁹⁰ As he headed south on the Henry Hudson Parkway, he started to slow down as he approached a "reverse-S" curve.³⁹¹ However, he could not avoid smashing into the concrete barriers.³⁹² His car flipped over and Robertson suffered neck and shoulder injuries.³⁹³ Nowlin suffered more serious injuries and became a paraplegic.³⁹⁴

³⁸⁸ BASEBALL QUOTATIONS, *supra* note 6, at 150; PEPE, *supra* note 8, at 187.

³⁸⁹ Robertson, who was the first African-American player to win a baseball scholarship to the University of Texas, was in his first full year playing shortstop for the Yankees and hitting .248 when the accident occurred. Danny Robbins, *Andre's Odyssey: Once a Promising Yankee, Robertson Toils in the Minors, Unwilling to Give Up the Dream*, NEWSDAY, July 24, 1989, at 87.

³⁹⁰ Nowlin, described as "a 24-year old former ballerina and beauty queen from Dallas," was visiting Robertson before entering her third year of law school. *Nowlin v. City of New York*, 582 N.Y.S.2d 669, 670 (App. Div. 1992), *aff'd*, 612 N.E.2d 285 (N.Y. 1993). By 1992, she had finished law school and was working as a city attorney in Dallas. *Id.* at 673. At age 14, she had been the youngest member of the Dance Theater of Harlem. Mark Lowery, *Ex-Ballerina Awarded \$14M*, NEWSDAY, Dec. 22, 1990, at 7.

³⁹¹ *Nowlin*, 582 N.Y.S.2d at 670-71.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ Nowlin also sued Robertson because he was driving between 50 and 65 mph, exceeding the speed limit of 35 mph. The jury apportioned liability 67% against the city and 33% against Robertson. *Id.*

Nowlin sued the City of New York claiming misplacement of the signs warning of the "reverse-S" curve and ultimately received a judgment for \$7.5 million.³⁹⁵ Robertson, however, received nothing.³⁹⁶ The reason for this was that he failed to comply with New York Municipal Code Section 50-e(1)(a) requiring a notice of claim to be filed against the City "within ninety days after the claim arises."³⁹⁷

This failure to file a timely notice of claim is not always fatal, because the courts have discretion to allow late filing.³⁹⁸ However, Robertson delayed too long. It was not until February 1986 that he produced a medical affidavit supporting his application for a late filing.³⁹⁹ The majority of the court concluded that the affidavit was insufficient, and Robertson was not allowed to have his day in court because of his failure to comply with the ninety-day rule.⁴⁰⁰ The shadows over this Yankee's case had grown too long for the majority of the Appellate Division.⁴⁰¹ The decision was split three to two.⁴⁰² The dissent would have allowed Robertson to file late, because the City had actual knowledge of the case and sufficient information such that it would not have been prejudiced in mounting a defense.⁴⁰³

Legal Significance:

Time requirements preclude even meritorious claims from being heard. Too many lawyers and their clients find that it gets late early out there.

³⁹⁵ *Id.* at 672.

³⁹⁶ Robertson returned to the Yankees in 1984 and was vying for the shortstop position during spring training in 1985, when Yogi quipped, "Andre's looked good. What I wanted to do here is see what he can do." Claire Smith, *Yanks Will Wait a Little More Before Panicking*, N. N.J. REC., Mar. 13, 1985, at D4. Unfortunately, Robertson injured his knee in spring training and required arthroscopic surgery. After some time in Columbus, he returned to New York, where he played third base for the Yankees and hit .328 in 50 games in 1985. He was released by the Yankees during the 1986 season, and by 1989, his career had virtually ended, as did his lawsuit against the City of New York. Robbins, *supra* note 389, at 87. In 1990, it was reported that he was working in a steam generating plant in Texas. Lowery, *supra* note 390, at 7.

³⁹⁷ N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 1986).

³⁹⁸ N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1986). The courts must consider if the petitioner has a reasonable excuse for delay and if the City has received actual notice of the claim and would not be prejudiced in maintaining its defense. *Robertson v. City of New York*, 536 N.Y.S.2d 70, 72 (App. Div. 1989), *aff'd*, 543 N.E.2d 745 (N.Y. 1989) (mem.).

³⁹⁹ *Id.* at 71-72 (Carro, J., dissenting).

⁴⁰⁰ *Id.* at 70-71.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 71.

⁴⁰³ *Id.* at 72-73 (Carro, J., dissenting).

