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**THE BARRY BONDS BASEBALL CASE¹—AN EMPIRICAL
APPROACH—IS FLEETING POSSESSION FIVE TENTHS OF THE
BALL?**

PETER ADOMEIT*

I. INTRODUCTION

Mr. Barry Bonds hit his record seventy-third home run on October 7, 2001, off a fifty-mile-per-hour knuckleball served up by Mr. Dennis Springer of the L.A. Dodgers, in the first inning of the last game of the season.² A Berkeley restaurant owner by the name of Mr. Alex Popov, age thirty-eight,³ six feet tall, and two hundred pounds,⁴ was smart enough to be in the standing room only area at San Francisco's Pacific Bell Park⁵ behind the right field bleachers known as the Arcade, where Mr. Bonds had hit many of his home runs.⁶ Mr.

1. Popov v. Hayashi, No. 400545, 2002 WL 833731, at *1 (Cal. Super. Dec. 18, 2002). See also <http://news.findlaw.com/hdocs/docs/bonds/popovhayashi121802dec.pdf> (last viewed Sept. 30, 2003). This dispute should not be confused with the dispute between four baseball fans about Mr. Bonds's six hundredth home run ball, which settled out of court. Jason B. Johnson, *Over the Fence—and into Court*, SAN FRANCISCO CHRON., Aug. 21, 2002, at A1. That ball sold for a mere \$48,000. Joe Garofoli, *Both Men Strike Out in Bonds Ball Flap*, SAN FRANCISCO CHRON., Dec. 19, 2002, at A1. The facts of the Popov case come from the court's opinion and the trial testimony as reported by the *San Francisco Chronicle* and the Court TV Web site. Court TV, among others, published a copy of the opinion on the Web.

* Professor of Law, Western New England College School of Law. I would like to thank my wife for suggesting the best part of this title, and for her critical reading of this article. And special thanks to my son Ian, age 8, who so willingly took part in the empirical portion of this article.

2. Matt Bean, *A Slugger, Two Fans and a \$1 Million Baseball*, at http://www.courtstv.com/trials/baseball/backgrounder_ctv.html (Oct. 2, 2002).

3. Matt Bean, *Trial Over Barry Bonds Baseball on Deck for Next Week*, at http://www.courtstv.com/trials/baseball/101002_ctv.html (Oct. 10, 2002) [hereinafter Bean, *Trial Over Barry Bonds Baseball*].

4. Trial testimony of Mr. Popov.

5. Pacific Bell Park is pictured at <http://www.ballparks.com/baseball/national/pacbel.htm> (last modified Oct. 2001) and http://sanfrancisco.giants.mlb.com/NASApp/mlb/sf/ballpark/sf_ballpark_history.jsp (last visited Nov. 19, 2003).

6. Mr. Popov testified he consulted an online database of every Bonds home run. Matt Bean, *'I Felt Like I Was Beaten Up: Man Who Lost the Ball*, at http://www.courtstv.com/trials/baseball/102402_ctv.html (Oct. 24, 2002) [hereinafter, Bean, *Man Who Lost the Ball*]. Mr.

Popov was lucky enough to be located almost precisely where the ball was hit, needing only to take one step back.⁷ He was also prescient enough to have brought a softball glove to the park, a Spaulding “Sure Stop Web” that he had borrowed from his girlfriend a year and a half earlier, as well as a small earbud radio on which he could listen to the play-by-play of the game.⁸ He was also skilled enough when the ball sailed 380 feet over the bleachers and into the walkway to extend the glove fully over his head and catch the ball in the glove’s webbing.⁹ The catch caused a loud smack and stopped the ball’s trajectory. With the ball motionless in the webbing, Mr. Popov brought the glove down, holding the ball for six tenths of a second.¹⁰ But, he was not strong enough to fight off the mob.¹¹ Mr. Popov testified that as he turned the glove and started bringing it to his chest, the mob tackled him, threw him to the ground, hit and punched and kicked him, and then fell on top of him.¹² He said he felt someone grabbing in the area of his glove, and someone stripped him of the ball.¹³ He had difficulty breathing.¹⁴ Someone ripped off his headphones.¹⁵ A lens in his glasses fell out.¹⁶ Security guards had to pull the mob off of him. Some resisted. Guards had to pull one man off by his hair.¹⁷ The court pulled no punches in characterizing this scene: “The videotape clearly establishe[d] that this was an out of control mob, engaged in violent,

Bonds also hit his five hundredth home run to this area. *See* Bean, *Trial Over Barry Bonds Baseball*, *supra* note 3.

7. Trial testimony of Mr. Popov.

8. *See* Bean, *Man Who Lost the Ball*, *supra* note 6. The glove is pictured on Court TV’s Web site. Matt Bean, *Trial Starts For Fans Battling Over Barry Bonds Baseball*, at http://www.courtstv.com/trials/baseball/101702_ctv.html (Oct. 17, 2002). Mr. Popov is pictured demonstrating how he reached over his head with the glove to make the catch. Bean, *Man Who Lost the Ball*, *supra* note 6. He identified it as a “Sure Stop Web” at the trial. Henry K. Lee, *Judge Hears Ecstasy, Agony of Catching Bonds’ Homer*, *SAN FRANCISCO CHRON.*, Oct. 25, 2002, at A20. It is an outfielder’s glove, open web, and to the unpracticed eye, is indistinguishable from a baseball glove. The pocket is a little larger, because a softball is larger (eleven inches in circumference versus nine inches). At the store The Sports Authority, baseball and softball gloves are sold side by side.

9. Bean, *Trial Over Barry Bonds Baseball*, *supra* note 3. Court TV described the scene captured by the video tape as a “forest” of gloves. *Id.*

10. Trial testimony of Mr. Popov. Court TV provided Web access to the videotape on its Web site.

11. *Popov v. Hayashi*, No. 400545, 2002 WL 833731, at *2 (Cal. Super. Dec. 18, 2002).

12. *Id.*

13. *Id.*

14. *Id.* *See also* Gary Smith, *The Ball (An American Story)*, *SPORTS ILLUSTRATED*, July 29, 2002, at 63, 67.

15. Smith, *supra* note 14, at 63, 67.

16. *Id.*

17. *Id.*

illegal behavior.”¹⁸ A San Francisco television station called the scene it recorded “a brutal melée.”¹⁹

Meanwhile, in an arcade nearby was another gentleman by the name of Mr. Patrick Hayashi, age thirty-seven, a Sacramento software engineer,²⁰ seven inches shorter than Mr. Popov, and considerably lighter in weight.²¹ As the ball descended towards Mr. Popov and the crowd began to surge in that direction, Mr. Hayashi was carried along with the surge and knocked to the ground, when his fortune improved immeasurably. For there on the ground within reach was the loose ball. At least, that is what he said, and the court accepted his testimony as true.²² He grabbed it, stood up, put it in his pocket, and motioned to a television camera man named Mr. Josh Keppel, who was standing nearby recording the scene, to turn the camera on him.²³ Eventually Mr. Keppel complied, and Mr. Hayashi showed the ball to the camera.²⁴ Mr. Popov, now standing, grabbed for the ball, but Mr. Hayashi pulled it away as security guards took Mr. Hayashi and the ball to a safe area.²⁵ Mr. Popov, addressing the security guards and speaking of Mr. Hayashi with a certain

18. Popov v. Hayashi, No. 400545, 2002 WL 833731, at *2 (Cal. Super. Dec. 18, 2002).

19. *KNTV Video Footage Examined in Bonds Ball Trial*, at <http://www.nbc11.com/news/1727116/detail.html> (Oct. 17, 2002) [hereinafter *KNTV Video*]. A reporter for the *San Francisco Chronicle* called the screams heard on the audio part of the tape “angry, jubilant, and frightening.” Gwenn Knapp, *Homer-Ball Trial Brings Out the Farce in Us*, SAN FRANCISCO CHRON., Nov. 12, 2002, at C2.

20. Bean, *Trial Over Barry Bonds Baseball*, *supra* note 3. According to news accounts, he had just started work with Cisco Systems, found the litigation too distracting, stopped working, moved to Sacramento, and is planning to obtain a degree in business administration. Joe Garofoli, *Bonds’ Ball No. 73 Transfigured Lives*, SAN FRANCISCO CHRON., Nov. 16, 2002, at A15.

21. Trial Testimony of Mr. Hayashi.

22. *Popov*, 2002 WL 833731, at *2. In a declaration filed with the court on October 24, 2001, in support of Mr. Popov’s request for a temporary restraining order, Mr. Doug Yarris declared that he was standing in the arcade, that he was not acquainted with Mr. Popov, and that he tried to catch the ball and saw and heard it go into Mr. Popov’s glove. Yarris Decl. at ¶¶ 2-3, 6, *Popov*, 2002 WL 833731, available at <http://news.findlaw.com/hdocs/docs/sports/ppvhyshiyarris102401.pdf> (Oct. 24, 2001). He declared that Mr. Popov was assaulted and knocked down before he was knocked to the ground along side Mr. Popov. *Id.* at ¶ 4. He declared that he saw the baseball inside Mr. Popov’s glove, saw Mr. Hayashi place his hand under Mr. Popov’s body near the glove, remove his hand, and then saw Mr. Hayashi with the ball. *Id.* at ¶ 4-5. Mr. Yarris declared that there was no loose ball. *Id.* at ¶ 4.

