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**From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Player Association (reviewing Marvin Miller, *a Whole Different Ball Game*, the Sport and Business of Baseball (1991))**

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## ESSAY/BOOK REVIEW

### From the Land of Bondage:\* The Greening of Major League Baseball Players and The Major League Baseball Players Association

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Marvin Miller's book, *A Whole Different Ballgame: The Sport and Business of Baseball*, is a breezy, informative and certainly controversial chronicle of the evolution of the Major League Baseball Players Association (MLBPA or Players Association) from an amoebic, ill-defined amalgam of players to a fully-developed specimen of trade unionism in professional sports.<sup>1</sup> Readers who seek to be entertained will find the sports anecdotes and inside information replete with proverbial page-turning excitement and energy. Those who seek to be educated in many of the legal nuances and practical ramifications of collective bargaining, antitrust regulation, individual contract negotiation, and varieties of arbitration in the world of Major League Baseball will find Miller's book illuminating. The book will expand

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\* Arbitrator Peter Seitz, in a letter to the *New York Times*, wrote: " 'In 1982 it developed that [Bowie] Kuhn was departing from his long-held job as commissioner of baseball; and that [Marvin] Miller, the Moses who had led Baseball's Children of Israel out the land of bondage, was resigning his position [as Executive Director of the Major League Baseball Players Association].' " MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL* 331 (1991).

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1. MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL*: (1991). Marvin Miller served as the first full-time Executive Director of the Major League Baseball Players Association from 1966 until 1983. Prior to his election to this post, he worked with the United Steelworkers of America as their Chief Labor Economist and Assistant to the International President. He also advised the MLBPA in various interim capacities between 1983 and 1985.

The MLBPA was first chartered in 1954. Former Cleveland Indians' pitcher and Hall of Fame member Bob Feller was elected as its first president in 1956. The Players Association was a loosely organized group of players with little concept of their identity, institutional stature and ultimate objectives. See JAMES B. DWORKIN, *OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING* 28 (1981); LEE LOWENFISH & TONY LUPIEN, *THE IMPERFECT DIAMOND* (1980); *infra* notes 110-13 and accompanying text.

the reader's knowledge of baseball and its collective bargaining history, without any of the pain and suffering typically associated with the assimilation of this much raw data.

The greatest attribute of Miller's work is the rare glimpse it offers of the Major League Baseball player as an employee. Miller's book reflects his profound understanding of the working class, whether embracing the most unskilled laborers or the most elegantly tooled professional athletes. His vast experience in trade unionism and his unique appreciation of what motivates workers lend considerable authority to his accounts of heated negotiating sessions, early "organizing" efforts rife with internecine debate, and legal strategies in complex antitrust and contract litigation. Although many of these accounts have entertainment value simply due to the "fly on the wall" revelations that only an insider can provide, Miller's reporting of these events rises above that level to instill the reader with a better understanding of the psyches, motivations, and tactics of the various participants.

All is not well, however, with Miller's review of the MLBPA's development. Readers who took the title "The Business of Baseball" literally may be disappointed at the paucity of detail regarding the economic underpinnings of the sport.<sup>2</sup> There is little discussion of the manner in which club revenues are amassed, divided among league members, and infused into minor league programs. We learn virtually nothing about the costs of operating a major league franchise and the various means through which these costs are offset through the myriad marketing schemes and revenue-producing stratagems cultivated by the league and club owners.<sup>3</sup>

Moreover, readers who desire a neatly packaged chronology of the origins of baseball's relationship with its players as a collective body may find themselves confused at various points. Miller frequently places us in one period in time but then shifts to collateral events without sufficient linkage or reference points.<sup>4</sup> For example, although Miller attempts to segregate the various labor disputes by chapter, his analysis of such events is often

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2. Miller, however, does not totally ignore baseball's economics. For example, he gives considerable attention to baseball card licensing arrangements, *see* MILLER, *supra* note 1, at 92, pension plan funding, *id.* at 75-78, 81, 86-90, 95, and television contracts, *id.* at 98, 105, 338-39, 350-51. Much of his discussion of money matters, however, revolves around the finances or financing of the Players Association and the salary structures affecting the players.

3. *Cf.* DAVID HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* (1986) (exploring in vivid detail the economics of professional football).

4. *See, e.g.*, MILLER, *supra* note 1, at 320-49. Miller's detailed recounting of the circumstances that led to baseball's work stoppages over the past 20 years, his salient differentiation of lockouts and strikes, and his probing exploration of the underlying motives that prompted the labor strife lost punch due to the somewhat disorganized treatment that these topics received. *See also* James E. Miller, *Labor's Last Heavy Hitter*, N.Y. TIMES, July 14, 1991, at 12.

meandering. Readers who are intimately familiar with Major League Baseball and its player relations developments will have little problem maintaining perspective. Neophytes, however, may find themselves flipping backward through the pages to ascertain whether perplexity over a chronological detail is attributable to the author's omission or to the reader's oversight.

In Miller's defense, the book does not purport to be a primer on collective bargaining and baseball; anticipating a road map treatment probably is asking too much from a work of this kind. Miller's desultory roaming, particularly in recounting the strikes and lockouts, is partially explainable because the issues spawning the disputes often overlapped, creating a complex mosaic rather than a simple, straight-line chronology. In any event, Miller's organizational problems do not detract substantially from the broad historical perspective that he provides.

Further, those readers who expect a detached and dispassionate monologue on labor relations in Major League Baseball should abandon the effort forthwith. Miller makes no mistake about his distaste for dealing with club owners, his dismay at their frugality (to put it generously), his frustration with their ignorance of relevant legal constraints or their misguided belief that they are above such law, and his own view of the monumental contribution that he has made to the players' prosperity. In this sense, one of the book's virtues is also its vice. Much of the insight and rich detail surrounding the background of the Players Association's development comes directly from Miller's first-hand experience and observation. Unfortunately, this autobiographical perspective, combined with Miller's hearty ego, detracts from the account.

The reams of literature<sup>5</sup> addressing the history of the players' struggle with management in Major League Baseball recognize Miller as one of the country's most creative, dedicated and successful trade unionists.<sup>6</sup> Yet Miller's self-indulgence is excessive. Often, in subtle ways, he heaps praise

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5. See, e.g., LOWENFISH & LUPIEN, *supra* note 1, at 195; see also DWORKIN, *supra* note 1, at 37. Professor Dworkin's book provides an outstanding and very readable synopsis of collective bargaining developments in Major League Baseball, as well as in other professional sports.

6. Marvin Miller inherited a labor union that was far less than a union, consisting of players who knew very little of collective bargaining, and who, in fact, were quite resistant to the notion of any dramatic change. These players were part of their employer's capital and did not enjoy the most fundamental prerogative of every other employee—the ability to switch jobs (within the same profession) at the end of their contract term. Moreover, they were hardly remunerated in proportion to their contribution to the presentation of the owner's product. MILLER, *supra* note 1, at 95. Add to this scenario the owners' absolute intransigence and their own deluded view that their actions were immune from all scrutiny, together with the fans' view that the players were having fun in a "non-business" enterprise.

upon the Players Association, and derivatively himself, perceiving no apparent limits to his own influence upon the players' financial, social, and even intellectual growth.<sup>7</sup> Moreover, Miller misses no opportunity to chastise his many tormentors—defined, by inference, as anyone who opposes, questions, or fails to accord him the lavish praise and deference that he feels is due.<sup>8</sup>

Perhaps, given Miller's contribution to the game of baseball and its most important assets—the players—it would have been difficult for him to recount accurately the events of those turbulent seventeen years without a modicum of self-promotion, however shameless, and antipathy, however strident. It is difficult to conceive that the players would have recognized even a small portion of their substantial gains without Miller's tireless leadership, keen appreciation of labor relations, and uncanny ability to judge the human spirit and tap wells of potential energy.<sup>9</sup>

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Under these circumstances, it is undeniable that Miller was a giant among labor leaders who left his indelible mark upon Major League Baseball. When he departed in 1985, the MLBPA had secured geometric increases in players salaries (including contractual minimums), had gained players the qualified right to free agency, had enhanced the life style of retired players through the funding of the pension plan, and had become a formidable decision-making component in the development of the game of baseball. *See, e.g., id.* at 87-90, 293, 316-19.

7. *See, for example,* Miller's references to the numerous prominent players who asked him to be their personal agent, MILLER, *supra* note 1, at 315, his self-assumed patriarchy, *id.* at 335, his condemnation of his immediate successor, Ken Moffett, *id.* at 320-29, his faint praise of current MLBPA Executive Director Don Fehr, *id.* at 334-35, 338-39, 345-46, and his assessment of head-to-head confrontations with Bowie Kuhn and baseball's well-heeled Player Relations Committee, *id.* at 292. Miller's lamentations about baseball players' failure to extend proper appreciation to him, such as the following commentary on former New York Yankee Catfish Hunter's autobiography, are most telling.

Either Hunter or Armen Keteyian, the writer working with him, or a source supplying Keteyian, would have readers believe that the chief executive of the Association (yours truly) somehow vanished during two of the most important arbitrations in the union's history. A nifty feat, considering that nothing of significance occurred without my direct involvement in the entire seventeen years of my tenure. I was very much a 'hands on' administrator.

*Id.* at 347.

8. While the field of labor relations is not to be occupied by the faint-hearted, and while one can expect industrial combat to yield considerable animosity and hurt feelings, some of Miller's observations are gratuitous, truculent, and ill-conceived. For example, Miller unnecessarily calls the reader's attention to San Francisco Giants' owner Horace Stoneham's drunkenness during one of their informal conversations. *See* MILLER, *supra* note 1, at 50-51. More often than not, Miller's most snide and demeaning comments are directed toward former Commissioner Bowie Kuhn. Although these comments discredit to a degree the credibility of Miller's account, it is difficult to criticize his deprecating air given Kuhn's unctuous, condescending, and disparaging review of Miller and his organization. *See generally* BOWIE KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* (1987); *see also infra* notes 14, 15, 74-101 and accompanying text.

9. Miller's ability to convert an impotent quasi-trade association into the most proficient labor organization in sports industry is testimony to his ability to coalesce forces of divergent interests, backgrounds, and talents. Indeed, although players seem to have an unrivaled com-

Much of Miller's vitriol can be explained by the fact that he, and the tactics that he employed as Executive Director of the Players Association, had been vilified in accounts that preceded this book.<sup>10</sup> Miller is the repository for the hostile invective of fans, the press, and all elements of the baseball community who misperceive the players as spoiled brats. In fact, Miller became the fall guy largely through the orchestration of the owners and the Commissioner's office,<sup>11</sup> who seemed unwilling to admit that the players had enough intelligence or perseverance to make demands and engage in collective action to secure them. Under the circumstances, some no-holds-barred retaliation should be expected.<sup>12</sup>

As suggested earlier, Miller often employs a stream of consciousness approach in reliving the evolution of the MLBPA. This Essay/Book Review will attempt to provide more traditional structure to Miller's historical musings. Typically, a course in professional sports law examines the nature of a sports league, emphasizing the roles played by commissioners, owners, players, and the players' representatives. Then, by examining the relationships of these individuals and institutions, a sports law class focuses upon critical areas of sports jurisprudence such as contracts, antitrust, and labor law.<sup>13</sup> This Essay/Book Review critiques Miller's book from that perspective, and attempts to provide observations and commentary on the various legal and technical issues that require clarification or elaboration.

