SMU | Dedman School of Law

SMU Law Review

Volume 56 | Issue 4 Article 6

January 2003

An Essay on Property Rights in Milestone Home Run Baseballs

Steven Semeraro

AN ESSAY ON PROPERTY RIGHTS IN MILESTONE HOME RUN BASEBALLS

*Steven Semeraro**

OVER the past decade, rising interest in sports memorabilia and an increasing number of home runs hit by major league baseball players[1] have produced an interesting property law question: Who owns the extremely valuable, milestone home run baseballs that are hit into the stands? To baseball fans unschooled in the intricacies of property law—and even to law professors[2]—that question has an easy answer: Whoever catches the baseball owns it. That conclusion rests on a long standing practice among major league baseball teams to permit fans to keep balls hit into the stands, including some extremely valuable milestone home run balls.[3]

Despite this common practice, the ownership question is more than a curiosity for sports buffs and property theory geeks—of which I am both. At least when considering milestone baseballs, the question has non-trivial implications for commerce, public safety, and judicial administration. Ordinary baseballs are worth about $12. Their modest commercial value minimizes the likelihood of (1) excessive violence when fans struggle for a loose ball and (2) litigation over ownership. A milestone ball, by con-

* J.D., Stanford Law School; Associate Dean of Academics and Associate Professor of Law, Thomas Jefferson School of Law. I thank Teresa Gillis, Shaun Martin, Maureen Markey, Paul Finkelman, and Arnold Rosenberg for their many helpful comments on earlier drafts. I also thank June MacLeod, Dorothy Hampton, and Kimberly Reisman for their help researching this article.

1. During the first 94 seasons of the modern baseball era, a batter hit 50 home runs in a single season only 18 times. And four of those 18 were accomplished by Babe Ruth in the 1920s. From 1930 to 1994, there were only 14 50-homer seasons and no player did it more than twice. From 1995 through 2002, however, there have been 18 50-homer seasons, including four seasons each by Mark McGwire and Sammy Sosa and two seasons each by Ken Griffey, Jr. and Alex Rodriguez. Murray Chass, *Preview 03; Going, Going, Gone*, N.Y. TIMES, Mar. 30, 2003, at A8.

2. An extended discussion of the issue on the LawProf internet list serve led to near unanimous agreement among the participants that a fan has superior rights in a milestone home run ball that she catches. *See* Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609, 1611 (2002). Similarly, an article in *Tax Lawyer*, analyzing the tax consequences of a fan's returning a milestone home run ball to the batter who hit it, declared without analysis that "it is common knowledge to all who attend baseball games that if you catch a baseball, you are allowed to keep it." Darren Heil, *The Tax Implications of Catching Mark McGwire's 62nd Home Run Ball*, 52 TAX LAW. 871, 874 (1999).

3. While long standing, the current practice has not always existed. For example, as recently as the 1940s, the Cleveland Indians required fans to return baseballs hit into the stands. Ken Myers, *Game for Anything: Ex-Indians Owner Veeck Pioneered Giving Fans More Than Just a Ballgame*, CRAIN'S CLEV. BUS., Sept. 30, 1996, at B26.

trast, may be worth thousands or even millions of dollars.[4] Given the exponentially greater commercial potential of such a ball, one would expect an increase in the likelihood that fans will employ violent methods to obtain possession.[5] In addition to disputes between fans, the potential for litigation increases with milestone baseballs because, unlike ordinary balls hit into the stands, the player who hits a milestone home run may want the ball returned to him.[6] While no lawsuits have yet arisen in this situation, the potential is certainly there.

Professor Paul Finkelman, like me a fan of the game, has written an article contending that neither the major league baseball team that controls the stadium, nor the player who hits the milestone ball could require the fan who catches it to give it back.[7] He bases this conclusion on three possible theories: (1) the traditional property law concept of abandonment; (2) the traditions and customs of baseball, which he calls the "common law of baseball"; and (3) contractual rights that the fan may receive when purchasing a ticket, which he calls "statutory claims."[8]

Much as I wish that he were right, I fear that Professor Finkelman, like Eco's Baudolino, has come to see what he wants to see.[9] While the doc-

---

4. Mark McGwire's 70th home run sold for over $3 million. Heil, *supra* note 2, at 871 n.3. Eddie Murray's 500th home run ball sold for more than half a million dollars. Carrie Muskat, *Where Have All the 500 Balls Gone?*, *at* http://www.mlb.com (Apr. 18, 2001).

5. For example, one high profile legal battle between two fans followed a violent struggle for control of the milestone ball. Popov v. Hayashi, No. 400545, 2002 WL 31833731 (Cal. Super. Ct. Dec. 18, 2002).

6. For example, Mike Piazza commented that his 300th home run ball was "a personal heirloom for [him]." Andrea Peyser, *Piazza's Playing Hardball with 6-Year-Old Fan*, N.Y. POST, Aug. 2, 2001, at 25. Piazza asked his team to retrieve the ball. Stadium security officials tracked down the fan who caught it, retrieving the ball in exchange for some alternative, less valuable souvenirs. Wallace Matthews, *Ballgate: Mike Was Right*, N.Y. POST, Aug. 12, 2001, at 98.

7. Finkelman, *supra* note 2, at 1611.

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

Id. While portions of Professor Finkelman's article are intentionally tongue in cheek, *see, e.g., id.* at 1617 ("Cubs fans do keep home run balls on those rare occasions when Cubs players actually hit them."), overall it presents sophisticated legal analysis that he appears to take seriously.

Professor Finkelman and I also apparently share an affinity for the New York Mets. *See id.* at 1626 n.69. That being so, I feel compelled to point out his omission of 1973 as a great baseball year. *Id.* In Willie Mays's final season, the Mets pulled off one of baseball's greatest comebacks to win the National League Eastern Division. The League Championship Series with the Cincinnati Reds was punctuated by the dramatic bench clearing brawl initiated by the diminutive Buddy Harrelson when Pete Rose slid hard into second base. The seven-game, extra-inning-filled World Series between the Mets and the Oakland A's is memorable for Rusty Staub's underhand throws from right field, A's manager Dick Williams's virtually endless strategy sessions on the mound, and Reggie Jackson's unabashed line of praise for the greatest Met, Tom Seaver, which went something like *blind people come to the park just to hear him pitch.*

8. *Id.* at 1619-24.

9. The relevant dialogue between Master Niketas and Baudolino reads:

> Master Niketas, the problem of my life is that I've always confused what I saw with what I wanted to see.

trinal analysis is admittedly debatable, the instrumental goals that typically inform the assignment of property rights—protecting public safety and minimizing litigation—weigh strongly in favor of settling that debate by placing the superior property right to a milestone home run baseball in either the home team that originally owned it or the batter who increased its value, rather than in the fan who caught it.

