

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1981

The Past As Prelude: The Early Origins of Modern American Sports Law

John Scanlan

Indiana University Law School, scanlan@indiana.edu

Granville E. Cleveland Sr.

University of Notre Dame Law School

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Sports Studies Commons](#)

Recommended Citation

Scanlan, John and Cleveland, Granville E. Sr., "The Past As Prelude: The Early Origins of Modern American Sports Law" (1981).

Articles by Maurer Faculty. Paper 989.

<http://www.repository.law.indiana.edu/facpub/989>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

OHIO NORTHERN UNIVERSITY LAW REVIEW

The Past as Prelude: The Early Origins of Modern American Sports Law

JOHN A. SCANLAN, JR.*

GRANVILLE E. CLEVELAND, SR.**†

I. INTRODUCTION

The history of sports law can be said to have begun with the origin of sport itself. Certainly each sport is defined by the internal rules which govern its play, but the study of sports law in its modern context goes far beyond these rules to embody the interaction of societal laws and sport. As is so often the case when we trace our present civilization's cultural origins, our first concern will be with the ancient Greeks; in this case, the discourse must begin with a brief examination of the early Olympics.

II. THE GREEK CONCEPTION OF SPORT

In 776 B.C., the first official Olympic Games were held.¹ Those games,

* Assistant Director for the Center for Civil and Human Rights, Notre Dame Law School. A.B. University of Notre Dame (1966); M.A. University of Chicago (1967); Ph.D. University of Iowa (1975); J.D. Notre Dame Law School (1978).

** Assistant Law Librarian and Coordinator of Sports and Entertainment Law, Notre Dame Law School. B.S. Central State College (1960).

† The authors express their gratitude to Michael E. Rowe for the assistance he afforded in editing this article.

1. Tradition tells us that the original sponsors of the event were Iphitus, the Elean monarch, Cleosthenes, king of Pisa, and the Spartan Lycurgus. According to E.N. Gardiner, the reference to Sparta influence at this early date may be a bit of what we today call "revisionist" work. Olympia originally was under the control of the Pisatans, control later challenged by Elean immigrants from the north. The respective kings, Cleosthenes and Iphitus, wearied of the war and concluded a truce which revived the festival and traditionally marks the beginning of the "official" Olympics. See E.N. GARDINER, *ATHLETICS OF THE ANCIENT WORLD* 33 (1930) [hereinafter cited as GARDINER]. In an earlier work, Gardiner went into some detail regarding the historicity of a bronze diskos on which the terms of the "sacred truce" are recorded, and from which the Spartans were able to claim partial credit for the initiating of the Olympic Games:

The antiquity of the diskos is unquestionable, but it may well be doubted if it was contemporary with the event described. More probably, it was dated from the seventh century, when Sparta . . . took an active part in the games. The introduc-

which were held at the sacred city of Olympia, developed out of an earlier Greek tradition of localized sport festivals. Often, in these earlier ceremonies, orators, poets, and musicians competed with the athletes for the attention of the spectators. An English scholar of ancient Greek history, E. Norman Gardiner, observed that:

[T]here is no necessary connexion between the founding of a festival and the institution of games. In the case of some festivals founded in historical times we know that athletic[s] . . . were instituted from the first. We know too that in other cases games were added later. Thus athletic competitions were not introduced into the Pythian festival till the sixth century [B.C.], though the festival itself and the musical contests were many centuries older.²

One generalization confidently made about these festivals is that they were devoted to the seeking of favor from the Greek gods. The religious basis of such festivals³ remained important throughout the millenium that Olympia hosted the Olympics, and indeed was a most relevant element in the final dissolution of the Games by the Romans in the fourth century A.D.⁴ If these pre-Olympic ceremonies were governed by any laws, present scholarship has been unable as yet to discern them.

The Olympic Games were dedicated to promoting better relationships among the disunified Greek city-states, at times providing a useful mechanism for peaceful meetings leading to resolution of inter-Hellenic disputes. As such the Games were Panhellenic in nature, meaning simply that they were open to free Greeks from every city-state and colony thereof. Perhaps the most famous scholar of ancient Greek history in this century, J. B. Bury, had this to say concerning the utility of the Games:

tion of Sparta and Lycurgus at this early date is certainly suspicious, . . . but the organization of the festival by Iphitus and Cleosthenes may be regarded as the first definite historical fact in its history.

E.N. GARDINER, GREEK ATHLETIC SPORTS AND FESTIVALS 43 (1910). The noted scholar J.B. Bury would seem to be in agreement with Gardiner's conclusion on this point. J.B. BURY, A HISTORY OF GREECE TO THE DEATH OF ALEXANDER THE GREAT 142 (3d ed. 1910) [hereinafter cited as BURY]. Gardiner also noted that the tradition prevalent among Greeks in the fifth century B.C. traced the origin of the Games to heroic times, attributing their founding to Heracles in the honor of Zeus. See GARDINER, *supra* note 1, at 31 & 32.

2. GARDINER, *supra* note 1, at 32.

3. Olympia was the "Canterbury of the Peloponnese." *Id.* at 31. Religious ceremonies "occupied a substantial part" of what came to be the five-day duration of the Games. M.I. FINLEY & H.W. PLEKET, THE OLYMPIC GAMES: THE FIRST THOUSAND YEARS 15 (1976) [hereinafter cited as FINLEY & PLEKET].

4. As Gardiner states:

The religion to which the Panhellenic festivals owed their life was dying. Christianity was now the established religion of the Roman Empire. These festivals were the last stronghold of paganism, and their very popularity sealed their doom . . . [t]he Olympic festival was abolished by the express decree of the Emperor Theodosius in A.D. 393.

GARDINER, *supra* note 1, at 52.

[T]he Olympian festival helped the colonies of the west to keep in touch with the mother country; it furnished a centre where Greeks of all parts met and exchanged their ideas and experiences; it was one of the institutions which expressed and quickened the consciousness of fellowship among the scattered folks of the Greek race; and it became a model, as we shall see, for other festivals of the same kind, which concurred in promoting a feeling of national unity.⁵

The Olympics were governed by special laws meant to preserve the peace and to guard the integrity of the Games. In keeping with the religious nature of the Games, certain other rituals were followed that over time became nothing more than traditional. For an example of the latter, the Games were held every fourth year, at the time of the second full moon after midsummer's day.⁶ The former type of rules are more relevant to the present study, and there is a rather extensive list of them that we remain aware of today.

