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# REVIEW ESSAY

## LAW, SPORTS, AND POPULAR CULTURE: THE MARRIAGE OF A RELATIONSHIP SCORNED

RICHARD P. COLE\*

REVIEW OF PAUL WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* (2000)

### INTRODUCTION

Professional sports have become central artifacts of American popular culture. In American popular culture, sports are sometimes even associated with religion.<sup>1</sup> Paradoxically, in spite of the

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\* Professor of Law, Western New England College School of Law. I wish to thank Dean Arthur Gaudio, Professor James Gordon, *Western New England Law Review* staff members Paul Leoni and Crescent Moran for the help they gave me in writing and completing this review essay. I also wish to thank Professor Bruce Miller for reading a draft of the essay.

1. An example of this association with religion is the statement made by Susan Sarandon's character in the film *Bull Durham*: "I believe in the *church* of Baseball!" PAUL WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 170 (2000). Weiler believes that

sports fans have traditionally viewed their favorite sports as a crucial part of the American culture, more akin to religion than to business. A game like baseball is felt to be much more a part of American heritage than the fine arts, and who wins the Super Bowl [is] far more important than who wins the Oscars.

*Id.* at 104.

Weiler also cites Justice Blackmun's opinion in *Curt Flood*'s classic attack upon baseball's reserve clause: "Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage." *Id.* at 170 (quoting *Flood v. Kuhn*, 407 U.S. 258, 266 (1972)). Rather than focusing upon "commercial and profit considerations," baseball exists "on higher ground; it behooves everyone to keep it there." *Id.*

The importance of sports in American popular culture was again demonstrated by the reaction to the terrorist attacks of September 11, 2001. Many stated that sports appeared trivial after these events. True enough. Nevertheless, a large amount of time was devoted to discussing and deciding whether or not to postpone upcoming sports events.

stature professional sports enjoy in American culture and their enormous rise in popularity in recent decades, sports fans have become increasingly alienated. This alienation stems from a number of sources: labor disputes;<sup>2</sup> free agency, and the seemingly endless movement of players; rich players, who sometimes engage in unpopular behavior; and owners who request public financing of expensive new stadiums while threatening to move their franchises.<sup>3</sup>

From the perspective of popular culture, most of the maladies of contemporary professional sports can be traced to two much-maligned foundations of modern American life. The first is the increasing commercialization of sports, as represented by the billions of dollars made annually by owners of sports franchises, players, their agents, and various marketers of sports property.<sup>4</sup> The second, which is the particular concern of this essay, is the interweaving of various strands of law into the everyday fabric of sports. These strands of law include the private lawmaking by sports leagues and their commissioners, and, increasingly, the decisions of arbitration tribunals, provided for by the collective bargaining agreements between players and team owners. More and more, however, legal issues related to sports are being taken to courts or legislatures for resolution. In whatever forum law is applied to sports, lawyers are almost always involved.<sup>5</sup> Perhaps this is why three of the four commissioners of major professional leagues in America are lawyers.<sup>6</sup> However, it is not the lawyer-executive, but the hardened lawyer-agent negotiating a huge contract for his professional athlete-client, who epitomizes the sordid intrusion of commercial greed and law into sports.<sup>7</sup>

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2. *Id.* at 103. During the 1990's, each of the major sports leagues was "rocked by a big labor dispute . . . resulting in a stoppage of play, a lawsuit, or a combination of the two, and we are quite sure there will be numerous replays in the coming decade." *Id.*

3. See discussion *infra* Parts I, II, III.

4. Sprinkled throughout the book are statistics on the amazing rise in revenues and salaries of the major professional sports leagues and their players during the past generation. Weiler observes that fans feel quite upset by "money battles" and their impact upon the playing of professional sports. This animosity is in contrast to the feelings of moviegoers, who rarely question the unprecedented receipts of popular movies. *Id.* at 103.

5. Weiler observes that American fans rarely open the sports section of the newspaper or turn on the sports news without reading or hearing about a lawsuit. Sports is one of the two industries that are most inundated with lawyers and lawsuits; the other is entertainment. *Id.* at 1.

6. They are Paul Tagliabue of the National Football League, David Stern of the National Basketball Association, and Gary Bettman of the National Hockey League.

7. Weiler observes that Americans have "a love-hate relationship with lawyers,"

In popular culture, the infiltration of law into the interstices of sports seems ironic from several perspectives. One, of course, is popular culture's association of sports with religion. The other is the view of sports as a last frontier in contemporary society for gargantuan heroes, who operate above the constraints that civilization imposes upon the lives of ordinary people.

The most fundamental theme of *Leveling the Playing Field: How the Law Can Make Sports Better for Fans*, is that, as much as popular culture may disdain law, legal regulation of many facets of the sports industry is unavoidably necessary if it is to remain a vibrantly growing enterprise pleasing to fans. Indeed, the book itself represents the intrusion of another lawyer into the domain of sports. Unlike the sordid sports lawyer in popular culture, the stance of Harvard Law School Professor Paul Weiler in this book is similar to that of the disinterested political leader envisioned by James Madison in No. 10 of *The Federalist Papers*.<sup>8</sup> That is, he tries to stand above, and thoughtfully and impartially arbitrate, the conflicting interests of the various constituencies of the modern sports industry. Weiler's proposals are invariably supported by a concise synthesis of a wealth of empirical data. This data includes wonderful overviews of historical developments in professional sports since their origin, which, in the case of baseball, dates back to the late nineteenth century.<sup>9</sup> One who reads *Leveling the Playing Field*, then, is rewarded with exposure to both a remarkable array of information about professional sports, as well as thought-provoking proposals for its reform.

