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# PLAYER DISCIPLINE IN PROFESSIONAL SPORTS: THE ANTITRUST ISSUES

JOHN C. WEISTART\*

## INTRODUCTION

One of the most frequently disputed aspects of the relationships which underlie professional sports is the power claimed by clubs and league commissioners to discipline athletes.<sup>1</sup> Provisions for discipline may be invoked to discourage a wide variety of activities, including gambling,<sup>2</sup> criticizing game officials,<sup>3</sup> associating with "undesirables,"<sup>4</sup> and failing to observe the rules of competition.<sup>5</sup> The penalties which may be imposed also cover a wide range, from mere reprimands to lengthy — and in some cases, lifetime — suspensions.<sup>6</sup> A question arises as to the legal principles which might

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1. See generally *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954); *American League Baseball Club v. Johnson*, 109 Misc. 138, 179 N.Y.S. 498 (1919), *aff'd*, 190 App. Div. 932, 179 N.Y.S. 898 (1920); Alyluia, *Professional Sports Contracts and the Players' Association*, 5 MANITOBA L.J. 359, 386-70 (1973); Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771 (1972) [hereinafter cited as *Discipline in Sports*]; Interview: Pete Rozelle, *PLAYBOY*, Oct. 1973, at 65.

2. See, e.g., *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 242 (S.D.N.Y. 1961) (basketball player suspended for placing bets on his team); *N.Y. Times*, Apr. 2, 1970, at 48, col. 1 (baseball player Denny McLain suspended for gambling activities); *id.*, Mar. 17, 1964, at 41, col. 1 (football players Paul Hornung and Alex Karras suspended).

3. See, e.g., *N.Y. Times*, Aug. 21, 1975, at 47, col. 1 (baseball player Bill Madlock fined for abusive language and throwing helmet in confrontation with umpire); *id.*, Mar. 19, 1975, at 63, col. 7 (Kareem Abdul-Jabbar challenged fine levied by NBA for his public criticism of referee).

4. See, e.g., *N.Y. Times*, Apr. 2, 1970, at 48, col. 1 (baseball player Denny McLain suspended for associating with gamblers); *cf. id.*, July 20, 1969, § 5, at 1, col. 1 (NFL Commissioner suggests that football players, including Joe Namath, avoid frequenting establishments suspected of housing gambling activities).

5. See, e.g., *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1212, 1218 (C.D. Cal. 1969) (bowler Ralph Manok suspended for bowling with a partner who used a false name); *cf. Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1262 (N.D. Ga. 1973) (golfer Jane Blalock accused of moving her ball illegally).

6. The league's and club's vast power of discipline is usually said to have its legal basis in the consent of the player. See, e.g., *Molinas v. Podoloff*, 133 N.Y.S.2d 743, 747 (Sup. Ct. 1954); *Discipline in Sports*, *supra* note 1, at 780-81. Not surprisingly, the standard player

be applied to limit the discretion of clubs and leagues in punishing their players. This Article explores the role which the antitrust laws can play in providing a framework for judicial review of these actions.

It is increasingly clear that, with the exception of baseball,<sup>7</sup> pro-

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contract is the vehicle through which this consent is secured. See, e.g., *Standard Player's Contract*, National Football League ¶ 4 (1975):

The Player agrees at all times to comply with and be bound by: the Constitution and By-Laws, Rules and Regulations of the League, of the Club and the decisions of the Commissioner of the League (hereinafter called "Commissioner"), which shall be final, conclusive and unappealable. The enumerated Constitution, By-Laws, Rules and Regulations are intended to include the present Constitution, By-Laws, Rules and Regulations as well as all amendments thereto, all of which are by reference incorporated herein. If the Player fails to comply with said Constitution, By-Laws, Rules and Regulations, the Club shall have the right to terminate this contract as provided in Paragraph 6 hereof or to take such other action as may be specified in said Constitution, By-Laws, Rules and Regulations, subject, however, to the right to a hearing by the Commissioner. All matters in dispute between the Player and the Club shall be referred to the Commissioner and his decision shall be accepted as final, complete, conclusive, binding and unappealable, by the Player and by the Club. The Player, if involved or affected in any manner whatsoever by a decision of the Commissioner, whether the decision results from a dispute between the Player and the Club or otherwise, hereby releases and discharges the Commissioner, the League, each Club in the League, each Director, Officer, Stockholder, Owner or Partner of any Club in the League, each employee, agent, official or representative of the League or of any Club in the League, jointly and severally, individually and in their official capacities, of and from any and all claims, demands, damages, suits, actions and causes of action whatsoever, in law or in equity, arising out of or in connection with any decision of the Commissioner, except to the extent of awards made by the Commissioner to the Player. The Player hereby acknowledges that he has read the present said Constitution, By-Laws, Rules and Regulations, and that he understands their meaning.

7. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). The Supreme Court's original rationale for excluding baseball from the reach of the antitrust laws was that the activity did not involve interstate commerce. *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, *supra* at 208-09. According to the Court, the activities involved — baseball exhibitions — were "purely state affairs." *Id.* at 208. The transportation of players across state lines was "a mere incident, not the essential thing." *Id.* at 209. The Court expressly reaffirmed *Federal Baseball* in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam). It premised its decision, however, on the fact that Congress had considered the baseball exemption and had not abolished it. *Id.* Moreover, the Court observed that "[t]he business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." *Id.* The Supreme Court considered the exemption for a third time in *Flood v. Kuhn*, 407 U.S. 258 (1972). In *Flood* the Court recognized that baseball was a business in interstate commerce. *Id.* at 282. Additionally, the majority recognized the anomaly of granting antitrust immunity to baseball while denying a similar status to other professional sports. *Id.* at 282-84. Nevertheless, the Court stated that "the aberration is an established one" and

fessional sports are within the scope of the antitrust laws.<sup>8</sup> To date, most sports-related antitrust cases have dealt with player restraints, those restrictions limiting the mobility and bargaining power of athletes.<sup>9</sup> These cases have served to focus attention on the capacity of the sports industry to create and define the market for professional athletic talent. It should quickly become apparent that the rules governing player discipline also have an effect upon the demand for players' services. Thus, it is appropriate to examine the application of these rules and to determine whether they are reasonable in light of the general federal policy favoring a free and competitive market.<sup>10</sup>

### THE RULE OF REASON

We begin our discussion by considering the principles which will be applied where the sanction involves suspending the athlete from competition. The other common sanction — the imposition of mon-

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is "fully entitled to the benefit of *stare decisis* . . . ." *Id.* at 282. Through its positive inaction, Congress had "clearly evinced a desire not to disapprove" the Court's grant of immunity. *Id.* at 283-84.

For a general discussion of the baseball exemption, see J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION*, §§ 50.01-.04 (Supp. 1976); Eckler, *Baseball — Sport or Commerce?*, 17 U. CHI. L. REV. 56 (1949); Gromley, *Baseball and the Anti-Trust Laws*, 34 NEB. L. REV. 597 (1955); Pierce, *Organized Professional Team Sports and the Antitrust Laws*, 43 CORNELL L.Q. 566 (1958); Topkins, *Monopoly in Professional Sports*, 58 YALE L.J. 691 (1949); Note, *Baseball Players and the Antitrust Laws*, 53 COLUM. L. REV. 242 (1953); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

8. See, e.g., *Haywood v. National Basketball Ass'n*, 401 U.S. 1204, 1205 (Douglas, Circuit Justice, 1971); *Radovich v. National Football League*, 352 U.S. 445, 452 (1957); *United States v. International Boxing Club, Inc.*, 348 U.S. 236, 241-42 (1955); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 466 (E.D. Pa. 1972). See also *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972) (dictum).

9. See, e.g., *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (Rozelle Rule); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (college player draft and perpetual reserve system); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (NHL reserve clause).

10. As players' associations assume a more predominant role in the representation of athletes, the matter of discipline becomes increasingly enmeshed with the principles of federal labor law. Before the clubs and league commissioners can claim the benefit of the nonstatutory labor exemption to the antitrust laws, however, they first must establish that the particular disciplinary rules were the result of serious, arm's length collective bargaining with the players' associations. Cf., e.g., *Mackey v. National Football League*, 543 F.2d 606, 614, 623 (8th Cir. 1976); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972). In most of the situations that exist today, however, courts are likely to find that the disciplinary rules imposed were the product of unilateral action by the clubs and commissioners. Cf., e.g., *Mackey v. National Football League*, *supra* at 616.

etary fines — is treated in a subsequent section.<sup>11</sup> And to bring the antitrust issues into somewhat clearer focus, this initial inquiry will assume that the discipline is imposed by the league, rather than the club. The issues peculiar to club-imposed sanctions are also treated separately below.<sup>12</sup> Thus, we will first be concerned with league suspensions, a form of discipline which may have severe economic consequences for the athlete involved.

Although such suspensions may be imposed for a variety of reasons, the few cases in this area suggest that allegations that the participant has cheated in competition or has bet on the outcome of his or her performance are particularly apt to prompt this drastic measure.<sup>13</sup> Such a suspension has many of the attributes of a group boycott.<sup>14</sup> When a league denies an athlete the right to continue playing, there is, in effect, a joint agreement among the member clubs that they will refuse to deal with the player for the period of the suspension. This joint action produces an injury, for the athlete is precluded from selling his or her services to the group and thus is denied an important means of livelihood. If this characterization were accepted without qualification, the legal result would be clear, for concerted refusals to deal are usually treated as per se unreasonable under the antitrust laws.<sup>15</sup> But while that result might be clear,

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11. See text accompanying notes 106-11 *infra*.

12. Issues peculiar to club-imposed sanctions are considered separately. See text accompanying notes 112-116 *infra*.

13. See, e.g., *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1262 (N.D. Ga. 1973); *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215, 1218 (C.D. Cal. 1969); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 242 (S.D.N.Y. 1961).

14. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), in which the Supreme Court found that the collective action of the New York Stock Exchange and its members in removing direct telephone connections between their office and a nonmember was a group boycott. *Id.* at 347.

15. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 467-68 (1941).

The per se rule is but one of two approaches used to evaluate existing competitive restraints. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . ." 15 U.S.C. § 1 (1970). Despite the breadth of this condemnation, the Supreme Court early concluded that the language precludes only those contracts or combinations which *unreasonably* restrain competition. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238-39, 241 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911). The determination of reasonableness normally requires an exhaustive judicial investigation into the industry involved, including an examination of the evil believed to exist, the reasons for adopting the particular restraint, the purpose or end sought to be attained, and the availability of less restrictive alternatives. See, e.g., *Chicago Bd. of Trade v. United States*, *supra* at 238.