On the first day of the Games, all athletes swore by Zeus Horkios to obey the rules and to compete fairly. The same oath was required of the trainers.⁷ As one scholar pointed out, "Zeus was a terrible, avenging god when perjury was involved, with lightning and the thunderbolt at his command."⁸ This in itself was generally enough to keep the competitors in line.

The Games were managed by the city-state of Elis. The Eleans were the keepers of the sacred site of Olympia, and since the Games were considered to be a religious festival, the state directly controlled the organization of all ceremonies.⁹ Eleans served as the self-named "Hellenic judges" whose power over the Games was nearly absolute.¹⁰ The judges' role combined the modern roles of the Olympic Committee, judges, and umpires.¹¹ Fundamental rule changes, which were rare, could be promulgated only by a special commission called the *nomo-graphoi* ("law-codifiers"), while the judges were confined to administering and interpreting the rules.¹²

Such rules included the following: a participant had to be the legitimate son of free Greek parents, without a criminal record, and officially registered as a citizen of his native city and he had to enter Olympia one month prior to commencement of the Games for registration and training. Penalties for violations of these or other rules were to be meted out by the judges, subject to review by the only other official body, the Olympic Council.¹³ Such available penalties included: fines, exclusion from

5. BURY, *supra* note 1, at 144.

6. *Id.* at 140.

7. FINLEY & PLEKET, *supra* note 3, at 15 & 20.

8. *Id.* at 15.

9. *Id.* at 59.

10. *Id.* See also note 13 and accompanying text *infra*.

11. FINLEY & PLEKET, *supra* note 3, at 59.

12. *Id.* at 60.

13. The Olympic Council was created no later than about 400 B.C. *Id.* at 59.

the Games, and flogging. The latter is somewhat surprising, since corporal punishment in Greece (the death penalty notwithstanding) was reserved to slaves. Yet Olympic judges from early on were permitted to flog athletes for violating training rules, for committing fouls, or for bribery. In regard to this latter violation, Gardiner notes that bribery was rare, noting that "[t]he athlete felt that any violation of the rules . . . especially any unfairness or corruption, was an act of sacrilege and displeasing to the gods . . . , [a] feeling [which] undoubtedly tended to preserve the purity of sport at Olympia."¹⁴

Quite naturally the legal structure of the Olympics had as one of its functions the control of the athletic contests themselves. The games initially included footraces, boxing, and wrestling; chariot-races, horse races, the pentathlon and others were added later.¹⁵ The judges, as noted, determined the fairness of each contest and the ultimate winner of every event.

Not all rules were enforced by the judges, however. The task of policing the grounds was entrusted to an official corps of whipbearers. These officials kept order among the spectators and between the athletes. They also had the task of watching the innumerable peddlers who invariably surfaced at this quadrennial event.¹⁶ It is also probable that the Eleans appointed a temporary market commissioner for the duration of the festival, with the power to impose fines on the spot.¹⁷

With regard to crowd control, one of the most striking differences between the law of the ancient Olympics and our law in this "era of Title IX" is that the ancient Greeks were blatantly sexist.¹⁸ Sources differ as to whether the prohibition extended solely to married women, or to all women of a marriageable age, but this much is clear: it was a violation of law, punishable by death, for most women past the age of puberty even to attend these contests as spectators.¹⁹ The method of enforcement was to have the transgressor "thrown from the Tropaen Rock, and . . . [o]nly one instance is recorded of this rule being broken."²⁰ The rule against women attending was never relaxed at Olympia, although late in the pre-Christian era women were allowed to compete in the sporting events of many of the other festivals.²¹ Gardiner gives us a view of women in athletics

14. GARDINER, *supra* note 1, at 33.

15. BURY, *supra* note 1, at 140.

16. FINLEY & PLEKET, *supra* note 3, at 54.

17. *Id.* at 54-55.

18. Greek women were little more than servants in marriage. They performed the daily domestic tasks and otherwise remained apart from the males of the family, spending their idle hours spinning, weaving, and sewing. Plutarch agreed with Thucydides: "The name of a decent woman, like her person, should be shut up in the house." They had little legal status, since they could not make contracts nor incur debts beyond a trifling sum: they could not bring actions at law.

S. EITZEN & G. SAGE, *SOCIOLOGY OF AMERICAN SPORT* 264 (1978) [hereinafter cited as EITZEN].

19. E.N. GARDINER, *GREEK ATHLETIC SPORTS AND FESTIVALS* 43-47 (1910).

20. *Id.* at 47.

21. FINLEY & PLEKET, *supra* note 3, at 45.

from the broader perspective of Greek society as a whole:

Athletics were not wholly confined to men and boys . . . Athenian women, it is true, were brought up in seclusion and forced inactivity, but it was not so among the Dorian [tribes]. Spartan girls took part in all the exercises of boys, and they attributed their beautiful complexions and figures to their athletic training. . . . At Olympia married women were not allowed even to be present at the festival, but women had their own festival, the Heraea, where there were races for maidens of various ages. . . . The festival of Hera is obviously modelled on the Olympic festival, but we do not know when it was introduced.²²

Indeed, the fact of the matter is that women were not excluded from every aspect of the Olympics.²³ Nevertheless, they were absolutely not allowed to watch, compete, or—as is demonstrated by one celebrated incident—serve as advisors to the athletes.²⁴

As has been noted previously, one was only allowed to compete for the victory wreath²⁵ if he was a freeborn Greek. It was felt by the Greeks that their love for athletic endeavors distinguished them from the barbarians.²⁶ With the conquests of Alexander the Great in his attempt to “Hellenize” the known world, competitors began entering the Games with somewhat dubious credentials of “Greekness.”²⁷ Although there appears to have been some degree of prejudice on the part of the spectators, it seems to have been miniscule; and there is no record whatsoever of any discrimination, national or social, by either the judges or the spectators.²⁸ As Finley and Pleket state: “Every competitor had the same formal rights, under the same rules, and could claim the same prize if he won; only his skill and strength mattered.”²⁹

There were certain risks involved for the participants. Scholars today inform us that “[d]eath was one of the recognized risks in sporting competitions; hence the law exempted fatal accidents from a charge of homicide.”³⁰ Boxing was apparently the primary culprit in this regard: “[A]ncient boxing appears to have been more ferocious than the modern version. Blood was what the spectators came for, and blood was what they got.”³¹ Contemporary contact sports are arguably more humane, although statistics on ring fatalities and football injuries make that statement difficult to prove.³² Although it is true that the athlete who killed

22. GARDINER, *supra* note 1, at 41-42.

23. GARDINER, *supra* note 19, at 47.

24. *Id.* at 46-47.