The first two parts of this article expand on and rebut Professor Finkelman's property law and customary practice arguments in favor of fan ownership of milestone home run balls. Each section demonstrates that existing legal rules do not adequately explain how the home team's ownership of a valuable milestone baseball, as opposed to a typical $12 ball, is transferred to a fan who catches the ball when the home team does not intend to transfer ownership. Part III addresses the contract law issue, concluding that it provides the fan's best—though hardly an unassailable—claim to ownership. Part IV demonstrates that, under the doctrine of accession, a batter who hits a milestone home run thereby obtains ownership rights in it. Part V considers the instrumental concerns that typically inform the assignment of property rights and concludes that the interests in judicial economy and public safety weigh in favor of awarding superior rights in the home team or the batter. While an instrumental goal of redistributing income from wealthy team owners and home run hitters would favor awarding the superior property right to the fan, this goal has rarely, if ever, been used to justify an assignment of property rights.

I. BASIC PROPERTY LAW CONSIDERATIONS WEIGH AGAINST FAN OWNERSHIP

Professor Finkelman analogizes a baseball hit into the stands to a wild animal, namely a whale on the open sea.[10] Wild animals in public places do not belong to anyone. Property law has thus developed rules to determine how such an unowned animal can be transformed into property, and this law has sometimes been expanded to cover non-living, but moveable, resources such as oil.[11] Like the animal or migratory resource, Professor Finkelman argues, a baseball moving freely in the stands should belong to the first person to capture it.[12]

While the process of catching a baseball in the stands bears some similarity to the tracking and capture of a wild animal, there is one glaring

---

[Niketas responded, "t]hat happens to many people."

"Yes, but with me, whenever I said I saw this, or I found this letter that says thus and so (and maybe I'd written it myself), other people seemed to have been waiting for that very thing. You know, Master Niketas, when you say something you've imagined, and others then say that's exactly how it is, you end up believing it yourself."

UMBERTO ECO, BAUDOLINO 30 (William Weaver trans., Harcourt, Inc. 2002).

10. Finkelman, *supra* note 2, at 1614, 1629-30. The *Popov* court made a similar assumption. *Popov*, 2002 WL 31833731, at *5.

11. *See, e.g.*, Westmoreland & Cambria Nat'l Gas v. DeWitt, 18 A. 724, 725 (Pa. 1889).

12. Finkelman, *supra* note 2, at 1629-30.

distinction: a wild animal is not owned by anyone, whereas a baseball already belongs to the home team.[13] If a baseball that is hit into the stands is to become the property of the fan who catches it, there must be some mechanism through which ownership rights are transferred from the home team to the fan.[14]

The law recognizes two ways of transferring property without compensation that may apply to milestone baseballs: gifts and abandonment; but the elements of neither doctrine would apply when the team has decided not to relinquish its rights to a particular milestone baseball. While there are legal doctrines that force transfers of property rights despite the intent of the true owner, the elements of these doctrines similarly are not satisfied when a baseball is hit into the stands.

A. VOLUNTARY TRANSFERS

One might conclude that property rights in milestone home run baseballs are voluntarily transferred from the home team to a fan via (1) a donative transfer, i.e. a gift, or (2) through the home team's abandonment of its property right in the baseball and the fan's taking possession of it. While either option could transfer ownership of a milestone ball, both depend on the intent of the home team with respect to the particular ball at issue. If the goal is to establish a property right in the fan that would survive the home team's attempt to repossess the ball, neither a donative transfer nor an abandonment theory will succeed.

1. Donative Transfer from Home Team to Fan

In the many instances in which fans have been permitted to keep a baseball that is hit into the stands, one could reasonably conclude that the home team has given the ball to the fan who catches it.[15] A gift or donative transfer requires two elements: (1) delivery of the chattel from the donor to the donee and (2) the donor's intent to transfer ownership without compensation. While the batting of a baseball into the stands is an unusual form of delivery because the recipient is not predetermined, it could nonetheless satisfy the first element. In order to succeed in transferring ownership, however, the home team must intend to give the ball

13. When a player approaches a milestone, Major League Baseball, rather than the home team, may provide specially marked baseballs to enable the milestone ball to be identified conclusively. *Id.* at 1614, 1616. For clarity purposes, the text refers only to the team as the owner of the ball. The same analysis would apply to Major League Baseball, however, were it the owner.

14. Professor Finkelman recognizes this distinction when discussing why, for example, a pitcher has no ownership right in the ball even though he has possession of it. *Id.* at 1613 ("While possession may be important here, it is not the determining factor. The pitcher never actually owned the ball.").

15. In *Popov*, an argument that the Giants, the home team, and/or Major League Baseball had given the ball to one of the fans was raised but then abandoned. *Popov*, 2002 LW 31833731, at *2 n.7 (explaining that the argument had been properly abandoned since there was no evidence to support it).

to the fan who catches it.[16] For ordinary baseballs, teams do intend to transfer ownership and the donative transfer theory places property rights in the fan.

In particular cases involving milestone baseballs, however, the team could prevent ownership from transferring by altering its intent. Instead of intending to give the milestone ball to the fan who catches it, the team might, for example, decide to keep it, give it to the batter, or donate it to the Major League Baseball Hall of Fame. In short, the gift basis of transfer depends on the intent of the home team in each case and would not provide a basis for the fan to argue that he may keep the ball despite the wishes of the team.

2. *Home Team Abandonment and Subsequent Fan Possession*

The theory of abandonment and subsequent possession provides an alternative basis to transfer ownership from the home team to a fan.[17] Pursuant to this theory, the team would abandon its rights when the ball goes into the stands. Since the ball would then be unowned property, hornbook property law would place ownership in the first person to take possession of it.[18]

In *Popov v. Hayashi*, a case involving the disputed ownership of a milestone home run ball, the parties agreed, and the court thus assumed, that "[a]t the time [the ball] was hit it became intentionally abandoned property."[19] Given that assumption, the court properly addressed a dispute between two fans who each claimed to have been first to take possession of the abandoned ball. If the ball were not abandoned by the home team, however, the first possessor would not have rights superior to the owner, the home team.[20] On the contrary, the true owner would retain its rights, and the fan would be obligated to return the ball to the home team.[21]

---

16. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 39, at 88 (2d ed. 1955) (explaining that to transfer ownership through a gift "requires the exercise of the will to transfer on the part of the transferor, and if such will be lacking, even though the goods may in fact pass from the possession of the donor to that of the donee, there is no delivery and hence no gift"); Allen v. Hendrick, 206 P. 733, 738 (Or. 1922) ("To constitute a gift inter vivos, there must be not only a donative intention but also a complete stripping of the donor of dominion or control over the thing given.").