23. *Popov*, 2002 WL 833731, at *2.

24. *Id.* See also Matt Bean, *Decision Expected on Record-Setting Baseball*, at <http://www.courtvtv.com/trials/baseball/walkuptoverdict.html> (Dec. 17, 2002) (displaying a still picture of Mr. Hayashi holding the ball).

25. *Popov*, 2002 WL 833731, at *2. Mr. Popov denied that his action was an attempt to take the ball. *Id.* at *2 n.6. “Defense counsel has attempted to characterize this encounter as one in which Mr. Popov congratulates Mr. Hayashi for getting the ball and offers him a high five. This is an argument that only a true advocate could embrace.”

degree of irritation, told the court: “I said, ‘I f—ing caught that ball, and he f—ing took it out of my glove.’”²⁶ The court found that Mr. Hayashi was an innocent bystander, not a member of the mob, and “committed no wrongful act.”²⁷ The ball was eventually placed in a safety deposit box under the control of the court.²⁸

There is only one ball in the world of baseballs that Mr. Bonds hit out of the park for the seventy-third time in one season,²⁹ a record that eclipsed Mr. Mark McGwire’s 1998 record of seventy home runs. The demand for the Bonds’s seventy-third record baseball far exceeds this supply.³⁰ Judge McCarthy noted that the ball might be worth one million dollars.³¹ Mr. McGwire’s seventieth home run ball sold for three million dollars at an auction in 1998.³² Mr. Bonds continues to create wealth.³³ Some of his home runs clear the ball park and fall into San Francisco Bay at McCovey Cove.³⁴ Mr. Scott Siciliano, a construction worker who takes his kayak to McCovey Cove, fished out Bonds’s sixty-ninth home run ball that season.³⁵ Major League Baseball officials authenticate these valuable baseballs by attaching a hologram on the spot.³⁶ The McCovey Cove attracts a “flotilla” of treasure

26. Bean, *Man Who Lost the Ball*, *supra* note 6; Lee, *supra* note 8.

27. *Popov*, 2002 WL 833731, at *2.

28. *KNTV Video*, *supra* note 19.

29. Court TV’s Web site carries a picture of the ball. In appearance, it looks very much like any other baseball. Matt Bean, *Fans Take the Stand to Describe Melee Over Record-Setting Ball*, at http://www.courttv.com/trials/baseball/101802_ctv.html (Oct. 18, 2002).

30. Its value lies in the trip it took from the bat of Mr. Bonds to the right field stands, and the fact that seventy-two of its fellow baseballs had taken a similar trip that year.

31. *Popov*, 2002 WL 833731, at *1 n.1.

32. Garofoli, *supra* note 1. Mr. Todd McFarlane collected most of the record home run balls from the 1998 season (Mr. McGwire’s numbers 1, 63, 64, 67, 68, 69, and 70 and Mr. Sammy Sosa’s numbers 33, 61, and 66). Some believed his interest bid up the price. The McFarlane Collection, *The Collection*, at <http://www.spawn.com/collection/collection.html> (last visited Nov. 19, 2003). Mr. McFarlane has raised money to fight Lou Gherig’s disease by exhibiting his collection around the country. The McFarlane Collection, *Tour Highlights*, at <http://www.spawn.com/collection/highlights.html> (last visited Nov. 19, 2003).

33. He is not doing badly himself, earning fifteen million dollars for the 2003 season. CBS Sportsline.com, at <http://www.sportsline.com/mlb/teams/roster/SF> (last visited Nov. 19, 2003). Mr. Alex Rodriguez of the Texas Rangers earned 22 million dollars, according to the same source. CBS Sportsline.com, at <http://www.sportsline.com/mlb/teams/roster/TEX> (last visited Sept. 30, 2003).

34. The McCovey Cove was named to honor Mr. Willie McCovey, the Giant’s Hall of Fame hard-hitting first baseman who ranks third on the all-time list of grand slam home runs. National Baseball Hall of Fame, *Willie McCovey*, at http://www.baseballhalloffame.org/hofers_and_honorees/hofer_bios/mccovey_willie.htm (last visited Nov. 19, 2003).

35. See Matt Bean, *Baseball Fan Claims He Was ‘Mugged’ for Barry Bonds Ball*, at http://www.courttv.com/trials/baseball/102502_ctv.html (Oct. 25, 2002).

36. *Id.* According to Mr. Siciliano, league officials first dried the ball that landed in the McCovey Cove with a hair dryer for ten minutes, and then attached a sticker. Mr. Hayashi called

hunters.³⁷ Mr. Tom Hoynes, a skilled and organized member of the “splash-hit brigade,” retrieved eight of Bonds’s home run balls from 2001 and 2002.³⁸ As the 2001 season came to a close, bleacherbums had taken to writing the word “sucker” on real baseballs, and when Mr. Bonds hit a home run, they have been known to throw ten or fifteen sucker balls into McCovey Cove, delighting in watching the boaters paddling about after them.³⁹ Trial witnesses testified that on October 7, 2001, when Mr. Popov momentarily caught and then lost the ball, Mr. Popov picked up a sucker ball, while Mr. Hayashi got the right one.⁴⁰ The court, however, found that the ball Mr. Popov held momentarily was the one hit by Mr. Bonds.⁴¹

Using these facts as the basis for discussion, it is apparent that Major League Baseball has to address the potential problems of home run baseball possession. In section two, this article will discuss the court’s involvement in the *Popov v. Hayashi* case and will analyze its underlying rationale. Section three puts the court’s resolution to the test through empirical experiments. Section four identifies potential solutions to the problem of possession after reviewing the implications of the court’s decision in *Popov*. Finally, section five addresses the fulfillment of the court’s orders and its effect on each person involved.

II. COURT INVOLVEMENT

A. A Unique Solution

Mr. Popov claimed he owned the ball because he caught it; Mr. Hayashi claimed the ball because he found it. Failing to settle their differences, they went to court. The case was heard by Judge Kevin M. McCarthy, sitting without a jury.⁴² After listening to the claimants and their witnesses, viewing the video tape, holding a free-wheeling session in which law professors opined on the case,⁴³ and consulting the literature on the law of baseballs,⁴⁴ the court

this witness in an attempt to prove that Major League Baseball gave him the ball. *See id.* The defense failed. *See Popov*, 2002 WL 833731, at *8.

37. Dwight Chapin, *HR Memorabilia Lures Heavy Hitters*, SAN FRANCISCO CHRON., Feb. 22, 2002, at C2.

38. *Id.*

39. Joe Garofoli, *Trial Over Bonds Ball Says it All About Us*, SAN FRANCISCO CHRON., Nov. 18, 2002, at A1.

40. *Id.*

41. *Popov*, 2002 WL 833731, at *1.

42. *See id.*

43. *Id.* at *3 n.17. The court noted the professors as:

Professor Brian E. Gray, University of California, Hastings College of the Law; Professor Roger Bernhardt, Golden Gate University School of Law; Professor Paul

on December 18, 2002, issued an elegant decision that contained a surprise. Mr. Popov did not have full possession, the court ruled, so he was not entitled to the ball outright; Mr. Hayashi was not entitled to full ownership either, because Mr. Popov had been “set upon by a gang of bandits, who dislodged the ball from his grasp.”⁴⁵ Mr. Popov, therefore, had a “legally protected pre-possessory interest.”⁴⁶ Neither owned the entire ball; both owned half of it. The court ordered them to auction the ball and to split the proceeds evenly.⁴⁷ Proving he was not only a power hitter but a power judge, Mr. Barry Bonds, before the trial, recommended the same result: “[G]oing to court, giving it to a lawyer—I think that’s ridiculous. You know. Those two guys could have just said here, take it to an auction and what we get we’ll just split it.”⁴⁸ The ball was estimated to be worth 1.5 million dollars in 2001, or \$750,000 each, but at the time of the court decision, because of the economy it was probably worth one million dollars.⁴⁹ Other experts think this high price was significantly inflated.⁵⁰ Mr. Popov’s attorney’s fees through trial were reported at \$200,000,⁵¹ which when subtracted from his half of the one million would have left him with \$300,000. As a business proposition, when the trial concluded he had lost \$450,000. Mr. Hayashi’s attorneys took the case on a one-third contingency basis.⁵² Assuming his half of the ball was worth \$500,000 at trial’s end, he would have been left with \$333,333. The combined

Finkelman, The Chapman Distinguished Professor of Law, the University of Tulsa School of Law; and Professor Jan Stiglitz, California Western School of Law.

The discussion was held during an official session of the court convened at the University of California, Hastings College of the Law.

Id.

44. *Id.* at *5 n.26 (citing Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609 (2002)).

45. *Id.* at *6.

46. *Popov*, 2002 WL 833731, at *7.

47. *Id.* at *8.

48. Bean, *Trial Over Barry Bonds Baseball*, *supra* note 3.

49. *Id.* For a window into the business of selling sports memorabilia, see www.mastronet.com, the auction site where the members of the McCovey Cove gang sell their finds.

50. The record ball hit by Mr. McGwire was sold before the excitement was over; Mr. Bonds’s record came so soon after Mr. McGwire’s, and the excitement had ended. Further, Mr. McGwire had a friendlier persona. See Matt Bean, *Who Wants to Buy a Baseball?*, at <http://www.courtvtv.com/trials/baseball/sell.html> (Dec. 20, 2002). Mr. Bonds’s record-tying seventieth home run ball, estimated to go at auction for at least \$100,000, sold for \$60,375 in 2002. His autographed bat used for number sixty-eight in 2001 went for \$32,000, a record for a modern day bat. Dwight Chapin, *Market Continues to Fluctuate for Bonds’ Items*, SAN FRANCISCO CHRON., May 13, 2002, at C2.

