

“Don’t Talk of Fairness’’: The Chicago School’s Approach Toward Disciplining Professional Athletes

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Professional athletes excluded or disciplined by their sporting association or league have challenged the action against them on antitrust grounds successfully. Many of you know the examples: Jane Blalock suspended by the Ladies Professional Golf Association for moving her ball illegally and not reporting it;¹ Spencer Haywood excluded from the NBA based on its rule against employing players during the first four years after high school;² Kenneth Linseman excluded by the World Hockey League based on its rule against drafting players under the age of twenty.³ Of course, some disciplined players have lost their antitrust cases: the *Neeld* case upholding the National Hockey League’s rule against one-eyed players;⁴ the *Manok* case upholding a bowling association’s suspension of a bowler who had fraudulently manipulated his handicap;⁵ the *Deeson* case upholding the PGA’s exclusion of a golfer who had not won sufficient tournaments to qualify for a PGA event.⁶ The granddaddy of all these cases was also a loser for the player: the *Molinas* case upholding the NBA’s lifetime exclusion of a player for betting on games and recruiting others in a point-shaving scheme.⁷

One could confidently extend these examples of the discipline of human athletes to cases where trotting horses were suspended from races,⁸ or Angus bulls were suspended from Angus bull exhibitions.⁹ One could extend these examples still further and apply my comments to cases where sports associations have excluded products from sanctioned events with the result that the products compete at a substantial disadvantage compared to sanctioned products. These examples include the *Guntner Hartz* case based on the U.S. Tennis Association’s refusal to allow spaghetti-strung rackets in USTA-sanctioned events,¹⁰ and the *Polara Enterprises* case based on the U.S. Golf

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1. *Blalock v. Ladies Professional Golf Ass’n*, 359 F. Supp. 1260, 1262 (N.D. Ga. 1973).

2. *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1059 (C.D. Cal. 1971).

3. *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315 (D. Conn. 1977).

4. *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

5. *Manok v. Southeast Dist. Bowling Ass’n*, 306 F. Supp. 1215, 1218 (C.D. Cal. 1969).

6. *Deeson v. Professional Golfers’ Ass’n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

7. *Molinas v. National Basketball Ass’n*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961).

8. *United States v. United States Trotting Ass’n*, 1960 Trade Cas. (CCH) ¶ 69,761 (S.D. Ohio).

9. *McCreary Angus Farms v. American Angus Ass’n*, 379 F. Supp. 1008 (S.D. Ill.), *aff’d mem.*, 506 F.2d 1404 (7th Cir. 1974).

10. *Gunter Hartz Sports, Inc. v. United States Tennis Ass’n*, 665 F.2d 222 (8th Cir. 1981).

Association's refusal to allow a certain kind of golf ball in USGA-sanctioned events.¹¹

These opinions reveal that a court is likely to acknowledge an antitrust issue upon finding concerted conduct, an effect on interstate commerce, and a plaintiff who has been put at a significant competitive disadvantage to his rivals.¹² Upon making these formalistic findings, the courts clearly display concern with the fairness of the sports association's action. Was the player's behavior culpable in light of the community ethics within the sport, a key issue in the *Manok* bowling case?¹³ Were fair procedures given the player before he was disciplined, an obstacle fatal for the defendant American Angus Society in the *Angus* bull case?¹⁴ Was the association biased, perhaps because one of its members was a rival player who might gain from excluding the plaintiff, or because it had too much discretion rather than being limited by previously created rules, obstacles fatal to the Ladies Professional Golf Association in the *Blalock* case?¹⁵ Was the sports association's rule a reasonable attempt to assure the integrity of the sports contest, a major factor in the *Molinas* betting case?¹⁶ Was the rule correctly applied to the player; that is, was the player guilty as charged? Was the disciplinary action excessive in light of the player's conduct? In short, the courts will address whether the association's action was "arbitrary," "unreasonable," or "unnecessary" in light of alternative actions available, and such findings will virtually assure victory for the plaintiff.¹⁷

But now let us enter the rarified world of the Chicago School, soon to be *the* world of antitrust analysis.¹⁸ In that world, none of these concerns

11. *Polar Enterprises, Inc. v. United States Golf Ass'n*, No. 78-1320, slip op. (N.D. Cal. Dec. 5, 1984).