25. *See* note 35 *infra*.

26. GARDINER, *supra* note 1, at 36.

27. FINLEY & PLEKET, *supra* note 3, at 58.

28. *Id.* at 45 & 58.

29. *Id.* at 58.

30. *Id.* at 40.

31. *Id.*

32. “The National Football Head and Neck Injury Registry, in compiling statistics since 1971, have records to support their claim that there have been 1,130 severe injuries, which by definition involve hospitalization of more than three days, surgical intervention,

another in the ring was not jailed, the offender was expected to comply with the Greek tradition of making amends to the bereaved family by the payment of "blood money."³³ The law enforced this tradition, and the offending athlete did not have the opportunity to raise defenses such as unavoidable accident and assumption of risk, which are commonly relied upon in sports-related injury litigation today.³⁴ The risks therefore for the Olympian athlete were very real; however, the potential rewards of victory were not to be taken lightly. The ancient Greeks did not distinguish so carefully as we do between "sport for play" and "sport for pay." It is true that the only prize one could win at the Games themselves was a crown of ivy,³⁵ and perhaps an animal to sacrifice to the gods; but the athlete skillful (or fortunate) enough to win could look forward to many years of royal treatment in his native city-state.³⁶ The status of the ancient Olympian hero could be compared to the status of present-day sports heroes in the Soviet Union. His standard of living was increased by public funds, given in gratitude for his past accomplishments which brought honor to the state. Unlike the modern American "superstar," the achievement of such status by the ancient Greek hero was in no sense complicated by the maze of contractual, antitrust, and tax considerations handled by the ever-present "player agent" with which we have become so familiar today.

It is not surprising that our conception of sport and that of the an-

fracture, dislocations, permanent paralysis, or death." L. Decof & Godosky, *Sports Injury Litigation*, PRACTICING L. INST. 9 (1979) [hereinafter cited as *Sports Injury*].

33. This Greek tradition is seen throughout ancient Greek literature. If one would want to compare "blood money" with today's concept of wrongful death, it is worth noting that the athlete's "assumption of risk," to use modern terminology, did not affect his family's right to be compensated.

34. See text accompanying notes 80-87 *infra*.

35. The only prize at the Olympic Games was a crown of wild olive. . . . The branches for the crowns were cut with a golden sickle by a boy both of whose parents were living, from the sacred olive tree that grew at the west end of the Temple of Zeus. . . . [T]his custom of rewarding the victor with no other prize than a wreath of leaves set an example of athletic purity which had an important influence on Greek athletes. . . . Indeed, the Olympic crown is a lesson in sportsmanship for all time, reminding us that the true sportsman contends not for the value of the prize but for the honour of victory and not for his own honours only but for that of his country, his school, his side.

GARDINER, *supra* note 1, at 35-36.

36. In recognition of the honor done to them the citizens of the victor's town sometimes received him with extraordinary demonstrations. It might be that, clad in purple, he entered the gates in a chariot drawn by white horses, and made his way through singing throngs to hang his wreath as an offering in the principal temple. We even hear of city walls torn down to make passage, as though where such a citizen dwelt there was no need of other defense. The choral ode which greeted him might have been composed for the occasion by lyric poets like Pindar and Bacchylides. His statue would be set up in the home city, or placed within the sacred enclosure at Olympia. He was perhaps granted a seat of honor in the theatre, and provided with board at the public table for the rest of his life. (Footnotes omitted).

F.E. LEONARD, A GUIDE TO THE HISTORY OF PHYSICAL EDUCATION 26 (2d ed. 1927). [hereinafter cited as LEONARD].

cient Greeks diverges at various points. A cultural gap is to be expected after more than two millenia, and is readily reflected in such areas as sculpture and literature. Quite clearly, our male athletes could not perform at our present Olympics *sans* clothing, as did their ancient counterparts;³⁷ but even such a summary perusal of the Games presided over by the Eleans suggests legal topics—apart from the quite obvious common objective of promoting peace through interstate athletic competition—which reflect to some degree the values and biases of our society as compared to theirs. Among these topics are racial and sexual discrimination, legal controls on the character and conduct of athletes, sport-related injuries, and the status and compensation of athletes. Before moving to the modern day, however, it is first necessary to examine some of the fundamental shifts in attitudes toward sports dating from the pre-Christian era in Europe, some remnants of which have remained somewhat influential up to the present day.

III. IMPACT OF THE ROMANS AND THE INSTITUTIONS WHICH SUCCEEDED THEM UPON THE EUROPEAN CONCEPTION OF SPORT

The ancient Olympics were at their peak during the "Golden Age" of Greece;³⁸ they served as a nationalizing institution, as a reflection of the general concern with the philosophy of a sound mind in a sound body, and perhaps as a means of reflecting what by then remained of the Greek religion's vitality. In 146 B.C., Greece was conquered by the Romans. The Games continued for another 500 years, but no longer as the exclusive property of the Greeks. Whatever cultural and religious significance they once had was increasingly diminished by bitter competition between Greeks and Romans, and by the ability of the Romans to commercialize their successes.³⁹ It could not be seriously suggested that the Roman perception of sport bore any meaningful resemblance to the values that athletics had represented to the ancient Greeks.

The Roman conception of "sport," which catered to the (shall we say "sensational"?) tastes of the Roman spectators, led to a strong "backlash" reaction in later years. The gladiators' battles waged in the Circus Maximus of the famed Colosseum of Rome were, ironically enough, the philosophical antithesis of the Olympics on which their presentation must have been roughly modeled. Even before the infamous "contests" between unfed lions and unarmed Christians were initiated, events were staged to satisfy the crowd's thirst for brutality rather than for skill. The Romans did not choose the combatants, as had the Greeks, from native-

37. W.M. HENRY, AN APPROVED HISTORY OF THE OLYMPIC GAMES 15 (1948). [hereinafter cited as HENRY].

38. The "Golden Age" was the "Age of Pericles," during which Athens reached her peak. Pericles died in the autumn of 429 B.C., a victim of the Athenian plague that was a by-product of the then-raging Peloponnesian War (431-404 B.C.) against Sparta and her fellow Dorian League members. See BURY, *supra* note 1, at 332-73 & 391.

39. HENRY, *supra* note 37, at 24.

born sons of proven virtue; instead, the gladiators were slaves from conquered lands, or criminals spared execution in order that their exploits might please the crowds. Killers did not pay "blood money" in repentance for their infliction of fatal injuries on an opponent; instead, it was only those who killed often, entertaining the spectators with their prowess, who received the ultimate reward of freedom. No system of justice regulated the conduct of the participants or that of the spectators. Instead, there was only the voiced approval of the mob, and the tyrant's single, arbitrary gesture with this thumb.

