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Comment

Popov v. Hayashi, a Modern Day Pierson v. Post: A Comment on What the Court Should Have Done with the Seventy-third Home Run Baseball Hit by Barry Bonds

Patrick Stoklas*

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.¹

I. INTRODUCTION

Have you ever tried to unravel a baseball? An official Major League baseball consists of two hand-stitched pieces of rawhide covering three hundred and fifty yards of yarn wrapped around a rubber ball.² Only when one reaches the rubber ball will one reach the core of a baseball.³

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2. Gary Smith, The Ball (An American Story), Sports Illustrated, July 29, 2002, at 63. A baseball starts as a small rubber ball sent from a factory in Alabama to a factory in Costa Rica, where Rawlings produces all of its official major league baseballs. It Seems Like They Need a Lot More Baseballs, Telegraph Online, May 24, 2000, available at http://archive.nashuatelegraph.com/Daily_Sections/Sports/Archives/2000/may/stories/0524w-baseballs.htm (last visited May 7, 2003). Once the rubber balls meet specifications, factory workers dip each one in a rubber-cement compressor. Id. Next, three machines wrap each ball with yarn. Id. An individual at the factory then places two rounded leather pieces over the yarn core and makes 108 stitches by hand to sew the two pieces together. Id. The Rawlings factory produces approximately 36,000 balls a day. Id.
3. See It Seems Like They Need a Lot More Baseballs, supra note 2.
In *Popov v. Hayashi*, a case concerning a dispute over the possession of a baseball, even after examining the film evidence and eyewitness reports, one still could not reach the core of the dispute and determine which fan had possession of the seventy-third home run baseball hit by Barry Bonds of the San Francisco Giants. The controversy before the California trial court took little time to develop but took significantly longer to unravel. The core of the dispute revolved around possession of the baseball and the theory of acquisition by capture developed in *Pierson v. Post*.

As Bonds chased history late in the 2001 Major League Baseball season, he knew that he would affect baseball history and the

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6. Smith, *supra* note 2, at 63. Gary Smith of *Sports Illustrated* describes the events that occurred when Barry Bonds hit his record setting seventy-third home run. *Id.* at 64-68. He discusses the difficulty of getting to the heart of the controversy through the stories of the individuals involved (their lives, their pasts, and their heritages) as well as the actual events at Pac Bell Park in San Francisco. *Id.* at 70-77.

7. See *CBS Evening News* (CBS television broadcast, Oct. 28, 2002). It took over a year for the controversy to reach a trial court. *Id.* The trial lasted about three weeks and consisted of fifteen days of testimony from over a dozen witnesses, including retired umpire Rich Garcia, a teenage boy who claimed that the defendant bit his leg, and a panel of legal scholars that discussed property law and the law of possession. Joe Garofoli, *Trial over Bonds Ball Says It All—About Us*, S.F. CHRON., Nov. 18, 2002, at A1, available at 2002 WL 4035941. The parties submitted a forty-two-inch thick stack of legal documents to the court. *Id.* The plaintiff also submitted a four-and-a-half-minute-long video shot by cameraman Josh Keppel that showed the "catch" and ensuing melee frame-by-frame, bringing to mind the famous Zapruder film that captured John F. Kennedy's assassination. See Smith, *supra* note 2, at 76; Matt Bean, *In Baseball Trial, A New Use for the Replay*, CourtTV.com (Nov. 18, 2002), at http://www.courttv.com/trials/baseball/102102_ctv.html (last visited May 7, 2003). From the time Dennis Springer threw his pitch to the point when Patrick Hayashi held the ball in his hands took less than five minutes. See Smith, *supra* note 2, at 76.


Bonds, however, could not have realized the potential impact he would have on the legal community and fan behavior in ballparks. On the last day of the 2001 season, with the single season home run record already set, fans flocked to Pac Bell Park in San Francisco to see if Bonds would hit another home run, giving them a chance to catch a potential two million dollar piece of baseball history.

Alex Popov and Patrick Hayashi came to Pac Bell with similar goals and left with potential claims to the possession of the seventy-third home run baseball hit by Bonds.

The controversy between Popov and Hayashi arose after Popov "caught" the record-setting seventy-third home run ball hit by Bonds. Although the evidence never clearly shows that Popov gained control of

10. See Smith, supra note 2, at 67. McGwire's seventieth home run garnered three million dollars at auction, twenty-five times more than the next most expensive baseball in history (Babe Ruth's first home run as a Yankee). Id. At the time, the purchaser of the ball, Todd McFarlane, stated that his purchase would turn "people into lunatics," as if foreseeing the events surrounding the Bonds seventy-third home run ball. Id.

11. See Garofoli, supra note 7. Only one other time had a trial occurred over a baseball, but it occurred on the television show The People's Court in 1998. See id. In that case, Mark McGwire hit a baseball that appeared to be his sixty-sixth home run (it was later ruled a ground-rule double because of fan interference). Id. One fan "caught" the ball, but a second fan held the ball after a pile-up occurred. See id. The judge at the time, former New York Mayor Ed Koch, awarded the ball to the second fan, who had complete control of the ball at the end of the melee. See id.

12. See Smith, supra note 2, at 64. Bonds had already hit his record-setting seventy-first and seventy-second home runs two days prior to the final game of the season. Id. Further, Bonds had possession of the seventy-second home run ball, as it landed back in play after clearing the fence. Id. at 64, 66.

13. See id. at 64. A memorabilia-marketing agent, Michael Barnes, valued the ball at between one and two million dollars before the trial began. Id. During the trial, however, those estimates fell to the lower end of the spectrum. See Corey Lyons, Judge Expected to Rule in Trial Over Bonds' Ball this Weekend, CONTRA COSTA TIMES, Nov. 16, 2002, State and Regional News (projecting the value of the ball at one million dollars), available at LEXIS, News Library, Contra Costa Times File; Tempest, supra note 8 (stating that attorneys' fees will cost the parties one million dollars, the estimated worth of the ball).

14. See Smith, supra note 2, at 64–68. Popov had traded a forty-dollar lower level box seat ticket for a ten-dollar standing room only ticket before the game started and positioned himself in right field beyond the 365-foot sign, where online research showed that Bonds had hit most of his home runs. Id. at 64. Hayashi, comparing the ticket to a lottery ticket, purchased his standing room only ticket on eBay (an online auction site) and also ended up in right field beyond the 365-foot sign, standing only a few feet from Popov. Id.

15. See id. at 67. The video by Keppel not only shows the ball in Popov's glove for six-tenths of a second but also shows that he had only a tenuous grasp on the ball. Joe Garofoli, Bonds' Ball No. 73 Transfigured Lives, S.F. CHRON., Nov. 16, 2002, at A15, available at 2002 WL 4035785.
the ball, it does show that he lost the ball at some point when the crowd surged towards him in an attempt to get the baseball.\textsuperscript{16} After Popov dropped the ball, Hayashi emerged triumphantly from the crowd with the ball.\textsuperscript{17} Both men claimed to have a right to possess it.\textsuperscript{18} Recently, California Superior Court Judge Kevin McCarthy declared that both Popov and Hayashi had a right to possess the ball and ordered them to sell it and split the proceeds.\textsuperscript{19} Although an appeal appeared imminent, neither side appealed McCarthy’s decision.\textsuperscript{20} Currently, however, the men have not abided by the decision either, as the ball remains unsold.\textsuperscript{21}

Although he crafted an equitable decision, Judge McCarthy did not clarify who had possession of the ball at the end of the melee—the one who first touched it or the one who ended up with it.\textsuperscript{22} Judge

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\item \textsuperscript{16} Smith, supra note 2, at 67.
\item \textsuperscript{17} Id. at 67–68.
\item \textsuperscript{18} See infra Part III.A (detailing the facts of the case and showing why each man had a claim to the ball).
\item \textsuperscript{19} Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *8–9 (Cal. Super. Ct. Dec. 18, 2002). Judge McCarthy’s decision calls to mind the biblical story of King Solomon ordering two harlots to split an infant child in half. See 1 Kings 3:16-28 (King James). Judge McCarthy stated that an individual gains a pre-possessory interest in property if that individual “undertakes significant but incomplete steps to achieve possession of a piece of . . . property and the [failure to continue the] effort is interrupted by the unlawful acts of others.” Popov, 2002 WL 31833731, at *6. For this reason, McCarthy awarded Popov partial possession of the ball. Id. at *7. He said, however, that awarding the ball to Popov would be unfair to Hayashi, the ultimate possessor of the ball. Id.
\item \textsuperscript{20} See Editorial, Splitting the Baby, 170 N.J. L.J. 1022 (2002) (noting Popov has already complained about the decision, stating that it “just shows that mob rule and violence can prevail”); see also Tempest, supra note 8 (stating that attorney’s fees will cost the parties one million dollars, the estimated worth of the ball).
\item \textsuperscript{21} See Gary Smith, And the Ball Plays On, SPORTS ILLUSTRATED, Jan. 20, 2003, at 18. “Popov, feeling that ballpark violence is being half-sanctioned by the ruling, has proposed that Hayashi name a reasonable sum and allow him to purchase Hayashi’s half-share—or possibly face a Popov appeal of the verdict that could continue the litigation for another year.” Id. Popov, however, will not submit the ball to arbitrators because he feels Hayashi’s arbitrators will provide an unreasonably high price. Id.
\item \textsuperscript{22} See infra Part IV.C (discussing why the decision does not create certainty and does not reduce the number of conflicts). Major League Baseball spokesman Patrick Courtney queried “how many balls are there that are this historically significant,” insinuating that this situation is not likely to occur again. Maura Dolan, Fight for Bonds’ Home Run Ball Spills into Court, L.A. TIMES, Nov. 27, 2001, at A1, available at 2001 WL 29832163. This question, however, fails to address how many baseballs will become significant and how often this type of situation will occur in the future. When Barry Bonds hit his 600th career home run home run on August 9, 2002, in San Francisco, as a fan, Jay Arsenault, emerged from a pile holding the ball with his face bloodied and his shirt torn. See Joe Roderick, Barry Bonds Blasts into History, CONTRA COSTA TIMES, Aug. 10, 2002, at Sports, available at LEXIS, News Library, Contra Costa Times Files; Major League Baseball: Pittsburgh Pirates at San Francisco Giants (ESPN television broadcast, Aug. 9, 2002). This ball also was the center of litigation after Arsenault and his friends “agreed before the game to share ownership if any of them caught the ball.” Bonds HR Ball Sparks Squabble, TULSA WORLD, Aug. 22, 2002, at B4, available at 2002 WL 7131089. The friends said
McCarthy’s decision does not meet either of the concerns expressed in *Pierson v. Post*; it does not establish certainty, nor does it reduce conflict. Because the *Popov* decision failed to reach the core of possession, it left the legal community unwrapping only the first layer of yarn that covers this controversy.

This Comment examines to whom the court should have awarded the ball by first looking to the history of acquisition by capture, discussing the theories of philosophers, and examining case law pertaining to wild animals and fugitive resources. Next, it discusses the facts of *Popov v. Hayashi* and Judge McCarthy’s decision. This Comment then examines both Popov’s and Hayashi’s claims to the ball, as well as the consequences of the recent court decision. Finally, this Comment discusses why the court should have awarded the ball to Hayashi and provides Major League Baseball with a solution to promote safety in its stadiums.

Arsenault breached his contract. See id. Currently, Ken Griffey, Jr., has 469 home runs and Alex Rodriguez has an opportunity to break Hank Aaron’s all-time record. See The Milestone Tracker, available at http://www.mlb.com/NASApp/mlb/mlb/stats/mlb_milestones.jsp (last updated May 8, 2003). How will the fans at the stadiums react if and when these events occur?

23. See *Pierson v. Post*, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (requiring the mortal wounding of an animal “for the sake of certainty, and preserving peace and order in society”).

24. See infra Part IV.C (discussing why the decision does not create certainty and does not reduce the number of potential conflicts between fans).

25. See infra Part II.A (discussing the property rights theories of John Locke and Sir William Blackstone).

26. See infra Part II.B (discussing classic cases concerning wild animals and who has the right to possess them).

27. See infra Part II.C (discussing the similarities between wild animals and fugitive resources and cases that applied the rule of capture to those resources).

28. See infra Part III.A (providing the facts of the *Popov* case).

29. See infra Part III.B (presenting the findings and holding of Judge McCarthy’s decision).

30. See infra Part IV.A (discussing Popov’s arguments that he would have maintained possession but for the violence of the crowd and why awarding him the ball would produce safer ballparks).

31. See infra Part IV.B (discussing Hayashi’s arguments that he clearly had possession of the ball and awarding him the ball would create certainty and eliminate the possibility of fraud).

32. See infra Part IV.C (discussing why the decision does not create certainty and does not reduce the number of potential conflicts between fans).

33. See infra Part V.A (discussing why awarding the ball to Hayashi would satisfy one of the goals of *Pierson v. Post*, while awarding the ball to Popov would satisfy neither of the goals).

34. See infra Part V.B (providing Major League Baseball with a solution that not only maintains a fan-friendly environment but also is a workable alternative to allowing fans to keep balls hit or thrown out of play).
II. BACKGROUND: THE RULE OF ACQUISITION BY CAPTURE

The rule of acquisition by capture still plays a role in the courts today, and an analogy can be made between wild animals or fugitive resources and the seventy-third home run ball hit by Bonds. The rule of acquisition by capture provides the conditions under which an individual has a right to possess certain resources. To protect these rights, individuals have entered into lawful society, which protects themselves and their property from the actions of others and relies on the courts to settle disputes. In Popov v. Hayashi, both Popov and Hayashi sought to secure their rights as against all others to seventy-third home run ball hit by Bonds. This Comment will argue that to reach a proper decision regarding ownership of the ball, one should examine the theories of classical political and legal theorists and the case law regarding the capture of wild animals and fugitive resources. After examining this history, one can determine what constitutes a property right in a baseball and conclude whether Popov or Hayashi gained a property right in it.

