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### Assignments & Exams

Course: Real Property: LGL-506-1504

Assignment: Assignment 1 (based on class 1)

KC Bunyan of the Mudville Nine came to bat in the ninth inning. In the first of his three at-bats, KC had hit a single, a double, and a triple. With a home run, KC would join an elite group of baseball players who had hit for the cycle in a single game.

With a full count, the opposing pitcher threw a blazing fastball over the outside corner of the plate. Casey connected, and the "cycle ball" soared into the sky. The cycle ball cleared the right-field bleachers, landed in the parking lot, and bounced high into the air. The ball came to rest in the front seat of Frank's convertible, which was parked on a public street outside of the parking lot.

The parking lot attendant, Paul, who had been following the game on his radio, saw the cycle ball bounce into Frank's car. Paul ran to the car, reached inside, took the cycle ball and put it in his pocket. Paul's co-worker saw the incident and left a note on Frank's windshield telling Frank what had happened. Frank read the note after the game ended and learned that the cycle ball had landed inside his car before Paul took the ball from the front seat.

Assume that Paul still has possession of the cycle ball. Frank has filed a conversion claim against Paul seeking the return of the cycle ball. How should the court rule on Frank's conversion claim?

Paul was a trespasser, therefore,  
Frank's possessory rights would be  
superior.

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Since the homer, I have been asked by a number of people whether or not our friend in the picture above broke the law. I'm going to go with yes. In two ways. One obvious, the other less so.

As a threshold matter, the guy here appears to be a trespasser. Maybe that's his boat, but if it is, he seemed to be walking by it as if he didn't know it. PNC Park and the land around it abutting the Allegheny River is owned by Sports and Exhibition Authority of Pittsburgh and Allegheny County. That makes it public or at least quasi-public land. Also worth noting that, **according to several boat forums I've read**, the docking area along that wall is open to the boating public and is available on a first-come-first serve basis, which means the boat is there legally. But guys: this is no different than a convertible parked in a lot at City Hall: **YOU CAN'T JUST HOP IN SOMEONE'S VEHICLE AND TAKE THINGS.**

But let's set that aside for a second. Most people asking me about this are less interested in that part of it all than they are about ownership of the baseball itself. This is, surprisingly, less clear-cut than you'd imagine, even if we can agree that in this case the law was broken.

When I was talking about this on Twitter this morning **Alan Chen, a law professor at the University of Denver's Sturm College of Law**, forwarded me **a link from an oldish law review article dealing with the legal ownership of home run balls.** It's long but fun reading, at least by law review standards, which talks about the history of balls flying into stands and people, you know, keeping them. Basically, the ball belongs to MLB until it's "abandoned" to the stands, either because it's hit there, a player throws it there or what have you. That's easy enough, I suppose.

The impetus for that article was **the then-pending case involving Barry Bonds' 73rd home run ball** hit in 2001. There the guy who first snagged the ball was a fellow named Alex Popov. He had it for a brief second. It entered his glove. He stopped its trajectory at least. However, he was almost immediately swarmed by the crowd. At the conclusion of the melee a fellow by the name of Patrick Hayashi ended up with the ball. Given this historic nature of this ball it was clearly valuable — it ended up selling for nearly half a million dollars — and when people have a dispute over something valuable, that ends up in court. Popov sued Hayashi, claiming conversion and trespass to chattel. Which is a fancy way of saying "bro, you stole my ball!"

The court ended up splitting the baby here, dividing the ball, or at least its proceeds, between them. Underlying the ruling was the notion that, though Popov had initial possession, we could not be 100% sure he'd hold on to it given the facts of the situation. And that even if you assume that he only lost it because he was attacked, Hayashi wasn't among his attackers.

I'm not sure I buy that conclusion — **old video of it makes it seem like Popov had the ball squarely in his glove** and had it taken from him illegally — but that's what the court did. At the very least it taught us all a lesson: if you're near someone who catches an historic ball, be ready to pounce but don't make it look like you're one of the pouncers. Hip-checking is probably pretty handy.

But the court also gave us a key takeaway which puts at least some lie to that old notion everyone likes to parrot in these situations: that "possession is nine-tenths of the law." That's just bull!

"The orthodox view of possession regards it as a union of the two elements of the physical relation of the possessor to the thing, and of intent. This physical relation is the actual power over the thing in question, the ability to hold and make use of it. But a mere physical relation of the possessor to the thing in question is not enough. There must also be manifested an intent to control it.

"A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not

possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor.”

As how this applies to the Pedro Alvarez homer: The ball landed in the boat and sat there. It wasn't going anywhere else. That is secure possession — “complete control,” to use the court's parlance — within the property of the boat's owner. As for “manifesting an intent to control it,” well, no, because there is no one there who could form that intent.

This case is rather easy as there appears to have been an intervening criminal act. But I'm struck by old law school hypotheticals. Like, say, a big barge goes by and its wake causes the boat here to rock so violently it spits the ball up onto the public sidewalk and someone walking by takes it. In that case I think “finders keepers” trumps the old nine-tenths rule, because the boat owner never even knew he had it. I'm sure there are a few other scenarios the law students and professors who read this blog can construct which would result in the boat's owner being totally out of luck and our friend on the sidewalk being able to walk away with the ball free and clear. Well, he did that anyway, but other scenarios may have allowed him to do it 100% legally too.

All I know for sure is that if you go to Pitt or Duquesne law school and are taking property class next fall, be SUPER prepared to have an exam question involving Pedro Alvarez and a long home run out of PNC Park.



## FUGITIVE BASEBALLS AND ABANDONED PROPERTY: WHO OWNS THE HOME RUN BALL?

*Paul Finkelman\**

On April 18, 2001 Barry Bonds of the San Francisco Giants hit his 500th career home run.<sup>1</sup> It sailed over the fence and indeed out of Pacific Bell Park and into a part of San Francisco Bay known as McCovey Cove.<sup>2</sup> As the home run ball landed in the water, Bonds landed in the inner circle of baseball power hitters: the 500 home run club. This home run immediately elevated Bonds to the status of baseball immortal, joining such greats of Major League Baseball as Hank Aaron, Hank Greenberg, Mickey Mantle, Eddie Mathews, Willie Mays, and Babe Ruth.<sup>3</sup> A baseball fan and souvenir hunter named Joe Figone, waiting in a boat to

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<sup>1</sup> I thank the following baseball fans: New York attorneys Gianna McCarthy, David Greene, and Martha Rix; Professor Bunji Sawanobori of Nanzan University, Nagoya, Japan; Providence attorney Eugene G. Bernardo, II; Cleveland attorney Joan H.D. Andrews; Tulsa attorney Jeff Chasen; my Tulsa Law School colleague Ray Yasser; my research assistant Sarah Teal; and Harvard Law students Trevor Livingston and Rob Jackson, and future law student Matt Abt for their input on this article.