* * *

Topic: Collateral Estoppel

Berraism: Explaining the declining attendance at Kansas City Athletics games: "If people don't want to come to the ballpark, nobody's going to stop them."⁴⁰⁴

Legal Application:

Under principles of collateral estoppel or issue preclusion, a party to a lawsuit may generally litigate an issue only once. After the issue has been litigated and decided, the party who lost on that issue is usually precluded from litigating it again in a subsequent lawsuit.⁴⁰⁵ Traditionally, such estoppel could be invoked only against someone who was a party to the former suit. To collaterally estop someone who was not a party to the first suit would arguably violate their due process rights to notice and to an opportunity to be heard before being deprived of their property.⁴⁰⁶

For a time, the Supreme Court toyed with the idea that collateral estoppel could be used against someone who was not a party to the prior lawsuit, provided they deliberately bypassed an adequate opportunity to intervene in the prior lawsuit.⁴⁰⁷ However, in *Martin v. Wilks*,⁴⁰⁸ the Court held that, in federal court, persons who choose not to come forward and intervene in an action and who are not otherwise made parties to that action cannot later be estopped from litigating issues that were decided in the first suit.⁴⁰⁹

⁴⁰⁴ BASEBALL QUOTATIONS, *supra* note 6, at 150; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 134; PEPE, *supra* note 8, at 185.

⁴⁰⁵ See, e.g., *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876).

⁴⁰⁶ U.S. CONST. amend. V, amend. XIV, § 1. See *Humphreys v. Tann*, 487 F.2d 666, 671 (6th Cir. 1973) (holding that for a federal court to collaterally estop a nonparty would violate the Due Process Clause of the Fifth Amendment).

⁴⁰⁷ *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968) (leaving open the question whether a person "should be bound by the previous decision because, although technically a nonparty, he had purposefully bypassed an adequate opportunity to intervene").

⁴⁰⁸ 490 U.S. 755, 761-62 (1989).

⁴⁰⁹ *Id.* at 761-62.

Legal Significance:

The Supreme Court might have summarized its holding in *Martin v. Wilks* by paraphrasing Yogi Berra: "If people don't want to come to [become a party to a lawsuit], nobody's going to [e]stop them."

* * *

Topic: Pleading

Berraism: "When you come to the fork in the road, take it."⁴¹⁰

Legal Application:

A considerable part of the job of a lawyer is to make choices about strategy based upon imperfect information. The ideal, of course, is to make the bold, brilliant, and unanticipated choice. Thus, Robert Frost's advice about what to do at a fork in the road is so often quoted as to become cliché.⁴¹¹ However, the better advice for most of us is to choose that which serves the

⁴¹⁰ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 7.

⁴¹¹ Two roads diverged in a yellow wood,
 And sorry I could not travel both
 And be one traveler, long I stood
 And looked down one as far as I could
 To where it bent in the undergrowth;
 Then took the other, as just as fair,
 And having perhaps the better claim,
 Because it was grassy and wanted wear;
 Though as for that, the passing there
 Had worn them really about the same.
 And both that morning equally lay
 In leaves no step had trodden black.
 Oh, I kept the first for another day!
 Yet knowing how way leads on to way,
 I doubted if I should ever come back.
 I shall be telling this with a sigh
 Somewhere ages and ages hence:
 Two roads diverged in a wood, and I —
 I took the one less traveled by,
 And that has made all the difference.

Robert Frost, "The Road Not Taken."

THE POCKET BOOK OF ROBERT FROST'S POEMS 223 (Louis Untermeyer ed., 1971).

client's immediate purposes and does not foreclose too many options in the future. Thus, although Robert Frost's view is perhaps more familiar, Yogi's is better advice: keep your options open and don't make false choices.

Drafting a complaint is one occasion where the law sides with Yogi. Rule 8 of the Federal Rules of Civil Procedure permits pleading in the alternative.⁴¹² Alternative pleading, especially subject to the requirements of Rule 11,⁴¹³ is not a concept that is intuitively obvious to most, although Yogi had no trouble with it. In *McCormick v. Kopmann*,⁴¹⁴ the widow of a man killed in a traffic accident involving a truck sued the truck driver as well as the owners of the bar where her husband had been drinking prior to the accident. In one count, the widow alleged that her husband had exercised due care and that the truck driver had driven across the center line and collided with her husband's car.⁴¹⁵ In another count, the widow sought damages from the bar owner under the state dram shop act and alleged that the bar had sold alcoholic beverages to her husband which led to his inebriation and that "as a result of such intoxication' [he] drove his automobile 'in such a manner as to cause a collision. . . .'"⁴¹⁶ Under Illinois law, to recover from the truck driver, the widow had to establish that her husband was free of contributory

⁴¹² Rule 8(e)(2) provides, in pertinent part:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency

FED. R. CIV. P. 8(e)(2). Rule 8(e)(2) admonishes lawyers, however, that "[a]ll statements shall be made subject to the obligations set forth in Rule 11." *Id.*

⁴¹³ Rule 11 provides, in pertinent part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . .

FED. R. CIV. P. 11(b).

⁴¹⁴ 161 N.E.2d 720 (Ill. Ct. App. 1959).

⁴¹⁵ *Id.* at 724.

⁴¹⁶ *Id.*

negligence.⁴¹⁷ Thus, the two counts were mutually exclusive; both allegations could not be true.⁴¹⁸

In upholding the denial of the truck driver's motion to dismiss the complaint, the court held that alternative and inconsistent pleading is permissible so that "complete justice [may be] accomplished in a single action," as long as the pleader does not know which of the inconsistent allegations are true and which are not.⁴¹⁹ "Where . . . the injured party is still living and able to recollect the events surrounding the accident, pleading in the alternative may not be justified, but where, as in the case at bar, the key witness is deceased, pleading alternative sets of facts is often the only feasible way to proceed."⁴²⁰

Legal Significance:

True professional skill, as Yogi recognized, is knowing when one must, for strategic reasons, make a choice, and when, on the other hand, the best tactic is to keep one's options open.

* * *

Topic: Summary Judgment

Berraism: "Anybody who can't tell the difference between a ball hitting wood and a ball hitting concrete must be blind."⁴²¹

Meaning: Yogi's statement illustrates perfectly the Supreme Court's standards for rendering summary judgment in federal civil actions. A blind umpire is akin to a jury that would find for a litigant even though no reasonable person could find for that litigant on the basis of the evidence presented. Of course, as always, Yogi's

⁴¹⁷ *Id.* at 725.

⁴¹⁸ This is why students find it difficult to square alternative pleading with Rule 11(b)(3)'s requirement that allegations have evidentiary support. *See supra* note 413. This is an opportunity for law professors to remind students that there is a world of difference between something's having evidentiary support and something's being true.

⁴¹⁹ *McCormick*, 161 N.E.2d at 726.

⁴²⁰ *Id.* at 727-28.

⁴²¹ DICKSON, *supra* note 10, at 41; PEPE, *supra* note 8, at 188. In an argument with an umpire who ruled that a ball hit a concrete wall and was thus in play, Yogi said it hit a wooden barricade beyond the wall and was thus a home run, *quoted in* SPORTS ILLUSTRATED, Apr. 1990.

statement is ironic in that one generally would expect the umpire and the judge to be the analogous actors from an adjudicatory standpoint. The double irony is that, as will be shown below, judges may be as blind or deaf as umpires.

Legal Application:

In the famous trilogy of summary judgment cases decided in 1986, the Supreme Court set out the modern standard for determining when summary judgment should be granted by a district court.⁴²² The purpose of the decisions was to clarify how much evidence a plaintiff would need, in opposing a motion for summary judgment, to defeat that motion and proceed to a jury. Thus, in *Celotex Corp. v. Catrett*,⁴²³ the Court ruled that the defendant need not disprove the plaintiff's case to be granted summary judgment.⁴²⁴ Rather, upon a simple showing by the defendant that the plaintiff, after a fair opportunity for discovery, lacks the evidence necessary to prove one or more essential elements of its claim, the plaintiff must submit evidence in its summary judgment response on such elements to show that there is a genuine issue of material fact.⁴²⁵

In the other two trilogy cases, *Anderson v. Liberty Lobby, Inc.*⁴²⁶ and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁴²⁷ the Court set forth the standards for determining when, after the plaintiff makes its submission, summary judgment should be granted. In *Anderson*, the Court equated the granting of a motion for summary judgment with a motion for a post-trial directed verdict.⁴²⁸ The Court found that the evidence submitted by the opponent of the summary judgment motion must be viewed "through the prism of the substantive evidentiary burden."⁴²⁹ The Court reasoned that the opponent should be entitled to a jury trial only if the evidence submitted would be enough to permit a reasonable jury to find as a matter of law for

⁴²² *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁴²³ 477 U.S. 317.

⁴²⁴ *Id.* at 322-23.

⁴²⁵ *Id.* at 322-24. See also FED. R. CIV. P. 56(e).

⁴²⁶ 477 U.S. 242.

⁴²⁷ 475 U.S. 574.

⁴²⁸ *Anderson*, 477 U.S. at 247.