A. Locke and Blackstone: Views on Property

In Pierson v. Post, the first American case in which a court examined the rule of acquisition by capture in regard to wild animals, the court

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35. See Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73, 75 (1985). Rose indicates that "inquiries into the acquisition of title to wild animals...may seem purely academic...." Analogies to the capture of wild animals show up time and again when courts have to deal on a nonstatutory basis with some "fugitive" resource that is being reduced to property for the first time," such as oil, gas, groundwater, or space on the spectrum of radio frequencies. Id.

36. See infra Part II.B (discussing what the court requires of an individual to create a property right in wild animals); infra Part II.C (discussing what the court requires of an individual to create a property right in fugitive resources).

37. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 14 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690). John Locke noted that "[i]o avoid [a] state of war—wherein there is no appeal but to heaven, and...where there is no authority to decide between the contenders—is one great reason of men’s putting themselves into society and quitting the state of nature." Id.

38. See Smith, supra note 2, at 63-64.

39. See infra Part II.A (discussing the property rights theories of John Locke and Sir William Blackstone).

40. See infra Part II.B (discussing classic cases that determine who has the right to possess wild animals).

41. See infra Part II.C (discussing the similarities between wild animals and fugitive resources and applying the rule of capture to these resources).

42. See infra Part V.A (concluding that the court should award the ball to Hayashi because it will satisfy one of the goals of Pierson v. Post, while awarding the ball to Popov will satisfy neither of the goals).
looked to the works of Justinian, Fleta, Pufendorf, and Barbeyrac. They also considered the works of two other prominent thinkers: John Locke and Sir William Blackstone. These theorists provide a strong and thoughtful start in determining how and when a property right develops.

According to Locke, God gave the Earth to mankind in common, making it difficult to determine how any individual can gain a private property right in any object. Each man or woman, however, has a property right exclusive to him or her in his or her body; no one can take away the fruits of an individual's labor. By mixing one's labor with property available to mankind in general, individuals appropriate that property for themselves exclusive of the rest of society.

43. *See Pierson v. Post, 3 Cal. R. 175, 177–79 (N.Y. Sup. Ct. 1805).* According to the court in *Pierson v. Post,* Justinian and Fleta stated that pursuit alone could not create a property right for an individual. *Id.* at 177. Even wounding an animal and remaining in pursuit does not create a property right. *Id.* They required that an individual actually take the animal. *See id.* According to the court, Pufendorf declared that a mortally wounded wild animal belonged to the individual who caused the wound if the individual remained in pursuit of the animal. *Id.* According to the dissent, Barbeyrac allowed a right to possess an animal when pursuit began, if pursuit included "large dogs and hounds." *See id.* at 181–82 (Livingston, J., dissenting). "Justinian's Institutes is a Roman law treatise of the sixth century; ... Fleta refers to a Latin textbook on English law written in 1290 or thereabouts, supposedly in Fleet prison and possibly by one of the corrupt judges Edward I put there." *Jesse Dukeminier & James E. Krier, Property 23* (4th ed. 1998). Barbeyrac and Pufendorf wrote about legal theory in the seventeenth and eighteenth centuries. *Id.*

44. *See infra* notes 47–52 and accompanying text (discussing Locke's views concerning property rights).

45. *See infra* notes 53–58 and accompanying text (discussing Blackstone's views concerning property rights).

46. Although the other philosophers discussed in *Pierson* provide insight into property rights, Locke and Blackstone have best survived the test of time. Locke's philosophy spread throughout Europe and eventually reached America, where its influence is seen in the Declaration of Independence and state constitutions. Thomas P. Peardon, *Introduction to John Locke, The Second Treatise of Government,* at xix–xx (Liberal Arts Press 1952) (1690). Blackstone's works influenced politicians and, like the works of Locke, students have studied his texts. *See Gareth Jones, Preface to Blackstone, The Sovereignty of the Law,* at vii (Gareth Jones ed., Univ. Toronto Press 1973) (1765). His works proved popular in England, France, Russia, Germany, and the United States amongst law students and lawyers, as well as the general population. *See id.* at x.

47. *See Locke,* supra note 37, at 16. Giving the earth to humankind in general allows an individual to use property for his or her support and comfort. *Id.* at 17. No one individual, however, has a private right to property exclusive to the rest of mankind. *Id.* Only when an individual appropriates property in common for his or her own good or benefit would that individual gain that property interest exclusive of the rest of humankind, assuming that the individual's appropriation of the property is prior to any other individual's appropriation of the same property. *Id.*

48. *Id.* at 17.

49. *Id.* "[L]abor put a distinction between them and common; that added something to them more than nature, the common mother of all, had done; and so they became his private right." *Id.*
considering the taking of wild animals from nature, Locke said that an individual who kills an animal expends his or her labor upon it, gaining a property right in that animal above all others. As people attempted to take away the property of others, people entered into society as a means to protect themselves and their property. For Locke, the individual who could first take actual possession over an animal, by either capture or mortal wound, gained the strongest right to the animal and entered society to protect these gains and other acquisitions of property.

Similar to Locke, Blackstone began his discussion of property rights by stating that God gave mankind the right to everything on the Earth. According to the laws of nature and reason, the individual who first used property gained a right to it that lasted only as long as that individual used the property. Blackstone, however, believed that as the population increased, people needed a concept for more permanent property rights. Without this concept of property rights, Blackstone foresaw disputes arising over who gained possession of and had a right

The court applied this in Haslem v. Lockwood, 37 Conn. 500, 506 (1871). In Haslem, the plaintiff gathered manure from public streets and placed it in a large pile. Haslem, 37 Conn. at 506. He planned to carry away the manure the following day and left it in the street. Id. Before he could remove the pile of manure created through his labor, however, the defendant appropriated the manure for himself. Id. The court found that the plaintiff’s labor in creating the pile gave him an exclusive right to the manure. Id.

50. See LOCKE, supra note 37, at 22. This theory appears to require inflicting a mortal wound or taking away an animal’s liberty pursuant to American case law. See infra Part II.B (discussing classic cases regarding who rightfully possesses wild animals). Locke presents similar views concerning fugitive resources stating, “[T]he ore I have digged in any place where I have a right to the common with others, becomes my property without the assignation or consent of anybody.” See LOCKE, supra note 37, at 18.

51. See LOCKE, supra note 37, at 14. Locke believed that people would enter into a state of war because they only had the rule of force and violence, similar to the way that wild animals act. See id. at 11. By entering into societies, an authority existed to resolve disputes and to produce a rule of law, not violence. See id. at 14.

52. See id. at 14–22.

53. BLACKSTONE, supra note 1, at 119. Blackstone stated that God gave man “dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.” Id. (quoting Genesis 1:28). From this premise, Blackstone concluded that all things upon the Earth “are the general property of all mankind.” Id.

54. Id. at 119–20.

55. See id. at 120. Richard Schlatter agreed, declaring that “[t]he institution of property was an agreement among men legalizing what each had already grabbed, without any right to do so, and granting, for the future, a formal right of ownership to the first grabber.” RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 130–31 (1951).
to property. For Blackstone, people entered a civilized society and crafted property rights and laws because they desired peace and security. Similar to Locke, Blackstone believed an individual could have a property right above all others if that individual could take possession before anyone else; Blackstone believed that societies developed to protect that right.

Both Locke and Blackstone required an individual to take action to acquire property, and this taking had to occur before all other people's actions. To protect their right to property, individuals developed civilized societies and created property laws. This development attempted to reduce the number of disputes that arose between individuals over the same property. Therefore, although an individual can gain property rights to a previously unclaimed object by being the first to capture, possess, or gain control over that object, the laws of the society must also grant an individual a right to the property.

B. The Rule of Capture in American Case Law with Regard to Wild Animals

Early courts in the United States relied on theories of property rights found in the works of Locke and Blackstone and used their theories to

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56. See BLACKSTONE, supra note 1, at 120. Without these property rights "innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed." Id. For a similar reason, the court in Pierson fashioned a right of possession to the individual who struck the mortal wound to preserve peace in society. Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805); see also infra notes 72–75 and accompanying text (discussing the majority opinion in Pierson).

57. See BLACKSTONE, supra note 1, at 130. In order to achieve peace and security, English lawmakers established a legal owner, whether that is the state or an individual, to everything. Id.

58. See id. at 119–30.

59. See supra notes 49, 54 and accompanying text (describing the actions that Locke and Blackstone required to achieve possession).

60. See supra notes 51, 57 and accompanying text (describing mankind’s reason for entering into society).

61. See supra notes 51, 56 and accompanying text (describing the views of Locke and Blackstone that numerous conflicts occurred while in a state of nature). In a similar manner, the court in Pierson attempted to craft a decision that would reduce the conflict in society. Pierson, 3 Cai. R. at 179.

62. See BLACKSTONE, supra note 1, at 129–30. At the time in England, the law gave the sovereign of the state property rights over wild animals because of disputes that arose among individuals. Id. In a similar manner, in the United States, "the state holds the title to wild animals in trust for the people, who are the beneficial owners," and the people have a right to take the animals subject to and in accordance with state laws and regulations. 4 AM. JUR. 2D Animals § 15 (1995); see also State ex rel. Visser v. State Fish & Game Comm’n, 437 P.2d 373 (Mont. 1968) (finding that the Game Commission acted within its authority when it confiscated two elk shot and killed by a guide without a hunting license).
develop the rule of acquisition by capture in regard to *ferae naturae*. Black's Law Dictionary defines *ferae naturae* as animals that are "wild; untamed; undomesticated." Animals, originally belonging to all people in common, become the absolute property of an individual only when killed because at death the animal cannot return to the wild. An individual does not gain an absolute property right in a captured wild animal because that animal may escape and return to the wild. A person can, however, gain a qualified property right in an animal by bringing the animal within his or her power or control. Mere pursuit of an animal, however, does not instill a property right to that animal in the pursuer. Even when mortally wounded, if one abandons one's pursuit of the wild animal, then one has abandoned his or her right to possess that animal.

The courts first examined the theory of acquisition by capture, in regard to wild animals, in *Pierson v. Post* in 1805. In *Pierson*, Post had pursued a fox with his hounds over public land, but, as he closed in on his target, Pierson shot and killed the animal. The dispute focused

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63. See supra notes 43–46 and accompanying text (discussing the use of property theories by the *Pierson* court in reaching its decision).

64. BLACK'S LAW DICTIONARY 635 (7th ed. 1999). For the remainder of this Comment, "wild animals" will be used in place of *ferae naturae*.


66. Id. at 394–95. While wild animals may escape and return to nature, domesticated animals remain the property of the individual who owns the animal. See Manning v. Mitcherson, 69 Ga. 447, 450–51 (1882) (holding that an escaped canary bird belongs to the original owner); Herries v. Bell, 107 N.E. 944, 945 (Mass. 1915) (finding that a dog that escaped from its owner belonged to the owner and not the finder); Helsel v. Fletcher, 225 P. 514, 515 (Okla. 1914) (holding that domestic cats do not qualify as wild animals); Oakley v. State, 214 S.W.2d 298, 300 (Tex. Crim. App. 1948) (finding that cattle wandering from their owner’s farm remain the property of the owner). Even some animals not normally domesticated may receive this treatment. See Ulery v. Jones, 81 Ill. 403, 404–06 (1876) (finding that a domesticated buffalo bull that escaped and was subsequently shot constituted property of its original owner). But see Mullet v. Bradley, 53 N.Y.S. 781 (App. Term. 1898) (finding that a sea lion that escaped from captivity belonged to the finder and not the original owner because after it escaped, it lived in the wild and did not show any signs of returning to the original owner).

67. Arnold, supra note 65, at 395.

68. See Dapson v. Daly, 153 N.E. 454, 454 (Mass. 1926) (awarding a deer to the hunter who killed it, not to the pursuing hunter).

69. See id. at 455.

70. See *Pierson v. Post*, 3 Cai. R. 175, 177 (N.Y. Sup. Ct. 1805).

71. See id. at 175. The non-ownership of the land played an important role in *Pierson v. Post*. Had the incident occurred on an individual’s property, it would have belonged to the person who owned the property under the theory of "ratione soli." DUKEMINIER & KRIER, supra note 43, at 33–34. This Comment will discuss this fact later in determining the ownership of the ball between Popov and Hayashi. See infra Part IV.B (providing Major League Baseball with a
on whether a property right developed in the fox during the pursuit or when it was killed.\textsuperscript{72} In reaching a decision in favor of Pierson, the court determined what acts were required to take possession of a wild animal.\textsuperscript{73} The court stated that possession required that an individual strike the mortal wound and continue to pursue the mortally wounded animal, showing the intention to use the animal for himself and deprive it of its liberty.\textsuperscript{74} The court determined that giving the fox to Pierson, who delivered the mortal wound, would produce a certain owner and reduce the amount of litigation.\textsuperscript{75}

Although the majority decided in favor of Pierson for certainty of ownership and safety, the dissent argued in favor of Post for two reasons.\textsuperscript{76} First, according to the custom of hunters, the hunter who pursues an animal gains a property right in that animal.\textsuperscript{77} Second, an individual in pursuit of a wild animal expends labor and energy in

\textsuperscript{72} See Pierson, 3 Cai. R. at 177.
\textsuperscript{73} Id. at 179.
\textsuperscript{74} Id. at 178. In Liesner v. Wanie, the Wisconsin Supreme Court reached a similar decision. Liesner v. Wanie, 145 N.W. 374, 376 (Wis. 1914). The plaintiff in Liesner mortally wounded a wolf and continued to track the wounded animal. See id. Prior to reaching the animal, however, the defendant fired a fatal blow into the wolf and took possession of it as his own. See id. The court found in favor of the plaintiff, declaring that he had brought the animal under his control with his first shot and that his pursuit made clear he meant to possess the wolf. Id.
\textsuperscript{75} Pierson, 3 Cai. R. at 179. As discussed by Blackstone and Locke, people entered into society because they wanted to protect themselves and their property. See BLACKSTONE, supra note 1, at 130; LOCKE, supra note 37, at 14. By establishing a rule that vests possession of an animal in the one who delivers the mortal wound, the court made people aware of the limits of their rights and consequently reduced the number of disputes between individuals. See Pierson, 3 Cai. R. at 179.
\textsuperscript{76} Pierson, 3 Cai. R. at 180–82 (Livingston, J., dissenting). The dissent looked to the custom of the huntsmen and believed that the labor expanded by a hunter in pursuit of a wild animal creates a property right in that animal, extinguished only when the hunter abandons pursuit. See id. (Livingston, J., dissenting).
\textsuperscript{77} Id. at 182 (Livingston, J., dissenting). The court and society have accepted customs for resolving disputes. See infra notes 86–106 and accompanying text (discussing how in cases concerning whales, the court considered the custom of whalers in determining who had the right to possess a whale carcass). During the gold rush, California courts gave deference to mining camp customs for settling disputes. Rose, supra note 35, at 82. These mining camps best knew how to interpret symbols concerning property claims. Id.; see also Arnold, supra note 65, at 393 (noting how custom played a role in settling disputes over mining and water claims). In Maine, lobstermen have rules that they expect all lobstermen to follow and handle disputes themselves, without the aid of the court. See James M. Acheson, The Lobster Gangs of Maine, in PERSPECTIVES ON PROPERTY LAW 141, 141–42 (Robert C. Ellickson et al. eds., 1995). For example, the lobstermen may handle territorial disputes by breaking or opening the offending parties lobster traps. Id. at 142–43.
pursuit of the animal. According to the dissent in *Pierson*, the court should have granted possession of an animal to the pursuer who tracked the animal with hounds, as Post did. The dissent favored the custom of the hunters, noting that the decision favoring Pierson would harm hunters’ desire to pursue and kill wild animals deemed to be social nuisances, such as the fox.

