

Spring 1995

Babe Ruth as Legal Hero

Robert M. Jarvis

Nova University Shepard Broad Law Center

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Litigation Commons](#)

Recommended Citation

Robert M. Jarvis, *Babe Ruth as Legal Hero*, 22 Fla. St. U. L. Rev. 885 (1995).
<http://ir.law.fsu.edu/lr/vol22/iss4/13>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

BABE RUTH AS LEGAL HERO*

ROBERT M. JARVIS**

TABLE OF CONTENTS

| | |
|--|-----|
| I. INTRODUCTION..... | 885 |
| II. LITIGATION INVOLVING BABE RUTH | 886 |
| III. BABE RUTH'S PLACE IN LEGAL LITERATURE | 891 |
| A. <i>Judicial References</i> | 891 |
| B. <i>Scholarly References</i> | 894 |
| IV. CONCLUSION..... | 896 |

I. INTRODUCTION

GEORGE Herman Ruth, better known as "Babe" Ruth, "The Sultan of Swat," and "The Bambino," generally is recognized as the greatest baseball player of all time.¹ During an illustrious career spent playing first for the Boston Red Sox (1914-19), then for the New York Yankees (1920-34), and finally for the Boston Braves (1935), Ruth appeared in 2503 games, belted 714 home runs, collected 2873 hits, knocked in 2211 runs, drew 2056 walks, and retired with a .342 batting average and an unparalleled .690 slugging average.² Incredibly, before his powerful bat dictated moving him from the mound to the outfield, Ruth also compiled a 94-46 won-loss record and a 2.28 earned run average as a pitcher.³

* © 1995 by Robert M. Jarvis. All rights reserved. This Article was first presented at "Baseball and the 'Sultan of Swat': A Conference Commemorating the 100th Birthday of Babe Ruth" held at Hofstra University on April 27-29, 1995. It appears here with the kind permission of the Conference.

** Professor of Law, Nova Southeastern University. B.A., 1980, Northwestern University; J.D., 1983, University of Pennsylvania; LL.M., 1986, New York University. The author is indebted to his NSU colleagues Johnny Burris, Tony Chase, Phyllis Coleman, and Doug Donoho for their many helpful comments, as well as Professor Paul M. Kurtz (University of Georgia), Professor Lawrence S. Ritter (New York University), Professor Joseph C. Sweeney (Fordham University), and Professor Glen Weissenberger (University of Cincinnati) for their research assistance.

1. The arguments for and against Ruth's claim are canvassed in LAWRENCE S. RITTER & MARK RUCKER, *THE BABA: A LIFE IN PICTURES* 1-5 (1988).

2. *Id.* at 276.

3. *Id.* at 277. As has been noted elsewhere, Ruth's ability to both hit and pitch makes him "the only player in history to have mastered completely the two antagonistic sides of the game." Warren Goldstein, *Babe Ruth, in THE READER'S COMPANION TO AMERICAN HISTORY* 960 (Eric Foner & John A. Garraty eds., 1991).

Although more than two dozen books have been written about Ruth,⁴ to date his place in the annals of American law has been overlooked. Given that 1995 marks the centennial of his birth,⁵ it seems fitting to highlight this neglected aspect of Ruth's life.

II. LITIGATION INVOLVING BABE RUTH

Despite the fact that he was a highly visible figure with a penchant for defying authority⁶ and was surrounded throughout his adult life by lawyers,⁷ Babe Ruth was a party in only two

4. Some of the better biographies about Ruth are MARSHALL SMELSER, *THE LIFE THAT RUTH BUILT* (1975); KEN SOBOL, *BABE RUTH & THE AMERICAN DREAM* (1974); KAL WAGENHEIM, *BABE RUTH: HIS LIFE AND LEGEND* (1974); ROBERT W. CREAMER, *BABE: THE LEGEND COMES TO LIFE* (1974); DAN DANIEL & H.G. SALSINGER, *THE REAL BABE RUTH* (1963); MRS. BABE RUTH & BILL SLOCUM, *THE BABE AND I* (1959); MARTIN WELDON, *BABE RUTH* (1948); and TOM MEANY, *BABE RUTH: THE BIG MOMENTS OF THE BIG FELLOW* (1947).