17. Professor Finkelman asserts that a "fan's theory of ownership must be based on the 'abandonment' of the ball by the management [of the home team]." Finkelman, *supra* note 2, at 1618. By suggesting that a home team is prohibited from deciding not to abandon a particular ball after it is hit, he introduces uncertainty into what he means by abandonment.

18. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 669 (1986).

19. *Popov*, 2002 WL 31833731, at *3 (citing generally Finkelman, *supra* note 2).

20. Professor Finkelman recognizes this point. Finkelman, *supra* note 2, at 1631. "A well known case asserts that it 'is wholly at variance with our views of right and justice' if a pet bird 'should accidentally escape from its cage to the street, or to a neighboring house, the first person who caught it would be its owner.'" *Id.* (quoting Manning v. Mitcherson, 69 Ga. 447, 450 (1883)).

21. "The finder of lost goods does not gain title thereto as against the owner, if the latter be discovered." BROWN, *supra* note 16, § 11. "[A] finder [of a chattel] who appro-

To be abandoned, the owner of property must dispose of the property with the intent to relinquish all legal rights to it. In a classic description of the legal rule, Ray Brown explained that "[t]he question, whether there is an abandonment or not . . . turns on the fact of intent to be determined . . . in light of all the circumstances. Without the intent there can be no abandonment."[22]

Typically, an owner must (1) "cast[ ] away or leave[ ] behind his property;" and (2) act "with the specific intent of desertion and relinquishment."[23] A baseball hit into the stands does not satisfy either element of the test. With respect to the first element, the batting of a ball outside the field of play does not amount to casting property away or leaving it behind.[24] Imagine a backyard game in which my ball is hit into a neighbor's yard. Neither the neighbor nor the first kid to pick up the ball would have property rights superior to mine simply because the ball left the field of play. In fact, the home team's argument is stronger than mine because the home team likely controls the stands as well as the field. In both football and basketball, teams regularly require fans to return balls that go into the stands.[25] The movement of personal property from one area to another when both are controlled by the property's owner thus hardly qualifies as a means of casting away or leaving behind the property.

Even if the home team were deemed to have met the first element of the abandonment test, the fan would still need to establish that the team intended to abandon the ball in order for property rights to transfer to the fan. To be sure, the law sometimes infers intent where an owner unintentionally loses property, but then makes no effort to reclaim it.[26] That determination, however, would require some passage of time.[27] The short interval between the batting of the ball and its arrival in the stands would surely be insufficient. Proof of actual intent to abandon the ball would thus be required, but would necessarily be impossible to prove if the home team promptly reclaimed the ball from the fan who caught it.

B. Forced Transfers

There are instances in which limited property rights are transferred from one private party to another even though the original owner did not

priates to his own use property known to belong to another would undoubtedly be guilty of a conversion." *Id.* § 15.

22. *Id.* § 6.

23. *Id.*

24. *Id.* (explaining that the owner of a movable chattel "should have the right to assert its title even though" the chattel should move from the owner's real property to the property of another).

25. *Cf.* Finkelman, *supra* note 2, at 1622 (noting the situation may be different in hockey).

26. Brown, *supra* note 16, § 6.

27. *See id.* ("The intent to abandon, *vel* or *non*, is harder to determine, however, when there is no positive evidence thereof, and the finding as to intent depends upon the prior owner's failure after a lapse of time to take steps to reclaim his property.").

intend the transfer. None of them apply here. Those who take possession of property for long periods of time may acquire ownership rights by adverse possession. But that doctrine requires years of possession.[28] The few moments a fan may control a ball before it is taken by security officials surely would not give the fan ownership rights under the doctrine of adverse possession.[29]

The owners of landlocked parcels may sometimes compel an easement by necessity from a neighboring landowner.[30] But there is no necessity compelling the transfer of ownership in a milestone baseball.

A somewhat more plausible argument would be that a fan, by purchasing a ticket, obtains an irrevocable license to keep milestone balls. A license to use certain property, which is typically revocable at the discretion of the property owner, may become irrevocable irrespective of the intent of the owner if (1) the license holder invests a substantial amount in reliance on the license and (2) the property owner observes this investment being made and fails to exercise her right to revoke the license.[31]

Because a fan has only a revocable license entitling her to a seat at the ball park to enjoy the game,[32] any ancillary right normally associated with a seat is likely to be revocable as well. Indeed, the cases finding irrevocable licenses *to use* real property generally arise where the licensee was employing the license to serve some property that it unquestionably owned. The case law does not support the right of a licensee to take possession of personal property that never belonged to the licensee.

---

28. *See, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991) (holding that the adverse possession period does not start to run until the true owner makes a demand for return of property). Some jurisdictions reach the same result through a discovery rule that awards ownership to a possessor who controls a chattel for a sufficient period of time after a reasonably diligent true owner would have discovered that her chattel was possessed by a particular person. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

29. The doctrine of adverse possession is sometimes justified by the claim that individuals build up attachment to particular pieces of property over time, meaning true owners have an obligation to assert their rights within a reasonable time or forfeit them. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897). A fan who catches a ball that is taken from her moments later does not have time to build up such an attachment.

30. For example, some states enable an owner of a landlocked parcel to condemn an easement over another's property. Siemsen v. Davis, 998 P.2d 1084, 1085 (Ariz. Ct. App. 2000) ("Arizona's private condemnation statute, A.R.S. § 12-1202 (1994), permits a landlocked private landowner to condemn a 'private way of necessity' across lands of another upon showing a 'reasonable necessity.'"); L & M Prof'l Consultants, Inc. v. Ferreira, 146 Cal. App. 3d 1038, 1052 (1983) ("In these statutes the Legislature empowered private property owners to acquire utility easements by eminent domain."); Kellett v. Salter, 261 S.E.2d 597, 601 (Ga. 1979); Shields v. Garrison, 957 P.2d 805, 806 (Wash. Ct. App. 1998) ("Under the Washington Constitution, article I, section 16, private persons may exercise eminent domain power to condemn private ways of necessity.").

31. *See, e.g.*, Dority v. Hiller, 986 P.2d 636, 639 (Or. Ct. App. 1999); Holbrook v. Taylor, 532 S.W.2d 763, 765 (Ky. 1976).

32. *In re* Gorodess, No. 01-17854MSK, 2001 WL 1676939, at *3 (D. Colo. Dec. 31, 2001) ("Because ticket rights and renewal privileges are not accompanied by any interest in the real property where the sporting event is held, they constitute bare, revocable licenses . . . ."); Soderholm v. Chi. Nat'l League Ball Club, Inc., 587 N.E.2d 517, 521 (Ill. App. Ct. 1992).