The Olympics and the gladiatorial contests ended at a time when Christianity was establishing itself in Rome. The acceptance of the religion by the Emperor Constantine marked its establishment as the official state religion, and fostered its development as the dominant cultural force in the western world.

It is worth noting that the spokesmen for this emerging religion, great scholars such as Saint Augustine and Saint Jerome, chose the customary rites celebrated at the Colosseum as powerful symbols of pagan decadence, and in the process tarred all sports with the same brush.⁴⁰ The outbreak of asceticism in the Middle Ages has also been linked to the persecution to which many converts had been subjected during the formative years of the Church.⁴¹ The self-torture admired and practiced by the ascetic as a means of liberating his soul through rejection of the body in which it was trapped was a far cry from the "sound mind, sound body" philosophy of the Greeks. Some have suggested, quite reasonably, that this philosophy was a contributing factor to the unprecedented succession of plagues which decimated the population of Europe at intermittent periods during the course of the medieval period.⁴²

In any event, the centuries following the Christianization of Rome were hardly the time for a sports revival. Even as Christianity spread to Britain and beyond, forces were at work making recreation of almost any sort an expensive, and at times even an impossible luxury.⁴³

40. St. Augustine's influence was still powerfully felt in medieval Europe fully one thousand years after his death. See Chroust, *The Philosophy of Law of St. Thomas Aquinas: His Fundamental Ideas and Some of His Historical Precursors* 19 AM. J. OF JURIS. 1, 2 (1974).

41. LEONARD, *supra* note 36, at 38.

42. *Id.* at 38-40.

43. Europe spent several centuries in a state of almost perpetual war, marked by invasions from the north, seven centuries of sporadic battles with the forces of Islam from the East, and a series of savage border disputes among the nations constituting the fragments of the once-great Roman Empire. As always, economic devastation accompanied war, and the intermittent onslaughts of bubonic plague further illustrate the severity and brevity that made life during the medieval period a struggle for survival. Only in maritime cities of Italy, where Renaissance was born and nurtured, was there much relief from the upheaval of the times. For those interested in a brief yet excellent treatment of the flowering of Renaissance thought, see E. WEBER, A MODERN HISTORY OF EUROPE 69-83 (1971). [hereinafter cited as WEBER]

Despite this atmosphere, which persisted throughout most of Europe into the fifteenth century, and which only began to dissipate in England in the early fourteenth century, we know that sports had growing albeit underground popularity.⁴⁴ This history is pertinent to an examination of sports law, because one of our chief sources of knowledge about the early existence of these sports is the early law of English-speaking nations—law originating by royal decree making the playing of certain sports illegal. One sports historian has noted:

King James II—the Scottish James II, that is, 'James of the Fiery Face,' who was killed by the bursting of one of his own primitive cannons . . . had in March 1457 issued (his) oft-quoted decree that 'the futeball and golfe be utterly cryed downe and not to be used.' A similar enactment was passed early in the following reign, and in 1491 the Third Parliament of (the Scottish) James IV renewed the ban imposed by his father and grandfather: 'It is statute and ordained that in na place of the Realme there be used Futeball, Golfe, or uthir sik unprofitable sportis,' which were contrary to 'the common good of the Realme and defense thereof.'⁴⁵

Apparently, country lads were abandoning archery practice which was so vital to the "common good of the Realme and defense thereof" in favor of participating in various athletic endeavors. There are many instances of such proclamations,⁴⁶ and they do far more than merely inform us of the approximate date of origin of particular sports. As sport is a mirror on the society in which it flourishes, much can be revealed of a society from studying its sport. For example, in the medieval period, with wars always either present or approaching, the favored sports of the government were archery for the common folk, and jousts and tournaments for the nobility.⁴⁷ Such a noted historian as Eugene Weber felt the history of sport relevant enough to include in his comprehensive (and outstanding) work on modern European history, illustrative as it is of the development of a society over time. The following comments of Weber make the point:

44. See text accompanying note 43 *supra* & notes 45-52 *infra*. Despite the enactment of many laws, especially in England, prohibiting participation in certain sports (see text accompanying notes 56-60 *supra* & 71-72 *infra*) there is evidence that these laws were not very successful. History tells us for example that "[y]oung Londoners in the region of Henry II (1154-1189) practised 'leaping, wrestling, casting the stone, and playing with the ball, together with other exercises.'" LEONARD, *supra* note 36, at 200. Furthermore, the English played the game of bowls during the thirteenth century; cricket seems to have appeared around 1600, and "football" (rugby) has been played by the English for well over six centuries. Apparently, "medieval football" on the continent was played by one village against another, with virtually the entire village participating. This activity was the forerunner of soccer. See A. GUTTMAN, FROM RITUAL TO RECORD 37, 38 (1973). [hereinafter cited as GUTTMAN].

45. R. BROWNING, A HISTORY OF GOLF: THE ROYAL AND ANCIENT GAME 2 (1955).

46. See, e.g., T. FINLASON, THE AULD LAWS AND CONSTITUTIONS OF SCOTLAND 140 (1609), wherein a statute of King William of Scotland prohibited golf and football, and imposed penalties for missing required archery practice.

47. For a more in depth discussion of sport as the preserve of the medieval nobility, see GUTTMAN, *supra* note 44, at 30-31. As is noted in LEONARD, *supra* note 36, at 46, the jousts and tournaments "cost many a life"; yet this was considered a "useful" sport, since it contributed to the defense of the land.

The equalization of the classes becomes particularly visible in the great public sectors of sport, entertainment, and education. Sport for a long time had been the preserve of the rich, who could afford it and who had time for it. (Under the Tudors, the lower classes were to stick to useful sports like archery, while gentry could indulge in bowls or tennis.) . . . [A]ll was still for the rich, until the Factory Act of 1847 prohibited the employment of women and children on Saturday afternoons. Soon the men were freed too. Here was a new weekly holiday to be filled, and one of the major contenders for filling it was football. . . . Thus, while . . . pursuits like hunting and tennis remained mere games, football was the first to serve the needs of the industrial society in which it grew, itself becoming an industry and a business.⁴⁸

Weber contends that team sports played a role in "debrutalizing the masses, filling their leisure time, and offering opportunities for distinction with less regard to class (or race) than might reign otherwise."⁴⁹ Sport not only was an indicator of the loosening of class distinctions, it may well have been a contributing factor.