5. Numerous events are being held to mark the occasion. For a description of some of the more important ones, see Alan Drooz, *The Legend That Ruth Built*, BECKETT BASEBALL CARD MONTHLY, Feb. 1995, at 6; see also Dave Anderson, *The Babe, Even at 100, Is Still a Major Draw*, N.Y. TIMES, Feb. 5, 1995, § 8 at 3. Ruth was born on February 6, 1895, and grew up in the seedy waterfront section of Baltimore. RITTER & RUCKER, *supra* note 1, at 7. Today, the area has been transformed into a chic shopping area whose crowning jewel is Camden Yards, the much-praised new home of the Baltimore Orioles. See Rachel Shuster, *Ruth's Daughter Revels In Baltimore's Blossoming*, USA TODAY, July 14, 1993, at C5. The Babe Ruth Museum, one of the country's most popular tourist attractions, sits just a few blocks away. See Saul Wisnia, *Remembering the Babe: What a Sport*, WASH. POST, Feb. 6, 1995, at C1 (noting that 60,000 people visited the museum in 1994).

6. Besides being a glutton, a womanizer, a spendthrift, and a heavy drinker and smoker, Ruth regularly collected speeding tickets, broke team curfews, and got into fights with umpires, fans, and teammates. Although Ruth's 1922 contract with the New York Yankees contained a "morals" clause that required him to abstain from liquor and be in bed by 1:00 a.m. during the season, neither side "ever took the clause seriously." RITTER & RUCKER, *supra* note 1, at 97. Despite his dislike for rules, however, Ruth was a lieutenant in the New York Police Reserve and often was made an acting superintendent of police in the cities he visited. *Id.* at 100, 159.

7. Although Ruth knew many lawyers, four played especially important roles in his life: Christy Walsh, a California lawyer in charge of Ruth's finances during most of Ruth's playing days; Miller J. Huggins, an Ohio lawyer and manager of the New York Yankees from 1918 to 1929; James Monroe Merritt, a law professor at the University of Georgia and father of Claire Merritt Hodgson, Ruth's second wife; and Melvyn Gordon Lowenstein, a New York lawyer who succeeded Walsh as Ruth's business advisor. See BABE RUTH & BOB CONSIDINE, *THE BABE RUTH STORY* 81, 105, 107, 170 (1948).

As a lawyer, the most notable of the four was Lowenstein. Born in 1892 and raised in Cincinnati, Lowenstein received an LL.B. from the University of Cincinnati in 1914. Upon graduating from law school, he became an Assistant Corporation Counsel for the City of Cincinnati. In 1917 he moved to Washington, D.C., where he joined the Advisory Commission of the Council of National Defense and received a naval commission. After World War I ended, he migrated to New York City and became an associate at the law firm of Stroock & Stroock & Lavan at a weekly salary of \$50. He subsequently left the firm to go out on his own.

In the 1930s Lowenstein, who was a corporate lawyer, joined the law firm of Wellman, Smyth & Scofield. The firm's senior partner was noted trial attorney Francis L. Wellman. Wellman became quite fond of the much younger Lowenstein and dedicated his last book SUCCESS IN

reported cases.⁸

In the first, *Ruth v. Educational Films, Inc.*, Ruth sought \$1 million in damages and an injunction. According to the complaint, the defendant had produced several newsreels and two shorts about Ruth without compensating him. A New York trial court, however, dismissed the action on the ground that Ruth was a public figure and his home runs were news.⁹ On appeal, the First Judicial Department summarily affirmed the trial court's decision.¹⁰

COURT, published in 1941, to "my esteemed friend and partner Melvyn Gordon Lowenstein."

Upon Wellman's death in 1942, Lowenstein took over the firm. During the next thirty years, the name of the firm changed a number of times, eventually becoming known as Lowenstein, Pitcher, Hotchkiss & Parr. Shortly before Lowenstein's death in 1971, the firm merged into what is today Whitman, Breed, Abbott & Morgan.

Lowenstein began representing Babe Ruth in 1935, soon after Ruth retired from baseball. Ruth, who had not had a regular attorney during his playing days (Ruth preferred to negotiate his own baseball contracts and left other business matters to Christy Walsh), sought Lowenstein's services at the suggestion of Colonel Jacob Ruppert, the owner of the New York Yankees. Although Ruppert did not know him, he had heard of Lowenstein from Paul Carey, the limousine magnate who was a friend of both Ruppert and Ruth.

Lowenstein, who Ruth always referred to as Gordon, served as Ruth's attorney for the remainder of Ruth's life and was the executor of Ruth's estate. Interestingly, none of Lowenstein's other clients were sports stars. Telephone interview with Mrs. Katherine P. Lowenstein (Feb. 26, 1995). In his autobiography, Ruth made special mention of Lowenstein and credited him for giving Ruth "the best business advice an easy-come, easy-go guy ever had." RUTH & CONSIDINE, *supra*, at 107.