*Leveling the Playing Field* is the product of twenty years of thinking about the problems in sports by an eminent authority on sports law. Part I of this review looks at the relationship between professional athletes and fans. Part II examines the relationship between team owners and their players. Part III considers the relationships among owners, and also between owners and fans of their respective teams. Each of these sets of relationships has engendered friction during the past generation. The purpose of the present essay is to acquaint the reader with Weiler's major proposals for making sports better for fans and to suggest that the scorned

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as "Sir Galahads who fight for justice, but also as deceitful schemers." WEILER, *supra* note 1, at 1-2.

8. THE FEDERALIST NO. 10 (James Madison).

9. WEILER, *supra* note 1, at 120-23 (concerning the history of baseball).

relationship between law and sports seems to have become a permanent marriage.

### I. PLAYERS AND FANS: THE MORAL REGULATION OF ATHLETES

Major professional sports leagues—baseball, football, basketball, and hockey—all have commissioners. They are vested with the authority to act in the best interest of their leagues. In exercising this authority, they mete out discipline to players whom they believe to have engaged in conduct harmful to their sports.<sup>10</sup> As we enter the new millennium, evidence exists indicating that the scope of discipline exercised by the commissioners of professional leagues over players is expanding.<sup>11</sup> As an enterprise, professional sports leagues are unique in possessing such regulatory authority over their employees. Since professional sports are a form of entertainment, it is notable that the artistic entertainment industry has no comparable authority. Thus, an important question to consider is: What rationales might justify vesting the commissioners of professional sports leagues with such disciplinary authority over their employees? There are two recurring rationales offered to distinguish professional athletes from entertainers and to justify the discipline applied to athletes: the integrity of competition rationale and the role model rationale.

The integrity of competition rationale begins with the premise that “the true essence of sports is athletic competition, a fierce struggle by players and teams pushing each other to new heights.”<sup>12</sup> But there is a paradox. For the fierce competition of professional sports to create an entertaining product, the teams in a sports league must engage in a cooperative venture. As a joint venture, everyone involved in professional sports has a stake in the integrity of the competitors. To assure the integrity of competition, in turn, requires that the leagues have a disciplinary authority over all players. Yet another reason for disciplining players, related to the integrity of competition rationale, is to present to the public a safe

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10. *See id.* at 9-15.

11. Evidence of this expansion is shown in how Major League Baseball defines the power of its commissioner to act in its best interest: “[N]othing in this Section 4 shall limit the Commissioner’s authority to act on any matter that involves the integrity of, or public confidence in, the national game of Baseball.” PAUL WEILER & GARY ROBERTS, STATUTORY AND DOCUMENTARY SUPPLEMENT TO SPORTS AND THE LAW 32 (2d ed. 1998).

12. WEILER, *supra* note 1, at 2.

and orderly athletic contest.<sup>13</sup>

A second basis for the disciplinary authority of league commissioners is related to a major distinction between professional athletes and artistic entertainers. Unlike the artist, the athlete is supposed to act as a role model for the public.<sup>14</sup> The connecting link between these two rationales for discipline is to assure that athletic contests are “challenging to players and attractive to spectators.”<sup>15</sup>

Examples of the exercise of discipline upon athletes based upon each of these rationales abound. Perhaps the quintessential example of discipline to preserve fair competition is the limitations upon the use of performance-enhancing drugs by athletes. Athletes who consume these drugs gain an unfair advantage over competitors. Nevertheless, to allow players room to enhance their abilities and performances, some allegedly performance-enhancing substances remain unregulated by some, or all, professional sports leagues.<sup>16</sup>

Another example of the influence of the fair competition rationale is the resistance of the Professional Golfers Association (hereinafter PGA) to the petition of Casey Martin for the right to ride a golf cart while he competes in PGA events.<sup>17</sup> Martin has a degenerative circulatory disorder that makes it painful and difficult to walk.<sup>18</sup> Nevertheless, the PGA has maintained that to allow Martin to ride a cart would confer upon him an unfair advantage over his competitors, who suffer fatigue over time from walking and, therefore, become less effective golfers.<sup>19</sup>

Further, to assure a reasonably safe and orderly athletic con-

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13. *See id.*

14. *See generally id.* at 73-103 (discussing how athletes are viewed as role models).

15. *Id.* at 2.

16. For example, as yet, no league bans the use of creatine, an amino acid that purports to build muscle power. The National Football League prohibits its players from using andro, a testosterone-producing substance; however, Major League Baseball is waiting for further testing before deciding whether or not to regulate its use. *Id.* at 74, 76. It remains unclear how different sports leagues draw the boundary line between legal and illegal substances that enhance athletic performance.

17. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879 (2001).

18. *Id.* at 1885.

19. *Id.* at 1886; *see also* WEILER, *supra* note 1, at 27-30. Advocates of the walking-only rule often cite Ken Venturi's victory in the U.S. Open in 1964. On a hot and oppressive day, the ill Venturi risked possible death to complete a 36-hole final round of that tournament. WEILER, *supra* note 1, at 29 (noting Arnold Palmer's comment that the “walking rule” was essential to “inject the element of fatigue into the skill of shot-making”).

test, professional sports leagues punish what are considered to be excessive acts of violence within the context of their sports. Examples of these include bean ball battles in baseball, flagrant fouls in basketball, prohibited uses of the hockey stick, and fighting among players and with fans.<sup>20</sup>

The most important, and controversial, basis for disciplining players in contemporary professional sports is the role model rationale.<sup>21</sup> For example, when professional leagues discipline athletes who use recreational drugs, they appear to be punishing those athletes for failing to be good role models. Unlike performance-enhancing drugs, the use of recreational drugs over time normally erodes a player's physical skills.<sup>22</sup> The influence of the role model rationale can also be seen in the disciplining of athletes who engage in violent acts outside of athletic contests, such as the physical abuse of women.<sup>23</sup> Since the abuse of women does not affect the fairness of an athletic contest, leagues that punish athletes for committing such acts must be basing their discipline upon a role model rationale.<sup>24</sup>

Finally, there are examples of the use of discipline that can claim justification in both the integrity of competition and role model rationales. Punishment of athletes who agree to throw games for pay from gamblers is one such example.<sup>25</sup> Morally reprehensible athletes commit this action, making a sham of the competitive contest. A bright side of the commercialization of modern sports is that players are now so well paid that they are unlikely to conspire with gamblers to throw games or shave points.<sup>26</sup> Nevertheless, allegations continue to surface that some professional athletes gamble. If players bet on their own games, the integrity of competition may be undermined, since they may provide gamblers with inside knowledge about their teams.<sup>27</sup> Discipline of athletes who gamble on competition outside of their own sports, however,

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20. WEILER, *supra* note 1, at 13-14.