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I also thank the following legal scholars who posted various comments on this issue on the internet site LAWPROF or who discussed this with me: Marla Mansfield, Kate Waits, William Wiecek, Michael Olivas, Robert Chapman, Matthew Harrington, James Alexander Tanford, David Langum, Herbie DiFonzo, Stephen Calkins, Craig Oren, Craig Albert, Steven Semeraro, David Sorkin, Mark Scarberry, Richard K. Neumann, Keith Rowley, Maura A. Flood, Dennis Hirsh, John Steele, Jerry L. Anderson, and Neil Bernstein.

<sup>2</sup> McCovey Cove is actually a slew that empties into the bay. It is named in honor of the great San Francisco Giants player, Willie McCovey.

<sup>3</sup> As of the beginning of the 2002 season the following players had hit 500 home runs: Hank Aaron, 755; Babe Ruth, 714; Willie Mays, 660; Frank Robinson, 586; Mark McGwire, 583; Barry Bonds, 574; Harmon Killebrew, 573; Reggie Jackson, 563; Mike Schmidt, 548; Mickey Mantle, 536; Jimmie Foxx, 534; Willie McCovey, 521; Ted Williams, 521; Ernie Banks, 512; Eddie Mathews, 512; Mel Ott, 511; and Eddie Murray, 504. See *The 500-Homers Club*, at <http://www.espn.com> (last visited Apr. 13, 2002).

recover the ball from this much anticipated home run, fished it out of the water.<sup>4</sup>

In our modern society, obsessed with artifacts of the famous, a 500th home run ball is a valuable trophy. In 1996 for example, Eddie Murray's 500th home run ball was auctioned off for half a million dollars.<sup>5</sup> Shortly after Bonds hit number 500 a law professor on the list serve "Lawprof" raised the interesting question, "by what legal theory does Joe Figone claim ownership and title to the baseball?"<sup>6</sup>

This article began as a modest attempt to answer that question. I presented the substance of Parts I-III at the Benjamin N. Cardozo School of Law's symposium on the law of baseball, directed precisely at that question.<sup>7</sup> However, over the rest of the 2001 season two more "home run" events—Mike Piazza's 300th career home run and Barry Bonds's 73rd home run on the last day of the 2001 season—have forced me to add new sections to the article, and explore how life, or at least major league baseball, imitates theory. Before getting to these two controversies of 2001, we must first consider the question I just posed: by what theory did Figone claim ownership of the 500th home run ball, and by what theory might someone claim ownership of any baseball.

Ownership comes to the person who catches the ball by two different legal theories: the "common law of baseball," which is based on the traditions and evolution of baseball and the traditional law of abandonment. This is supplemented by what might be considered a "statutory claim," based on the posted or announced regulations—or "laws"—at some major league stadiums. The New York Mets, for example, have a stated policy that fans may keep the balls they catch. This may further be supplemented by a contract claim based on the warning on tickets that balls might be hit into the stands.<sup>8</sup> The Seattle Mariners deal

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<sup>4</sup> See Jim Herron Zamora et al., *Giants' Fan Now a Real Ball Hawk*, available at <http://www.mccovey-cove.com/headlines.htm> (last visited Jan. 9, 2002).

<sup>5</sup> See Carrie Muskat, *Where Have All the 500 Balls Gone?*, available at <http://www.mlb.com> (Apr. 8, 2001).

<sup>6</sup> James Alexander Tanford, in *Lawprof posting*, [lawprof@chicagokent.kentlaw.edu](mailto:lawprof@chicagokent.kentlaw.edu) [hereinafter *Lawprof posting*] (last visited Apr. 19, 2001).

<sup>7</sup> Symposium, *Batter Up! From the Baseball Field to the Courthouse: Contemporary Issues Face Baseball Practitioners*, 23 CARDOZO L. REV. 1597 (2002) [hereinafter *Cardozo Baseball Symposium*].

<sup>8</sup> The Colorado Rockies address this issue on their web site. The policy is apparently grounded in state law. The web site states:

Ticket holders assume all risks and danger incidental to the game of baseball, whether occurring prior to, during or subsequent to the actual playing of the game; including without limitation, injury from thrown bats, thrown or batted balls and spectator conduct. The Colorado Rockies cannot be held responsible for the conduct of other Guests when attempting to obtain a foul or homerun

with both issues on their web site, which asserts:

The Mariners encourage guests to keep any balls hit into the stands. Batted balls and other items leaving the field can be dangerous, however, so we ask that guests stay alert at all times for balls or bats that could land in seating areas. If you would like to lessen this risk, the Mariners will exchange your ticket for one in the upper deck prior to the first pitch being thrown. Please do not attempt to retrieve balls directly from the field, because the ball could still be in play. Fan interference can cost the Mariners in runs scored. Fans interfering with a ball in play will be ejected.<sup>9</sup>

It seems obvious that the person who catches a home run ball has taken ownership of it. Nevertheless, the following investigation and analysis of this conclusion helps us better understand the nature of property in law, and at the same time allows us to see how in one more way, baseball mirrors our legal system and helps us understand the rule of law.<sup>10</sup>

## I. WHO MIGHT OWN THE BALL?

Before turning to the law of abandonment and the common law of baseball, it is worth taking a moment to consider who might own the ball if the person who caught it, or in the case of Figone, found it first, does not. In part, this analysis will cut down on potential owners.

### A. The Batter

Of the possible owners, the person who has the weakest claim to the ball is the player who hit it over the fence. This is significant, in light of the claim by some pundits, as well as New York Mets catcher Mike Piazza, that the ball should be "returned"

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ball. Ticket holders agree that neither the Rockies nor the opposing team, their respective players and agents shall be liable for injuries or damages caused by such risks or dangers. (State of Colorado/City of Denver Spectator Act, 7/1/93). Major League Baseball, *Colorado Rockies Ballpark A to Z Guide*, at [http://www.mlb.com/NASApp/mlb/col/ballpark/col\\_ballpark\\_guide.jsp](http://www.mlb.com/NASApp/mlb/col/ballpark/col_ballpark_guide.jsp) [hereinafter *Colorado Rockies Ballpark Guide*] (last visited Jan. 9, 2002) (implying that fans may go after, and keep, home run balls).

<sup>9</sup> Major League Baseball, *Seattle Mariners Ballpark A to Z Guide*, at [http://www.mlb.com/NASApp/mlb/sea/ballpark/sea\\_ballpark\\_guide.jsp](http://www.mlb.com/NASApp/mlb/sea/ballpark/sea_ballpark_guide.jsp) [hereinafter *Seattle Mariners Ballpark Guide*] (last visited Jan. 9, 2002).

<sup>10</sup> See Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239 (1998); BASEBALL AND THE AMERICAN LEGAL MIND (Spencer Weber Waller et al. eds., 1995).

to the batter who hit the home run.