8. Ruth also was a participant in several legal proceedings that did not result in court decisions. In 1923, for example, Ruth was identified as the father in a short-lived paternity suit brought by Dolores Dixon, a Manhattan department store telephone operator. WAGENHEIM, *supra* note 4, at 120-21. In 1929, Ruth was temporarily a suspect when his first wife, Helen Woodford, died in a fire in her Boston home. *Id.* at 185-91. In 1930, Ruth legally adopted two young girls: Julia, the daughter (by a previous marriage) of his second wife, and Dorothy, whose real name was Marie Harrington and who had come to live with Helen and Ruth in 1922. *Id.* at 201. Shortly before her death, Dorothy wrote a book in which she claimed to be Ruth's illegitimate daughter. See DOROTHY RUTH PIRONE & CHRIS MARTENS, *MY DAD, THE BABE: GROWING UP WITH AN AMERICAN HERO 192-96* (1988).

In addition, while not named in the underlying lawsuit, Ruth deserves partial credit for *Johnson v. Lyon*, 143 A. 373 (N.J. Ch. 1928). Shortly after beating the Pittsburgh Pirates in the 1927 World Series, Ruth and teammate Lou Gehrig agreed to perform in an exhibition game in Asbury Park, New Jersey. According to the contract, the two stars were supposed to be paid in advance. On the day of the game, however, the promoter admitted he did not have the money to pay them. When Ruth and Gehrig refused to take the field until the terms were met, a good Samaritan named Donaghy stepped in and wrote out a check for the full amount (\$2,500). When Donaghy later sued to recover his outlay, the New Jersey courts held that his rights, if any, were subordinate to other parties.

True fans of Ruth also will recognize his impact in *The G. A. Stillwell v. The Wyomissing*, 46 F. Supp. 770 (E.D.N.Y. 1942), an admiralty case that involved two tugboats and several barges, including one named "Babe Ruth."

9. Because the court's opinion is unpublished, the account of its holding is based on the one that appears in WAGENHEIM, *supra* note 4, at 73.

10. See 184 N.Y.S. 948 (N.Y. App. Div.), *later proceedings at* 185 N.Y.S. 952 (N.Y. App. Div. 1920). Ironically, several years later Ruth helped publicize a movie called "In the Name of

Ruth also lost his other lawsuit. In *George H. Ruth Candy Co. v. Curtiss Candy Co.*,¹¹ Judge Lenroot upheld the government's refusal to grant Ruth a trademark on his candy bar—known as “Ruth's Home Run”—because of the likelihood of public confusion with Curtiss' “Baby Ruth” candy bar.¹²

Several factors account for Ruth's limited involvement in litigation. First, Ruth achieved his fame in the 1920s, a period of remarkable lawlessness.¹³ Second, Ruth's celebrity status helped shield him from the consequences of his actions.¹⁴ Third, Ruth's transgressions often were treated as matters requiring the intervention of organized baseball rather than the courts.¹⁵

the Law” by catching a baseball dropped from the top of a building. See WAGENHEIM, *supra* note 4, at 114.

11. 49 F.2d 1033 (C.C.P.A. 1931).

12. *Id.* at 1034. Although the court's decision did not prevent Ruth from selling his candy bar, it eventually disappeared from store shelves. In contrast, the Curtiss candy bar, which is named for President Grover Cleveland's baby daughter Ruth, continues to sell well even today. See RITTER & RUCKER, *supra* note 1, at 74 (15th unnumbered page), 88. At one time, however, Ruth's candy bar, which cost a nickel, was quite popular. In *State v. Reed*, 44 S.W.2d 31, 32 (Mo. 1931), the Missouri Supreme Court noted that among the items stolen from a store by a group of teenagers were “about a dozen bars” of Ruth's Home Run.

In addition to the candy bar, Ruth endorsed numerous other products, including an ice cream cone shaped like a baseball. See *Eskimo Pie Corp. v. Levous*, 24 F.2d 599, 600 (D.N.J. 1928), *aff'd*, 35 F.2d 120 (3d Cir. 1929).

13. The breakdown of law-and-order that followed World War I, as well as Ruth's role in transforming the existing social order, is detailed in Allen Boyer, *The Great Gatsby, the Black Sox, High Finance, and American Law*, 88 MICH. L. REV. 328 (1989). See also Edward Yorio, *Federal Income Tax Rulemaking: An Economic Approach*, 51 FORDHAM L. REV. 1, 30 n.156 (1982) (contrasting the importance of having tax receipts during Ruth's heyday with today).

14. While the news media now serve as a clearinghouse for celebrity gossip, in Ruth's day reporters were friends with the stars they covered and refused to betray their confidences. See Andrew K. Craig, Comment, *The Rise in Press Criticism of the Athlete and the Future of Libel Litigation Involving Athletes and the Press*, 4 SETON HALL J. SPORT L. 527, 527 n.2 (1994) (pointing out that although many reporters suspected that Ruth's inability to start the 1925 season was due to a bout of venereal disease, newspapers announced he had a stomach ache); see also Hubert Mizell, *Rose Merits Hall for Hits, Not Errors*, ST. PETERSBURG (FLA.) TIMES, Aug. 9, 1989, at C1 (comparing press treatment of Ruth and Pete Rose).