Although the majority in *Pierson* refused to follow the custom of the huntsmen, custom in the whaling industry had a different effect on the courts. The customs of the whaling industry were extended beyond whalers, as authors wrote about these customs in prose, and England transformed the customs into formal rules. The “English Rule” regarding whaling granted possession of a whale to the whalers who could attach a whale to their ship with any apparatus, even if the

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78. *See Pierson*, 3 Cai. R. at 181 (Livingston, J., dissenting). While Locke advanced a belief that an individual must perform a significant act of labor, such as wounding or killing an animal, to gain a property right in the animal, he also accepted the idea that a pursuit constitutes labor that could create a property right. *See Locke*, supra note 37, at 19. Locke stated:

> [T]he hare that anyone is hunting is thought his who pursues her during the chase; for, being a beast that is still looked upon as common and no man’s private possession, whoever has employed so much labor about any of that kind as to find and pursue her has thereby removed her from the state of nature wherein she was common, and has begun a property. *Id.*

79. *Pierson*, 3 Cai. R. at 182 (Livingston, J., dissenting). Arguably, the dissent’s decision would result in more disputes. *See Jeremy Paul, A Bedtime Story*, 74 VA. L. REV. 915, 921–23 (1988) (noting that law professors will typically present the majority opinion in *Pierson* as providing an easier rule to administer than the dissent’s proposal).

80. *Pierson*, 3 Cai. R. at 180–81 (Livingston, J., dissenting). Judge Livingston noted that the fox caused tremendous harm to farmers and the court should have crafted a decision that would encourage the hunting of these creatures. *Id.* at 180 (Livingston, J., dissenting). He questioned who would keep hounds if any individual could intercept the hunt and take the animal as his or her own. *Id.* at 180–81 (Livingston, J., dissenting). Carol Rose, however, notes that in most cases the pursuer will capture the animal unless one assumes that interveners, like Pierson, inhabit the forest in large numbers, waiting to intercept the pursuit. *See Rose*, supra note 35, at 77.

81. *See HERMAN MELVILLE, MOBY DICK* (Wordsworth Editions Ltd. 1993) (1851); *see also* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989). Robert Ellickson describes the three basic whaling customs that existed prior to 1800. *See Ellickson*, supra, at 89–94. The first, as written about by Herman Melville in *Moby Dick*, concerned the fast-fish rule. *Id.* at 89–90; *see also infra* note 95 (explaining the fast-fish rule). The second custom stated that the whaler who first struck the whale with a harpoon and remained in pursuit had the right to the whale. *See Ellickson*, supra, at 90–92. This is similar to the finding in *Pierson* and *Liesner*. *See supra* note 74 and accompanying text (discussing *Pierson* and *Liesner*). The final custom stated that “the value of the carcass . . . be split between the first harpooner and the ultimate seizer.” Ellickson, supra, at 92. This is similar to the court’s reasoning in *Popov v. Hayashi*. *See infra Part III.B* (discussing the decision in *Popov*).
harpoon did not remain in the whale. The courts in *Ghen v. Rich* and *Swift v. Gifford* followed the whaling customs in reaching their decisions and also followed the idea of the mortal wound as declared in *Pierson*.

In *Ghen*, whalers sought to recover the value of a finback whale they had struck with a "bomb-lance." After the whalers had killed the whale with this type of lance, they watched it sink to the bottom of the sea. After three days, the whale resurfaced and floated onto a beach near where the crew had struck the mortal wound. An individual found the beached whale and sold it at an auction. The whalers received word of this sale and went to claim their kill; when the individual refused to return the whale, the whalers brought suit.

In reaching its decision, the *Ghen* court held that when whalers have done everything in their power to obtain or secure a killed whale, they

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82. See Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 Cardozo L. Rev. 1609, 1630 (2002). Paul Finkelman was one of the expert witnesses for Popov, and he argues that the court should have awarded the ball to Popov in order to create a safer environment at baseball stadiums. *Id.* at 1632. The English Rule is similar to the custom that Melville discussed in *Moby Dick*. *See Melville, supra* note 81, at 327–30 (describing the custom and distinctions between fast and loose fish). Finkelman uses this rule to say that Popov caught a “fast-fish” when he caught the seventy-third home run ball hit by Bonds and, because it qualifies as a “fast-fish,” Popov owned the ball. *Finkelman, supra*, at 1630.

83. *Ghen v. Rich*, 8 F. 159, 159 (D. Mass. 1881); *see also infra* notes 86–94 and accompanying text (discussing *Ghen v. Rich*, where the court allowed the individual who struck the mortal wound, and not the finder, to gain a property right in the whale).

84. *Swift v. Gifford*, 23 F. Cas. 558 (Mass. Dist. Ct. 1872); *see also infra* notes 95–106 and accompanying text (discussing the decision in *Swift v. Gifford* in which the court applied whaling custom to determine which party gained a property right in a fast-fish).

85. *See Pierson*, 3 Cai. R. at 179 (requiring a mortal wound in order to promote certainty and the preservation of order in society).

86. *Ghen*, 8 F. at 159. After death with this type of weaponry, a whale would sink to the bottom of the sea and would rise to the surface after a few days. *Id.* According to the decision, whalers would claim their whales based on the markings on the lances imbedded in the whales. *Id.* at 160.

87. *Id.* at 160.

88. *Id.* The crew killed the whale on April 9, 1880, near Cape Cod. *Id.* It resurfaced and floated onto a beach in Brewster, Massachusetts, on April 12, 1880, seventeen miles from where the crew killed it. *Id.*

89. *Id.* According to the custom at that time, finders of whales killed in this manner would notify the whalers of their find and receive a finder’s fee. *Id.* This is similar to the third custom discussed by Ellickson, whereby the finder of a whale and the first harpooner split the value of the whale carcass. *See Ellickson, supra* note 81, at 92–94. Nevertheless, custom at this time dictated that the individual who killed a whale had the right to the carcass of the whale. *See Ghen*, 8 F. at 160. The decision in *Pierson* would support this custom. *See Pierson*, 3 Cai. R. at 178–80 (awarding possession of the fox to the individual who struck the mortal wound).

90. *See Ghen*, 8 F. at 160.
create a property right in the whale and should obtain possession of it.\footnote{91} When a whaler kills a whale, the whaler establishes complete and absolute possession of the killed whale.\footnote{92} Fearing that the whaling industry would fail if it awarded the whale to the finder,\footnote{93} and finding that the whaler struck the mortal wound and did all he could to identify the kill, the court awarded the whaler damages.\footnote{94}

In an earlier whaling case, the court faced a question of property rights in a whale characterized as a fast-fish.\footnote{95} In Swift v. Gifford, a whaler's harpoon struck and remained in a hunted whale, but the line did not remain attached to the ship.\footnote{96} The first whaler remained in pursuit, but before he could catch the wounded whale, a second whaling ship captured it.\footnote{97} Upon arriving at the second whaler's ship, the first

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\footnote{91} Id. at 160, 162. The requirement to do whatever a whaler could do within his or her power seems to include distinctly marking his or her lances. See id. at 160.

\footnote{92} Id. at 161. When a whaler strikes the mortal wound, his or her right to the whale "become[s] firm and complete, the right of property is clear, and has all the characteristics of property." Id. (quoting Bartlett v. Budd, 2 F. Cas. 966, 966 (Mass. Dist. Ct. 1868)). This reasoning resembles the finding in Pierson. See Pierson, 3 Cai. R. at 179 (awarding possession of the fox to the individual who struck the mortal wound).

\footnote{93} Ghen, 3 F. at 162. The dissent in Pierson had a similar fear that no one would hunt foxes if the court awarded the fox to Pierson and that foxes would multiply and cause harm to farmers. See Pierson, 3 Cai. R. at 180–81 (Livingston, J., dissenting). In Ghen, the court feared that no whaler would attempt to pursue whales if a chance finder could reap the benefits. Ghen, 3 F. at 162.

\footnote{94} Ghen, 3 F. at 162. In a similar case, whalers killed a whale, wound a cable around it, anchored it at sea, and returned to shore. See Bartlett, 2 F. Cas. at 966. The following morning, a different crew found the whale wound in cable but detached from the anchor. Id. The court awarded the whale to the crew that had stricken the mortal wound, finding that the crew had established possession in the whale. Id. Again, that crew had done everything it could to secure the whale and had shown its intent to possess it. Id.

\footnote{95} See Swift v. Gifford, 23 F. Cas. 558, 559 (Mass. Dist. Ct. 1872). Melville wrote that a "fast-fish" belongs to the individual attached to it. See MELVILLE, supra note 81, at 327. He explained:

Alive or dead a fish is technically fast, when it is connected with an occupied ship or boat, by any medium at all controllable by the occupant or occupants,—a mast, an oar, a nine-inch cable, a telegraph wire, or a strand of cobweb, it is all the same. Likewise a fish is technically fast when it bears a waif, or any other recognized symbol of possession; so long as the party waifing it plainly evince their ability at any time to take it alongside, as well as their intention to do so.

Id. at 327–28.

\footnote{96} See Swift, 23 F. Cas. at 560; see also Ghen, 3 F. at 161 (providing a more detailed factual background of the Swift case than the opinion in Swift does).

\footnote{97} See Swift, 23 F. Cas. at 560. Again, Ghen also provided a clear picture of the factual events involved in Swift. See Ghen, 3 F. at 161. This fact pattern resembled that seen in Liesner v. Wanie, 145 N.W. 374, 374 (Wis. 1914).
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whaler laid claim to the animal and took it away.98 Citing custom that granted the whale to the finder, the second whaler brought suit to regain possession of the whale.99

The *Swift* court began by examining the two contemporary, yet conflicting, general customs that concerned whales struck with a harpoon but unattached to any boat.100 The first custom, followed by English and Scottish whalers, declared that whalers would classify a whale as a fast-fish only if “the line remains fast to the boat.”101 The other custom, as followed in the Americas, declared that the harpoon marked the whale and did not require attachment to a boat, meaning that the harpooned whale belonged to the boat that struck it.102 The court wanted to uphold the reasonable customs of the whalers and reduce the number of disputes that arose concerning whales struck by a harpoon.103 It did not want to arrive at a decision that would undermine society’s general understanding of the whalers’ customs by creating an arbitrary exception to the customs;104 its decision proved difficult when faced with the two conflicting customs.105 The court concluded that the crew that first struck the whale, so that its harpoon remained in the carcass, and continued its pursuit developed a property right in the whale.106

98. *See Swift*, 23 F. Cas. at 559. When the first whaler arrived, the second whaler gave him the killed whale. *Id.* According to the court, by doing so, the second group of whalers acknowledged that it had no right to possess the dead whale. *See id.* at 560.

99. *See id.* at 559. The custom that the second group of whalers cited granted the finder of a whale struck by a harpoon, yet unattached to a ship, a right to possess the whale. *See id.* Under that custom, the finder had a right to the whale if the finder could begin cutting the blubber and extracting the oil prior to a demand for the whale from the ship that caused the mortal wound. *See id.*

100. *See id.*

101. *Id.*

102. *See id.*

103. *Id.* at 560. The court in *Pierson* wanted to craft a decision that would have a similar result: to preserve peace and order in society. *See Pierson v. Post*, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805).

104. *Swift*, 23 F. Cas. at 559–60. Concerning this point, the court noted that Justice Story had declared: “It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law.” *Id.* at 559 (quoting *The Reeside*, 20 F. Cas. 458, 459 (C.C. Mass. 1837)). The court adopted a well-known use or custom so as to limit the number of disputes that would arise. *See id.*

105. *Id.* at 560. The court acknowledged this difficulty when it declared that it was unreasonable to allow a finder of a whale to acquire title when the crew that wounded the whale had a reasonable hope to capture it. *Id.* Because a harpoon remained in a whale, however, did not present conclusive evidence that another party had a right to the whale. *Id.*

106. *Id.* This decision fell in line with other cases concerning wild animals. *See Liesner v. Wanie*, 145 N.W. 374, 376 (Wis. 1914) (finding that, even though a wolf survived an initial wound, it would eventually die, and, because the pursuit continued, the individual who struck the
The holdings of Pierson, Ghin, Swift, and their progeny provide important insights and conclusions when looking at cases involving wild animals. First, a court's decision concerning who has created a property right in a wild animal can take into account custom as long as the majority of society knows of the custom. Second, when considering ownership rights regarding wild animals, courts have attempted to craft decisions that achieve certainty and maintain a peaceful society by preventing disputes. Because of its desire for certainty and the prevention of disputes, the court required that a party strike the mortal wound and, if the mortal wound did not kill the animal immediately, that the party pursue the animal until it was captured. Finally, the state has the power to regulate the capture of wild animals.