51. Garofoli, *supra* note 1 (referring to the total fee incurred through the day after Judge McCarthy’s decision).

52. Matt Bean, *In the Battle for the Ball, a Mediator*, at http://www.courtvtv.com/trials/baseball/100702_ctv.html (Oct. 7, 2002) [hereinafter Bean, *In the Battle for the Ball*].

losses, therefore, for both men, as of the trial's conclusion on December 19, 2002, would be \$866,666, not including the cost of four settlement discussions before retired Judge Coleman Fannin,⁵³ a \$9,000 per day mediator.⁵⁴ There is some wisdom to the old Italian saying that a lawsuit is a fruit tree planted in a lawyer's garden.⁵⁵ As it turned out, when the ball was eventually sold the losses were even higher.⁵⁶

Mr. Bonds himself lost a small fortune however, the moment he hit number seventy-three. Two days before, when Mr. Bonds came to the plate in the first inning against Los Angeles starter Mr. Chan Ho Park, he hit home run number seventy-one, breaking Mr. McGwire's record,⁵⁷ and momentarily making Mr. Jerry Rose, who caught the ball in the right-center seats, a potentially wealthy man.⁵⁸ Mr. Bonds led off the third inning in the same game and hit one of Mr. Park's curve balls over the center field wall for home run number seventy-two and then the ball bounced back into the outfield.⁵⁹ The center fielder threw it to the infield and the Giants presented the ball to Mr. Bonds.⁶⁰ Number seventy-two was the record ball, so for two days Mr. Bonds owned a million-dollar baseball. By hitting number seventy-three, he transferred a large percentage of that value to Mr. Popov and Mr. Hayashi.

Mr. Gary Smith, in a *Sports Illustrated* magazine article, suggests that part of the reason why the dispute could not be settled was because both parties thought they were right.⁶¹ He described Mr. Popov as the son of a "Russian immigrant who'd been captured and forced into labor by the Nazis" and Mr. Hayashi as the son of "Japanese-Americans once locked away in internment camps."⁶² Both graduated from the same university, California Polytechnic State University, San Luis Obispo, both majored in electrical engineering, both were still bachelors, both came to the park wearing gloves, and both were accompanied by their brothers.⁶³ The author believed that Mr. Hayashi,

53. Joe Garofoli, *Retired Judge to Umpire Bonds Ball Battle*, SAN FRANCISCO CHRON., Oct. 8, 2002, at A17. Judge Fannin was named Distinguished Mediator of the Year in 2001 by the San Francisco Trial Lawyer's Association. *Id.*

54. Bean, *Trial Over Barry Bonds Baseball*, *supra* note 3. Court TV called him a "superstar." Bean, *In the Battle for the Ball*, *supra* note 52. At least four mediation sessions occurred. Garofoli, *supra* note 39.

55. Six attorneys were reported to be working on the case before trial, "with the meter running." Garofoli, *supra* note 39.

56. *See infra* notes 146-77 and accompanying text.

57. Bill Plaschke, *Moment Has All the Thrills, Lacks the Chills*, L.A. TIMES, Oct. 6, 2001, at D1.

58. Associated Press, *He Made Catch of Moment*, L.A. TIMES, Oct. 6, 2001, at D7.

59. Jason Reid, *The Barry Best 72*, L.A. TIMES, Oct. 6, 2001, at D1.

60. *Id.*

61. Smith, *supra* note 14, at 67, 75.

62. *Id.* at 64.

63. *Id.*

because of his family's history of acquiescence to internment, would not settle because settlement would mean similarly giving in.⁶⁴

B. The Court's Reasoning

There is much to admire in the court's decision. With the legal world watching, and with no direct precedents to choose from, the court fashioned an equitable remedy that left neither side an outright winner. The opinion began with a history of the home run record from sixty by Mr. Babe Ruth in 1927 to seventy by Mr. Mark McGwire in 1998, omitting Mr. Roger Maris who hit sixty-one in 1961.⁶⁵

The parties and the court agreed on the following starting point: "Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit [out of the park] it became intentionally abandoned property. The first person who came in possession of the ball became its new owner."⁶⁶

Possession, according to the court, after a review of the relevant law, is ambiguous and varies by context.⁶⁷ The court stated that "possession is a process which culminates in an event. The event is the moment in time that possession is achieved."⁶⁸ Possession requires intent and it requires control.⁶⁹ Mr. Popov had sufficient intent.⁷⁰ The issue for the court was whether he had control. "The question is whether he did enough to reduce the reduce [sic] the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?"⁷¹

For a rule governing the case, the court began with a proposed definition by Professor Brian Gray:

64. *Id.* at 75. Mr. Hayashi's attorney, Mr. Don Tamaki, a San Francisco civil rights attorney, also argued the case overturning the World War II conviction of Mr. Fred Korematsu for refusing internment. *Id.*

65. *Popov v. Hayashi*, No. 400545, 2002 WL 833731, at *1 (Cal. Super. Dec. 18, 2002). Mr. Ruth first played for the Boston Red Sox, who up until then had won six pennants and five world series. He was traded in 1920 to the New York Yankees, who up until then had never won even an American League pennant, for \$100,000, a huge sum. The Yankees proceeded to win fourteen pennants in the next twenty years before the Red Sox could win again. In the last fifty years, the Yankees have prospered to a greater extent than the Red Sox. Some believe Mr. Harry Frazee's sale of Mr. Ruth, in hindsight, was probably not a good decision for Boston. Bruce Lowitt, *Bambino's Curse Begins as Red Sox Trade Ruth*, ST. PETERSBURG TIMES, Dec. 21, 1999, at 1C.

66. *Popov*, 2002 WL 833731, at *3 (citations omitted).

67. *Id.* at *4.

68. *Id.*

69. *Id.*

70. *Id.* at *4.

71. *Popov*, 2002 WL 833731, at *4.

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, . . . 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.⁷²

The court rejected the rules governing hunting wild animals (you wound it, you own it), hunting whales (harpoon it and it is yours) and the salvage of sunken vessels (find it and secure it and start operations) as “contextual in nature” and “influenced by the custom and practice of each industry.”⁷³ It stated, “It is impossible to wrap ones [sic] arms around a whale, a fleeing fox or a sunken ship.”⁷⁴

The court then applied “Gray’s Rule,” which is as follows:

The central tenant of Gray’s Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.⁷⁵

Earlier in the opinion, the court stated the following finding of fact regarding the catch:

[The ball] landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance. . . . He was tackled and thrown to the ground while still in the process of attempting to complete the catch.”⁷⁶

Then came the most interesting part of the decision. Not having full possession did not mean Mr. Popov must lose. “The reason we do not know whether Mr. Popov would have retained control of the ball” wrote the court, “is not because of incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.”⁷⁷ That is a fact that cannot be ignored.⁷⁸ The judge acknowledged that his decision might “affect the way people conduct themselves” and that he must vindicate “an important principle,” namely, that “[w]e are a nation governed by law, not by brute force.”⁷⁹

72. *Id.*

73. *Id.* at *5.

74. *Id.*

75. *Id.* at *6.

76. *Popov*, 2002 WL 833731, at *2-3.

77. *Id.* at *6.

78. *Id.*

79. *Id.*

Remove the rule of law from the bleachers and we are left with raw power. Mr. Jack London, raised in Oakland, a community across the Bay from Pacific Bell Park, described such a world in *The Call of the Wild*, Chapter 2: “There was imperative need to be constantly alert; for these dogs and men were not town dogs and men. They were savages, all of them, who knew no law but the law of club and fang.”⁸⁰

The aversion to brute force was part of Mr. Popov’s case. He claimed that Mr. Hayashi, in the middle of the pile, bit a fifteen-year-old boy on the knee. Mr. Hayashi vehemently denied it. Mr. Hayashi’s counsel undercut the boy’s direct examination with a text-book cross examination revealing the boy had already fallen on his knee, felt pain, thought he had been bitten but did not see anyone bite him, and upon seeing Mr. Hayashi near the knee, assumed it was him.⁸¹ The court did not find that Mr. Hayashi had taken these actions.⁸²

In a footnote, the court then used words that may be interpreted as a criticism of Major League Baseball and the San Francisco Giants for their failure to provide adequate security.⁸³ The Giants did not wait until this court decision to increase security, deciding to deploy “their full security force” to avoid “the kind of dog pile that occurred” with the seventy-third home run.⁸⁴ The violent attack on Mr. Popov did not go unnoticed by the press, nor did the resulting trial. By the time Mr. Bonds hit his six hundredth career home run, fans were not allowed to mill around where Mr. Popov was standing, and the San Francisco Police Marine Unit planned to patrol McCovey Cove, enforcing a no-motor ban.⁸⁵ The ball was caught without incident, but not without litigation. The man who caught number six hundred forgot that he had agreed to share the proceeds with three friends,⁸⁶ but litigation improved his memory

80. JACK LONDON, *THE CALL OF THE WILD* 12 (University of Oklahoma Press 1997) (1903). His description of the dog fight is among the finest in literature. The attacking dogs were beaten off by men with clubs, hence the title of the chapter, “The Law of Club and Fang.”