21. *Id.* at 87-89. During the 1977 National Basketball Association finals, a fight broke out between players of the Philadelphia 76ers and the Portland Trailblazers. One player, Julius Erving, walked to another section of the court and sat quietly until the referees restored order—an outstanding example of a sports figure acting as a good role model.

22. *Id.* at 95-96.

23. *Id.* at 90-95.

24. *See id.* at 94-95 (discussing the National Football League commissioner's change in attitude in 1998 toward players' misconduct off the field).

25. *See WEILER, supra* note 1, at 31-55, for a discussion of sports gambling.

26. *Id.* at 51.

27. *Id.* at 54.

can only be justified from the perspective of the role model rationale.<sup>28</sup>

Disciplining professional athletes to assure fair competition seems to be a self-evident proposition. The perception of athletes as role models, however, is not. Some professional athletes, such as outspoken retired basketball star Charles Barkley, have rebelled at being cast as role models at all.<sup>29</sup> In contrast, the public expects today's sports figures to act as role models. Can this expectation for professional athletes, but not artistic entertainers, be justified? Weiler thinks so. He argues that while the public may identify with the roles actors play, they identify directly with sports stars as "real people."<sup>30</sup> This is especially true for children. The famous athlete who takes drugs is more likely to lead children off the straight and narrow path than the artistic entertainer.<sup>31</sup> While this distinction places a special burden upon athletes, it creates a payoff for them. Athletes, not actors, usually receive lucrative advertising contracts.<sup>32</sup> Further, the unique joint venture characteristic of professional sports also requires that players act as role models.<sup>33</sup> Professional sports benefit from every player having a clean image.<sup>34</sup> Finally, viewing the professional athlete as a role model seems once again to suggest the association of sports and religion in the popular American mind.<sup>35</sup>

If Weiler persuasively argues for the professional athlete as a unique role model in American culture, important questions remain concerning the permissible scope of law in the punishment of fallen athletes. These issues can be identified if we reconsider the athlete's proclivity to engage in acts of violence. When violent acts occur on the playing field, athletes are clearly subject to league discipline.<sup>36</sup> Conversely, when athletes engage in acts of violence

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28. *See id.* at 53-54 (suggesting that the real problem with athletes gambling lies in the criminal element associated with illegal gambling).

29. "In a Nike ad [Barkley stated:] 'I'm *not* a role model. I am paid to wreak havoc on the basketball court, not to raise someone else's kids.'" *Id.* at 89.

30. *Id.*

31. *See id.* (discussing the differences between sports figures and actors).

32. *See id.*

33. *Id.* at 90.

34. *Id.* at 87-90.

35. Churches sometimes discipline clergy who violate their rules. *See, e.g.,* LEFFERTS A. LOETSCHER, *THE BROADENING CHURCH: A STUDY OF THEOLOGICAL ISSUES OF THE PRESBYTERIAN CHURCH SINCE 1869*, at 48-62 (1954) (relating the case of Professor Charles A. Briggs, a Presbyterian theologian who was prosecuted for heresy by his own church for challenging Presbyterian ideologies).

36. WEILER, *supra* note 1, at 9-16.

outside of the field of play, as with violence against women, state law clearly applies. Should a professional league discipline one of its athletes for such acts? How far should league discipline extend for morally questionable activities having no impact upon athletes' on-field performance?

The issue of disciplining professional athletes could be the basis for an entire law review article. A libertarian would argue, based upon expansive notions of individual liberty and privacy rights, that off-field activities of athletes should be left solely to state law to resolve. Weiler does not address this position, presumably because it necessarily circumscribes his view of sports figures as special role models in American society. To illustrate Weiler's position on the thorny issue of the scope of the discipline that professional sports exercises over its players, it is helpful to compare and contrast his views concerning the use of recreational drugs by athletes, which professional leagues have routinely punished, with off-field acts of violence, which professional leagues have largely ignored.<sup>37</sup> Weiler distinguishes these two cases in the following way. He believes that sports leagues should punish players who commit acts of violence against women at least to the extent they punish those who consume recreational drugs.<sup>38</sup> To Weiler, the critical distinction between these two cases is that athletes who use recreational drugs typically inflict harm only upon themselves, while those who commit violent acts harm others.<sup>39</sup> Thus, Weiler views violence upon women as a greater threat to American society than the use of recreational drugs and, therefore, favors league discipline of such players whether or not they are prosecuted for a crime by the state.<sup>40</sup>

Another difficult question is how severely professional leagues should discipline athletes for making offensive statements in interviews or for objectionable artistic expression. Such cases present league commissioners with hard choices, such as whether to uphold free speech or to try to protect the public image of the league. Weiler recognizes that a "principled" exercise of disciplinary powers relative to the off-field activities of professional athletes is very dif-

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37. *Id.* at 92.

38. *Id.* at 90-95.

39. *Id.* at 94.