The batter *never* owned the ball. He never had physical possession of it, and indeed, never directly touched it. His only contact with the ball was to touch it with a tool (his bat) in an attempt to force the ball to move away from him. Indeed, the entire goal of the batter was to make the ball go as far away from him as possible. In fact, he is paid to literally commit a "battery" on the ball to chase it from his presence. As such it is hard to subsequently argue, under any theory of law or possession, that the ball should be "returned" to the batter. He never had it in the first place; did not want it; and used all his might and skill to make it go away. Whoever might own the ball, it is clearly not the batter, who hit it, chased it away, and did everything in his power to remove it from his sight.

Some might make the argument that the batter has a claim to a ball because by hitting it, he has increased its value. This would be especially so for a milestone ball like a lifetime 500th home run ball or Barry Bonds's 73rd home run ball. The argument is that this "value added" interest accrues to the batter, perhaps in the same way that an artist adds value to a piece of paper by drawing on it. Some might also argue that this increased value might be like a patentable discovery, which would give the discoverer (or batter) a claim on the increased value. This argument seems inherently weak. Unlike the artist who might draw on a piece of paper, or even the famous person who might sign a credit card slip,<sup>11</sup> the batter has not added anything of his own to the ball.

It is clear that by hitting the ball the batter has increased its value, but this does not make the batter the owner of the ball or give the batter a claim to the increased value. Rather than being analogous to art, an autograph, a discovery, or an invention, the relationship of the batter to the ball is more like that of a celebrity to a place or event. It is perhaps similar to an inn, which asserts "George Washington slept here," or a restaurant that might set aside the plate or silverware used by Elvis or John Lennon, as a souvenir of something touched by the famous. Washington's night at the inn did not give him property claims in the inn; Elvis's eating soup at a restaurant did not give him a property claim to the soup spoon.

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<sup>11</sup> Pablo Picasso allegedly often paid for goods with checks, knowing that his autograph was more valuable than the items purchased, and thus the check would never be cashed.

### B. *The Catcher*

The catcher might have a claim to the ball because he was trying to gain temporary possession of the ball. In fact, however, the catcher did not gain possession of the ball, so he had no claim to the ball. Indeed, we know that if the catcher had gained possession of the ball, he would have immediately thrown it to the pitcher.<sup>12</sup> Thus, in his incomplete attempt to catch the ball, the catcher cannot claim an ownership interest in the ball.<sup>13</sup>

### C. *The Pitcher*

The pitcher once had possession of the ball. In fact, he was the last one to touch it before it left the playing field (or in the case of Barry Bonds' 500th career home run, the stadium). But, the pitcher did not keep the ball; in fact, he threw it in the vicinity of the batter, in an attempt to turn temporary possession of the ball over to the catcher.

While possession may be important here, it is not the determining factor. The pitcher never actually owned the ball. His job and goal was to in effect "play catch" with the catcher, until the other side made three outs; then he would hand the ball over to the pitcher from the other team.

An alternative theory of the law, for both the pitcher and the catcher, is that they are simply employees of their teams and using a tool—the ball—provided by their employers for the purpose of the job. As such they can never have "owned" the ball. This analysis would also apply to the batter, whose job it was to hit this tool—the ball—which he certainly never owned.<sup>14</sup>

### D. *Could Major League Baseball Own the Ball?*

Recently Ron Borges, a columnist for MSNBC, writing about the 73rd home run that Barry Bonds hit at the end of the 2001

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<sup>12</sup> However, in the event of an attempted stolen base, or an attempt to "pick off" a runner who was leading off of a base, the catcher would have thrown it to an infielder.

<sup>13</sup> Thus, this is also true for any claim by the outfielder nearest to where the ball went over the fence as he too tried, but failed, to gain possession of the ball.

<sup>14</sup> I thank Matthew Harrington of George Washington University School of Law for this insight.

season, asserted that the ball was "something that belongs to baseball—and Barry Bonds—if it belongs to anybody."<sup>15</sup>

Mr. Borges did not offer any support for this assertion, and it is quite frankly difficult to figure out the basis for his claim. Surely the ball belongs to someone, or some entity. And, if it is not technically owned by anyone after it goes over the fence, then it is perhaps like a wild animal, over which the first hunter to capture,<sup>16</sup> kill,<sup>17</sup> mortally wound,<sup>18</sup> harpoon,<sup>19</sup> or even possess on his land,<sup>20</sup> can claim ownership.<sup>21</sup> Borges does not suggest who or what "baseball" might be—although the most obvious interpretation of this assertion is that he means it belongs to that entity known as Major League Baseball ("MLB"). For some home run balls, such as Barry Bonds's 73rd home run, this may indeed be a correct analysis. While home teams usually provide all baseballs for games, in the case of Bonds's record breaking home run, the specific ball pitched to Bonds apparently was not provided by the home team, the San Francisco Giants. Instead, when Bonds came to bat specially marked balls, apparently provided by MLB, were used. They had a marking and number on them that was only visible with a black light. The authenticity of these balls was certified by representatives from MLB as well as a representative of the Arthur Andersen Accounting firm.

Borges seems mostly to be complaining that there is a dispute

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<sup>15</sup> Ron Borges, *Battle of Ball from Bonds' 73rd HR Is Silly*, at <http://www.msnbc.com> (Oct. 2001).

<sup>16</sup> See, e.g., *Young v. Hichens*, 6 Q.B. 607, S.C.D. & M. 592 (1844) (Great Britain). The plaintiff in *Young* had "nearly encompassed the fish with a net" but had not fully surrounded the fish with his net, when the defendant scared the fish away and caught them himself. Lord Chief Justice Denman of the Court of the Queens Bench ruled that there could be no possession "until the party had actual power over the fish." *Id.* at 611. The implication of course is that once the party has possession, such as catching the fish in a net, or a ball in a glove, then the fish or the ball belongs to the person who caught it.

<sup>17</sup> See, e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (holding that the first hunter to kill a wild fox, rather than the hunter that first chased the fox, is entitled to keep the animal).

<sup>18</sup> See, e.g., *State of Montana ex rel. Visser v. State Fish & Game Comm'n*, 437 P.2d 373 (Mont. 1968) (holding that the person who mortally wounds the animal is the owner, even if another person fires the fatal shot that actually kills the animal); *Liesner v. Wanie*, 145 N.W. 374 (Wis. 1914) (same).

<sup>19</sup> See, e.g., *Swift v. Gifford*, 23 F. Case. 558 (1872) (finding that the first ship to harpoon a whale is entitled to the whale, even if another ship intervenes and kills the whale).

<sup>20</sup> See, e.g., *Keeble v. Hickeringill*, 90 Eng. Rep. 906, 907, 908 (Q.B. 1707). Lord Chief Justice Holt of the Court of the Queens Bench ruled that Keeble had a property interest in the wild ducks that landed on the pond (or decoy as the case called it) that he had built for the purpose of hunting and capturing ducks. This was so, even though he had not yet reduced the ducks to his possession. *Id.*; see also A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 45-75 (1995).

