



Promoting Values: A Comment on *Catalyzing Fans*

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Danny Markel was a true original. He was smart and imaginative, broad-ranging in his interests, exceedingly generous, self-promoting, friend-promoting, and full of life. His death, too early and too violent, was a tragedy—for his family, most of all, but also for his legion of friends, for the students who will be deprived of his insight and mentorship, and for the world of legal scholarship. *Catalyzing Fans*,¹ if not as profound or fully developed as the best of Danny’s work, nonetheless exemplifies his characteristic scholarly virtues: it is innovative, clearly reasoned, and thought-provoking. I am honored to have been asked to offer a few thoughts in reaction.

The central conceit behind *Catalyzing Fans* is simple enough: fans of professional sports teams can combine into “Fan Action Committees” (“FACs”) that will raise money for the purpose of influencing free-agent athletes, when weighing offers from competing clubs, to sign with the FAC’s preferred team.² FACs could achieve this influence either by paying the athlete directly or, in a model that Danny and his co-authors Michael McCann and Howard Wasserman strongly prefer,³ by making contributions to one or more charities associated with the athlete. In either model, FACs would thereby empower fans and increase aggregate preference-satisfaction. Under the charitable model, they would also, plausibly, increase total charitable giving.

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¹ Dan Markel et al., *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1 (2015).

² Although the article notes that FACs could be used to influence the movement of non-sport entertainment figures, it focuses on athletes in professional sports leagues in the United States. That will be my sole focus in this short essay.

³ Markel et al., *supra* note 1, at 11.

The authors are explicit that *Catalyzing Fans* is intended as “an ‘idea’ paper, one meant to spur further conversation without attempting to provide the final word on the matter.”⁴ In precisely that spirit of continued conversation, I will offer two thoughts, both tentative and exploratory.

First, I will register strenuous disagreement with the article’s characterization or conception of professional sports. In the authors’ view, professional sports are simply one form of commercial entertainment, no more and no less. I believe that is an impoverished view of sport. Sport is not only a source of entertainment, but a domain of value and virtue. If this is so, then the worth of FACs might be, in large measure, a function of the extent to which they promote or retard the values and virtues characteristic of sport.

Second, I will ask how FACs fare when professional sports are conceived as crucibles for the development and manifestation of human values and not merely as sources of entertainment. The short answer is that I have precious little idea. But consideration of one factor (that allowing wealth disparities to influence sporting outcomes is harmful to sporting values) leads me to suggest that FACs might be more attractive when geared toward lower profile sports than the big four of professional baseball, football, hockey and men’s basketball. Indeed, FACs for low-popularity sports might be an even better idea than Danny and his co-authors envision.

I. SPORT AND VALUE

What is professional sport? According to the authors, professional sports

are principally a form of commercial entertainment and thus should be amenable to arguments in favor of private ordering, no different than the norms governing restaurants, airport fiction, and network TV shows. Professional sport is just one aspect of commercial entertainment and there is no intrinsic reason why the norms of commerce and private ordering shouldn’t govern in that domain.⁵

I do not share that conception of sport. To be sure, professional sports contests *are* a form of commercial entertainment. But they are not *only* that. They are elite sporting competitions. *Sport* is a domain of human life with an unusual capacity to promote value and virtue—beauty, drama, grace, fortitude, resilience, grit, courage, discipline, teamwork, camaraderie, and sportsmanship, among others—along with the full range of somatic excellences such as strength, speed, agility, and coordination. *Elite* sport is a

⁴ *Id.* at 5.

⁵ *Id.* at 28.

region within that domain that (at its best) can help realize for the athletes, and make manifest for the rest of us, the highest degrees of sporting value, virtue, and excellence. Professional sport therefore has (at least) two different aspects or logics: athletic competition and commercial entertainment.

Any change in, or concerning, professional sport can be evaluated both in terms of how it promotes or retards the sport's ability to serve sporting excellences and in terms of how it affects the sport's value qua entertainment. *Catalyzing Fans* concentrates its attention on the latter question. I would place greater weight on the former. But whatever the optimal emphasis might be, insofar as we should care at all about professional sports qua sports, and not merely qua modes of entertainment or amusement, then the norms that properly govern professional sports *are* meaningfully different from the norms that properly govern, for example, restaurants, airport fiction, and sitcoms.