15. In Ruth's eyes, however, there probably was very little difference between the two. During most of his career, Ruth played under the watchful eye of Kenesaw Mountain Landis, baseball's first and most powerful commissioner. Unlike recent commissioners, Landis, a former federal judge, was an iron-willed disciplinarian who was quite willing to punish wrongdoers. His tenure and celebrated run-ins with Ruth are described in Mark T. Gould, *In Whose “Best Interests”?* *The Narrowing Role of Baseball's Commissioner*, 12 ENT. & SPORTS LAW. 1 (Spring 1994); Michael W. Klein, Commentary, *Rose Is in Red, Black Sox Are Blue: A Comparison of Rose v. Giamatti and the 1921 Black Sox Trial*, 13 HASTINGS COMM. & ENT L.J. 551 (1991); and Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409 (1990).

While Landis is castigated today by many for his autocratic ways, women hold a special grudge against him. This is due to the fact that in 1931 Landis banned Jackie Mitchell, a 17-year-

Four decades after his death,¹⁶ however, Ruth emerged as the central player in a hotly contested "celebrity likeness" case. In 1987, the MacMillan Publishing Co. issued "The 1988 MacMillan Baseball Engagement Calendar," a weekly diary that included two pictures of Ruth as well as a photograph of a baseball signed by him. Upon seeing the calendar, Ruth's heirs, led by his daughters Dorothy Pirone and Julia Stevens, sued MacMillan for trademark infringement, unfair competition, and invasion of privacy.¹⁷

Pirone and Stevens based their complaint on two different legal theories. They contended that because they had trademarked the words "Babe Ruth," the use of any picture of Ruth without their consent was illegal. They also maintained that as Ruth's heirs they had inherited his privacy rights, including the right to control the commercial use of his likeness.¹⁸ Rejecting both arguments, District Judge Leval granted summary judgment for MacMillan on the trademark infringement and unfair competition claims and dismissed the privacy claim.¹⁹

On appeal, the Second Circuit affirmed.²⁰ With respect to the first two allegations, Circuit Judge Kaufman compared the case to an earlier one involving Elvis Presley:

old pitching sensation who once struck out Ruth in an exhibition game, and all other women, from organized baseball. See Melissa M. Beck, Note, *Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports*, 12 CARDOZO ARTS & ENT. L.J. 241, 248 n.32 (1994). Mitchell's exploits are now the subject of a play titled "Boys and Girls Together." The play had its premier on February 2, 1995, at the Playwrights Theater of Baltimore as the kickoff event of the Babe Ruth centennial celebration. See Donna Miskin, *Babe and Babes*, NEWSDAY, Jan. 29, 1995, at T5.

16. Ruth succumbed to throat cancer on August 16, 1948, at the age of 53. Following a funeral attended by thousands, he was laid to rest in Hawthorne, New York, just a short distance from Yankee Stadium. RITTER & RUCKER, *supra* note 1, at 240-41. Ruth's will, executed just one week before his death, left the bulk of his considerable estate to his wife and, following her death, to his daughters and the Babe Ruth Foundation, a charity for underprivileged children. See *In re Ruth's Estate*, 132 N.Y.S.2d 650 (Sur. Ct. 1954); DAVID WALLECHINSKY & IRVING WALLACE, *The People's Almanac* #2 1199 (1978). Although she believe that Ruth had been mentally incompetent when the changes were made, Dorothy Ruth decided not to challenge the will to avoid "mak[ing] Babe look bad." PIRONE & MARTENS, *supra* note 8, at 183.

17. *Pirone v. MacMillan, Inc.*, No. 88 Civ. 3173 (PNL), 1989 WL 230549 (S.D.N.Y. June 28, 1989), *aff'd*, 894 F.2d 579 (2d Cir. 1990).

18. *Id.* at *1, *2, *3. It has been estimated that royalties paid for the right to use Ruth's likeness now amount to \$1 million annually. In recent years, Ruth's image has been licensed to more than 250 companies, including IBM, Sears, Coca-Cola, and Zenith. See Alan Drooz, *Sultan of Success*, BECKETT BASEBALL CARD MONTHLY, Feb. 1995, at 8; and Glen Macnow, *He's Been Dead for 42 Years, But 'the Babe' Reigns Now as Sultan of Sales*, CHI. TRIB., Sept. 30, 1990, at C14.

19. *Pirone*, 1989 WL 230549 at *4.

20. *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990).

Pirone . . . asserts rights in every photograph of Ruth.