⁴²⁹ *Id.* at 254.

the opponent after trial.⁴³⁰ The Court in *Matsushita* embellished on this theme. The more implausible the theory underlying the opponent's claim, the more evidence the opponent would need to rebut the more plausible inference raised by the proponent of the motion.⁴³¹ Again, there would be no point in allowing the case to be tried by a jury when, as a matter of law, the opponent of the motion lacked sufficient evidence to win.⁴³²

Legal Significance:

In the case of the disputed home run, Yogi wisely suggests two theories for why summary judgment is appropriate for him. First, he appears to be arguing that there is no credible evidence suggesting that the ball was not a home run. Instead, given the differences in the "thud" that would be heard and in the way the ball would carom off the different materials, a reasonable person could only find that the ball hit wood, and therefore was a home run. The umpire, in Yogi's view, lacked sufficient evidence that the ball hit concrete to get to a jury. Second, Yogi is arguing that it was implausible that the ball hit concrete. Given the thud and the way the ball caromed off the wall, the only plausible explanation for what happened was that the batter had hit a home run.

The irony, of course, is that Yogi was fighting with the judge. Indeed, Yogi's statement demonstrates the trap for the unwary built into the Supreme Court's approach for deciding summary judgment. In *Anderson*, the Court noted that when looking at the opponent's evidence through the evidentiary prism, the court should consider the quality and quantity of the evidence submitted.⁴³³ The district court is not allowed to weigh the evidence on a motion for summary judgment. That, of course, is the function of the jury, and the majority in *Anderson* dutifully pointed out that fact.⁴³⁴ As the dissent feared,⁴³⁵ however, and as Yogi learned, this loose language can be used by those visually or tonally impaired umpires to doom justice in the land by depriving the good guys of the cheers they so richly deserve to hear, thereby giving new meaning to the axiom that "justice is blind."

⁴³⁰ *Id.* at 250-51.

⁴³¹ *Matsushita*, 477 U.S. at 587.

⁴³² *Id.* at 587-88.

⁴³³ *Anderson*, 477 U.S. at 254.

⁴³⁴ *Id.* at 254-55.

⁴³⁵ *Id.* at 258 (Brennan, J., dissenting).

* * *

Topic: Injunctions

Berraism: Asked by a player for the correct time, Berra responded: "Do you mean now?"⁴³⁶

or

Yogi asked sportscaster Jack Buck what time he would be arriving at the hotel during a World Series. Buck answered "About 2 a.m.," to which Yogi responded: "Was that local time?"⁴³⁷

or

Once while playing the game Twenty Questions, Yogi asked: "Is he living?" Then, without thinking, Yogi asked, "Is he living now?"⁴³⁸

Legal Application:

The meaning of each of these three Berraisms is "be precise." The Supreme Court agreed with Yogi's admonition in *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*,⁴³⁹ a case which discussed specificity in an injunction.⁴⁴⁰ The district court had issued an injunction which dealt with strikes along the Philadelphia waterfront.⁴⁴¹ Some union members and officers were held in contempt for violating the injunction despite their arguments that the injunction was vague and that they did not know what acts constituted violations of the injunction.⁴⁴² The Supreme Court agreed with the union members, saying:

Rule 65(d) of the Federal Rules of Civil Procedure was designed to prevent precisely the sort of confusion with which this District Court clouded its command. That rule provides: Every order granting an in-

⁴³⁶ BASEBALL QUOTATIONS, *supra* note 6, at 152; BERRA, *supra* note 18, at 9, 17; LEDERER, *supra* note 18, at 134; PEPE, *supra* note 8, at 187.

⁴³⁷ BERRA, *supra* note 18, at 17.

⁴³⁸ *Id.* at 9.

⁴³⁹ 389 U.S. 64 (1967).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 68.

⁴⁴² *Id.* at 72.

junction . . . shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained

* * *

We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.⁴⁴³

Legal Significance:

Thus, Yogi's "Do you mean now?," "Was that local time?," and "Is he living now?" are at the very heart of American justice: the law must be precise.

14. TRUSTS AND WILLS

Topic: Oral Promises; Trust Termination

Berraism: To wife Carmen about the movie *The Magnificent Seven*⁴⁴⁴ starring Steve McQueen: "He made that picture before he died."⁴⁴⁵

Legal Application:

Yogi seemingly distinguished acts having effect during one's lifetime from acts not having effect until death. This distinction is important in the law.

Under the Statute of Frauds, certain contracts are unenforceable unless they are in writing and signed by the party to be charged. An example is a contract that cannot be performed within the lifetime of the promisor.⁴⁴⁶

⁴⁴³ *Id.* at 74, 76.

⁴⁴⁴ United Artists 1960.

⁴⁴⁵ BASEBALL QUOTATIONS, *supra* note 6, at 149; BERRA, *supra* note 18, at 6; DICKSON, *supra* note 10, at 42; PEPE, *supra* note 8, at 186.