<sup>21</sup> See discussion *infra* Section V.

over ownership of the ball, and seems annoyed that it may have some great monetary value. We might indeed question the wisdom of paying large amounts of money for a home run ball. But, that is beside the point. Whether valuable or without much value, the ball must belong to someone.

It seems plausible that MLB might in the future assert ownership over balls. Because MLB provided the specific ball for the record breaking home run, MLB would have the legal right to assert ownership over that ball, just as a team might assert ownership over a baseball, as the Cleveland Indians once did.<sup>22</sup> MLB might require that all franchise owners take steps to retrieve these special home run balls and return them to the League; it might require that franchisees post signs that balls hit into the stands must be returned.

But, MLB has not done any of this and, for marketing reasons, if nothing else, is unlikely to do so. MLB clearly abandoned any claim to the Barry Bonds record-breaking ball. Any doubt about this is resolved by the procedures following the home run. After Barry Bonds's 67th home run, each ball and whoever held it at the time, were taken to a special room in the stadium where an MLB official and a representative of the Arthur Andersen accounting firm, authenticated the ball, marked it, and returned it to the person who had possession of it before it was authenticated. Barry Bonds never owned the home run ball or any other ball and can claim no ownership of the milestone home run ball.<sup>23</sup> Major League Baseball did own this home run ball, before it was hit, but clearly relinquished any claim to it when it sailed over the fence. For other baseballs, not supplied by major league baseball, a similar analysis would be applied to the home teams. They supply the balls for the games, and they could claim ownership in the balls if they chose to do so. However, since the mid-1940s, no team has in fact done so. Rather, teams have explicitly or implicitly allowed fans to keep balls.<sup>24</sup>

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<sup>22</sup> BILL VEECK & ED LINN, VEECK—AS IN WRECK (1962).

<sup>23</sup> Borges, writing in the wake of the attack on the United States on September 11 by Islamic terrorists, suggested that proceeds from the ball be given to various charities for the families of the firemen and others who died in the attack. In the process, Borges belittles the idea that anyone should be concerned with the ball. See Borges, *supra* note 15. This is a worthwhile point, which of course goes directly to the more serious question of why the United States is so obsessed with sports and the artifacts of sports. This is a profoundly important question, but not one I think Mr. Borges would really want to explore, since it would undoubtedly raise questions about his profession as a sports writer. We might equally ask why newspapers and other media pay so much attention to sports.

<sup>24</sup> See *infra* note 44. The one exception to this was when Mets security personnel seized Mike Piazza's 300th home run ball from a fan. See *infra* note 46.

E. *The Real Owner, Before the Ball Was Hit*

If neither the batter, the catcher, the pitcher, nor MLB ever owned the ball, or had more than a temporary possession of it, then who did own it? The answer, of course, is obvious: the home team. Each home team supplies balls for the game. Before the game they are turned over to the umpires, who inspect them, rub them with special mud from the Delaware River,<sup>25</sup> and prepare them for the game.

In the past few years the home teams, in cooperation with MLB, have begun to use specially numbered balls when a player is approaching a significant home run record. This program, known as the Home Run Chase Authentication Program, began during the 1998 season when both Mark McGuire and Sammy Sosa were competing to set a new home run record. Towards the end of the 2001 season, when Bonds was closing in on the new record, Major League Baseball began to provide balls to be pitched to Bonds. These balls, authenticated by the accounting firm of Arthur Andersen, were individually numbered and the umpires put them in play in sequence, thus insuring easy identification of the record-breaking ball. Since all balls used by MLB are essentially fungible, this precaution is the only way to authenticate the provenance of any particular record-breaking ball. Significantly, neither the teams nor MLB have any systems for keeping track of these specially numbered balls—or for that matter any balls used in a game—once they are put into play. There is no system in place for retrieving these specially numbered home run balls if they are hit into the stands, either as foul balls or home runs. But, these specially numbered balls do allow MLB to identify a record-breaking ball when it ends up in the hands of a fan. The willingness of MLB to identify a ball caught by a fan indicates that MLB accepts that fans who catch balls are entitled to keep them.<sup>26</sup> Indeed, in the case of Barry Bonds's 73rd home run ball, representatives of MLB and Arthur Andersen identified the ball and declared it to be the right ball.

Whether specially numbered or not, the home team (or possibly Major League Baseball for record breaking balls) remains the owner of balls, as long as they are on the playing field. The home team *could* post signs requiring that fans return balls hit into the stands. But, no home team has done this in recent memory; on

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<sup>25</sup> This mud is known as Lena Blackburne's Baseball Rubbing Mud.

<sup>26</sup> Amidst the controversy over the ownership of Barry Bonds's 73rd home run ball, the San Francisco Giants identified the ball as the Bonds home run ball immediately after the home run, and later MLB confirmed this identification.

the contrary, as I demonstrate below, for more than half a century teams have allowed, and in fact, encouraged, fans to keep balls that are hit into the stands. Some teams post signs indicating this is their policy.

Teams, in fact, warn fans that balls may be hit into the stands and that these spheroids, traveling at high speeds, are dangerous. Waivers to this effect appear on the backs of some tickets. If the teams wanted the balls returned, this waiver would presumably say so; the fact that it does not seems to be an implied waiver by the team of any claim to a ball hit over the fence.

Two recent trends in baseball illustrate the "ownership" of the ball. In the last decade fielders catching foul balls have gently tossed them into the stands, or actually handed them to fans close to the field. This clearly reflects a management decision—a very smart management decision—that the good will gained by such a gift to the lucky fan more than offsets the value of the ball, which by this point is too scuffed to be put back into play, and can only be used for practice.

Another trend, first started in Wrigley Field, home of the hapless Chicago Cubs,<sup>27</sup> is for home team fans to toss back on to the field home run balls hit by the Cubs's opponents. This is a not terribly subtle attempt to show disrespect for the visiting team, essentially making the point that "we could keep your ball, but we will not stoop so low." Cubs fans do keep home run balls on those rare occasions when Cubs players actually hit them.<sup>28</sup> Two teams have dealt with this issue, in opposite ways, on their web site. The Colorado Rockies tell fans: "At no time should a foul or home run ball be thrown back on the field. Violators will be subject to ejection."<sup>29</sup> On the other hand, the San Francisco Giants web site tells fans: "In addition, any fan entering the field of play or throwing objects in the stands or onto the field, with the exception of home run balls, will face arrest and prosecution."<sup>30</sup>

The bottom line here is that the management clearly "owns" the ball while it is on the field and is in fact empowered to toss used balls (foul balls) into the stands; and that once a ball is in the

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<sup>27</sup> The Cubs have not been in a World Series since 1945, and have not won a World Series since 1908. Reflecting on the Cubs's records over the years, we realize that any team can have a bad century.