Even if the greater power to revoke the seat license did not ipso facto include the lesser power to take back a milestone baseball hit into the stands, the irrevocable license doctrine would nonetheless fail to apply. One might argue that the fan has invested in the ticket, relying on the standard practice that fans are entitled to keep balls that they catch. But people generally do not attend a ball game primarily because of the possibility of catching a baseball. Fans go to enjoy the game. Assuming for the sake of argument that a particular fan could establish that he purchased a ticket to a game primarily to get a chance to catch a milestone home run ball, the investment in a single game ticket is unlikely to be substantial enough to trigger a right to an irrevocable license.[33]

In the case of season ticket holders, the amount of money invested may well be substantial; however, the fan would be hard pressed to demonstrate that the season ticket price was invested in reliance on a right to keep milestone baseballs. The odds of catching any ball, much less a milestone ball, are so low that it is implausible to believe that anyone would invest such a substantial amount in their license to attend baseball games in reliance on their right to keep milestone baseballs.[34]

II. THE INFLUENCE OF CULTURE AND PRACTICE

Major league baseball teams have long allowed fans to keep baseballs hit into the stands, and there are plausible arguments for why it makes commercial sense for them to maintain this practice.[35] Professor Finkelman labels this custom a part of the "common law of baseball"; and he argues that it compels a court to recognize a property right in a fan who catches a milestone baseball even if the home team does not intend to abandon its property rights with respect to that particular ball. This law would dispense with a showing of actual intent—the critical defini-

33. An imaginable exception would be a fan who purchases a large block of tickets to increase the chances of catching a baseball hit into the stands:

> [Charlie] Sheen bought all the seats behind the left field fence of Anaheim Stadium for [a] game between the California Angels and Detroit Tigers in hopes of catching a ball. He sat with three friends on an aisle about 20 rows back, pounding a glove in anticipation of a home run that never came.
> He saw the Angels win 4-3, though he never came in contact with a ball.
> "Anybody can catch a foul ball. I want to catch a fair ball," Mr. Sheen said.
> He chose to set himself apart from the crowd because "[He] didn't want to crawl over the paying public. [He] wanted to avoid the violence."

People, Places, & Things in the News, SOUTHCOAST TODAY, April 18, 1996, *at* http://www.s-t.com/daily/04-96/04-21-96/zpeople.htm#XINDEX3 (last visited July 11, 2003). Such a fan, however, would be unlikely to obtain such a large block of tickets for any game in which a milestone ball was reasonably likely to be hit.

34. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 4.1 cmt. g (2000) ("The expectations that create the servitude also define its scope and terms. The relevant expectations are those that reasonable people in the position of the landowner and the person who relied on the grant of permission or representation would have had under the circumstances.").

35. The public relations value of permitting fans to keep balls hit into the stands, and even encouraging players to occasionally toss balls into the stands, far outweighs the value of the baseballs.

tional factor in the concept of abandonment—in order to create a legal fiction of constructive abandonment.[36]

There are several problems with this line of reasoning. First, there is no such thing as the common law of baseball. There is no legal precedential value embodied in standard practice. The common law is law that is found, uncovered, recognized, or made by judges applying the facts of the case before them to the facts of prior analogous cases. A common practice outside the scope of decisional law is not legal precedent compelling a decision in accord with that practice.[37]

Second, even if a court were inclined as a prudential matter to give substantial weight to a long standing practice at a sporting event, the practice of allowing fans to keep extremely valuable milestone baseballs is not so long standing. While fans have for some time been permitted to keep the baseballs that they catch in the stands,[38] until relatively recently virtually all of those baseballs were worth about $12. The practice of allowing fans to keep valuable milestone baseballs has a much shorter history. Only in the past decade have milestone baseballs generated the sort of value that they now command.[39]

Third, even if the practice of allowing fans to keep milestone home run balls was well established, one would have to take into account a number of competing common baseball practices. For example, the home team

36. Professor Finkelman's discussion is confusing, however, because he suggests that the home team constructively abandons baseballs hit into the stands because team officials "know where [the ball] is, and [do] not go after it." Finkelman, *supra* note 2, at 1621. While that fact is probably better viewed as evidence of an actual intent to abandon rather than a fact supporting a claim of constructive abandonment, it would be a reasonable way to conclude that a fan had acquired ownership rights in a ball that she caught in the stands and was allowed to keep. The problem arises when the home team takes the ball back. Professor Finkelman reaches the same conclusion that the fan should be the owner. *Id.* at 1625 (describing the New York Mets' recovery of Mike Piazza's 300th home run baseball as "strong-arm robbery" and commenting that the fan "would have a solid case against the Mets for conversion").

37. Indeed, perhaps the most famous of the wild animal cases reached a legal result that was precisely the opposite of the standard practice. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (awarding property rights in a fox to the first possessor despite the practice that the pursuer should be entitled to catch the fox).

38. *See supra* note 3. An interesting anecdote indicative of older conceptions of the status of baseballs that went into the stands involves Johnny Evers recollection of the 1908 National League playoff game between the Chicago Cubs and the New York Giants. In the bottom of the ninth inning with the game tied and a runner on second, the following incident occurred: Fred Merkle of the Giants hit a ground-rule double into the stands. Merkle got as far as a little past first base and, seeing the celebration begin in the dugout and the fans starting to exit the stands, he turned and headed for the dugout. Second baseman Johnny Evers, seeing Merkle had failed to touch second base, dashed for the bleachers and asked the gentleman in the bleachers who had caught the ball to hand it over. When he refused, Evers bopped him on his derby hat, grabbed the ball, and threw it to Joe Tinker, the shortstop, who stepped on second base. The umpire called Merkle out. In the pandemonium that ensued, the game had to be called. Two weeks later the Cubs defeated the Giants 4-2, and went on to defeat the Detroit Tigers and Ty Cobb in the World Series, the last time the Cubs ever won a World Series. JOHN P. CARMICHAEL, MY GREATEST DAY IN BASEBALL AS TOLD TO JOHN CARMICHAEL 37 (A.S. Barnes ed., 1945).

39. *See* discussion *supra* notes 1, 4.

typically permits a player who achieves a milestone to keep the ball.[40] When a pitcher strikes out his 3000 batter, for example, the home team gives him the ball. There is thus a conflict in common practices. When an ordinary ball is hit into the stands, the fan who catches the ball may keep it. When a milestone ball is not hit into the stands, the player achieving the milestone gets to keep it. These common practices conflict with each other when a player hits a milestone ball into the stands.