Antitrust litigation under the rule of reason approach is typically a laborious process requir-

it would also be absurd. It would be a rather startling notion if the antitrust laws meant that a business operation such as a league could not protect itself against actions of participants which might seriously injure, if not destroy, the enterprise. The success of most professional sports activities depends upon the fans' belief that games and matches represent honest competition. With the possible exception of professional wrestling, the premise upon which the exhibitions are offered is that they represent a true test of the skills, conditioning and coaching of the opposing sides. It is unlikely that the interest of fans would continue at present levels if they had reason to believe that the outcome of the competition was controlled by factors other than the personal efforts of those participating and the pre-established rules of the game.<sup>16</sup>

Although the Supreme Court seemed to indicate at one time that all concerted refusals to deal were per se illegal,<sup>17</sup> it subsequently

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ing extensive pretrial discovery and review of documents, extensive fact gathering, and lengthy presentations. The Supreme Court recognized the burden such litigation placed upon the plaintiff seeking redress under the antitrust laws. In the Court's view, the extensive economic inquiry often was unnecessary because prior cases had established that the particular practice ultimately would be found to be unreasonable. *See, e.g., United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 363 (1963). The Court's response was to announce that some types of activities could be per se unreasonable:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are *conclusively presumed* to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

*Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (emphasis supplied). Among the practices the Court has deemed unlawful per se are price-fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); horizontal market divisions, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); group boycotts, *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 468 (1941); tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

16. The potential repercussions of player misconduct are illustrated rather starkly by the Black Sox scandal of 1919 in which eight players confessed that they had accepted bribes to throw the World Series. *See generally E. ASINOF, EIGHT MEN OUT; THE BLACK SOX AND THE 1919 WORLD SERIES* (1963). The event produced a considerable public outcry about the integrity of the game and threatened the existence of the league when three clubs threatened to withdraw and join another association. *See Davis, Self-Regulation in Baseball, 1909-71, in GOVERNMENT AND THE SPORTS BUSINESS*, 349, 376-77 (R. Noll ed. 1974).

17. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). The Court stated:

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden [per se] category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality."

*Id.* (footnote and citation omitted).

recognized that its pronouncements to this effect could not be applied literally. Particularly relevant in this connection is the Court's decision in *Silver v. New York Stock Exchange*.<sup>18</sup> The case arose when the stock exchange attempted to prevent Silver, a non-member, from gaining access to exchange transactions by means of a private telephone connection with certain member firms. *Silver* involves a number of issues which are relevant to our discussion of discipline, but particularly pertinent for the immediate inquiry is the Court's suggestion that the condemnation of concerted refusals to deal under the antitrust statutes will not be applied where there is a "justification derived from the policy of another statute or otherwise."<sup>19</sup> Because the controversy in *Silver* focused on the question of whether another statute — the Securities Exchange Act — provided a justification for the defendant's refusal to deal with the plaintiff,<sup>20</sup> the case offers little indication of the types of facts which might "otherwise" avoid summary condemnation under the per se doctrine. Other courts, however, both before and after *Silver*, have had occasion to address the question of the right of private groups to engage in self-regulation. These courts have generally accepted that there are certain types of group actions which cannot be adequately dealt with under the per se doctrine, but rather require a more detailed inquiry into the reasonableness of the action taken.<sup>21</sup> Among the groups entitled to this more deliberate treatment are those engaged in activities of a nature which require self-policing of standards of conduct and methods of competition.<sup>22</sup>

Sports enterprises would appear to present clear examples of groups which need this authority for self-regulation. Not only are rules necessary for the successful staging of competition,<sup>23</sup> but in

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18. 373 U.S. 341, 348-49, 361 (1963).

19. *Id.* at 348-49. See generally Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966) [hereinafter cited as *Trade Association*].

20. 373 U.S. at 364.

21. See, e.g., *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365, 1369 (9th Cir. 1970); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165, 170, 172 (9th Cir. 1966), cert. denied, 385 U.S. 846 (1966); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1066 (C.D. Cal.), stay vacated sub nom. *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (Douglas, Circuit Justice, 1971); *STP Corp. v. United States Auto Club*, 286 F. Supp. 146, 151 (S.D. Ind. 1968); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961); *United States v. United States Trotting Ass'n*, 1960 Trade Cas. ¶ 69,761 (S.D. Ohio). But see *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1267 (N.D. Ga. 1973).

22. See *Trade Association*, supra note 19, at 1501-02.

23. The essence of "league competition" is the race for the league championship. For the

addition, the groups have an interest in insuring that their ventures remain free of illegal and fraudulent activities which might undermine fan support. Moreover, private regulation is necessary because traditional public legal remedies — those secured through the criminal process or through civil actions — are typically inadequate. Depending on the nature of the violation, such remedies either are not available or afford a form of relief which does not provide sufficient protection of the group's interest in preserving the integrity of the competition. For example, cheating under privately-defined rules normally does not involve a violation of the public criminal law, and there is no clear body of civil law doctrine which would provide a complete remedy.<sup>24</sup> Because such misconduct represents a clear threat to the success of the private sports venture, it is appropriate that the group which controls it be given authority to take corrective action.

The recognition that sports authorities enjoy some discretion to regulate the conduct of participants suggests that disciplinary actions normally will be reviewed under the rule of reason standard.<sup>25</sup> The concept of *per se* illegality, however, will continue to play a limited role. The prerogatives which a league enjoys can properly be limited by the conditions which give rise to the need for self-regulation.<sup>26</sup> If the league uses its powers to achieve ends which clearly cannot be justified by the need for preserving the integrity of the sport, the *per se* doctrine should be applied.<sup>27</sup> Similarly, the

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designation of "champion" to be meaningful, the teams must compete according to the same rules so that comparison can be made. Thus, the league has an interest in defining such things as the types of plays that will be permitted and the types of individual on-the-field conduct that will be proscribed.

24. A number of theories might be proposed. Perhaps cheating could be viewed as a breach of an implied term of the player's contract, or it might be seen as such an infringement upon the economic position of the league as to warrant a court to exercise its equity powers. But money damages are likely to be an ineffective remedy. They are likely to be speculative and, moreover, would do little to satisfy the concern for fan reaction. Some form of injunction might be devised to achieve the same purpose as a suspension, but a basic problem is that there is no clearly defined existing body of law which would afford these rights. Moreover, judicial procedures would be considerably more cumbersome than internal enforcement, a fact which might well limit the effectiveness of the discipline.

25. See cases cited note 21 *supra*.

26. For a discussion explaining the rationale for moving some activities into the realm of *per se* illegality see note 15 *supra*.

27. Such would be the case, for example, if a league used its disciplinary powers for anti-competitive purposes such as blacklisting athletes who played in rival associations. See, e.g., *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966). For a further discussion of situations in which the *per se* rule may be applied, see text accompanying notes 43-48 *infra*.



procedural aspects of an otherwise proper disciplinary action may be so lacking in fairness and objectivity as to warrant a summary disapproval under the *per se* standard.<sup>28</sup> But these will be extreme cases, and most situations are likely to call for an inquiry under the rule of reason test. Since this standard requires only a showing of the reasonableness of the action taken, a league which acts responsibly in defining its disciplinable offenses and affords adequate procedural protections should find that the antitrust laws represent no substantial intrusion into its efforts at self-regulation.

#### SELF-REGULATION: PROCEDURAL AND SUBSTANTIVE ASPECTS OF DISCIPLINE

##### *Procedural Aspects of Discipline*

There are two different elements of a league's disciplinary action which might be called into question under the antitrust laws. The first is a concern for the substantive aspect of the discipline: Was the punished conduct a matter over which the league could properly assume control, and was the league's sanction appropriate in light of the interest which it sought to protect? A second and distinct concern is whether the league followed reasonable procedures in determining that a violation had occurred. The following discussion treats these two issues separately and begins with a consideration of procedural concerns. As will be seen, the sports area has produced only a few cases which have specifically explored these questions.<sup>29</sup> There are, however, other authorities, including the *Silver* case, which deal with issues similar to those which will arise in the sports context.<sup>30</sup> A consideration of the general principles applicable to private group discipline serves to identify the legal standard to be applied in sports cases.

One might wonder how the antitrust statutes could be interpreted to require procedural safeguards in private group disciplinary actions. Those laws are primarily concerned with practices which improperly limit competition and at least on the surface seem to have little to say about procedural fairness. Since it is the fact of exclu-

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28. See, e.g., *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973). See also *Silver v. New York Stock Exchange*, 373 U.S. 341, 364 (1963).

29. See, e.g., *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961).

30. See, e.g., *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

sion which limits competition for a participant's services, and not the procedures which precede such a decision, it might appear that the only relevant question was whether the conduct involved was properly punishable. Under this view, it would be argued that the antitrust laws authorize a court to look only at the propriety of the end achieved and not at the means by which it was attained.

This is not the approach which has been taken, however. In *Silver*,<sup>31</sup> the Supreme Court made clear that the procedural aspects of private self-regulation were an appropriate matter for inquiry by the antitrust court.<sup>32</sup> The concern for procedural safeguards is supported by a number of considerations. It is thought that the requirement of notice and a hearing will facilitate the administration of the antitrust laws.<sup>33</sup> Such procedures serve to define more precisely the factual basis for the group's actions as well as the defenses and contentions of the accused. Thus, a court called upon to review the matter in an antitrust proceeding will be in a better position to determine whether a basis exists for the discipline and whether the action is justified in light of the group's purposes.<sup>34</sup> In addition, the requirement that a group use reasonable and deliberate procedures tends to discourage arbitrary action and thus serves to foster compliance with the substantive antitrust rules.<sup>35</sup> If the group is required to state and defend its reasons for imposing the discipline, it will constantly be reminded of the need to adopt defensible rules and to apply them only when the proper factual basis exists.<sup>36</sup> A structured hearing will serve to expose weaknesses in the group's position and is likely to encourage adjustments — such as a reduction in the offense charged or the punishment imposed — which will bring its actions into antitrust compliance without the need for litigation.<sup>37</sup>

*Silver* is particularly useful in defining the nature of the inquiry a court should make into the question of procedural fairness. In one portion of the opinion, the Court attempts to define the general type of procedures to be followed. The Court stated that before self-regulation by private groups could be justified, there must be "some

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31. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

32. *Id.* at 364.

33. *See id.* at 363.

34. *See id.* at 362-63.

35. *See id.* at 362.

36. *See id.*

37. *See id.* at 361-62.

method of telling a protesting non-member why a rule is being invoked . . . and allowing him to reply in explanation of his position."<sup>38</sup> Thus, it would appear that the charges must be examined in a specific proceeding designed for that purpose and the accused must be given an opportunity to participate. While the Court did not elaborate on how the proceeding should be structured, its concern for informing the accused and allowing him to respond implies that there should be some type of advance notice, which would allow the accused time to formulate his response and gather any pertinent evidence. By the same token, the opportunity to offer an explanation presumably must be a meaningful one, which would mean that it must precede the determination of guilt.