81. Henry K. Lee, *Tale of Leg-Biting Colors Bonds Ball Trial*, *SAN FRANCISCO CHRON.*, Oct. 24, 2002, at A15.

82. *Popov*, 2002 WL 833731, at *2 n.5., slip op. at 3 n.5.

83. The court wrote:

There are a number of ways courts can enforce the rule of law. Major League Baseball, as well as each individual team has a duty to provide security against foreseeable violence in the stands. The failure to provide that security, or worse, the tacit acceptance of some level of violence, will inevitable [sic] lead to lawsuits against the teams and the parent organization.

Id. at *6 n.35.

84. Peter Fimrite, *Giants Plan for Historic Bonds Ball*, *SAN FRANCISCO CHRON.*, Aug. 6, 2002, at A15.

85. *Id.*

86. Johnson, *supra* note 1.

and the case was settled,⁸⁷ with each man getting one quarter of the ball's \$46,000 sale price.⁸⁸

Having elevated the rule of law over the rule of violence and implicitly rejecting the argument advanced by Mr. Hayashi's lawyer that the common law of the stands tolerates a little self-help in the pursuit of a ball, the court explained that "Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. That will not happen."⁸⁹

The way of assuring this result was through the law of conversion, which permits the plaintiff who lacks possession to sue someone who has interfered with dominion over property even if the plaintiff merely has the right to possession.⁹⁰ The court then declared the rule governing the case: "Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessionary interest in the property."⁹¹

Turning to Mr. Hayashi, who the court absolved of any wrongdoing and asserted was "a victim of the same bandits that attacked Mr. Popov,"⁹² the court wrote that Mr. Hayashi picked up the ball but did not have a "full right to possession"⁹³ because "the ball itself [was] encumbered by the qualified pre-possessionary interest of Mr. Popov."⁹⁴ In short, the ball had "a cloud on its title."⁹⁵

To award the ball to Mr. Popov, wrote the court, "would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts."⁹⁶ Why not then give the ball to Mr. Hayashi? That "would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts."⁹⁷ Each person's claim, wrote the court, is superior "against all the world"⁹⁸ and "of equal dignity as to the other."⁹⁹

87. Charlie Goodyear, *4 Men Divvy Up Bonds Baseball*, SAN FRANCISCO CHRON., Oct. 17, 2002, at A21.

88. Garofoli, *supra* note 1.

89. Popov v. Hayashi, No. 400545, 2002 WL 833731, at *6 (Cal. Super. Dec. 18, 2002).

90. *Id.*

91. *Id.*

92. *Id.* at *7.

93. *Id.*

94. Popov, 2002 WL 833731, at *7.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Popov, 2002 WL 833731, at *7.

Having brought the legal analysis this far, the court reached for the same result that Mr. Barry Bonds himself recommended—a split.¹⁰⁰ “Thankfully,” wrote the court, “there is a middle ground.”¹⁰¹ The court found it in the concept of equitable division of lost or mislaid property, between the person who found it and the owner of the land on which it was found, based on a law review article by Professor R.H. Helmholz.¹⁰² The court also found this middle ground in a one hundred and six year-old New Jersey case involving five boys who found a sock on the railroad tracks, passed it around, and when \$775 spilled out, could not agree on how to split it.¹⁰³ The answer? Equally.¹⁰⁴

Turning to Mr. Popov and Mr. Hayashi, the court imposed the New Jersey solution: “Albeit for different reasons, they stand before the court in exactly the same legal position as did the five boys. Their legal claims are of equal quality and they are equally entitled to the ball.”¹⁰⁵ Whereupon the court ordered that the ball be sold with the proceeds divided equally, that the parties agree on how it was to be sold, and that the court would retain jurisdiction over the remedy and retain custody of the ball.¹⁰⁶

Mr. Hayashi reportedly thought the result was fair. He stated, “I want to move on with my life. I don’t see a need to appeal. The judge has proposed a decision which I think is fair. But if [Popov] appeals it, I’ll be forced to go along.”¹⁰⁷ Mr. Popov, through his attorney, indicated he was preoccupied with his father’s health and had no comment.¹⁰⁸ How the two men reconciled after a bitter trial and reached a settlement is described in the Epilogue of this article at section five.

100. *Id.* at *8. A writer for the *San Francisco Chronicle* observed some of the trial and had a similar reaction. She called the trial an “outrageous farce” and wrote: “For that reason alone, I hope [the judge] finds a way to rule that Alex Popov, who originally grabbed the ball out of the air, gets to take it home but that he has to pay a large settlement to Patrick Hayashi, who ended up with the ball.” Knapp, *supra* note 19. She was not far off.

101. *Popov*, 2002 WL 833731, at *7.

102. *Id.* (citing R.H. Helmholz, *Equitable Division and the Law of Finders*, 52 *FORDHAM L. REV.* 313 (1983)).

103. *Id.* at *8 (citing *Keron v. Cashman*, 33 A. 1055 (N.J. Ch. 1896)).

104. *Id.* at *8.

105. *Id.*

106. *Popov*, 2002 WL 833731, at *9. Judge David A. Garcia issued a temporary restraining order on October 24, 2001 and a preliminary injunction on November 27, 2001 placing the ball in the custody of the court. The documents are available respectively at <http://news.findlaw.com/hdocs/docs/sports/ppvhyshiro102401.pdf> (Oct. 24, 2001) and <http://news.findlaw.com/hdocs/docs/sports/ppvhayashi112701pi.pdf> (Nov. 27, 2001).

107. *Litigants in Bonds Ball Case Haven’t Obeyed Judge’s Order*, *SAN FRANCISCO CHRON.*, Dec. 31, 2002, at A12 [hereinafter *Litigants*].

108. *Id.*

III. TESTING THE COURT'S PREMISE THAT WHETHER MR. POPOV WOULD HAVE HELD ONTO THE BALL CANNOT BE KNOWN.

The central facts of the case are that Mr. Popov was standing still with his arm fully extended, had his glove in the air over his head, the ball entered the web with glove showing both above and below the ball, he held it for six tenths of a second as he lowered it to his body, and the ball did not move or wobble within the web as he lowered the glove. Then, he disappeared under the mob.

The court decided that whether Mr. Popov would have held on to the ball was not known and stated:

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.¹⁰⁹

This, of course, is true in one sense. If you throw an egg out of a moving car at sixty miles per hour and lose sight of it, you may never "know" if it breaks or not. But you can infer from the circumstances that more likely than not, the egg broke. In wrongful death cases, the juries must infer lifetime earnings of people who will never again work. The law thrives on inferences. It could not work without them.

What about Mr. Popov? Would he have held onto the ball? In effect, the court implied that it was equally likely that Mr. Popov would have dropped the ball or held onto it, and therefore, we will never know. I decided to test the court's assumptions by an empirical test.

A. *The First Experiment*

The Hypothesis: I posited the following hypothesis: When a baseball is caught by a person standing with his glove over his head, and held for six tenths of a second, there is an equal chance that the person will drop the ball as hold on to the ball. I conducted two experiments with different gloves and different ball trajectories.

The Ball: I bought an official major league baseball from The Sports Authority. The ball was made by Rawlings and retailed for \$14.99. It came enclosed in a plastic show case and was brand new. We did not rub it down before use. For the second experiment, I purchased an identical ball.

The Glove: My wife purchased a Wilson outfielder's glove two years ago for my son Ian, with no thought of it being the subject of scientific inquiry. It is the Barry Bonds model, ten and one-half inch, closed web.¹¹⁰ At the time, she did not know who Mr. Barry Bonds was and had never heard of him. Because it is a smaller glove than the one Mr. Popov used, it presents a smaller

109. *Popov*, 2002 WL 833731, at *3.

110. Model Number A2275 AS2.

target and is more difficult to use. Mr. Popov's open web glove makes it easier to catch.¹¹¹ The similarities outweigh the differences. Both have webs, which are designed by trap and hold the ball. Both are outfielder gloves.¹¹² Some manufacturers do not even mark their softball gloves separately, selling them as baseball gloves.¹¹³

The Web: The webs on the Wilson and on Mr. Popov's Spaulding glove work the same way. As the ball enters the web, the force of the ball creates an audible "smack" and pushes the web out, forcing the thumb and forefinger of the glove inwards, placing pressure on the sides of the ball, and trapping it. The web, therefore, is literally a trap for the ball. The deeper the web, the easier it is to hold the ball, but it is more difficult to extract the ball and throw a runner out. Hence, the shallower glove for second basemen.

The Person Catching the Ball: I decided against using an adult, even though Mr. Popov was thirty-eight. An adult could have more skill than Mr. Popov and ruin the experiment. A child of eight who played catch for two years but who never before played organized baseball might well drop half the balls thrown after holding them for six tenths of a second. I also needed someone who had good reflexes and who was fearless, as I was going to throw the ball between fifty and sixty miles per hour. Fortunately, I had ready access to precisely such a child, my youngest son, Ian.

The Person Throwing the Ball: I had played organized baseball every summer from age six on, and in high school and college. I could throw with speed, accuracy, and safety. Although five balls got away from me and went toward Ian's body instead of over his head, he knocked all five down.

The Experiment: I threw 101 balls to Ian, starting at 10:15 a.m. on December 28, 2002, in the school parking lot of Duffy Elementary School, in West Hartford, Connecticut. The backstop was a seven-foot snow pile. Conditions were moderately warm, sunny, with the temperature between thirty-four and thirty-six degrees Fahrenheit, and humidity of sixty-three percent. There was no noticeable wind. The sun was well to the side. Footing

111. The Sports Authority Web site has a complete discussion of the types and relative advantages of baseball gloves. *How to Buy a Baseball Glove*, at http://www.thesportsauthority.com/info/index.jsp?categoryId=222883&backTo=711627&savePath=711608&clickid=body_buyguide_txt (last visited Nov. 19, 2003).

112. Outfielder gloves are designed to catch and hold the ball, with a deeper pocket and longer length for reach. Softball gloves are slightly longer in length and in the pocket to handle the larger ball. "If you play both baseball and softball, and you only want to buy one glove, select a softball glove." *Id.* Outfielder gloves are usually twelve to twelve and a half inches for adults, and eleven inches for children, with sizes to fourteen inches. Softball gloves also run large, to fourteen inches. Second base gloves are smaller to get the ball out fast for quick throws, while third basemen use a slightly larger glove. First base gloves have large webs, and catcher gloves have no fingers and much padding. *Id.*

113. See *Softball Gloves*, at <http://www.baseballgloves.com/softball-gloves/index.html> (last visited Nov. 19, 2003).

was excellent. The blacktop pavement was dry. I told Ian to try to catch and hold onto as many of the balls as possible. He was not told about the hypothesis. He did know it had something to do with Mr. Bonds. The balls were thrown hard, at least fifty miles per hour, above his head and to his left (the glove was in his left hand), so that he had to reach up for the ball, just as Mr. Popov had done. I threw sufficiently hard for the ball to deform the web, but not so hard as to be unsafe. (Little league pitchers can throw at seventy miles per hour.) Ian was to hold each ball he caught for at least ten seconds, on the theory that ten seconds was sufficient time to establish “possession.” While Ian had caught softer “safety” balls before, he had never caught a real hardball before, nor had he caught one thrown this hard. Therefore, if it was common for baseballs to be held for six tenths of a second and then dropped, this experiment would have shown it.

I threw in groups of five, and wrote down the data after completing each group.¹¹⁴ If he held the ball for ten seconds, it was a “catch.” Balls that hit the side of the glove kept going. After about seventy throws he complained that

114. Group 1: three catches; one hit the side of the glove, and one hit the glove and immediately popped out.

Group 2: four catches; one hit the glove and immediately popped out.

Group 3: four catches; one missed the glove completely.

Group 4: four catches; one hit the glove and immediately popped out.

Group 5: three catches; one missed the glove; one went toward his body and into his glove, and he held onto it briefly, but stepped back onto the snow bank and fell, and when he hit the ground, the ball fell out.

Group 6: three catches; two hit the side of the glove.

Group 7: three catches; one hit the glove and immediately popped out and one went toward his body and into his glove, and he held it briefly, but stepped back again onto the snow bank, and when he hit the ground, the ball fell out.

Group 8: three catches; two hit the side of the glove, one hit the glove and immediately popped out. (We lost count and threw it 6 times in this group.)

Group 9: one catch; three hit the glove and immediately popped out and one was thrown at his body, he got his glove on it, and knocked it down. I call this a “flinch-drop.” We included it because it was data.

Group 10: one catch; one flinch-drop, three hit the glove and immediately popped out.

Group 11: two catches; one flinch-drop, two hit the glove and immediately popped out.

Group 12: three catches; two immediate pop outs.

Group 13: four catches; one immediate pop out.

Group 14: four catches; one immediate pop out.

Group 15: four catches; one immediate pop out.

Group 16: four catches; one immediate pop out.

Group 17: four catches; one immediate pop out.

Group 18: 5 catches.

Group 19: four catches; one hit the side of the glove.

Group 20: three catches; one hit the side of the glove; one thrown at his body, hit his glove, popped out, and he caught it out of the air with his free hand. We counted it as a pop out.

his hand started to feel some pain, but he volunteered to keep going, so we did. The following is a summary of the data:

Number of balls thrown:	101
Number of balls caught and held for six tenths of a second:	66
Number of the 66 balls dropped after six tenths of a second:	0
Number of the 66 balls dropped after two tenths of a second:	0
Number of the 66 balls held for at least ten seconds:	66
Number of complete misses: ¹¹⁵	2
Number of glancing misses: ¹¹⁶	7
Number of wild throws to the body causing an immediate drop:	3
Number of falls to the ground where the ball was dropped: ¹¹⁷	2
Number of falls to the ground where the ball was held:	0
Number of balls striking the glove and immediately popping out:	21
Number of balls striking the glove and immediately rolling out:	0

After analyzing the results of experiment one, it is apparent that the data did not support the hypothesis. Instead of showing that at least fifty percent of the time, balls held for six tenths of a second were dropped, the data went in another direction. Of all the balls thrown above Ian's head that he caught and held for six tenths of a second, none were dropped at all and all were held for at least ten seconds—sixty-six caught, sixty-six held.

To summarize: A person standing stationary who catches a well-thrown ball above his head and holds the ball for at least six tenths of a second, continued to hold the ball for ten seconds in one hundred percent of the throws—sixty-six times out of sixty-six.

The data also showed the following: Excluding the two instances when the subject stepped back onto the snow and fell, in one hundred percent of the instances in which he dropped the ball thrown over his head, the ball popped out of the glove immediately upon striking the glove. If he did not drop the ball immediately, he did not drop the ball at all.

The data showed that when a person falls down, he holds the ball until hitting the ground two times out of two. It also shows that a person standing on dry pavement will continue to stand ninety-eight percent of the time, and will only fall when a ball is thrown at his body so that he steps back into a snow bank.

The data also showed that a person who catches a baseball over his head does not step back but maintains his balance ninety-nine times out of ninety-

115. A "complete miss" is defined as the ball sailing over the glove without making any contact. These were throwing errors.

116. A "glancing miss" is defined as the ball barely hitting the side of the glove and continuing onto the ground with barely any change in the ball's speed or trajectory.

117. Ian fell 2 times out of 101, and both times he instinctively stepped back onto the snow pile and lost his footing when I mistakenly threw a ball at his stomach.

nine. (The court's near speculation that Mr. Popov might have lost his balance while standing on pavement was not supported by the experiment.).

The data show that a person who expects a ball over his head but receives it instead at chest level will step back two times out of five, and if the person steps back onto a snow pile, will fall one hundred percent of the time, losing the ball only when hitting the ground. The data show that such a person will not step back three times out of five, but instead will stop the ball, and the ball will pop out of the glove immediately. Only once when the ball was thrown at his body did he hold onto the ball for ten seconds. But when the ball was thrown above his head, he caught the ball in the web. The ball did not pop out immediately, and he held on to it for six tenths of a second. Further, he continued to hold it for ten seconds. The data actually show that if he held the ball for one tenth of a second, he held the ball for ten seconds one hundred percent of the time.

The court's premise that it is unknown whether Mr. Popov would have held on to the ball after holding it for six tenths of a second is not supported by the experiment. The experiment shows that a baseball caught over one's head in the web of a glove and held for six tenths of a second will continue motionless in the web for at least ten seconds sixty-six times out of sixty-six. The experiment demonstrated inertia. "Every body perseveres in its state of rest, or of uniform motion in a right line, unless it is compelled to change that state by forces impressed thereon."¹¹⁸ To this we can add, baseballs caught for six tenths of a second in the web of a glove tend to remain in the glove for at least ten seconds until removed.

The court's inference that it is unknown whether Mr. Popov would have held the ball for more than six tenths of a second is not supported by our data. There is a strong likelihood that Mr. Popov would have continued to hold the ball. Our data shows it would have been a virtual certainty.

Why did some baseballs pop out of the glove? Newton's Third Law of Motion states that, "To every action, there is always opposed an equal reaction."¹¹⁹ Balls that hit the glove and were not securely in the web bounced right back. Action causes reaction. Why were some baseballs caught? The force of the ball against the back of the web closed the web, exerting force on the sides of the ball and absorbing the force. Why were all the balls caught in

118. This is the First Law of Motion of Sir Isaac Newton. ISAAC NEWTON, THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 23 (Philosophical Library 1964) (1686). The Glenn Research Center of NASA has a good description of Newton's three laws. See <http://www.grc.nasa.gov/WWW/K-12/airplane/newton.html> (last visited Nov. 19, 2003).

119. NEWTON, *supra* note 118, at 23. Baseball and rocket science both depend on Newton's Third Law of Motion. When a ball spins, the air moves to one side, and the reaction of the ball causes it to move in the opposite direction, hence, the curve ball. See <http://www.grc.nasa.gov/WWW/K-12/airplane/newton3.html> (last visited Nov. 19, 2003). When a rocket takes off, the rear thrust provides the forward motion. *Id.*

the web without bouncing held back? Because of inertia, once a ball is in the web and is stationary, it would take an external force to cause the ball to drop (such as an attack by a mob). While it is conceivable that gravity could cause the ball to fall out, in our experiment, the force of the web overcame the forces of gravity and the ball stayed put. If a small child unimpeded by any mob could hold for ten seconds sixty-six balls out of sixty-six that were trapped in the web for less than six tenths of a second, it is reasonable to assume that a man thirty years older with more experience and a superior glove with a larger web, would likewise hold a ball that stayed in the web for six tenths of a second.¹²⁰

B. *The Second Experiment*

The first experiment had two variables different from the historic catch: the size of the glove and the descent angle of the ball.¹²¹ Mr. Popov testified at trial that the ball went high into the air before coming down and that he used a glove with an open web.¹²² We purchased a softball outfielder's glove for \$24.95 with an open webbing from The Sports Authority, from a rack marked "softball" located next to the baseball gloves. It looks like an exact copy Mr. Popov's "Sure Stop Web." It is a leather Franklin "Fieldmaster" Model 4950 (thirteen inches) and is made in China. Nothing on the glove indicates that it is sold as a softball glove. Its web is the same size as my Jose Conseco baseball outfielder's glove by Rawlings. The only difference is that the pocket on the Franklin is slightly larger, but without placing the two gloves side by side and examining them closely, the difference is not obvious. Now we had similar gloves.

To simulate the sharp angle of descent, I threw the ball down from a second-story deck, fourteen feet off the ground, at a private residence in West Hartford, Connecticut, at the target approximately eight horizontal feet away. The angle of descent was approximately sixty degrees. For reasons of safety, I placed a skateboarder's helmet on Ian's head. He held the glove as far above his head as possible, and I aimed the ball for the glove. There was fourteen

120. One variable I could not control for in the first experiment is trajectory. The home run ball did not come in flat. But it came in hard, and got caught in the Web for six tenths of a second, motionless, because its force caused the web to hold it. At that point, Newton's laws of motion take over. The ball remains at rest unless disturbed by an outside force (for example, a mob of people).

121. The other variable we did not control for was speed. A ball hit hard will produce hard sideward forces in the web, holding it tighter. Mr. Bonds' record ball traveled three hundred eighty feet from home plate. It took 5.7 seconds to reach Mr. Popov. Smith, *supra* note 14, at 66. Because the ball did not travel in a straight line, but went up a considerable distance before coming down, the closing speed of the ball is much faster than sixty-seven feet per second (three hundred eighty divided by 5.7). (Eighty-eight feet per second is sixty miles per hour.)

122. Trial Testimony of Mr. Popov.

inches of snow on the ground. We spread a blue tarp on the ground for him to stand on, so if he missed a ball, it would hit the tarp, and not be lost in the snow. The footing was uneven and slippery. The date was January 1, 2003 and the time was 1:20 p.m. The weather was sunny, thirty-one degrees Fahrenheit, and there was no wind. I threw 100 balls.

The Hypothesis: Of those balls he caught in the glove's web and held for at least six tenths of a second, fifty percent would be held and fifty percent would be dropped. I did not tell Ian about the hypothesis. He was told to try to catch and hold as many as he could.

Following is our resulting data:

Number of balls thrown:	100
Number of balls caught and held for six tenths of a second:	43
Number of the 43 balls dropped after six tenths of a second:	0
Number of the 43 balls dropped after two tenths of a second:	0
Number of the 43 balls held for at least ten seconds:	43
Number of complete misses: ¹²³	11
Number of glancing misses: ¹²⁴	10
Number of falls to the ground where the ball was dropped: ¹²⁵	8
Number of falls to the ground where the ball was held:	3
Number of balls striking the glove and immediately popping out:	23
Number of balls striking the glove and immediately rolling out:	2

His catching percentage dropped from sixty-six percent to forty-three percent. That was to be expected. It is easier to catch a ball coming at you than falling on you. The descending ball requires precise horizontal and vertical alignment between glove and ball, and adds a third element—the in and out distance from home plate.

Of the forty-three balls that he caught and held for six tenths of a second without falling down on the tarpaulin, forty-three remained in his glove for ten seconds—long enough to establish possession. Of those he caught and held for six tenths of a second without falling, none were dropped. Of those he did drop while standing (twenty-five), twenty-three popped out immediately upon striking the glove and two rolled out immediately on striking the glove. None of the twenty-five were held for six tenths of a second. Interestingly, all twenty-five struck the part of the glove in the pocket, not the web. None of the balls that landed in the web popped out and none were dropped.

123. See *supra* note 115.

124. See *supra* note 116.

125. Because Ian was standing on a tarp spread over fourteen inches of snow, the footing was uneven and slippery. Mr. Popov was standing on firm footing, and as we saw from the earlier experiment, Ian only fell twice out of one hundred-one times, both times when he stepped back onto the snow pile and lost his footing.

The data does not support the hypothesis that there is an equal chance that a ball held for six tenths of a second will fall out before possession, as defined by the court, is established. The data in both tests demonstrated just the opposite—of the forty-three balls in experiment two and the sixty-six balls in experiment one that were held for at least six tenths of a second, all were held for ten seconds and none were dropped. Therefore the court's statement that "[w]e will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so"¹²⁶ is not supported by the empirical study. We do know. There is virtually no chance he would have dropped the ball after holding it for six tenths of a second. Indeed, if Ian held the ball for even one tenth of a second, he held it for ten seconds.

This experiment shows that the court's thesis, that it will never be known if Mr. Popov would have dropped the ball or not, is not supported by the data. If the court's thesis was correct, then it would be equally likely that a ball held for six tenths of a second would be dropped or held. The study shows that in one hundred percent of the cases, a ball held for six tenths of a second did not come out of the glove during the following ten seconds.

C. A Suggested New Rule of Baseball Possession: Ian's Rule

It is not true that those who catch home run baseballs are regularly stepped upon, thrown to the ground, pummeled, bit, hit, smothered, and robbed, particularly not in San Francisco. Here is how Mr. Matt Bean of Court TV described the San Francisco experience before number seventy-three:

[W]hen St. Louis fan Philip Ozersky caught [number 70 hit by Mark McGwire, which later sold for 3 million dollars], he remained relatively unfettered by the surrounding fans. And when Bonds tied McGwire in the 161st game of the season with his 70th home run, fans surrounding the lucky father-son duo who caught it stepped back and applauded. Numbers 71 and 72 (which caromed back into the park) were peaceful shots as well. Then came his 73rd.¹²⁷

The court has stated the obvious, that fans will be influenced by the law, and therefore, the law should not tolerate violence. Nor is violence the norm. The court implied it would prevent assaults in the future by giving Mr. Popov an interest in the ball.

That may not be a safe assumption. As long as Mr. Bonds plays in San Francisco, he will attract not only fans, but trophy hunters, including some who would, in the court's phrase, use "brute force" to grab the next million-dollar baseball. Peter Fimrite, a writer for the *San Francisco Chronicle*, indicated he

126. *Popov*, 2002 WL 833731, at *3.

127. Bean, *Trial Over Barry Bonds Baseball*, *supra* note 3.

would not be surprised if they are “willing to do almost anything to get their hands on the ball.”¹²⁸

The court’s decision does not solve the problem of the pack—three or four conspirators¹²⁹ who divide the job up, some attacking the person who catches the ball, and others diving for the ball. Nor does it solve the problem of someone who grabs for the person holding the ball with the hopes that he will not be seen or caught. Violence in the stands is still a possibility. One observer said that the court’s decision tells fans that “[t]hey’d better have sure hands and a killer instinct.”¹³⁰ What is needed, beside good security, is a new rule that removes all incentive for anyone to interfere with the person who caught the ball.

Here is a proposed new rule, based on scientific evidence, entitled “Ian’s Rule.” When a baseball is hit into the stands or out of the ball park and lands in a person’s glove, but then immediately bounces out and is picked up, the person who picked it up is the owner of the ball. If a hit baseball is caught by a person in his glove and does not immediately bounce out, that person owns the ball, even if the ball is jostled loose by contact with other people, and even if the person who caught the ball only held it for six tenths of a second. The person who retrieves the ball, if an innocent bystander, becomes a constructive partner of the person catching the ball, and the ball’s value will be equitably divided between them. This rule is consistent with the empirical study and may discourage fan violence.

IV. THE AFTERMATH OF THE COURT’S DECISION

A. *Should the Decision be Precedent?*

Judge McCarthy tried to balance all the equities, and it is easy enough for critics to poke holes in his decision. But the judicial system has done its job, as it has resolved this conflict in an orderly and somewhat dignified way. Arbitration would have been less spectacular,¹³¹ and it possibly would have been less of a spectacle.¹³² Mr. Hayashi has announced that he was at first disappointed in not getting the ball, but he does not intend to appeal.¹³³

128. Fimrite, *supra* note 84.

129. Mr. Hayashi was not a member of any conspiracy. The fact that he was not does not mean that others will not try it.

130. Garofoli, *supra* note 1. This was a comment by Mr. Paul Zingg, a consultant to Mr. Ken Burns’s *Baseball* documentary and provost at California Polytechnic State University, San Luis Obispo. *Id.*

131. See Gwenn Knapp, *High Drama, Low Brow*, SAN FRANCISCO CHRON., Dec. 19, 2002, at C1. “This was the most satisfying tie in sports history In theory, this case was deplorable In truth, it was a blast.” *Id.*

132. Mr. Ed Koch, formerly the mayor of New York City, heard a baseball case as the judge on the television show *The People’s Court*. Mr. McGwire had hit what would have been his

Did the judge conduct a fair and impartial trial? It appeared so from the press reports. Did the court consider all the evidence and the law? Extensively. Did the court write a thoughtful opinion? Yes. Is it defensible? Obviously. Did it treat the litigants fairly? That depends on where you sit. Professor Joseph Rand of Fordham University Law School thought so. He said, "It's still an elegant, Solomonic solution to the problem [It is] consistent with the modern tendency of property law to consider equity and fairness in apportioning property rights, rather than making an absolute, all-or-nothing resolution of ownership."¹³⁴ Professor William Gould IV of Stanford University Law School, an arbitrator and former chairman of the National Labor Relations Board, was quoted as saying it was "quite a thoughtful and sensible opinion."¹³⁵

*B. An Alternative Theory: Constructive Partnership*¹³⁶

Our data is not consistent with the court's thesis that we will never know if Mr. Popov would have held on to the ball. Does that mean that Mr. Hayashi gets nothing? On the court's property theory, the answer would be yes. However, there is an alternative theory that results in a split, constructive partnership.

One could have given more to Mr. Popov and less to Mr. Hayashi, on the ground of relative contribution to the joint cause. Mr. Popov stopped and momentarily caught the ball, without which Mr. Hayashi would have received nothing. One could impose a constructive partnership consisting of Mr. Popov and Mr. Hayashi. The partnership gained possession and ownership of the ball. The partnership shares would depend upon their relative contribution. If Mr. Popov's contribution to the endeavor was seventy-five percent based on his skill and ability and Mr. Hayashi's was twenty-five percent, then that would be the split. The constructive partnership theory is a legal construct. But so is the idea of possession and property. The advantage of the partnership theory is that the court can adjust the percentages based on the relative contributions of each. The *Popov* court's property theory almost requires a 50-

sixty-sixth home run, but a fan touched the ball before it left the field and it was ruled a ground rule double. But it was still worth around \$9,000. Mr. Koch granted possession of the ball to the man who ended up with it after a pileup and not to the person who first touched it. More recently, Mr. Koch said that he did not know much about baseball, but that "to keep the ball, you have to show legitimate possession and control." He also said he did not think courts were going to use his decision as precedent. Garofoli, *supra* note 39.

133. *Litigants*, *supra* note 107.

134. Garofoli, *supra* note 1.

135. *Id.*

136. The author first proposed this theory during the trial in an unpublished letter to the editors of the *San Francisco Chronicle*.

50 split, regardless of the relative contribution of each. The court's theory also proceeds on a factual premise inconsistent with our data.

Mr. Hayashi was able to articulate the partnership concept in an interview after the trial. Mr. Popov reportedly offered to purchase Mr. Hayashi's interest in the ball. Mr. Hayashi declined, believing that if he sold the ball to Mr. Popov, Mr. Popov would claim to be the rightful owner. Mr. Hayashi stated, "Neither party is the true owner We're partners . . . forced partners."¹³⁷

Realtors earn six percent, auctioneers fifteen percent, and lawyers forty percent or more. But, this is quibbling. Mr. Hayashi performed a valuable service in rescuing the ball from the mob. The author's quarrel, therefore, is more with the rule of law announced and the factual basis behind the rule, rather than with the result. If Major League Baseball wants a different rule, league officials can create one. If they fail to act, they will have, to a great degree, affirmed Judge McCarthy's decision. This is one case in which baseball can change the rule for future cases by contracting with fans and patrons.

It was not the dispute itself, but the manner in which the legal system resolved this dispute and especially the cost, that offended some observers. Mr. Paul Zingg, provost at California Polytechnic State University, Sal Luis Obispo and a consultant to the wonderful Ken Burns's documentary, *Baseball*, got it right: "You've got to wonder if these people have a life."¹³⁸ "Baseball is a marvelous and a terrible metaphor at the same time for our culture," he said, "and this is the perfect example of its excesses."¹³⁹

Professor Paul Finkelman of the University of Tulsa Law School and a paid consultant for Mr. Popov, said, "I think everybody should cut their losses and go home."¹⁴⁰

There is a moment in the Walt Disney movie *Fantasia*, during the Igor Stravinsky *Rite of Spring* segment, when a pteradon takes a fish from the waters and another pteradon steals the fish away. A sea creature then grabs the second pteradon in mid-flight and pulls it under the water. World without law.¹⁴¹

How should we approach a case where one man catches a baseball worth one million dollars and a mob of pteradons knock the ball loose, and some lucky soul finds it? Should we simply say, each take half? And would we feel the same way if instead of taking a baseball, the mob had tried to steal an

137. *Talks Continue on Fate of Bonds Ball*, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2002/12/30/ball.DTL> (Dec. 30, 2002).

138. Garofoli, *supra* note 39.

139. *Id.*

140. Garofoli, *supra* note 1. Finkelman thought the judge was "rewarding [Mr.] Hayashi for what a gang of bandits did. It's an invitation for a mugging in the stands." *Id.*

141. Prehistoric violence is an old theme. "The earth also was corrupt before God; and the earth was filled with violence." *Genesis* 6:11.

inheritance? In both cases it is found money. Should we protect the victims equally? Should the seeming frivolity of the baseball world, with grown men playing a boy's game, color our attitudes? Where, and what, is justice? Is it skill or luck that should be rewarded?¹⁴² Is justice the process, or the result?¹⁴³ There will be as many answers as oracles.

C. *Major League Baseball Needs to Create a Rule for All Parks*

Major League Baseball may wish to consider taking two steps. First, it should print the rules of baseball possession on every ticket stub or post them at the gate. If people knew the rules, then these disputes would settle more easily. What made *Popov v. Hayashi* difficult to settle was the fact that the gentlemen were disputing the rules governing baseball possession. When the rules are uncertain, settlement is more difficult. The case is not binding in other states, or on other California judges.

Second, Major League Baseball should consider hiring an arbitration provider, with a nationwide panel of arbitrators, with the power to resolve any dispute between fans concerning which of them is entitled to a contested ball, and require all fans, as a condition of entering the ball park, to agree to submit any such dispute to arbitration. If the Pacific Maritime Association and International Longshoremen's Workers Union, with far more at stake, can agree to a single, permanent arbitrator,¹⁴⁴ Major League Baseball might consider a similar approach with several arbitrators from around the country. This would eliminate the \$900,000 problem outlined earlier in this article, in which the delays and costs of litigation can soon overtake much of the ball's value. This will not eliminate all problems, as there is still the flotilla out in McCovey Cove. But they seem quite tame by comparison, and the risk of conflict has been greatly diminished by the motor boat ban. Baseball is used to arbitrating grievances and salaries with the Player's Union. They may well consider arbitrating the ownership of loose baseballs. Were that to happen,

142. "I returned, and saw under the sun, that the race *is* not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill; but time and chance happeneth to them all." *Ecclesiastes* 9:11 (emphasis in original).

143. "It is important, of course, that controversies be settled right, but there are many civil questions which arise between individuals in which it is not so important the controversy be settled one way or another as that it be settled." William Howard Taft, *Adequate Machinery for Judicial Business*, 7 A.B.A. J. 453, 453 (1921). "It is usually more important that a rule of law be settled, than that it be settled right." *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

144. Steven Greenhouse, *Both Sides See Gains in Deal to End Port Labor Dispute*, N.Y. TIMES, Nov. 25, 2002, at A14.

Popov v. Hayashi would be the last court case regarding possession of a baseball.¹⁴⁵

V. EPILOGUE — RECONCILIATION, SETTLEMENT, SALE OF THE BALL, A MAGNANIMOUS GESTURE BY HAYASHI'S LAWYERS, AND A NEW LAWSUIT IS FILED AGAINST MR. POPOV FOR ATTORNEY'S FEES.

On December 18, 2002, the court ordered the parties to agree on a method to sell the ball and to split the proceeds. The litigation system, which is not designed to make friends out of adversaries, had been bitter. The deadline for appeal was running out, and the parties had not agreed on a sales agent. Additionally, a new baseball season was about to start. It was time to fish or cut bait, to appeal or to settle. Mr. Popov and Mr. Hayashi met alone¹⁴⁶—no lawyers, no mediators, just the two litigants. The more they talked, the more they discovered their common humanity—their love of baseball and their respect for Mr. Bonds. They discovered they attended the same university. They announced their agreement on March 12, 2003, and Mr. Popov talked to the press. “We have come to an agreement that the best thing to do is get back to what this is all about, which is that this is a historical moment in baseball history that we are both a part of.”¹⁴⁷ Mr. Hayashi gave some of the credit for their coming together to Mr. Bonds himself. He said, “Barry Bonds commented a while back, ‘Why don’t these guys come together and split the ball and its proceeds,’ and we respected that opinion a lot and thought the best thing for baseball would be to move forward.”¹⁴⁸

Mr. Popov had this to say about Mr. Hayashi: “It was great to talk to him. I wish that a lot of the hype and the media attention way back when wasn’t there and we could have talked.”¹⁴⁹ Mr. Popov was likewise charitable towards the trial judge:

Sitting here almost 90 days after the decision, it’s easier to see we didn’t give Judge McCarthy as much credit as we should have If he had ruled for

145. Major League Baseball should probably have a bat rule as well. Bats also can occasionally fly into the stands. A bat once used by Shoeless Joe Jackson recently sold for \$179,591 at www.mastronet.com. E-mail from Laura Harden, representative of www.mastronet.com, to *Saint Louis University Law Journal* (Sept. 30, 2002, 17:08:48 CST) (on file with *Saint Louis University Law Journal*). These auctioneers also sold one of Mr. Ted William’s bats for \$50,566 in November 2002. *Id.* Mr. Doug Yarris, a witness in *Popov v. Hayashi*, recalled as a twelve-year-old catching an extra point ball at a Stanford game, after which two kids stole his ball. Smith, *supra* note 14, at 70. Then there is the problem of footballs going into the stands at NFL games. . . .

146. They discussed their meeting in a joint press conference on March 12, 2003. Lisa Leff, *Bonds Fans Agree on How to Sell Baseball*, *CONTRA COSTA TIMES*, Mar. 13, 2003, at 4.

147. *Id.*

148. Wire Reports, *HARTFORD COURANT*, Mar. 13, 2003, at C7.

149. Leff, *supra* note 146.

either party, the other would have likely appealed and dragged this on, so there is some wisdom to his ruling that was not appreciated at the time.¹⁵⁰

Although some in the press believed the two had allied themselves to promote the sale of the ball by making the rounds of television studios,¹⁵¹ their statements of friendship seemed genuine to the author, not feigned.

They agreed to hire the Barnes Sports Group of St. Louis (the same agents that sold Mr. McGwire's baseball for three million dollars), to find a buyer or arrange an auction.¹⁵² Mr. Barnes announced at the same press conference that it was a million-dollar baseball, but "[w]hether this one [was] \$1 million, \$2 million, \$3 million," it was premature to guess.¹⁵³ Mr. Barnes hired Lelands to conduct the auction.¹⁵⁴ The auction date was set for June 25, 2003, and the auction was to be broadcast live on ESPN.¹⁵⁵ The chairman of lelands.com auction house, Josh Evans, all but conceded five weeks before the auction that the delay had diminished the value of the ball: "It is what it is It might have sold for more if it was put up (for auction) shortly after it was hit, but then again, you never know. These things aren't quantifiable. What happens that day (of the auction) is very emotional."¹⁵⁶ Lelands insured the ball for two million dollars and the press quoted experts as saying the ball would sell for a million dollars.¹⁵⁷

They were not even close. The ball sold for \$450,000. Todd McFarlane, who paid \$3 million for the McGwire baseball, was the high bidder.¹⁵⁸ Mr. McFarlane knew immediately that the sellers had lost. He even predicted how badly, saying after the bidding ended:

The funny thing [is] [t]hese two guys have two sets of lawyers that they've got to pay court costs. These two guys could actually be in debt when it's all said and done. They could actually be worse off for having that ball. Add up two sets of lawyers. I'm being generous if those lawyers fought in court for a combined total of less than \$500,000.¹⁵⁹

150. *Id.*

151. Gwen Knapp, *Bonds' No. 73 Sets No Records at Auction*, SAN FRANCISCO CHRON., June 26, 2003, at A1.

152. Leff, *supra* note 146.

153. *Bonds' 73rd to be Split Evenly by Claimants*, SFGate.com, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/03/13/BA147719.DTL> (Mar. 13, 2003).

154. Joe Garofoli, *Rivals Finally Agree to Sell Bonds Ball at Auction*, SAN FRANCISCO CHRON., May 28, 2003, at A15.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Sold! McFarlane Pays \$450,000 for Bonds' 73rd HR Ball at* http://sportsillustrated.cnn.com/baseball/news/2003/06/25/bonds_73ball/ap/ (June 25, 2003) [hereinafter *Sold!*]. With commissions, the official purchase price was \$517,500. *Id.*

159. *Id.*

Mr. Popov did not seem happy. “It was about history, [he] said. It wasn’t about money. I’ve got 20 months of joy out of the experience. It was unpredictable. I had no expectations.”¹⁶⁰ Mr. Hayashi expressed his disappointment: “In the end, it’s probably going to be a wash.”¹⁶¹ Mr. Bonds watched the auction from the Giants clubhouse. He declined to talk to reporters after the bidding concluded, saying, “Don’t come over. I saw it.”¹⁶²

Why was the price so low? Mr. McFarlane thought he might have scared off other bidders.¹⁶³ Another bidder told his agent not to go above \$300,000 because “someone else will break the record fairly soon.”¹⁶⁴ The next highest bidder, Nicholas DePace of Philadelphia, said to the press, “The only reason I didn’t push him higher is because I thought the record could be broken in the next five or [ten] years.”¹⁶⁵ Others blamed the slumping economy to explain why such a presumably valuable ball would sell for such a low price. Also, the long delay resulting from the parties’ court battle deflated the hype surrounding the ball, and McGwire was a more popular player than Bonds.¹⁶⁶ One writer concluded, “The devaluation of home-run records has led to a devaluation at the auction house.”¹⁶⁷ Neither litigant played well in the press. In a verbal attack that could be called harsh, even savage, a San Francisco sportswriter criticized Mr. Popov and Mr. Hayashi for not settling.¹⁶⁸ Steve Wilstein, a sports columnist for the Associated Press, concluded that “[t]he two men who once held the Bonds ball in their grasp, victims of their own avarice, will only have their stories to tell.”¹⁶⁹

Mr. McFarlane, it turned out, was only half right when he predicted the two litigants would end up worse off for having fought over the ball. Mr. Hayashi’s lawyer, Don Tamaki, announced that because of the low price the

160. *Id.*

161. *Id.*

162. Hal Bock, *Bonds’ 73rd Homer Sells for \$450,000*, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2003/06/25/sports1853EDT0418.DTL> (June 25, 2003).

163. *Sold!*, *supra* note 158.

164. Ira Berkow, *73rd Home Run Ball Sells for \$450,000*, N.Y. TIMES, June 26, 2003, at D4, available at <http://nytimes.com/2003/06/26/sports/baseball/26berkow.html> (quoting John Doyle).

165. Matt Bean, “*Million-dollar*” *Bonds Ball Sells for \$450,000*, at http://www.courttv.com/trials/baseball/ballsold_ctv.html (June 25, 2003).

166. *Id.*

167. Phil Sheridan, *Bonds’ Devalued Home-Run Ball a Sign of the Times*, at <http://www.bayarea.com/mld/mercurynews/sports/6179873.html> (June 26, 2003).

168. See generally Ray Ratto, *Bonds Ball Greed Twins Just Won’t Go Quietly*, SAN FRANCISCO CHRON., May 28, 2003, at C1, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/05/28/SP157248.DTL>.

169. Steve Wilstein, *Bonds No. 73 Ball: A Story of Greed*, at <http://www.sfgate.com/cgi-bin/article.cgi?file=news/archive/2003/06/26/sports0443EDT0156.DTL> (June 26, 2003).

ball fetched, he was reducing his fee to a point that would leave Mr. Hayashi with a “significant amount” of money left over.¹⁷⁰

Mr. Popov was not so fortunate in his choice of lawyers. When he balked over paying his attorney’s fees, his attorney, Martin Triano, sued him for \$473,530.22.¹⁷¹ Mr. Triano was quoted as saying he discussed his fees, an undisclosed hourly rate, with Mr. Popov, while Mr. Popov said the fees were “way overblown.”¹⁷² “I feel taken advantage of,” Mr. Popov said, adding, “I’ve talked to legal counsel that says he (Triano) owes me the full value of the baseball because he lost it.”¹⁷³ Mr. Triano replied:

Alex is now speaking up because he’s disappointed with the auction and how much money he got . . . We paved new legal ground and got him half the ball. I think there was a very substantial case that he was entitled to the whole ball, but Alex chose not to take it up on appeal.¹⁷⁴

Finally, one other participant has sued Mr. Popov. Roger Bernhardt, a professor of law at Golden Gate University, testified as an expert witness under a fee agreement that he contends entitled him to \$19,000.¹⁷⁵ Mr. Popov says the agreement depended upon him being awarded the ball.¹⁷⁶ Mr. Popov may have the last word in the matter, though; he is writing a book detailing his experience.¹⁷⁷

Meanwhile, baseball continues on. The Yankees are leading their division, Boston is fighting for a playoff spot, and the White Sox, Cubs, and Cardinals are all doing well. The all-star game did not end in a tie. Bonds continues to excel. Albert Pujols, of the St. Louis Cardinals, only in his third season, is having a sensational year at the plate. The best game ever invented continues to spread its spring hope, summer joys and sorrows, and its autumn magic.

170. David Kravets, *Fan Who Caught Bonds’ Record Homer Sued By Attorney*, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2003/07/08/sports2021EDT0163.DTL> (July 8, 2003). “‘We almost worked for free here,’ Tamaki said.” *Id.*

171. Bob Egelko, *Fan Not Having a Ball: Fresh Legal Woes for Man Who Caught Bonds’ 73rd Homer*, SAN FRANCISCO CHRON., July 9, 2003, at A14, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/07/09/BA156606.DTL>; *In Re: Triano*, No. CPF-03-503194 (Cal. Super. June 20, 2003), available at <http://207.215.212.16/scripts/magic83/mgrqispi.dll?APPNAME=IJS83&PRGNAME=casenumbrprompt> (last visited Nov. 19, 2003).

172. Kravets, *supra* note 170.

173. Egelko, *supra* note 171.

174. *Id.*

175. Bernhardt v. Popov, No. CGC-03-421765 (Cal. Super. June 25, 2003), available at <http://207.215.212.16/scripts/magic83/mgrqispi.dll?APPNAME=IJS83&PRGNAME=casenumbrprompt> (last visited Nov. 19, 2003).

176. Egelko, *supra* note 171.

177. *Id.*