40. *Id.* at 92 ("From any fair-minded perspective, athletes' assaults on women are a far greater source of personal and social harm than their use of cocaine, let alone marijuana.").

ficult and requires restraint.<sup>41</sup> He believes that, so far, the combination of collective bargaining, the availability of arbitration, and the good sense of the current commissioners of the professional sports leagues, has generally resulted in reasoned exercises of discipline of players who fail to act as good role models.<sup>42</sup> Will this continue to be the case in the future with different professional league commissioners? It is unlikely, unless some guidelines for such cases are established.<sup>43</sup>

One final issue of the appropriate spheres of league discipline and state law needs to be addressed. Should state law ever circumscribe the exercise of discipline by leagues, sports federations, or teams, upon their players? A salient example of such an issue is the controversy engendered by the request of Casey Martin, because of his severe physical disability, to be allowed to ride a golf cart while playing in PGA tournaments.<sup>44</sup> Recall that the PGA had resisted Martin's request, based upon the view that golf is a game of stamina and that riding a cart would confer a competitive advantage upon him.<sup>45</sup> Martin claimed that to prohibit him from competing because he must ride a cart would violate his civil rights under the Americans with Disabilities Act.<sup>46</sup> Though Weiler recognizes that the PGA's position has validity in some circumstances, he ultimately sides with Martin. State law should force the PGA to allow Martin to ride a cart.<sup>47</sup> Yet, Weiler does not always support state limitations upon league autonomy.<sup>48</sup> For example, in light of concerns regarding HIV, he generally eschews state interference with a league's regulation of players who bleed during an athletic

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41. *Id.* at 97-98.

42. *See id.* at 69-71 (discussing the restrained exercise of broad disciplinary powers regarding the use of recreational drugs by both National Football League Commissioner Paul Tagliabue and National Basketball Association Commissioner David Stern).

43. One factor that has emerged recently that limits the exercise of league discipline of players is collective bargaining agreements. A number of them now provide mechanisms, like arbitration, for the review and resolution of such cases. *See, e.g., id.* at 65-70 (discussing the effect of collective bargaining agreements on the enforcement of professional league drug policies).

44. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879 (2001).

45. *Id.* at 1886-87; *see supra* notes 17-19 and accompanying text.

46. *Id.*

47. *WEILER, supra* note 1, at 28-30. In fact, the United States Supreme Court, in a 7-2 decision, recently upheld Martin's petition to force the PGA to allow him to ride a cart. *Martin*, 121 S. Ct. at 1897. Critical to its decision was the view that walking was not fundamental to the game of golf, and that the nature of Martin's infirmity was such that he gained no competitive advantage by riding a cart. *Id.*

48. *WEILER, supra* note 1, at 24-27.

contest.<sup>49</sup>

There are some gaps in Weiler's coverage of player discipline issues. For example, it would be helpful to readers if Weiler explained further why he distinguishes the bleeding professional athlete case from that of Casey Martin. A bigger gap is that, though Weiler recognizes that a number of bodies of law regulate contemporary sports, the book does not at any point discuss what body, or bodies, of law would best regulate the activities of professional athletes (and if it is several bodies of law, exactly how these might mesh together). One could build upon this oversight to argue that Weiler is a visionary who pays insufficient attention to important practical issues. However, a reading of Weiler's generally careful analysis of the problems of sports suggests that this would be an unfair criticism of his general methodology. Whatever his omissions, Weiler has made his basic point. Clearly, the law plays an important role in defining the relationship of professional sports figures and their fans.

## II. OWNERS AND PLAYERS: FREE AGENCY

The watershed event in the history of the relationship of professional athletes and club owners was the destruction of the reserve clause that limited athletes to playing for one team.<sup>50</sup> This momentous change, and the rise of free agency, was the result of legal advocacy that drew upon contract, labor, and antitrust law.<sup>51</sup> While, in all professional sports, young athletes remain bound to one team for a period,<sup>52</sup> professional athletes have achieved at last a large measure of economic freedom.

In popular culture free agency is grudgingly accepted, but it is also blamed for many of the perceived ills of modern professional sports. Free agency unleashed lawyer-agents to extract huge increases in the salaries of star athletes.<sup>53</sup> Over the past generation the rate of increase in the compensation of the professional athlete

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49. *Id.*

50. See *id.* at 120-25, 135-40, for a discussion of the rise and fall of the reserve clause in professional sports.

51. *Id.* at 118-69.

52. In all of the major professional leagues, teams still obtain most of their young players by drafting them. Once it drafts players, the team holds the exclusive right to their services for a number of years, a period that varies from league to league. Finally, after a period of exclusive service for a team, the player attains free agency. See *id.* at 205-08, for a discussion of the rookie draft systems in various leagues.

53. *Id.* at 103-17.

has far outdistanced that of the ordinary American.<sup>54</sup> Predictably, the players' search for the highest possible paycheck has encountered the resistance of owners, and engendered labor strife that has included strikes and lockouts.<sup>55</sup> At the conclusion of these labor-management confrontations, fans are invariably burdened with increasingly steep prices to attend games and to view them on cable television.<sup>56</sup> The perception in popular culture, then, is that much of what is taking place in professional sports is an unsavory fight over money, with the public as its victim.<sup>57</sup>

In addition, contemporary players seem to constantly change teams. In the view of loyal fans, such movement has undermined the "good old times" of stable professional sports teams with favorite players to whom the fans gave undying support.<sup>58</sup> Player movement also raises the fear that a competitive imbalance will result in an entertainment product that is frustrating or boring for many fans.<sup>59</sup> This already seems to be coming to fruition in baseball, in which small market teams lack any chance of winning a World Series,<sup>60</sup> while the New York Yankees have won three of the last four.<sup>61</sup>

Weiler addresses these popular concerns about the effects of free agency.<sup>62</sup> True, players' salaries have risen dramatically over the past generation, but so have both the revenues and values of sports franchises.<sup>63</sup> Furthermore, free agency has contributed to a fairer distribution of revenues between players and owners.<sup>64</sup> It has not been primarily free agency, but rather ordinary forces of supply

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54. For example, in 1947, the average baseball player earned \$11,000 a year, about four times the average American worker. *Id.* at 119. In 1967, the baseball player earned \$19,000, about three and a half times the income of the average worker. *Id.* Still, in the mid-1970s the average pay of the baseball player was about four times that of the average worker. *Id.* During the last quarter of the twentieth century, however, the relationship between the income of the baseball player and the average worker dramatically changed. While the real hourly pay of millions of Americans declined in relative value, the average salary of major league baseball players rose to \$1.57 million, or fifty-six times the income of the average worker. *Id.*

55. *Id.* at 103, 114.