This sweeping contention resembles that rejected in *Estate of Presley v. Russen*, 513 F.Supp. 1339 (D.N.J.1981). The estate of the entertainer Elvis Presley argued that his "image and likeness" was a valid mark; the District of New Jersey rejected the claim as too broad. *Id.* at 1363-64. However, the court went on to note that a particular image of Presley could be a valid mark since it had been used consistently in promotional and advertising materials and thus had retained a "single and continuing commercial impression." *Id.* at 1364.

A similar analysis is appropriate here. Even if Pirone could show that it [sic] has established a trademark in a particular pictorial representation of Ruth, such a trademark would not cover all photos taken of Ruth during his career, no matter how dissimilar. Ruth was one of the most photographed men of his generation, a larger than life hero to millions and an historical figure in whom interest still runs high. The purpose of a trademark is to designate the source of a product and it has no existence apart from the trade "in connection with which the mark is employed." It cannot be said that every photograph of Ruth serves this origin-indicating function. Since Pirone has no trademark relating to any of the photographs used in the calendar, there is no basis for liability. . . .²¹

Judge Kaufman had even less trouble disposing of the privacy claim. Although recognizing that such claims are becoming increasingly common, he declined the plaintiffs' invitation to be a trailblazer:

Pirone also asserts a common law "right of publicity" claim, and asks for relief under New York's statutory right to privacy. N.Y. Civ. Rights Law §§ 50, 51. The Civil Rights Law forbids the use for advertising or trade purposes of any portrait or picture without the consent of the subject. The right of privacy protection, however, is clearly limited to "any living person."

Pirone contends there is a common law right of publicity, barring the unauthorized commercial use of a person's image or likeness, that survived the death of Babe Ruth. "No such non-statutory right has yet been recognized by the New York State courts."

[S]ince the New York courts have indicated clearly that the Civil Rights Law preempts any common law right of publicity action, Pirone has failed to state a claim upon which relief may be granted.

21. *Id.* at 583 (citations and footnote omitted).

Pirone's right to relief in this area lies not with us, but with the New York legislature.²²

III. BABE RUTH'S PLACE IN LEGAL LITERATURE

Despite his lackluster record as a litigant, Babe Ruth has proven to be a hit with both judges and legal scholars. The reason for this is difficult to pinpoint, except for the obvious fact that Ruth's baseball accomplishments continue to astound even after sixty years.

A. Judicial References

Judges most often mention Ruth's name when writing about the history of baseball. In *Flood v. Kuhn*,²³ the landmark opinion dealing with baseball's reserve clause, Justice Blackmun counted Ruth among the players who "sparked the diamond and its environs . . . provid[ing] tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season."²⁴

Justice Blackmun's reference to "recaptured thrills" is evident in *Selig v. United States*,²⁵ a tax case stemming from Bud Selig's acquisition of the Milwaukee Brewers. In the course of his opinion, Circuit Judge Bauer took time to recall how, in 1919, Ruth set a new single season record by hitting twenty-nine home runs and then proceeded to better his own mark three different times.²⁶ In *King v. Burris*,²⁷ a defamation action arising out of an argument at the 1981 winter meetings of the American Association (one of the minor leagues), District Judge Kane paid homage to Ruth's "called shot" against the Chicago Cubs in the 1932 World Series.

In addition to waxing poetic over Ruth's legendary feats, judges have compared them to those of latter-day ball players. In *Hunt's Generator Committee v. Babcock & Wilcox Co.*,²⁸ an indemnification

22. *Id.* at 585-86 (citations omitted). Celebrity publicity rights are discussed further in Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171 (1990); Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 B.Y.U. L. REV. 597; and Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993).

23. 407 U.S. 258 (1972).

24. *Id.* at 262.

25. 740 F.2d 572 (7th Cir. 1984).

26. *Id.* at 573.

27. 588 F. Supp. 1152, 1153 (D. Colo. 1984).

28. 863 F. Supp. 879, 882 n.4 (E.D. Wis. 1994).

suit having little to do with baseball other than its ability to distract the judge from the World Series, and *Mattgo Enterprises, Inc. v. Aaron*,²⁹ a service of process decision, District Judges Evans and Gurfein both recalled Hank Aaron's long and ultimately successful pursuit of Ruth's career home run record. Likewise, in *Maris v. Commissioner*,³⁰ a tax case involving a transfer of corporate stock by Roger Maris, Judge Dawson reminded readers that it was Maris who, in 1961, broke Ruth's single season home run mark.