⁴⁴⁶ California Civil Code § 1624 is a typical Statute of Frauds and states:

*Hagan v. McNary*⁴⁴⁷ applied the distinction with disastrous results to the plaintiff. Therein, Mr. Kupper orally promised to pay plaintiff \$7,000 if plaintiff promised to take care of him for life.⁴⁴⁸ When Mr. Kupper died, plaintiff made a claim against his estate based on the oral promise.⁴⁴⁹ The court denied the claim because decedent's obligation to pay could not arise during his lifetime, but only at his death.⁴⁵⁰ Thus, under the Statute of Frauds, the oral promise was unenforceable.⁴⁵¹

The distinction is also illustrated in the area of trust termination. In *Rosenauer v. Title Insurance & Trust Co.*,⁴⁵² the settlor of a trust reserved in herself the power to terminate the trust.⁴⁵³ This power, by the terms of the trust, could be exercised anytime during the *lifetime* of the settlor by a written instrument executed and delivered to the trustee.⁴⁵⁴ Subsequently, the settlor executed a will in which she identified the trust, expressly terminated it, and directed that the trust assets be delivered to her estate.⁴⁵⁵

The court found that the attempted termination of the trust was ineffective.⁴⁵⁶ A will is operative only upon death. Consequently, the will could not constitute a written revocation during the settlor's (and the testator's) *lifetime*.⁴⁵⁷

The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

* * *

(e) An agreement which by its terms is not to be performed during the lifetime of the promisor.

CAL. CIV. CODE § 1624 (West 1996).

⁴⁴⁷ 170 Cal. 141 (1915).

⁴⁴⁸ *Id.* at 141.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 142-43.

⁴⁵¹ *Id.*

⁴⁵² 30 Cal. App. 3d Supp. 300 (1973).

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 301.

⁴⁵⁵ *Id.* at 301-02.

⁴⁵⁶ *Id.* at 303-04.

⁴⁵⁷ *Id.* at 303.

Legal Significance:

Without any legal training,⁴⁵⁸ Yogi grasped a concept that is critical in the law: while most acts are effective during one's lifetime, others are not. The failure to grasp that distinction can have dramatic consequences. Unfortunately, the plaintiff in *Hagan* and the settlor in *Rosenauer* did not share the same insight.

* * *

Topic: Punitive Damages; In Terrorem Clauses

Berraism: On the Mets' chances in the 1973 National League East pennant race: "It's not over 'til it's over."⁴⁵⁹

Legal Application:

Two recent California Court of Appeal decisions⁴⁶⁰ involving the estate of *Star Trek* creator Gene Roddenberry contemplated the legal finality of death. The first case, *Roddenberry v. Roddenberry*,⁴⁶¹ involved the issue of whether punitive damages were properly awarded against Gene Roddenberry's loan-out corporation, Norway, after his death.⁴⁶² Eileen Roddenberry, Gene

⁴⁵⁸ Yogi never went to school beyond the eighth grade. See *supra* note 12 and accompanying text.

⁴⁵⁹ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 5; DICKSON, *supra* note 10, at 43; PEPE, *supra* note 8, at 185.

⁴⁶⁰ *Roddenberry v. Roddenberry*, 44 Cal. App. 4th Supp. 634 (1996) [hereinafter *Roddenberry I*] and *Estate of Eugene Wesley Roddenberry*, unpublished Cal. App. B086718 (Sup. Ct. No. SP000741) (1996) [hereinafter *Roddenberry II*].

⁴⁶¹ 44 Cal. App. 4th Supp. 634.

⁴⁶² *Roddenberry I* also involved the right of Eileen Roddenberry to postdivorce profits generated by the *Star Trek* television series, movies, animations, and other *Star Trek* properties. As a part of the 1969 divorce settlement agreement between Gene and Eileen, Eileen was allocated a one-half interest in all future profit participation income from *Star Trek* to which Eileen and/or Gene were entitled. *Id.* at 641. It is interesting to note that in 1969, at the time of the divorce, *Star Trek* had rated third in its time slot for each of its three seasons, had just been cancelled by NBC, and had amassed a multimillion dollar production deficit. *Id.* Efforts were made by Desilu, *Star Trek's* production company, to syndicate the series, and Desilu agreed that, in the event of syndication, Norway was entitled to several types of income, including a set payment per rerun and "profit participation" if reruns ever yielded profits according to the contractual formula. The contract provided that *Star Trek* had to repay a large and growing production cost deficit before any syndication profits would be payable to Norway. *Id.* By 1984, 15 years after the divorce, *Star Trek* had recouped its production deficit, Norway began to receive "profit participation" payments, and Norway began making

Roddenberry's first wife, claimed fraud in connection with Norway's and Gene Roddenberry's handling of postdivorce payments to her, and she sought punitive damages.⁴⁶³