The Court in *Silver* also continued a role for the per se doctrine in these matters.<sup>39</sup> The Court observed that the decision of the stock exchange to terminate Silver's private line connection with member firms had been made unilaterally without a statement of charges or an opportunity for Silver to be heard. Under those circumstances, the Court concluded, a finding of per se illegality was appropriate.<sup>40</sup> Thus, a disciplined athlete may be entitled to a summary finding of illegality if he or she can establish that the method for determining guilt was inherently defective.<sup>41</sup> In such a case the court need not make a detailed inquiry into the basis of the discipline, its justifications, or its effects. Before a defense on the merits will be heard, the disciplining group must initially establish that its action has the characteristics of reliability which come from a more deliberate proceeding in which the accused participated.<sup>42</sup>

While *Silver* seems to indicate that notice and a hearing — or a chance to explain — are necessary before drastic action can be taken, numerous other questions may arise concerning the formalities which must accompany the decision-making of the disciplinary authorities. Can the accused insist that he or she be represented by counsel? Even if a representative is allowed, may attorneys be excluded? Does the accused have a right to cross-examine witnesses? Must a transcript, stenographic or otherwise, be provided? Must the accused be given the right to participate in the

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38. *Id.* at 361.

39. *See id.* at 365.

40. *Id.*

41. *See, e.g.,* *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973).

42. *See generally Trade Association*, *supra* note 19, at 1508-10.

selection of the members of the tribunal hearing the case? What rules of evidence will be followed? What standard of proof must be applied to the determination of guilt: must guilt be shown beyond a reasonable doubt, or only by reasonable evidence?

The existing case law has not developed to the point that specific answers can be given to these questions. There are, however, several considerations which should provide guidance. Because of the nature of the question raised, there is a temptation to view the matter of procedural safeguards in constitutional terms and to look to cases which define procedural due process in the areas of criminal and administrative law. A comparison with these areas would not be entirely inappropriate. The purposes of the requirement of a fair hearing are similar, particularly where private self-regulation and governmental administrative enforcement are compared. In each instance, procedural fairness is required to insure the integrity of the process, to facilitate subsequent judicial review, and to foster voluntary compliance with the legal mandate.<sup>43</sup> But by the same token, it would seem inappropriate to view private group self-regulation in purely constitutional terms. On some matters, the relevant constitutional provision specifies the protections to be afforded in greater detail than is found in the antitrust area, where the requirement for procedural safeguards is judge-made. In the criminal law, for example, limitations on evidence-gathering are specifically mandated and reflect the particular needs of the areas to which they apply. On a more general level, it should be noted that the nature of private group decision-making is quite different from that found in cases involving governmental action. For example, leagues normally do not have, and should not be expected to maintain, the elaborate permanent institutions for the investigation, prosecution, and review of violations which are found in the public sphere. Relatedly, the private groups do not have available the option of broad-based taxation to support these institutions, and it can be expected that economic considerations will impose significant restraints.

Again, the point is not that notions of constitutional due process should be ignored, but only that their application must be tempered by the peculiar nature of the private decision-making which will be reviewed under the antitrust laws. The central question concerns which of the constitutional protections will be incorporated, and in

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43. Compare McCormick, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 52 TEX. L. REV. 1257 (1974), with text accompanying notes 31-37 *supra*.

what form. In resolving this question, there are two considerations which will deserve particular weight: the concern for the reliability of the decision and the significance of the consequences to the individual. There is a high degree of interrelationship between these factors; the more severe the consequences of a decision, the greater the need for a carefully structured proceeding.<sup>44</sup> When the accused is threatened with a suspension or expulsion which seriously restricts his opportunity to earn a living, a high degree of deference to his interests will be required.

As is implied in the above analysis, the extent of protection afforded will vary from case to case. The severity of the consequences may be an important ingredient, and the range of relevant considerations will include such things as the complexity of the factual issues and the sophistication of the accused. Because of the *ad hoc* quality of the question, there is little value in attempting to anticipate all of the issues which might arise. A few examples, however, will serve to illustrate the type of balancing which should be undertaken. For example, does the accused athlete have a right to be represented by an attorney? The answer would seem to depend upon a number of factors. If the enforcing agency — the league — conducts its affairs through professional counsel and if the participant has no particular sophistication on the matter of how to present his defense, it would seem that the fairness of the proceeding could be insured only if there were a balance in the relative professionalism of the two sides. But if the disciplinary proceeding is handled by non-legally trained personnel and otherwise has the attributes of impartiality, a court should accept that some individuals can adequately represent themselves, particularly if the factual issues are not overly complex.<sup>45</sup> The primary concern should be whether the disciplined athlete was seriously disadvantaged by the denial of counsel, and that would seem to be a matter upon which no *a priori* judgment could be made.

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44. Cf., e.g., *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). See generally Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267 (1975).

45. Cf. *Cornelio v. United Bhd. of Carpenters*, 243 F. Supp. 126 (E.D. Pa. 1965), *aff'd*, 358 F.2d 728 (3rd Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). In *Cornelio* the court rejected the contention of a union member that his inability to be represented by "outside" counsel in a proceeding before the union's trial committee resulted in a denial of procedural due process. 243 F. Supp. at 128. The court stated that "[d]enial of assistance of counsel is of even less significance as it bears upon the requirement of 'fair hearing' where, as here, the trial body is made up of union members who, in all likelihood, will not be 'learned in the law.'" *Id.* at 129 (footnote omitted).

Another and perhaps more significant question arises as to the rules of evidence and standard of proof which the league tribunal must apply. On a general level, the private group should not be expected to conform to the strict standards imposed in the criminal area. The tribunals used in the sports area generally do not have the sophistication of a court of law; and to expect them to operate with the same care and precision as found in criminal proceedings would require a fundamental restructuring which is not warranted in light of the nature of the decision involved. A primary antitrust concern is for the reliability of the decisions which are made. This can be insured even if some hearsay evidence is presented, the traditional notions of privileged testimony are ignored, and the decision is made on the preponderance of the evidence. If the opportunities for bias are removed and if there is an orderly presentation of evidence bearing on a particular issue, there would seem to be no inherent reason why the tribunal's decision should be suspect. But, of course, this does not mean that a reviewing court should be unconcerned about the quality of proof. If the tribunal ignores opportunities to hear relevant testimony, admits considerable prejudicial evidence, or fails to pursue important issues, the resulting decision is not likely to be one which generates confidence and may properly be rejected.

Reviewing courts should be particularly sensitive to the possibility of bias or prejudice in the decision-making process. There are several attributes of the disciplinary systems in sports which suggest that this may be a particular problem in this area. Disciplinary decisions are often made by a commissioner or similar official who is not totally removed from the internal politics of the league's venture.<sup>46</sup> While it is inappropriate to conclude generally that league-

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46. The league commissioner typically is selected by the club owners and is viewed as dependent upon them. See generally Davis, *supra* note 16, at 377-82. The owners usually determine and pay the commissioner's salary; they have authority to modify the documents defining his powers, and they retain the right to fire him. Under these circumstances, it is alleged the commissioner is not likely to render decisions contrary to the owners' basic interests. See generally *Arbitration in Professional Athletics* in ARBITRATION OF INTEREST DISPUTES — PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 109-13, 123 (remarks of Richard Moss, Counsel, Major League Baseball Players Ass'n, and Edward Garvey, Executive Director, NFLPA) [hereinafter cited as *Arbitration in Professional Athletics*].

In addition to their objection that the owners influence the commissioner's loyalties, the players claim that the commissioner himself is so involved in matters that come before him for arbitration that it is unrealistic to expect that he can treat them impartially. For example, in addition to his role as arbitrator, the commissioner often is given power to promulgate rules

appointed commissioners are inherently biased, there may be cases in which the commissioner does not act with the appropriate objectivity.<sup>47</sup> On another level, there may be a temptation by sports authorities to use players caught in rule infractions as scapegoats. For example, if it develops that there are widespread rumors of gambling in a particular sport, there may be a tendency to "throw the

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governing such subjects as player conduct and personnel procedures. See, e.g., CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE (1972), which provides that: "The Commissioner shall interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and By-Laws and any enforcement thereof." *Id.* at § 8.5. He may be required to arbitrate a case in which the meaning of the rule or his authority to promulgate it is called into question. As a result, the players contend that the commissioner cannot be expected to remain objective when his own actions are under review. See *Arbitration in Professional Athletics*, *supra* at 123 (remarks of Edward Garvey, Executive Director, NFLPA). In other situations the commissioner is empowered to rule upon player complaints concerning disciplinary actions that he himself has taken. See *id.* at 125. See also discussion in *National Football League Players Ass'n v. NLRB*, 503 F.2d 12, 14 (8th Cir. 1974).

47. An analysis of the commissioner's role will indicate that his relationship to the owner presents a different legal issue than is suggested by the fact that he performs the dual functions of administrator and arbitrator. With respect to the former, the basic question is whether the owners' control over the commissioner's salary, position, and powers results in the sort of partiality which will invalidate an arbitrator's actions. There is no doubt that a finding of partiality will permit a court to vacate an arbitrator's award. This was true at common law, see generally M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* §§ 21.02-03 (1968); Annot., 65 A.L.R.2d 755, 759-61 (1959), and is true under the United States Arbitration Act, which specifically identifies "evident partiality" as a ground for denying the enforceability of an award. 9 U.S.C. § 10(b) (1970). The meaning of partiality, however, is tempered by the realities of commercial arbitration. Unlike judges, arbitrators are not expected to remain aloof from the transactions giving rise to the disputes presented to them. Indeed, arbitrators often are chosen specifically for their experience and expertise in the particular field, and these qualities often exist because the arbitrator is employed in the relevant industry. See *Commonwealth Coating Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring). Thus, it is clear that neither the arbitrator's friendship with one of the parties, see *Kentucky River Mills v. Jackson*, 206 F.2d 111, 117 (6th Cir.), *cert. denied*, 346 U.S. 887 (1953), nor his prior or subsequent business dealings, see, e.g., *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263-64 (2d Cir. 1973), will necessarily provide a basis for disqualification. See generally M. DOMKE, *supra*, at § 21.02. Moreover, it would seem that there is nothing inherently improper about a system in which one party pays the arbitrator's salary as long as the decisions reached are otherwise fair. See generally *id.* at § 42.01. Despite the player's resistance, the fairness of the commissioner must be judged, therefore, on a basis other than the source of his compensation. Finally, although the owners do control the commissioner's power and tenure, consideration must be given to the provisions of the league by-laws protecting the commissioner from removal by a small number of owners. See, e.g., CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE §§ 8.1(b) 7 (c) (1972) (modification of Commissioner Rozelle's contract requires the affirmative vote of 2/3 of the league members as well as approval by 12 of the 15 clubs which were members of the league in 1966). Thus, particularly with respect to matters affecting only a single club, the commissioner may be insulated from vindictiveness on the part of a club owner. For an interesting debate between owners' and players' representatives on the problems of a commissioner form of self-government, see *Arbitration in Professional Athletics*, *supra* note 46.

book" at the first player to be caught.<sup>48</sup> Such action will give the appearance to the public that the problem has been eliminated and serve as a pointed reminder to other participants who might be involved. Because of the need for swift, forceful action in these cases, there is a risk that the guilt of those who are accused will be determined summarily or that the degree of the offense will be overstated.