We can further see sport as a mirror on society by examining Puritan attitudes towards sport in colonial America. We are told that the Puritans of Massachusetts and Connecticut "banned dice, cards, quoits, bowls, nine-pins, 'or any other unlawful game in house, yard, garden, or backside,' singling out for special attention 'the Game called Shuffle Board, in howses of Common Interteinment, whereby much precious time is spent unfruitfully!'"⁵⁰ (The author goes on to note rather wryly that "[t]he interdiction of shuffleboard does not suggest a strong disposition toward sports.")⁵¹ We are informed that Governor William Bradford exhorted the citizens of Massachusetts to refrain from pitching and batting in the streets, "wasting time at stooleball and other such sports."⁵² In New York, as well as in the southern states, official tolerance of team sports emerged much earlier, although the more class-conscious Southern gentlemen preserved for a time the English custom that sport was the sole preserve of the upper classes.⁵³ The following comment by Wells Twombly is as illustrative as those of Eugene Weber cited earlier in demonstrating that law and sport share a common role as barometers of evolving societies when examined retrospectively:

The records for 1693 of Windham Borough in eastern Connecticut show that Nathaniel Reed was fined twelve shillings and sentenced to six hours in the stocks for 'playing ball on the Sabbath after being thrice warned against such an abomination. . . .' Later, at the time of the American Revolution, and [d]espite his enthusiasm and love of games, the com-

48. WEBER, *supra* note 43, at 1047-48.

49. *Id.* at 1047.

50. GUTTMAN, *supra* note 44, at 83.

51. *Id.*

52. W. TWOMBLY, 200 YEARS OF SPORT IN AMERICA 18 (1976). [hereinafter cited as TWOMBLY].

53. *Id.* at 18-22.

moner . . . had precious little time to play. Workers in Boston during George Washington's second term demanded a work day limited to ten hours and were refused on the grounds that too much idleness would lead them to trouble. The heavy hand of the Puritan still lingered. However, his influence was beginning to fade. Ultimately, it would be dissipated by industrialization, urbanization, immigration, increased leisure, and commercial promotion. Yet as late as the Second World War there were still vestiges of the Puritan influence, in the complaints about Sunday baseball. The movement to guard against society enjoying itself died hard.⁵⁴

Yet as prohibitionists of various stripes have discovered over the years, laws alone cannot succeed in preventing people from doing those things that they most enjoy. As in England a succession of prohibitions did not stop the playing of soccer, so in America a succession of laws did not stop the development of various sports.⁵⁵ However, a case can be made that the progress of sport, in the particular forms it took, was a contributing factor in the retarded development of certain areas of the law. There are particular social tenets which have worked themselves into the fabric of law by affecting the broad pattern of American social development. Justice Cardozo once admonished the members of the profession that "we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment."⁵⁶ Many of these social tenets have involved broadly-accepted suppositions concerning such topics as racial and sexual equality, monopolization and restraint of trade, and the rights of an extensive list of interested parties to sue in tort. Such tenets have, in recent years, "worked themselves into the fabric" of *sports law*, though this has not always occurred very naturally or very easily. For example, almost everyone is familiar with the saga of Jackie Robinson, the man chosen by Brooklyn Dodgers President Branch Rickey to break the color barrier in major league baseball. However, it is a little known fact that two black players, Moses Fleetwood (Fleet) Walker and his brother Weldar Walker played for Toledo of the American Association—at that time one of the three major leagues⁵⁷—in 1884.⁵⁸ That year was their first—and last—in the major leagues, a story that will be expanded upon somewhat in the next section of this article. "Baseball's segregation policies reflected widespread . . . exclusionary practices throughout the land. Supported by social Darwinian ideologies, blacks were harried from white teams and forced to form their own black leagues."⁵⁹ This would make the sport of

54. *Id.*

55. A short history of the development of the major team sports in the United States, and of the role played by the universities in spreading their popularity, is contained in LEONARD, *supra* note 35, at 264-84.

56. *People v. Knapp*, 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920).

57. McKinney, *Negro Professional Baseball Players in the Upper South in the Gilded Age*, 3 J. OF SPORT HIST. 273-74 (1976).

58. This little-known occurrence is covered in a bit more depth in *id.* at 274-76. See also I. VOIGHT, *AMERICA THROUGH BASEBALL* 110 (1976).

59. VOIGHT, *supra* note 58, at 111.

baseball something of a pioneer in the legal sphere; after all, it was not until 1896 that the United States Supreme Court gave its seal of approval to such "Jim Crow" practices in its ignominious decision of *Plessy v. Ferguson*.⁶⁰ The effects of this decision have not been extirpated fully from the "fabric of our law" to this very day.

IV. MODERN PROBLEMS

A. *Discrimination*

Welday Walker, after his exclusion from baseball following his 1884 debut, accused Adrian "Cap" Anson of leading the opposition against all black players. Anson answered by later taking credit for the installation of the "unwritten rule" in his autobiography, giving as his reason his own personal dislike of all blacks.⁶¹ By the turn of the century, the rule had become well-established.

In 1901 Manager John McGraw [of the Baltimore Orioles] tried to pass black pitcher Charles Grant [as an Indian under the alias of Charlie Tokohama], but when Grant was seen in the company of some black friends a wave of protest [from other clubowners, primarily] forced American League officials to nullify his contract.

The acquiescence of baseball officials in the Grant case reflects American solidarity behind segregationist practices. At the turn of the century, baseball in company with railroads, hotels, restaurants, and other public institutions was segregated by customs and laws. In baseball, an elaborate code of customary law accomplished the deed. Major league clubowners acting in concert promulgated a segregationist code that barred blacks from 'organized baseball.'⁶²

By 1945, Branch Rickey decided that the time had come to crash the barrier. After searching for the "right black man" — for as Rickey saw it, the first black major leaguer would have to be both an exceptional ballplayer and an exceptional man — Rickey settled on Jack Roosevelt Robinson. In October of that year Rickey signed Robinson to a contract to play for the Dodgers' top farm club, the Montreal Royals.⁶³ The next year

60. 163 U.S. 537 (1896).

61. VOIGHT, note 58 *supra*, at 110.

62. *Id.* at 111. See also W. BRASHLER & J. GIBSON, A LIFE IN THE NEGRO LEAGUES 58 (1978).