C. The Rule of Capture as Applied to Fugitive Resources in American Case Law

The rule of capture pertaining to fugitive resources, such as oil and natural gas, states that an individual who can extract oil or mineral deposits from the land prior to or at the same time as another individual has developed a property right in the deposits appropriated. This rule parallels the rule of capture for wild animals. Early court decisions...
found that oil and gas possess similar characteristics to wild animals because they could migrate from one area to another.\footnote{115} This Part will examine early case law pertaining to oil and natural gas,\footnote{116} how different jurisdictions handle property rights in resources prior to extraction,\footnote{117} and how courts handle reinjected resources.\footnote{118}

In Ohio Oil Co. v. Indiana,\footnote{119} the United States Supreme Court described the similarities and differences between wild animals and fugitive resources, holding that a property right arises in fugitive resources only after someone can reduce those resources to possession.\footnote{120} The Court found three similarities between wild animals and fugitive resources: (1) owners of the land have the exclusive right to reduce wild animals and fugitive resources to possession when those

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\footnote{115} See Dukeminier & Krier, supra note 43, at 37 (stating that oil and gas may migrate from A’s land to B’s land because of natural conditions or because B placed an oil well on the land); Rance L. Craft, Of Reservoir Hogs and Pelt Fiction: Defending the Ferae Naturae Analogy Between Petroleum and Wildlife, 44 EMORY L.J. 697, 703 (1995) (describing how oil will travel through the earth’s crust based on “the viscosity of the petroleum, the porosity of the rock, and the pressures exerted by gas and water”). Scientific research has shown that oil and gas do not have the same ability to escape by their own power as do wild animals. See A.W. Walker, Jr., Property Rights in Oil and Gas and Their Effect upon Police Regulation of Production, 16 TEX. L. REV. 370, 370-71 (1937-1938) (discussing how scientific research has eliminated the analogy of wild animals to fugitive resources). But see Craft, supra, at 732-33 (concluding that the analogy was appropriate). This early case law, however, still proves helpful because of the court’s belief that oil and gas could escape on their own and how the court applied this belief. See Finkelman, supra note 82, at 1629-32 (discussing why the analogy of wild animals applies to the baseball). This early handling of fugitive resources is helpful in examining the Popov because a baseball has the power to escape from an individual’s grasp, just like a wild animal can escape from a hunter or, as the court believed, like oil seeping through the pores of the earth, escaping from a landowner. See id.

\footnote{116} See infra notes 120-42 and accompanying text (discussing the early case law by examining Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900), Kelley v. Ohio Oil Co., 49 N.E. 399 (Ohio 1897), Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1909), and DeWitt, 18 A. at 724).

\footnote{117} See infra notes 143-47 and accompanying text (discussing property rights in resources prior to extraction under the theories of qualified ownership and non-ownership).

\footnote{118} See infra notes 148-58 and accompanying text (discussing the early law regarding reinjected resources and how that law has changed).

\footnote{119} Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

\footnote{120} Id. at 208-11. The State of Indiana enacted a law that protected private property owners from wasteful practices of common property, such as gas and oil beneath the surface. Id. at 190-91. The State sought an injunction against an oil company that allowed gas drawn from a well to escape. Id. at 192-93. The Supreme Court stated that landowners who held property with oil and gas deposits beneath it had a right to appropriate the oil and gas but did not gain a property right in it until they actually could reduce it to possession. See id. at 203.
animals and resources are on their land;\footnote{121} (2) once the animals or resources have left their land, landowners have no ability to follow;\footnote{122} and (3) both require actual possession before a property right develops.\footnote{123} The Court noted only one distinction between wild animals and fugitive resources: wild animals belong to the public in general, whereas fugitive resources belong only to those individuals who possess the land above those resources.\footnote{124}

The Pennsylvania Supreme Court in Westmoreland & Cambria Natural Gas Co. v. DeWitt\footnote{125} made the first analogy between wild animals and oil and gas, creating a rule of capture for these resources.\footnote{126} The court concluded that an individual’s possession of the land did not immediately vest the owner of the land with a possessory right to the oil and natural gas below the ground.\footnote{127} In concluding that oil and natural gas had similar characteristics to wild animals, the court applied the
analogy of the rule of capture to oil and natural gas and required that the resources come under the control of a party for that party to gain possession of the oil or natural gas. This meant that if another party, whether an adjoining or distant party, could tap into an existing pool of oil or gas and gain control of it, the landowner lost title to the resource. Although the DeWitt decision faced criticism, other courts applied its finding in similar cases involving oil and natural gas.

The Supreme Court of Ohio applied this analogy in Kelley v. Ohio Oil Co., where the plaintiff sought to enjoin the defendant from drilling a well that would draw from the same pool of resources. The court would not grant the injunction, stating that it had no control over the legal actions of property owners. The court determined that an individual landowner had no property right in oil beneath the surface of the property that he owned; it required that the landowner actually gain control of the oil to develop his property right. In refusing to grant

128. Id. The court noted that oil and gas possess “the power and the tendency to escape without the volition of the owner.” Id. Because of this power, an uncertainty existed as to whether the oil or gas would remain within a tract. Id.

129. Id. Locke arrived at a similar conclusion. See Locke, supra note 37, at 18 (concluding that an individual gains possession of a mineral only after that individual has exerted his or her labor and gained full control over the mineral).

130. DeWitt, 18 A. at 725. The court stated that “the one who controls th[e] gas, has it in his grasp, so to speak, is the one who has possession in the legal as well as in the ordinary sense of the word.” Id. The Supreme Court of Pennsylvania applied this principle four years later in Hague v. Wheeler, 27 A. 714 (Pa. 1893). The plaintiffs and defendants all drew gas from the same existing pool, and the plaintiffs wanted an injunction to close the defendants’ well because the defendants could not sell the gas. Hague, 27 A. at 718–19. The court denied the injunction, allowing the defendants to drill for and possess as much of the gas as they could. See id. at 720.

131. See Hardwicke, supra note 126, at 391 (noting that critics blame the rule of capture for waste in the oil industry); see also Craft, supra note 115, at 713–15 (noting that critics found the analogy erroneous and that it led to overproduction, but concluding that the analogy generally works).


133. Id. at 399–400. The plaintiff contended that he had a property right in the uncaptured underground oil because of his property right to the land above the oil. Id. The oil company wanted to build a derrick on its property that would likely drain resources from the pool, which was located partially beneath the plaintiff’s adjacent property. Id.

134. Id. at 401. Landowners have the right to use property in whatever manner they desire, as long as they do not interfere with the legal rights of others. Id. For example, one generally cannot angle a well beyond the boundaries of one’s land “so as to trespass on the premises of adjoining owners.” Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 603 (Dist. Ct. App. 1938). The court in Kelly saw the building of the well on the oil company’s land as similar to an improvement, and noted that owners of property do not have to submit to what their neighbors view as a proper use of property. See Kelley, 49 N.E. at 401.

135. See id. The court said that because of the fugitive nature of the underground oil, “it is property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty.” Id. Oil residing under land forms part of that land tract;
the injunction, the court allowed both parties to build as many wells as they saw fit, allowing them to collect as much from the pool as they desired.\footnote{See id. The court found that this amounted to a proper amount of protection for both parties. See id. "Protection of lines of adjoining lands by the drilling of wells on both sides of such lines, affords an ample and sufficient remedy for the supposed grievances complained of in the petition and supplemental petition, without resort to either an injunction or an accounting." Id. This allowance for wells to draw more from the resource pools than one’s competition led to criticism of the rule of capture. See Craft, supra note 115, at 713–15 (noting that critics found the analogy erroneous and that it led to overproduction); Hardwicke, supra note 126, at 391 (noting that critics blame the rule of capture for waste in the oil industry).} The well owners gained a property right in whatever they could draw from below the surface, regardless of whether the oil came from below their land or the land of another.\footnote{Kelley, 49 N.E. at 401. The court, echoing the finding of DeWitt, declared: Whatever gets into the well belongs to the owner of the well, no matter where it came from. In such cases the well and its contents belong to the owner or lessee of the land, and no one can tell to a certainty from whence the oil, gas or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner. Id.} In \textit{Barnard v. Monongahela Natural Gas Co.},\footnote{See id. at 802. The decision stated that every landowner possessed a right to drill on his own land and erect as many wells as he saw fit. Id. It declared that the neighboring landowner could protect his rights to the oil only by building his or her own wells. Id. Legislation has altered this result, attempting to control the unnecessary production of wells. See Hardwicke, supra note 126, at 398 n.9 (attempting to reduce the costs to oil producers, and therefore consumers, by restricting the number of wells one can build). Although legislation has altered this decision, the important part of the decision remains: The ownership of the oil belongs to the individual who can capture the oil. See Colby, supra note 121, at 403 (presenting a detailed history of case law regarding oil and gas in the United States, concluding that “oil and gas lawfully belongs [sic] to those who have the ability and first capture them").} the Supreme Court of Pennsylvania reached a similar conclusion, finding that an individual could obtain relief by building another well to offset the production of his competition.\footnote{See Barnard, 65 A. 801 (Pa. 1907).} Oil and gas that exist underneath the surface of an individual’s property “belong” to the individual who holds title to that property.\footnote{See Barnard, 65 A. 801 (Pa. 1907).} Yet, this “ownership” lasts only as long as the oil remains beneath the land or until another party can tap into the pool and draw when it moves to an adjoining tract, it forms part of that land tract. \textit{Id.} It, however, never becomes the property of an individual until captured. \textit{Id.}
The idea that individual landowners hold no property right in fugitive resources prior to capture has changed over time. Now, jurisdictions arrive at different conclusions as to a landowner's property rights in fugitive resources prior to drilling. Landowners may hold either a qualified right to the fugitive resource beneath the soil or have no property right to it prior to capturing the resource. Although both doctrines grant an absolute property right in the fugitive resource only after one has reduced it to possession, only the states that subscribe to the qualified property right theory concede that a landowner has a property right in the fugitive resources prior to drilling.

141. See Barnard, 65 A. at 802.
142. See Colby, supra note 121, at 403.
143. See id. at 374–402 (discussing absolute ownership, or the theory of qualified ownership in Pennsylvania, the non-ownership rule in Indiana, and the development of the non-ownership rule in California case law); Hardwicke, supra note 126, at 400–04 (discussing the differing views of qualified ownership and non-ownership).
144. See Colby, supra note 121, at 374–402; Hardwicke, supra note 126, at 400–04.
145. See Colby, supra note 121, at 373–79. This qualified right to ownership allows owners of land with fugitive resource deposits an exclusive right to drill from the surface. Id. at 374. In Hague v. Wheeler, the court declared that "the owner of the surface is an owner downward to the centre, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature." Hague v. Wheeler, 27 A. 714, 719 (Pa. 1893). Later, the Pennsylvania Supreme Court modified this decision, stating that these resources "belong" to the landowner "while they are part of his land, but when they migrate to the lands of his neighbor or become under his control, they belong to the neighbor." Jones v. Forest Oil Co., 44 A. 1074, 1075 (Pa. 1900) (adopting the decision and opinion of the lower court). Therefore, a qualified right to possess the fugitive resource existed, but it would not become absolute until an individual could collect it. Among the jurisdictions to accept this doctrine are Arkansas, Kansas, Michigan, Mississippi, Montana, New Mexico, Ohio, Pennsylvania, Tennessee, Texas, and West Virginia. See Hardwicke, supra note 126, at 401–02 n.14 (discussing the ownership rights of landowners).
146. See Colby, supra note 121, at 380–84. This doctrine resembles the qualified ownership doctrine, in that individuals gain an absolute property right in the fugitive resource only after they capture it. See id. at 380. Because of the nature of the resource, however, no property right existed until an individual could capture the resource. See id. at 383–84. The owners of land above fugitive resource deposits have an exclusive right on their own land to try to appropriate these resources, but they have no property right in it until it actually is captured and controlled. See Ohio Oil Co. v. Indiana, 177 U.S. 190, 208 (1900). States that have adopted this doctrine include California, Illinois, Indiana, Kentucky, Louisiana, New York, and Oklahoma. See Colby, supra note 121, at 384 n.97.
147. See Colby, supra note 121, at 380–84. This right depends on the migratory nature of the resource and whether another individual landowner has the ability to tap into the resource. See Jones, 44 A. at 1075. As long as the resource remains on an individual's property, he has an "ownership" right to the resource. See id. This resembles the idea of ratione soli in cases of wild animals, which "refers to the conventional view that an owner of land has . . . constructive possession . . . of wild animals on the owner's land; in other words, landowners are regarded as
Courts have also developed an interesting way of handling fugitive resources reinjected into the earth as a means of storage.\textsuperscript{148} This fugitive resource case law, however, still rests on the basic tenet that an individual gains an absolute property right only after reducing that resource to possession.\textsuperscript{149} Early courts held that oil reinjected into the ground extinguishes an individual’s right to the oil, much like the release of a captured wild animal extinguishes an individual’s right to the wild animal.\textsuperscript{150} This concept acknowledged that fugitive resources have the power to migrate to neighboring land and that individuals must actually capture a resource to gain absolute possession.\textsuperscript{151} Therefore, when an individual reinjected oil into the ground, the individual had a property right in the oil only while the oil remained on his or her property and no one else extracted it.\textsuperscript{152}

The analogy between reinjected fugitive resources and wild animals, however, received significant criticism.\textsuperscript{153} Based on this criticism, courts eventually overruled the earlier line of cases and held that reinjected gas belongs to the individual or company that placed the gas back underground.\textsuperscript{154} Courts, however, now require that an individual

\textsuperscript{148} See, e.g., Texas Am. Energy Corp. v. Citizens Fid. Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987) (finding that the original owner of a reinjected resource does not lose title to the resource when it is reinjected into the ground); Hammonds v. Cent. Ky. Natural Gas Co., 75 S.W.2d 204 (Ky. 1934) (finding that a reinjected resource belonged to the first individual to recapture the resource), overruled by Texas Am. Energy Corp., 736 S.W.2d at 25. Companies would reinject these captured resources back into the ground for storage purposes. David C. Green, Note, The Ownership of Natural Gas and Some Real Property Concepts, 36 VA. L. REV. 947, 947-48 (1950).