12. The famous Supreme Court opinions indicating that an antitrust issue arises upon these findings include: *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); and, most significantly, *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

13. *Manok*, 306 F. Supp. 1215.

14. *McCreary Angus Farms*, 379 F. Supp. 1008.

15. *Blalock*, 359 F. Supp. 1260.

16. *Molinas*, 190 F. Supp. 241.

17. *E.g.*, *United States v. Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980) (restrictions deemed "unnecessary" for group's legitimate purposes constitute an antitrust violation); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) (exclusions deemed "arbitrary" constitute an antitrust violation).

18. For background on the approach of the Chicago School of antitrust analysis toward "group boycotts" such as sports discipline cases, see R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 207-10 (1976) (group boycotts illegal "when, and only when, they are employed to enforce a practice that is objectionable on the basis of substantive antitrust policy"). See also Liebler, *ANTITRUST ADVISER* § 1.32, at 45-59 (C. Hills 2d ed. Supp. 1983) [hereinafter cited as Liebler, *ANTITRUST ADVISOR*].

For the approach of the Chicago School generally, see R. POSNER & F. EASTERBROOK, *ANTITRUST* (2d ed. 1981); Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319; Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Liebler, Book Review, 66 CALIF. L. REV. 1317 (1979).

matters to any significant extent. According to the Chicago School, it does not matter that the exclusion of a player put him at a competitive disadvantage. It does not matter that the player was in fact innocent or that the discipline was in retaliation for the player's collective bargaining efforts on behalf of other players. Nor does it matter that the sports association failed to give the player a hearing or other procedural protection. Nor does it matter that the sports association's action was "arbitrary," or "unreasonable," or "unnecessary." What is sure under the Chicago School's antitrust approach is that the player is very likely to lose and the association is very likely to win.

Why do they display such indifference to the player's fate? To answer in the most conclusory way, the Chicago School believes that antitrust laws concern only allocative and productive efficiency, and that if the two conflict, the court should strive for the result that yields the largest net economic welfare.¹⁹ In other words, the court should balance the output-restricting effects of the association's discipline—the harm to allocative efficiency—against the efficiency enhancing effects—the gain to production efficiency. And in the joint action of forming an association and then excluding an athlete from that association, the Chicago School is likely to see little harm to allocative efficiency and substantial gain to productive efficiency.²⁰

How do they reach this conclusion? First, they see a sports association as an integration of the productive facilities of those forming the association, such as the teams and the players, to market the association's product, namely the sporting events, broadcasts and related paraphernalia. Clearly the successful marketing of this product is itself desirable, if only because it intensifies competition with other products such as other sporting and nonsporting events, other broadcasts and the like. Forming the association also enhances efficiency because it increases the marketability of the generic product that previously existed; that is, it increases the consumer's demand schedule for this product compared to the demand schedule that would exist absent the association's formation.

To be sure, forming the association also increases the ability to restrict output by increasing the share of the generic product market controlled by the firms forming the association. Thus, those forming the association increase their ability to fix the price for the sports events and to restrict the

19. Liebeler, *Intrabrand "Cartels" Under GTE* *Sylvania*, 30 *UCLA L. REV.* 1, 15 (1982).

20. This is true regardless of whether the association's action would be characterized under the old antitrust law as a horizontal boycott, which occurs where rivals of the excluded player imposed the discipline, or a vertical boycott, which occurs where non-rivals, such as a team owner or other employer, imposed the discipline. Because characterizing the boycott as horizontal under the old antitrust law greatly aided the player, I will discuss the Chicago School's approach toward this kind of boycott, with the understanding that the player's case becomes still weaker, a fortiori, whenever the conduct is characterized differently. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 92 (2d ed. 1977) (emphasizing the greater scrutiny appropriate for "horizontal" boycott).

number of events or the number of broadcasts short of the number that would be produced in the perfectly competitive world. But this effect is only a necessary incident to the main purpose of the integration, marketing a product successfully or at least more successfully than without the integration. A glance at the real world should make clear that most modern sports associations were formed in order to increase the marketability of the members' products and that these associations have in fact done so.