This conflict may be resolvable with reference to another common baseball practice. Less often than ordinary baseballs, but more often than milestone baseballs, a piece of baseball equipment worth substantially more than $12 makes its way into the stands. Most commonly, a player will lose control of a bat and the momentum of his swing will carry the bat into the stands. In these cases, the customary practice is to require the fan to return the bat to the player, usually in return for another souvenir. This practice is consistent with general practices across sports. Teams often require fans to return valuable equipment that goes into the stands, such as footballs and basketballs, but not less expensive items such as hockey pucks.[41] Considering all three common practices, a rule that required the return of valuable milestone balls to the player with the fan receiving an alternative souvenir would best harmonize the three practices.

Professor Finkelman distinguishes situations in which bats go into the stands because they can still be used to play the game while baseballs that go into the stands cannot.[42] That explanation is neither factually nor legally correct. Factually, a long drive that is caught at the wall by an outfielder is thrown back to the pitcher and continues in play. There is no reason why a ball that is hit just over the fence and caught cleanly by a fan could not be put back in play. And just as a ball hit into the stands might suffer damage that leaves it unplayable, a bat that flies into the stands is in danger of chipping or cracking in a way that would make it unusable.

As a matter of law, usability has nothing to do with the assignment of property rights. Much to my chagrin, I have no less of a property right in my old, worn out tires than I had in them when they were new. Their lack of usability is irrelevant. Were I to put the old tires in the street in front of my house, one might reason that I intended to abandon them because they had become unusable. But that inference rests on a tacit

40. An interesting anecdote regarding a player's interest in milestone baseballs concerns the infamous Richie "Call Me Dick" Allen. Banished from the Phillies, Cardinals, and Dodgers for his somewhat flaky antics, the slugger found a comfortable home with the Chicago White Sox. In the early 1970s, Allen produced two and a half wonderful seasons for the Chisox before injuries and age reduced his production. During the glory days, Allen once struck out and then asked for and received the ball as a keepsake because he considered the strikeout to be a personal milestone.

41. Finkelman, *supra* note 2, at 1622.

42. *Id.* at 1620-21, 1623.

assumption that unusable tires have no value to me, and therefore my act of placing them on the street is strong evidence of abandonment.

When dealing with an unusable but nonetheless extremely valuable milestone baseball, however, reasonable inferences about intent cannot be drawn from usability. One must look directly to the value of the item for insight into likely intent. An ordinary baseball or hockey puck has little value, so teams abandon them when they go into the stands. A football or basketball has considerably more value, so teams do not abandon them. A used bat is even more valuable to a player; therefore he does not intend to abandon his bat when it leaves the field. A milestone baseball has substantially more value than any of these items. The home team would thus be highly unlikely to intend to abandon it.[43]

Professor Finkelman also argues that there is a difference between milestone baseballs, on the one hand, and footballs, basketballs, and baseball bats, on the other, in that only the former is intentionally hit into the stands.[44] As an initial matter, that statement is not quite accurate. The ball is intentionally hit over the outfield fence. It is purely a matter of happenstance, however, as to whether the ball lands in an area to which fans have access. Many home runs land in areas between the outfield fence and the stands that are inaccessible to fans.

More importantly from the perspective of property rights, the field of play is as meaningless as usability. The home team has as much of a property right to the stands as to the field of play itself. And there is nothing unusual about the grant of a license to enjoy a particular place that does not include a profit to remove valuable souvenirs located there. Parks and beaches often prohibit the removal of rocks or artifacts found by those with a license to use the area, and one granted a license to tour a winery is not entitled to partake freely, even if wine may be spilling from a vat.

III. CONTRACT LAW PROVIDES THE FAN'S STRONGEST ARGUMENT

Some major league baseball teams, in one way or another, communicate to ticket holders that they may keep baseballs that are hit into the stands.[45] Professor Finkelman argues that these statements provide a

43. While I am unaware of a hockey team ever attempting to retrieve a puck from the crowd, it is unlikely that a milestone hockey puck would ever make its way outside the rink. Milestones in hockey generally occur when pucks go into the net. Conceivably, a hockey goalie's milestone save might deflect off the goalie's equipment and into the crowd. If milestone hockey pucks attained substantial value as items of sports memorabilia, the save-deflection example would pose an issue similar to the milestone home run ball.

44. Finkelman, *supra* note 2, at 1623-24.

45. *Id.* at 1610-11, 1621-22. Professor Finkelman finds further support for this argument in provisions that notify fans that they assume the risk of injury from objects that may enter the stands from the field of play. *Id.* at 1610 & n.8. It is unclear why such a warning would support a contract claim over ownership rights to the ball. For example, the warning that he cites mentions bats as well as balls, and fans generally are not permitted to keep bats that go into the stands.

"statutory" basis for concluding that fans own the milestone home run balls that they catch.[46] But just as the common practices of baseball are not common law, pronouncements by baseball teams are not statutes embodying judicially enforceable rules of law.

These statements could, however, amount to contracts between the team and the fans through which the team promises to transfer property rights in milestone baseballs to the fans who catch them. A fan's contract claim would take the following form: While baseball teams primarily offer entertainment, the right to keep baseballs hit into the stands is part of the entertainment experience offered. At least when a team explicitly tells fans that they may keep balls hit into the stands, a contractual right to keep the ball likely arises.

This contract claim is probably the strongest legal ground that a fan would have to claim a ball in the face of a competing claim by the team; however, even this claim is strained in the special case of a milestone ball. A team could argue that its statements about fans keeping baseballs hit into the stands—and the reasonable understanding of ticket-holders—relate to the 99% or greater of baseballs that are worth about $12. Any contractual right should therefore stop short of milestone balls.

On the one hand, a court would surely be tempted to conclude that the agreement says "baseball" and a milestone ball is a baseball. On the other hand, one should not extrapolate an agreement contemplating $12 souvenirs to extremely valuable pieces of memorabilia. Is a ball a ball when the value differs by a factor of 10,000? If the contracting parties actually contemplated the right to keep milestone baseballs as a part of the contract, one would expect the parties to seek opportunities to adjust their side of the bargain according to the relative risks and rewards. More specifically, the home team would be expected to vary ticket prices according to the likelihood of catching a milestone ball.

In general, ticket prices appear to vary in a manner that is roughly in line with the likelihood of catching an ordinary ball, but not a milestone home run. Field level seats between home plate and the bases are generally the most expensive and generally provide the best chance of catching a ball, albeit an ordinary foul ball. Seats further from home plate and higher up in the stadium generally cost less and provide less of a chance to make a catch. Milestone home runs—comprising only a very small percentage of the total balls that go into the stands—fall in the seats behind the outfield, which tend to be among the least expensive. A court could thus conclude that the contracting parties did not reasonably contemplate the inclusion of milestone balls within the scope of the contract.[47]

---

46. *Id.* at 1621-22.

47. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152, at 385 (1981) ("Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party."); *see also* 1 CORBIN ON CONTRACTS § 4.10, at 618 (1993) (explaining that "if the parties had materially different meanings, and

Professor Finkelman analogizes a ticket to a baseball game to a lottery ticket.[48] Unlike a lottery, however, a ball game provides entertainment that is unrelated to the gamble. The point of buying a ticket to the game is not simply to take a chance at winning a prize.[49] Indeed, unlike a lottery, there is no guarantee that the prize will even materialize. The player might never hit the milestone home run, or he might hit it in an area of the stadium to which no fan has access. These factors suggest that a reasonable interpretation of the agreement between the baseball team and the fan does not necessarily include the right to keep milestone baseballs.

IV. THE BATTER'S PROPERTY RIGHT

While a fan's argument for a property right in a milestone ball is tenuous, if not utterly unsupportable, the batter has a claim that rests firmly on established property law doctrine. According to the labor theory of property, ownership is justified by the mixing of an individual's labor with a material good. In its most basic form, the mere act of possessing something previously unowned requires the labor of the possessor.[50] More often, however, one person will use the property of another to create something of greater value. In such a situation, the doctrine of accession awards ownership rights to the creator, rather than the original owner of the property, whenever the value of the property increases substantially.[51] The theory underlying the doctrine is that returning property that has substantially increased in value to the original owner would punish the laborer too harshly and provide an undeserved windfall to the original owner.[52]

When a batter hits a milestone home run, he combines his labor with an ordinary baseball owned by the home team to create a ball worth po-

---

neither one knew or had reason to know the meaning of the other, there is no contract"). *See generally* Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CAL. L. REV. 1123 (1986) (explaining that, contrary to the classical model, most contracts are incomplete in that the parties do not reasonably account for the full allocation of risk attendant to all possible outcomes).

48. Finkelman, *supra* note 2, at 1625 ("The ticket to a game is in fact a lottery ticket.").

49. Professor Finkelman argues that like a lottery, more tickets are purchased when the payoff is likely to be higher. *Id.* But that fact is explained by the desire of many fans to see a player hit a milestone home run. Professor Finkelman asserts that "[f]or every ticket purchaser who catches a valuable ball, there are hundreds of thousands—indeed millions—who do not. But they buy tickets to games, hoping that they might." *Id.* at 1626. It seems inconceivable to me that all but a tiny fraction of the millions of baseball fans who buy tickets each year are actually influenced in their decision by the hope that they might catch a valuable milestone home run ball.

50. The labor theory of property ownership is attributed to John Locke. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 303-20 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Other philosophers sought to justify vesting property rights based on possession as a matter of respect for the freedom of individuals to bring an object "within the sphere of his will." OLIVER WENDELL HOLMES, THE COMMON LAW 207 (Mark DeWolfe Howe ed., 1963).

51. BROWN, *supra* note 16, § 24, at 53. For example, by converting lumber into barrel hoops, thereby increasing the lumber's value 28 times, a laborer was awarded property rights in the barrel hoops. *Id.* (citing Wetherbee v. Green, 22 Mich. 311 (Mich. 1871)).

52. *Wetherbee*, 22 Mich. at 313-16.

tentially thousands or even tens of thousands of times the value of the original ball. The labor involved is not just hitting that particular home run, but also all of the prior home runs that made the milestone ball so valuable. This increase in value is more than sufficient to trigger the doctrine of accession.[53]

Professor Finkelman considers, but rejects, the possibility that the batter's right to ownership could outweigh the fan's right. First, he argues that under ordinary understandings of the possession theory of property, the batter would have no rights: "The [batter's] only contact with the ball was to touch it with a tool (his bat) in an attempt to force the ball to move away from him. . . . As such it is hard to subsequently argue, under any theory of law or possession, that the ball should be 'returned' to the batter. He never had it in the first place; did not want it; and used all his might and skill to make it go away."[54]

This focus on possession is misplaced because the value of a milestone ball rests in an intangible quality that the batter imparts to the ball in the only possible way. If the batter were to take possession of the ball, it would never become a milestone ball. To say that in creating that value the batter demonstrates his lack of intent to take possession and therefore has no property rights in the ball is like saying that a sculptor loses any property rights in her creation because she must move away to enjoy its beauty.[55]

Professor Finkelman does consider whether the batter might acquire rights based on what he calls a "'value added' interest."[56] But he rejects this argument because the batter, unlike an artist, "has not added anything of his own to the ball."[57] The cases awarding ownership rights through accession, however, do not require the laborer to add something other than labor. A skilled laborer who turns grass into hay or mud into bricks contributes nothing but labor.[58] The batter surely does the same, if

53. *See* Walch v. Beck, 296 N.W. 780, 783 (Iowa 1941) (value increased 30 to 40 times); *see also* Ron Borges, *Battle of Ball from Bonds' 73rd HR is Silly* (Oct. 2001) (asserting that the batter should have some property rights in a milestone home run ball), *at* http://www.msnbc.com; *cf. Wetherbee*, 22 Mich. at 312-16 (value increased 28 times).

Because the batter is employed by his team and hits the milestone home run in the course of his employment, his property right in the milestone ball may transfer to the team, depending on the terms of his contract. *Cf.* Dalzell v. Dueber Watch-Case Mfg. Co., 149 U.S. 315, 320 (1893) (recognizing that an express contract is needed to transfer property rights in an invention from an employee to an employer); Banner Metals, Inc. v. Lockwood, 3 Cal. Rptr. 421, 428 (Cal. Dist. Ct. App. 1960) ("It is the unanimous rule that the mere existence of an employer-employee relationship is not, in and of itself, sufficient to entitle the employer to partake of the benefits of the employee's inventive genius.").

54. Finkelman, *supra* note 2, at 1612.

55. *Cf.* Haslem v. Lockwood, 37 Conn. 500, 507 (Conn. 1871) (holding that a laborer who found abandoned and "comparatively worthless" property "and greatly increase[d] its value by his labor" does not lose his right to the property by failing to take immediate possession).

56. Finkelman, *supra* note 2, at 1612.

57. *Id.*

58. *See, e.g.*, Lewis v. Courtright, 41 N.W. 615, 616 (Iowa 1898); Hamilton v. Rock, 191 P.2d 663, 668 (Mont. 1948); Baker v. Mersch, 45 N.W. 685, 685 (Neb. 1890); Carpenter v.

not more. By hitting the baseball, the batter creates a connection between the baseball and his reputation; without the connection the ball would not be nearly so valuable. An artist sketching with someone else's pencil does no more than the batter: the talented artist touches the paper with her reputation, creating value in the paper. In each case, the individual's effort created a connection between the individual's reputation and the tangible article, significantly increasing the value of the tangible object. The only basis to distinguish the two is that the artist leaves something tangible—graphite on the paper—while the batter merely temporarily distorts the shape of the ball. But property need not be tangible. Returning to a sculptor, what does she leave of her own on the wood?