63. The following anecdote may be of some interest to the reader:

Clay Hopper, a Mississippian and manager of the Montreal team, had received the news of Robinson's signing without comment or sign of antipathy, but the depth of his feelings is measured by a conversation with Rickey. During a spring training session Rickey asserted that no other human being could have made an exceptionally skillful play executed by Robinson. Hopper replied, 'Mistuh Rickey, do you think he is a human bein'?' But at the end of the season his feelings and opinions had changed, for he told Rickey, 'You don't have to worry none about that boy. He's the greatest competitor Ah ever saw, an' what's more, he's a gentleman!'

Broom & Selznick, *The Jackie Robinson Case*, SPORT AND SOCIETY: AN ANTHOLOGY, 235, 238 (1973).

Robinson was a Dodger, and on his way to a career that would span a decade and lead to his election to Baseball's Hall of Fame.

Jackie Robinson's breakthrough had been hailed—and rightly so—as a significant event in American civil rights history. Before Robinson, the only blacks to participate in American professional sports were boxers, most notably Joe Louis.⁶⁴ Although opportunities for blacks proceeded to open up in every professional sport following their acceptance by the “national pastime,” their progress in such traditionally upper-class sports as golf and tennis has been painfully slow.⁶⁵ Still, Robinson's entry into the major leagues in 1947 was clearly a climacteric. It is rather ironic that baseball has received so much credit for fostering social justice in taking this courageous step, since for a period of over sixty years major league baseball had made no move to integrate.⁶⁶ Instead, it had permitted scores of talented black players, of whose presence in the Negro Leagues it was well aware, to languish there in relative obscurity.⁶⁷ Today no one really thinks much about how far we have come in so little time; black players on the surface have gained complete acceptance in the realm of professional sports. However, lingering effects of past prejudice can still be seen in the dearth of blacks in responsible positions of sports management. The problem, it would appear, is being ever so slowly overcome.⁶⁸

For all the credit given Mr. Rickey for bringing the black man into major league baseball, it should be noted that Bill Veeck wanted to purchase the Philadelphia Phillies in 1940 and stock the team with stars from the Negro Leagues, but was not granted permission by the other owners to purchase the Phillies once his intentions leaked out. TWOMBLY, *supra* note 52, at 196.

64. Broom & Selznick, *supra* note 63, at 224. See also Orr, *The Black Boxer: Exclusion and Ascendance*, SPORT SOCIETY: AN ANTHOLOGY 240-60 (1973). See also TWOMBLY, *supra* note 52, at 196.

65. EITZEN, *supra* note 18, at 236, 242-43.

66. VOIGHT, *supra* note 58, at 116-17.

67. As Wells Twombly has said:

An underworld of black baseball existed! Fly-by-night Negro leagues, sometimes playing on skin diamonds in third-rate parks, sometimes luxuriating in a major league stadium on an off date, and a gaggle of gypsy barnstormers, twelve-or fourteen-man squads jammed into a few limping autos or a decrepit bus and covering a couple of hundred miles to play two or even three games in a single day . . . Major league all-stars . . . acknowledged that a Stachel Paige or a Josh Gibson could hold their own with anyone.

Why didn't they get the chance? . . . When you came right down to it, the whole country accepted the Southern view of black folks. . . . [E]ssentially segregation and inequality of opportunity were built into America's way of life.

TWOMBLY, *supra* note 52, at 197.

68. There have to date been three black baseball managers in the majors (Larry Doby, Frank Robinson—twice—and Maury Wills), but no black professional head football coaches. There have been a number of black head coaches in professional basketball (Bill Russell, Al Attles, and Len Wilkens come immediately to mind), but the percentage of black coaches in the NBA remains miniscule when compared with the proportion of black to white players in that league. Front-office jobs in sport franchises tend to be reserved to whites, save a few for retiring black *superstars*, such as the Aarons and the McCoveys, although Wayne Embry—who was a solid but unspectacular player and who is now the General Manager of the Milwaukee Bucks professional basketball club—is a notable exception.

One cannot draw a direct parallel between the history of racial discrimination and racial acceptance in professional sports, and the history of discrimination against, and acceptance of, women. This is because sexual discrimination in sports has a very different meaning from that of racial discrimination.⁶⁹ "Separate but equal," as approved by *Plessy v. Ferguson*,⁷⁰ was a moral disaster; and in the sports arena, as in all other walks of life, such segregation inevitably resulted in situations quite separate but very unequal. On the other hand, "separate but equal" would seem to be the course our society has decided to take in assuring the right of women to have equal opportunity to compete in sports.⁷¹ The challenge will be to provide more effective policing of the establishment of the mandated "equality" than was done in the racial sphere during the fifty-eight years that *Plessy* was the approved law of the land.

Let us state the issue precisely: no reasonably objective American, even in the heyday of the Negro Leagues, would have denied that players such as Josh Gibson, Satchel Paige, or Buck Leonard had the ability to play big-league ball. Yet valid questions still remain about the comparability of male and female skills in most of the major sports. It was arguably more enjoyable to watch Billie Jean King perform during her prime than it was to watch Rod Laver; yet it is unlikely that even Ms. King could have fared particularly well against the best players on the male circuit (her victory over the then fifty-five year old Bobby Riggs notwithstanding). One could go on, for instance, comparing Nancy Lopez-Melton to Tom Watson in golf. The point should by now be clear: as a general rule, the best male athlete could hold his own against the finest female competition, at least in those sports emphasizing strength and speed, rather than endurance. Clearly then, the issue is not male-female integration of particular teams or events. Title VII of the Civil Rights Act of 1968 permits jobs to be reserved to one sex or the other only if such a restriction is based upon "bona fide occupational qualifications."⁷² Simple logic would indicate that *most* young women would have no desire to play in leagues which, at best, will always be male-dominated.

As a result, alternative leagues or associations have sprung up in a number of sports, permitting capable women athletes to compete among themselves for pay. At the heart of the sexual equality issue in professional sports is the question of equal pay. Compensation is probably the most popular barometer used in judging equality between men and women on the professional level.

A comparison would again perhaps best illustrate the problem. There

69. Whereas there was little doubt that at least some blacks had the ability equal to that of whites, (See note 67 *supra*) there is much doubt as to whether the same claim could be made today concerning women regarding men. See text accompanying note 71-72 *infra*.

70. 163 U.S. 537 (1896).

71. See 20 U.S.C. §168-1 (1976).

72. 42 U.S.C. §2000 (1976).

can be little doubt that the highest paid player on the Chicago Bulls professional men's basketball team makes a salary so far in excess of the highest-paid performer on the Chicago Hustle,⁷³ the professional women's counterpart to the Bulls, that it is hard to believe these two individuals would list the same occupation on their respective resumes. The reason can be simply—and admittedly rather bluntly—stated: lack of interest. Two examples should suffice to point out this fact, both of which it seems are being remedied, albeit slowly.