\textsuperscript{149} See Texas Am. Energy Corp., 736 S.W.2d at 28 (holding that an individual gains title to oil or gas by capturing it); Hammonds, 75 S.W.2d at 205 (holding that oil and gas do not become an individual’s property until extracted).

\textsuperscript{150} See Hammonds, 75 S.W.2d at 206. The court in Hammonds employed the example of a fish being placed in a private pond. Id. If the fish remains in the pond, then it belongs to the owner of the pond. Id. If it escaped the pond, however, it would belong to the general public. Id.

\textsuperscript{151} See id. The court in Hammonds applied the analogy of the wild animal to fugitive resources because fugitive resources could escape like a wild animal. See id.

\textsuperscript{152} Id. Once the Central Kentucky Natural Gas Co. reinjected gas into the land, “the company ceased to be the exclusive owner of the whole of the gas,” meaning that any neighbor that could tap into the reservoir could capture the gas for his or her own purposes. Id.

\textsuperscript{153} See Green, supra note 148, at 947 (discussing the problems with the analogy to wild animals); John Parmerlee, Mines and Minerals—Leases—Rentals Accruing Under a Subterranean Gas Storage Lease, 21 U. KAN. CITY L. REV. 217, 222 (1952–1953) (concluding that the analogy comparing reinjected fugitive resources to wild animals would produce illogical results).

\textsuperscript{154} See Texas Am. Energy Corp., 736 S.W.2d at 28 (holding that an individual who draws oil or gas from beneath the surface and then reinjects it into the earth retains possession of that oil or
or a company place the reinjected gas into a well-defined and inescapable underground storage reservoir. This law also requires an individual to reduce the oil or natural gas to his or her possession prior to reinjecting it into these underground storage reservoirs. Thus, title to oil or natural gas reinjected into underground storage reservoirs remains in the person who first extracted it. Based on this theory, landowners above an underground storage reservoir cannot extract and gain title to the oil—title remains with the original possessor.

Besides the use of the analogy of wild animals to fugitive resource law, the courts also used the theories of Locke and Blackstone to reach their decisions. Basing its reasoning on such concepts, the court concluded that a landowner only gains an absolute property right to oil or gas by extracting those resources from an underground reservoir before any other individual. A landowner does not gain an absolute property right to gas or oil because he or she owns the land above the reservoir. Depending upon where the landowner resides, however, he or she may have a qualified ownership in that resource. Early case law that applied the analogy of wild animals to oil and gas received criticism because of the scientific research done in this area; when considering a fugitive object that has the power to escape on its own volition, however, the case law provides helpful insights.

III. DISCUSSION

Popov brought claims of conversion and trespass to chattel against Hayashi, which forced the court to focus on who had gained possession

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gas); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870, 881 (Tex. 1962) (holding that the owner of gas who reinjected it into a well-defined underground reservoir retained title to that gas).
155. See Texas Am. Energy Corp., 736 S.W.2d at 26. Such reservoirs must hold the gas so that it cannot escape, thereby remaining in the individual's control. See id.
156. See id. at 27-28 (requiring that an individual first convert the gas to property by extracting it from another source).
157. Id. at 28.
158. See id.
159. See supra notes 47-62 and accompanying text (discussing the theories of Locke and Blackstone).
160. See Ohio Oil v. Indiana, 177 U.S. 190, 209 (1900) (concluding that objects become property after one reduces them to possession); Colby, supra note 121, at 403 (concluding that fugitive resources become property only after capture).
162. See supra notes 143-47 and accompanying text (discussing the theory of qualified ownership and the no-ownership rule).
163. See Craft, supra note 115, at 718-20 (presenting a discussion on why the courts employed the analogy of wild animals to fugitive resources like oil and gas).
In determining who had a right to possess the ball, the court had to make a difficult decision in *Popov v. Hayashi*, but its decision likely will have little effect on fan behavior at ballparks. Only one individual, Hayashi, clearly had possession of the baseball. Popov, however, could also claim to have a right to possess the ball. This Part will discuss the factual findings of the court in *Popov v. Hayashi*. It will then examine the reasoning and holding of Judge McCarthy.

### A. The Facts

The court’s examination of the video evidence of the “catch” and the melee in right field, the testimony of more than a dozen eyewitnesses, and the reports from various news agencies have produced a basic factual history of the case, which is summarized below.

In the first inning, Bonds, facing a full count, launched Dennis Springer’s pitch into right field. Popov heard the cheers and watched as the ball fell back to earth directly towards him. His elation, however, turned into terror as the out-of-control mob closed in.

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165. See Finkelman, *supra* note 82, at 1632 (discussing how a decision awarding the ball to Popov could result in fans allowing another fan to catch the ball, “hoping that the person who catches it is unable to hold it”).

166. See Smith, *supra* note 2, at 67–68. Security guards, meant to prevent the chaos that occurred, verified that Hayashi held the Bonds home run baseball. *Id.* at 68. Giants officials did the same. *Id.* Major League Baseball representatives, while taking no stand as to whom has a right to possess the ball, stated that Hayashi had the ball when they arrived to verify it. Dolan, *supra* note 22.

167. See Finkelman, *supra* note 82, at 1628. Simply stated, but for the actions of the out-of-control mob, Popov would have maintained control and possession of the ball. *See id.* This argument has some merit. See Garofoli, *supra* note 15. The Keppel film shows the ball entering Popov’s glove and remaining there for six-tenths of a second. *See id.*

168. See *infra* Part III.A (detailing the facts of *Popov v. Hayashi*).

169. See *infra* Part III.B (discussing the findings and holding of the court in *Popov v. Hayashi*).


171. *Id.* Popov believed that the ball was meant for him and no one else. *Id.* Regardless, because Bonds did not declare before his swing for whom the ball was meant, every fan in the general vicinity of the ball’s landing believed that the ball was “meant” for him or her. *Id.*

172. Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *1 (Cal. Super. Ct. Dec. 18, 2002). The word “caught” appears in quotes because Popov arguably did not catch the ball. *See infra* Part IV.A (discussing Popov’s arguments for having the court award the ball to him). Keppel’s video footage shows the ball in Popov’s glove for six-tenths of a second. Garofoli, *supra* note 15. Popov’s “catch” may not be adequate to secure possession, however, because former Major League umpire Rich Garcia defines a catch as requiring “that a player must secure possession of the ball and firmly hold it long enough to prove that he has complete control of the ball and that his release is voluntary and intentional.” Dolan, *supra* note 22.
crowd around him surged together and trampled him. During the melee, Popov lost the ball, and when he emerged from the crowd, he held a fake ball. He claimed that he had the ball and would have held onto the ball but for the actions of the crowd and Hayashi.

Hayashi watched the ball travel back toward the earth and entered the melee to try to get it. According to Popov, the film shows Hayashi biting the leg of a teenage boy in an effort to get closer to the middle of the scrum. As members of the crowd intentionally clawed for the ball or unintentionally fell into the pile, the ball rolled to Hayashi's feet; he picked it up and placed it in his pocket for safekeeping. After realizing that he held the record ball, Hayashi attracted the attention of a cameraman, raised the ball in the air, as is the custom in ballparks, and showed he had possession of the ball. Hayashi alleged that he held the ball at the end of melee and, for this reason, has the strongest right to possess the ball.

B. Judge McCarthy's Decision

In Popov v. Hayashi, the California Superior Court focused on Popov's claim of conversion, a claim that requires that the plaintiff have
actual possession of the property converted.\textsuperscript{182} Therefore, the court had to determine whether Popov attained possession of the Bonds baseball before the alleged conversion occurred.\textsuperscript{183} In determining whether Popov gained possession of the ball, the court first looked to general principles of possession.\textsuperscript{184} The court also examined the definitions of possession provided by Hayashi and Popov.\textsuperscript{185} Hayashi wanted the court to require that one had to completely control a ball to gain possession of it.\textsuperscript{186} Conversely, Popov argued for a definition that only requires one to intend to possess a ball and to manifest "that intent by stopping the forward momentum of the ball whether or not complete control is achieved."\textsuperscript{187}

The court determined that a fan should gain absolute control over a baseball before gaining possession of that ball.\textsuperscript{188} The court, however, did not award the ball to Hayashi.\textsuperscript{189} Instead, the court stated that the facts could not establish that Popov would not have retained control of the ball but for the actions of the others in the right field stands.\textsuperscript{190} The court declared that overlooking the fact that others intentionally attempted to strip Popov of the ball would condone the use of brute force.\textsuperscript{191} Therefore, in order to find that Popov had developed a property right in the ball, the court relied on the theory of a pre-possessory right.\textsuperscript{192} The court found that Hayashi had done everything necessary to create a property right in the ball but could not gain an

\begin{itemize}
\item \textsuperscript{182} Popov, 2002 WL 31833731, at *3. "The act constituting conversion must be intentionally done." Id. The defendant, however, does not have to know the property belongs to another for the conversion to occur. Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id. at *4. Professor Roger Bernhardt from the Golden Gate University School of Law stated that "'[p]ossession requires both physical control over the item and an intent to control it or exclude others from it. . . . Possession is a blurred question of law and fact.'" Id. (quoting Roger Bernhardt). The court therefore had to "use these principles . . . to craft a definition of possession that applie[d] to the unique circumstances of this case." Id.
\item \textsuperscript{185} Id. at *4–5.
\item \textsuperscript{186} Id. at *4.
\item \textsuperscript{187} Id. at *5.
\item \textsuperscript{188} See id. The court stated that "'[t]he custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with this expectation.'" Id.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} Id. at *5–6.
\item \textsuperscript{191} Id. at *6.
\item \textsuperscript{192} Id. A pre-possessory interest arises when "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." Id. Judge McCarthy, however, cited no precedent for the rule, stating instead that "[a] court sitting in equity has the authority to fashion rules and remedies designed to achieve fundamental fairness." Id.
\end{itemize}
absolute right in the ball because of Popov’s pre-possessory right. 193 Because both men had a right to the ball, but neither had a superior right to possess it, the court found that each man had a right to an equal and undivided share of the ball and ordered them to sell it and split the proceeds. 194

IV. ANALYSIS

Through the writings of philosophers, 195 case law concerning wild animals, 196 and early case law regarding fugitive resources, 197 the court should have drawn the following conclusions: first, an individual must take some action, comparable to striking a mortal wound 198 or extracting oil from the ground, 199 to reduce an object to his or her

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193. Id. at *7. Hayashi argued that baseball fans understand that “when someone drops the ball, whoever winds up with it owns it.” Paul Sullivan, Bonds’ Record Ball Courts Legal Wrangling, CHI. TRIB., Oct. 24, 2002, at N3, available at 2002 WL 101654713. Professor Brian Gray of the Hastings College of Law developed the following definition for the court:

A person who catches a baseball that enters the stand 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.

194. Popov, 2002 WL 31833731, at *4. Hayashi satisfied the requirements of this definition. See id at *7.

195. Popov, 2002 WL 31833731, at *8. In a 1983 article, Professor R.H. Helmholz advances this idea of equitable division. R.H. Helmholz, Equitable Division and the Law of Finders, 52 FORDHAM L. REV. 313 (1983). Helmholz examines the particular difficulties that occur when deciding who has gained possession of an object between the finder and the owner of the property on which the object was found. Id. at 313. He proposes that the finder and the owner of property each gain an equal share in the object. Id. at 314. This theory of equitable division would protect the interests of the true owner, promote honesty among the parties, and would resolve the claims between the finder and the property owner. Id. at 315. Helmholz, however, notes that “realities of litigation... discourage either party from making an argument for equitable division.” Id. Equitable division attempts to divide the object between the two opposing parties in a fair manner, giving each an equal share because both have a right to the property. Id. at 326. In Popov, the court applied the theory of equitable division as advanced in Keron v. Cashman, 33 A. 1055 (N.J. 1896). Popov, 2002 WL 31833731, at *8. In Keron, five boys came across a sock with unknown contents and each held the sock. Keron, 33 A. at 1056. The sock broke open, revealing $775, and the court granted each boy an equal share of the money because none of the boys could show a superior interest in the sock based on his intent and control. Id.

196. See supra Part II.A (discussing the theories of Locke and Blackstone concerning property rights).

197. See supra Part II.B (discussing classic cases concerning wild animals and who has the right to possess them).

198. See supra Part II.C (discussing the similarities between wild animals and fugitive resources and applying the rule of capture to those resources).

This action must occur before any other person can perform a similar action in an effort to obtain the same object or property. By requiring an action of this nature, the court would leave no question as to the ownership of a baseball hit into the stands. Second, the court could have considered well-known customs in reaching its decision about who has possession of a fugitive object. The court, however, should employ these customs in its decision only if most of society knows of the custom, so as to limit or eliminate disputes regarding possession of an object. Finally, people have entered into civilized society to protect themselves and their property, relying on an arbitrator or judge to resolve disputes and offer protection. Based on these principles, the court in Popov v. Hayashi should have crafted a decision requiring a specific act to obtain a property right in a fugitive baseball in order to create certainty and security at ballparks.