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munity of interest, it must be noted that almost 200 times a year they compete with one another in athletic events that determine, to a large degree, their value and eventual financial compensation.

10. See, e.g., KUHN, *supra* note 8, at 76-84; see *infra* note 15.

11. Bowie Kuhn suggests that Miller was the darling of the sporting press and attributes this kinship to Miller's smooth and ingratiating style. See, e.g., KUHN, *supra* note 8, at 80, 106, 313, 336, 347. In truth, Miller received more than his share of negative press coverage and was frequently the whipping boy for the poisoned pen of columnists such as Dick Young of the *New York Times*. See MILLER, *supra* note 1, at 85, 205-06, 215, 218, 262, 284, 292, 297, 300, 307.

12. As I read each page with great curiosity and greater enjoyment, I could not help but think how much more I might have relished the experience had the account been more biographical than autobiographical, and if the book had been written, rather than introduced, by a historian such as Studs Terkel. Doubtless, Terkel would have extolled Miller's virtues much the same as the author did himself. While the result would have been largely the same, it is likely that Terkel's sardonic, yet avuncular, wit would alienate far fewer than Miller's book obviously will, and thereby would greatly increase the universe of those readers who might be receptive to the many relevant and salient points advanced by Miller. See, e.g., STUDS TERKEL, *TALKING TO MYSELF: A MEMOIR OF MY TIMES* (1973).

13. See, e.g., 1 ROBERT C. BERRY & GLENN M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES: PROFESSIONAL SPORTS LEAGUES* (1986). Miller's book does not follow this basic pattern, but rather visits these areas in random fashion. As discussed at various points herein, his account suffers somewhat from disorganization. Thus, this review has realigned the discussion to facilitate the reader's understanding of the people and events that Miller recollects.

## I. THE OWNERS

Miller makes no secret of his perception of who occupy the hero and villain roles in the world of Major League Baseball. There are few owners whom he likes, and fewer still who have managed to earn his respect.<sup>14</sup> His dismay derives from his perception of the hypocrisy of the owners' relish for the free enterprise, capitalist system when it comes to amassing their own wealth, but their total abhorrence of such a program of economic operation when it is practiced by players who are attempting to profit from their own athletic and entrepreneurial skills.<sup>15</sup> Without listing all of Miller's individual complaints about each owner and about Major League Baseball's collective managerial body, the primary sources of his consternation warrant examination.

Over the years, team owners have grown accustomed to complete and unfettered control over their game and its participants. Miller sees this manic need to control all phases of the sport and the failure to recognize that the players are entitled to some input in the governance of the enterprise as major impediments in the development of meaningful collective bargaining.<sup>16</sup> The observation that sports club owners perceive themselves as feudal lords indenturing their serfs, or chessmasters moving their players around as pawns, is an oft-repeated refrain.<sup>17</sup>

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14. See generally MILLER, *supra* note 1, at 363-92. Miller strains to offer some positive comments about the owners and other managerial officials with whom he waged daily war. Michael Burke, former president of the New York Yankees, is identified as one who maintained an air of grace and objectivity notwithstanding the adversarial relationship. *Id.* at 64, 94, 162. Owners Charles Finley of the Oakland A's, Walter O'Malley of the Los Angeles Dodgers, and George Steinbrenner of the New York Yankees were also found to possess some redemptive qualities. *Id.* at 370, 377, 381.

Miller was particularly fond of the late Bill Veeck, whose innovations and maverick style offended many of baseball's power elite. *Id.* at 364, 367. Veeck was not viewed in the same shining light by Bowie Kuhn. See KUHN, *supra* note 8, at 213, 220-21.

15. MILLER, *supra* note 1, at 351-52. Noted journalist Red Smith declared: "Nobody gives more pious lip service to the free-enterprise system than the typical owner of a baseball club. But he does not want it operating in baseball. In spite of a whole series of court rulings, he still believes his players are property . . . ." KUHN, *supra* note 8, at 337.

16. MILLER, *supra* note 1, at 114, 123-24.

17. Noting that baseball's arcane antitrust exemption bestowed a gift of perpetual potential collusion upon the owners, Miller comments:

[C]ollusion had been an everyday part of baseball since 1876. The owners controlled everything from ticket prices to the color of a ballplayer's skin. Take salaries: There had been an unwritten rule for years (a collusive "understanding") that said no player—not Ted Williams, Joe DiMaggio, or Stan Musial—would be paid more than \$100,000 a year. The reserve rules system was more of the same. Each club agreed not to talk to any player who *belonged* to another club. . . .

*Id.* at 257; see also LOWENFISH & LUPIEN, *supra* note 1, at 39.

Nowhere is the owners' preoccupation with dominance more visible than in the endless debate surrounding the reserve clause and free agency.<sup>18</sup> Miller notes that the owners' persistent complaints about free agency and its deleterious impact upon league balance and competition have been little more than a "smoke screen."<sup>19</sup> As he suggests, the owners' hysterical predictions that the elimination of the reserve system would bring about the ruination of the game arguably is nothing more than a pretext to hide their real concern—the permanent end to their absolute control over the game of baseball.<sup>20</sup>

The players' desire to loosen the bonds of the reserve system, however, was neither a novel nor a subversive notion. As early as 1887, baseball star and innovator John Montgomery Ward declared: "Like a fugitive slave law, the reserve rule denies [the player] a harbor or a livelihood, and carries him back, bound and shackled, to the club from which he attempted to es-

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18. The reserve rule, which in some form or other has been in place for over a century, permits Major League clubs to freeze a certain number of players and to prohibit them from signing with other teams. The original reservation of rights has been modified over the years and is now embraced in the collective bargaining agreement between Major League Baseball and MLBPA. See Jeffrey S. Moorad, *Negotiating for the Professional Baseball Player*, in *LAW OF PROFESSIONAL AND AMATEUR SPORTS* 5-1 app. at 5-62 to 5-71 (Gary A. Uberstine ed., 1991); (providing a copy of Article XX, Reserve System, of the Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and MLBPA (Effective Jan. 1, 1990)). Free agency generally refers to limitations on the clubs' reservation of rights and the expansion of a player's ability to negotiate with the team of his choice upon expiration of his Uniform Players' Contract. *Id.*; see also *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976) (affirming lower court order sustaining Arbitrator Peter Seitz's ruling that the Uniform Player Contract and the Major League rules did not establish permanent control over a player's movement); see also *infra* notes 143-49, 154-55 and accompanying text; DWORKIN, *supra* note 1, at 80-82; Moorad, *supra*.

19. During collective bargaining and work stoppages that succeeded Arbitrator Seitz's decision and the unsuccessful appeals, several owners declared that free agency would sound a death knell for Major League Baseball. MILLER, *supra* note 1, at 275, 287.

20. Miller, whose entry onto the baseball scene was greeted with cries of "cataclysmic," "disastrous," and "certain bankruptcy," clearly has no sympathy for the owners' perpetual "wolf" cries of poverty. MILLER, *supra* note 1, at 85. He notes that in 1990, a "year of record-breaking profits," Charles Bronfman of the Montreal Expos declared that "expenses may soon choke many of us" and that the current salary configuration "had to be eliminated." See *id.* at 287. Shortly after the players had secured free agency, approximately 10 years earlier, Bronfman stated "baseball is not a healthy industry." *Id.* More incredibly, Ray Grebey, league negotiator, added that most owners could earn a better living "as a waiter at the ballpark." *Id.* (footnote omitted).

Miller indicates that one seldom hears owners comment favorably on the game's increasing popularity and prosperity over the last 15 years. Commenting on what he characterizes as the "trickle-up" theory of economic development, Miller explains that the gains of the players resulted in substantial financial advancement for "trainers, coaches, field managers, general managers, league presidents, club officials, umpires, owners, players' agents, and, yes, the commissioner." *Id.* at 287-88.

cape.' ”<sup>21</sup> Borrowing on Ward’s characterization, and adopting verbatim some of his thoughts, the Manifesto of the Brotherhood of Professional Baseball Players states: “ ‘By a combination among themselves, stronger than the strongest trust, the owners were able to enforce the most arbitrary measures, and the player had either to submit or get out of the profession in which he had spent years attaining proficiency.’ ”<sup>22</sup>

Indeed, many owners portray themselves as a cadre of entrepreneurs who see no bounds to the extent of control that they should be permitted to exercise over all facets of the game,<sup>23</sup> including their erstwhile chattel, the players. Former Oakland A’s owner Charlie Finley acknowledged: “We run our club like a pawn shop—we buy, we trade, we sell.”<sup>24</sup> Similarly, George Steinbrenner, former owner of the New York Yankees, offered this comment, perhaps tongue in cheek, but nonetheless demeaning: “I like my horses better because they can’t talk to sportswriters.”<sup>25</sup>

Miller also seriously questions the character and moral fiber of most of the individual owners. He highlights several of their foibles, including their outright refusals to pay monies owed contractually,<sup>26</sup> their attempts to subvert

21. LOWENFISH & LUPIEN, *supra* note 1, at 31. The involuntary servitude theme was echoed in 1949 by United States Court of Appeals Judge Jerome Frank, who dismissed suggestions that the reserve system’s legitimacy could be evidenced by the handsome salaries paid to many players. He stated that “only the totalitarian-minded will believe that high pay excuses virtual slavery.” *Gardella v. Chandler*, 172 F.2d 402, 410 (2d Cir. 1949). As recently as 1972, baseball player Curt Flood, plaintiff in the infamous lawsuit challenging baseball’s reserve clause and the sport’s singular immunity from antitrust scrutiny, analogized himself to a slave. CURT FLOOD, *THE WAY IT IS* 14-16 (1971).

22. LOWENFISH & LUPIEN, *supra* note 1, at 27 (quoting Manifesto of the Brotherhood of Professional Baseball Players, Nov. 6, 1889).

23. *See, e.g.*, KUHN, *supra* note 8, at 66.

24. L.A. TIMES, June 23, 1977, pt. III, at 2.

25. *They Said It*, SPORTS ILLUSTRATED, Apr. 22, 1985, at 18. Unfortunately, the livestock comparison is not idiosyncratic to Mr. Steinbrenner. Curt Flood, whose autobiography shows him to be a thoughtful and perceptive analyst of baseball and its personages, laments, “in the hierarchy of living things, he [the baseball player] ranks with poultry.” FLOOD, *supra* note 21, at 15.