<sup>28</sup> It should be noted that over the years a few great home run hitters have played for the Cubs, including Ernie Banks and Sammy Sosa, but unfortunately, one great player does not a team make.

<sup>29</sup> *Colorado Rockies Ballpark Guide*, *supra* note 8.

<sup>30</sup> Major League Baseball, *San Francisco Giants Ballpark A to Z Guide*, at [http://www.giants.mlb.com/NASApp/mlb/sf/ballpark/sf\\_ballpark\\_guide.jsp](http://www.giants.mlb.com/NASApp/mlb/sf/ballpark/sf_ballpark_guide.jsp) [hereinafter *San Francisco Giants Ballpark Guide*] (last visited Jan. 9, 2002).

stands, whether because it is hit there or tossed there, the fans claim it belongs to them. The fan's theory of ownership must be based on the "abandonment" of the ball by the management. This has been a precedent—everywhere in baseball—for more than half a century, and this has been the practice for most of Major League Baseball's history. Only once in recent years, the 300th home run ball hit by Mike Piazza, has there been any attempt by the home team to claim the ball.

## II. ABANDONMENT

The law of property has historically considered that property once legally possessed by someone can lose its status as being "owned" if the possessor or owner abandons it. According to one treatise, "Abandonment occurs when there is 'a giving up, a total desertion, and absolute relinquishment' of private goods by a former owner."<sup>31</sup> Such goods "may be restored to private property by subsequent reclamation,"<sup>32</sup> either by the owner or some other person, a "finder."<sup>33</sup>

Not all property can be abandoned. Statutory regulations may prohibit abandonment. For example, in the antebellum South most states did not allow a master to "abandon" a slave, by freeing the slave. Indeed the most important fugitive slave case heard by the Supreme Court, *Prigg v. Pennsylvania*,<sup>34</sup> turned in part on whether a slave couple became free simply because the master allowed them to live as free people. Under Maryland law the slaves were not free, and thus when their daughter left Maryland she became a fugitive slave. Free blacks were considered dangerous to the slave South, and thus their increase was strictly regulated.

Modern law also prohibits abandonment of some kinds of property. Most jurisdictions prohibit the abandonment of pets, especially dogs, who when left to run free can become dangerous.<sup>35</sup>

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<sup>31</sup> RAY ANDREWS BROWN, *THE LAW OF PROPERTY* 8 (Walter B. Raushenbush ed., 3d ed. 1975).

<sup>32</sup> *Id.*

<sup>33</sup> In a baseball context, the "finders" could be either the person who first caught the ball or the person who first found it floating in the water. It might also be the person who first took possession of it, either by catching it, fishing it out of the water, or simply grabbing it as it rolled by.

<sup>34</sup> 41 U.S. 539 (1842); see also Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1995).

<sup>35</sup> On March 5, 2001, ten-year-old Rodney McAllister was attacked and killed by a pack of abandoned and wild dogs in the park across the street from his home in St. Louis.

Modern environmental regulations also prevent the abandonment of certain kinds of property and hazardous waste.<sup>36</sup>

Similarly, in most places it is illegal to abandon an automobile on a highway or street. This line of discussion can be taken a step further, noting that abandonment of many kinds of property can be seen as littering, dumping, or some other nuisance.<sup>37</sup>

Can this analysis help us think through the problem of the home run ball that leaves the stadium? Plausibly a baseball team might be held liable for the cost of removing its litter from the streets or, in the case of the San Francisco Giants, the water. Can we charge Barry Bonds with being a polluter, for depositing unwanted spheroids in San Francisco Bay? Can we fine the San Francisco Giants for creating an environmental nuisance by hiring people, and indeed rewarding them, for polluting the Bay? Has the team become a public nuisance by encouraging its employees to litter the streets of San Francisco, or the Bay, with baseballs? If someone, especially a child, drowns in the Bay trying to retrieve a ball, or if a child is hit by a car while chasing down a ball, can the team be sued for creating an "attractive nuisance" or even be prosecuted for negligence?

Assuming that a baseball in the Bay is not a form of pollution, does it constitute abandoned property?

There seem to be two categories of abandonment. The most obvious is "specific intent of desertion," such as throwing property away. This occurs when the owner "casts away or leaves behind his property."<sup>38</sup> Objects of value, or no value, left in a dumpster, or purposefully left behind in a hotel room, for example, would fit this description. Hitting a ball over a fence probably would not fit this description. On the other hand, the recently adopted practice of tossing a foul ball into the stands surely illustrates "specific intent of desertion."<sup>39</sup>

In the second category of abandonment the intent is determined by the failure of the owner to retrieve or reclaim

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See Travis Mitchell, *Who Let the Dogs Out?*, MO. PETS MAG., Summer 2001, available at [http://www.mopetsmag.com/2001\\_Editorial.html](http://www.mopetsmag.com/2001_Editorial.html) (last visited Aug. 5, 2002).

<sup>36</sup> See, e.g., 42 U.S.C. § 14301 (2000) (describing the management of rechargeable and mercury batteries). Note that this law has nothing to do with "batteries" in baseball nor does it have anything to do with the assault and battery that the hitter commits against the ball.

<sup>37</sup> Arguably, because a baseball has "value" it is not litter (litter being defined as "rubbish"). However, this is surely not the case with other property that has value. For instance, soda cans, which can be redeemed for a cash deposit, or sold as scrap, have "value," and yet when left by the side of the road, or on the street, are still considered litter.

<sup>38</sup> BROWN, *supra* note 31, at 8.

<sup>39</sup> *Id.* at 8.

property "after a casual and unintentional loss."<sup>40</sup> One commentator cites the example of the owner of a mule who "left it where it lay, stating it was of no value" after it had been injured, but not killed, by a railroad train.<sup>41</sup> This seems analogous to the home run ball, but this may not tell the whole story.

In the example of the injured mule, the owner articulated a specific intent to abandon the property, and in fact declared that the mule ought to be killed, presumably to put it out of its misery.<sup>42</sup> Certainly that is not the case with the home run ball. The stadium announcer would not likely say something to the effect of "Well folks, that ball is out of the stadium, and of no use to this ball team. Whoever catches it can keep it." Some stadiums of course do have signs indicating fans can keep balls, but short of that, we must find this right through a deeper analysis of the law of abandonment.

Thus, if there is an abandonment in the home run going over the fence, it must be a function of what might be called a constructive abandonment. In an earlier time, the baseballs themselves were relatively valuable<sup>43</sup> and baseball teams asked fans to return balls, especially foul balls. In the early 1940s, the Cleveland Indians required fans to return home run balls. The legendary Bill Veeck, who bought the team in 1946, used this policy to illustrate the utter failure of the previous management, writing: "When I say that the Cleveland management still demanded that balls hit into the stands be thrown back onto the field, I am saying it all."<sup>44</sup> Doubtless, one of the reasons for Veeck's great popularity in Cleveland<sup>45</sup> was the abolition of this incredibly stupid policy. Certainly no team in more than half a century has required fans to return balls.<sup>46</sup>

Furthermore, returning home run balls would make no logical sense. Once the ball is hit out of the stadium it is a dead ball, no longer in play. The ball could theoretically be returned to an umpire, who would put it back in play by handing it to the catcher

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (citing *Kansas City, M & B. R. Co. v. Wagand*, 32 So. 744 (Ala. 1902)).