Courts have dealt with the risk of bias in other situations involving private discipline.<sup>49</sup> Those cases suggest that courts should be alert to the fact that a group's procedures may not provide mechanisms to guard against the possibility of prejudice. If there is evidence that the decision-maker has made up his mind before the hearing or that there have been improper attempts by club owners to influence the proceedings, it is fully appropriate that the results not be accepted. Because of their more disinterested perspective, the courts are particularly well-suited to provide a buffer against overzealous action by league authorities anxious to rid themselves of a brewing scandal.

A somewhat different aspect of the concern for bias was treated in *Blalock v. Ladies Professional Golf Association*.<sup>50</sup> Jane Blalock was accused of cheating in an LPGA sponsored tournament and upon being found guilty was suspended from tournament play for a year. She sued, alleging that the suspension constituted a group boycott.<sup>51</sup> The court accepted the plaintiff's characterization and found the defendant's action to be per se illegal.<sup>52</sup> The court's opinion can be read as presenting the highly debatable conclusion that *Silver* permits private self-regulation only when it is supported by specific statutory authorization.<sup>53</sup> But that aspect of the case aside,

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48. See, e.g., *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961).

49. See, e.g., *Falcone v. Dantine*, 420 F.2d 1157 (3d Cir. 1969); *Cefalo v. Moffett*, 78 LRRM 2112 (D.D.C. 1971).

50. 359 F. Supp. 1260 (N.D. Ga. 1973).

51. *Id.* at 1263.

52. *Id.* at 1265-66.

53. *Id.* at 1266-67. The district court noted that in *Silver*, the Supreme Court had said that self-regulation might be appropriate if justified by "'another statute [other than the anti-trust statutes] or otherwise.'" *Id.* at 1266, quoting 373 U.S. at 348-49. The court also recognized that other courts had indicated that the structure of certain industries might present cases in which the justification for self-regulation arose "otherwise" than from a statute. 359 F. Supp. at 1267. Judge Moye, however, chose to give a more limited reading to the Supreme Court's inclusion of the "or otherwise" language:

The question posed in *Silver* was whether the existence of a statutory framework for self-government in the [securities] industry repealed the antitrust



the court reaches a sensible result and suggests an independent rationale. The court was primarily concerned about the structure of the disciplinary organ in the LPGA. The committee which imposed the suspension was composed of golfers who competed with Blalock on the LPGA circuit. Moreover, in the court's view, the group was given "completely unfettered, subjective" discretion in determining the appropriateness of exclusion as the sanction for the alleged offense.<sup>54</sup> Although the court did not dwell on the question of how this discretion might be affected by bias, it clearly was concerned about the fact that the decision was made by players who stood to gain if Blalock were removed as a competitor.<sup>55</sup> In the court's view, this situation had the essential characteristics of *Fashion Originators' Guild of America v. FTC*,<sup>56</sup> where one group attempted to regulate practices in the trade for the purpose of eliminating a potential source of competition.<sup>57</sup>

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laws to that extent. The Supreme Court stated that "This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.'" . . . *A fortiori*, a private, nonstatutory rule to govern a private association cannot repeal by implication a federal statute, the "law of the land."

*Id.* (citation omitted).

The primary difficulty with the court's analysis is that it would lead to the logical conclusion that a sports association has no authority to discipline participants, even those engaging in conduct, such as bribery and cheating, which threatened the league's very existence. The court did temper its analysis, however, by an approving reference to *Molinas v. National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961), in which a lifetime suspension was sustained under the antitrust laws. 359 F. Supp. at 1267. The court distinguished *Molinas* because the punishment in that case was not imposed by the athlete's competitors, which suggests that the *per se* rule in *Blalock* may be limited to those situations.

A more correct reading of *Silver* would still have allowed the district court to apply the *per se* rule on the facts of *Blalock*. The court could have recognized that private groups enjoy some discretion to impose discipline and that normally the exercise of this right will be treated under the rule of reason. As *Silver* clearly indicates, however, *per se* illegality will be found if the group fails to afford procedural safeguards to the accused. See text accompanying notes 39-40 *supra*. Because Blalock's discipline was imposed by competitors who might have gained by her exclusion from the sport, 359 F. Supp. at 1265, it was questionable whether the proceeding had the requisite procedural fairness.

54. 359 F. Supp. at 1268.

55. *Id.* at 1265.

56. 312 U.S. 457 (1941).

57. 359 F. Supp. at 1267-68. In *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941), the petitioners included manufacturers and designers of original dress designs who conspired to discourage other manufacturers from copying or pirating the unpatented designs and selling them at lower prices. The device chosen was a secondary boycott in which the Guild members refused to sell their products to retailers who also purchased the cheaper copies. The Guild argued that the pirating by other manufacturers was tortious under state law and that the resulting boycott was thus undertaken for a proper purpose. *Id.* at 461, 467. The Court upheld the FTC's refusal to hear this evidence. *Id.* at 468. In the Court's view "the

It should be noted that the court did not find that any of the players on the discipline committee was actually biased. Rather, the central objection was that the disciplinary process had not been structured to guard against this possibility.<sup>58</sup> This result seems consistent with the teachings of *Silver*, in which the Court did not inquire into the correctness of the group's decision, but rather into the fairness of the procedures under which the action was taken.<sup>59</sup> Thus, it will not always be necessary for the plaintiff to directly attack the integrity of particular members of the disciplinary tribunal, a tactic which would likely lead to unwanted repercussions. Some cases will provide the occasion for a less personalized criticism of the imperfections in the structure of the disciplinary mechanism.

Although *Blalock* dealt with a sport involving individualized competition, the case may have interesting implications in the league sports context. A criticism often raised in the major team sports is that the league commissioner, who is usually hired and paid by the club owners, is given sole discretion to administer the disciplinary system.<sup>60</sup> One logical reform would be to restructure the disciplinary tribunal to include representatives of the players. An obvious question arises as to whether *Blalock* would permit this type of arrangement, since it might be argued that the player representatives from opposing teams are competitors of those who would be disciplined and thus their decision-making might be guided by improper considerations. It might be asserted that the decision-makers would be tempted to eliminate the accused in order to decrease his team's chance of winning the championship and securing the resulting rewards. There are, however, some weaknesses in the use of *Blalock* in this setting. Because competitive success depends upon a team, rather than a purely individual effort, it is less clear that a player decision-maker would gain any significant advantage from the ex-

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reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination." *Id.* The Court suggested that the Guild should have pursued its state law remedies directly and not undertaken its own method of extra-judicial enforcement. *Id.* at 465, 468. The vices which the Court identified in the Guild's arrangement were similar to those attributable to player restraints: the arrangement "narrowed the outlets" through which the affected parties could trade; it subjected non-complying parties to a boycott; and it "takes away the freedom of action" of members of the combination in the operation of their businesses. *Id.* at 465.

58. 359 F. Supp. at 1268. See text accompanying note 56 *supra*.

59. 373 U.S. at 364-66. See text accompanying note 40 *supra*.

60. See *Arbitration in Professional Athletics*, *supra* note 46.

clusion of a single participant. Moreover, because the players are salaried and generally receive game-by-game compensation only in championship contests, the economic rewards of an improper exclusion are more speculative and for that reason represent a less certain risk.

Although its applicability is somewhat debatable, the *Blalock* decision should have the desirable effect of prompting the parties to consider alternatives other than direct participation for increasing player inputs into the disciplinary system. One approach might give the players a voice in the selection of an independent party who would be given authority over disciplinary matters. A less venture-some alternative would permit the players to participate in redrafting the rules defining punishable conduct for the purpose of limiting the discretion afforded the administering authority. A consideration of other techniques which are available should serve to underscore the fact that direct player participation is not an indispensable element in a fair disciplinary system and, indeed, may not be a desirable feature.

### *Substantive Aspects of Discipline*

Once it is accepted that leagues have authority to maintain a system for internal discipline, a question arises as to how broadly it may extend its regulatory authority. Unless some legal control is introduced, there is a risk that the disciplinary power may be used to achieve improper economic goals or to require conformity with a standard of morality which reflects more the idiosyncrasies of a commissioner or a group of owners than the needs of the sport. Although some have concluded that the antitrust laws are not a particularly useful vehicle for controlling a league's abuse of its disciplinary power,<sup>61</sup> a review of the relevant doctrine does suggest a standard which could serve as an effective control. The courts have had few occasions to consider how antitrust principles, with their basically commercial orientation, should be adjusted to deal with the concern for ethics and morality which will arise in the disciplinary context.<sup>62</sup> But it would appear that the goal of a legal

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61. See, e.g., *Discipline in Sports*, *supra* note 1, at 779-80.

62. See, e.g., *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (copying dress designs); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973) (cheating); *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215 (C.D. Cal. 1969) (failure to report cheating); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961) (gambling).

restraint upon the disciplinary power of a sports enterprise bears a close affinity to the basic policy of the antitrust laws. In each instance, there is a concern for protecting an individual from undue restraints upon his competitive opportunities. Thus, it is not surprising that principles which were developed in a purely economic setting can be adapted to answer questions which, to some extent, involve matters of ethics.

Some of the limits on a league's disciplinary prerogatives can be stated rather easily. For example, there should be little debate that a sports authority cannot use its disciplinary power solely to enhance its economic position or to restrict the competitive opportunities of a player.<sup>63</sup> Thus, it would not be permissible for a league to impose sanctions on players who entered into negotiations for future employment with a rival league. Equally suspect are cases in which a league blacklisted a player who abandoned his or her contract to play in a competing league.<sup>64</sup> While the athlete's conduct might amount to a breach of an existing contract, there are independent legal actions through which the injured club can seek relief,<sup>65</sup>

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63. Cf., e.g., *Trade Association*, *supra* note 19, at 1502-03.

64. See Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 425-26 (1967); Note, *The Balance of Power in Professional Sports*, 22 MAINE L. REV. 459, 465-67 (1970); cf. *Radovich v. National Football League*, 352 U.S. 445, 448 (1957); *Gardella v. Chandler*, 172 F.2d 402, 410 (2d Cir. 1949) (Frank, J.). See also *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966), in which the Court of Appeals for the Ninth Circuit held that a bowling association's rules disqualifying from tournament competition those bowlers who competitively bowled in nonmember bowling establishments constituted a boycott that was illegal per se. *Id.* at 376.

65. If an athlete undertakes to play for another club in breach of an existing contract, the original employer might pursue at least two different causes of action. It might bring an action against the athlete to enforce the athlete's promise to play exclusively for it, a covenant found in most standard player contracts. The remedy available in such a suit is somewhat unusual. The plaintiff club usually will not receive money damages because the player's services often will be found to be unique, thus precluding a calculation of his market value. Similarly, for reasons of public policy, courts have refused to grant specific performance and therefore they will not order the athlete to play for his original employer. Rather, the remedy afforded is typically a negative injunction which enjoins the defendant from playing for any other club. See, e.g., *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969); *Central New York Basketball, Inc. v. Barnett*, 181 N.E.2d 506, 517 (Ct. C.P. Cuyahoga County, Ohio 1961); *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902); *Matuszak v. Houston Oilers, Inc.*, 515 S.W.2d 725 (Tex. Civ. App. 1974). See generally Brennan, *Injunction Against Professional Athletes Breaching Their Contracts*, 34 BROOKLYN L. REV. 61 (1967); Gilbert, *Some Old Problems in a Modern Guise*, 4 CALIF. L. REV. 114 (1916); Comment, *Injunctions in Professional Athletes' Contracts — An Overused Remedy*, 43 CONN. B.J. 538 (1969).