The key to success in the sports realm has become "the television connection." There can be little doubt, for instance, that the American Football League (AFL) achieved the respectability that later led to its merger with the well-established National Football League (NFL) in great part through the television contract it enjoyed with the National Broadcasting Company (NBC). The money and the exposure thus garnered by the fledgling league enabled it to compete on an equal basis for quality players with the NFL; the NFL owners, realizing that competition was pushing player compensation to unprecedented heights, decided that the AFL owners had best be admitted to the brotherhood. NBC had of course acted purely out of its own interests in televising AFL games; they recognized America's insatiable appetite for football, and decided to contest their rival network's domination of Sunday afternoons by "fighting fire with fire." They knew that they were not going to compete with NFL telecasts by putting "Wild Kingdom" up against them. But a market for women's sports, for a very long time, simply was not perceived by the networks. Two sociologists put the issue in perspective quite well when they observed that:

Until quite recently professional women's athletic events rarely appeared on television. For example, between August 1972 and September 1973, NBC televised 366 hours of 'live' sport, one hour of which was devoted to women's sports]. A television executive at ABC was quoted as saying: "Women don't play sports."⁷⁴

Today, in certain sports, women do receive ample—though not "equal"—television exposure. Golf and tennis come immediately to mind, and the impact of television is seen in the increase in the purses women compete for in these sports as television exposure increases. Team sports for professional women have not been as fortunate in this regard. The woman on the Chicago Hustle still barely makes ends meet because television does not feel that the public would provide adequate Nielsen Ratings to justify a contract to broadcast her team's games nationally. Furthermore, the networks' intuition is most likely correct. This perceived lack of interest is, in the shared opinion of the present authors, directly traceable to a second, and more basic, "lack of interest" that the

73. Since this article was originally written, the Hustle has gone out of business, a victim of its inability to earn television or live spectator dollars.

74. EITZEN, *supra* note 18, at 280.

law is presently in the process of rectifying: the reference here is to the past failures of our schools to provide equal opportunity for young women athletes to develop their skills.

Women's leagues, in order to make their product a saleable commodity to the sports-viewing public, require talented performers across the board. One of the primary difficulties they face is admittedly a shortage of highly-skilled performers coming up through the ranks. This problem is at the heart of the issue of equality for women in sports. Until recent federal legislation was passed,⁷⁵ public schools generally manifested no intention to provide the athletic facilities, coaching, and equipment to undeniably interested—and talented— young women in any way resembling the willingness they showed in providing it to young men. Boys played football; girls, with the full approval of the law, waved pompoms. At least we had come further than the ancient Greeks, for we did allow members of the opposite sex into the stadium. Recently we went a far step beyond that: the Greeks certainly never had to comply with any requirement remotely similar to Title IX.

B. *Tort Liability*

It is not uncommon today for the spectators to be treated to the sight of seeing one of our modern "gladiators" wheeled out on a stretcher. But sports injuries have always been with us, and it can be argued that recent concerns with safety have cut back on their severity, if not their frequency. At every level of the sports continuum, from pee-wee hockey to the seniors' tennis circuit, the participants are likely to be covered by insurance when injured. Yet insurance is not always capable of compensating the entire cost of an injury, or of satisfying the justifiable claims of every injured party. Until quite recently, however, certain peculiarities of sports law made it virtually impossible for an injured party to obtain additional relief in a tort action brought in a court of law.

The plaintiffs who were most often successful were school children (who, for the reasons already noted, were almost always boys). If they were injured due to the failure of the equipment they were wearing, they (or their surviving parents) stood a chance of collecting from the distributor or manufacturer. If instead, they were injured due to careless coaching or to defects in the condition of a playing field or arena, their chances of recovery from the negligent coach or school administration were much lower. Coaches in public and private schools alike, under ordinary common law principles, have been held to a duty of supervision.⁷⁶ In determining whether this duty has been met, "the critical inquiry will be whether the coach has fulfilled the duty to exercise reasonable care for the protection of the athletes under his or her supervision, which duty

75. Civil Rights Act, Title IX (1968).

76. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 980-82 (1979).

will be satisfied by providing proper instruction in how to play the game and by showing due concern that the athletes are in proper physical condition."⁷⁷ However, that duty ordinarily has been interpreted narrowly by the courts, supported by the existence of doctrinal and statutory exceptions. In some states, for example, coaches are liable only if their negligence is not limited by the ancient doctrines of contributory negligence or assumption of risk, or both.⁷⁸

The doctrine of assumption of risk in essence holds that those who knowingly and willfully confront a risk forfeit all rights of bringing an action when such danger comes into play and results in injury.⁷⁹ It is not hard to see that this doctrine can be successfully applied to most injuries in all sports. As long as the coach has met his requisite duty to prepare the athlete for competition he will not be held liable. For example, where a high school football player charges head first into oncoming tacklers and receives a broken neck, the coach will be absolved of all liability where he saw to it that the player was physically and mentally prepared for competition.⁸⁰ Once the coach has met this duty of preparation, the players must assume the responsibility for injuries, which are a part of the game.

If assumption of risk does not save the defendant-coach, contributory negligence often will. The doctrine of contributory negligence holds completely blameless any defendant unless the plaintiff can prove a total lack of contributory blame for the event causing his injury.⁸¹ To avoid this doctrine, the plaintiff must prove that he acted *reasonably* with regard to the portion of the cause attributable to his actions. Moreover, the athlete is barred from recovery if his own negligence has contributed to his injury in any degree, however slight.⁸² Unfortunately for the injured athlete, it is likely that some contributing behavior on the part of the athlete falls below the standard of reasonableness.⁸³

Should a school child be able to overcome the defenses of contributory negligence and assumption of risk, he still may be unable to sue his school. That difficulty will arise if the injured party attends a public school in one of the diminishing number of jurisdictions that clings to the

77. *Id.* at 980.

78. *Id.* at 980-81. For a case showing a memorandum of law for the lawyer trying this type of case, see *Sports Injury*, *supra* note 32, at 37-69.

79. See W. PROSSER, *LAW OF TORTS* 493-57 (4th ed. 1971).

80. [A]ll students on the football team had to be pronounced physically fit by a physician and once fitness was determined they were put through a training program that included calisthenics, classes on physical conditioning and training rules, and instruction in the fundamental skills of the game. . . . The coach has stressed these 'fundamentals' as an essential aspect of successful play and self-protection.