Pursuant to California Probate Code section 573(b),⁴⁶⁴ punitive damages were not available against Gene Roddenberry's estate and were assessed only against Norway.⁴⁶⁵ On appeal, it was contended that the statutory postdeath ban on punitive damages should be extended to Gene Roddenberry's loan-out corporation.⁴⁶⁶ The court, reaffirming the distinction between the punitive and exemplary aspects of a punitive/exemplary award, stated:

The proposition that such awards should be banned rests on a distinction between the punitive and exemplary aspects of a punitive/exemplary award. The distinction was recognized in *Evans v. Gibson*, which stated that since "the purpose of punitive damages is to punish the wrongdoer for his acts, accompanied by evil motive, and to deter him from the commission of like wrongs in the future, the reason for such damages ceases to exist with his death. It is true that the infliction of punishment serves as a deterrent to the commission of future wrongs by others as well as by the wrongdoer, but punitive damages by way of example to others should be imposed only on actual wrongdoers." Thus although the exemplary function of a punitive/exemplary award can still be performed by an award against the wrongdoer's estate, the exemplary function without the punitive is not considered sufficient to justify the imposition of punitive/exemplary damages. Hence the Legislature has outlawed such awards.⁴⁶⁷

Because Gene Roddenberry's death did not cause the legal termination of Norway, the Court determined that the public policy motivations behind puni-

payments to Eileen. *Id.* at 642.

⁴⁶³ *Id.*

⁴⁶⁴ CAL. PROB. CODE § 573(b) (West 1992). Effective January 1, 1993, Probate Code § 573(b) was repealed and replaced without substantive change by California Civil Procedure Code § 377.42, which likewise bars punitive damages against a decedent or estate. CAL. CIV. PROC. CODE § 377.42 states:

In an action or proceeding against a decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, on a cause of action against the decedent, all damages are recoverable that might have been recovered against the decedent had the decedent lived except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages.

CAL. CIV. PROC. CODE § 377.42 (West 1996).

⁴⁶⁵ *Roddenberry I*, 44 Cal. App. 4th Supp., at 666.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 666-67 (citation omitted).

tive damages awards would be fulfilled by affirming the award of punitive damages against Norway.⁴⁶⁸

The second case, *Estate of Eugene Wesley Roddenberry*,⁴⁶⁹ involved Dawn Roddenberry, the daughter of Eileen and Gene Roddenberry. When Gene Roddenberry died in 1991, he left most of his estate in trust for his second wife, Majel, and he provided that Dawn would receive \$500,000 and a share of the trust fund upon Majel's death.⁴⁷⁰ Gene Roddenberry's will contained an *in terrorem* clause⁴⁷¹ stating, "If any beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will or any of its provisions, any share or interest in my estate given to that contesting beneficiary under this Will is revoked and shall be disposed of in the same manner as if that person had predeceased me leaving no issue."⁴⁷²

Dawn contested the will on grounds that undue influence allegedly was exercised by Majel upon Gene.⁴⁷³ Dawn also accused Majel of fraud.⁴⁷⁴ After two years of legal battles, Dawn voluntarily dismissed the will contest on the day the matter had been set for trial, and Majel was awarded \$334,568 in attorney's fees for her successful defense of the will contest.⁴⁷⁵

Majel subsequently filed an action seeking enforcement of the *in terrorem* clause against Dawn.⁴⁷⁶ Los Angeles Superior Court Judge Irving Shimer

⁴⁶⁸ *Id.* at 667.

⁴⁶⁹ *Roddenberry II*, unpublished Cal. App. B086718 (Sup. Ct. No. SP00741) (1996).

⁴⁷⁰ *Id.* at 3.

⁴⁷¹ For a complete discussion of *in terrorem* clauses in California see, Andrew S. Garb, *The In Terrorem Clause: Challenging California Wills*, 6 ORANGE COUNTY B.J. 259 (1979). Note that Andrew Garb of Loeb and Loeb in Los Angeles represented Majel Roddenberry, executor of the Gene Roddenberry estate, in her successful petition to enforce the *in terrorem* clause. *Roddenberry II*, Cal. App. B086718 at 1.

⁴⁷² *Id.* at 2.