<sup>42</sup> *See id.*

<sup>43</sup> The price of baseballs has remained relatively stable, and has not increased relative to inflation over this century. Thus, the baseball itself has little intrinsic value.

<sup>44</sup> VEECK & LINN, *supra* note 22, at 88.

<sup>45</sup> Aside from bringing the city a winning team. The Indians had not won a pennant for twenty-six years when Veeck bought the team; within two years the team was in the World Series. *See id.* at 118.

<sup>46</sup> The one exception to this appears to be a recent action of the New York Mets in seizing Mike Piazza's 300th home run ball. This does not appear, at the moment, to be a new policy, but it has ominous implications. *See* Andrea Peyser, *Piazza's Playing Hardball with 6-Year-Old Fan*, N.Y. POST, Aug. 2, 2001, at 25.

then on the field. Realistically, such a ball would probably not be put back in play because it was most likely damaged by going over the fence, hitting wood, seats, etc. In the case of the Barry Bonds home run that went into McCovey Cove, there was even more reason to think it could not be put in play. It was soaking wet, perhaps waterlogged, by the time it was retrieved. It would have been impossible to put it in play.

Consistent with this notion of a constructive abandonment is the fact that with only a few exceptions, like the one Bill Veeck described, no team in memory has had a policy of attempting to retrieve balls. This is consistent with the notion of abandonment. Property is abandoned if the owner knows where it is, and does not go after it.<sup>47</sup> This is surely an aspect of the common law of baseball.

### III. THE COMMON LAW OF BASEBALL

For at least the last eighty years, almost all fans attending professional baseball games in the United States<sup>48</sup> have assumed they have a right to take home any balls they catch or retrieve in the stands.<sup>49</sup> Many teams encourage this policy, urging fans, especially children, to bring gloves with them. Advertisements for MLB similarly push this notion, showing fans entering the stadium with gloves. Stadiums have signs and rules about what fans can bring with them. Beer is banned in some stadiums; others ban any food at all, except perhaps baby food. In states where concealed weapons may be carried with impunity, such as Texas and Oklahoma, I assume that both major and minor league teams can, and may, post signs banning guns. But as far as I know, no team bans taking gloves into the stadium.

At least one stadium, Detroit's Commercial Park, has codified the common law of baseball. The stadium has posted signs

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<sup>47</sup> *Schley v. Couch*, 284 S.W.2d 333 (Tex. 1955).

<sup>48</sup> The situation in Japan has been somewhat different. In 1989 Robert Whiting noted that "[s]tadium attendants retrieve all foul balls." ROBERT WHITING, *YOU GOTTA HAVE WA* 221 (1989). Whiting noted that at most parks the attendants "bark, 'Give it back!'", but at Seibu stadium "they politely doff their caps, bow, and chirp, 'We hope you weren't hurt.' Then they present a small gift in return for the ball." *Id.* Apparently, since then things have changed. A survey done for me in 2001 by Law Professor Bunji Sawanobori, at Nanzan University in Nagoya, determined that all stadiums allow fans to keep home run balls, and only two stadiums (Osaka Dome and Koshien in Osaka) still require that fans return foul balls. It is unclear whether the two holdouts reflect the economic conditions at those stadiums, or simply an inherent conservatism in Osaka, especially at Koshien, which is almost a sacred icon of Japanese baseball.

<sup>49</sup> *But see supra* text accompanying note 44.

indicating fans are free to keep foul balls and home run balls.<sup>50</sup> As noted earlier, the Seattle Mariners deal with the issue on the team's web site, which states under the heading "Foul Balls & Home Run Balls & Bats": "The Mariners encourage guests to keep any balls hit into the stands. Batted balls and other items leaving the field can be dangerous, however, so we ask that guests stay alert at all times for balls or bats that could land in seating areas."<sup>51</sup>

Other stadiums do the same. Other teams encourage fans in other ways to catch balls. The public address announcer at Baltimore's old Memorial Stadium used to declare "Give that fan a contract," whenever someone in the stands caught a ball.<sup>52</sup> The San Francisco Giants use their web site to direct fans as to where home runs hit by Barry Bonds are most likely to land.<sup>53</sup>

This common, and now statutory, law of baseball can be compared or contrasted with the common law of other sports. As my colleague Kate Waits has pointed out, professional hockey teams allow fans to keep pucks that go into the stands.<sup>54</sup> Perhaps this is due to the relatively small cost of pucks, or possibly the extremely volatile nature of hockey fans. Who would dare take the puck away from the rowdies who sometimes populate the stands and occasionally get into fights with the players? On the other hand, the more genteel tennis spectators return balls to ushers, despite the fact that professional players, like John McEnroe, have been arguing that U.S. Open officials should make the game more fan-friendly by allowing those who catch balls to keep them.<sup>55</sup>

For nearly half a century football teams, on the other hand, have required the return of their much more expensive balls if they go into the stands.<sup>56</sup> Demanding the return of the ball may have originally have been a function of the relatively higher cost of these balls, but this surely does not explain the practice today, and this explanation may not have ever really explained the practice. In the 1940s and 1950s, when the sport made far less money, fans could keep footballs kicked into the stands on field goals and extra points. This changed in the 1960s, when the teams put up nets to

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<sup>50</sup> Stephen Calkins, in *Lawprof posting*, *supra* note 6, 19 Apr. 2001, 14:23:50.

<sup>51</sup> *Seattle Mariners Ballpark Guide*, *supra* note 9.

<sup>52</sup> Interview with Jeff Chasen, Esq., in Tulsa, Ok. (Sept. 1, 2001).

<sup>53</sup> See *San Francisco Giants Ball Park Guide*, *supra* note 30.

<sup>54</sup> Kate Waits, in *Lawprof posting*, *supra* note 6, 19 Apr. 2001, 12:22:11.

<sup>55</sup> I thank my colleague and sports law expert Ray Yasser for this information.

<sup>56</sup> In recent years, some professional football players have tossed balls into the stands after scoring touchdowns.

catch the balls. Balls that go over the net are retrieved by ushers.<sup>57</sup>

Basketball teams have always required that balls be returned. Initially this may have been due to the cost of the balls but, given the vast amount of money involved in college and professional basketball today, this answer makes no sense. Rather, the returning of the ball is part of the culture and mystique of the game. Fans actually toss the ball back to a referee or player, thus in a sense becoming part of the game. That is part of the common law of basketball.