Second, the Chicago School sees little harm to output when a single athlete is excluded from a sports association. In the case where the association members are looked upon as employers of the athlete (and therefore related to him vertically rather than horizontally), the agreement not to hire him will be viewed as analogous to a monopsony, i.e., an agreement eliminating rivalry between businesses in their purchase of inputs. The input here, the player, will therefore be forced to devote his services to other uses in the economy less highly valued than playing for the association's members. Thus, the overall output from the player's services is reduced, and the association members will not be offering the products consumers most desire. Unless substitute associations and products emerge, consumers will spend their money on goods or services which they desire less than they desire the products the association would have produced absent the discipline. And any collusively imposed restriction on the players that association members can hire will tend to disturb allocative efficiency for the same reason. Therefore, it is not true that efficiency is completely unaffected when a player is excluded. Indeed, a sweeping exclusion of the players whom fans would most like to see, such as an absurd exclusion from professional football of all players under the age of forty, would significantly reduce the output from players' services, especially since the services of a player may have substantially greater value in football than in the next best alternative use. Such a sweeping exclusion would also significantly reduce the demand for the association's products. On the other hand, the reduction in output from excluding a single player is likely to be modest. Moreover, the association only hurts itself when it excludes highly demanded players and reduces the demand for its product. Thus, the association probably has some efficiency-enhancing reason for excluding the player which more than offsets the welfare loss from the slight reduction in output.

Before discussing the efficiency-enhancing reasons for the discipline which the Chicago School might see, I want to clarify that the Chicago School does not infer harm to efficiency merely from the association's prominence in the marketplace, from its ability to hurt the player severely, or from the arbitrariness of its action. And this is true even if the association and the player are viewed as horizontal competitors. For the Chicago School, the key issue is whether the association's action increases the ability of the association to fix prices or engage in some other practice that would significantly reduce output. The exclusion of a single player seems unrelated to this ability. Nor does the danger of reduced output increase when the

discipline was arbitrary, unreasonable or unfair, or when the effect of the discipline was to put a player at a severe competitive disadvantage. Under the Chicago School's view, the fact that one or more players might be denied the opportunity to compete on equal terms has no necessary relationship whatever to the question of whether the association's action restricts, or increases the capacity of the association to restrict, output. The mere ability of an association of firms to exclude other firms or their employees from the market is not sufficient by itself to establish the existence of power to restrict output. The harm to output must be gauged with reference to the market in which the association's product is consumed, not with reference to the players themselves. As long as requiring the association to let the player play would not reduce the ability of the association to fix prices or restrict output, the fact that the association treats players arbitrarily or unfairly should not be a matter of concern to the antitrust laws. The question of fairness to the players remains, of course. But since federal antitrust law is to be concerned exclusively with questions of market efficiency, such questions of "fairness" are to be addressed, if at all, only in another forum.²¹ In short, the Chicago School attacks the previous antitrust approach for unduly emphasizing the injury to the player rather than the injury to competition.

And even if the discipline exacted upon the player caused a significant reduction in output, the Chicago School will view it as ancillary to the association's efficiency-enhancing aspects. Why? As Peter Gerhart, one proponent of the Chicago School, has explained,²² the exclusion overcomes the free-rider problem that would otherwise occur if the player were allowed to impose costs on the other teams in the form of decreased reputation, without having to compensate the other teams for those costs. Without the disciplinary action, one player whose actions decreased the reputation of the association, as in the *Molinas* betting case,²³ will thereby impose costs on the rest of the association for which he does not compensate. So if the association does not act against the player, the player will have too much incentive to engage in reputation-decreasing activities, and the rest of those in the association will have insufficient incentive to engage in reputation-enhancing activities. Thus, the association must be allowed to exclude the player in order to insure an optimum investment level in reputation-enhancing activities. Stating the same point in other language, the association must be allowed to discipline these athletes in order to internalize the benefits of the association's reputation-enhancing activities. The player's reputation-decreasing actions represent an externality the costs of which can be internalized

21. This is the approach called for by Professor Wesley Liebeler of UCLA, a major proponent of the Chicago School. See Liebeler, *ANTITRUST ADVISOR*, *supra* note 18.