56. *Id.* at 104, 172.

57. *Id.* at 103-04.

58. *Id.* at 175.

59. *Id.* at 177-78.

60. *Id.* at 182-83.

61. *Id.* at 223.

62. *Id.* at 170-97.

63. *Id.* at 178.

64. In baseball, for example, the players' share of revenues has risen from under 20% in 1967 to over 60% in 1999. *Id.* at 178-79, 198.

and demand, that are at the root of higher ticket prices.<sup>65</sup> According to Weiler, free agency has not accelerated the rate of movement of players from team to team.<sup>66</sup> Additionally, some player movement has actually increased the quality of the product presented to fans.<sup>67</sup> Weiler argues that, in its overall impact, free agency has probably contributed to, rather than undermined, the competitive balance of professional sports.<sup>68</sup> Weiler concludes that everyone involved in professional sports, not just rich players, has greatly benefited from free agency.<sup>69</sup>

Weiler's conclusion, however, does not lead him to embrace the Major League Baseball Players Association's position that sports should adopt an entirely unregulated regime of free market bargaining for the relationship of players and owners.<sup>70</sup> He provides a number of reasons for his rejection of that position. First is that baseball, which since its 1994 collective bargaining agreement failed to impose any meaningful restraint upon players' salaries, seems to be evincing some of the competitive imbalance that critics

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65. *Id.* at 174. The cost of a ticket to the Oscar-winning movie *TITANIC* remained low because the public continued to have many other movie options, with an unlimited number of potential showings. *Id.* In contrast, professional sports teams have only a finite number of available tickets. *Id.* For example, ticket prices are especially high in Boston because Fenway Park has the smallest seating capacity among baseball stadiums in the major leagues. *Id.* Further, sports leagues create monopolies within their home territories. *Id.*; see *id.* at 334-40 for a discussion of the monopoly status of sports.

66. *Id.* at 174. Between 1951 and 1976 an average of 4.7 players per team were transferred from one club to another each year. *Id.* at 176. In the eighteen years after free agency was established in baseball in 1976, the average player movement declined slightly to 4.6 per year. *Id.* Some of the player movement comes from the increasing phenomenon of the geographic relocation of franchises. *Id.* at 176-77.

67. *Id.* at 181. ("As a matter of general market principle, free movement of talent from one firm to another is likely to enhance the quality of the overall product offered to consumers.").

68. *Id.* at 182-83. For example, prior to the mid-1960's, professional baseball was dominated primarily by the New York Yankees and secondarily by the Dodgers and Giants. During the next decade smaller market teams became more dominant—the Cincinnati Reds, Oakland Athletics, and Baltimore Orioles. Then, during the two decades after free agency became established in 1976, fifteen different baseball teams won the World Series. *Id.*

69. *Id.* at 185.

The clear lesson from baseball experience, then, is that if we must choose between the traditional reserve system and unrestricted free agency, the latter is a far better instrument for improving sports welfare—whether viewed as allocative efficiency in enhancing the quality of the game for fans or distributional equality in sharing gains between owners and players.

*Id.*

70. *Id.* at 186 ("Still, the fact that full free agency makes a sport better than it was with *no* free agency does not necessarily mean that unrestrained free agency is the best regime for professional sports.").

of free agency fear.<sup>71</sup> Next, he argues that unlike the artistic entertainment industry, in sports the winner takes the greater share of the market.<sup>72</sup> For example, a movie studio is generally satisfied with having one star in its movie to attract an audience.<sup>73</sup> In contrast, a sports team with a star has one great incentive to lure other stars to the team.<sup>74</sup> Even Michael Jordan did not win any championships without Scottie Pippen. But this “spending frenzy” on the part of some teams “tends to send other teams in the opposite direction.”<sup>75</sup> If an owner knows that he cannot acquire enough talent to win a championship, “[t]he rational economic strategy is not simply to refrain from bidding for free agent players but also to dispose of his own best and highest-paid talent.”<sup>76</sup> Though such “downsizing” will hurt a team’s record on the field, it does not necessarily hurt the team’s bottom line.<sup>77</sup> But the obvious result of such rational conduct is a less competitive sports product, creating the professional sports version of the “tragedy of the commons.”<sup>78</sup>

Weiler adds another reason for distinguishing sports from other American businesses in which owners and employees enjoy greater freedom to bargain over wages—the “public goods” dimension to the sports market.<sup>79</sup> By this, Weiler seems to refer again to the joint venture nature of sports.<sup>80</sup> That is, while professional sports teams engage in fierce competition with one another, they present a single product whose appeal to the public ultimately rests upon the synergistic interaction of all of the teams in a league.<sup>81</sup>

Consequently, Weiler stands between those who criticize free agency and those who advocate for an unregulated regime of free market bargaining.<sup>82</sup> He does not support any of the salary caps that presently exist in professional sports.<sup>83</sup> Nevertheless, for Wei-

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71. *Id.* The 1960 Pittsburgh Pirates beat a talented Milwaukee Braves team for the National League pennant. It then defeated the New York Yankees on a ninth-inning home run in the seventh game of the World Series. It now seems impossible for a team with the Pirates’ payroll to win a World Series.

72. *Id.* at 186-87.

73. *Id.* at 187.

74. *Id.*

75. *Id.* at 188.

76. *Id.*

77. *Id.* (discussing the effects of sports “downsizing”).

78. *Id.* at 189.