26. MILLER, *supra* note 1, at 224-87; Matter of the Arbitration between American and National Leagues of Professional Baseball Clubs (Oakland Athletics) and Major League Baseball Players Ass’n (James A. Hunter), Doc. No. 23, Grievance Nos. 74-18 and 74-20, Seitz, Impartial Chairman of Panel, Dec. 13, 1974. Miller frowns upon Commissioner Kuhn’s reaction to Seitz’s decision releasing grievant Catfish Hunter from further contractual obligations due to owner Charles Finley’s material breach (repeated failure to pay money due and owing). Kuhn claims that the award was excessive, characterizing the contract forfeiture as “ ‘giving a life sentence to a pickpocket.’ ” MILLER, *supra* note 1, at 235. Miller correctly points out that the award was nothing more than the remedy ordained by the contract itself. *Id.* at 228. Further, Kuhn, as an experienced lawyer, should have realized that a material breach evincing a breaching party’s failure to perform substantially his contractual obligation warrants contract forfeiture. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* §§ 11-18, at 458-64 (3d ed. 1987).

provisions such as free agency through unlawful collusive efforts,<sup>27</sup> and their overall disingenuousness in dealing with the players, the Players Association, and one another.<sup>28</sup> He wryly notes that owners are plainly cognizant of their own avarice, and have consistently attempted to cajole players into accepting bargaining proposals that protect the owners from themselves.<sup>29</sup>

Miller's myriad problems with the ethics of baseball ownership are hardly unique characterizations. One of baseball's first operators, Ferdinand Able, co-owner of the Brooklyn franchise in the National League, admitted: "Whenever I go to a baseball meeting, I never forget to check my money and valuables at the hotel office before entering the session chamber."<sup>30</sup> Mr. Able's comments portended other self-effacing observations about the financiers of Major League Baseball. Approximately seventy-five years later, Ewing Kauffman, popular and successful owner of the Kansas City Royals, noted with apparent chagrin that "[b]aseball has 24 teams and the owners have inherited wealth, or become wealthy themselves. They are self-confident, egotistical, even egocentric, and need a broad, strong hand in order to keep baseball running smoothly."<sup>31</sup>

Miller's disenchantment also stems from the owners' lack of sophistication in the nuances of the law and their belief that they were beyond its purview and immune from its sanctions, particularly in the area of labor management relations and collective bargaining. Miller suggests that, given baseball's ridiculous insulation from antitrust scrutiny, the owners can hardly be faulted for any misguided belief that whatever they did with their game was above reproach.<sup>32</sup> On more than one occasion, Miller points out that the owners committed unpardonable labor relations sins, notwithstanding the fact that many of them had considerable experience with unions and the collective bargaining process in their other financial endeavors.<sup>33</sup> Perhaps nothing evinces in more glaring fashion the owners' disregard for labor law than the fact that they repeatedly attempted to advise, run, and even finance the Play-

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27. Matter of the Arbitration between Major League Baseball Players Association and the Twenty-Six Major League Baseball Clubs, Doc. No. —, Grievance No. 86-2, Roberts, Impartial Chairman of Panel, Sept. 21, 1987.

28. See, e.g., MILLER, *supra* note 1, at 68, 309; KUHN, *supra* note 8, at 219-20.

29. MILLER, *supra* note 1, at 82, 296, 309.

30. LOWENFISH & LUPIEN, *supra* note 1, at 57.

31. *Royal's Kauffman Backs Kuhn in Player Suit Filed by Finley*, WASH. POST, Jan. 8, 1977, at B4.

32. See *Flood v. Kuhn*, 407 U.S. 258 (1972); see also MILLER, *supra* note 1, at 90-91; *infra* notes 136-41 and accompanying text.

33. MILLER, *supra* note 1, at 107, 124.

ers Association—flagrant unfair labor practices and probably violations of the National Labor Relations Act's anti-racketeering provisions.<sup>34</sup>

Aside from his observations regarding the blatant subversion of federal labor law represented by the owners' virtual dominance of the Players Association, Miller contends that there were numerous other examples of the owners' utter disregard for labor regulation and their overt desire to break the union at any cost.<sup>35</sup> He cites instances in which the owners engaged in bad faith bargaining by: outright refusals to bargain;<sup>36</sup> bypassing the collective bargaining representative;<sup>37</sup> employing dilatory tactics during negotiations;<sup>38</sup> and attempting to take away gains hard-earned through earlier bargaining and arbitrations.<sup>39</sup> Miller also strongly urges that baseball owners repeatedly culled the ranks of player representatives by trading, releasing, or otherwise adversely affecting the working conditions of the most vocal Players Association activists.<sup>40</sup>

Miller is also concerned with the owners' insensitivity to civil rights issues and, at times, their abject bigotry in dealing with minorities. The issue came into full bloom following the ABC television *Nightline* interview in which former Dodger executive Al Campanis responded to Ted Koppel's inquiry regarding whether there was still significant prejudice in baseball and about the absence of blacks in managerial positions by stating: "No, I don't believe it's prejudice. I truly believe that they may not have some of the necessities to be, let's say, a field manager or, perhaps, a general manager."<sup>41</sup>

It is clear that Miller, without recalling the incident specifically, does not view Campanis' comment as aberrational in the baseball community. Rather, Miller's account suggests that these words are all too indicative of

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34. *Id.* at 87-88. During the first days of Miller's tenure, the owners had tentatively committed to the subsidization of the Players Association with funds derived from the Major League All-Star game. This type of employer contribution was part and parcel of the owners' overall treatment of the Players Association. The MLBPA was viewed as some type of corporate subdivision that had to be subsidized and accommodated, but in no way would it be permitted to interfere substantially with basic management prerogatives or the direction of the business. To his credit, legal counsel Paul Porter eventually acknowledged that federal labor law, 29 U.S.C. §§ 158(a)(2), 186 (1988), rendered any transmission of All-Star game revenue money to support the labor union illegal, "and that he and other baseball attorneys had not 'focused on' the Players Association as a union until 'very recently.'" MILLER, *supra* note 1, at 71. From the time Miller took office, there were no misconceptions about the nature of the MLBPA.

35. *See, e.g.*, MILLER, *supra* note 1, at 203-06.

36. *Id.* at 96. *See generally* 29 U.S.C. § 158(a)(5) (1988).

37. *Id.* at 213, 270.

38. *Id.* at 99, 190.

39. *Id.* at 113-16.

40. *Id.* at 163, 206, 303-04. *See generally* 29 U.S.C. § 158(a)(3) (1988).

41. *Nightline: Prejudice in Baseball* (ABC television broadcast, Apr. 8, 1987).

the mindset of baseball's ruling class vis-à-vis minorities. Miller cites dramatic examples of both owner and public perceptions that indicate considerably less tolerance of the frailties and mistakes of black athletes and greater resentment of their economic advancements.<sup>42</sup> Certainly, the raw statistics, standing alone, speak volumes about baseball's "good old boy" network and the absence of any meaningful upward mobility for blacks, even veteran players.<sup>43</sup>

In sum, Miller expresses unequivocally his view that on several levels baseball's owners have failed to demonstrate a modicum of respect for their players or for each other. In fact, the available evidence lends considerable support for his assertions. Yet, if Miller could have distanced himself somewhat, he may have provided some plausible explanations for the owners' attitudes and conduct beyond greed, megalomania, and ignorance. At no point does he elaborate on the prudence of club ownership as a business venture, the costs of minor league player development, any affirmative action programs to rectify the discrimination problems, or other stratagems that he undoubtedly observed during seventeen years at the bargaining table. It is likely that readers would have heartily endorsed many of Miller's observations about the character and predilections of baseball's owners. Indeed, many of the owners' actions over the past several decades resist any plausible explanation. Still, Miller's points would have had greater impact if the readers had been given more information from which to draw their own conclusions.

## II. THE COMMISSIONER

Marvin Miller's dismay with baseball's "brass" is by no means limited to club owners and their operating officers. Most commissioners absorb their fair share of Miller's vituperative comments. At the core of Miller's disenchantment is the commissioners' unwillingness to acknowledge that, though they hold the title, "Commissioner of baseball," they are allied with

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42. MILLER, *supra* note 1, at 133-34, 308; *see also* FLOOD, *supra* note 21, at 74-76.

43. *See* Jim Meyers, *Pros Make Progress on Race Issue*, USA TODAY, July 10, 1990. For example, between 1947 and 1971, baseball did not hire a single black manager. MILLER, *supra* note 1, at 39-40. Miller is astounded that, at a time when other industries were subject to the strictest scrutiny for failing to promote minority employees, baseball was "as lawless . . . as Dodge City in 1876." *Id.* at 40. Again, Miller sees a perverse logic in the owners' belief that they had no need to defend their hiring practices; in every other legal venue, their conduct seemed to be sacrosanct. Indicative of baseball's unconsciousness in the civil rights area is Minnesota Twins' owner Calvin Griffith's statement that he made the decision to relocate the Washington Senators in Minnesota "when I found you only had 15,000 blacks here." Bob Fowler, *Twins' Players Raging Over Cal's Remarks*, THE SPORTING NEWS, Oct. 14, 1978.

and answerable to only the ownership component of the sport.<sup>44</sup> He concedes that this view is not entirely inaccurate in the sense that, vis-à-vis the players, the commissioners' power is paramount and supreme.<sup>45</sup> Miller points out that in relationships with certain owners, the commissioners also have been able to exert considerable pressure,<sup>46</sup> and that in most instances, the commissioners' exercise of authority in matters pertaining to the business of baseball has not and will not be questioned by courts or arbitrators.<sup>47</sup> Miller, however, contends that the apparently unfettered authority of the commissioner is exclusively a function of the owners' whim. He explains that, even in those cases where the commissioner has wielded his power against an owner (e.g., through fines, suspensions or veto of trades or sales of players), the allegedly recalcitrant owner has been a "new kid[ ] on the block . . . considered expendable by establishment owners."<sup>48</sup> Miller believes that the media's romantic view of baseball and the purity of the commissioner's authority contributes substantially to the public's misperceptions as to where the ultimate power rests: "If Fay Vincent or any other commissioner ever attempted to act 'in the best interests of baseball' *but* against the best interests of a significant group of owners, the press's illusions about the commissioner's power would be quickly shattered."<sup>49</sup>

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44. See, e.g., MILLER, *supra* note 1, at 110, 293-94.

45. *Id.* at 405.

46. *Id.* at 406.

47. See, e.g., Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978); Milwaukee American Ass'n v. Landis, 49 F.2d 298 (N.D. Ill. 1931). *But see* Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (N.D. Ga. 1977). Recently, limits on the commissioners' broad authority were recognized when former Cincinnati Reds player and manager Pete Rose obtained a Temporary Restraining Order precluding Commissioner Bart Giamatti from conducting a hearing on Rose's alleged gambling in violation of baseball rules. The court concluded that Giamatti's conduct, particularly sending a letter to the United States District Court for the Southern District of Ohio's Chief Judge Carl B. Rubin extolling the virtues of Ron Peters, a convicted drug trafficker awaiting sentencing, manifested pre-judgment bias. Specifically, Giamatti declared that Peters had been a "candid, forthright and truthful" witness in his testimony about Rose's activities. *Rose v. Giamatti*, No. A8905178, 1989 Ohio Misc. LEXIS 4, at \*5 (C.P. June 19, 1989). In fact, Giamatti had never seen or heard Peters testify, and Rose had had no opportunity to cross-examine him. See *id.*; *infra* notes 88-91, 103-06 and accompanying text.

48. MILLER, *supra* note 1, at 383, 406.

49. *Id.* at 406. The press is certainly a minor actor in the "commissioner as absolute" scenario. Much of the mythology surrounding the evolution of the commissioner's role stems from the early days of Judge Kenesaw "Mountain" Landis' reign. Judge Landis became baseball's first commissioner (baseball previously operated with two league presidents) following the infamous Black Sox scandal of 1919. Given the disarray in Major League Baseball at the time, and the fear that the gambling scandal would have a permanent negative impact upon fan support, the owners were prepared to take drastic measures.

Sensing the need for cohesion and control, Landis agreed to become commissioner on the condition that his power be absolute. Team owners, in no mood to debate the finer points of

According to Miller, all commissioners, in one fashion or another, have succumbed to the notion that they are no longer accountable to any mortal soul. Illustrations of primogenitor Judge Kenesaw Landis' imperious bearing and unbridled arrogance need not be documented here. He successfully rebuked superstars like Babe Ruth<sup>50</sup> and Shoeless Joe Jackson,<sup>51</sup> as well as certain league owners,<sup>52</sup> with scarcely more than a whimper from the opposition.

Landis' successors likewise operated under the assumption that they were beyond sanction, whether it be for violations of the law or transgressions against basic human dignity. Miller claims that Landis' immediate successor, A.B. "Happy" Chandler, portrayed his indifference to law and public opinion by, among other things, spying on the union activities of early player organizer Robert Murphy,<sup>53</sup> suspending Leo Durocher for an entire season,<sup>54</sup> and subverting players' attempts to conduct a peaceful work stoppage.<sup>55</sup> However, Ford Frick, next in Miller's fools' parade, quickly

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commissioner authority and prompted by a need to convince the public that the sport was not rudderless, agreed to Judge Landis' terms. As Miller correctly points out, it set a precedent in which baseball's commissioner gradually assumed broad authority over all aspects of the game—again, so long as the "good old boy network" remained, for the most part, undisturbed. *Id.* at 107.

50. See ROBERT W. CREAMER, *BABE* 244-52 (1974).

51. MILLER, *supra* note 1, at 215; ELIOT ASINOF, *EIGHT MEN OUT* 292 (1963).

52. See *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

53. MILLER, *supra* note 1, at 6. Such surveillance is a violation of section 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1) (1988).

54. MILLER, *supra* note 1, at 57. Miller depicts Chandler as a somewhat paranoid, devious, and vindictive commissioner. When he was criticized by renowned baseball writer Red Smith as being a pawn for the owners and for the excessiveness of his season-long suspension of Leo Durocher, Chandler accused Smith of conspiratorial activity and of "trying to run him out of baseball . . . Smith replied: 'If I can get paid for thinking Happy Chandler has performed like a clown and a mountebank, then I want all that kind of money I can get. Ordinarily I have to work for mine.'" *Id.*

55. *Id.* at 64. Ironically, in some circles, Chandler is viewed as having been a players' commissioner. In 1946, Commissioner Chandler, who had been appointed less than a year earlier, announced that those players who "jumped" to the Mexican league would be barred from Major League Baseball for five years. *Id.* at 176. The word "jump" is clearly a misnomer because the players simply left after their contracts had expired. The only thing they were "jumping" was the outrageous reserve rule and system of perpetual options. One of the players, Danny Gardella, instituted an antitrust action, claiming that the blacklist was a violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-3 (1988). See *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949). His case was particularly poignant because he had never been subject to the reserve clause; rather, he had simply turned down a \$5,000 signing bonus from the New York Giants to play baseball in the United States. With the lawsuit pending, Chandler granted amnesty to all players who had defected to the Mexican League. His purpose allegedly was to temper justice with mercy—thus the designation "players' Commissioner." Miller disputes the title, however, claiming that Chandler was motivated by the pending Second Circuit case

developed a reputation as a “‘do-nothing’”<sup>56</sup> commissioner whose greatest offense was his inactivity rather than his power-mongering.<sup>57</sup> Frick was followed in office by Colonel William “Spike” Eckert, who was commonly viewed as the “‘know-nothing’” counterpart to Frick and someone who, by his own admission, was ill-suited for the position.<sup>58</sup> Eckert lacked sophistication in labor relations and by many accounts was “overmatched by the job.”<sup>59</sup>

Miller’s most pointed commentary is reserved for Bowie Kuhn and, somewhat surprisingly, the late Bart Giamatti. A perusal of Miller’s book in comparison with Kuhn’s *Hardball*<sup>60</sup> will convince most readers that there is precious little common ground upon which these adversaries stand. While a litany of the differences between Miller and Kuhn would fill a separate volume, a few brief illustrations on the 1981 strike will make the point.

In recounting the strike, where the gravamen of the impasse centered upon the owners’ demand that the acquiring club compensate (e.g., with a roster player) the club losing a player to free agency, Miller recalls: “The 1981 strike was the most principled I’ve ever been associated with . . . . [I]t

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and by a desire to forestall any decision in which baseball’s reserve clause would be threatened and baseball’s antitrust exemption removed. MILLER, *supra* note 1, at 176-80.

56. MILLER, *supra* note 1, at 70.

57. In addition, there were instances in which Frick distinguished himself for his insensitivity to blacks as well as for his commitment to integration. For example, at one point he explained the absence of blacks from baseball by saying, “‘Colored people’ . . . ‘did not have a chance to play’ during slavery, ‘and so were late in developing proficiency . . . . Consequently, it was another fifty years before they arrived at the stage where they were important in the organized baseball picture.’” HAROLD SEYMOUR, *BASEBALL: THE PEOPLE’S GAME* 532 (1972). As National League President, however, Frick responded to threats by some teams that they would strike rather than play against Jackie Robinson. “I do not care if half the league strikes. Those who do will encounter quick retribution. . . . This is the United States of America and one citizen has as much right to play as another.” ROGER KAHN, *THE BOYS OF SUMMER* 45 (1972). In attempting to identify the real Ford Frick, one should be aware that he opposed admitting Negro Leaguers into the Hall of Fame. KUHN, *supra* note 8, at 110. Kuhn noted that as “[w]rong though Frick may have been on this issue, no one could challenge his honesty, genuineness or decency.” *Id.* This naivete probably explains Kuhn’s wonderment as to why baseball has had a difficult time attracting black fans. “Although blacks are measurably strong baseball fans, there has always been a notable failing on the part of the major leagues to turn them into paying customers. Why this is, I have never been quite sure.” *Id.* at 116-17. Perhaps it escapes Kuhn’s ken that, until 1947, blacks were excluded from those major leagues.

58. MILLER, *supra* note 1, at 70; *see also* KUHN, *supra* note 8, at 29-30.

59. MILLER, *supra* note 1, at 69-70. Even the hapless Eckert was carried away by his title. When confronted by Miller regarding his decision to bar the Executive Director from a crucial meeting with player representatives, Eckert declared: “The Commissioner decides who will come to these meetings, and the Commissioner has made that decision.” He soon relented. *Id.* at 70.

60. *See supra* note 8.

was the Association's finest hour."<sup>61</sup> Kuhn, on the other hand, comments, "On June 12 the Major League Players Association blundered into a strike that would prove to be the worst in American sports history."<sup>62</sup>

Miller adds that the owners' lamentation about free agency was a subterfuge. In his view, the owners were aware that more teams would have an opportunity to improve themselves, and the game as a whole would prosper as a result of the open bidding.<sup>63</sup> Kuhn was strongly in favor of a compensation package<sup>64</sup> and frequently expressed his concern that unqualified free agency would cripple the industry.<sup>65</sup>

Finally, Miller characterizes the strike as a players' dispute in which the athletes "[t]op to bottom, star to sub, liberal to conservative . . . stood firm."<sup>66</sup> He quotes numerous players who endorsed the strike and lauded its accomplishments.<sup>67</sup> In assessing the aftermath, Miller notes that the players, while losing thirty-four million dollars, secured their future income earning potential—a fact borne out by data that compares player payrolls of 121 million dollars in 1981 to over 388 million dollars in 1990.<sup>68</sup> Kuhn, conversely, labels the 1981 work stoppage as "Miller's strike,"<sup>69</sup> in which the players were "[l]ed . . . as a trusting light brigade into the valley of death . . . . [T]hey were the major financial losers."<sup>70</sup>

Their direct evaluations of each other round out these dramatically opposite perspectives. Kuhn, who admits to the existence of "rogues in our business,"<sup>71</sup> opines that Miller "hated management generally and the management of baseball specifically."<sup>72</sup> Kuhn states that Miller perceived the owners as "scoundrels" and "tyrants," emulating those employers of bygone days "who had suppressed the rightful interests of American labor."<sup>73</sup> Kuhn would have his readers believe that Miller's perspective is a product of his standing as "an old-fashioned, nineteenth-century trade unionist" who "harbored a suspicion of most institutions" and who "had a deep hatred and suspicion of the American right and of American capitalism."<sup>74</sup> Yet,

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61. MILLER, *supra* note 1, at 302.

62. KUHN, *supra* note 8, at 3.

63. MILLER, *supra* note 1, at 118.

64. KUHN, *supra* note 8, at 3.

65. *Id.* at 338; MILLER, *supra* note 1, at 248, 275.

66. MILLER, *supra* note 1, at 302.

67. *Id.* at 303.

68. *Id.* at 318.

69. KUHN, *supra* note 8, at 346.

70. *Id.* at 362.

71. *Id.* at 77.

72. *Id.*

73. *Id.* at 78.

74. *Id.* at 77.

Kuhn's assessment of Miller overstates the point. Rather, Kuhn's observation that professional baseball fits the prototype of what Miller must despise, "with its rich, lordly owners and its players shackled by the reserve system," together with Miller's awareness of the role that he occupies as union leader, offers a more plausible explanation for Miller's perennial distance from baseball's ownership and inherent distrust for many of its actions.<sup>75</sup>

Miller makes clear that he regards Kuhn as a shill for baseball's owners, insensitive to players,<sup>76</sup> and bent on destroying their Association.<sup>77</sup> The fact that Kuhn, an experienced Wall Street lawyer, manifested such a profound lack of sophistication with regard to legal matters,<sup>78</sup> especially in the areas of labor relations<sup>79</sup> and due process, is particularly frustrating to Miller.<sup>80</sup> Miller remembers Kuhn as unreliable,<sup>81</sup> disingenuous,<sup>82</sup> paternalistic,<sup>83</sup> and unrealistic,<sup>84</sup> and he highlights the shameless and repeated distortion of facts and events appearing in Kuhn's autobiography.<sup>85</sup>

At the close of his book, Miller reflects upon those Commissioners who followed his retirement as Executive Director. He finds virtue in both Peter

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75. *Id.* Nothing contributed to the inability of Miller and Kuhn to find a common ground so much as their own self-perceptions. Miller saw and correctly positioned himself in an adversarial role vis-à-vis baseball's owners. MILLER, *supra* note 1, at 110-11. Indicative of Miller's allegiance to the Players Association and his traditional view of trade unionism is his refusal to accept his salary while the players were on strike. *Id.* at 212. Kuhn, on the other hand, appeared to view himself as a man for all seasons, a moderating influence upon the opposing forces, a servant to the game and, at times, even a players' commissioner. *Id.* at 105-06, 111, 293-94. "I wanted to reach the players. . . . I admired them. . . . I would always be the little kid on the curb watching the parade of stars march by." KUHN, *supra* note 8, at 44. As Curt Flood says, however, "From the players' point of view, he was straight Establishment, a grinder of the owners' ax." FLOOD, *supra* note 21, at 169. Throughout his book, Miller expresses his disdain for what he perceives to be Kuhn's self-delusions.

76. MILLER, *supra* note 1, at 127.

77. *Id.* at 91.

78. *Id.* at 234-35; *see also supra* note 26.

79. MILLER, *supra* note 1, at 96.

80. *Id.* at 130.

81. *Id.* at 93.

82. *Id.* at 119.

83. *Id.* at 202.

84. *Id.* at 294.

85. *Id.* at 300. Miller's synopsis of Kuhn is most damning.

His moves consistently backfired . . . . His inability to distinguish between reality and his prejudices, his lack of concern for the rights of players, sections of the press, and even of the stray, unpopular owner—all combined to make Kuhn a vital ingredient in the growth and strength of the union. To paraphrase Voltaire on God, if Bowie Kuhn had never existed, we would have had to invent him.

*Id.* at 91.

Ueberroth's<sup>86</sup> and Fay Vincent's<sup>87</sup> tenures, but gives each of them a mixed review. He has few kind words for the late Bart Giamatti, who was lionized as Commissioner and almost canonized since his untimely death.

Miller's principal dispute with Giamatti centers upon the latter's handling of the Pete Rose case<sup>88</sup> and his response to Arbitrators Thomas Robert's and George Nicolau's collusion decisions of 1985, 1986, and 1987.<sup>89</sup> With regard to Rose, Miller contends that Giamatti acted irresponsibly and seriously undermined Rose's due process rights by crediting an adverse witness before he heard the testimony of that witness and without the benefit of any cross-examination.<sup>90</sup> He adds that Giamatti signed an agreement with Rose specifically acknowledging no finding of any baseball-related gambling; yet,

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86. Miller praises certain aspects of Ueberroth's tenure, including his reversal of Kuhn's banning of Willie Mays and Mickey Mantle from Major League Baseball due to their affiliation with Atlantic City casinos. He was also impressed with Ueberroth's interest in the Players Association's collective bargaining history. MILLER, *supra* note 1, at 386-88. On the negative side of the ledger, Miller calls Ueberroth to task for bypassing the Players Association in a grandstand fashion on the drug testing question. *Id.* at 389-90. Further, he identifies Ueberroth as one of the architects in the infamous collusion cases where the owners were found guilty of conspiring to suppress free agency during the 1985, 1986, and 1987 seasons (with a resultant liability of \$280 million in backpay). *Id.* at 390-92; *see also supra* note 33.

87. Miller states that Vincent may be the "best baseball commissioner of the last quarter century." MILLER, *supra* note 1, at 407. He comments favorably on Vincent's intelligence, sense of humor, interest in the game, and lack of self-righteousness. *Id.* at 403. Miller suggests, however, that recent events have caused him to doubt Vincent's stature. In particular, Miller believes that Vincent has joined the "Illusion of the Commissioner Having Real Power Club," *id.* at 406, as evidenced by Vincent's statement that "'I'm not going to resign. . . . The decision whether I stay or go is mine. . . . That's the way it is.'" *Id.* at 407. Moreover, Miller is troubled by Vincent's contention that disciplining guilty owners for their collusive activity would amount to double jeopardy because the owners had already absorbed a \$280 million backpay liability. Miller irrefutably points out: "Imagine that a bank robber was caught red-handed, convicted and forced to return the loot—and then claimed that going to jail constituted double jeopardy!" *Id.* at 400.

88. *Id.* at 393-98, 400-01.

89. *Id.* at 351, 398-99.

90. Many commentators have suggested that allegations of Giamatti's bias and the issuance of a Temporary Restraining Order by Ohio Circuit Court Judge Norbert Nadel violated all precedent and represented a marked and unprovoked departure from judicial deference to private associations and their decision-making procedures. They have even gone so far as to discredit Judge Nadel by suggesting that his decision was politically motivated. A close examination of the facts, however, indicates that Judge Nadel's action and Miller's criticism of Giamatti are perhaps more well-placed than one would think at first blush. No one questions that Rose was entitled to some type of hearing and due process prior to any final determination of his guilt. *See* Major League Agreement, Major League Rules of Procedure, §§ 2, 3; *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972). While the amount of due process to which a litigant is entitled may vary from case to case, *see, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976), there is little doubt that an unbiased decision maker is an indispensable component. For that reason, Judge Nadel's decision reflects sound legal analysis and courageous jurisprudence, rather than hometown politics and pandering for reelection.

within a few hours, Giamatti pronounced in a news conference that Rose had indeed bet on baseball games. Miller finds this conduct to be contemptible both in the dictionary and legal sense of that term.<sup>91</sup>

Miller's other dispute with Giamatti concerns the Commissioner's alleged involvement with, or at least tacit approval of, the owners' collusion to stifle the proliferation of free agents in violation of the collective bargaining agreement.<sup>92</sup> Miller finds it unfathomable that Giamatti viewed the collusion case as a non-issue and ignored the overwhelming evidence and legal conclusions of the arbitration panels. More significantly, Miller cannot comprehend Giamatti's argument that, as National League President, he was completely unaware of any collusion in the face of evidence placing him in meetings in which the owners' conspiratorial activities were discussed.<sup>93</sup> Miller concludes that Giamatti lied about his involvement, and intimates that the final arbitration decision in 1990 preserved the late Commissioner's reputation by refraining from any mention of Giamatti's National League presidency coinciding with the years of collusion.<sup>94</sup>

The principal difficulty with Miller's evaluation of the Commissioner's office and his *ad hominem* attack on its various office holders is his failure to present his arguments in an organized fashion. He devotes an entire chapter to Commissioner Kuhn, yet proceeds to lace every other chapter with innuendo and direct criticism of Kuhn's performance. He likewise reserves separate chapter treatment for "Owners and Other Bosses" and "white collar" types after having filled the preceding chapters with observations on many of the same people. While Miller's insights are sharp and clear, the packaging leaves something to be desired.

### III. PLAYERS AND THE MLBPA

Miller recalls that throughout baseball history players sporadically have attempted to establish a collective body to deal with the owners on the most crucial issues affecting their "employment." From 1885 through 1946, the players established four different unions, each enjoying limited success, but none creating a long-term collective bargaining relationship.<sup>95</sup>

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91. MILLER, *supra* note 1, at 397.

92. *Id.* at 351, 399.

93. *Id.*

94. *Id.*

95. *Id.* at 6; DWORKIN, *supra* note 1, at 8-21. Before the formation of the MLBPA, the players had "unionized" (in a fashion) four different times: The National Brotherhood of Professional Baseball Players (1885-1890); The League Protective Players Association (1900-1902); The Baseball Players Fraternity (1912-1918); and The American Baseball Guild (1946). *Id.*; see also Erwin G. Krasnow & Herman M. Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749 (1963).

In 1954, the sixteen player representatives, one from each team (chosen by the commissioner), voted to establish the MLBPA.<sup>96</sup> Although there was clearly some intent that this group would air work-related grievances with the owners, the MLBPA described itself as a social or fraternal organization and not as a union.<sup>97</sup> Presumably, some players viewed themselves as something more than employees, akin to independent contractors, existing on a level with the owners. If so, Miller points to their working conditions, especially the reserve system, to show that they were whistling past the graveyard. Between 1954 and 1966 it became apparent that the MLBPA was a toothless consensus—a company union relatively impotent in terms of accommodating the players' growing concerns about salaries, job security, and retirement.<sup>98</sup>

Miller graphically describes the appointment process leading to his directorship of the MLBPA. As part of a strategy to formalize the MLBPA and give it greater credibility, the players decided to create the position of full-time Executive Director and selected a screening committee to consider candidates for the inaugural post. Miller recounts that Robin Roberts, former Philadelphia Phillies' pitcher and member of the committee, contacted Dr. George Taylor, Dean of the University of Pennsylvania's Wharton Business School, and asked for possible suggestions. Taylor, after consulting with Miller, recommended him to Roberts; Miller was asked to interview shortly thereafter.<sup>99</sup> At this initial interview with the players' screening committee, Miller received his first of many shocks regarding the players' naivete about collective bargaining in general and its application to baseball specifically. Miller was told directly that, if elected, his general counsel would be former President Richard Nixon. Miller could think of no one less suitable for the position, and he felt that the mere mention of Nixon's name showed how

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96. DWORKIN, *supra* note 1, at 27. Subsequent to the formation and quick demise of Robert Murphy's American Baseball Guild in 1946, the owners attempted to forestall future organizing by establishing a two-pronged representation plan whereby sixteen player representatives, one from each club, were selected by the Commissioner for the purpose of airing player grievances, and two additional players, one from each league, were chosen to serve on baseball's Executive Council. *Id.* at 26.

97. *Id.* at 27.

98. Between 1947 and 1966, the minimum salary for a Major League baseball player was increased once, from \$5,000 to \$6,000. MILLER, *supra* note 1, at 156. The reserve system guaranteed that a player signed to a Uniform Player Contract, encumbered as it was with the repeating option clause, was bound to the signing club in perpetuity. *Id.* at 41-42; *see also supra* note 18. Retirement benefits were gossamers, hardly providing any assurances of security or quality of life after the player's career ended. *Id.* at 7, 40, 45. The Uniform Player Contract, in Miller's words, was "one sided," reminding him of a lease "drawn up by an association of landlords and handed to prospective tenants for signature." *Id.* at 41.

99. *Id.* at 3-5.

“little the players knew about labor relations” or about him.<sup>100</sup> At the conclusion of the interview, Miller indicated that he would not work with Nixon and that Nixon was an “‘owners man’” who “‘wouldn’t know the difference between a pension plan and a pitcher’s mound.’”<sup>101</sup>

After Miller declined the offer, the player representatives awarded the executive directorship to Milwaukee Circuit Judge and perennial owner advocate Robert Cannon. Within a short time, Cannon was dismissed.<sup>102</sup> After Cannon’s ouster, Miller received the nomination of the screening committee. In his brief “campaign” to gain membership approval, he met with the players from each club during spring training. Despite setbacks early in his tour, Miller was overwhelmingly confirmed.<sup>103</sup>

When Miller assumed the position of Executive Director in 1966, two things were readily apparent. First, the players were sorely in need of an outside agent to represent them, notwithstanding the protest of baseball’s owners that the players were better served dealing on a one-to-one basis. Second, until some inroads were made into the impenetrable reserve system, players would never be able to assert themselves and secure a proportionate share of the profits to which they contributed so substantially. Miller’s book explains the paths taken and strategies employed in approaching these problems.

Miller relates that he immediately set about addressing the first issue through an exhaustive campaign to apprise the players of their organization’s potential, and to cultivate the players’ confidence in his ability to help effectuate their objectives. The first order of business was the funding of the union and appropriation of his salary. At one point, the owners had represented to the players that their labor organization could be financed with funds deducted from revenues from the annual All Star game. Shortly thereafter, the owners reneged on this promise claiming, among other things, that this type of contribution would violate the National Labor Relations Act.<sup>104</sup>

After some debate, the problem was resolved when Miller convinced the ownership to convert from an employee contribution pension plan to an employer funded program. Under this arrangement, those funds formerly remitted from players’ salaries as pension contributions would no longer be

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100. *Id.* at 3-4.

101. *Id.* at 9-10.

102. *See id.*, at 6. After Miller’s initial interview with the Players Association, Cannon became a front-runner for the Executive Director position and was approved by a plurality of the players. *Id.* at 33. Shortly thereafter, Cannon, who had never endorsed a “players’ union” and had alienated the player representatives, was fired. *Id.* at 34, 65; *see also*, FLOOD, *supra* note 21, at 153 (stating that Cannon “stopped giving owners a hard time.”)

103. MILLER, *supra* note 1, at 61.

104. *Id.* at 67-68; *see also supra* note 34 and accompanying text.

required to finance the plan.<sup>105</sup> The amount that had been appropriated for pension plan funding became “employee money” and could be utilized to sustain the Players Association without running afoul of the National Labor Relations Act. The players actually received a modest windfall because the former pension allocation was sufficient to provide the Players Association its requisite financial backing—obviating the fifty dollar monthly union dues that the players had been paying.<sup>106</sup>

Miller recounts that his next hurdle involved negotiation of a more structured pension plan, an issue that had been at the forefront of the players’ concerns since Miller’s initial meeting with the screening committee.<sup>107</sup> During the early discussions with management concerning this issue, Miller first recognized that the owners were not aware of their full responsibilities in the area of collective bargaining. The pension plan was not due to expire for approximately nine months. The owners, however, were about to announce changes in the plan as a *fait accompli*, without any consultation with the Players Association. Eventually, after Miller’s vehement protest and less vehement primer on management’s duty to bargain in good faith with the employees’ exclusive bargaining representative, negotiations commenced and a settlement was reached. This accord marked a watershed event in sports negotiations—the first collective bargaining agreement of any type.<sup>108</sup>

The 1966 pact was merely the first step, addressing only pension and insurance benefits. Miller immediately turned to the task of reaching a collective bargaining agreement on all wages, hours, and working conditions. Again, after some disagreement as to the role of the MLBPA in the bargaining process, including further manifestations of the commissioner’s reluctance to recognize the Association’s status, good faith negotiations ensued and a definitive collective bargaining agreement was reached. Miller boasts that its advancements included the incorporation of the Uniform Players Contract (rendering any changes therein subject to collective bargaining), a formal grievance procedure circumscribing, to some extent, the commissioner’s role as neutral arbitrator, and an initial agreement to begin reconsideration of the noxious reserve rule.<sup>109</sup>

During the term of the 1968 contract, the first threat of a major work stoppage was presented and averted. Although the agreement did not expire until 1970, the pension and benefit plan of 1966 was due to lapse in the spring of 1969. The owners had made it clear to Miller that they were

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105. MILLER, *supra* note 1, at 69-72, 92-94.

106. *Id.*

107. *Id.* at 7.

108. *Id.* at 87-89, 95.

109. *Id.* at 95-98.

adopting an aggressive position on the pension program and that they were hoping to roll back some of the current benefits.<sup>110</sup> As a result of the owners' intransigence, the players agreed that no one would sign a 1969 Uniform Player Contract until some type of accord could be reached on the benefit issues.<sup>111</sup> With spring training rapidly approaching, the owners relented. Even Miller, ever the optimist, seemed surprised at the magnitude of the achievements, especially the increases in the owners' contribution to the pension plan from 4.1 million to 6.5 million dollars per year and the reduction of pension eligibility from five to four years (applied retroactively to 1947).<sup>112</sup> Miller acknowledges that Bowie Kuhn promoted the resolution of this dispute, characterizing it as one of Kuhn's "finest hours."<sup>113</sup>

Miller recounts that the next significant development in the Players Association's bargaining history occurred in 1972 when, once again, the dispute arose over pensions (amount and eligibility).<sup>114</sup> Miller notes that although negotiations proceeded slowly, he had not anticipated a strike. In fact, he admits that he had not even mentioned the possibility of major confrontation at his pre-negotiation meetings with the players.<sup>115</sup> It quickly became apparent that Miller had misgauged the owners' position. In Miller's mind, the pension issue constituted the owners' veiled attempt to "destroy the union."<sup>116</sup> On the other side, the owners and many of the members of the press characterized Miller as an extremist, and even questioned whether pensions for baseball players were necessary or appropriate.<sup>117</sup> In just a few years, the roles of each side had become clearly defined and the positions on various issues had begun to crystallize.

Miller explains that, as a result of the pension impasse, the players voted to strike, precipitating a thirteen-day, eighty-six-game work stoppage. Seeking to terminate the first major strike in sports history, the parties quickly reached agreement.<sup>118</sup> The owners acceded to the players' pension demands

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110. *Id.* at 98-99.

111. *Id.* at 99-100.

112. *Id.* at 104-05.

113. *Id.* at 105.

114. *Id.* at 203-06.

115. *Id.* at 204.

116. *Id.* at 203-06.

117. *Id.* at 213-15.

118. *Id.* at 221-22. This strike marked Miller's earliest realization that the players had truly warmed to the task of supporting his efforts in developing the Players Association as a true trade union. Early on, they demonstrated the solidarity necessary to achieve their desired collective bargaining objectives. At an initial strike poll, the players voted 663-10 to endorse a strike in support of the players' demand regarding the pension plan. Miller, however, was concerned about the strike and the players' inadequate funding to support such a collective action. As a result, he suggested an alternative strategy in which negotiations would continue

while the players forfeited salaries lost for games missed during the strike. The players did not surrender any accumulation of seniority or service benefits. Because Miller had held no realistic hope for recovering lost wages, he considered the settlement a victory and a signal to the owners that the players on the field had now become players in the theater of collective bargaining.<sup>119</sup>

While Miller was well on the way toward establishing the Players Association as a force in Major League Baseball, no meaningful progress had been made on the reserve clause question. Although study groups had gathered to discuss the matter, they had proved to be unproductive. The owners' position appeared to be unyielding.<sup>120</sup> As Miller recalls, at this stage of the players' development, litigation and not negotiation was perceived as the route to free agency.

In 1970, baseball player Curt Flood decided to contest the decision of his team, the Saint Louis Cardinals, to assign his contract—trade him, in common parlance—to the Philadelphia Phillies. He approached Miller to discuss the possibility of initiating an antitrust action to challenge the reserve

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throughout the season, thereby postponing a strike to the following year when the basic agreement expired. *Id.* at 211. When Miller presented his postponement idea to the player representatives, however, they voted 47-0 (one abstention) in favor of a strike, with the lone abstainer subsequently impeached by his fellow players. *Id.* at 212. This demonstration of the players' resolve, sustaining a strike that cost them approximately \$600,000 and the ownership \$5.2 million, prompted Miller to comment: " 'All fans should be proud of the players. They showed courage and hung together against terrible odds. They made the owners understand that they must be treated as equals.' " *Id.* at 222. Miller's pride and the esteem that he felt for the players was echoed in the work stoppages that followed in 1976 and, particularly, in 1980-81. *Id.* at 258, 262, 302-03.

Yet, one of the unfortunate aspects of Miller's book is his inability to understand how Major League Baseball players could not immediately grasp the significance of the issues before them and, more importantly, how they could not accord him and the Players Association appropriate recognition for their overall advancement as "employees." Miller's musings are replete with expressions of hurt feelings about incidents which he believed were indicative of the players' lack of appreciation and simpatico. Even players who at one point in the book were praised for their dedication to the Players Association found themselves on the wrong end of Miller's invective for failing, for example, to mention the contributions of the Players Association in their autobiographies. *See id.* at 254-55, 274-75, 348.

119. One of the by-products of this negotiation was an agreement on a salary arbitration program implemented to resolve impasses on questions of players' salaries, which, except for minimums, were not and are not collectively bargained. DWORKIN, *supra* note 1, at 33-34, 136-50. Through salary arbitration, the players received a benefit that permitted them, after a certain number of years of service (it has varied over the years), to submit their claims for arbitration to a neutral arbitrator. Under the system, the player and his club owner each submit final offers, from which the arbitrator must choose. There is no compromise figure that the arbitrator is permitted to reach, thus insuring that each side will present the arbitrator with a realistic figure. *Id.*; *see also* MILLER, *supra* note 1, at 109-110.

120. MILLER, *supra* note 1, at 189-90.

system in a judicial forum. As Miller's vivid account illustrates, his response to Flood was hardly sanguine. Miller carefully explained the history of baseball's arcane antitrust exemption and his cynicism about the possibility of convincing the court to reverse fifty years of *stare decisis*.<sup>121</sup>

Once Flood made it clear that he was prepared to pursue the litigation notwithstanding the limited chance of success, Miller and his general counsel, Dick Moss, took various steps to promote Flood's lawsuit. They met with scores of players explaining the imminence of Flood's litigation and its potential impact, secured the financial backing of the players and selected former Supreme Court Justice Arthur Goldberg to represent Flood.<sup>122</sup>

In recalling the early stages of Flood's lawsuit, Miller underscores Commissioner Kuhn's unwillingness or inability to appreciate the players' concerns. After Flood had sent an obligatory letter to Kuhn protesting the trade, expressing his legal position, and asking for relief, Kuhn paternalistically acknowledged the letter but remonstrated that Flood had not voiced a specific objection. Miller sardonically observes, "[c]lose your eyes and poke your finger at Flood's letter; you will scarcely find a sentence that doesn't 'specify' Curt Flood's 'objection'."<sup>123</sup> Having exhausted his remedies, Flood instituted his action in federal court. Most followers of law or baseball are intimately familiar with the progress of that litigation; baseball's exemption was sustained and the merits of the antitrust challenge to the reserve system were never broached.<sup>124</sup>

In reflecting upon events leading to Flood's defeat, Miller acknowledges that he was responsible for deficiencies in the presentation of the case. For example, he believes that the players did not demonstrate the requisite solidarity through a sufficient courtroom presence. Few players attended the hearings or the Supreme Court oral argument and, in fact, many of them even openly debated whether elimination of the reserve system would be det-

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121. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 917 (1953); *Federal Baseball Club, Inc. v. National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922). Given the 50-year history of the mysterious baseball exemption, Miller's cynicism was certainly justified. MILLER, *supra* note 1, at 109-10.

122. MILLER, *supra* note 1, at 182-88. Several factors prompted Miller's recommendation, including Goldberg's considerable experience as Secretary of Labor, Supreme Court Justice, and private practitioner, his sensitivity to the concerns of organized labor, spawned in part by his considerable experience with the Steelworkers' union, and his outrage at the continued existence of the reserve clause. *Id.* at 188-90. The only reservation that Miller experienced centered on the possibility that Goldberg would make a bid in New York's gubernatorial race. When Goldberg made it abundantly clear that he had no intention to run for governor, Miller, Dick Moss, and others decided that he should represent Flood. *Id.* at 198.

123. *Id.* at 192.

124. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

rimental to the game of baseball.<sup>125</sup> Further, Miller questions his own selection of Arthur Goldberg as counsel. Most observers of the Supreme Court oral argument found that Goldberg's performance, while thorough, was uninspired and uninspiring. Miller suggests that Goldberg was distracted by the governor's race in New York (Goldberg had decided to run for governor after assuring Miller prior to the litigation that he had no intention of doing so), contributing to his sub-par performance.<sup>126</sup> In any event, regardless of the mistakes and misapplied strategies, the *Flood* case looms, at best, as an aberration and, at worst, as a proverbial derelict in mainstream antitrust jurisprudence.<sup>127</sup>

Given the owners' absolute refusal to grant any meaningful concessions at the bargaining table, Miller realized after Flood's defeat that the battle for free agency would have to be fought and won in another forum. The avenue of next (and apparently last) resort was the collective bargaining agreement's grievance machinery. The point of attack was the Uniform Player Contract and the owners' persistent contention that the option clause of that contract created a system of perpetual renewal and, thus, permanent reserve.

Miller's recollections of the strategy employed in attacking the reserve system through the collective bargaining agreement are thoughtful and thought provoking. He explains that in 1975 players Dave McNally and Andy Messersmith refused to sign their individual contracts at the conclusion of the option year. Miller recalls that, although the grievants were rightfully concerned about the impact of this litigation upon their careers, they agreed to pursue the matter through arbitration—notwithstanding attempts by the owners to dissuade them.<sup>128</sup> They argued, through the Players Association, that the option clause did not renew with the contract and that they could only be bound for one year after the contract containing the option had expired.

Following the denial of the McNally and Messersmith grievances, the Players Association proceeded through the contractual machinery to submit the matter before the arbitration panel. Arbitrator Peter Seitz, who had decided the controversial Catfish Hunter case, was the neutral arbitrator.<sup>129</sup>

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125. MILLER, *supra* note 1, at 196-97.

126. *Id.* at 198.

127. See, e.g., Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209, 210 n.3 (1983); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1381 (1988); see BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 189-92 (1979) (accounting briefly the tragi-comical nature of the machinations surrounding the eventual Flood decision).

128. Miller, *supra* note 1, at 242-45.

129. *Id.* at 245. While typical labor arbitration cases involve a single arbitrator, baseball often employs a three-person panel. In this scenario, each adversarial party chooses its own

At the conclusion of the arbitration, Seitz found that the reserve system constituted a violation of the collective bargaining agreement and the Uniform Player Contract that it embraced.<sup>130</sup> Rejecting the owners' procedural argument that the collective bargaining agreement specifically precluded consideration of the reserve system under the grievance clause, Seitz concluded on the merits that the option clause did not perpetually renew. He further found that the Major League rules establishing a system of reserve were ineffectual in preventing McNally and Messersmith from becoming free agents because the rules depended upon the allegedly insulated player being signatory to a Uniform Player Contract.<sup>131</sup> It cannot be denied that *McNally-Messersmith* is one of the most significant decisions in baseball's mercurial legal history and one that was to have a profound impact on labor negotiations during the succeeding fifteen-year period. Yet, Miller does not characterize the Seitz ruling as a bombshell, suggesting, rather, that the owners had seen it coming since the initiation of the suit.<sup>132</sup>

Miller explains that in 1976 the owners and players again found themselves at impasse. On this occasion, the precipitate was the *McNally-Messersmith* decision and the owners' purposeful goal of eliminating free agency at the bargaining table.<sup>133</sup> Whether the true motive for the owners' intransigence on the free agency question was the fear of escalated salaries, domi-

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arbitrator/representative and those two individuals select an impartial chairman who represents neither party. MILLER, *supra* note 1, at 250. Commissioner Kuhn and others had vigorously opposed the selection of Seitz to resolve this case, given his earlier decision in the *Hunter* case. *See supra* note 26.

130. 66 Lab. Arb. Rep. (BNA) 101, 118 (1975).

131. *Id.*; *see also* *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976) (affirming 409 F. Supp. 233 (W.D. Mo. 1979)).

132. MILLER, *supra* note 1, at 250. In truth, a close reading of Seitz's decision demonstrates that he had made a diligent effort to limit the reach of this decision and, prior to deciding the case, had encouraged the parties to resolve their differences through collective bargaining prior to deciding the case. *See id.* at 251-52. Some commentators have even suggested that his decision seemed "apologetic," not because he regretted its reasoning or conclusions, but, rather, because he believed that the parties should have been able to compromise on the reserve system question. DWORKIN, *supra* note 1, at 80. Notwithstanding these assessments, Kuhn reminisced: "Kindly and well-intentioned, [Seitz] was a prisoner of his own philosophy and would rationalize his way to the destruction of the reserve system." KUHN, *supra* note 8, at 157. Kuhn reminisced further that Seitz's ultimate conclusions were preordained, describing the arbitrator (prior to the hearing) as follows: "Seitz, benign and gracious with visions of the Emancipation Proclamation dancing in his eyes." *Id.* at 158.

133. MILLER, *supra* note 1, at 254-55, 259. One interesting feature of the 1976 dispute is that there may have been a larger area for compromise than the owners realized. Miller himself was concerned that an unqualified, wide-open free agency system would glut the market with available players, thereby increasing supply, reducing demand, and suppressing salary elevation. *See id.* at 259, 267. Only Charlie Finley seemed to appreciate that modification of the *McNally-Messersmith* decision through collective bargaining could ironically provide the Players Association with its most significant long-range gain. *Id.* at 259.

nant franchises, and ruination of competition, or simply surrender of the reserve system and total entrepreneurial control of player movement, the owners were adamant.<sup>134</sup> To rectify the problem, they proposed diluting the absolute free agency decreed by Seitz with a series of qualifiers.

Included among the owners' conditions for the unqualified free agency already captured by the players through *McNally-Messersmith* was a nine-year service requirement (with a tenth-year option year), a "kicker" that the club could preclude free agency by offering the player a contract of \$30,000 or more, and a requirement that the club who acquired the free agent would be responsible for a large cash settlement to the jilted team.<sup>135</sup> Miller characterizes these initial proposals as "preposterous" and, given the owners' clear intractability, recalls that the players were prepared for his worst expectations—a lockout.<sup>136</sup>

On March 1, 1976, as expected, the owners closed the doors to spring training and locked the players out. After seventeen days, the owners reopened spring training camps and negotiations resumed, largely through the intervention of Los Angeles Dodgers' owner Walter O'Malley and the action of Commissioner Bowie Kuhn.<sup>137</sup> After various attempts to stimulate a compromise, including the exclusion of attorneys from the bargaining process,<sup>138</sup> negotiations improved and the opportunity for a mid-summer settlement seemed possible.<sup>139</sup> The parties finally reached agreement on July 12, 1976. In addition to a new four-year pension agreement, this settlement in-

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134. *Id.*

135. *See* MILLER, *supra* note 1, at 256.

136. *Id.* Again, Miller was astounded at some players' continued naivete, as many of them believed that total free agency would destroy baseball and that the owners actually had offered something of value. *Id.* at 258-59. At the same time, Miller was heartened by the sophistication and vocal support of many other players. *Id.* at 263.

Miller takes great pains to explain that the eventual cessation of work in 1976 was a lockout rather than a strike. At various points he was asked why the players would not return to work while efforts were made to resolve the impasse. On each occasion, he emphasized that the players were powerless because the lockout was not a strike and thus could only be ended upon the players' capitulation or the owners' decision to resume play. *Id.* at 262. Although a lockout can assume various forms, including defensive and offensive postures, essentially it is an aggressive move by management to close its doors and suspend salaries as a means of exerting economic pressure upon a union, much the same as a strike and the withholding of the labor supply exerts economic pressure upon management. *See* International Bhd. of Boilermakers Local 88 v. NLRB, 858 F.2d 756, 760 (D.C. Cir. 1988); ABA SEC. LAB. REL. L., THE DEVELOPING LABOR LAW 539-51 (Charles A. Morris ed. 1971).

137. *See id.* at 264.

138. *Id.* at 265. Miller secured the League's permission for Players Association General Counsel Dick Moss to remain at the table. *Id.* at 265-66.

139. *Id.* at 266. Miller gives credit for the "movement" to American League President Lee MacPhail, who acknowledged the inevitability of free agency and encouraged the owners to accept it. "We're trying to swim against the social current. We've got to change." *Id.*

cluded resolution of the free agency question through a compromise package that contained a complex reentry draft and amateur player compensation system, a six-year length of league service requirement for eligibility, and modifications on management's right to assign or deny reassignment of a player's contract.<sup>140</sup>

It was Miller's belief that the acrimony of the 1976 negotiations would produce peace and order in the years that immediately followed.<sup>141</sup> In fact, that period was rife with tension, debate, and the owners' escalated resolve to recoup the control categorically taken away in the *McNally-Messersmith* decision and partially surrendered in the 1976 agreement.<sup>142</sup> Miller was perplexed with management's position because baseball was enjoying tremendous prosperity and popularity. For example, in 1978, baseball grossed approximately \$278 million, of which approximately \$68.5 million was attributable to salary expenditures.<sup>143</sup> Miller notes that remaining "expenses did not come close to absorbing" the remaining profit of over \$200 million.<sup>144</sup> Again, Miller reiterates that the problem was neither profitability nor competitiveness, but rather the owners' surrender of power and control.<sup>145</sup> If Miller had any doubts about the mood preceding the next stage of the players' collective bargaining saga, a meeting with Commissioner Kuhn in the fall of 1979 removed them. Over drinks, the Commissioner boldly declared: "Marvin, the owners need a victory."<sup>146</sup> Miller construed this comment as a request that he take a dive, and, upon returning to his office, confided to his deputy, Donald Fehr, "We're in for a hell of a fight."<sup>147</sup>

The agreement emerging from the crucible of the 1976 lockout expired on December 31, 1979. When negotiations commenced in 1979, the possibility of a major confrontation quickly became self-evident. The owners posited that salaries had spiraled out of control and that the only way to alleviate the problem was to establish a compensation plan in which the club losing a roster player would be reimbursed with a player from the acquiring club.<sup>148</sup>

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140. See DWORKIN, *supra* note 1, at 82-88; MILLER, *supra* note 1, at 267. Regarding eligibility, the new agreement did not affect any players who had become free agents under the *McNally-Messersmith* ruling; they were able to sign with any club without condition. *Id.* at 266.

141. MILLER, *supra* note 1, at 275.

142. See *id.* at 295. The 1976 agreement, though diluting part of the freedom dictated by *McNally-Messersmith*, represented the owners' first negotiated concession on the reserve system.

143. *Id.* at 285.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 287, 290.

The owners also proposed terminating salary arbitration and individual contract negotiations, and substituting a fixed salary schedule.<sup>149</sup>

The players vociferously opposed any type of compensation plan resulting in the depletion of the signing club's roster, and likewise refused to accept the elimination of individual salary negotiations—especially now that free agency gave such negotiations meaning. *Boston Globe* writer Bob Ryan tersely expressed the view of the union and most of the players: “‘There is no sense in even dignifying the proposal by analyzing it as a legitimate expression of human thought. It is merely the depraved workings of some reactionary brains.’”<sup>150</sup>

The negotiations that spilled over into 1980 and 1981 were probably the most bitter in the history of professional baseball.<sup>151</sup> In April 1980, a player walkout cancelled the final week of spring training. At that time, the players agreed to begin the season as scheduled, but also voted 967 to 1 (one player objecting for religious reasons) to strike on the highly attended Memorial Day weekend, beginning May 23, 1980.<sup>152</sup> The owners averted this strike at the eleventh hour by agreeing to continue salary arbitration, to reduce eligibility for such arbitration from three years to two years of service, and to increase pension benefits.<sup>153</sup> The parties deferred the free agency/compensation issue and convened a study group to research the question further. As part of this understanding, the Players Association agreed that they would call a strike over the controversial compensation proposal no later than June 1, 1981.<sup>154</sup>

Miller comments that the efforts of the study group produced nothing of value and that the players and the owners found themselves at an impasse. The owners attempted to implement unilaterally the “harshest proposal” yet proffered, one that had been “consistently rejected” by the players.<sup>155</sup> After

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149. *Id.* at 290, 296.

150. *Id.* at 296.

151. *Id.* at 286. Miller claims that Commissioner Kuhn's remonstrance regarding the owners' lack of preparedness for a strike are misleading, given their purchase of a \$50 million strike insurance policy from Lloyds' of London and their creation of a \$15 million war chest. *Id.* at 294-95.

152. *Id.* at 291.

153. *Id.* at 291-92; see also DWORKIN, *supra* note 1, at 92.

154. MILLER, *supra* note 1, at 291-92.

155. *Id.* at 292. It is settled law that, once impasse has been reached, an employer may unilaterally implement changes that are “reasonably comprehended within his pre-impasse proposals.” *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 966 (D.N.J. 1987) (quoting *Taft Broadcasting Company*, 163 N.L.R.B. 475, 476 (1967)). Miller mentions that the owners' right to change the free agency system unilaterally was triggered 30 days after the issuance of the study group proposal—but he does not explain if or why that is the impasse date. This type of spotty reporting characterizes Miller's discussion of the 1980-81 strike, which is a treasure trove of insight, but an organizational quagmire.

the season had reached its halfway point, the players called a strike in support of their demands. This work stoppage lasted fifty days and cost the owners over \$72 million after insurance payments. The players lost almost \$34 million in salary, an average of \$52,000 per man.<sup>156</sup> Miller reflects upon the senselessness of this strike, emphasizing that the owners failed to achieve a single additional restraint on the free agency system. Further, Miller proudly asserts that the result of the players' perseverance is a relatively unfettered free agency program that promoted the average pre-strike salary of \$186,000 to its current figure of \$597,000 per year.<sup>157</sup>

Nowhere is Miller's insight more evident than in the accounts of his initial meetings and confrontations with the union membership, and his subsequent negotiating struggles with league owners. To comprehend the dynamics of labor negotiation, one must fully appreciate the skills, motives, and personalities of the negotiators, as well as the economic power and strength of character of the parties who provide the marching orders. Miller's astute observations will instill the reader with the necessary understanding in this regard. Further, Miller's recollections doubtless will provide baseball historians with valuable nuggets of information that have heretofore escaped their notice. Unfortunately, Miller's disorganization often makes the reader pan for these nuggets much like a prospector who knows their general whereabouts but must patiently sift through the silt. Miller's redemption is that the results are well worth the effort.

#### IV. CONCLUSION: THE MLBPA AFTER MARVIN MILLER

Since Marvin Miller's departure, the MLBPA has continued to represent the players in an able fashion predominantly under the leadership of Execu-

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156. MILLER, *supra* note 1, at 318.

157. *Id.* When Miller discusses salaries, he also expresses his scorn for many players' agents. While saving praise for certain agents, such as Dick Moss, Miller finds that many agents have reaped the benefits of the players' substantial salary advances with little effort and less expertise. *See, e.g., id.* at 271-74, 277-78. At first blush, it may appear that players' agents and the Players Association share a special relationship as custodians of the players' economic advancement. Oftentimes, nothing could be further from the truth. In fact, the goals of the individual and the objectives of the collective are frequently at odds, particularly where there may be a finite amount of funds available to be distributed among the members of the bargaining unit. *See, e.g.,* Agreement between the National Basketball Ass'n and NBAPA, Art. VII (Salary Cap). Professional sports are unique in the sense that, although the athletes may have an exclusive collective bargaining representative, they retain the right to negotiate salaries on an individual basis. This prerogative is a function of the bargaining representative's waiver, often incorporated into an "special covenants" provision. *See* Basic Agreement between Major League Baseball and the MLBPA, Art. III; Uniform Player Contract, Special Covenants; *see also* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); Midland Broadcasting Company, 93 N.L.R.B. 455 (1951).

tive Director Donald Fehr. During the period following his resignation, Miller served intermittently as a formal and informal consultant, enabling him to provide first-hand observation of the union's continuing developments. However, in recounting the events of the Moffet-Fehr period,<sup>158</sup> Miller intimates that the leadership shunted him aside, often leaving him in the dark on critical issues.

Miller's assessment of the union's involvement in, and the results of, two major bargaining events post-dating his resignation—the 1985 negotiations, characterized by a two day walkout, and the 1990 lockout—are damning and lukewarm, respectively. He asserts that in 1985, “[f]or the first time in almost twenty years of existence, the Players Association took backward steps.”<sup>159</sup> In part, he faults the players for their diminished concern for younger colleagues and their “‘I’ve got mine’ ” mentality.<sup>160</sup> He also gives Don Fehr a dubious compliment: “By 1985 the players had lost touch with their own history. This was the union’s fault—Don Fehr’s fault. Which is not to say that Don didn’t negotiate a good agreement.”<sup>161</sup>

Regarding the 1990 lockout and the resultant agreement, Miller confesses to “mixed feelings,”<sup>162</sup> particularly regarding the divisions among player ranks. He is most concerned with the fact that the owners’ “futile and incompetent” strategy for 1989-90 negotiations signaled that they will never cease their efforts to reverse baseball’s growth and the advances of the Players Association.<sup>163</sup>

Plainly, Miller has conflicting emotions regarding his tenure with the MLBPA and the aftermath of those turbulent years. He is rightfully proud of the Players Association’s accomplishments and his contribution to the

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158. Ken Moffet served as Executive Director for a brief period following Miller’s resignation. The players had been impressed with his performance as a federal mediator during the 1981 strike. However, Miller severely criticizes Moffet’s tenure as head of the Players Association. MILLER, *supra* note 1, at 320-39. Further, Miller notes that the 1985 baseball negotiations were personally unrewarding because he neither made decisions nor initiated strategy, despite rumors that he was “a puppeteer pulling the Association’s strings.” *Id.* at 335. Further, addressing the lockout of 1990, *id.* at 290, 350-62, Miller scotches rumors that he had secretly been orchestrating the union’s negotiating strategy: “[T]he truth is that I sweated out this lockout as any fan would, and often had nothing to go by except what I read in the papers.” *Id.* at 358.

159. *Id.* at 335. Apparently, Miller presumes that the MLBPA has only been in existence since he assumed the helm. He later explains that, prior to 1966, the Players Association was not a legitimate union because it had been company-dominated and illegally financed. Yet, Miller’s comments are counter-intuitive. In order for him to assert that the MLBPA was “illegally” financed, he must assume that it was a labor organization already.

160. *Id.* at 336.

161. *Id.* at 338.

162. *Id.* at 362.

163. *Id.* at 350.

development and growth of the union. On the other hand, he retains feelings of frustration and unappreciation that, to some degree, impact his analysis of events occurring both during and after his reign as Executive Director. Given the huge salary increases enjoyed by almost everyone connected with the game (except for Miller during his term of office), and given the fact that history may not fairly accord him proper credit for his achievements, his feelings are not altogether unwarranted.

Although some of his accounts were one-sided, they were no more one-sided than the early confrontations between baseball's owners and players. The combination of the arcane insulation from antitrust scrutiny, together with the outrageous reserve system that robbed players of the fundamental prerogative to contract freely with the employer of choice, placed the players at a severe disadvantage. Miller arrived and picked up the gauntlet that had been slapped across the players' collective visage for one hundred years.

Thus, while Miller's account is somewhat imbalanced, overall it is a thorough, insightful review of an exciting period in baseball and labor relations. And, although Miller's recollections are often meandering, almost to the point of being irritating, they possess a diary-like intrigue that is redeeming. I would highly recommend his work to anyone remotely interested in baseball, baseball players, underdogs, labor relations, antitrust, or any combination thereof.