⁴⁷³ *Id.* at 4.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 5. Dawn took approximately 16 depositions and conducted substantial written discovery. *Id.*

⁴⁷⁶ *Id.* at 6. The appellate court commented in a footnote that Judge Shimer correctly applied the law although he disagreed with it. The court referred to Judge Shimer's statement that extrinsic evidence that Gene Roddenberry may not have wanted to disinherit his daughter regardless of her actions made the court

. . . angry . . . towards the lawyers and accountants for what they did. . . [T]hey took this man in his declining years, this very talented writer, but not a lawyer, and put words at the end of his pen on a page that he might have initialed if he was lucky. But that's all. I'm offended by it, but that's the law. I read an article in the last week some place that the *Burch* case goes against the national grain. There are more cases nationally which are rejecting no-contest forfeiture provisions, which I applaud. It's a better world when you have that kind of thing, than what we have in California. [But] You lose. The petition is granted.

decided that the *in terrorem* clause applied, and the California Court of Appeal affirmed the trial court decision to disinherit Dawn.⁴⁷⁷ Thus, the voice of Gene Roddenberry lived on through his will, and Dawn will not get the \$500,000 bequest, nor will she share in the millions she was entitled to upon Majel's death. But this case is not yet over. Dawn may still seek a rehearing by the California Supreme Court.

Legal Significance:

Although it is commonly believed that death is the final act in a person's life, Yogi correctly recognized that "it's not over 'til it's over." Undoubtedly, Gene did not envision a courtroom as his final frontier.

FIELDS OTHER THAN LAW

Medicine and physics provide two examples of other disciplines to which Yogi's wisdom relates. Since Yogi's wisdom is boundless, we hope that these examples will motivate scholars in other fields.

15. MEDICINE⁴⁷⁸

Topic: Dedication Required in the Study and Practice of Medicine

Berraism: After Yogi's roommate, Yankee infielder and medical student Bobby Brown, closed his medical book, *Gray's Anatomy*, Yogi, who had just finished a comic book, asked: "How did yours come out?"⁴⁷⁹

Id. at 6 n.3.

⁴⁷⁷ *Id.*

⁴⁷⁸ Our guest scholar who authored this medical entry is Kalman S. Eisenberg, M.D., an avid Yankees fan and Assistant Clinical Professor of Orthopedic Surgery at the UCLA School of Medicine.

⁴⁷⁹ DICKSON, *supra* note 10, at 42; PEPE, *supra* note 8, at 187.

Medical Application:

Once again, Yogi's words go beyond their literal meaning. The thrust of his playful question was not to suggest that the conclusion of a comic book in any way resembles the final chapter of the ponderous textbook, *Gray's Anatomy*. Instead, Yogi was cleverly encouraging Bobby Brown to continue his reading, knowing that a career in medicine demanded a dedication to the unending acquisition of knowledge.

In addition to a memorable career in baseball (New York Yankees third baseman (1946-54)), President of the Texas Rangers (1974), and President of the American League (1984-94), Bobby Brown, perhaps spurred by Yogi's encouragement, pursued a successful career as a cardiologist in Fort Worth, Texas.⁴⁸⁰

Medical Significance:

As Yogi's comment implies, the practice of medicine is just that—an endeavor demanding the lifelong pursuit of knowledge and the perpetual honing of one's skills.

16. PHYSICS⁴⁸¹*Topics: Quantum Mechanics and Relativity**Background:*

It was only in this century that the quirky and highly nonintuitive rules that God apparently plays by, embodied in the laws of quantum mechanics and relativity, have been uncovered by physicists such as Einstein,⁴⁸²

⁴⁸⁰ Jay K. Varna, *Bobby Brown, M.D.*, JAMA, Nov. 2, 1994, available in 1994 WL 12885232; Ryan Ver Berkmoes, *Baseball's Modest Dr. Brown; Cardiologist, American League President, and Ex-Yankee Slugger Bobby Brown, M.D. Keeps a Surprisingly Low Profile*, AM. MED. NEWS 21, Sept. 7, 1990, available in 1990 WL 3259937.

⁴⁸¹ Our guest scholar who contributed this physics entry is Paul Horowitz, professor of physics at Harvard University. Professor Horowitz was a co-author of another scholarly legal essay. See *Horowitz et al.*, *supra* note 36, at 186-90.

⁴⁸² A. Einstein, *On the Electrodynamics of Moving Bodies*, 17 ANNALEN DER PHYSIK, 17, 891-921

Schroedinger,⁴⁸³ and Heisenberg.⁴⁸⁴ Although few understood his Delphic pronouncements at the time, the great Yogi Berra demonstrated his deep knowledge and appreciation of modern physics and quantum theory, always with characteristic humility and subtlety.

Berraism: "When you come to the fork in the road, take it."⁴⁸⁵

Quantum Mechanical Application:

Intuition teaches us that an object, faced with a pair of alternative paths, must choose one or the other. To the delight of generations of physicists, Nature does it differently: an object traverses *both* paths, a phenomenon known as quantum mechanical interference. In an often-quoted statement, Professor Richard Feynman said the interference of massive particles "has in it the heart of quantum mechanics." "In reality," he added, "it contains the *only* mystery."⁴⁸⁶

Quantum Mechanical Significance:

Only in the last decade has there been direct experimental proof that an atom, faced with a pair of holes in a wall, goes through both.⁴⁸⁷ When faced with a fork in the road, it takes it.