The original employer may also have a separate cause of action against the club that hired

and the additional sanction of perpetual disbarment from the original league would seem to serve no legitimate purpose.

In the examples given, the disciplinary action has the same aspect of coercive use of market power which has been condemned in other settings,<sup>66</sup> and the mere fact that a sports venture is involved should not change the analysis. The cases from other areas also suggest that such actions will be treated as *per se* illegal<sup>67</sup> and thus the court need not entertain evidence which the league might offer in justification. While the more detailed inquiry required by the rule of reason will be appropriate in most group discipline situations, the present cases involve actions so clearly directed to anti-competitive ends that they are appropriately treated as naked restraints of trade for which there is no justification.

The issues of necessity and justification require more attention when the focus is shifted from discipline undertaken for purely anti-competitive reasons to that which is imposed to preserve the integrity of on-the-field competition.<sup>68</sup> As previously noted, the league has an interest in protecting its ventures against those who violate important playing rules, engage in gambling activities, or otherwise undermine the appearance that the league's contests involve honest athletic competition.<sup>69</sup> The difficulty is that the league's concern for protecting its public image can easily be corrupted into rules which regulate player conduct having little connection with what occurs on the field. There is a real risk that the definition of proper conduct will be drawn so narrowly as to infringe upon the political, religious, or social prerogatives of the players. Moreover, the problem of achieving an appropriate balance between the corporate interest and that of the players is complicated in no small measure by the fact that non-conforming behavior tends to attract the interest of the sports news media. Private actions of employees which would go unnoticed in other industries may appear as lead stories on the

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the breaching player. The theory of this action would be that the "hiring away" amounted to a tortious interference with an existing contract. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 129 (4th ed. 1971). Because there are few precedents in the sports area, the precise contours of this action are somewhat uncertain. See, e.g., *American League Baseball Club, Inc. v. Pasquel*, 187 Misc. 230, 63 N.Y.S.2d 537 (Sup. Ct. 1946); *World Football League v. Dallas Cowboys Football Club, Inc.*, 513 S.W.2d 102 (Tex. Civ. App. 1974).

66. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

67. For a discussion of the application of the *per se* rule, see note 15 *supra*.

68. See generally *Trade Association*, *supra* note 19, at 1493-97, 1504-10.

69. See notes 13-16 *supra* & accompanying text.

sports pages. Such coverage tends to blur the distinction between the player's public and private affairs and may prompt league authorities to assume that most aspects of an individual's off-the-field conduct are appropriate subjects for control.<sup>70</sup>

The developing body of law dealing with the regulatory powers of private groups suggests the general standard which should be applied to define the range of the league's authority in controlling player conduct. It will be recalled that the courts seem to be prepared to permit private group regulation where such internal control is justified by the structure of the industry or the nature of the activity undertaken.<sup>71</sup> While the latter concerns identify the reasons for granting private regulatory powers, they also serve as a limitation on the prerogatives which may be assumed.<sup>72</sup> Thus, the group, in this case the league, should be permitted only that range of control which can be justified by the special needs of its peculiar venture. In determining whether particular disciplinary action bears the necessary relationship to the concerns which support self-regulation, the rule of reason will be applied, except, of course, where the action so clearly reflects an anti-competitive motive as to call for treatment under the *per se* doctrine.<sup>73</sup> Thus, for most rules related to the integrity of league competition, the relevant inquiry is whether the action is reasonable in light of the goals sought to be achieved, on the one hand, and the effect upon the players' competitive opportunities on the other.<sup>74</sup> In making this determination, it

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70. The relationship between sports and the news media is an interesting one; few other private commercial activities receive as much free "advertising." Indeed, extensive news coverage has been an important ingredient in the economic success of modern sports. See generally J. MICHENER, *SPORTS IN AMERICA* 285-336 (1976).

71. See text accompanying notes 21-24 *supra*.

72. See generally *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970); *Barber, Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); *Trade Associations*, *supra* note 19.

73. See authorities cited note 72 *supra*; accord, *STP Corp. v. United States Auto Club*, 286 F. Supp. 146 (S.D. Ind. 1968); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961); *United States v. United States Trotting Ass'n*, 1960 Trade Cas. ¶ 69,761 (S.D. Ohio).

74. It should be noted that the Supreme Court has declined to decide whether the appropriate standard of review is one of reasonableness. In *Silver*, the Court noted that because it had decided the case on procedural grounds

there is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises.

is appropriate for the court to consider evidence on a wide range of matters, including the prior experiences of the league,<sup>75</sup> practices of leagues in other sports,<sup>76</sup> the quality of the deliberations which preceded the definition of the offense, informed testimony on fan and player reaction to similar conduct, the availability of less restrictive controls,<sup>77</sup> and, not least of all, the severity of the impact of the rule upon those who are disciplined. It must be accepted that many points which will be called into controversy will not admit of certain proof. There are no clear answers as to how personal freedoms are to be valued when balanced against the organization's concern for fan reaction. However, legal institutions have considerable experience in making similar judgments on matters of personal liberties, and many of the issues likely to appear will not be wholly foreign to the judicial forum.

The role to be fulfilled by the general standard identified above becomes more clear when specific types of misconduct are considered. Gambling by players has been a source of considerable concern for sports leagues.<sup>78</sup> Especially apt to attract disciplinary action are cases in which a player bets on the outcome of games in which he participates.<sup>79</sup> An application of the reasonableness test is likely to create a standard of review that weighs in favor of sustaining the

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373 U.S. at 365-66. Most of the lower courts, however, have implied that a reasonableness standard provides an appropriate criteria for review. See cases cited in note 21, *supra*.

75. In sustaining the suspension of a player for gambling in *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961), the court emphasized that the league had experienced difficulties as a result of persistent rumors concerning betting activities.

76. The practices of other leagues may not always be a useful guide. For example, some leagues, particularly the hockey leagues, are willing to tolerate more violence than would be accepted elsewhere. See generally Kennedy, *Wanted: An End to Mayhem*, *SPORTS ILLUSTRATED*, Nov. 17, 1975, at 17; Smith, *Good Unclean Fun for All*, *N.Y. Times*, Nov. 9, 1975, § 5, at 3, col. 6; Facht, *NHL Bloodbath Sparks Spate of Empty Rhetoric*, *Washington Post*, Apr. 21, 1976, at E1, col. 1; *Winnipeg Free Press*, Mar. 20, 1976, at 72, col. 1.

77. There is a growing body of literature on the issue of whether the antitrust laws require an entity to utilize only the "least restrictive" means of control or whether a broader range of discretion is afforded. See, e.g., Robinson, *Recent Antitrust Developments: 1975*, 76 *COLUM. L. REV.* 191, 231-35 (1976). See also *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248-50 (3d Cir. 1975).

78. See generally J. MICHENER, *SPORTS IN AMERICA* 406-13 (1976); *Discipline in Sports*, *supra* note 1, at 772-79; *N.Y. Times*, June 27, 1976, § 5, at 9, col. 6 (review of controversial survey made for Commission on the Review of the National Policy Toward Gambling); *Washington Post*, June 25, 1976, at D1, col. 2 (national gambling report); *N.Y. Times*, Dec. 10, 1975, at 35, col. 1 (New York Jets' Steve Tannen cleared of bookmaking involvement).

79. See *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954). For an account of lifetime suspensions meted out against two hockey players accused of wagering on their clubs, see R. BEDDOES, S. FISCHLER, & I. GITLER, *HOCKEY! THE STORY OF THE WORLD'S FASTEST SPORT* 268-70 (1969).

league's efforts to control such conduct. For example, it is readily apparent that gambling falls within the category of activities which justify regulation. The league has a strong interest in insuring that its contests are solely tests of athletic skill and are not influenced by the desire of some participants to have the team perform better or worse than the odds-makers have predicted.<sup>80</sup> The player-betting cases typically involve few delicate questions of personal liberty. Betting is illegal in most states, and this fact is usually well-known to the players. Moreover, the athlete is hired specifically to contribute his talents to the club's, and hence the league's, effort, and it can reasonably be implied that he will do nothing which suggests that his on-the-field performance had any other purpose.

A case which suggests that the courts will be willing to sustain league discipline in these instances is *Molinas v. National Basketball Association*.<sup>81</sup> Molinas, a player for the NBA Fort Wayne Pistons, admitted that he had placed several bets on his team to win particular games. The league had a specific prohibition on gambling, and pursuant to those rules, the NBA commissioner declared that Molinas was suspended indefinitely. The player applied for reinstatement on several occasions, but his request was denied each time. Molinas eventually sued, alleging that the league's suspension and the subsequent denials of reinstatement amounted to unreasonable restraints on trade under the antitrust laws.<sup>82</sup> The court rejected this contention. Its treatment of the issue indicated a willingness to afford sports leagues considerable deference in their efforts to minimize the influences of gambling:

A rule, and a corresponding contract clause, providing for the suspension of those who place wagers on games in which they are participating seems not only reasonable, but necessary for the survival of the league. Every league or association must have some reasonable governing rules, and these rules must necessarily

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80. See note 16 *supra* & accompanying text. There are a number of indications suggesting that the leagues regard gambling as a serious threat. One is the harsh penalties meted out to those suspected of gambling. See, e.g., *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961) (indefinite suspension); *Discipline in Sports*, *supra* note 1, at 777 n.30, 778 n.31. Moreover, on occasion, leagues have attempted to block efforts to legalize gambling. In 1976, the NFL was denied a temporary restraining order that would have barred the state of Delaware from beginning operation of a pro football lottery. See *Washington Post*, Aug. 28, 1976, at E1, col. 5.

81. 190 F. Supp. 241 (S.D.N.Y. 1961). See also *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (1954).

82. 190 F. Supp. at 243.



include disciplinary provisions. Surely, every disciplinary rule which a league may invoke, although by its nature it may involve some sort of a restraint, does not run afoul of the antitrust laws. And a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined.<sup>83</sup>

Not all gambling cases will admit of such an easy resolution. There is a variety of conduct other than betting which a league may attempt to punish, and where a player's involvement with the gambling establishment is more attenuated, the range of the league's prerogatives will be more limited. At this juncture, it may be useful to point out that the relevant antitrust doctrine serves not only to limit the types of conduct which can be punished, but also to control the sanctions which can be imposed. Again, the basic standard is one of reasonableness,<sup>84</sup> and it is appropriate to ask whether the particular punishment can be justified in light of the league's interest in controlling the disputed conduct.<sup>85</sup> While less serious gambling offenses might support some form of disciplinary action, they may not justify the most serious sanction of perpetual suspension.

The *Molinas* court specifically approved the NBA lifetime suspension of the plaintiff in that case, but that holding should be read in light of the facts which established that the athlete had directly and knowingly involved himself with the gambling process.<sup>86</sup> The

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83. *Id.* at 243-44. For a brief account of Molinas's later involvement in other types of gambling activities connected with sports and his other questionable dealings, see N.Y. Times, Aug. 6, 1975, at 18, col. 1.

84. As noted earlier, the question of the appropriate standard of review is not entirely free from debate, although the trend of authority supports the reasonableness test. See note 74 *supra*.

85. Although no sports cases can be found in which a court refused to approve a penalty as being too harsh in light of the infraction involved, the notion that the sanctions used must be reasonable can be inferred from the general principle that a league can use its disciplinary power only to achieve legitimate goals of self-regulation. See text accompanying notes 63-67 *supra*. The imposition of long-term suspensions for relatively minor infractions is the sort of coercive action the antitrust laws are intended to guard against. Cf. *Trade Association*, *supra* note 19, at 1506-08.

86. 190 F. Supp. at 244. In responding to Molinas's objection to the length of his suspension, the court stated:

The same factors justifying the suspension also serve to justify the subsequent refusal to reinstate. The league could reasonably conclude that in order . . . to restore and maintain the confidence of the public vital to its existence, it was necessary to enforce its rules strictly, and to apply the most stringent sanctions. One can certainly understand the reluctance to permit an admitted gambler to return to the league, and again to participate in championship games, especially in light of the aura and stigma of gambling which has clouded the sports world in the past few years. Viewed in this context, it can be seen that the league was

case actually lends support to the notion that differentiated punishments are required, for the court selects as its frame of reference the question of whether the league's actions were reasonable.<sup>87</sup> Presumably, the requirement of reasonableness would require a different sanction in a case, for example, in which the player's only offense was that he had secured information about the predicted point spread for particular games. There are few legitimate uses for such data, and the league would be justified in taking steps to prevent the player's involvement even to this limited extent. But the conduct would not warrant the league's permanent termination of the player's career, particularly if its investigation failed to establish a more substantial connection between the player and the gambling elements. A fine or probation would be sufficient to stop the misconduct, deter others, and satisfy the public of the seriousness of the league's purposes.

A similar analysis would apply when the focus is shifted to other types of misconduct. Infractions which involve violations of the rules of competition are particularly appropriate subjects for a differentiated treatment. Some forms of cheating directly affect the integrity of the game. The use of unapproved equipment or improperly advancing the ball, when done with an intent to deceive, are

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justified in determining that it was absolutely necessary to avoid even the slightest connection with gambling, gamblers, and those who had done business with gamblers, in the future.

190 F. Supp. at 244.

Perhaps the most debatable portion of the court's analysis was its observation, offered in further justification of the permanent suspension, that "conduct reasonable in its inception certainly does not become unreasonable through the mere passage of time, especially when the same factors making the conduct reasonable in the first instance, are still present." *Id.* But cf. *United States v. Jerrold Elec. Corp.*, 187 F. Supp. 545, 558 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961). Although it may be reasonable to impose an indefinite suspension initially, a player subsequently may engage in activities that serve to establish his integrity and thus cleanse his public image. For example, the athlete may play in another league, assume some position of public responsibility, or undertake to express convincingly his regret for his earlier misconduct. When the player has been able to improve his reputation, it would be inappropriate to justify a continuing suspension on the ground that the action was "reasonable in the first instance." It should be noted, however, that the *Molinas* court suggested that the plaintiff there had not shown an improvement in his reputation sufficient to make unreasonable the league's refusal to reinstate him as a player. *Id.* *Molinas's* subsequent difficulties with the law and with gambling indicate that his may have not been a good case for testing the point made here. See *N.Y. Times*, Aug. 6, 1975, at 18, col. 1.

87. For example, the court observed that "plaintiff must show much more than he has here in order to compel a conclusion that the defendant's conduct was in fact unreasonable. Thus, it is clear, that the refusal to reinstate the plaintiff does not rise to the stature of a violation of the antitrust laws." 190 F. Supp. at 244.

destructive of the sports organization's effort to avoid fan disgust and cynicism and, therefore, warrant harsh treatment. Alternatively, other misconduct, including some which is intentional, may not justify any greater penalties than those which are imposed in the context of the competition itself. For example, offensive holding in football and intentional fouls in basketball normally only require action by the game officials.<sup>88</sup> On matters of this sort, one must often look to the community ethics within the sport to determine how the varieties of "cheating" should be viewed. While an absolutist would find it difficult to rank various forms of dishonesty, it seems clear that differentiations can be made. The factors to be considered include the degree of deception involved; the motive with which it is practiced, including the immediacy of any economic gain; the risk of physical injury to others; and the degree of community tolerance.

Fighting among players, although it does not involve the type of dishonesty found in other rule infractions, is often a source of concern for league officials.<sup>89</sup> There have been numerous instances in which fighting and other activity which threatens the safety of participants have resulted in players being suspended from competition, although the suspensions are usually for short periods of time.<sup>90</sup> There should be little doubt that the league can take action to control such conduct.<sup>91</sup> It has a legitimate concern not only for the

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88. If particular types of rule violations become too disruptive, however, the league may find it necessary to add a penalty in addition to that imposed by game officials. Thus, when technical fouls became a problem in the NBA, the league imposed an additional automatic fine. This escalation of the penalty apparently had the desired effect, for the number of technical fouls decreased in subsequent years. See *N.Y. Times*, Oct. 7, 1975, at 31, col. 1.

89. Not all leagues share the same concern for violence in their respective sports. The NHL has been criticized for its failure to take more forceful action to stem the recent escalation of assaults and fighting in that sport. See sources cited in note 77 *supra*. Other leagues, by using sanctions ranging from fines to suspensions, have taken stronger positions against violence. See sources cited in note 91 *infra*. Cf. *National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974).

90. See, e.g., *Globe & Mail* (Toronto), Dec. 5, 1975, at 33, col. 6 (hockey player Phil Roberto suspended pending league review of incident involving spearing opposing player in throat); *Gazette* (Montreal), Jan. 30, 1976, at 24, col. 5 (hockey player Dave Schultz given two game suspension for butting opposing player); *Washington Post*, Feb. 4, 1976, at D6, col. 5 (hockey player Dave Hutchison suspended for eight games without pay for spearing at head of opposing player); *N.Y. Times*, April 23, 1976, at 43, col. 3 (baseball pitcher Lynn McGlothen suspended five days for throwing beanball). See also *Minneapolis Tribune*, Aug. 12, 1975, at 2B, col. 3 (NHL players-owners council requests rule automatically suspending player who deliberately attempts to injure an opponent).

91. Although there can be little question that the league has an interest in preventing fights and violence among players, some might question whether league control is necessary in view of the public remedies available through the criminal laws. It might be argued that the

physical well-being of its players but also for the problems which might result if a brawl developed to the point where fans joined in. Finally, major altercations among players disrupt the contests in which they occur and tend to attract attention away from the regular competition, a result which undermines the league's efforts to focus fan attention on the game itself. That the league may be justified in controlling such unauthorized combat does not mean that its action will not be reviewed. As with other types of miscon-

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leagues should defer to the more neutral policies of the criminal authorities. A closer analysis, however, suggests that separate league enforcement is desirable. Public prosecutors generally have been reluctant to prosecute for assaults arising out of athletic competition, and, as a result, there have been few prosecutions in the past. Although the level of public law enforcement has increased markedly in response to the recent rise in violence in hockey, some remain critical of this use of the criminal law. See Kennedy, *Wanted: An End to Mayhem*, SPORTS ILLUSTRATED, Nov. 17, 1975, at 17 (some public prosecutors demand more criminal enforcement; league officials question necessity); Globe & Mail (Toronto), Apr. 26, 1976, at 52, col. 6 (survey of 30 criminal actions taken in hockey-related violence at professional and amateur levels); Winnipeg Free Press, Apr. 21, 1976, at 69, col. 8 (Philadelphia district attorney terms prosecution of three Philadelphia players a "perversion of office" by Canadian officials); *id.*, Apr. 22, 1976, at 74, col. 2 (Ontario Attorney General responds to criticism of his prosecution of Philadelphia players). The difficulty of obtaining convictions further diminishes the practicability of a league's reliance solely on criminal enforcement. Not only is the legal standard unclear, but also there appears to be a propensity for juries, particularly those composed of avid fans, to accept the notion that violence and assaults are part of the game. For example, David Forbes of the Boston Bruins assaulted Henry Boucha, a player for the Minnesota North Stars during a hockey game. Boucha required remedial surgery for a fracture of the eye socket and continued to experience double vision six months after the incident. Forbes was indicted for aggravated assault with a dangerous weapon. *State v. Forbes*, No. 63280 (Dist. Ct. Minn., July 19, 1975). The case ended in a mistrial because of a hung jury. N.Y. Times, July 19, 1975, at 17, col. 2; Kennedy, *A Nondecision Beggars the Question*, SPORTS ILLUSTRATED, July 28, 1975, at 12. NHL President Clarence Campbell, who suspended Forbes for ten games after the incident, criticized the prosecution of Forbes: "Courts are not the answer. Discipline must remain within the sport." Kennedy, *supra*, at 12. See Hockey News, Sept. 1, 1975, at 3, col. 1 (effect of *Forbes* on future enforcement of NHL rules).

League enforcement may in fact be preferable to that administered through the criminal process. The league is in a better position to define and enforce specific rules of conduct than are the courts, from which standards could emerge only from a case-by-case interpretation. Also, the range of conduct that the league might wish to control may well include actions of a sufficiently minor nature that public prosecution would be unwarranted. Thus, a system of league control may be more encompassing than that which would be found on the public side. Moreover, a league system is likely to be more even-handed, since it relies upon central administration, and thus avoids the variance which might be reflected in the enforcement practices of individual prosecutors. Finally, the league has interests that are not likely to be considered fully in a public enforcement action. Concern for preserving the athletic contest as the primary focus of the fans' attention, concern for the individual club's responsibility to pay the medical expenses of players, and concern for the cost of crowd control are matters which are not typically taken account of in public prosecutions. This analysis does not suggest, however, that it is not proper to use the public criminal law to control particular kinds of violence.

duct, the punishment for fighting which is imposed must not be excessive. Moreover, the league should be prepared to show that it has pursued an even-handed enforcement policy.

The concern for the public image of the sport may prompt the league to extend its disciplinary authority to the off-the-field conduct of its athletes. It is in this area that there may be a particularly lively debate about the range of control which the league may assume. A player may insist that he is hired primarily for his athletic prowess and that as long as he maintains his physical condition and performs to the best of his ability in practice and competition, he has fulfilled his contractual obligation. What he does off-the-field, it will be contended, is his own business. The league official may claim, however, that fan interest in sports personalities does not end at the stadium exit and, due in no small measure to the active sports press, the image of the sport will often be influenced by the athlete's off-hours activities. Moreover, it will be contended that the fans' perception of the athlete on-the-field cannot be disassociated from what he has done elsewhere.

In trying to weigh the two positions, we again find little guidance in the case law. There are no sports cases directly on point. Moreover, there appears to be no other industry which practices the type of control found here, so there are no useful analogies.<sup>92</sup> The cases dealing with the political and social rights of employees usually involve an application of constitutional principles.<sup>93</sup> Although some claim that a sports league involves "state action" and hence is bound by the Constitution,<sup>94</sup> that appears not to be the case. But

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92. There is very little literature dealing with employer disciplinary action generally and even less which considers the special concerns which surface in the sports area. Some of the common law principles applicable to employment related discipline are treated in 56 C. J. S. *Master and Servant* § 102-08.

93. See, e.g., *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *DeGrazio v. Civil Serv. Comm'n*, 31 Ill. 2d 482, 202 N.E.2d 522 (1964). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

94. See *Discipline in Professional Sports*, *supra* note 1, at 791-92. But see Charles O. Finley & Co. v. Kuhn, Cause No. 76C2358 (N.D. Ill., Sept. 7, 1976). In his suit against Commissioner Kuhn for disapproving the sales contracts of players Vida Blue, Rollie Fingers and Joe Rudi, Charles O. Finley alleged a deprivation of due process under the fourteenth amendment. Cause No. 76C2358 at 7. Finley argued that the "state action" necessary for such a claim consisted of the use by some of the baseball clubs of state-owned stadiums and the "baseball exemption" from the antitrust laws. *Id.* Judge McGarr summarily dismissed Finley's argument, noting that "[f]or an otherwise private party to be engaged in state action, there must exist a nexus between the state and the particular activity being challenged." *Id.* at 8 (citation omitted). No such "nexus" had been alleged, *id.*; nor is one likely to be found.

even in the absence of firm authority, some conclusions can be reached about the types of outside player conduct the league can hope to control. Again the relevant standard is one of reasonableness. As suggested, that concept is sufficiently flexible to permit the court to make judgments about the relative weight to be afforded the respective corporate and individual interests.

There are some types of activities in which concern for the league's public image is clearly outweighed by the player's right of personal freedom. While there may have been an earlier time when owners and league officials could have imposed rigid rules of personal conduct, we are presently operating in an era in which the individual's private prerogatives are entitled to greater respect. There are some types of outside activities which will have to be accepted even though they may not project the image which some leagues might wish. Thus, despite the somewhat peculiar identification of sports and conservative politics,<sup>95</sup> an athlete's support of an unpopular political cause is not a proper matter for concern by sports authorities.<sup>96</sup> It can be accepted that some fans may not like what the athlete says and may even lose enthusiasm for the team, but under a "reasonableness" criteria, the athlete's interest should predominate. The league should not suppose that it has a duty to insulate its fans from non-conforming behavior which they find unpleasant. The fans do not receive such protection in their other social contacts, and it is not clear why they should expect it in the narrow area of sports activities. Moreover, it is common in other segments of the entertainment industry for the performers to align themselves with diverse political viewpoints without incurring industry-imposed punishments. A performer may diminish his box office attractiveness by such activities, but it is quite another matter whether he should be disciplined for the stands he takes. Finally, there is the fundamental concern for the players' personal freedom. Whatever other roles the athlete may fulfill, he continues to be a citizen in a political system which grants him the prerogatives to choose his ideological identification.<sup>97</sup> It will require rather compelling circumstances to establish that those rights have been relin-

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95. See J. MICHENER, *SPORTS IN AMERICA*, 375-86 (1976). See also P. HOCH, *RIP OFF THE BIG GAME* 70-99 (1972).

96. Cf. *Ali v. State Athletic Comm'n*, 308 F. Supp. 11, 16-17 (S.D.N.Y. 1969) (dictum).

97. Cf. *Mitchell v. International Ass'n of Machinists*, 196 Cal. App.2d 796, 16 Cal. Rptr. 813 (Dist. Ct. App. 1961) (importance of individual's political rights outweighs union interest in controlling political behavior; decided on nonconstitutional grounds).

quished. In light of the limited nature of the contract between an athlete and his club, the relationship seems not to present such a case.

This same analysis would apply to other matters as well. The fact that the athlete chose an unconventional life-style and ignored traditional mores on matters of marriage, family, and the like, would appear to be beyond the range of the league's proper concerns. It is true that some aspects of the athlete's life-style might affect his ability to perform on the field. There is no serious question but that the employer can demand that the athlete maintain his physical condition, and the typical standard player contract outlines the club's prerogatives to deal with these situations.<sup>98</sup> But the determination of whether the athlete has the necessary physical capacity must be made according to objective criteria and does not provide the occasion for the persons in authority to impose their personal preferences as to the life-style to be followed.

A final area which deserves attention involves cases in which the athlete is involved in criminal activity off-the-field. Some cases should not present much difficulty. Traffic offenses, scuffles with the police, and the like should not be viewed as within the area of appropriate concern for sports officials, even though these usually receive coverage in the news media and thus may affect how some fans view the sport. If the players are to retain freedom in conduct-

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98. Standard player contracts typically reserve to the club the right to terminate a player who fails to maintain adequate physical condition. Under the NFL contract, for example, the player agrees to submit to a physical examination at the start of each training season. The contract provides: "[I]f the Player fails to establish his excellent physical condition . . . by the physical examination, or . . . if in the opinion of the Head Coach, Player does not maintain himself in such excellent condition . . . the Club shall have the right to terminate this contract." Standard Player's Contract, National Football League ¶ 6 (1975). See generally *Hennigan v. Chargers Football Co.*, 431 F.2d 308 (5th Cir. 1970); *Sample v. Gotham Football Club, Inc.*, 59 F.R.D. 160 (S.D.N.Y. 1973); *Schultz v. Los Angeles Dons, Inc.*, 107 Cal. App. 2d 718, 238 P.2d 73 (Dist. Ct. App. 1951); *Tillman v. New Orleans Saints Football Club*, 265 So. 2d 284 (La. Ct. App. 1972); *Houston Oilers, Inc. v. Floyd*, 518 S.W.2d 836 (Tex. Civ. App. 1975). If, for example, the player adopts a diet that decreases his stamina and significantly interferes with his playing performance, the club could conclude properly that the athlete has failed to maintain his physical condition.

Under the NFL contract, the decision whether the athlete is in "excellent physical condition" is reserved to the discretion of the team physician and the club's head coach. The contracts used in other leagues, particularly those in which collective bargaining has been successful, suggest a trend away from giving the club final decision-making authority with respect to the athlete's condition. Under the new NBA contract, for example, disputes about the player's condition are resolved within a mechanism agreed to by the owners and the players' union. See Uniform Player Contract, National Basketball Ass'n, ¶ 6(c) (1976) (veteran's contract).

ing their private lives, such minor brushes with the law are likely to occur. The leagues should be prepared to tolerate these in order to give some breathing room for more important personal rights.

As one moves up the scale of seriousness of offenses, however, the analysis is less simple.<sup>99</sup> Cases likely to cause concern are those involving capital crimes, such as murder and rape, and lesser sexual crimes which meet with strong disapproval from fans. Although the accused murderer may be fully capable of performing his athletic duties on the field, his presence may prove to be a disruptive force, either to the fans or to other players. For example, it is not unusual for fans to seek out a player on their team upon whom to vent their frustration when the club is losing, and the accused player could become the object of this derision. Moreover, the normal probing of the news media is likely to create a heightened sense of controversy, and the situation could easily develop to the point that the focus of public attention is shifted from the club's playing efforts to the turmoil surrounding the particular athlete. Not only would this undermine the league's main goal, but it could easily have a demoralizing effect upon the performance of the clubs involved.

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99. A case which illustrates the difficulty in defining the league's prerogatives in this area is that involving football player Lance Rentzel. Rentzel, a star performer as a wide receiver for the Dallas Cowboys, was suspended from the NFL following two convictions for indecent exposure and an arrest for drug possession. League Commissioner Rozelle suspended Rentzel under a rule that authorized such action when a player engages in "conduct detrimental to the welfare of the League, or professional football . . . ." The NFL Players Association, through its Executive Director Ed Garvey, publicly criticized the suspension and assisted in filing legal actions to enjoin the continuance of the punishment. The public debate raised the issues which are considered here. For example, club owners argued for the need for discipline among players and expressed concern for the distraction that might be caused by the presence of a controversial figure on the field. Garvey, on the other hand, saw the suspension as an attempt by the Commissioner to legislate the moral standard to be followed by the players. Others viewed the matter as illustrating the difficulty of drawing a line between "life-style" and truly detrimental conduct. The resulting debate is summarized in Cady, *The Central Issue: How Much Authority Should the Sports Authorities Have?*, N.Y. Times, Aug. 5, 1973, § 5, at 1, col. 1. See also *id.*, Aug. 4, 1973, at 15, col. 2 (Federal Judge Carr refuses to remove temporarily Rozelle's suspension of Rentzel; suit filed by Rentzel and NFLPA on ground that suspension for conviction of possession of marijuana and indecent exposure was "arbitrary, capricious, and discriminatory"); *id.*, Aug. 7, 1973, at 41, col. 3 (Los Angeles Superior Court Judge Thomas issues order for NFL Commissioner and Los Angeles Rams to show cause for suspension of Rentzel); *id.*, Aug. 24, 1973, at 27, col. 2 (Judge Thomas refuses Rentzel's request for injunction to end his suspension for conduct detrimental to NFL). Rentzel's suspension was eventually lifted and he was permitted to play again in the NFL. *Id.*, May 16, 1974, at 56, col. 1.

For a discussion of the range of discretion enjoyed by the commissioner of baseball in disciplinary matters, see Durso, *Kuhn Can "Punish" Those Who "Undermine" Baseball*, *id.*, Aug. 5, 1973, § 5, at 2, col. 5.



There is reason to question whether the anticipated disharmony is sufficient to justify a suspension, for this same reaction might occur if a player takes a truly aberrational political position. And as indicated above, the fact that some third parties might react adversely seems not to provide a sufficient justification for allowing the league to control the behavior. The central argument made in that context — that neither the fans nor the leagues can insist that they be insulated from unpleasantness — would seem to have some application here.

In the final analysis, however, it seems preferable to allow the leagues some prerogative to suspend, at least temporarily, the player accused of a serious crime. The arguments for requiring tolerance of unpopular political beliefs are not wholly applicable here.<sup>100</sup> It is possible to make an ordering of the relative importance of particular types of conduct, and on that scale, the exercise of basic political freedoms must surely come before actions which result in serious criminal charges. It should be kept in mind that the basic inquiry is whether the league's act of suspending the player was reasonable. The league which temporarily suspends the accused felon would seem to satisfy that standard. Such a suspension might in fact be quite desirable. It would afford time for explanation and clarification and avoid the situation in which incomplete details of the event unnecessarily flamed emotions.

But as this analysis implies, a permanent suspension, or a refusal to hire an ex-felon, would be difficult to justify. Although the player might not be able to wholly disassociate himself from his past, it would be difficult to find the requisite reasonableness in a rule which did not recognize the possibility of rehabilitation.<sup>101</sup> Some fans might refuse to accept the player's efforts to make a new start, but, again, we are presumably not operating in an era in which players must project a socially neutral image.<sup>102</sup>

#### FINES V. SUSPENSION

Up to this point, we have been considering situations in which the punishment imposed for player misconduct was an expulsion or suspension from the league. It might be asked whether the league's

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100. See text accompanying notes 91-93 *supra*.