79. *Id.*

80. *Id.*

81. *See id.*

82. *Id.* at 186, 190-97.

83. *Id.* at 190. It would be too complicated to recap Weiler’s excellent description

ler there remain distributional problems with free agency, specifically with the total amount of money that teams spend on players' salaries, and the distribution of salary money among players.<sup>84</sup> He therefore proposes the adoption of league-wide payroll standards that would bring a greater degree of equality both to the players' compensation and to the total amount of money that each team in a league spends on players' salaries.<sup>85</sup>

The most important step that some professional sports leagues have taken to encourage a greater equality of spending on salaries by teams is revenue sharing.<sup>86</sup> Weiler argues, however, that revenue sharing is not effective in achieving this goal.<sup>87</sup> Instead, Weiler proposes a "meaningfully graduated salary tax" to encourage clubs to spend roughly equivalent total amounts on player salaries.<sup>88</sup> In contrast to baseball's present salary tax, which places a weak tax upon the five clubs that have the highest salary payrolls, Weiler's approach would have leagues establish a designated total annual payroll figure for all of its teams.<sup>89</sup> Any team that spent either above or below that figure for player salaries would be taxed at an agreed rate of taxation.<sup>90</sup>

Weiler believes that in contemporary professional sports there are also several problems of maldistribution of the wealth among professional athletes.<sup>91</sup> One is that stars receive much higher salaries than do other players. The other problem is that veteran players, relative to the value of the contributions they make to their teams, receive much more money than do players early in their pro-

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of the extant salary cap and salary tax systems in the major professional sports. Weiler believes that the term cap is often a misnomer for what is really revenue/salary sharing by teams in a league.

84. See generally *id.* at 198-219 (discussing the problems with the current salary distribution among professional athletes).

85. *Id.* at 189 (discussing how a "win-win approach would make the game better for fans, and consequently more rewarding for owners and players").

86. *Id.* at 190.

87. *Id.* at 196. The Montreal Expos' share of major league baseball revenues for television and merchandising was \$15 million in 1998. *Id.* Yet the team's total payroll remained just \$8 million. *Id.* In essence, the Expos pocketed some of its own, admittedly low, revenues, as well as some of its shared revenues, giving the team's owners a much higher return on their investment than the owners of some clubs who were more successful on the field. *Id.*

88. *Id.* at 193-94 (discussing the benefits to sports leagues of a well-designed tax system).

89. *Id.* at 190-92.

90. *Id.* at 193-96.

91. *Id.* at 199.

fessional careers.<sup>92</sup> Incidentally, these high salaries encourage teams to cut useful veteran players. This disproportionate pay scale is exaggerated by the fact that the careers of professional athletes are fragile and often so short that they fail to attain veteran status and its salary benefits.<sup>93</sup> There are a number of ways the problem of under-compensating young athletes could be addressed, including the abolition of the player draft.<sup>94</sup> Weiler rejects such proposals and takes a more moderate approach akin to that established by the most recent collective bargaining agreement of the National Basketball Association in 1998.<sup>95</sup> It limits players who become free agents after their fourth year to 25% of the team payroll cap figure during their fifth and sixth years; 30% from their seventh to ninth years; and 35% in their tenth and later years.<sup>96</sup> It also includes a minimum salary range from slightly under \$300,000 in the first year to \$1,000,000 in the tenth year.<sup>97</sup>

Weiler believes that the adoption of proposals such as the National Basketball Association's 1998 collective bargaining agreement would help fans by contributing to greater competitive balance in sports.<sup>98</sup> Such action would, for example, discourage future owners from fire sales like the one engaged in by former Florida Marlins owner Wayne Huizenga after the Marlins won the

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92. Major League Baseball provides a prime example of these problems. Successful collective action by the Major League Baseball Players Association has raised the players' share of revenues from under 20% in 1967 to over 60% in 1999. *Id.* at 198. But it has "also dramatically exacerbated the inequality in distribution of their share—particularly for the new and the journeyman players." *Id.* The salaries of star players are between fifty-five and seventy-five times higher than those of backup players, and ten to fifteen times higher than those of other regular players. *Id.* at 214. The minimum starting salary for a rookie in the major leagues is eight times less than the overall average salary, and a much smaller fraction of the pay received by a league veteran. *Id.* at 207. It has been calculated that during their first three years baseball players earn about 20% of their market revenue productivity, while players who are eligible for free agency earn 135% of theirs. *Id.*

93. *Id.*

94. *See id.* at 200.

95. *See generally id.* at 198-219.

96. *Id.* at 213.

97. *Id.* Weiler also likes that the National Basketball Association has agreed to pick up much of the additional salary that the veteran makes over the rookie, so that teams will make their decisions on which players to retain largely based upon their value, not upon their paycheck. *Id.* But he would like the system to be more graduated, with, for example, a \$50,000 increase in the pay minimum for each year of service. *Id.* at 217. Also, he would like any limits upon the top players' pay to be set on net after-tax pay, so that teams in no-tax states do not gain an advantage in obtaining free agents. *Id.* at 213.

98. *Id.* at 218-19.

World Series in 1997.<sup>99</sup> Weiler also argues that the more equitable distribution of pay among players is simply fairer when it is based upon the contributions that players make to their teams. In this regard sports could act as a “role model” for America’s broader political economy to narrow its massive pay gap.<sup>100</sup>

With professional sports entering a new millennium, are Weiler’s proposals for restructuring the relations between players and owners persuasive? Certainly a return to the old days of the reserve clause is unthinkable—even critics of free agency admit that it constituted a form of peonage that violated basic tenets of personal liberty.<sup>101</sup> It is more difficult to determine whether Weiler’s approach is preferable to unregulated free agency. Critical to shaping one’s view concerning Weiler’s approach is determining free agency’s impact on the competitive balance in contemporary sports.<sup>102</sup>

### III. OWNERS AND FANS: THE FINANCING OF NEW STADIUMS

For Weiler, the critical fact in the relationships among owners of sports teams and also of the owners’ relationships with fans, is that “every major league is a monopoly in its own sport.”<sup>103</sup> This monopolistic quality is a major reason why the value of sports

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99. *Id.* at 117 (stating that, as the existing contracts of his players expired, and the possibility that they would ask for higher salaries increased, Huizenga traded away players for young, inexpensive prospects).