* * *

Berraisms:

(a) (When asked what time it was) "Do you mean now?"⁴⁸⁸

(1905). Not much of a title for a paper that shook physics to its foundations and changed forever how we view the universe. A translation is available in ARTHUR I. MILLER, ALBERT EINSTEIN'S SPECIAL THEORY OF RELATIVITY (1981). Better yet, one stands a chance of actually *understanding* it in a modern text such as EDWIN F. TAYLOR & JOHN A. WHEELER, SPACETIME PHYSICS (1992).

⁴⁸³ E. Schroedinger, *Quantisierung als Eigenwertproblem*, 79 ANNALEN DER PHYSIK, 361-76 (1926).

⁴⁸⁴ W. Heisenberg, *Über quantentheoretische Umdeutung kinematischer und mechanischer Beziehungen*, 33 ZEITSCHRIFT FÜR PHYSIK, 879-93 (1925). Physics in those days was a German monopoly.

⁴⁸⁵ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 7.

⁴⁸⁶ RICHARD P. FEYNMAN ET AL., THE FEYNMAN LECTURES ON PHYSICS vol. 3 at 1-1 (1965).

⁴⁸⁷ O. Carnal & J. Mlynek, 66 PHYS. REV. LETT. 2689 (1991). The atom here was metastable helium, which was forced to encounter a pair of two-micrometer holes spaced eight micrometers apart. The action was observed from a vantage point two feet downstream.

⁴⁸⁸ BASEBALL QUOTATIONS, *supra* note 6, at 152; BERRA, *supra* note 18, at 9; PEPE, *supra* note 8, at

(b) (When asked about the shadows in left field at Yankee Stadium in the fall) "It gets late early out there."⁴⁸⁹

(c) (When asked about his variety of sweaters in assorted colors) "The only color I don't have is navy brown."⁴⁹⁰

Application to the Theory of Relativity:

In his famous paper on relativity,⁴⁹¹ Einstein turned intuition on its head by showing that the concept of absolute time is a fiction. A first event that precedes a second one, for one observer, may in fact follow it when viewed by a different observer who is in motion. Yogi, keenly aware of this "relativity of simultaneity," put it succinctly in (a), above.

Einstein showed that the relativity of simultaneity implies that clocks in a moving frame of reference run slow compared with clocks in a stationary frame of reference.⁴⁹² Physicists call this *time dilation* and demonstrate, with considerable glee, how it can prolong life in a bizarre effect known as the "twin paradox," wherein a long-traveling twin returns home to find his brother considerably older than himself.⁴⁹³ Yogi knew all about this, and applied it to Yankee stadium in (b), above.

Continuing the theme of the physics of moving objects, the well-known Doppler effect (whereby the observed pitch of a train whistle changes as it passes by) was refined by Einstein's theory to the compact form $f' = f(1 \pm \beta)$. The f 's refer to frequency, which for light is the same thing as color.

187.

⁴⁸⁹ BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 11; DICKSON, *supra* note 10, at 43; LEDERER, *supra* note 18, at 134; PEPE, *supra* note 8, at 187.

⁴⁹⁰ PEPE, *supra* note 8, at 186; LEDERER, *supra* note 18, at 134.

⁴⁹¹ Einstein, *supra* note 482. The year 1905 was a banner year for the young patent examiner, who also published an astonishing paper on the photoelectric effect (which showed that light behaves like particles), and another on the so-called "Brownian Motion." The Nobel committee awarded Einstein its prize for 1921, but not for relativity—they weren't sure of the long-term significance of this radical physics. Instead, they played it safe, giving him the award for his explanation of the photoelectric effect.

⁴⁹² *Id.*

⁴⁹³ See TAYLOR & WHEELER, *supra* note 482, at 125ff. This predicted refrigeration of one's aging tendencies has been tested experimentally; see, e.g., J.C. Hafele & R.E. Keating, SCIENCE 177, 166-70 (1972), for details of a flamboyant around-the-world plane trip with precise atomic clocks as passengers.

Einstein's formula thus teaches us that navy blue, when seen running fast enough, becomes navy brown. Yogi, with characteristic modesty, skipped the fancy formulae, cutting to the quick in (c), above.

CONCLUSION

This Essay is over.⁴⁹⁴

⁴⁹⁴ As Yogi said, "It's not over 'til it's over." BASEBALL QUOTATIONS, *supra* note 6, at 150; BERRA, *supra* note 18, at 5; DICKSON, *supra* note 10, at 43; PEPE, *supra* note 8, at 185.