Judge McCarthy's decision, while equitable in nature, does not identify the actual possessor of a fugitive baseball, which satisfies neither the goal of certainty nor the goal of safety. This Part will examine the probable results of awarding the ball to one of the parties by discussing the arguments available to each side as to why each has a greater property right in the ball and why these arguments fail. Also, it will discuss why Judge McCarthy's decision does not define who has a right to possess a ball hit out of play and does not accomplish either of the goals of Pierson. Upon reviewing these arguments, the court should have awarded the ball to Hayashi.

200. LOCKE, supra note 37, at 17. Locke required that an individual labor in some way to gain a property right in a particular object. Id.
201. BLACKSTONE, supra note 1, at 119–20 (stating that the individual who first uses a land or an object gains a right to it); see also BLACK'S LAW DICTIONARY, supra note 64, at 1232 (defining the rule of capture for wild animals and fugitive resources and what each requires).
202. See Pierson, 3 Cai. R. at 179.
204. See Swift, 23 F. Cas. at 559–60.
205. BLACKSTONE, supra note 1, at 120; LOCKE, supra note 37, at 14.
206. See Pierson, 3 Cai. R. at 179.
207. See infra Part IV.C (discussing the holding of Popov v. Hayashi and the problems with the equitable solution).
208. See infra Part IV.A (discussing Popov's arguments for having the court award the ball to him); infra Part IV.B (discussing Hayashi's arguments for having the court award the ball to him).
209. See infra Part IV.C (discussing the holding of Popov v. Hayashi and the problems with the equitable solution).
210. See infra Part V.A (discussing why the court should have awarded the ball to Hayashi).
A. Popov’s Argument for Safety

Popov claimed that, but for the violent collisions and the malicious intent of the fans around him, he would have held onto the ball and established absolute possession of it.\(^{211}\) Countering the expert testimony of former Major League umpire Rich Garcia,\(^{212}\) Popov alleged that no one interferes with a player attempting to catch a fly ball.\(^{213}\) Applying the rules of baseball,\(^{214}\) the umpires would have awarded an out if an opposing player interfered with a player trying to catch the ball; it would be as if he caught and possessed the ball.\(^{215}\) In a similar fashion, Popov could have alleged that the court should have awarded him the Bonds ball because he would have caught it and maintained control over it.\(^{216}\)

This reasoning contains several flaws, however, beginning with the fact that several eyewitnesses questioned whether Popov “caught” the Bonds ball.\(^{217}\) Even if Popov held the actual Bonds ball, evidence only established that he held it for six-tenths of a second,\(^{218}\) and a dispute exists as to what actually happened in the ensuing pileup.\(^{219}\) Popov’s

\(^{211}\) See Finkelman, supra note 82, at 1628. The evidence showed the violent actions of the crowd. See Smith, supra note 2, at 67. For example, eyewitness Doug Yarris stated that he looked into Popov’s glove during the pileup and saw the Bonds ball in the glove. Id. Video evidence shows the ball entering Popov’s glove and remaining there for six-tenths of a second. Garofoli, supra note 15.

\(^{212}\) See Evelyn Nieves, A Custody Battle for a Baseball’s True Owner, N.Y. TIMES, Nov. 28, 2001, at A16, available at 2001 WL 30651380. Garcia stated that “if the rules of baseball applied, as they should, then Mr. Popov never actually caught the ball.” Id. Based on this argument, Garcia contends that the ball belongs to the first person who can control it. See Dolan, supra note 22.

\(^{213}\) See Finkelman, supra note 82, at 1628–29 (arguing that, in actuality, fielders receive an unimpeded chance to catch the ball).

\(^{214}\) See Editorial, supra note 20, at 1022. Some commentators have indicated that following the rules of the National Football League would have meant that Popov lost possession of the ball. See id. “If he never had control of the ball in the first place, there was no reception. And if he did have control of the ball, albeit momentarily, and then lost it, a fumbled ball belongs to the one who recovers it.” Id.

\(^{215}\) See Finkelman, supra note 82, at 1629.

\(^{216}\) See id.

\(^{217}\) See Smith, supra note 2, at 67. Jim Callahan, an individual who intentionally attempted to take the ball from Popov, stated that he looked into Popov’s glove and saw that he held a ball with black felt-tip lettering, a “sucker” ball. Id. Fans at Pac Bell would throw ten to fifteen of these “sucker” balls every time Bonds hit a home run in an effort to add to the confusion. See Garofoli, supra note 7.

\(^{218}\) Garofoli, supra note 15.

\(^{219}\) See Finkelman, supra note 82, at 1628 (alleging that the crowd forced the ball from Popov’s glove). People, however, can question whether he lost control and dropped the ball before anyone forced it from his glove. Id. Garcia, noting the tenuous hold Popov had on the ball, believes that the crowd jarred the ball loose before a malicious action occurred. Id.
claim that no one interferes with a player attempting to catch a fly ball also fails because players from the same team will occasionally collide with each other in an attempt to catch a fly ball. Finally, and most importantly, based on the rule of capture, Popov's dropping of the ball does not meet the requirements for the capture of wild animals or fugitive resources. In Popov, only catching or recovering a baseball should have amounted to an act, like tapping into and drawing oil from a well or striking the mortal wound, that would reduce the baseball to possession.

Popov also could have argued that awarding him the ball would support public policy, encouraging a safer venue. As Paul Finkelman, one of Popov's expert witnesses, stated, fans purchase tickets to enjoy games, not to allow other fans to attack or jump on them. Awarding the ball to Popov would establish that a fan should have an opportunity to enjoy the game and have an unimpeded chance to catch a ball hit into the stands. Popov, in an out-of-court statement, claimed that awarding the ball to Hayashi would encourage

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220. When this occurs and the player drops the ball, the umpire does not say that, but for the collision, the player would have made the catch and then award an out. OFFICIAL BASEBALL REGULATIONS R. 6.05. All runners are safe when this occurs and continue at their own risk around the base paths until someone can get the ball into the infield and stop play. OFFICIAL BASEBALL REGULATIONS R. 5.10.

221. See supra Part II.B (requiring the act of the mortal wound to reduce an animal to possession).

222. See supra Part II.C (requiring the act of tapping into and drawing oil from a well to reduce the oil to possession).

223. In arriving at a decision concerning the "mortal wounding" of a baseball, a court has to determine whether stopping the momentum of a ball, that is, making a "snow cone" catch and then losing that ball, constitutes possession. See Finkelman, supra note 82, at 1628-29 (supporting a view that Popov should possess the ball although he could not maintain control of it). Alternatively, a court has to determine whether possession belongs to the person holding the ball at the end of the melee. See Dolan, supra note 22. According to former Major League umpire Rich Garcia, "if a home run ball is hit in a crowded stadium... unless the ball is cleanly caught, there is usually a scramble for the ball and collisions or other contact between spectators rushing to get the ball." Id. According to Garcia, until someone has complete control of the ball, it remains "fair game." Id.

224. See Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805). As Popov's attorney questioned, "What's it going to take: an eight-year-old child getting trampled to death?" Tempest, supra note 8. Similarly, as Todd McFarlane, owner of the Mark McGwire record home run ball, questioned, "How do you know some 250-pound guy won't do a belly flop for the ball and permanently compress your child into the bleachers? Whoever catches it first should be the guy who gets it. But we'll probably wait till an eight-year-old gets his ribcage crushed." Smith, supra note 2, at 77.

225. See Finkelman, supra note 82, at 1628-29 (discussing why the court should award the ball to Popov).

226. See id. at 1632 (proposing that awarding the ball to Popov would create an incentive for other fans "to sit back and wait, hoping that the person who catches it is unable to hold it").
the “law of the jungle,” allowing larger and stronger fans to jar a ball loose.\textsuperscript{227} Because Locke and Blackstone believed people entered into civilized society to protect themselves and their property rights,\textsuperscript{228} Popov could have argued that civilized society would not allow a group of people to force the ball from his hands.\textsuperscript{229} Therefore, to minimize the number of disputes between fans over baseballs hit into the stands and to create safer environments at the ballparks, the court should have awarded the ball to Popov.\textsuperscript{230}

Although this argument pertaining to the creation of a safer ballpark satisfies the second goal of \textit{Pierson},\textsuperscript{231} it also presents problems that may not create a safer ballpark in practice. Fans who assault an individual, forcing that individual to give up a ball, should never gain possession of a ball appropriated in this manner.\textsuperscript{232} The court’s decision to award the ball to Popov, however, likely will have little impact on “normal” fan behavior at ballparks.\textsuperscript{233} Although fans do not purchase tickets to allow people to assault them, fans do expect that potentially violent jostling will occur while in pursuit of a ball.\textsuperscript{234} This jostling could result in a dropped ball, at which point the person who picks up the ball gains the property right.\textsuperscript{235} The claim that awarding the ball to Popov would cause fans to allow one individual to catch a

\textsuperscript{227} See \textit{id}. A fan who violently takes the ball away from the original catcher has acted illegally. See Budish, \textit{supra} note 180. “Anyone can go after the ball and ‘secondhand’ ownership is allowed. Of course, you can’t beat, bite or assault others to get the ball.” \textit{Id}.

\textsuperscript{228} See \textit{supra} Part II.A (discussing the theories of Locke and Blackstone concerning property rights).

\textsuperscript{229} See All Things Considered (Nat’l Pub. Radio broadcast, Nov. 27, 2001), at 2001 WL 9437414 [hereinafter All Things Considered]. Finkelman states that the rules of civilized society apply to the Popov case. \textit{Id}. He argues:

[I]f someone puts his hand up and the ball is in that person’s glove, we can’t have a society where it is OK for a mob of people to then jump on the person and force him to give up the ball. If we do, then we have the rule of the mob rather than the rule of law. \textit{Id}.

\textsuperscript{230} See Finkelman, \textit{supra} note 82, at 1632.

\textsuperscript{231} See \textit{Pierson} v. \textit{Post}, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (discussing the desire to create a peaceful and safe environment).

\textsuperscript{232} See Budish, \textit{supra} note 180. A fan who violently takes the ball away from the original catcher has acted illegally. See \textit{id}. Fans can acquire a baseball after another fan has dropped or lost control of the ball, but they cannot violently take the ball from another fan \textit{Id}.

\textsuperscript{233} See, \textit{e.g.}, Smith, \textit{supra} note 2, at 67. Fans at a stadium likely will attempt everything necessary to get a normal ball hit out of play, let alone a ball potentially worth one million dollars. \textit{Id}.

\textsuperscript{234} See Dolan, \textit{supra} note 22. “[T]here is usually a scramble for the ball and collisions or other contact between spectators rushing to get the ball.” \textit{Id}. Much like the court in \textit{Swift}, the court in Popov should have considered this custom in reaching its conclusion, as most fans realize and accept it. See \textit{Swift} v. \textit{Gifford}, 23 F. Cas. 558, 560 (Mass. Dist. Ct. 1872).

\textsuperscript{235} See Dolan, \textit{supra} note 22.
ball and wait for that individual to drop it is flawed. Fans arrive at the stadium, carrying their gloves, believing that they will catch any ball hit in their general vicinity. Every fan believes that a ball hit out of the park was meant for him or her, meaning no fan will sit back to see if another fan drops the ball. Collisions will still occur, some of them violent, which may result in dropped fly balls. Therefore, a decision in favor of Popov would not guarantee safer ballparks.

B. Hayashi’s Argument for Certainty

The best argument that Hayashi could have made was that he clearly possessed the ball at the end of the melee in right field, satisfying the first goal of Pierson. In the Popov case, Hayashi reduced the ball to his possession, which satisfies the requirements of taking an action to reduce the ball to his possession as in the wild animal and the early fugitive resource case law. Under fugitive resource case law, whether governed by the qualified ownership or the non-ownership

236. But see Finkelman, supra note 82, at 1632 (opining that fans would give an individual the opportunity to catch a ball hit out of play if the court awarded the ball to Popov).

237. See Smith, supra note 2, at 66. Just as Post brought his hounds to catch the fox, fans bring their gloves to the game to catch a ball. See Pierson v. Post, 3 Cai. R. 175, 175 (N.Y. Sup. Ct. 1805). Fans come to baseball games hoping to bring a souvenir foul ball or home run ball back home with them. See Finkelman, supra note 82, at 1628. A batter, however, does not indicate to whom he will hit the ball, so any number of fans may believe the ball belongs to them, resulting in significant jostling for position and occasional violent collisions. See Smith, supra note 2, at 66. Just as custom says fans can keep a ball hit out of play, it also dictates that people will collide to attain that ball. Garufi, supra note 15. Fans, however, do not purchase their tickets “to be tackled, jumped on, mauled, or in any other way assaulted by other fans” while in pursuit of a baseball. Finkelman, supra note 82, at 1628.

238. See Finkelman, supra note 82, at 1621-22.

239. See Budish, supra note 180 (stating that the law of the jungle applies at the ballparks); see also Dolan, supra note 22 (discussing how fans react at a game when a player hits the ball into the stands).

240. See Smith, supra note 2, at 67-68. Security guards, meant to prevent the chaos that occurred, verified that Hayashi held the Bonds ball. Id. at 68. Giants officials did the same. Id. Major League Baseball representatives, while taking no stand as to whom has a right to possess the ball, stated that Hayashi had the ball when they arrived to verify it. Dolan, supra note 22.

241. Pierson, 3 Cai. R. at 179. The court concluded that Pierson had a right to possess the fox “for the sake of certainty.” Id. Unlike the certainty of striking the mortal wound in an animal, problematic questions arise as to when an individual gains possession of a wild animal because of their pursuit; when they first see the animal or after a certain length or duration of the chase. See Paul, supra note 79, at 921-23 (discussing why the majority opinion in Pierson provides an easier decision to administer).