100. *Id.* at 218. Weiler concludes that a star hitting .325, even with more home runs and runs batted in, instead of .275, does not warrant a salary twenty times higher than his more ordinary teammate. *Id.* at 214.

101. *Id.* at 146-49.

102. It seems logical to find a causal link between free agency and competitive imbalance in professional sports. The New York Yankees, with baseball’s highest payroll, have won three of the last four World Series. Weiler believes that competitive imbalance has been a particular problem in professional basketball. But what about the Seattle Mariners of 2001? Having been forced to trade three major stars—Randy Johnson, Ken Griffey, Jr., and Alex Rodriguez—because of their impending free agency, the Mariners have nevertheless emerged from the ashes to become the team with the most wins in the major leagues this year. They fell one game short of setting an all-time record for wins by a team in one season. Weiler believes that the competitive imbalance is greater in the National Basketball Association than in Major League Baseball. *Id.* at 192. Since the rise of free agency, more teams have won National Basketball Association championships than in the preceding era, which had been dominated by the Boston Celtics. *Id.* Because of salary cap restraints, movement by free agents is less frequent in basketball than in baseball. *Id.* at 193. Yet for the 1995-1999 seasons the winning percentage of the top three basketball teams was 400% better than that of the bottom three teams. *Id.* at 192.

103. *Id.* at 335.

franchises has risen for the past several decades.<sup>104</sup> This quality also impacts almost every interaction between sports franchises and fans.<sup>105</sup> This section will focus on the one effect that Weiler believes represents the greatest threat that professional sports poses to American society—the monopoly of sports franchises.<sup>106</sup> To attract or retain sports franchises, which are in short supply, many cities have been willing to fund the construction of expensive new stadiums.<sup>107</sup> It is taxpayers, then, who often pay for facilities that generate large profits for professional sports teams, consequently enhancing the value of these teams.<sup>108</sup> Weiler concludes that stadium subsidies are “the biggest social problem we have encountered in this book.”<sup>109</sup>

Sports law has developed in a way that maximizes the pressure that teams can exert upon cities to get public funding for their stadiums. Based upon the cases that allowed the Oakland Raiders to move to Los Angeles, despite opposition by the National Football League, professional leagues are now reluctant to try to restrain franchise moves.<sup>110</sup> Further, the only court to face the issue of whether it is a violation of antitrust law for a league to deny an application for a new franchise held that it was not.<sup>111</sup> The law, therefore, allows a team to threaten a city with leaving without giving the city a viable option of forming its own new team, or the option of getting an expansion team to replace the departing one.<sup>112</sup> By the 1990s, the cumulative effect of this law was to foster what Weiler calls “franchise free agency.”<sup>113</sup> The choice that this law effectively presents to cities is a “Prisoner’s Dilemma”—provide huge public financing for a new stadium or lose your professional sports team.<sup>114</sup>

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104. *Id.*

105. *See id.* at 336.

106. *Id.*

107. *Id.* at 337.

108. *Id.*

109. *Id.*; *see also id.* at 240-41 (listing the costs of new sports stadiums over a number of decades).

110. *Id.* at 246-51.

111. *Mid-South Grizzlies v. Nat’l Football League*, 720 F.2d 772, 785 (3d Cir. 1983). The plaintiff-team was located in Nashville, Tennessee, which at that time was nearly 300 miles away from any other NFL team. *Id.* at 776. The court specifically noted that had the plaintiff been operating within the territory of an existing National Football League team, the court might have altered its decision. *Id.* at 787.

112. WEILER, *supra* note 1, at 317.

113. *Id.* at 224. *See generally id.* at 223-45 (describing “franchise free agency”).

114. Teams have the most leverage against small-market cities, but even large-

Some cities do refuse to finance new stadiums; for example, San Francisco refused to finance a new baseball stadium for the Giants.<sup>115</sup> An example such as this one proves that there are private sources of funding for sports stadiums.<sup>116</sup> This example, however, represents a small minority. Since sports are so central a feature of popular culture, popular sentiment is not galvanized against the public funding of stadiums. To the contrary, there was great public angst when, for example, the Raiders moved from Oakland,<sup>117</sup> and more recently, when the Browns left Cleveland to become the Baltimore Ravens.<sup>118</sup>

In contrast to popular sentiment, Weiler presents an encompassing critique of public funding for sports stadiums.<sup>119</sup> He begins by summarizing the proponents' often used "spin-off benefits" argument for public financing of stadiums and then points out the misconceptions, showing that the "spin-off benefits" argument is "dead wrong."<sup>120</sup> Weiler concludes that building a stadium is more like opening a public park than financing a new industry, and unlike a park, patrons must pay to enjoy sports.<sup>121</sup>

While a sports team may constitute a big part of a community's social life, it constitutes only a small part of the community's economy.<sup>122</sup> Sports franchises are really small businesses.<sup>123</sup> They do not attract many tourists, and they do not stimulate much new spending, by either residents or tourists, that is beneficial to the community at large.<sup>124</sup> It is the wealthy who derive most of the benefits of new stadiums, given that only wealthy patrons can buy

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market cities are not immune from losing sports franchises. Presently, the huge Los Angeles market is without a football team.

115. *Id.* at 262.

116. *Id.* at 242-43. Major sources of private funding for stadiums include selling the stadium's name and selling private seat licenses. Stadium revenues, which include parking and refreshments, are another way to finance stadiums. *Id.* Weiler concludes that "more than enough private money is now available to build any needed professional sports facility." *Id.* at 338.