As a larger-than-life figure, Ruth dominated his era. This fact has not escaped judicial notice. In *Application of New York Braves Baseball Club, Inc.*,³¹ an incorporation proceeding, Justice Hofstadter wrote that "The names of yesterday's heroes of the diamond, such as . . . Babe Ruth . . . are more familiar to some of our youth than historic characters."³² Similarly, in the intermediate appeal in *Flood*,³³ Circuit Judge Moore penned a concurrence in which he observed,

In this century alone the names of such players . . . as . . . Babe Ruth of home-run fame . . . were probably better known to a greater number of our populace than many of our statesmen; and their exploits better remembered than the activities of our outstanding public figures.³⁴

Perhaps because Ruth once boasted that he deserved to be paid more than the President of the United States,³⁵ several judges have mentioned him in the same breath as the nation's chief executive. In his dissent in *Commonwealth v. Moon*,³⁶ a death penalty appeal,

29. 374 F. Supp. 20, 21 (S.D.N.Y. 1974).

30. 41 Tax Ct. Mem. Dec. (CCH) 127, 129 (T.C. 1980).

31. 195 N.Y.S.2d 80 (N.Y. Sup. Ct. 1959).

32. *Id.* at 81.

33. 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

34. *Id.* at 269.

35. See RITTER & RUCKER, *supra* note 1, at 177. Ruth made his remark in March 1930, shortly after the start of the Great Depression, during Herbert Hoover's second year in office. Although Ruth meant to embarrass the White House (he had been an ardent supporter of Hoover's opponent, Al Smith, in the 1928 presidential election because Smith, like Ruth, was a Roman Catholic, *see id.* at 168-69), modern commentators view the incident as proof that Ruth was aware of his economic value to his employers. See Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 608 (1993); Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1452 (1985).

36. 117 A.2d 96 (Pa. 1955) (Bell, J., dissenting and concurring).

The care, treatment and punishment for each mental class is equal except as to persons who may be convicted of first degree murder, in which case the mentally ill person who is otherwise sane, but has a delusion that he is Babe Ruth or Caruso or Napoleon or President of the United States, or has some other mental disorder or mental illness

Justice Bell of the Pennsylvania Supreme Court placed Ruth in the same company as Caruso, Napoleon, and the President. In *State v. Smith*,³⁷ Justice Campbell of the Oregon Supreme Court commented, while discussing the requirement that criminal suspects be advised of their constitutional rights,

The federal Miranda warnings have become a part of our culture. They have been widely discussed and quoted in all areas of our society. In some places the name of 'Ernesto Miranda' is better known than the names of 'Babe Ruth' and 'Calvin Coolidge.'³⁸

Ruth's life has even been used to help justify several holdings. In *Cudahy Junior Chamber of Commerce v. Quirk*,³⁹ for example, the Wisconsin Supreme Court refused to enforce a gambling contract. In defending the court's decision, Justice Hansen wrote,

In essence the Quirk challenge was a wager—'I'll gamble my \$1,000 against your efforts to prove me wrong that my statements are correct.' It is not close kin to a bet that the Green Bay Packers will best the Chicago Bears in their next gridiron encounter. It is, however, a twin to the bet that Babe Ruth once pitched for the Boston Red Sox.⁴⁰

Similarly, in *Springer v. George*,⁴¹ Justice Bell dissented from the majority's conclusion that a jury verdict in favor of a teenager killed in an automobile accident should be affirmed. Contending that damages were being awarded solely on the basis of the decedent's professed hope to someday become a teacher, Justice Bell fumed,

What happens when a boy desires or plans to become President of the United States or of General Motors, or a major league ball player like . . . Babe Ruth . . . —what is the measure of damages in that

less severe than insanity, goes to a hospital and the mental defective, who is less able to exercise self-control, judgment and discretion, goes . . . to the death chair or imprisonment in jail for life.

Id. at 108. Although Justice Bell had no trouble comparing Babe Ruth and Enrico Caruso, the same cannot be said of Caruso: "[When he was] asked what he thought of his contemporary, Babe Ruth, [Caruso] replied that he did not know—he had never heard her sing." John Frohnmayer, *Should the United States Have a Cultural Policy?*, 38 VILL. L. REV. 195, 195 (1993).

37. 725 P.2d 894 (Or. 1986).

38. *Id.* at 906 n.12.

39. 165 N.W.2d 116 (Wis. 1969).

40. *Id.* at 118.

41. 170 A.2d 367 (Pa. 1961).

case? How far can speculation be stretched in order to measure and justify damages for possible future loss?⁴²

B. Scholarly References

Besides doing well with judges, Ruth also has scored with legal scholars.