Yet, as I noted earlier, there is a practical aspect to the return of basketballs and footballs. They can be returned to play. A scuffed football is a scuffed football. A scuffed baseball is an illegal ball that the umpire will immediately throw out of the game. Indeed, when a ball is hit the physical properties of the ball are altered, thus giving the pitcher an unfair advantage.<sup>58</sup> This is why spitballs and other marked up balls are illegal. Thus, the modern rules of baseball make the ball useless once it leaves the playing field. So, the team abandons it.

There is one other plausible reason for returning footballs and basketballs, but not baseballs. This goes to the nature of the games and their rules. Baseball players *try* to hit balls into the stands; that is part of the game, and ever since the appearance of Babe Ruth, this has been a central focus of the game. And ever since Babe Ruth, fans have been keeping home run balls. Indeed, baseball is the only sport where the object of a player is to make a ball go *outside* the playing field. Neither football nor basketball players want to send the ball into the stands. A football kicked for a field goal or extra point may end up in the stands, but that is not the *goal* of the kicker, but only a possible consequence. This differs from the batter, who tries, with all his might, to propel a baseball over the wall and into the stands.

Indeed, one difference between baseball and all other sports is that in no other sport is a player or team rewarded for intentionally sending the ball into the stands.<sup>59</sup> In most cases a basketball, football, soccer ball, tennis ball, or hockey puck only ends up in the stands because of the failure on the part of the player to accurately throw a pass, shoot at the basket or goal, or return a serve from an opponent.<sup>60</sup> In some games, like basketball

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<sup>57</sup> See Waits, *supra* note 4.

<sup>58</sup> See ROBERT KEMP ADAIR, *THE PHYSICS OF BASEBALL* (2d ed. 1994).

<sup>59</sup> Or in other words, "why is this sport different from all other sports?"

<sup>60</sup> It is possible to imagine a quarterback "throwing the ball away" into the stands in order to avoid a sack, but this in itself is outside the spirit of the game, and could be considered an infraction of the rules known as "intentional grounding."

or soccer, sending the ball into the stands costs the team possession of the ball and gives the other team an opportunity to score. Only in baseball can a team score by putting a ball into the stands.

#### IV. MIKE PIAZZA AND THE METS

During the Summer of 2001, New York Mets star Mike Piazza hit his 300th career home run. This home run led to an event that is unprecedented in recent baseball history, and one that according to one *New York Post* reporter was shameful.<sup>61</sup>

The story is sad, and indeed disgraceful. On July 13, 2001, Mets catcher Mike Piazza hit his 300th home run. A fan, Rafael Vasquez, caught the ball and gave it to his six-year-old daughter, Denise, who was a great Piazza fan. Vasquez was immediately surrounded by at least ten Mets security guards who forced Denise and Rafael Vasquez, against their will, to give them the ball, which they later gave to Piazza. The stated policy of the Mets is that fans may keep the balls they catch. The guards apparently promised Vasquez that he would get the bat Piazza used, autographed by the hitter. But, it later turned out that he got a different bat. Piazza asserts "I'm very careful with my bats," noting he has them locked up after every game. He cited the "growth of the memorabilia industry" as one of two reasons, along with the increasing shortage of "good wood" for bats, to explain why he is so careful with them.<sup>62</sup> Apparently he is so concerned about the "memorabilia industry" that he was unwilling to keep an agreement with a six-year-old fan and her father. This is in sharp contrast to Barry Bonds, who, at the very end of the 2001 season, apparently sought to purchase his record-breaking home run balls from the fans who ended up with them.

The story led to some television coverage, and some newspaper stories,<sup>63</sup> but later died down. The Mets eventually arranged for Denise Vasquez to meet Piazza. The Mets gave her a few inconsequential souvenirs, and that was the end of it. She did

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<sup>61</sup> Peyser, *supra* note 46. The first sentence of Ms. Peyser's article is "SHAME on Mike Piazza." I initially discussed this article at a symposium on baseball and the law, held at the Benjamin N. Cardozo School of Law. Sponsors of the symposium included the New York Mets Organization and Mr. Fred Wilpon. It certainly saddens me that the behavior of the Mets organization in this case requires that I must at least metaphorically bite the hand that fed me at the Cardozo symposium.

<sup>62</sup> *Me and My Bat*, SPORTS ILLUS., Mar. 25, 2002, at 80, 84.

<sup>63</sup> See, e.g., Wallace Matthews, *Ballgame: Mike Was Right*, N.Y. POST, Aug. 12, 2001, at 98.

not get to keep the ball she once had, and neither Piazza nor the Mets offered to pay her for its value. Piazza claimed to know nothing about the controversy until weeks after the ball was seized by Mets security guards. He claimed that he simply wanted the ball for his trophy case. "That's a personal heirloom for me" he later told a reporter.<sup>64</sup> Knowing it would be an "heirloom," Piazza had arranged to have the Mets security forces seize the ball. Once it left Denise Vasquez's hands, she never had a chance to get it back.

Legally, this seems like a strong-arm robbery by the New York Mets. Could Vasquez have resisted a phalanx of security guards? It is unlikely. Moreover, the actions of the Mets security forces apparently violate "Shea's policy that says fans can keep balls they catch."<sup>65</sup>

Vasquez would have a solid case against the Mets for conversion or trespass, as well as a possible claim for battery. There might also be civil fraud issues here. If the Mets organization sells tickets to fans under a policy that allows them to keep balls hit into the stands, it is not unreasonable to argue that the team committed fraud. Major League Baseball advertises itself as a sport in which the fans catch the home run balls and keep them. Given the behavior of the Mets, there may be an issue of false advertising, with both the team and Major League Baseball having liability.

Defenders of Piazza and the Mets argue that a ticket to a ball game is not an invitation to vast enrichment. A baseball ticket, they claim, is not a "lottery ticket." However, in fact, it is advertised as just that. You can "catch" the ball and keep it. Just as a bigger possible payout attracts more purchasers of lottery tickets, so too might the possibility of catching a valuable baseball attract more fans. As a player gets close to a milestone home run more fans may come out to watch. Some may even choose seats far in the outfield, not great for seeing the game, but better for catching a valuable ball. The ticket to a game is in fact a lottery ticket. Sometimes the payoff is small: a foul ball hit by an insignificant player. Sometimes it is larger: a home run by a major slugger. And every once in a while it is like a huge powerball lottery pay off. In a sense, Denise Vasquez won the powerball, and the Mets security forces grabbed the winning ticket right out of her hand.

Even Justice Oliver Wendell Holmes, Jr., who did not think

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<sup>64</sup> Peyser, *supra* note 46.

<sup>65</sup> *Id.*

baseball was an aspect of interstate commerce,<sup>66</sup> did concede it was "the business of giving exhibitions."<sup>67</sup> It is clearly a business, as everyone knows. It is essential to that business that fans come to the park. One lure is the chance of catching a ball and keeping it. The Mets and Mike Piazza violated the implicit contract with fans, as well as stated Mets policy, by strong-arming a ball away from a fan. Such an action bodes poorly for baseball and for the future of the game.