117. *Id.* at 177. The City of Oakland actually tried to retain the Raiders by taking them over through an action of eminent domain. This approach was initially upheld in a lower state court, but at a rehearing of the case after remand from the California Supreme Court, the court accepted a dormant commerce violation defense against the exercise of eminent domain dreamed up by the Raiders' legal team. *Id.* at 250-51.

118. *Id.* at 224-29.

119. *Id.* at 265-72.

120. *Id.* at 267-69.

121. *Id.*

122. *Id.*

123. *Id.* at 268.

124. *Id.* at 268-69.

the luxury boxes.<sup>125</sup> Moreover, the money spent upon sports mostly increases the profits of team owners and players.<sup>126</sup>

Further, if public money pays for a new stadium, the money almost always derives from a regressive tax—typically a sales tax.<sup>127</sup> Indeed, everyone, even those in a city that loses a professional franchise, helps to finance the deals that allow professional teams to relocate.<sup>128</sup> Finally, since the costs of building new sports stadiums skyrocketed during the 1990's, more and more public money is being diverted away from other useful purposes, such as education.<sup>129</sup>

Weiler's indictment of public financing of stadiums leaves several important questions unanswered. First, is it the case that sports teams confer only small economic advantages to their cities? Next, what effect would a public vote to accept a stadium proposal have on Weiler's analysis? Put differently, does popular sovereignty trump all other considerations? Weiler's response to these questions would likely be that popular voting patterns reflect the "Prisoner's Dilemma" that law has created for urban sports fans.

If one accepts Weiler's view that the public financing of stadiums constitutes a major social problem, the next step is to ask what should be done about it. One approach might be to apply a dose of antitrust law to reduce the monopolistic structure of professional sports. There are several ways this could be affected. For example, one approach would be to break up the present leagues into three or four smaller competitive leagues.<sup>130</sup> Another approach would be to require leagues to expand into all urban markets that meet certain objective criteria suggesting that they can reasonably support its teams.<sup>131</sup> Because of the limitations of antitrust law, courts are not likely to mandate such changes.<sup>132</sup> Congress, however, clearly

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125. *Id.* at 271.

126. *Id.* at 266, 271.

127. *Id.* at 271. There are a number of variations on funding. Sometimes the sales tax is targeted to a specific activity; for example, on the purchase of cigarettes and alcohol (a "sin tax"); or on the use of hotels and car rentals (a "visitors' tax"); or on bars and restaurants (a "fun tax"). *Id.* at 245.

128. *Id.* at 263-64. Tax-exempt bonds are often used to finance the public funds used for these deals, and these require higher rates of federal taxation upon other sources of wealth. *Id.* at 264.

129. *Id.* at 240-44 (providing examples of the amounts of money spent on stadiums during the twentieth century).

130. *Id.* at 315.

131. *Id.*

132. Since section 1 of the Sherman Act prohibits only combinations in restraint of trade, it implies that the parties involved are separate entities. But there is much support for the view that the teams in a professional sports league constitute a single

has the authority to mandate these changes if it had the political will to do so.<sup>133</sup> Though creating competing professional leagues would have numerous advantages for fans, Weiler does not push such proposals because he believes that professional sports constitute natural monopolies.<sup>134</sup> No matter how the law structures professional sports, over time the gravitational forces of competition will tend toward monopolization.<sup>135</sup>

Weiler also resists proposals to restrict the movement of sports franchises. He points out that the movement of franchises has often had a salutary effect for the public.<sup>136</sup> Further, he expresses concern over restricting the autonomy of teams and leagues in making decisions with respect to franchise movement.<sup>137</sup>

These points lead Weiler to focus upon "more moderate and feasible legal reforms,"<sup>138</sup> and specifically restricting public financing of stadiums.<sup>139</sup> He advocates a cap on the amount of permissible public financing of sports stadiums.<sup>140</sup> Limiting public funding of stadiums could be achieved either by the league self-regulation, or by state or federal law.<sup>141</sup> Since the former is unlikely, Weiler recognizes legal regulation as the best chance for reform.<sup>142</sup> There are numerous ways to set a cap, including the imposition of a "user-tax," the formation of a union of municipalities as a single national body that would collectively bargain on a cap, or legislation (preferably federal) that would establish a cap.<sup>143</sup>

#### IV. CONCLUSION

Some readers may feel that even Weiler's moderate proposal

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entity. Section 2 of the Act requires not just monopolies, but improper action. There exists far too much legal precedent justifying the methods of doing business of professional sports teams and leagues for courts to find a section 2 violation at this late date. *Id.* at 298; *see also* Sherman Act, 15 U.S.C. §§ 1, 2 (1890).

133. WEILER, *supra* note 1, at 328-29 (detailing how Congress restructured the telecommunications industry by breaking up AT&T in the 1980's).

134. *Id.* at 330-33.

135. *Id.*

136. For example, professional sports began in the northeast quadrant of the United States. Beginning with the movement of the Dodgers and baseball Giants from New York to California during the 1950's, professional sports has now spread to all parts of the United States. *Id.* at 260-62.

137. *Id.*

138. *Id.* at 333.

139. *Id.* at 345.

140. *Id.* at 272-77.

141. *Id.* at 274-75.

142. *Id.*

143. *Id.* at 272-77.

for the regulation of stadium financing imposes the law of state institutions to too great an extent upon contemporary sports. This important issue will be worked through in cities across America in the upcoming decades of the new century. Reasonable readers may disagree not only about how to resolve the issue of the financing of stadiums, but also about other sticky issues raised by Weiler throughout the book. Still, one cannot deny that Weiler has, in *Leveling the Playing Field*, established his basic premise. Although the marriage of law and the contemporary professional sports industry may not have been forged in heaven, it seems that it is a marriage that must endure if sports are to thrive and to avoid further alienating popular culture during the twenty-first century.