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## **SOLOMON, HE AIN'T; Opinion; Baseball**

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### **Body**

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Opinion

Baseball

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AS THE ARBITER of the Barry Bonds 73d home run ball dispute, San Francisco Superior Court Judge Kevin McCarthy struck out with his decision that Alex Popov and Patrick Hayashi had to arrange, by Dec. 30, 2002, to sell the ball and split the anticipated \$1 million. Contrary to media blandishments, McCarthy is no Solomon. Indeed, neither Popov nor Hayashi has been willing to go along with his order, so the case continues to languish.

When Bonds knocked his record-breaking home run into the right field stands in October 2001, Popov urged the ball into the upper part of his glove's webbing, only to be set upon by a mob of competitors struggling to grab it away. Hayashi, felled by the same stampede, managed to spot the ball on the ground and to pocket it. Popov sued, arguing that his stopping the ball was sufficient to constitute legal possession.

McCarthy struggled with competing definitions of possession. We will never know, he reasoned, whether Popov could have succeeded in establishing complete control over the ball, if not for the illegal and violent actions of a mob. That mob needs to hear a strong message of disapproval. On the other hand, he was convinced that Hayashi--who emerged with unequivocal control of the ball-- had done nothing wrong.

McCarthy rightly rejected suggestions that the limited steps Popov took to possess the ball themselves constituted legal possession: To catch a baseball requires more than blocking its progress. Popov never had possession and thus never acquired title. On the other hand, McCarthy's sense of moral outrage led him to invent, in equity, a prepossessory interest sufficient to cloud the clear possession of the law-abiding Hayashi.

Having convinced himself that each claimant has an equally reasonable and equally incomplete argument, McCarthy turned to Roman law for a save and relied on the equitable remedy of division to resolve competing claims that are equally strong, which comports with what one instinctively feels to be fair.

This is not Solomonic. Solomon offered to divide the contested baby not because he shrugged his legal shoulders, but rather as a psychological ploy to tease out the facts. Solomon never intended to split the baby, and a modern-day Solomon should not have ordered the ownership of the baseball to be divided.

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A higher authority

Equity is meant to address gaps in the law, to be used when individual circumstances, or unclean hands of one party, prevent the law from performing the way it was designed. Neither of these considerations applied to our disputed baseball. Equity should not have been invoked.

Judge McCarthy would have been better served going to a more major-league rule book: the Talmud (ancient rabbinic writings). Jewish law, the oldest continuously practiced legal system known to man, would have provided him with far more incisive and nuanced guidance. A third century Mishna (early redaction of rabbinic law) opens with a discussion of two people, each of whom has spotted an abandoned garment. They arrive in court, each holding on to an end and claiming full ownership as the first to pick it up. Further discussion yields what one could call the laws of intractable and insoluble dilemmas.

The Talmud introduces a variety of tools. Courts can sometimes walk away from the decision process (insufficient evidence of claim on either side). They can send contested property into a judicial limbo (as a disincentive to false claims). They can, on rare occasions, summarily award contested property to an individual litigant (through extrajudicial weighing of truthfulness, as Solomon did).

They can also divide the trophy. But division is appropriate only if both parties have physical possession, either in whole or in part, directly or by proxy. There must exist at least the possibility that the division ordered by the court could match a factual scenario--both parties could have found the item at the same time, and taken legal title simultaneously, making them joint owners. Neither of these criteria obtained in the baseball case; either Popov or Hayashi is the real owner, but not both.

Possession, according to Jewish law, not the phantom of prepossessory interest, is crucial. Hayashi wound up with clear possession. Popov could trump that in Jewish law only by showing that Hayashi's possession was illegal, in that Popov had satisfied the legal requirements for possession first. Popov would have to demonstrate that, but for the interference of the crowd, the ball would have completely and fully lodged in his mitt. (This but for standard for legal possession is assumed by another third century Mishna, and falls halfway between the poles of absolute, complete control and that of partial control, both offered by the competing legal lights that McCarthy consulted.) Because Popov could, or can, do nothing of the sort, Hayashi's claim should prevail.

Jewish law insists on at least a stab at fairness. The court is instructed to attempt to coax the litigants to arrive at a solution through compromise, for the sake of communal peace and tranquility. But if the parties wish to know what the law says, they--and society--should be able to hear it, loudly and clearly. Let the law pierce the mountain, says the Talmud. Neither compromise nor equity should substitute for the rule of law.

Barry Bonds' home run generated a judge's dilemma, somewhat akin to a fielder who cannot decide whether to throw to first or second. Throwing it halfway between the bases is not an option.

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