As with the player strikes and management lockouts, the absurdly high salaries, and the rising cost of tickets and food at the game,<sup>68</sup> the greed of owners and players threatens the game. If the next Mike Piazza wants an "heirloom" that he never owned, possessed, or had control over, let him buy it on the open market like any other collector. If a lucky fan catches a lottery ticket, or fishes one out of San Francisco Bay, the players and the owners should be thrilled.

For every ticket purchaser who catches a valuable ball, there are hundreds of thousands—indeed millions—who do not. But they buy tickets of games, hoping they might.

For most of the history of professional baseball, the common law of the sport has been one of first possession. The first person to catch the ball, or in the case of Figone to fish it out of the water, has been considered the owner. This has all sorts of analogies to property law, including the old law of homesteading and mining claims. Without going into those analogies, this common law development has been a useful rule of law, and profitable rule, for professional baseball. Unfortunately, the New York Mets<sup>69</sup> have substituted the rule of law for the rule of the playground bully. Ten guys can take a ball from a six-year-old girl. And so they did.

#### V. BARRY BONDS' 73RD HOME RUN: WHEN LIFE IMITATES THEORY

On the last day of the 2001 baseball season Barry Bonds once again hit a home run that raised property issues. This was his 73rd of the season, surpassing Mark McGuire's record of 70 home runs

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<sup>66</sup> See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Baseball Clubs*, 259 U.S. 200 (1922).

<sup>67</sup> *Id.* at 208.

<sup>68</sup> In 2002, the average family of four will spend \$145.26 to attend a Major League Baseball game. See *Scorecard*, SPORTS ILLUS. Apr. 8, 2002, at 25, 26.

<sup>69</sup> I should note that, while I still root for the Brooklyn Dodgers, I have transferred some of my loyalty to the other teams in New York. As such, I am a bit uncomfortable denouncing the team that helped make 1969, 1986, and 2000 such great years.

in a season. This ball, also hit in PacBell Park, remained in the stadium, and was speared by Alex Popov, a longtime Giants fan and Berkeley restaurateur. A local television news camera captured the catch for posterity.

Within seconds of catching the ball Popov was thrown to the ground and pounced on by at least ten fans. Popov screamed for help, while the Giants security forces did nothing. A minute or two later, another fan, Patrick Hayashi, emerged from the pile with the ball in hand. Hayashi now claimed to own the ball. The Giants certified that he had the right ball, but avoided the ownership issue.

Shortly after this attack Popov initiated legal proceedings to prevent Hayashi from selling the ball, which had an estimated value of one to three million dollars. On October 24, 2001 Judge David A. Garcia of San Francisco Superior Court, a former full-time law professor, issued a temporary restraining order preventing Hayashi from selling this baseball.<sup>70</sup> This order was made permanent on November 28, 2001, pending a trial on the ownership of the ball.<sup>71</sup>

The lawsuit over the ball generated national and international coverage. Radio and television networks in the U.S., including national programs like *The Today Show* and *All Things Considered*, had stories about the case. Radio programs in Scotland, Ireland, and New Zealand had stories about the case, while the *New York Times*,<sup>72</sup> *Los Angeles Times*,<sup>73</sup> the *International Herald Tribune*,<sup>74</sup> and *The Times* of London<sup>75</sup> covered it.

The lawsuit raises a novel question about the nature of the home run ball. It is no longer about whether the team, or the batter, or the fan owns the ball. Barry Bonds has made no claim to the ball; nor has the San Francisco Giants. The question is, which fan owns it.

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<sup>70</sup> In the interest of full disclosure, I should point out that I gave an affidavit on behalf of Mr. Popov in this litigation based on an earlier draft of this article.

<sup>71</sup> See Evelyn Nieves, *A Custody Battle for a Baseball's True Owner*, N.Y. TIMES, Nov. 28, 2001, at A16.

<sup>72</sup> See *id.*

<sup>73</sup> See Maura Dolan, *Fight for Bonds' Home Run Ball Spills into Court*, L.A. TIMES, Nov. 27, 2001, at A1.

<sup>74</sup> See Evelyn Nieves, *'I Got It' No, 'I Got It' So Bonds's Record Ball Heads for Trial*, INT'L HERALD TRIB., Nov. 29, 2001, at 16.

<sup>75</sup> See Martin Fletcher, *The \$3m Baseball*, LONDON TIMES, Dec. 12, 2001, (Times 2) at 4.

### A. *Fan Behavior and Balls in the Stadium*

Films clearly show Popov with the ball in his glove, after which he was covered by a crowd of fans. What happened under this pile of humanity is in dispute. What is not in dispute is that Popov had the ball in his glove, he was covered with people, and minutes later Hayashi had the ball.

Some sports commentators and fans have argued that the rule of ownership should simply be one of "finders keepers." Hayashi found the ball, so he is entitled to it. These people argue that Popov lost the ball in a "scrum," or ask "what was his time of possession," implying that he was like a tight end, who caught a football but was tackled and dropped the ball before he could "control" it.

Such analogies do not work, however, because the fan in the stadium is not a "player" and catching a ball in the stadium is not part of the sport.<sup>76</sup> Purchasing a ticket to baseball game is not an invitation to be tackled, jumped-on, mauled, or in any other way assaulted by other fans.

Patrick Hayashi's expert witness is Rich Garcia, a former major league umpire. Garcia notes that Popov caught the ball in what is called a "snowcone catch," with part of the ball sticking out above the webbing of the glove. Although such catches are perfectly acceptable in baseball, providing the fielder does not drop the ball, Garcia argues that "if the rules of baseball applied, as they should, then Mr. Popov never actually caught the ball."<sup>77</sup> The problem with this analysis is that it is not clear why the "rules of baseball" should apply. Popov is not a baseball player, and he was not on the playing field. However, even if the rules of baseball did apply, Garcia's argument makes no sense. Garcia is quoted as saying that Popov did not catch the ball "cleanly" and thus it was "fair game" for someone else to catch it.<sup>78</sup> This is a truly odd position for an umpire, since in baseball there is no such thing as a ball being "fair game." Fielders, who are on the same team, do not compete with each other in catching a ball; and no one knocks down a fielder while he is catching the ball. One can only wonder what "call" Garcia would have made in a game when a fielder speared a ball in a snowcone catch, as Popov did, and absent a

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<sup>76</sup> A second obvious problem with these sports analogies are that they are analogies for the wrong sport. Except for tagging a sliding runner, baseball is not a contact sport; fielders are not tackled when they make a catch; there are no pile-ons and scrums to take the ball from a fielder.

<sup>77</sup> Nieves, *supra* note 74.

<sup>78</sup> Nieves, *supra* note 71.