In reviewing a book about Oliver Wendell Holmes, Professor James Fishman described the renowned jurist as "the Babe Ruth of American law."⁴³ When asked for his reaction to the Delaware Supreme Court's decision in *Paramount Communications, Inc. v. Time Inc.*,⁴⁴ former Securities & Exchange Commission Commissioner Joseph A. Grundfest replied, "In the history of corporate governance, the Paramount decision is what Babe Ruth is to home runs—one for the record books."⁴⁵ An oft-cited student note on mediators is entitled "Sultans of Swap,"⁴⁶ an obvious reference to Ruth's "Sultan of Swat" moniker. A primer on legal writing by a respected trial attorney advises that, just as watching a film about Babe Ruth will not make a Little Leaguer into a batting champion, studying opinions by Cardozo will not turn a budding lawyer into a first-rate wordsmith.⁴⁷

Several years ago, when Professor Frederick Schauer sought to refute Professor Mark Tushnet's argument that every question has numerous correct answers, he used Babe Ruth to prove his point.⁴⁸ A student comment on artificial insemination observes that even famous

42. *Id.* at 371.

43. See James J. Fishman, *Book Review*, 10 PACE L. REV. 625, 625 (1990) (reviewing SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989)). Many other famous people also have been likened to Babe Ruth. See, e.g., Pat Calabria, *Larger Than Life, The World Hasn't Forgotten Babe Ruth: If Anything, the Fascination with the Bambino Has Increased*, L.A. TIMES, Apr. 17, 1992, at C1 (noting that Luciano Pavarotti is considered the "Babe Ruth of opera," Pele the "Babe Ruth of soccer," Willie Sutton the "Babe Ruth of bank robbers," and Francisco Churruga the "Babe Ruth of jai-alai"). In a recent article, however, Professor Pamela S. Karlan wrote "Justice Blackmun was never Babe Ruth . . . [and] never pretended to be. . . ." Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 19 (1994).

44. 571 A.2d 1140 (Del. 1989).

45. See Norma M. Sharara & Anne E. Hoke-Witherspoon, *The Evolution of the 1992 Shareholder Communication Proxy Rules and Their Impact on Corporate Governance*, 49 BUS. LAW. 327, 331 n.32 (1993).

46. See Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876 (1986).

47. See Christopher T. Lutz, *Why Can't Lawyers Write?*, 15 LITIG. 26 (Winter 1989).

It is . . . wrong to criticize any lawyer's writing in comparison to that of Learned Hand, Cardozo, or Justice Robert Jackson. . . . Telling a lawyer to write like Cardozo is like giving a Little Leaguer a film of Babe Ruth and telling him to hit 60 home runs in the big leagues.

Id. at 29.

48. The Tushnet-Schauer debate and Ruth's role in it are explained in Anthony D'Amato,

people such as Ruth carry deleterious genes.⁴⁹ And a joke about a team of deceased all-stars, including Ruth, who cannot win because the devil controls the umpires, begins two different law review articles by Professor Richard Lempert.⁵⁰

Harry Frazee's infamous agreement, in December 1919, to sell Ruth to the New York Yankees⁵¹ is cited in an article about the fiduciary duties of team owners as a prime example of misfeasance.⁵² Likewise, the technological sleight-of-hand used to make actor John Goodman, who bats right-handed, appear to hit left-handed (as Ruth did) in the 1992 movie "The Babe"⁵³ is discussed in a student note that calls for changes in the federal copyright laws.⁵⁴ And a column supporting the mandatory retirement of elderly judges, recalling that Ruth's batting average slipped to just .181 in his final season, concludes that "a

Can Legislatures Constrain Judicial Interpretation of Statutes?, 75 VA. L. REV. 561 (1989).

We can find a formula that yields [the sequence]: 1, 3, 5, 7, Reggie Jackson, Babe Ruth . . . if we take a position on what we mean by "correct." If we mean, "numerically correct," and we translate the letters in the names . . . to their numerical equivalents (and these numerical equivalents can be any number . . .) then we can find a formula that yields those numbers in proper sequential order.

Id. at 598 n.96 (emphasis in original).

49. See Kathleen M. Peterson, Comment, *Federal Regulation of Artificial Insemination Donor Screening Practices: An Opportunity for Law to Co-Evolve with Medicine*, 96 DICK. L. REV. 59, 77 n.180 (1991).

50. See Richard Lempert, *DNA, Science and the Law: Two Cheers for the Ceiling Principle*, 34 JURIMETRICS J. 41 (1993).

The late, great Yankee baseball manager, Casey Stengel, is reported to have once dreamed that he died and went to heaven, where he was asked by the Lord to organize a baseball team. Casey looked around at Babe Ruth, Ty Cobb, Christy Mathewson—all the great players—and was thrilled. But who would they play? The question was quickly answered, for no sooner was the team assembled and the players in shape when the phone rang. It was Satan, challenging Heaven's minions to a game. "But you don't understand," said Casey. "You don't have a chance. I've got all the players." "No, you don't understand," said Satan, "I've got all the umpires."

Id. at 41. See also Richard Lempert, *Error Behind the Plate and in the Law*, 59 S. CAL. L. REV. 407 (1986).