WEISTART & LOWELL, *supra* note 76, at 980-81.

81. See PROSSER, *supra* note 79, at 416-26.

82. WEISTART & LOWELL, *supra* note 76, at 978. See also *id.* at 935 n.11.

83. For an application of these concepts in sports-related cases, see *id.* at 933-51.

doctrine of sovereign immunity, and interprets it broadly.⁸⁴ Many states have adopted Tort Claims Acts which permit suits against particular types of officials under specified conditions. Most of these statutes are broad enough to provide some relief in the case of athletic injuries. Students attending private schools need not concern themselves with sovereign immunity, though they may still have to face the innate reluctance of the judicial system to award large judgments against religious institutions.

Large judgments against professional teams, and against particular members of those teams, have made the headlines in recent years. Clearly, when one professional athlete assaults another violently in the course of a game, it is now possible to sue both the offender and his club for large sums of money. Rudy Tomjanovich's successful suit against Kermit Washington,⁸⁵ and the subsequent settlement with Washington's employers, the Los Angeles Lakers, have established the existence of that principle whenever the assault is reckless and unprovoked. It is unclear, however, whether the more common injuries suffered in the ordinary course of professional contact sports afford the professional athlete any remedy beyond those afforded by his contract or guaranteed by the applicable Workmen's Compensation Act.⁸⁶ This is because if there is any area of the law where the assumption of risk doctrine holds undisputed sway, it is in the area of professional athletics. The theory, applicable also to paying spectators,⁸⁷ is that risk of injury is simply part of what was contracted for. Recalling the ancient Olympics, and the Greeks' requirement that a party causing injury to another make amends, it would seem that our own concept of this aspect of sports law is not necessarily more humane, and not necessarily more just.

C. *Sport As a Business*

Throughout the course of this article it has been noted that sport serves as a mirror of society. As the world has expanded, so also has sport. As America has turned from the agrarian nation that Thomas Jefferson always had hoped it would remain into the world's leading proponent of capitalist ideology, its sports have evolved from the pastimes of rural boys into what must be classified as "big business." The fact that sport today is first and foremost a business raises an ironic point that deserves to be touched upon, if only briefly. That irony relates to the application of the theory of private contract, which permits theories like assumption of risk to arise in the area of sport. Yet sport in the great majority of cases involves monopolies or something very close to them

84. *Id.* at 970-80 & 1030-35. Sovereign immunity prevents a private citizen from suing the state or any of its instrumentalities. PROSSER, *supra* note 79, at 970.

85. 4 SPORTS L. REP. no.2, at 6 (1981).

86. For a discussion of workman's compensation, see PROSSER, *supra* note 78, at 530-36.

87. WEISTART & LOWELL, *supra* note 76, 951-65

which place definite limits on the private contracting rights of athletes. This is an irony that apparently was not perceived by the Supreme Court of the United States in the 1972 case of *Flood v. Kuhn*,⁸⁸ a decision which preserved baseball's curious immunity from our nation's antitrust laws. The decision did not address the propriety of the "reserve clause" then contained in the standard player contract, and thus left the players tied to their clubs in perpetuity. Yet since that decision the players have gained an enormous amount of freedom to offer their services freely in the marketplace, a change initiated by the decision of arbitrator Peter Seitz when Los Angeles Dodgers' pitcher Andy Messersmith filed a grievance challenging the reserve clause in 1975.⁸⁹ This is so despite the fact that baseball's antitrust exemption still has not been stricken from the books.

In other sports, where the courts have invoked the antitrust laws and apparently have given players freedom to negotiate with whomever they please upon expiration of their contracts, restrictive compensation clauses coupled with players' abdication of rights in collective bargaining agreements have left the players with actually less freedom to choose than their baseball counterparts. One such example is the much-traveled professional basketball star Adrian Dantley, whose career has had no more personal stability than that of baseball's legendary "Suitcase" Simpson, who for years bounced back and forth among the various major league cities. Despite great success in the pro ranks, Dantley has been traded almost annually. Players in the major team sports have achieved monetary goals in recent years they never would have believed possible only a few short years ago. Yet players in Dantley's situation could tell you that certain things remain for the players to achieve. Curt Flood stated the issue nicely a decade ago, even before baseball players achieved their remarkable monetary gains:

Like other human beings, baseball players crave stability and continuity. They want to live, work, and grow old in familiar, congenial surroundings. Having found a niche in life, they are unlikely to dislodge themselves, terminate various business and social relationships and move to strange communities for no reason other than an extra few thousand dollars a year.⁹⁰

88. 407 U.S. 258 (1972). The antitrust exemption was created in 1922 by the decision in *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922). Several years ago veteran baseball executive Bill Veeck drolly said of the decision in *Federal Baseball*:

It is no secret that baseball has been engaged in a highly successful rear-guard action against being placed under the restrictions of the antitrust law, ever since that delightful day in 1922 when the Supreme Court granted us an exemption on the grounds that baseball was 'not a commercial enterprise.'

Of course not. Baseball, like loan-sharking, is a humanitarian enterprise.

Comment, *The Messersmith Decision and the 1976 Basic Agreement: Baseball's Emancipation Proclamation*, 46 UMKC L. REV. 239, 242 (1977).

89. See Comment, *supra* note 88, at 239. See also *The Sporting News*, June 27, 1981, at 7.

90. C. FLOOD, *THE WAY IT IS* 141 (1971).

V. CONCLUSION

The evolution of modern American sports law from its earliest Greek origins would, in its full complexity, take volumes to recite. Nearly 3,000 years ago, history tells us that sports was institutionalized to serve as an adjunct to diplomacy and religion. Its participants were highly honored, but carefully selected. Only "citizens" of the Greek city states were permitted to compete, a requirement that excluded members of all minorities. Sports became more commercial and brutal during the Roman era. Participants were in the most literal sense, slaves. Rather than promoting the higher values of society, sports catered to its sensationalism. The inevitable reaction during the Christian era was highly negative. Law was used to suppress the practice of sport, which was perceived not only as a violent, but also as an idle, activity. Today, sports has again assumed a central role in the lives of the millions of Americans who participate, and the hundreds of millions who watch. The games Americans play are probably less violent, and are certainly less segregated, than the games played in the past. Better protection exists for injured participants, and more contractual freedom. The development is far from complete. The law, in its proclamation and application, is still learning to deal with the inequality, violence and privileged servitude, which periodically fill the small screen and is still displayed in thousands of nation's schoolyards.