22. Gerhart, *supra* note 18, at 339.

23. See *Molinas*, 190 F. Supp. 241.

to the player by the disciplinary action. Overcoming the free-rider problem will improve allocative efficiency through a more complete specification of property rights so that every relevant cost or benefit is included in someone's decisionmaking.

To summarize Gerhart's position, disciplining a player is efficiency-enhancing because it helps to provide optimum incentives for the association's reputation-enhancing efforts. More generally, a sports association's action would be efficiency-enhancing whenever it lowers the cost or increases the demand for the products of the association or of its members.

Now notice the implications of Gerhart's position. One implication is that an association could exclude any player whenever it thought the exclusion would help to increase the marketability of its product. I take it then that the U.S. Tennis Association could confidently have excluded Martina Navratilova if it thought she was such a dominant player (at least in 1983 and 1984) that the marketability of USTA events might increase without her. Likewise, the National Football League could exclude with impunity a player with a bad reputation regardless of whether the player had in fact done anything to warrant the bad reputation. Players could be excluded because of their off-the-field political activity or their unconventional lifestyle. In short, any exclusion should be applauded if it aimed at increasing the appeal of the sport in the eyes of the generally conservative professional sports fan. And because we measure marketability not by counting the number of fans but by counting the amount of dollars of demand offered for the league products, the league might rationally exclude players who were generally popular but who decrease the appeal of the league's product among particularly wealthy fans. Moreover, the Chicago School does not call for careful judicial scrutiny of whether in fact the discipline of the athlete increased the marketability of the sport. As long as that discipline does not increase the association's ability to reduce output, courts should defer to the association on the ground that it has incentive to, and superior knowledge about how to, increase the marketability of its product, lower costs, and improve efficiency.²⁴

That someone might see the sports association's action in some of my examples, like my Martina Navratilova example, as an encroachment on the player's personal freedom or her right to pursue a vocation for which she meets the game-related qualifications, means nothing to the Chicago School. Their view of antitrust does not allow room for such notions.²⁵

This is not to suggest that a player will never have a chance at success under the Chicago School's approach. I suppose that if a group like the

24. Liebler, *ANTITRUST ADVISOR*, *supra* note 18, at 54.

25. Protecting a person's ability to work at a lawful vocation was, however, a major goal of the ancient common law action of restraint of trade. Case of the Tailors of Ipswich, 11 Coke 53a, 77 Eng. Rep. 1218 (K.B. 1614) ("no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil").

U.S. Tennis Association disciplined a player for playing in too many tournaments, especially events not sponsored by the USTA, the discipline would at least raise a close question. Arguably, the discipline does reduce the output of tennis events, and I doubt the USTA could prevail by claiming that it needs to control the number of player's appearances in order to create optimum incentives for the organizers of the USTA.

The Chicago School might also agree that Spencer Haywood should have won his case against the NBA.²⁶ The outcome would depend on whether the NBA could put forth some plausible claim that their rule against hiring those out of high school less than four years was efficiency-enhancing. The NBA would need to suggest how the rule lowered cost, increased demand, provided optimum investment incentives or otherwise facilitated a more complete specification of property rights. My claim that defendants will almost always win these cases springs from my firm belief that defendants can always concoct some plausible efficiency-enhancing reason for their action. For example, any exclusion of an especially vulnerable player, like the NHL's rule against one-eyed players,²⁷ can be defended by several efficiency-enhancing claims. The rule may reduce the amount of insurance for injuries that the league needs to carry, thereby lowering costs. The rule may enhance the reputation of the league and of its product by avoiding injuries which would revolt its fans, thereby increasing demand. The Chicago School approach invites a defense lawyer to search his imagination for a plausible efficiency-enhancing story. And once the story is put forth, a court has no effective way to evaluate it.²⁸

Despite the possibility that the approach of the Chicago School would not alter the result in some sports discipline cases, these cases bring into relief the fundamental difference between the old approach in antitrust and the Chicago School's approach. I call the old approach a tort approach because it reflects concern for the individual player who may be mistreated by the association and generally aims at allocating rights and duties between players and associations. As Learned Hand once stated, antitrust law, like tort law, calls on a judge "to appraise and balance the value of opposed interests and to enforce [his] preference."²⁹ In contrast, the Chicago School approach reflects concern only for the consumers of the association's product. It emphasizes the freedom of the association to compose and market its product as it sees fit. Just as it imposes no obligation on any other business to treat its employees or independent contractors "fairly," it imposes no such obligation on a sports association. It encourages prospective players

26. See *Denver Rockets*, 325 F. Supp. 1049.

27. See *Linseman*, 439 F. Supp. 1315.

28. Others have pointed out the difficulty of evaluating the efficiency-enhancing and output-restraining stories and of deciding the correct trade-off between them. *E.g.*, Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11-14 (1984).

29. *Associated Press v. United States*, 52 F. Supp. 362, 370 (1943) (L. Hand, J.).

to view the association's actions and rules as exogenous factors. The players have no rights vis-a-vis the association beyond those they contract for. Players unwilling to accept the association's terms may seek another pursuit.

Now that we see the various approaches, how do we evaluate them? In one sense there is no point in discussing which approach is more sound. If you believe that balancing allocative and productive efficiency is the sole goal of antitrust, the Chicago School's approach is more sound. If you think one goal of antitrust should be the control of arbitrary business behavior generally toward rivals, sellers, buyers and employees, the old approach is more sound. Debating the matter resembles debating religion and usually profits no one.

That being said, I cannot resist offering one observation through a philosophical, or, more accurately, a sociological aside. What the Chicago School ignores is that a sports association is not just an efficiency-creating economic organization. It is not just a form of integration that helps to organize a sport and put forward a sporting product. It is not just one of many competitive businesses seeking to maximize the marketability of its product. In light of its substantial power to affect the lives of players, and in light of its highly visible and representative role in American culture, it is also what I will call a ruling organization.³⁰ As such, it may not concern itself only with profit maximization, but, like all ruling organizations, also needs to concern itself with maintaining its legitimacy. As part of maintaining its legitimacy, it needs at least to appear to treat players fairly. Indeed, since the players have access to the mass media, creating the appearance of treating players fairly probably requires treating them fairly in fact. And in popular American culture, in particular American sports culture, treating a player fairly requires allowing him to play regardless of his unpopularity, politics, and dominance, even when these factors reduce the marketability of the association's products; even when, in short, the player is "bad for the game." On the other hand, "fair" treatment does not prevent the discipline of criminals, cheaters, malingerers, certain gamblers, or drug addicts. Admittedly, the content of "fair" treatment in popular American culture will change with times and fashions and cannot be proven.

A sports league is not the only aggregation of private economic power to be a ruling organization. Some individual businesses are large enough and

30. Others have studied private regulatory regimes similar to those of sporting associations with much more subtlety than is attempted here. Cross, *The College Athlete and the Institution*, 38 *LAW & CONTEMP. PROBS.* 151 (1973); Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Object of Study*, 7 *LAW & SOC'Y REV.* 719 (1973); Zand & Hair, *The Social Control of General Hospitals*, in *ORGANIZATION RESEARCH ON HEALTH INSTITUTIONS* 51-81 (B. Georgopoulos ed. 1972).

Although liberalism encourages us to think of rulemaking and enforcement as a function of the "public sector," in fact we inhabit a world of legal pluralism where "private" units like sports associations exercise what are, effectively, legal powers. Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 *LAW & POL'Y* 149, 153 (1984).

visible enough to amount to a ruling organization by themselves. Popular language reflects the notion that these businesses have more obligations than merely maximizing profits. The very concept "corporate responsibility," as in the corporate responsibility of the television networks to refrain from broadcasting pornographic programs, suggests that some businesses are expected by the culture to sacrifice profits in order to abide by the culture's dominant noneconomic norms. In turn, abiding by those norms enhances the ruling organization's legitimacy and helps to justify its claim to its wealth and power.

In failing to see that a sports league has obligations beyond maximizing profits, the Chicago School is not alone. All those who believe in liberalism—that is individualism—a group which includes, I suspect, most Americans and almost all modern American lawyers, tend to be guilty of the same oversight. They tend to divide the world between the government, which has the power to make and enforce rules but which must observe the constitutional protections given the unpopular, and private individuals who do not have this power, who are subject to the government's rules but who are generally free to profit maximize as they wish. This is the well known public-private distinction. And in this world view there is no place for the reality that some private groups acting in concert make rules and play a part in ruling this nation. As Arthur S. Miller contends,

"neither our constitutional law nor our political theory is able to account for the corporate presence in the arena of social power." . . . American views of law . . . are in the main based on Austinian notions of sovereignty, under which law is the command of the sovereign — that is, the government.³¹

It is not surprising then that our law has waffled in dealing with the reality that private groups rule and make rules. One judicial impulse is to refuse to review private rule by ruling organizations entirely (except when output is restrained and there is no efficiency-enhancing benefit), as the Chicago School prescribes. Another impulse, for which Justice Black's antitrust opinions are famous,³² is to prohibit concerted private rule regardless of its

31. A. MILLER, *THE MODERN CORPORATE STATE* 30 (1976) (quoting Hacker, *Introduction: Corporate America*, in *THE CORPORATION TAKE-OVER* 8 (A. Hacker ed. 1964)). See also Hacker, *Politics and the Corporation*, in *THE CORPORATION TAKE-OVER*, *supra*; A. HACKER, *THE END OF THE AMERICAN ERA* 72 (1970).

32. In *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941), for instance, Justice Black condemned the efforts of garment manufacturers to control style piracy with this language:

the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute."

Id. at 465 (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899)). See also *American Medical Ass'n v. United States*, 130 F.2d 233, 248-49 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).

content on the ground that the private businesses are usurping the role of the government. Such a prohibition, however, is wildly unrealistic in light of the pervasive presence of private power, the inevitable need for private groups to judge others, and the many economic and noneconomic benefits which private rule can provide.³³ Wisely, lower courts, especially in the common law of torts³⁴ and in the old antitrust cases like *Molinas*,³⁵ have avoided both extremes. They have instead reviewed the reasonableness of actions by private groups acting in concert just as they often review the reasonableness of government actions. And, of course, this review of reasonableness does not ask only whether the private groups' actions were output-restraining. Siding more with Justice Black, this review reflects hostility toward the exercise of private concerted power over the opportunities of others and over the rights of others to pursue their vocation, regardless of the effect of that power on industry output.

In fact, I suspect most lawyers would agree that a modern court faced with an association's suspension of a player on clearly arbitrary grounds would feel obliged to review that action, if not as part of antitrust, then at least as part of tort, property, or contract law. If this suspicion is correct, the old tort approach offered a more accurate insight into the attitudes of courts than the Chicago School approach. The insight is simply that courts are troubled when a private group acting in concert, like a sports association, possesses too much power vis-a-vis another group, like the players, and then acts to abuse that power. In contrast, the Chicago School's approach, like all approaches which would present law as a science, invites courts to entertain the illusion attacked by Justice Holmes so long ago, the illusion that courts are above the fray of groups striving for power.³⁶

Even those who reject this sociological view entirely may acknowledge certain benefits from accepting the reality that private groups rule and that courts, one way or another, are likely to review that rule. One benefit is

33. Any joint activity by potential rivals, including the formation of a partnership, joint venture, or trade association, or the mere preparation of a joint statement about health or safety standards, entails a "judgment" about whom to exclude from the joint activity. Whenever this extra-judicial "judgment" puts some rival at a significant competitive disadvantage, the joint activity would merit condemnation under Justice Black's sweeping language. See *supra* note 32; see also *Associated Press v. United States*, 326 U.S. 1 (1945).

In the language of public choice analysis, private regulation is to be preferred to government regulation unless the transaction costs of promulgating the regulation privately become prohibitive or unless significant externalities exist. J. BUCHANAN, *THE BASES FOR COLLECTIVE ACTION* (1971).

34. According to the *First Restatement of Torts*, liability for entering an agreement to refuse to deal with another turns on whether the action is deemed "justified." Many non-economic factors are considered including the degree of harshness to the plaintiff, the social desirability of forcing the plaintiff to comply with the defendants' requirements, and the relative economic power of the plaintiff and the defendants. See *RESTATEMENT OF TORTS* § 765 (1939); see also *RESTATEMENT (SECOND) OF TORTS* §§ 766(b), 767, 768 (1977).

35. *Molinas*, 190 F. Supp. 241.

36. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

that courts might start to indicate more specifically which disciplinary actions by a sporting association are appropriate. I believe a host of private associations would profit from the courts devising more specific guidelines for their actions. Realtors who control admission to multiple listings services, doctors who control the granting of staff privileges at private hospitals, and trade association officers who control access to the association's advantages would profit from safe-harbor guidelines indicating the procedures through which, and substantive grounds on which, they may exclude a member without fear of legal liability. A judicial effort to specify such guidelines would not necessarily mean a bonanza for players or a headache for sports associations. A court might acknowledge that the disciplinary actions serve a variety of social purposes. For example, disciplinary actions can help to enforce the criminal law, as in disciplinary actions for undue violence during a sports event. The assault on Rudy Tomjanovich is one example.³⁷ Government officials often consider it impractical to prosecute athletes for undue violence, if only because of jury sympathy for members of the home team.³⁸ Thus, league action may be the only deterrent feasible. League disciplinary action may also help to enforce customary morality, as in disciplinary action based on verbally abusing an official during a contest. Here there is probably no public law making the conduct criminal because the conduct is not so widespread as to create an outcry for legislative action.

Those who insist on the public-private distinction of individualism, however, will find no sensible legal basis for a league trying to supplement the criminal law or trying to enforce customary morality. After all, there is no constitution giving the league any "police power" to pursue these ends. Nor is there any other legal basis for asserting that league efforts to these ends serve a social benefit. These believers in individualism face the extreme choice referred to above: either adopt the Chicago School's view and leave ruling organizations alone, or adopt Justice Black's view and condemn all private rule which intrudes on the government's domain as long as concert of action or some other formalistic requirement is present. Those who see beyond the public-private distinction of individualism are most likely to understand why a court might intervene only against league actions deemed "arbitrary" or "unreasonable."³⁹

37. Tomjanovich was punched in the face and seriously injured while trying to stop a fight between two other players during a professional basketball game. See *N.Y. Times*, Apr. 21, 1981, at B18, col. 5.

38. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 *WM. & MARY L. REV.* 703, 709 n.24, 728-29 n.91 (1977).

39. As Professor Macaulay has written:
the public/private distinction is suspect. While it may be useful or vital to carve out areas of activity and put them beyond public control, reifying public and private governments and seeing them as distinct entities only obscures reality.
S. MACAULAY, *PRIVATE GOVERNMENT* 134 (1984) (forthcoming in the *Handbook of Law and Social Science* to be published under the auspices of the Social Science Research Council; currently available at the University of Wisconsin-Madison Law School).

My more mundane conclusions are that when the Chicago School's triumph is complete, the antitrust laws will rarely offer a remedy for a player who is disciplined. Instead, the player will need to hope courts fashion a tort, contract, or property remedy for him. If only because the tort, property, and contract law in this area is utterly undeveloped, players will need to be especially creative in suggesting the elements and limits of the proposed common law actions. Players may also want to consider bringing these actions in state courts; for even if federal courts find jurisdiction, they will hesitate to create new common law actions under state law before the state courts have addressed the matter. And, of course, even if courts do create new actions in tort or property law to help the players, the actions will not carry with them the advantages of treble damages, attorney's fees, federal jurisdiction or any of the other substantive and procedural advantages of the antitrust laws. Thus, the effect of the Chicago School's forthcoming triumph is to put a premium on collective bargaining by players' associations, and a premium, therefore, on an individual player keeping in the good graces of his collective bargaining unit.