101. Cf. note 85 *supra*.

102. See text accompanying notes 91-93 *supra*.

power to fine is treated under the same legal principles.<sup>103</sup> Some might question whether punishment in the form of a fine has the characteristics necessary to make out an antitrust violation.<sup>104</sup> It can be noted that the potential group boycott is more obvious where a suspension, as opposed to a fine, is imposed.<sup>105</sup> When a player is suspended from the league, all league teams are told, in effect, that it is improper for them to contract with the athlete. There is clearly a refusal to deal, and by virtue of the league's power to insure compliance by member clubs, the action is concerted. There is more difficulty in fitting a monetary fine into this same analysis. One can legitimately ask whether there is really any boycott, for if the athlete is only fined, he presumably is still allowed to play and earn

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103. Leagues frequently use their broad fining power. For example, in the five-year period prior to 1976 NFL Commissioner Rozelle collected \$53,000 in fines from players and approximately \$245,000 from NFL clubs. Brief for Appellants NFL & Alvin Ray Rozelle at 46, *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976). Fines often are used as a less severe penalty for conduct of the sort discussed above in connection with league-imposed suspensions. Thus, fines may be imposed against players who engage in fights, *see, e.g.*, N.Y. Times, April 22, 1976, at 43, col. 1 (ABA Commissioner DeBusschere fines 14 players a total of \$2,200 for fighting during basketball game), or other activities that threaten player safety. *See, e.g., id.*, May 9, 1976, § 5 at 5, col. 1 (pitcher fined for throwing "beanballs"). Monetary assessments are also used when players are unduly abusive of referees and umpires, *see id.*, Aug. 21, 1975, at 47, col. 1 (Chicago baseball player Bill Madlock fined \$200 for throwing helmet and using abusive language in confrontation with umpire), and for other conduct that disrupts the orderliness of the game. *See id.*, Oct. 7, 1975, at 31, col. 1 (NBA increases amount of automatic fines for technicals).

Fines also are used to control conduct in individual sports. In one celebrated case, a \$6,000 fine was levied against tennis player Ilie Nastase for public profanity and "not using his best efforts to win" following a disputed line call. When Nastase initially refused to pay the fine, which was equal to his second-place prize money, he was suspended from further play by the Men's International Professional Tennis Council. He eventually paid and secured his reinstatement. *See id.*, Mar. 11, 1976, at 49, col. 1; *id.*, Mar. 16, 1976, at 43, col. 1; *id.*, Mar. 17, 1976, at 26, col. 3.

Before the Nastase incident, the concern for player conduct prompted the international tennis council to adopt a schedule of fines covering a wide range of behavior. For example, a player can be fined \$1,000 for physically or verbally abusing the umpire, opponents, or spectators; \$1,000 for leaving the court or failing to appear in final ceremonies; \$50 for "unprofessional" dress; and \$50 for throwing a racket. A player who accumulates \$3,000 in fines in any twelve month period receives an automatic twenty-one day suspension. *See Winnipeg Free Press*, Dec. 9, 1975, at 48, col. 1.

104. There is little authority, either generally or in the sports area, specifically considering the authority of private groups to use fines to achieve compliance with their rules. In the few instances in which fining systems in other industries have been reviewed, the focus has usually been on whether the group can properly impose discipline at all, and the issue of whether monetary penalties are entitled to greater, or lesser, deference typically has not been raised. *See, e.g.*, *Mechanical Contractors Bid Depository v. Christiansen*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966). *See also* E. ROCKEFELLER, *ANTITRUST QUESTIONS AND ANSWERS* 49 (1974).

his salary. Moreover, there might be some dispute about whether the requisite concerted action is present. Other clubs may refuse to deal with the athlete, but this usually has nothing to do with the fine. The reason, rather, is the fact that the player is under contract to his club and thus not available for employment with other clubs.

Yet, it would be anomalous if fines required a wholly different analysis under the antitrust laws. In some cases, a fine might be a much more severe penalty than a suspension. For example, a low-paid athlete might prefer to endure a short suspension rather than pay a fine of several thousand dollars. Moreover, it is clear that the leagues regard fines and suspensions as part of a singular disciplinary system. The league's ultimate purposes in imposing punishment are basically the same in each case, and the choice of one sanction rather than the other may merely reflect differences in the seriousness of the offense, the mental state of the offender, or the quality of the factual proof.<sup>106</sup>

A closer analysis should dispel the difficulties mentioned above. The requisite concerted action can be found if one focuses, not upon the effect of the sanction in a particular case, but rather upon the system through which it is imposed. Thus, the antitrust objection should be directed to the characteristics of the arrangement which give the leagues power to exact monetary penalties. The clubs have, in effect, jointly agreed that the league will be empowered to exercise control over the conduct of their employees. The officials who mete out discipline thus serve as the administrative organ through which the group achieves its goals in these matters. Moreover, it is clear that there is a "refusal to deal." Any player coming into the league is bound by the pre-ordained system, and no club will deal with a participant except on the terms which prescribe the league's authority. Thus, while the clubs may not act together in the imposition and enforcement of a particular fine, they have joined together in structuring the system through which the punishment is imposed.<sup>107</sup>

It appears, then, that league fines should be judged under the same standards which the antitrust laws impose upon suspensions.

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105. See text accompanying notes 14 & 15 *supra*.

106. See note 103 *supra*.

107. This analysis could be applied to define the antitrust offense when a suspension, rather than a fine, is involved. Although discussion of suspensions in this Article has focused upon the coercive nature of the individual suspension and not on the system under which the power to suspend was exercised, the requisite refusal to deal could be found at either level.

Fines may only be used to punish conduct which is within the range of the league's self-regulatory powers. Such penalties cannot be used as a device to protect the league from outside competition, nor may they be used to control behavior which does not affect legitimate league interests.<sup>108</sup> Moreover, the amount of the fine must be reasonably related to the quality of the interest at stake, and the disciplinary authorities must be sensitive to the need for differentiated treatment of the various degrees of misconduct which might arise.<sup>109</sup> Finally, an accused player is entitled to procedural safeguards in the proceeding in which the fine is imposed.<sup>110</sup> For large fines, the required procedures may be as elaborate as those which accompany suspension. Where small fines are involved, less formality will be tolerated.

#### DISCIPLINE BY INDIVIDUAL CLUBS

Most sports leagues recognize the right of individual clubs to enforce their own disciplinary rules.<sup>111</sup> These usually pertain to matters which are of a more direct interest to the club and may include such things as curfews, training rules, and rules concerning the players' obligations to follow orders given by the coaching staff.<sup>112</sup> The sanctions imposed may range from small fines to suspensions.<sup>113</sup>

Are the disciplinary actions of a club subject to review under the antitrust laws? On the surface, there might be reason to question whether they involve the sort of joint action which will establish a concerted refusal to deal. That feature is present in league disciplinary action because the league derives its authority from the collective agreement of the member clubs. Yet, where a club takes action which affects only its own employees, it is less clear that the requisite conspiracy is present.

There are no cases which address the question of how discipline by individual clubs should be characterized for antitrust purposes.

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108. See text accompanying notes 61-67 *supra*.

109. See notes 85 & 86 *supra* & accompanying text.

110. See text accompanying notes 29-63 *supra*.

111. The standard player contract usually contains provisions authorizing the club to enforce a variety of disciplinary rules. See, e.g., Standard Player's Contract, National Football League ¶ 4 (1975).

112. See, e.g., N.Y. Times, Aug. 18, 1975, at 25, col. 3 (WFL player Anthony Davis fined \$500 for disrespectful remarks to assistant coach); Los Angeles Times, Aug. 31, 1975, Pt. III, at 2, col. 2 (baseball player Dock Ellis suspended thirty days for "insubordination"; reinstated, but still required to pay "substantial" fine).

113. See note 108 *supra*.

But there is another view of the club's authority which suggests that it should be subject to the same standard of review which is applied to league-imposed discipline. Rather than focusing on the particular disciplinary action — which appears to involve only a single employer and its employee — it is useful to consider the source of the authority which is being exercised. In most leagues, a club's right to control a player's conduct arises from the contract which is entered into with the employee. That contract, however, is not wholly the product of individual negotiation between the two parties. In most cases, the basic outline of the agreement is prescribed by the league and embodied in a uniform player's contract which all clubs must use. One of the uniform terms is that which exacts the player's agreement to abide by the rules which the club imposes.<sup>114</sup> There may be differences among leagues in the extent to which such terms are subject to modification through the individual negotiations between the player and the club.<sup>115</sup> But where such variations are not allowed, it can be argued that the club's disciplinary authority is indeed the product of a concerted refusal to deal. The clubs have in effect agreed that they will not contract with a player except upon terms which reserve to them authority to control the player's conduct. And while a club might otherwise have sought to retain that right even without the joint agreement, a uniform provision for club discipline is partially intended to serve the interest of the league as a whole. The image of the league as sponsoring competition between teams of athletes who are serious, dedicated, and well-trained will be promoted if each club accepts responsibility for controlling its own employees. Thus, the common agreement on the need for discipline by individual employers can be seen as a part of the larger design to ensure the success of the joint venture. If this theory is accepted, discipline by individual clubs would be treated under the same standards applied to league discipline.

### CONCLUSION

The notion that the antitrust laws provide a basis for judicial review of sports discipline might be resisted by some, particularly those involved in professional sports administration. While such a reaction may confirm the relative novelty of this use of the antitrust

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114. See, e.g., *Standard Player's Contract*, National Football League ¶ 4 (1975).

115. *Cf. Chuy v. Philadelphia Eagles*, 407 F. Supp. 717, 724-25 (E.D. Pa. 1976).

laws, there should be little question about the propriety of the proposition that antitrust principles have a role to play in this area. Their applicability has been accepted in the few sports cases which have arisen, and the trend of general precedents dealing with private group action leaves little doubt as to the correctness of this approach. As the prior discussion is intended to suggest, it seems more appropriate that attention be focused on, not *whether*, but rather *how* antitrust principles will affect discipline in professional sports.

Often when it is discovered that federal law intrudes into an area previously unregulated, there are cries of despair from those involved in the day-to-day operation of the activity affected. Typically, the concern is that significant new administrative burdens will be imposed and that those in charge will be prevented from doing what needs to be done. On the basis of the prior discussion, it can be suggested that any such fears are unfounded in the sports area. The fact that disciplinary decisions are reviewable under the antitrust laws does not mean that sports authorities cannot control player conduct. As suggested, such controls are fully appropriate for many types of misconduct, and the imposition of discipline should not prompt extensive litigation. What the antitrust laws do mean, however, is that both leagues and clubs must act responsibly in defining and administering their disciplinary systems. Proper reflection in defining the range of the entity's legitimate interest and in structuring the disciplinary proceeding should provide adequate protection against unwanted litigation.