51. See *Appeal of the Boston American League Baseball Club*, 3 B.T.A. 149 (1925) (describing the sale and ruling on its tax consequences).

52. See John K. Harris, Jr., *Fiduciary Duties of Professional Team Sports Franchise Owners*, 2 SETON HALL J. SPORT L. 255, 271 (1992). Many Boston fans believe that the sale of Ruth put a curse on the team and is the reason the Red Sox have not won a World Series since 1918. See DAN SHAUGHNESSY, *THE CURSE OF THE BAMBINO* (1990).

53. Like earlier movies about Ruth's life, the 1992 version generally received poor reviews. See, e.g., Neil Hirsch, *He Scores as Ruth, But Goodman's Performance Aside, 'The Babe' Strikes Out*, N.Y. L.J., Apr. 17, 1992, at 5.

54. See Heather J. Meeker, Note, *Multimedia and Copyright*, 20 RUTGERS COMPUTER & TECH. L.J. 375 (1994). "Computer effects are increasingly common in films that are not considered high-tech or heavily reliant on special effects. For example, computer generated graphics and editing tools made right hander John Goodman pitch lefty in his role as Babe Ruth creating an illusion imperceptible to the moviegoer." *Id.* at 378 n.10.

judge's robes cannot hide his age anymore than Babe Ruth's uniform could hide his.'⁵⁵

In a symposium on blackmail, Professor George Fletcher set forth the view that an offer to sell a baseball signed by Ruth for a ridiculously high price to the parent of a dying child (knowing that the parent would be unable to say no because of the child's attachment to Ruth) is not criminally actionable.⁵⁶ Perhaps he was influenced by Professor John Simmons' earlier argument that the owner of such a baseball is entitled to demand any price that the market will bear.⁵⁷

Finally, a student note on direct democracy points out that despite the public's fervent belief to the contrary, an asterisk was never added to the record books to indicate that Roger Maris needed eight extra games to topple Ruth's single season home record.⁵⁸ Along similar lines, Professor Sanford Levinson has likened the myth of the asterisk to the purported Twenty-Seventh Amendment.⁵⁹

IV. CONCLUSION

A star in life, an icon in death, Babe Ruth continues to be one of history's most memorable figures. Just how impressive is Ruth? In a

55. See Mordecai Rosenfeld, *Rock of Ages*, N.Y. L.J., Dec. 17, 1990, at 2.

56. See George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1619 (1993).

57. See A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 815 n.64 (1984). At present, baseballs signed by Ruth usually fetch at least \$4,000. See Andrew Leckey, *Hot Simpson Collectibles Reflect Folly of Investors*, BALT. SUN, June 24, 1994, at 12C.

58. See Douglas H. Hsiao, Note, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267, 1308-09 (1992).

When Roger Maris of the New York Yankees hit his sixty-first home run against the Boston Red Sox on October 1, 1961, he surpassed the legendary achievement of Babe Ruth, who had hit sixty home runs in 1927. This straightforward history is complicated by the fact that Maris accomplished his feat in a season that had 162 games, whereas Ruth had only 154. The controversy created a fiction: that Roger Maris's single season home run record would go into the record books with an asterisk next to it indicating that he had done it in a 162-game season. As a point of fact, no asterisk ever existed; most baseball encyclopedias merely included both Maris's record and Ruth's record under the same heading.

Id. at 1308 (footnote omitted).

59. See Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENTARY 101 (1994).

I might note at this point the observation of my irreverent colleague Scot Powe that the use of the asterisk to place into question the status of the Twenty-Seventh Amendment is reminiscent of baseball commissioner Ford Frick's decision to order that an asterisk accompany the listing of Roger Maris's 61 home runs as the record for one season, given that his season was eight games longer than the 154-game season played by Babe Ruth.

Id. at 109 n.27. The Twenty-Seventh Amendment reads: "No law, varying the compensation for the services of Senators and Representatives, shall take effect, until an election for Representatives shall have intervened." U.S. CONST. amend. XXVII.

law review article on the separation of church and state, Professor Steven Smith declared that unlike the birth of Jesus Christ, the births of George Washington, Marie Curie, and other mortals have no religious significance. Professor Smith quickly added, however, that Ruth's birth might be an exception.⁶⁰

60. See Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

Indeed, the early christian church condemned the notion that Jesus was not truly or fully human as a Gnostic heresy. Consequently, a positive or inclusive understanding of 'secular' could properly regard the birth of Jesus, like the birth of George Washington, Marie Curie, Babe Ruth, or any other mortal, as a secular event. This classification would not in any way deny that the birth of Jesus—unlike the birth of Babe Ruth, *perhaps*—also has deep religious significance.

Id. at 1009 (emphasis added) (footnote omitted).