Rejecting the artist analogy, Professor Finkelman compares the batter's relationship to the ball to the relationship between a celebrity and a place that the celebrity has frequented.[59] An inn where George Washington slept may increase in value, Professor Finkelman argues, but that does not give Washington any property rights in the inn. There are at least two grounds on which to distinguish the batter who hits a milestone home run from the celebrity who sleeps at an inn. First, while the batter uses both talent and history to add value to the baseball, the celebrity uses only history to add value to the inn. The skills that made the celebrity famous played no direct role in increasing the value of the place where the celebrity slept. By contrast, the batter uses his skills directly in adding value to the ball.

Second, there is a dramatic difference in magnitude. The intrinsic value of the baseball is only a tiny fraction of the value of a milestone ball. By contrast, the intrinsic value of an inn will typically far exceed any increase in value created by the celebrity who spent a night there. It is precisely the magnitude of the increase in value that triggers the accession doctrine with respect to the batter who hits a milestone home run, but not with respect to the celebrity who stays at a particular hotel.

V. INSTRUMENTALISM AND PROPERTY RIGHTS

Property rights are instrumental tools that advance social goals. While legal treatises tend to focus on the technical rules of possession, there is little doubt that common law judges took instrumental goals into account in deciding what would constitute possession sufficient to confer ownership rights in particular circumstances.[60] In the whaling cases that Profes-

Lingenfelter, 60 N.W. 1022, 1023-24 (Neb. 1894); Louis Werner Stave Co. v. Pickering, 55 Tex. Civ. App. 632, 634-45, 119 S.W. 333, 334-35 (1909, no writ).

59. Finkelman, *supra* note 2, at 1612.

60. Justice Holmes explained how common law judges upheld at least three means of determining ownership of whales that a boat harpoons, but does not capture: (1) the first to capture the whale receives exclusive ownership; (2) the whale is divided between the first to harpoon and the first to capture; and (3) the first to harpoon receives exclusive rights as long as they are claimed before the whale is cut. HOLMES, *supra* note 50, at 168. As Justice Holmes explained, these decisions were obviously intended to minimize disputes

sor Finkelman cites, for example, common law courts developed a variety of sometimes conflicting property rules that would enable important, but different, whaling industries to operate efficiently.[61] Some courts held that a whaling ship had to maintain a line to the whale in order to obtain a property right in the whale, while others held that merely shooting the whale with a marked lance was sufficient to create a property right in whales that washed ashore days later.[62] Modern law, by contrast, prohibits the exercise of many property rights with respect to whales in order to preserve endangered species.[63]

Baseball, Justice Holmes's views notwithstanding,[64] is no doubt a business. Deciding who has the superior property right in a milestone baseball, however, is hardly an issue that would affect the efficient operation of the business. Instead, the property rights issue with respect to milestone baseballs is a matter of sport, and therefore other instrumental goals may be more important.[65]

In at least one famous sporting case at common law, the court chose to set the property right in the way that would minimize legal disputes.[66] The dissenting opinion in that case argued for a different rule that would enhance public safety and minimize damage to property.[67] Both of these

---

among whalers and, he concluded, "[i]f courts adopt different rules on similar facts, according to the point at which men will fight in the several cases, it tends, so far as it goes, to shake an *a priori* theory of the matter." *Id.*

61. *See, e.g.*, Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881).

> Unless [the practice of enabling whalers to obtain rights in whales that wash ashore] is sustained [by the courts], this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder .... That the rule works well in practice is shown by the extent of the industry which has grown up under it ....

Id. Common law courts recognized the importance of encouraging the efficient use of property in developing property rules in other areas as well. *See, e.g.*, Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Queen's Bench 1707) (recognizing a property right in ducks attracted to a decoy pond even though the ducks' freedom of movement was unaffected).

62. Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 89-93 (1989).

63. *See, e.g.*, International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 716, 74 U.N.T.S. 1953.

64. Justice Holmes drafted an opinion holding professional baseball exempt from the antitrust laws because it did not constitute interstate commerce. Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

65. The instrumental goals that ordinarily support vesting the finder of lost or abandoned property with ownership rights also fail to apply here. In the case of lost property, finders are given superior rights against the world, except for the actual owner, in order to encourage finders to acknowledge their finds. With respect to abandoned property, finders are encouraged to bring the property back to productive use. Neither incentive is necessary with respect to milestone baseballs. The home team would have no trouble retrieving the ball if it wanted it. And the nature of the circumstances in which the ball goes into the crowd ensures that the ball will not lay dormant for more than a few seconds. On the contrary, fans will try to catch balls hit into the stands merely for the thrill of catching them.

66. In *Pierson v. Post*, the court held that one must take actual possession of or at least wound a wild animal in order to obtain ownership rights "for the sake of certainty, and preserving peace and order in society." 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805). The court explained that requiring less "would prove a fertile source of quarrels and litigation." *Id.*

67. *Id.* at 180-82 (Livingston, J., dissenting).

rationales weigh in favor of placing superior property rights in milestone home run baseballs in either the home team or the batter.

A. JUDICIAL ECONOMY

With respect to legal disputes, a rule that gives superior property rights to either the team or the batter would be easy to administer and would minimize disputes. A rule that gives a property right to the fan who catches the ball, by contrast, would ensure disputed ownership claims as fans scurried to recover balls hit into the stands. While the law of first possession is well established, determining what constitutes *possession* as a matter of both fact and law is difficult.[68]

Professor Finkelman proposes a rule that would award the ball to the fan who first catches it even if others knocked the ball from her, but not if she dropped it of her own accord.[69] Such a rule would be hopelessly difficult to administer and would give rise to endless disputes.[70] Even in the relatively clear case where a fan—to use baseball parlance—*got a glove on the ball* directly off the bat, it would often be difficult to tell whether the fan dropped the ball of her own accord or whether others knocked it free. As the *Popov* court declared, "[r]esolution of that question is the work of a psychic, not a judge."[71] Cases in which the ball starts bouncing through the stands will be even more difficult. What happens when one fan, about to pick up the ball, is knocked aside by another who grabs it instead?

The problem is not merely factual. Articulating a legal definition of possession in these cases is no easy task.[72] The *Popov* court recognized a

---

68. Popov v. Hayashi, No. 400545, 2002 WL 31833731, *4 (Cal. Super. Ct. Dec. 18, 2002) ("Possession is a blurred question of law and fact."); HOLMES, *supra* note 50, at 163-94.