242. See supra Part II.B (discussing classic cases concerning wild animals and what is required to possess them).

243. See supra Part II.C (discussing the way that courts handle fugitive resources, concluding that an absolute property right exists in a resource only when someone has reduced that resource to possession).
doctrine, absolute ownership occurs only after an individual captures the resource. By considering the ball as a fugitive resource, every individual in the right field arcade had a “right” to possess the ball. Only that individual who stops the momentum of the ball and holds it, however, gains a property right in the ball. Knocking a ball down or bobbling a ball does not create certainty in ownership. By awarding the ball to Hayashi no question would exist as to what constitutes a prepossessory right or whether an individual who proceeds to drop the ball, after overzealous fans jostle him or her, has any property right to the ball. The fan who catches, controls, and holds on to the ball has a property right therein.

244. See supra notes 143–47 and accompanying text (discussing how qualified ownership states find that fugitive resources “belong” to the individual who holds title to the tract of land under which the resources rest, whereas non-ownership states find that the resources belong to the people in common and grant no property rights in the property until the resource is reduced to possession).

245. See Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *4 (Cal. Super. Ct. Dec. 18, 2002) (providing a definition of a catch leading to possession). Only Major League Baseball and the National Hockey League allow their fans to keep balls or pucks that land in the stands. See Finkelman, supra note 82, at 1621–24 (discussing the common law of baseball, specifically who has an ownership right in balls that land out of play). The National Football League and the National Basketball Association require that fans catching their balls out of play must return them. Id. Accordingly, all fans who attend a baseball game have a right to retain possession of a ball hit out of play; Major League Baseball does not reserve this right to a select few. As a side note, the National Hockey League has reduced the number of pucks that reach the stands by requiring all arenas to install protective netting behind the goals, after a fan in Columbus, Ohio, died because a puck hit her. See Steve Rushin et al., Stories of the Year, SPORTS ILLUSTRATED, Dec. 30, 2002, at 15 (explaining the steps taken by the National Hockey League to protect fans who attend games from airborne pucks after such a puck tragically killed thirteen-year-old Brittanice Cecil).

246. See Popov, 2002 WL 31833731, at *4. This is similar to striking the mortal wound, as seen in the wild animal cases, or drawing oil from a well, as in the fugitive resource cases. See id. at *5.

247. Id. at *5.

248. See id. at *6. In his decision, Judge McCarthy determined that Popov had a “prepossessory” interest in the property. Id. A “pre-possessory” interest arises when “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.” Id. This interest raises several questions: When does this pre-possessory right begin? What constitutes a significant step? Is it an unlawful act for a fan at a ballpark who wants to catch a ball hit out of play to unintentionally knock over the fan seated next to him or her? How will one determine whether a fan intentionally attempted to take the ball or just attempted to catch the ball? In a similar manner, questions would arise as to the right of possession of wild animals if the court accepted Judge Livingston’s dissent in Pierson. See Paul, supra note 79, at 921–23 (discussing why the majority opinion in Pierson provides an easier decision to administer).

Hayashi also could have argued that awarding the ball to Popov creates an opportunity for fraud. Only under rare circumstances will anyone have conclusive film evidence of a fan making the catch, thus leaving the court to sift through eyewitness testimony. Further, in cases where video evidence exists, the court will still have a difficult time determining whether someone reduced the ball to possession or whether another fan maliciously took the ball away from the first "possessor." Because of this difficulty, nothing will stop a fan from declaring that he or she had possession of the ball and only lost it after other fans stripped him of it. To prevent this type of fraud, the court should award the ball to the individual who secures possession of the ball.

This argument, however, contains one major flaw: awarding Hayashi the ball would promote future chaos in ballparks and would harm the second goal of Pierson. If people know that the person who holds the ball at the end of any sequence of events has the right to possess the ball, then the five-minute melee in Popov v. Hayashi could turn into longer, more dangerous, and more frequent occurrences. Even

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250. See id. at *3. The decision notes that Popov's testimony proved, on the whole, unconvincing. Id. In the Popov case, however, with the number of witnesses and the Keppel video of the melee, it is highly unlikely that Popov attempted to fraudulently obtain the ball. The court noted that the ball landed in Popov's glove, but it could not determine when the ball escaped his glove. Id. at *2.

251. See Smith, supra note 2, at 77–78. Keppel stationed himself in the right field arcade because of the proclivity of Bonds for hitting the ball to that side of the field and because of the magnitude of the home run record. See id. at 64. Had Bonds hit a home run into the left field bleachers, it is less likely that video evidence would exist. Id. at 77–78.

252. See Popov, 2002 WL 31833731, at *1. The court heard testimony from seventeen eyewitnesses. Id. "The testimony of these witnesses varied on many important points.... Some appeared disinterested in the outcome of the litigation and others had a clear bias. Some remembered the events well and others did not. Some were encumbered by prior inconsistent statements which diminished their credibility." Id.

253. See Bean, supra note 7. Although Keppel's video showed the ball landing in Popov's glove for six-tenths of a second, it did not show what occurred in the pile-up. Id.

254. See infra Part V.A (discussing why awarding the ball to Hayashi will satisfy one of the goals of Pierson, while awarding the ball to Popov will satisfy neither of the goals). By awarding the ball to the person who gains absolute control over it, no individual can allege that he or she had "possession" of the ball in the scrum or that another individual maliciously took the ball from his or her possession. See Popov, 2002 WL 31833731, at *2 (concluding that the testimony and video evidence showed no wrongful acts by Hayashi as alleged in Popov's complaint).

255. See Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805). The court said that it wanted to preserve "peace and order in society." Id. As Judge McCarthy indicated, "we are a nation governed by law, not by brute force." Popov, 2002 WL 31833731, at *6; see also Greg Sandoval, Judge Orders Parties to Split Bonds-Ball Cash, WASH. POST, Dec. 19, 2002, at D01 (recounting the Popov case and the decision of the court), available at 2002 WL 104307229.

256. See All Things Considered, supra note 229. Paul Finkelman said that "[a]t some point, the ball rests with someone, and we don't allow a fight to continue forever and ever and ever.
security guards and ushers at the stadiums do not have the ability to stop attacks and pile-ups. 257 Therefore, the court should have decided whether to award the ball to Popov to create a safe environment at baseball stadiums 258 or to award the ball to Hayashi to create a definite owner. 259

C. The Trial Court’s Middle Ground

The trial court, finding that awarding the ball to one claimant over the other would promote unfairness, elected to follow the middle ground and award the ball to both claimants. 260 In reaching this middle ground, the court found that both men had a right to possess the ball. 261 Although this decision provides each man with an equal share in the ball, it neither provides certainty in the event that this situation were to happen again nor creates a safe environment at baseball games. 262 First, how does one develop a pre-possessory right and at what point does this occur? 263 This pre-possessory interest produces the same result as allowing the hunter in pursuit of a wild animal to develop a property right in the animal; it would create more questions and more

And it seems . . . that the fight stops as soon as somebody has it in his hand, which Popov did.”
Id. By awarding the ball to Hayashi, the fight could continue until someone stopped it. See id.

257. See Smith, supra note 2, at 67.
258. See supra Part IV.A (discussing why awarding the ball to Popov would create a safer environment at the ballpark).
259. See Paul, supra note 79, at 921–23 (discussing why the majority opinion in Pierson provides an easier decision to administer). This would satisfy the first goal of Pierson. See Pierson, 3 Cai. R. at 179.
260. See Popov, 2002 WL 31833731, at *7. The decision stated:
   An award of the ball to Mr. Popov 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. An award of the ball to Mr. Hayashi 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.
   Id.

261. See id. at *7–9 (discussing how each man had gained a property right in the ball, why neither had a superior interest, and why the court could reach an equitable decision).
262. See Pierson, 3 Cai. R. at 179. As stated previously, the two central goals of Pierson were to provide a certain owner and maintain a peaceful, safe environment. Id. As precedent in the case of a fugitive baseball, the court should attempt to reach similar goals.
263. See Popov, 2002 WL 31833731, at *6 (concluding that a pre-possessory right develops when an individual attempts to obtain possession of an object but others unlawfully prevent that individual from gaining possession of the object). This pre-possessory interest raises many questions in certain scenarios. See Paul, supra note 79, at 921–23. For instance, does Fan A develop a pre-possessory right to a ball if he nearly catches the ball but Fan B knocks A’s glove down before A can even touch the ball? What if A ran across two sections before B knocked A’s glove down? What if A actually touched the ball but B provided a “gentle” shove that caused A to bobble the ball? Further, what constitutes an unlawful action? Will this definition lead to more people claiming that they have a right to a baseball?
litigation.\textsuperscript{264} For this reason, it does not satisfy the first goal of \textit{Pierson}.\textsuperscript{265} Second, this decision does nothing to improve the safety of fans attending a game because it still allows attacks like the one suffered by Popov.\textsuperscript{266} The definition of pre-possessory rights and what constitutes possession does not provide fans with a clear indication of when a fan has gained absolute possession of a baseball.\textsuperscript{267} As a result, fans will do whatever they can to obtain absolute possession.\textsuperscript{268} For this reason, Judge McCarthy’s decision does not satisfy the second goal of \textit{Pierson}.\textsuperscript{269} Therefore, because this decision satisfied neither goal of \textit{Pierson}, the court reached an incorrect conclusion that will not aid in the future protection of fans at baseball games or help to define a certain possessor of baseballs hit out of play.

V. PROPOSAL

As the previous discussion indicated, the court’s decision will likely produce an adverse effect,\textsuperscript{270} sacrificing certainty, safety, or both.\textsuperscript{271} Consequently, the court should have examined the advantages and disadvantages of each possibility, awarded the ball to the individual

\textsuperscript{264} See Paul, supra note 79, at 921–23 (discussing why the majority opinion in \textit{Pierson} provides an easier decision to administer than awarding a fox to a pursuing hunter).

\textsuperscript{265} See \textit{Pierson}, 3 Cai. R. at 179 (providing certainty in the decision is the first goal of \textit{Pierson}).

\textsuperscript{266} See \textit{Popov}, 2002 WL 31833731, at *6. Although Judge McCarthy stated that he would not allow a result creating a rule “dictated by violence,” the rule does nothing to prevent violent assaults from occurring. See \textit{id}.

\textsuperscript{267} See Garofoli, supra note 15 (noting that Professor Gray, arguing on behalf of Hayashi, asked that the court arrive at a decision that tells fans, “Once a ball is caught, then back off”).

\textsuperscript{268} See supra Part II.B–C (discussing case law pertaining to the capture of wild animals and fugitive resources). In cases involving wild animals, absolute possession occurs with the mortal wound. See supra Part II.B (examining the classic cases concerning wild animals and who has a right to possess them). In fugitive resource cases, absolute possession occurs when an individual captures the fugitive resource. See supra Part II.C (discussing the similarities between wild animals and fugitive resources and applying the rule of capture to those fugitive resources). In the \textit{Popov} case, Hayashi gained absolute possession over the ball according, to the definition provided by Professor Gray. See \textit{Popov}, 2002 WL 31833731, at *4 (citing Professor Gray’s belief that possession of an object occurs when someone secures that object). As Hayashi picked up the loose ball after the assault on Popov and still retained an interest in the ball, nothing will stop fans in similar situations from attempting to obtain a loose ball.

\textsuperscript{269} See \textit{Pierson}, 3 Cai. R. at 179 (explaining the second goal for requiring the mortal wound as a means for “preserving peace and order in society”).

\textsuperscript{270} See supra Part IV.A (explaining that giving the ball to Popov results in safety but sacrifices certainty); supra Part IV.B (discussing the concept that giving the ball to Hayashi results in certainty but sacrifices safety); supra Part IV.C (explaining that an equitable result provides for neither safety nor certainty).

\textsuperscript{271} See \textit{Pierson}, 3 Cai. R. at 179 (requiring the mortal wound to create certainty and preserve the peace).
who best satisfied the rule of capture, and crafted a decision that best satisfied the goals of Pierson. To create a property right in a fugitive object, an individual must perform an act that reduces the object to possession, such as inflicting the mortal wound or drawing oil from beneath the surface of each. Because Hayashi controlled the baseball and reduced it to possession, he developed a property right in the ball. Further, awarding the ball to Hayashi would satisfy the goal of certainty in Pierson, while awarding the ball to Popov would satisfy neither goal. Major League Baseball, which has the ability to dictate who can possess the ball, can provide a rule or a practice that will provide certainty and safety, yet acknowledge the rule of capture for future baseballs hit out of play. By claiming ownership of all baseballs used during the game, Major League Baseball creates a certain owner in all baseballs and, by eliminating milestone baseballs from the memorabilia market, would reduce fighting in the stands because all balls would be valueless.

A. The Sacrifice of Safety at Ballparks: Why the Court Should Have Awarded the Ball to Hayashi, Thereby Granting Possession to the Individual Who Controlled the Ball

Based on case law regarding fugitive objects, such as wild animals and oil or natural gas, and the goals of Pierson, the court should have awarded the ball to Hayashi. Only Hayashi could show that he stopped the momentum of the baseball and brought it under his possession. Security guards, meant to prevent the chaos that occurred, verified that Hayashi held the Bonds ball. Giants officials did the same. See supra Part IV.B (discussing why the court should award the ball to Hayashi).

272. See id.

273. See Ohio Oil v. Indiana, 177 U.S. 190, 209 (1900) (concluding that ownership occurs only when an object is reduced to actual possession); Ghen v. Rich, 8 F. 159, 160 (D. Mass. 1881) (requiring that a whaler do everything in his power to secure a killed whale); see also supra Part II.B (discussing classic cases concerning wild animals and who has the right to possess them); supra Part II.C (discussing the similarities between wild animals and fugitive resources and applying the rule of capture to those fugitive resources).


275. See supra Part IV.B (discussing why the court should award the ball to Hayashi).

276. See supra Part IV.A (discussing the impact of the court awarding the ball to Popov).

277. See Finkelman, supra note 82, at 1628 (explaining that baseball currently allows fans to keep baseballs hit into the stands).

278. See infra Part V.B (providing a plan for major league baseball to retain possession of all balls hit into the stands and still retain a fan-friendly environment).

279. See infra Part V.B (describing a proposal to Major League Baseball that would reduce fighting in the stands and create a certain owner in every baseball used at a game).

280. See supra Part II.B–C (concluding that fugitive objects require an individual to reduce the object to possession, thus taking away its liberty).
control. Popov could not show that he ever had possession of the ball; he could claim only that he would have maintained control of the ball but for the actions of an out-of-control mob. A decision awarding the ball to Popov would raise many questions concerning when possession begins, just as awarding possession to a hunter in pursuit of a wild animal would create the same questions. At the same time, although arguments for either side in this case are flawed, awarding the ball to Hayashi appears harsh. Nonetheless, awarding the ball to Hayashi would satisfy at least one of the goals of Pierson, the goal of certainty.

The court should have better considered the goals of Pierson. In awarding the ball to Hayashi, the court would satisfy the goal of certainty; in awarding the ball to Popov, the court would appear to satisfy the goal of safety. On the other hand, because a court cannot alter human nature with its decision and a decision awarding the ball to Popov would likely have no effect on fan behavior, awarding the ball to him would satisfy neither of the goals of Pierson. Even if the court

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281. See Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *2 (Cal. Super. Ct. Dec. 18, 2002). The court adopted the definition of possession of a baseball authored by Professor Gray, which Hayashi achieved. Id. at *5; see also infra note 291 (quoting Professor Gray’s definition of possession). This definition of possession is much like the mortal wound of a wild animal. See Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805). Giants officials and security guards verified that Hayashi held the Bonds ball. See Smith, supra note 2, at 68. Major League Baseball representatives, while taking no stand as to whom has a right to possess the ball, stated that Hayashi had the ball when they arrived to verify it. See Dolan, supra note 22.

282. See Popov, 2002 WL 31833731, at *6-7 (discussing why Popov could not maintain control of the ball but still had achieved a legally recognizable pre-possessory right to the ball).

283. See Paul, supra note 79, at 921-23 (discussing why the majority opinion in Pierson provides an easier decision to administer).

284. See supra Part IV.A (discussing the strongest arguments for Popov to retain possession of the Bonds ball); supra Part IV.B (discussing the strongest arguments for Hayashi to retain possession of the Bonds ball).

285. See infra notes 288-91 and accompanying text (explaining the reasons why awarding the ball to Hayashi would satisfy the goal of certainty in Pierson, while awarding the ball to Popov would satisfy neither the safety nor the certainty goal).

286. See Pierson, 3 Cai. R. at 179 (requiring a mortal wound in order to promote certainty and preserve order in society).

287. See supra Part IV.A (discussing Popov’s arguments that he would have maintained possession but for the violence of the crowd and why awarding him the ball would produce safer ballparks); supra Part IV.B (discussing Hayashi’s arguments that he clearly had possession of the ball and that awarding him the ball would create certainty and eliminate the possibility of fraud).

288. See THOMAS HOBBES, LEVIATHAN 69–73 (Everyman 1973) (1651) (discussing the human nature of partaking in war with every other person, leading to a short, nasty, and brutish life). In the Popov case, stating that a fan “should have . . . the opportunity to try to complete his catch unimpeded by unlawful activity” will not cause fans to sit back and allow someone else to catch a ball hit out of play. Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *6 (Cal.
awarded the ball to Popov, most fans would still believe that, while the ball was in the air, it belonged to them and would therefore do anything in their power to possess that ball.\textsuperscript{289}

Therefore, future courts should award a fugitive baseball to the fan who retains possession of the ball at the end of the play because the fan who first touches the ball cannot establish that he or she would have gained control of the ball. Awarding the ball to the fan who first touches it would not promote certainty or create a safer environment at a ballpark.\textsuperscript{290} To that end, future courts should adopt Professor Gray's definition of possession of a baseball.\textsuperscript{291} Because representatives for Major League Baseball have declared that they will not institute new rules that would take away fans’ right to keep a baseball hit out of play, future courts need to act in order to craft a rule that would define possession, create certainty, and provide for a safer environment at ballparks.\textsuperscript{292} A ruling in favor the fan who first touches a fugitive baseball likely would have little effect on fan behavior at ballparks and likely would lead to numerous questions regarding what constitutes possession, and, therefore, only by awarding the ball to the fan who

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\textsuperscript{289} See Smith, \textit{supra} note 2, at 66. Because each fan will try to catch a ball, does it become an unlawful activity for someone to push another fan to get a better position or to jump up to catch the ball and land on another fan, creating a pre-possessory right? This rule creates too many questions, much like the dissenting opinion in \textit{Pierson}. See Paul, \textit{supra} note 79, at 921–23 (discussing why the majority opinion in \textit{Pierson} provides an easier decision to administer than awarding a fox to a pursuing hunter).

\textsuperscript{290} See \textit{Popov}, 2002 WL 31833731, at *4–6. "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." \textit{Id.} at *6. Hayashi established possession of the ball, but the court would not award him the ball because of Popov's pre-possessory interest in it and because awarding him the ball would condone violence. \textit{See id.} at *6–7.

\textsuperscript{291} \textit{Id.} at *4. Professor Gray provides the following definition of possession as it relates to a baseball hit into the stands at a ballpark:

\begin{quote}
A person who catches a baseball that enters the stand 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.
\end{quote}

\textit{Id.}

\textsuperscript{292} See Garofoli, \textit{supra} note 7; see also \textit{Pierson v. Post}, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (requiring the act of the mortal wound, instead of pursuit only, to create a property right in an effort to provide certainty and a peaceful society).
\end{flushleft}
retains possession at the end of the play can the court satisfy at least one of the goals of Pierson. 293

B. A Proposal to Major League Baseball

Although no written rule of Major League Baseball states that fans may retain baseballs hit into the stands, baseball customs provide that fans may keep what they catch. 294 Several teams and stadiums provide written rules or act in a manner that grants fans the right to keep balls hit into the stands. 295 Allowing fans to keep baseballs creates a fan-friendly environment for those who attend games. 296 After the events that occurred at Pac Bell, however, Major League Baseball could potentially face lawsuits if similar events occur again. 297 Because of these potential lawsuits, Major League Baseball should develop a plan that maintains its fan-friendly image, protects its fans at the ballparks, and provides a definite owner of all baseballs. 298

Major League Baseball should develop a league-wide rule that declares that all baseballs used during an official game belong to Major League Baseball. 299 Such a rule would create certainty as to whom has

293. See supra notes 280–85 and accompanying text (discussing why awarding the ball to Popov would not lead to safety or surety and why awarding the ball to Hayashi creates a definition that provides a definite possessor).

294. See Finkelman, supra note 82, at 1621. “For at least the last eighty years, almost all fans attending professional baseball games in the United States have assumed they have a right to take home any balls they catch or retrieve in the stands.” Id.

295. Id. at 1621–22 (noting that Comerica Park in Detroit contains posted signs saying fans can keep balls hit out of play and that the web site for the Seattle Mariners encourages fans to keep balls hit out of play). “[T]he Giants . . . like all major league franchises, . . . traditionally allow[] fans to keep balls that land in the stands . . . .” Dolan, supra note 22.

296. See Finkelman, supra note 82, at 1622. Further, Finkelman notes that John McEnroe and other tennis pros “have been arguing that U.S. Open officials should make the game more fan-friendly by allowing those who catch balls to keep them.” Id.

297. See G.M. KELLY, SPORT AND THE LAW 219–26 (1987) (describing the liability of the organizer of a sporting event in cases of injury to spectators because of a failure to protect them).

298. With the high cost to attend games, high player salaries, and the reduced attendance at games, Major League Baseball needs to do something to improve its image, especially after the recent events at Pac Bell. It costs fans an average of $145.28 to attend a baseball game at a major league stadium. See The Guide to Major League Baseball Stadium Expenses (2002), at http://home.digitalcity.com/ballparkfigures (last visited May 7, 2003). This cost is based on “the cost of two average child-price tickets and two average adult-priced tickets, four small soft drinks, two small beers, four hot dogs, parking for one car, two game programs and two souvenir caps.” See id. The highest paid player in baseball, Alex Rodriguez, makes an average of $156,000 per game. See Greg Cote, Fans Left Adrift in Widening Gulf Between Them, Athletes, MIAMI HERALD, July 17, 2002, at Sports, available at 2002 WL 24339488. The high cost to attend games and the salaries of players has led to a reduction of fan attendance and a growing separation between fans and players. See id.

299. See Budish, supra note 180. This would be similar to the way that the state “owns” and regulates the takings of wild animals. See 4 AM. JUR. 2D Animals § 14 (1995). Teams in Japan
a right to possess any ball hit or thrown out of play and would also create safer ballparks.\footnote{Popov v. Hayashi, a Modern Day Pierson v. Post} By declaring Major League Baseball the owner of all baseballs, the rule would eliminate the question of what an individual has to do to create a property right in a ball.\footnote{Pierson v. Post, 941} Further, because an individual fan could not own a ball, the balls would have no secondary market value.\footnote{Further, because an individual fan could not own a ball, the balls would have no secondary market value.} Therefore, such a league-wide rule would reduce the chance that fans would fight over a ball. Finally, the rule would ensure that every major baseball milestone resides with Major League Baseball and its Hall of Fame.\footnote{Major League Baseball, however, should not take away the fans' right to catch and to keep balls hit out of play without giving the fans something in return.}

Major League Baseball, however, should not take away the fans’ right to catch and to keep balls hit out of play without giving the fans something in return.\footnote{If Major League Baseball took away the opportunity to keep balls without giving fans anything in return, it would harm its fan-friendly image.} In return for fans giving up any ball that they catch, ushers at the stadiums could present fans with a voucher.\footnote{Such a voucher would allow fans who catch balls hit out of play to redeem them for two tickets to a future game or an} required fans who caught foul balls to return them to ushers; in return those fans received a small gift. See Finkelman, supra note 82, at 1621 n.48. Armond Budish suggests that Major League Baseball make a rule that requires fans to return baseballs of significant importance, such as Bonds’s seventy-third or Hank Aaron’s 755th, to place them in the Hall of Fame. See Budish, supra note 180. Budish, however, acknowledges the difficulty in seeking the return of only significant baseballs, recognizing that “[m]aybe no official wants to be the one to have to approach a young child who caught a home-run ball to demand its return.” See id.

\footnote{See Pierson v. Post, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (requiring a mortal wound in order to promote certainty and preserve order in society).} 300. See Budish, supra note 180. This rule would create a situation of a lost and found item, with the fan acting as both the finder and bailee of the baseball. In such a situation, “[a] finder of property acquires no rights in mislaid property, and is entitled to possession of lost property against everyone except the true owner.” Michael v. First Chi. Corp., 487 N.E.2d 403, 409 (Ill. App. Ct. 1985). Major League Baseball would be the true owner of the ball and fans would have to return all balls to it.

\footnote{See Matt Bean, Fans Take the Stand to Describe Melee Over Record-Setting Ball, CourtTV.com (Oct. 18, 2002), at http://www.courttv.com/trials/baseball/101802_ctv.html (last visited May 7, 2003) (noting that fans who held season tickets had never seen an attack at the ballpark, insinuating that the unusual value of the ball caused fans to act in this manner); see also Bean, supra note 7 (detailing that fans admitted to “groping and grappling . . . for the ultimate prize”).} 302. See Finkelman, supra note 82, at 1621 n.48. This solution would be similar to the way in which Japanese teams collected balls hit into the stands. See id. A fan in Japan who caught a ball hit out of play received a gift in return. Id.

\footnote{See Budish, supra note 180.} 303. See Budish, supra note 180.

\footnote{See Finkelman, supra note 82, at 1621 n.48.} 304. This solution would be similar to the way in which Japanese teams collected balls hit into the stands. See id. A fan in Japan who caught a ball hit out of play received a gift in return. Id.

\footnote{See id. at 1621–24 (discussing how Major League Baseball allows fans to keep part of the game by catching balls hit out of play, unlike other sports that require fans to return balls).} 305. See id. at 1621 n.48.

\footnote{This would allow a fan to attend the game of his or her choice.} 306. See id. at 1621 n.48.

\footnote{This would allow a fan to attend the game of his or her choice.} 307. See id. at 1621–24 (discussing how Major League Baseball allows fans to keep part of the game by catching balls hit out of play, unlike other sports that require fans to return balls).
opportunity to meet the players after the game. Providing fans with two tickets to a future game would defray some of the costs of attending games, while allowing fans to meet the players after the game would provide fans with the chance to meet their heroes and create a connection between fans and players. These options should improve the image of baseball and lead to an increase in fan attendance.

Major League Baseball would also need to declare that it would never attempt to sell any of the collected baseballs for a profit in order to eliminate the secondary market for historic baseballs. The teams could use the retrieved balls in one of three ways: (1) they could return the ball for game use, provided the ball was not scuffed or damaged in any way; (2) they could provide the baseballs to youth baseball programs, like Little League Baseball; or (3) they could enshrine significant balls in the Baseball Hall of Fame for the enjoyment of the fans. Rules such as these would provide a certain owner for all baseballs, a safer environment at all stadiums, and improve the image of Major League Baseball. Although this plan would protect fans and baseball, Major League Baseball has no current plans to institute rules like these.

VI. CONCLUSION

In cases such as Popov v. Hayashi, no court decision will provide for a certain possessor and also create a safe environment; it can accomplish only one or the other. The actions and behavior of fans at any sporting event, however, will not change based on a decision from the courts. Awarding the ball to Popov will not cause fans to move...
over and let someone else catch a ball hit out of play; the fans will still push and shove in an effort to catch the ball. Instead, the court should have followed and applied the law of possession for cases of wild animals and fugitive resources to the baseball. This requires that an individual perform an act, such as striking the mortal wound or drawing oil into a well, to reduce an object to possession and gain a property right in that object. In the controversy between Popov and Hayashi, only Hayashi reduced the ball to possession by stopping its momentum and holding on to the ball. The court should have adopted the definition of possession of a baseball provided by Professor Brian Gray and allowed Major League Baseball to create a solution to protect its fans and the league.