II. BEYOND THE NBA

Much of the exposition in *Catalyzing Fans* focuses on the NBA. And the focus is on the NBA "because fan funding of free-agents is likely most effective in that sport."⁶ My instinct differs. I would not focus on the NBA, or on any of the major professional sports leagues, for reasons of both efficacy and desirability. First, I suspect that fan funding of free agents is much more likely to be effective in (what I will call) low-popularity sports such as the WNBA and MLS than in the high-popularity sports that make up the four "major" North American sports leagues: the NBA, the NFL, the NHL, and MLB. Second, and assuming that FACs could be (comparably) effective for both low-popularity and high-popularity sports, I think that they are more likely in the former context than the latter to promote sport-related values to which we should be committed.

There are two reasons to doubt that FACs would significantly influence an athlete's (re)location decision in high-popularity sports. First and more obviously, total athlete compensation (mostly, salaries plus endorsement deals) in the high-popularity sports is so great that sums offered by FACs are unlikely to affect the athlete's deliberation. The mean annual salary in the NBA sits comfortably north of \$4 million. The total value of multi-year contracts signed by top stars exceeds \$100 million.⁷ Major League Baseball

⁶ *Id.* at 13.

⁷ See *Player Contracts*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/contracts/players.html>, (last visited Feb. 17, 2015), *archived at* <http://perma.cc/A9HX-FU46>.

sees similar mean annual salaries, and even higher total contract values.⁸ Given such astronomical sums, it is hard to imagine that FACs can raise enough money to affect a player's economic calculus. This is especially true given that the figure that might potentially influence an athlete's decision is not the total sum that a FAC offers but the *difference* between the sums offered by competing FACs. Of course, because FACs don't (yet) exist, it is entirely speculative how much money they could collect and distribute, and I don't claim that my own speculation on this question deserves respect from others whose speculations differ. Still, I might as well announce my own guess that the sums would not be nearly large enough.

Athletes in low-popularity sports do not merely earn less than their counterparts in high-popularity sports; their salaries are tiny fractions of what athletes in high-income sports pull in. Take the WNBA. Although their finances under the newest collective bargaining agreement are not public, salaries under the last agreement ranged from a minimum of \$38,000 to a maximum of \$107,000.⁹ Minimum salaries in the MLS are almost exactly the same, with the median salary around \$92,000.¹⁰ At these compensation levels, FACs would not have to collect vast sums from fans to be able to offer inducements sufficient in magnitude to plausibly make a difference to an athlete's financial calculation—especially in the direct-contribution model, but also perhaps in the charitable model. Even an extra \$5,000 to \$10,000 is real money to an athlete earning \$50,000.

The second reason to suspect that FACs can be more effective in low-popularity than high-popularity sports is, I concede, even more speculative: it concerns the likely receptivity of the leagues. Markel, McCann and Wasserman find it easy to imagine that "teams and leagues will embrace FACs, and even welcome and celebrate that level of involvement and influence."¹¹ I do not. From where I sit, the major sports leagues appear to value only one thing nearly as much as they value money: control. (Exhibit A might as

⁸ See, e.g., Ronald Blum, *Dodgers Top Spender, ending Yanks' 15-year streak*, ASSOCIATED PRESS (Mar. 26, 2014, 2:07 AM), <http://bigstory.ap.org/article/dodgers-top-spender-ending-yanks-15-year-streak>, archived at <http://perma.cc/KPM2-JN2A>.

⁹ Russ Wiles, *Mercury title run puts spotlight on pay gap in sports*, THE ARIZONA REPUBLIC (Sept. 6, 2014, 5:27 PM), <http://www.azcentral.com/story/money/business/2014/09/06/mercury-wnba-unequal-sports-pay/15217833/>, archived at <http://perma.cc/6Y8J-CYPT>; Nate Parham, *WNBA's new collective bargaining agreement reflects owners' interest in limiting offseason play in foreign leagues*, SB NATION (Mar. 10, 2014, 8:00 AM), <http://www.swishappeal.com/2014/3/10/5485828/wnba-collective-bargaining-agreement-time-off-bonus>, archived at <http://perma.cc/W5BG-ZVK6>.

¹⁰ Andrew Keh, *Many in M.L.S. Playing Largely for Love of the Game*, N.Y. TIMES, Oct. 26, 2014, at D1, archived at <http://perma.cc/5CSE-UAWU>.

¹¹ Markel et al., *supra* note 1, at 12.

well be the NFL, which had been branded a “dictatorship” even before Roger Goodell’s heavy handed approach to player discipline in the Ray Rice and Adrian Peterson cases.)¹² Accordingly, I find the notion that the NBA and its peers would “welcome and celebrate” a high level of “influence” by fans—really, by anyone other than owners—naïve. And if a league does not want player movement to be influenced by FACs, I have little doubt that it possesses levers sufficient to neuter them.

Here too, low-popularity sports just might be different. Partly out of necessity, and partly because wealth and power are corrupting, low-popularity sport leagues might be more receptive than their high-popularity counterparts to FAC involvement. In general, young ventures and struggling ones tend to be more open to new ideas.

Recall that the two considerations I have just briefly discussed (vast differences in player compensation, and potential differences in league receptivity to FACs) serve the same basic claim—namely, that FACs are more likely to be effective in low-popularity than in high-popularity sports. But now let us assume that I’m mistaken about that, and that they are likely to be comparably (and nontrivially) effective in both contexts. The question then becomes whether they are likely to be comparably conducive—or deleterious—to sport-relevant values and virtues in the two contexts. In truth, I am unsure whether FACs would significantly affect the realization of sporting excellences one way or another. My hunch, however, is that FACs in high-popularity sports are more likely to exacerbate problems that fall under the broad heading of “competitive balance.”

Catalyzing Fans expressly addresses objections or concerns that sound broadly in “competitive balance” or “parity,” and in the potentially distorting or corrupting effects that disparities of wealth may produce. But the article does not make entirely clear just what competitive balance involves or why wealth disparities might be problematic. A few words on this subject are therefore warranted. This is a complex topic that I cannot address in the depth it deserves, so I will simplify pretty ruthlessly.

Sports are generally viewed as a subset of games. Orthodoxy in the philosophy of sport maintains that sports are games that involve physical excellences of some sort—physical prowess or exertion, or the deployment of gross motor skills, or something else along these lines. As it happens, I (and others) have raised some doubts regarding whether all sports are games.¹³

¹² Alex Koppelman, *The N.F.L. Dictatorship*, THE NEW YORKER (Sept. 25, 2012), <http://www.newyorker.com/news/sporting-scene/the-n-f-l-dictatorship>, archived at <http://perma.cc/MY89-W83V>.

¹³ See, e.g., Mitchell N. Berman, *Sprints, Sports, and Suits*, 40 J. Phil. Sport 163 (2013).

But even I agree that the team sports that FACs are apt to involve are games. What such sports are not, however, are games of chance. They are games of skill. As such, it is built into the nature of such contests that they should be structured, to the extent possible or practicable, to make outcomes sensitive to the exercise of sport-relevant skills or excellences. This may be the core commitment underlying the regulatory ideal of a “level playing field.”

The principal skills and excellences at issue in most sports are, roughly speaking, athletic—speed, strength, hand-eye coordination, and the like. But the relevant excellences often include as well mental excellences related to the crafting and execution of strategies and tactics, and holistic virtues such as resilience and courage. Furthermore, the excellences in team sports are not limited to those displayed by the athletes themselves: coaches and managers also contribute to the success of sport teams, and the excellences that are characteristic of their roles count among the excellences that team sports properly incentivize and reward.

If all the foregoing is true, we can see why disparities in the resources that teams have available to lure and retain athletes run counter to the desideratum that outcomes be sensitive to the exercise of sport-relevant excellences.¹⁴ It is hard to build a successful team because player evaluations can be difficult and opportunity costs loom large. The more equal are the sums that owners are allowed to spend on players, the greater is the extent to which success or failure in team composition may be attributed to managerial skill. (Of course, successful team construction is never entirely a function of skill: unforeseeable over- and under-performance due to injuries among other causes can never be entirely eliminated.) In contrast, if owners have radically divergent sums to spend, then outcomes are sensitive to wealth disparities. And if these disparities are not fairly attributable to sport-relevant skills of players, coaches, and managers, then the outcomes are sensitive to luck or chance, which, by hypothesis, is inimical to the inner

¹⁴ Concededly, as *Catalyzing Fans* emphasizes, many other disparities that influence the movement of talent—from climate to state income tax laws—are also in tension with this “excellence-sensitivity” desideratum. It is not clear, though, exactly how that fact should bear on the extent to which background or fortuitous wealth disparities should also be allowed to influence the ability of clubs in the same league to construct rosters. In places, the authors appear to believe that just because some clubs will always enjoy the benefit of structural advantages such as good weather (and others will always suffer the detriment of bad weather), we should be unconcerned with the extent to which wealth disparities are allowed to influence and shape the composition of teams. See, e.g., Markel et al., *supra* note 1, at 24–25. I believe that much more argument must be supplied before we should draw that lesson.

values of sport. Notice that this is not an *aesthetic* argument for minimizing the influence of wealth disparities. Pace Markel and his co-authors, the argument is *not* “merely that FACs make watching sports worse in some way.”¹⁵

Consider fantasy sports. As far as I am aware, fantasy leagues that assign players to teams by auction rather than by snake draft uniformly allot the same auction budget to all owners. Whether or not it would be “unfair” to allow each owner to create as large or small an auction budget as she wishes, out of her own funds, such an approach would certainly be inimical to the notion that fantasy sports are contests of skills of the fantasy owners and not only of the real-life athletes. The same is true of professional sports. That the Yankees and Dodgers have vastly more money to spend on players than do, say, the Twins or the Brewers, due only to the different sizes of the fan bases that the teams can “naturally” capture, so to speak—i.e., that the teams will attract with the exercise of average skill—makes fortunes on the playing field too sensitive to sport-irrelevant factors, and therefore is a less good test of skill.

What does this have to do with FACs? Simply that FACs of large market teams have a built-in advantage over FACs of small market teams. Markel, McCann, and Wasserman insist that FACs reflect intensity of preference or passion and not sheer numbers, and they are right. But only up to a point. All else equal: (a) teams with larger fan bases will generate more passion, hence more money for FACs, and (b) teams in cities with larger populations will have larger fan bases. So if FACs ever become effective in influencing player movement in the NBA, it is foolish to expect that FACs associated with or devoted to the Oklahoma City Thunder or the Memphis Grizzlies will generate resources remotely comparable to the resources assembled by FACs for the Knicks, Lakers, Celtics, or Bulls. FACs, in short, exacerbate the influence of wealth disparities that have nothing to do with sport-relevant excellences.

You might think that the same analysis applies to low-popularity sports. And it does, to a degree. But there is a difference born of the fact that support for low-popularity teams is very low as a percentage of potential audience. Low-popularity leagues have vastly more *untapped* fan potential than do high-popularity leagues. Suppose that High-Popularity League H (say, the NBA) and Low-Popularity League L (say, the WNBA) both have teams in Big City B and Small City S, and that City B has twice the population of City S. Suppose too that, on average, teams in League H enjoy support from 40% of the residents of the team’s city, and that teams in League L enjoy support from 4% of their city’s population. (Such a difference is just

¹⁵ *Id.* at 25.

what it means for H to be high-popularity and for L to be low-popularity.) If each team in each league in each city has its own FAC, and holding all other factors constant, City S's FAC for League H can compete successfully against City B's FAC only if it attracts support from 80% of S's population. But City S's L-League FAC can compete against its City B rival if it attracts support from only 8% of S's population. These are highly stylized assumptions, of course. But they suggest that the task facing the FAC for the low-popularity league (L) in the small city (S) is doable, if difficult, while the FAC for the high-popularity league (H) in the small city (S) faces a truly hopeless challenge.

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One virtue of Fan Action Committees, Markel, McCann, and Wasserman conclude, is that they "should spur some important conversations about professional entertainment and sports, and what we expect from these fields of endeavor and why."¹⁶ I think that is true, and I have argued (albeit very sketchily) against the too-common temptation to reduce professional sports to entertainment. Professional sports are entertaining (at least often), but they contribute much more to our lives than mere entertainment, which is why they can be worthy objects of our serious engagement. That caution notwithstanding, I see little reason to resist or reject the authors' hope that FACs "offer promise to a vision that empowers fans, greases commerce, directs money to charities, and, in so doing, very likely effects positive social change."¹⁷ That's an optimistic picture, in my opinion, but not a fanciful one. If that vision comes someday to be realized, FACs will serve as fitting tribute to the memory of Danny Markel, a thoughtful scholar and a good man.

¹⁶ *Id.* at 39.

¹⁷ *Id.* at 40.