69. Finkleman, *supra* note 2, at 1631-32.

70. The now infamous legal battle over Barry Bonds's 73rd home run ball is not the only possession dispute to arise over a milestone home run. Fuchsia, *It's How They Played The Game*, ORLANDO SENTINEL, Sept. 30, 1998, at A14 ("Disputes over ownership of some [milestone] balls hit into the stands by the home-run duo [of Mark McGwire and Sammy Sosa] have wound up in court."); *Major League Log*, PITTSBURGH POST-GAZETTE, Sept. 15, 1998, at D5 ("As of yesterday, three people had claimed to be the owner of the valuable baseball. No one is sure who the rightful owner is . . . .").

71. Despite a professionally shot videotape of the event, the court in *Popov* was unable to determine whether Mr. Popov actually caught the ball:

> It is important to point out what the evidence did not and could not show. Neither the camera nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd . . . . We do not know when or how Mr. Popov lost the ball.
>
> Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so.

Popov, 2002 WL 31833731, at *3.

72. In *Popov*, the court explained:

> The parties fundamentally disagree about the definition of possession. In order to assist the court in resolving this disagreement, four distinguished law professors participated in a forum to discuss the legal definition of possession. The professors also disagreed.

pre-possessory interest in a fan who intended to catch a ball hit into the stands and took "significant but incomplete steps to achieve possession of [the ball, but had this effort] interrupted by the unlawful acts of others."[73] Certainly, that rule of law does not portend to resolution without judicial intervention.

B. PUBLIC SAFETY

A concern for public safety also weighs in favor of placing the property right in the batter or the team. Fans often behave irresponsibly, if not dangerously, in seeking to catch ordinary baseballs hit into the stands. That behavior is unlikely to improve when a valuable milestone baseball is up for grabs. Accounts of efforts to gain control of milestone home runs are punctuated with descriptions of "out of control mob[s]" tackling, kicking, and even biting one another in an attempt to gain possession of the ball.[74]

Professor Finkelman recognizes that public safety is relevant to the appropriate property rule.[75] Thus, he argues that fans should not be permitted to knock the ball away from the fan who first catches it.[76] Placing the property right in the batter or the home team would go much further toward minimizing the "violence and mayhem"[77] that accompanies the

---

> The disagreement is understandable. Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used. Various courts have condemned the term as vague and meaningless.

Popov, 2002 WL 31833731, at *3-4 (footnotes omitted).

73. *Id.* at *6.

74. After examining a video tape of the event and hearing the testimony of numerous witnesses, the *Popov* court found:

> When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. . . .
>
> Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.
>
> Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. . . .
>
> The videotape clearly establishes that this was an out of control mob, engaged in violent, illegal behavior.

Id. at *1-2 (footnote omitted); *see also* Heil, *supra* note 2, at 874 ("Television highlights of [McGwire's] prior [milestone] home runs showed fans kicking and punching one another in mad scrambles for the baseball.").

> Bob Milkovich, Cubs fan who was involved in the mad chase on Waveland Avenue for Sammy Sosa's No. 62 home run baseball [said]: "Now you know how Elvis and the Beatles felt. Or the running of the bulls . . . ."
>
> . . . [P]eople fought tooth-and-nail, literally, for [the ball]. One person went to the hospital and claimed that a person bit his hand and took the ball.

Major League Log, *supra* note 70.

75. Finkelman, *supra* note 2, at 1632 (arguing that the property rule should be set so as to discourage "violence and mayhem").

76. *Id.*

77. *Id.*

typical scrum for a baseball in the stands. If fans knew that anyone who catches a valuable milestone ball would be required to return it to the home team or the batter, the level of irresponsible violence might be reduced.

C. Redistribution of Wealth

The instrumental goal of redistributing wealth strongly favors giving the superior property right to the fan who catches a milestone home run baseball. The owners of major league baseball teams are all multi-millionaires, and the batters who hit milestone home run balls are also likely to be among the wealthiest individuals. Few fans will be in the same economic bracket. Awarding the superior property right to the fan would thus serve the instrumental goal of redistributing income. Perhaps not surprisingly, this argument is often asserted by those who argue in favor of giving the fan a property right in the milestone ball.[78]

The goal of redistributing wealth, of course, has not historically been of much, if any, importance to the assignment of property rights. Despite its personal appeal to many fans, there is no realistic legal basis on which to conclude that the goal of wealth redistribution should control the assignment of property rights in milestone home run baseballs.

CONCLUSION

Whether the ordinary practice through which fans keep baseballs hit into the stands is viewed as a gift or the acquisition of abandoned property, the intent of the home team is critical. To be sure, with respect to ordinary baseballs and most milestone baseballs, the home team has intended to transfer ownership, in one way or another, to the fan who gains possession. If the home team decided not to give away or abandon the ball, there is no recognized doctrine of property law that would compel the team to do so. The law does not require consistency.[79]

Like most baseball fans, I would like to see fans keep milestone home run baseballs. While I certainly understand the batter's desire for the ball, most players who hit a milestone home run can well afford to purchase the ball from the fan who catches it. From the perspective of public relations, it may also make financial sense for major league baseball teams to adopt that approach.

---

78. *Id.* ("[I]f a player wants a ball back, he should buy it on the open market, using some of his vast salary to compensate the fan for relinquishing a treasure.").

79. For example, a 40-year practice of selling season tickets to a particular fan does not establish a right to continue purchasing tickets. Soderholm v. Chi. Nat'l League Ball Club, Inc., 587 N.E.2d 517, 520 (Ill. App. Ct. 1992) (describing a prior unreported case). A law that did compel consistency would be objectionable on the ground that it would create perverse incentives against generosity and the abandonment of property that could be put to productive use by others because of the fear that, once established, a practice could not be terminated or altered. *Cf.* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 377-78 (7th Cir. 1986) (explaining that imposing antitrust liability for withdrawing from voluntary business arrangements will discourage pro-competitive alliances for fear of liability if the firm seeks to end the alliance).

As a matter of legal theory, however, the argument that the fan who catches a milestone home run ball has property rights superior to either the batter or the home team is tenuous. Neither property law nor baseball custom offers strong support for the fan's right. A fan's contract claim is somewhat stronger, particularly where the team includes a statement on its ticket purporting to permit fans to keep balls hit into the stands. But even that theory is strained when a milestone ball is at stake.

Standard property law provides a much stronger basis to conclude that either the home team, based on acquisition and possession, or the batter, based on the doctrine of accession, have rights superior to the rights of a fan. In addition to the logic of the arguments, the instrumental goals of minimizing legal disputes and ensuring public safety—both traditional instrumental goals informing the assignment of property rights—weigh strongly on the side of concluding that the superior property right in a milestone home run baseball does not rest with the fan who catches it.

Comments


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS