



## The Integrity of the Game: Professional Athletes and Domestic Violence

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## I. INTRODUCTION

There is an argument to be made that our sports heroes should be valued solely for their conduct on the field, that the Halls of Fame should bestow the honor of admission based only on career achievement; professional athletes need not be role models to earn our esteem for their talent. However, Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Football League (“NFL”) have not chosen to proceed according to these principles. While past league rhetoric has sometimes pointed to the opposite conclusion,<sup>1</sup> it is clear from league action that certain off-field conduct is indeed a consideration of team and league evaluation and discipline of players. One must consider: What off-field conduct has been deemed detrimental enough to the league to result in disciplinary action? What message does this send regarding the off-field player conduct that is routinely ignored and thus implicitly condoned? Finally, what value judgments are being made and passed down to the fans through these decisions?

From the time the role of the commissioner was established in MLB, player gambling has been forbidden. Similarly, substance abuse is punished with either suspensions or fines. Conversely, other off-field crime has traditionally remained a permissible activity for professional athletes—one that is met without team or league punishment. One might attempt to justify this pattern of punishment by arguing that gambling and substance abuse directly affect the outcome of games, whereas other criminal activity does not;<sup>2</sup> however, this argument is flawed. Players are punished for gambling, whether or not they bet on games involving their own team, whether or not they bet on games involving their own sport. Players are also punished for use of drugs that do not enhance performance. The leagues have chosen to condemn drug use and gambling, despite the fact that it occurs off field and may not impact the game.

On the other hand, domestic violence has been largely ignored by professional sports leagues. This inaction persists despite the fact that a survey revealed seventy-six percent of U.S. adults and eighty-two percent of teens think it is “bad for society” to allow athletes to continue their sports careers when convicted of a violent crime.<sup>3</sup>

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<sup>1</sup> For instance, in a 1998 article, Greg Aiello, NFL communications director, was quoted as saying, “We’re not the criminal justice system. We can’t cure every ill in society. You know, we’re putting on football games. And unless it impacts on the business, we have to be very careful [from a legal standpoint] about disciplinary action we take.” Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 183 (1998).

<sup>2</sup> See, e.g., Dabbs, *supra* note 1, at 183 (“Gambling and drug use reduce the public’s belief in the honesty and fairness of the athletic contest. The NFL’s Lee Burnham distinguishes this from domestic violence: “[T]his domestic violence thing is different. It’s a society thing and there are laws that govern it.”).

<sup>3</sup> Anna L. Jefferson, *The NFL and Domestic Violence: The Commissioner’s Power to Punish Domestic Abusers*, 7 SETON HALL J. SPORT L. 353, 354 (1997) (citing David Diamond, *Victory, Violence and Values Out of Bounds*, USA WEEKEND, Aug. 25, 1996, at 4).

Only fourteen percent of adults and teens think allowing athletes to go unpunished is “good because it shows people deserve a second chance.”<sup>4</sup>

Although MLB, the NBA, and the NFL do not release information regarding player arrests or player punishment by teams or leagues, some external studies were conducted in the late 1990s as a result of public attention to domestic violence during the O.J. Simpson murder trial, which concluded with his acquittal for the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman in 1995.<sup>5</sup> One comprehensive study conducted by Jeff Benedict, former director of research at the Center for Sport in Society, found that 172 athletes were arrested for sex felonies between 1986 and 1995, yet only thirty-one percent were successfully prosecuted.<sup>6</sup> The study also concluded that 150 athletes had domestic violence criminal complaints filed against them between 1990 and 1996, yet only twenty-eight resulted in convictions and the majority of cases were not prosecuted.<sup>7</sup>

The O.J. Simpson trial and the attention that studies such as Benedict’s brought to the issue of domestic violence had a direct effect on NFL policy. Within weeks of the murders, the NFL sent counselors to twenty-eight team training camps to discuss domestic violence with the players.<sup>8</sup> In addition, then-Commissioner Paul Tagliabue adopted the Violent Crime Policy in 1997, which was further revised in 2000, becoming a version of the current Personal Conduct Policy.<sup>9</sup> It was, and is, the *only* policy of its kind among major U.S. sports.<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> See Elliott Almond & Gene Wojciechowski, *Domestic Violence Comes Out of the Closet; Discipline: Once an Issue that Was Hushed Up When Athletes Were Involved, Now It’s Front-Page News*, L.A. TIMES, Sept. 12, 1995, at C1. The murder trial brought new light to Simpson’s 1989 New Year’s Day arrest for allegedly beating his wife, Nicole Brown Simpson. See Bill Brubaker, *Violence in Football Extends Off Field*, WASH. POST, Nov. 13, 1994, at A1. He allegedly kicked and punched her while screaming “I’ll kill you.” *Id.* Nicole complained to the police that her eight previous 911 calls had resulted in no action. See *id.* While Nicole asked that no charges be filed the next day, prosecutors filed charges anyway. See *id.* The Times did not report the incident; later, when he pleaded no contest, only a small brief appeared. See Almond & Wojciechowski, *supra*. The plea resulted in two years’ probation, counseling, 120 hours of community service, a \$500 donation to a battered women’s organization, and a \$200 fine. Brubaker, *supra*. Simpson was not punished by the league or his team and he retained his endorsement deals with Hertz and NBC Sports. See *id.*

<sup>6</sup> JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN 80 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> See Brubaker, *supra* note 5. Though Lem Burnham, in charge of the NFL’s employee assistance program, insisted that domestic violence was already on his “laundry list of things to cover” with players, the timing insinuates that, at the very least, domestic violence became a more pressing concern after the murders. *Id.*

<sup>9</sup> See Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1086–87 (2008).

<sup>10</sup> See *id.*

Regardless of the attention given domestic violence in the 1990s and the studies and policies that resulted therefrom, it remains difficult to go even one week without hearing of an athlete involved in some sort of domestic altercation. For instance, at the start of the broadcast of the 2008 NFL season playoff game between the Arizona Cardinals and Atlanta Falcons, television commentator Cris Collinsworth stated that, in the week leading up to the game, Larry Fitzgerald's girlfriend obtained a restraining order against him and Michael Turner was involved in a domestic dispute with the mother of his child. Fitzgerald and Turner were two of the most celebrated players on the field that day.

Some argue that athletes are predisposed to commit acts of domestic abuse and sexual assault because they are trained to use violence and intimidation for a psychological edge during their games and because sports create a "macho sub-culture" that equates masculinity with violence.<sup>11</sup> One statistical analysis by researchers at Northeastern University and the University of Massachusetts appears to give credence to these beliefs.<sup>12</sup> The study reviewed 107 cases of sexual assault reported at thirty National Collegiate Athletic Association Division I schools between 1991 and 1993 and concluded that "male college student-athletes, compared to the rest of the male student population, are responsible for a significantly higher percentage of the sexual assaults reported to judicial affairs on the campuses of Division I institutions."<sup>13</sup> Limiting the scope to ten schools, the study found that student-athletes comprised 3.3% of the male student body, but were involved in nineteen percent of the reported sexual assaults.<sup>14</sup>

Despite this study and the perceived prevalence of such activity in professional sports, evidence is inconclusive regarding whether athletes are more likely to commit violent acts against women.<sup>15</sup> The San Diego Union-Tribune reviewed news reports and public records from January 2000 to April 2007 and concluded that the biggest problems for NFL players were the same as those of the general population: drunken driving, traffic stops, and repeat offenses.<sup>16</sup> Further, it concluded that the arrest rate among NFL players was less than that of the public population.<sup>17</sup> In an April 2008 update to the study, the Union-Tribune found that the NFL's arrest rate since 2000 was better than that of the rest of society—there was approximately one arrest per forty-seven players per year compared with one arrest per twenty-one for the general

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<sup>11</sup> Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1050 (1996) (citing MICHAEL A. MESSNER & DONALD F. SABO, *SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY* 34 (1994)).

<sup>12</sup> See Dabbs, *supra* note 1, at 169–70 (citing William Nack & Lester Munson, *Special Report: Sports' Dirty Secret*, SPORTS ILLUSTRATED, Jul. 31, 1995, at 68).

<sup>13</sup> *Id.* at 170.

<sup>14</sup> *Id.*

<sup>15</sup> See Note, *supra* note 11, at 1050–51; Brubaker, *supra* note 5.

<sup>16</sup> See Brent Schrottenboer, *Arresting Image; As Concerns over Player Conduct Rise, A Review of Crime Reports Shows Arrest Rates Are Consistent with General Population, and DUIs Dominate*, SAN DIEGO UNION-TRIB., Apr. 22, 2007, at C1.

<sup>17</sup> See *id.*

population.<sup>18</sup> It is indeed quite possible that the rate of domestic violence involving professional athletes mirrors the violence against women that occurs in society at large, but when committed by professional athletes and splashed across the sports page, the prevalence of such abuse in our society simply becomes more noticeable.

Nonetheless, there is evidence that professional athletes are not punished by the leagues, teams, or criminal justice system as harshly or consistently as their general public counterparts. “One study indicates that, out of 141 athletes reported to police for violence against women between 1989 and 1994, only one was disciplined by league officials.”<sup>19</sup> While this number has increased since 1994—an increase that will subsequently be addressed—the number remains remarkably low. Similarly, conviction rates for athletes are astonishingly low compared to the arrest statistics.<sup>20</sup> Though there is evidence that the responsiveness of police and prosecution to sexual assault complaints involving athletes is favorable,<sup>21</sup> there is an off-setting pro-athlete bias on the part of juries.<sup>22</sup> For example, in 1995, domestic violence cases involving athletes resulted in a thirty-six percent conviction rate, as compared to seventy-seven percent for the general public.<sup>23</sup> There are many individual cases that reflect occasional bias at some point in the criminal justice system, including those of Clarence Kay,<sup>24</sup> Barry Bonds,<sup>25</sup> and John Stephens.<sup>26</sup>

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<sup>18</sup> Brent Schrottenboer, *Holding that Line; In the Year Since NFL’s Player-Conduct Policy Took Effect, the League Has Taken a Tougher Stance with Players with Criminal Issues . . . Or, at Least, Most of Them*, SAN DIEGO UNION-TRIB., Apr. 19, 2008, at D1.

<sup>19</sup> Michael O’Hear, *Blue-Collar Crimes/White-Collar Criminals: Sentencing Elite Athletes who Commit Violent Crimes*, 12 MARQ. SPORTS L. REV. 427, 431 (2001) (referring to Linda Nicole Robinson, Note, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1330 (1998)).

<sup>20</sup> See Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence against Women*, 11 SPORTS LAW. J. 69, 77 (2004) (citing BENEDICT, *supra* note 6, at 80).

<sup>21</sup> See O’Hear, *supra* note 19, at 432. Out of 217 sexual assault complaints involving athletes from 1986 to 1995, at least fifty-four percent resulted in formal charges, which compares favorably with sexual assault cases generally. *Id.*

<sup>22</sup> See *id.* In this same study, only fifteen percent of the cases that went to trial resulted in conviction. Further, while fifty-four percent of rape arrests nationally result in conviction, only thirty-one percent of athletes were convicted. *Id.*

<sup>23</sup> *Id.* (noting that this may have as much to do with juries’ bias in favor of the athletes as it has to do with athletes’ ability to hire superior defense counsel).

<sup>24</sup> In 1990, Kay, a Denver Broncos tight end, was arrested on a domestic violence charge after allegedly breaking into the home of his ex-girlfriend, Patricia Spillman. See Brubaker, *supra* note 5. While domestic violence charges usually result in overnight jail time, he was released only five hours later, allowing him to fly to Tokyo with his teammates for a preseason game. See *id.* This only perpetuated the cycle of violence, which eventually ended with Spillman obtaining a restraining order after one of many instances of domestic violence and breaking and entering, and Kay being placed on probation after pleading no contest to violating the order. See *id.*

<sup>25</sup> Sun Bonds and Barry Bonds, then San Francisco Giant outfielder, divorced after alleged instances of domestic violence, including one instance in which Barry Bonds allegedly grabbed

While there is extensive off-field conduct that arguably should be punished by professional sports leagues, this article will focus on domestic violence because of its prevalence in sports and society at large and because of the interesting issues that charges of domestic violence raise, given that they are frequently dropped and often do not result in conviction.<sup>27</sup> In order to assess what can and should be done regarding the treatment of domestic violence in sports, this article will first trace the authority of the league commissioners and clubs in disciplining players in MLB, the NBA, and the NFL. After examining the legal documents and case precedent of the three leagues, this article will trace the disciplinary action that has been taken against players. Given the increased attention to domestic violence in the late 1990s, the article will focus on the comparative actions of Commissioners Bud Selig (MLB), David Stern (NBA), and Paul Tagliabue and Roger Goodell (NFL), who have been responsible for league action since that time. The NFL's Personal Conduct Policy is emphasized, as it provides a template for possible league action against off-field behavior that compromises the integrity of the game; however, the NFL's Personal Conduct Policy will also be analyzed for its potential faults. Lastly, this article proposes the adoption of similar league-wide personal conduct policies in MLB and the NBA with a few modifications, including the addition of sentencing guidelines, the inclusion of provisions ensuring due process and prohibiting double jeopardy, and the incorporation of such policies into the collective bargaining agreements of the respective leagues.

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his wife around the neck, threw her into a car, and then kicked her when she was on the ground. See Aditi Kinkhabwala, *Way off Base: MLB Needs to Take a Stand against Domestic Violence*, SI.COM, May 31, 2007, [http://sportsillustrated.cnn.com/2007/writers/aditi\\_kinkhabwala/05/31/dukes.domestic/index.html](http://sportsillustrated.cnn.com/2007/writers/aditi_kinkhabwala/05/31/dukes.domestic/index.html). When Barry went to court to request a reduction in his family-support payments to Sun and their two children, pleading financial hardship during the baseball strike, County Superior Court Judge George Taylor granted the request and then asked Bonds for his autograph. See Nack & Munson, *supra* note 12, at 70.

<sup>26</sup> Kim Williams, former wife of then-New England Patriots running back John Stephens, claims she made several domestic violence-related complaints to the police, who never arrested him or counseled her on her rights, and repeatedly told her to "calm down." Brubaker, *supra* note 5. Stephens was later charged with the rape of another woman, which resulted in conviction of a lesser charge of sexual assault and only five years' probation. See Matt Taibbi, *Hands of Stone, Sports Blotter: "Ex-Patriot" Edition*, BOSTON PHOENIX, Jan. 16, 2008, <http://thephoenix.com/Boston/RecRoom/54696-Hands-of-stone/?rel=inf>.

<sup>27</sup> Domestic violence victims frequently back away from allegations because they fear their abusers or want to avoid disruption of their family lives. See Brubaker, *supra* note 5. It has been suggested that wives of professional athletes may be even more likely to drop charges because of the increased publicity and disruption to their lives. See *id.*

## II. THE COMMISSIONERS' AUTHORITY

### A. MLB

The first commissioner in American professional sports was Judge Kenesaw Mountain Landis, who was selected to serve as commissioner in 1920.<sup>28</sup> The position was created in response to the Chicago Black Sox Scandal, in which eight White Sox players were charged with intending to defraud the gambling public, and the general notion was that baseball had been compromised by widespread gambling.<sup>29</sup> Landis was given the authority to “be the final arbiter of disputes between leagues and clubs and disputes involving players and to impose punishment and pursue legal remedies for any conduct that he determined to be detrimental to the best interests of the game.”<sup>30</sup> Under the Major League Agreement that governed baseball at the time, he could “investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of base ball [sic] . . . [and] determine, after investigation, what preventative, remedial or punitive action [was] appropriate.”<sup>31</sup>

Landis’s powers were broad and, today, the MLB commissioner continues to have expansive authority to take disciplinary action punishing conduct that is detrimental to the best interests of the game. The uniform player contract (“UPC”), incorporated by reference into the Basic Agreement (MLB’s collective bargaining agreement (“CBA”)) in Article III, pledges players to “abide by and comply with all provisions of the Major League Constitution.”<sup>32</sup> Over time, however, these broad powers have been defined and constrained by new provisions in the CBA. For example, MLB’s current CBA, which is in effect until 2011, outlines a grievance procedure that allows players to appeal disciplinary action taken against them to an impartial arbitrator who will use “just cause” as the standard of review.<sup>33</sup> Under Article XI(A)(1)(b), the commissioner has the power to remove a grievance from this system and hear the complaint himself if he deems the action taken with respect to the player involves “the preservation of the integrity of, or the maintenance of public

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<sup>28</sup> See Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 141 (2008).

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* (citing Matthew B. Parchman, *Limits on Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1415 (1990)).

<sup>31</sup> James M. Pollack, *Take My Arbitrator, Please: Commissioner ‘Best Interests’ Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1646 (1999) (citing Major League Agreement § 2(a)–(b), at 1 (1921)).

<sup>32</sup> 2007–2011 Basic Agreement between Major League Clubs and the Major League Baseball Players Association, Schedule A § 9(a), at 219 (2006), available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) [hereinafter MLB Basic Agreement].

<sup>33</sup> *Id.* at 32, 43.

confidence in, the game of baseball.”<sup>34</sup> However, in a letter to Donald Fehr, Executive Director of the Major League Baseball Players’ Association (“MLBPA”), current Commissioner Bud Selig vowed not to remove any actions from the grievance system.<sup>35</sup>

The MLB commissioner’s authority has also been shaped over the years by judicial decisions and arbitral awards. Traditionally, the courts have granted the commissioner “almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball.”<sup>36</sup> In *Milwaukee Am. Ass’n v. Landis*, Landis’s refusal to approve the trade of a St. Louis Browns’ player to a minor league club was challenged.<sup>37</sup> The court concluded that the intent evidenced by the various MLB agreements and rules was “to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial *pater familias*.”<sup>38</sup> Using this deferential standard of review, the court held that the commissioner had acted within the confines of his authority.<sup>39</sup>

In 1978, when Bowie Kuhn was serving as commissioner, the commissioner’s authority was challenged again. In *Charles O. Finley & Co. v. Kuhn*, the court concluded: “While it is true that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor.”<sup>40</sup> Using the arbitrary and capricious, or not made in good faith, standard of review, the court deferred to the commissioner’s judgment.<sup>41</sup> This judicial deference to commissioner authority was yet again confirmed in *Rose v. Giamatti* (stating that the commissioner “is given virtually unlimited authority to

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<sup>34</sup> *Id.* at 32–33.

<sup>35</sup> *Id.* Attachment 2, at 128. Further, the Basic Agreement provides that, if the commissioner were to utilize his powers granted under Article XI(A)(1)(b), the MLBPA can reopen negotiations. *See id.* at 32–33.

<sup>36</sup> *Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298, 303 (N.D. Ill. 1931).

<sup>37</sup> *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 14–15 (3d ed. 2004). Landis had learned that the player involved in the trade, Fred Bennett, had been transferred numerous times between the Browns and minor league teams—all of which were secretly controlled by the Browns’ owner, Phil Ball. *See id.*

<sup>38</sup> *Milwaukee*, 49 F.2d at 299.

<sup>39</sup> *See id.* at 304.

<sup>40</sup> *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978). In this action, Charles Finley, owner of the Oakland Athletics, challenged Kuhn’s disapproval of the assignments of Joe Rudi, Rollie Fingers, and Vida Blue to the Boston Red Sox and New York Yankees. *See* WEILER & ROBERTS, *supra* note 37, at 18. Kuhn disapproved the transaction as “inconsistent with the best interests of baseball” because of the potential loss of competitive balance that would occur as a result of the assignments. *Id.* Finley planned to sell off these players—his veteran stars—to invest in the farm system and younger stars who would not demand high salaries. *See id.*

<sup>41</sup> *Charles O. Finley*, 569 F.2d at 539.



formulate his own rules of procedure for conducting . . . investigations”<sup>42</sup> and *Atlanta Nat’l League Baseball Club v. Kuhn* (upholding Kuhn’s power to suspend Atlanta Braves owner Ted Turner for breaching free agency rules).<sup>43</sup>

While these judicial decisions granted MLB commissioners the utmost authority in acting to protect the best interests of the game, arbitration awards have undermined this authority. Originally the CBA did not provide for the use of an outside arbitrator; however, in 1970, Bowie Kuhn approved the use of independent arbitrators for grievances so long as the grievance did not implicate baseball’s integrity or public confidence in the game.<sup>44</sup> Though the independent arbitrator is required to use a just cause standard of review according to the CBA,<sup>45</sup> past arbitral awards have reflected the use of a much less deferential standard. For example, George Nicolau’s ruling in the arbitration of a Los Angeles Dodgers relief pitcher, Steve Howe, significantly undermined the authority of the MLB commissioner.<sup>46</sup> After Howe’s seventh reported incident of illegal drug use in his twelve-year career, then-Commissioner Fay Vincent banned him from baseball.<sup>47</sup> Nicolau heard Howe’s appeal and, while claiming to use the CBA-imposed just cause standard, he reduced the punishment to a one-year suspension,<sup>48</sup> essentially substituting his own judgment for that of the commissioner. Significantly, in another arbitration that has not been released publicly, Nicolau lifted a club suspension of a player who had been arrested on drug and sexual assault charges.<sup>49</sup> Nicolau has stated his own belief that “baseball fundamentally errs in justifying punishment by holding out players as role models,”<sup>50</sup> and his arbitration decisions clearly seem to abide by this personal philosophy. Though MLB governing documents and judicial opinions indicate that the MLB

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<sup>42</sup> *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989). This suit was brought by Pete Rose against then-Commissioner Bart Giamatti for pre-judging the facts of his case and not giving “due regard for all the principles of natural justice and fair play.” WEILER & ROBERTS, *supra* note 37, at 8. It resulted in Rose agreeing to settle the case by withdrawing his suit and accepting the commissioner’s permanent ban from baseball in return for not having to admit or deny betting on baseball. *Id.* at 9.

<sup>43</sup> *Atlanta Nat’l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977). It is, however, important to note that the court ruled that Kuhn “went beyond the scope of his authority” by taking a draft pick away from the Braves. WEILER & ROBERTS, *supra* note 37, at 26. Nonetheless, it came to this conclusion because a draft penalty was not one of the specific commissioner sanctions mentioned in the Major League Agreement. *See id.* at 26–27.

<sup>44</sup> Pollack, *supra* note 31, at 1662. However, as discussed earlier, current Commissioner Bud Selig has assured the MLBPA that he will not deem any grievance to implicate the integrity or public confidence in the game, thereby making this exception moot.

<sup>45</sup> *See* MLB Basic Agreement, *supra* note 32, at 43.

<sup>46</sup> *See* WEILER & ROBERTS, *supra* note 37, at 51–56.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> John Gibeaut, *When Pros Turn Cons: Athletes Who Commit Crimes Are Giving Sports a Black Eye. But While the NFL Claims It’s Tackling the Problem, Other Leagues Appear Content to Sit on the Sidelines*, 86 A.B.A.J. 38, 103 (2000).

<sup>50</sup> *Id.* at 106.

commissioner has broad discretion and authority in administering discipline, these arbitration rulings have served to diminish this authority.

### B. NBA

The NBA did not have a commissioner until 1967, when President Walter Kennedy changed his title to commissioner.<sup>51</sup> In 1971, the commissioner was granted far-reaching authority to oversee the league and take disciplinary action.<sup>52</sup> In contrast to the numerous commissioners of baseball, the NBA has had only four commissioners, including current Commissioner David Stern, who was elected in 1984.<sup>53</sup> At the time Stern was elected, Rule 35 of the NBA Constitution gave him the authority to “fine a player for any statement he ma[de] or endorse[d] which [was] prejudicial or detrimental to the best interests of basketball and to suspend or fine the player for conduct that [was] detrimental to the NBA.”<sup>54</sup> Under the *current* Rule 35, Stern has the power:

[T]o suspend for a definite or indefinite period, or to impose a fine not exceeding \$50,000, or inflict both such suspension and fine upon any player who, in his opinion, (i) shall have made or caused to be made any statement having, or that was designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member, or (ii) shall have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association.<sup>55</sup>

The NBA UPC, incorporated in Article II of the CBA, binds players to Rule 35.<sup>56</sup>

When Stern took power, the CBA allowed him to make final determinations regarding discipline.<sup>57</sup> However, the 1995 CBA restricted the commissioner’s power, allowing players to have their grievances reviewed by an independent arbitrator.<sup>58</sup>

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<sup>51</sup> Lockwood, *supra* note 28, at 149. However, President Maurice Podoloff disciplined Jack Molinas for gambling in 1953 by handing down an indefinite suspension. *Id.* at 147–48.

<sup>52</sup> *Id.* at 149.

<sup>53</sup> *Id.* at 150.

<sup>54</sup> *Id.* at 151.

<sup>55</sup> NBA Constitution and By-Laws R. 35(d).

<sup>56</sup> NBA Uniform Player Contract § 5(d), *available at* <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf> [hereinafter NBA UPC].

<sup>57</sup> Lockwood, *supra* note 28, at 151.

<sup>58</sup> *Id.* at 154. Players continue to have the ability to have their grievances reviewed by an independent arbitrator under the current (2005) NBA CBA. However, players may not file a grievance over “[a] dispute involving (i) a fine of \$50,000 or less or a suspension of twelve (12) games or less . . . imposed . . . for conduct on the playing court . . . or (ii) action taken by the Commissioner . . . (A) concerning the preservation of the integrity of, or the maintenance of public confidence in the game of basketball and (B) resulting in a financial impact on the

Though the grievance procedure is outlined in detail in Article XXXI of the CBA, there are seemingly conflicting provisions regarding the standard of review to be used. In § 8, which is titled “Special Procedures with Respect to Player Discipline,” the standard of review for disputes involving the preservation of the integrity of, or public confidence in, the game is “arbitrary and capricious.”<sup>59</sup> However, in § 14, which is titled “Miscellaneous,” the standard of review for disputes involving discipline is listed as “just cause.”<sup>60</sup> As can be seen in the subsequent discussion of the Sprewell arbitration, this has led to confusion regarding the appropriate standard of review and, implicitly, the appropriate amount of deference to be given to the commissioner’s determinations.

Significantly, the current CBA also includes sentencing guidelines regarding off-court conduct—“when a player is convicted of (including a plea of guilty, no contest, or nolo contendere to) a violent felony, he shall immediately be suspended by the NBA for a minimum of ten (10) games.”<sup>61</sup> In addition:

[W]hen the NBA and the Players Association agree that there is reasonable cause to believe that a player has engaged in any type of off-court violent conduct, the player will . . . be required to undergo a clinical evaluation . . . and, if deemed necessary by such expert, appropriate counseling.<sup>62</sup>

Sexual assault and domestic violence are specifically enumerated as examples of “violent conduct.”<sup>63</sup> In addition, the current CBA provides that the commissioner’s disciplinary action “will preclude or supersede disciplinary action by any Team for the same act or conduct.”<sup>64</sup>

As in baseball, the courts have granted the NBA commissioner much deference while arbitrators have been less likely to do so. In *Riko Enters., Inc. v. Seattle Supersonics Corp.*, the court defined the outer limits of NBA commissioner authority,<sup>65</sup> concluding that the commissioner did not have the authority to deny a team’s draft choice, but only because the NBA Constitution explicitly reserved this disciplinary action for the NBA Board of Governors.<sup>66</sup> In other words, as long as the commissioner does not contradict the express terms of the Constitution, the best interest clause will be interpreted broadly.

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player of \$50,000 or less.” NBPA Collective Bargaining Agreement, art. XXXI, § 8(a) (2005), available at [http://www.nbpa.com/cba\\_articles.php](http://www.nbpa.com/cba_articles.php) [hereinafter NBA CBA].

<sup>59</sup> NBA CBA, *supra* note 58, at art. XXXI, § 8(b).

<sup>60</sup> *Id.* at art. XXXI, § 14(c).

<sup>61</sup> *Id.* at art. VI, § 7.

<sup>62</sup> *Id.* at art. VI, § 8(a).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at art. VI, § 10(a). The NBA borrowed this language from the NFL’s CBA after seeing the role double jeopardy played in the arbitrator’s determination of fairness in the Sprewell arbitration, discussed subsequently.

<sup>65</sup> *Riko Enters., Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973).

<sup>66</sup> *Id.* at 525.

While the courts continue to grant the commissioner much authority aside from this one caveat, the arbitration decisions in the Latrell Sprewell and Jermaine O'Neal cases exemplify the extent to which independent arbitrators have impinged on the commissioner's authority. On December 1, 1997, Latrell Sprewell of the Golden State Warriors threatened to kill Coach Carlesimo and proceeded to strangle him for ten to fifteen seconds before his teammates were able to pull him away.<sup>67</sup> After retreating to the locker room, Sprewell returned to practice twenty minutes later to attack Coach Carlesimo by punching him.<sup>68</sup> The Warriors terminated Sprewell's contract two days later,<sup>69</sup> and Commissioner Stern handed down a one-year unpaid suspension.<sup>70</sup> Sprewell filed a grievance, which was heard by Arbitrator John Feerick.<sup>71</sup> Though Feerick noted that the commissioner was entitled to "great deference" and that "it would be wrong for [him] to substitute [his] judgment for [the commissioner's],"<sup>72</sup> Feerick concluded that fairness dictated that Sprewell's sentence was too severe—in part because Sprewell was punished by both his team and the league.<sup>73</sup> In the end, Sprewell's suspension was reduced to sixty-eight games instead of the original suspension of eighty-two games imposed by Commissioner Stern.<sup>74</sup>

In a similar case of violent conduct considered to be off the playing court, Ron Artest, Stephen Jackson, Anthony Johnson, and Jermaine O'Neal engaged in a fight with fans during a Detroit Pistons and Indiana Pacers game in 2004.<sup>75</sup> Two days later, Commissioner Stern announced suspensions for each player under the authority granted to him in Article 35 of the NBA Constitution—O'Neal was suspended for twenty-five games without pay.<sup>76</sup> As in the Sprewell case, the arbitrator supposedly applied a just cause standard of review yet still reduced O'Neal's suspension to fifteen games.<sup>77</sup> The Sprewell and O'Neal arbitrations demonstrate the way in which

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<sup>67</sup> Roger A. Javier, "You Cannot Choke Your Boss and Hold Your Job Unless You Play in the NBA": *The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA*, 7 VILL. SPORTS & ENT. L.J. 209, 210–11 (2000).

<sup>68</sup> *Id.* at 211.

<sup>69</sup> *Id.* The Warriors terminated Sprewell's contract under the authority of paragraph 20(b)(i) of the UPC, which states, "The Club may terminate this contract . . . if the Player shall do any of the following: (a) at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character and good sportsmanship . . ." *Id.* at 219. This language remains the same in the current UPC but is now found in § 16(a)(i). NBA UPC, *supra* note 56, at § 16(a)(i).

<sup>70</sup> Javier, *supra* note 67, at 211–12.

<sup>71</sup> *Id.* at 212.

<sup>72</sup> Lockwood, *supra* note 28, at 154. It should be noted that Feerick claimed to use a just cause standard of review instead of an arbitrary and capricious standard, which many attributed to his leniency for Sprewell in the arbitral award. *See* Lockwood, *supra* note 28, at 155.

<sup>73</sup> *See* Lockwood, *supra* note 28, at 155; *supra* note 64 and accompanying text.

<sup>74</sup> Javier, *supra* note 67, at 217.

<sup>75</sup> *See* Lockwood, *supra* note 28, at 156.

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* at 157–58.

arbitrators have undermined NBA commissioner disciplinary authority, although the arbitrators claim to review such punishments solely for just cause.

### C. NFL

Unlike the NBA, which waited many years to create the role of the commissioner, the NFL followed in MLB's footsteps and created the role of the commissioner in 1921—just one year after Judge Landis assumed the role in baseball.<sup>78</sup> Joe Carr was the first commissioner; however it was not until Pete Rozelle became commissioner in 1960 that the potential for professional football in America was realized.<sup>79</sup> Rozelle was also the first commissioner to make investigating off-field personal conduct a priority, focusing on gambling.<sup>80</sup> The two most recent commissioners—Paul Tagliabue, serving from 1989 to 2006, and Roger Goodell, still serving—have continued this leadership. Significantly, it was Paul Tagliabue, a former antitrust lawyer, who “consolidated the Management Council under his office, making him the sole authority over NFL business, including discipline of players and all other league employees for misconduct outside work.”<sup>81</sup>

Under the NFL Constitution, the commissioner may discipline players who have “violated the Constitution or by-laws of the [NFL], or [have] been or is guilty of conduct detrimental to the welfare of the [NFL] or professional football.”<sup>82</sup> Under the NFL CBA, Article XI outlines the commissioner's disciplinary authority.<sup>83</sup> Contrary to the rules of MLB and the NBA, the NFL CBA stipulates that any “action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football” may only be appealed to the commissioner.<sup>84</sup> In other words, there is no independent arbitrator available to review, and possibly undermine, the commissioner's disciplinary action for off-field conduct. While clubs may also punish players for off-field conduct deemed “detrimental to the club,”<sup>85</sup> “[t]he Commissioner's disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct.”<sup>86</sup> The NFL player contract, incorporated into the CBA in Article XIV(1), assures that the players

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<sup>78</sup> Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 189 (2008).

<sup>79</sup> *Id.* at 189–90.

<sup>80</sup> See Ambrose, *supra* note 9, at 1085.

<sup>81</sup> Gibeaut, *supra* note 49, at 107.

<sup>82</sup> Mahone, *supra* note 78, at 191 (citing Constitution and By-Laws of the National Football League, art. VIII, § 8.13(A)).

<sup>83</sup> See Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2006–2012, art. XI (2006), available at [http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL COLLECTIVE BARGAINING AGREEMENT 2006 - 2012.pdf](http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL_COLLECTIVE_BARGAINING_AGREEMENT_2006_2012.pdf) [hereinafter NFL CBA].

<sup>84</sup> *Id.* at art. XI, § 1(a).

<sup>85</sup> *Id.* at art. VIII, § 1(a).

<sup>86</sup> *Id.* at art. XI, § 5.

agree “the Commissioner will have the right . . . to fine . . . to suspend . . . and/or to terminate this contract” if the player is “guilty of any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.”<sup>87</sup>

Because the NFL’s grievance procedure excludes review of punishment for conduct deemed detrimental to the integrity of the game, of the three league commissioners, the NFL commissioner has the most authority in disciplining players for their off-field conduct. This is enhanced by the fact that there is no arbitral or judicial precedent restricting the authority. Further, Commissioners Tagliabue and Goodell have instituted personal conduct policies to reinforce the importance of good player behavior both on and off the field. These policies, which have not been incorporated into the NFL CBA, are discussed subsequently.

### III. HISTORICAL USE OF THE COMMISSIONERS’ DISCIPLINARY AUTHORITY TO PUNISH OFF-FIELD CONDUCT

#### *A. MLB*

It is very difficult to garner data on player arrests and corresponding league discipline because the leagues do not publish this data. Most of the studies that have been conducted on league punishment, and specifically on punishment for athlete violence against women, are dated and, therefore, do not include the most relevant data from the years following the O.J. Simpson trial, which shined a spotlight on domestic violence. It is safe to say, however, that MLB has done the least in terms of punishing players for off-field conduct; after reading countless newspaper and journal articles from the past ten years describing domestic violence allegations, arrests, and convictions, I did not discover one corresponding case of league punishment.

Although many domestic violence arrests result in dropped charges because the victim refuses to testify in order to escape public ridicule or out of fear of retribution, the lack of a conviction has not stopped baseball from punishing players for other transgressions in the past. Indeed, Judge Landis’s first disciplinary action as commissioner was to impose lifetime suspensions on the eight players allegedly involved in the Black Sox Scandal, despite their acquittal.<sup>88</sup> “Commissioner Landis linked the integrity of baseball to his view of American morality. He believed that baseball held a special place in the hearts of the nation’s youth, and that required him to take decisive action.”<sup>89</sup> Landis utilized his “best interest” power against Benny Kauff, a New York Giants outfielder, in much the same manner—after Kauff was acquitted for stealing a car and receiving stolen automobiles, Landis banished him from the game for life.<sup>90</sup> He did so because, after considering the evidence against Kauff, he found that Kauff’s presence in baseball would “burden patrons of the game

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<sup>87</sup> *Id.* at app. C, § 15.

<sup>88</sup> See Lockwood, *supra* note 28, at 142.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 143.

with grave apprehension as to its integrity.”<sup>91</sup> This is a clear-cut and early example of use of the commissioner’s authority to punish off-field conduct that did not relate to or affect the game of baseball and that did not result in a criminal conviction.

Baseball has even disciplined players and coaches for legal, but reprehensible, personal conduct. Both Marge Schott, then-managing partner and largest shareholder of the Cincinnati Reds, and John Rocker, a former relief pitcher for the Atlanta Braves, were punished by Commissioner Bud Selig for derogatory, racist remarks that were made to reporters off the field.<sup>92</sup> After Schott made offensive remarks regarding African-Americans, Asians, and Jews to a reporter, she was suspended from baseball for a year.<sup>93</sup> A few years later, she resigned from the daily operation of the Reds because she was, again, under threat of suspension.<sup>94</sup> Likewise, Rocker was suspended for two months and fined \$20,000 for racial and ethnic slurs he directed at New Yorkers, Mets fans, and one of his teammates.<sup>95</sup> His team took action too, later fining him \$5,000 for allegedly threatening the *Sports Illustrated* author of the article containing his remarks, and ultimately sending him to the minor leagues.<sup>96</sup>

Although these examples suggest commissioner willingness—from the beginning of the commissioner’s office to present day—to punish off-field conduct that offends the public, a line has been drawn between these instances and instances of athletes committing domestic violence. “While [MLB] doesn’t condone domestic violence and provides counseling for players in such situations, [Robert D. Manfred Jr., Executive Vice President of MLB] says the sport can’t justify punishing those players, unlike the epithet-slinging Rocker. ‘It’s a little different than someone insulting your fan base,’ Manfred says.”<sup>97</sup> But is it?

A 2007 *Chicago Tribune* article notes, “While Major League Baseball continues to focus on steroids and other performance-enhancing substances, it appears to be experiencing a quiet epidemic of domestic battery.”<sup>98</sup> While this “epidemic” may be reflective of the “epidemic” in society at large rather than particular to baseball, the prevalence of domestic violence in baseball, and sports in general, is undeniable. Prior to the general awakening to this phenomenon in the late 1990s, baseball greats

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<sup>91</sup> *Id.* (citing HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 375 (1971)).

<sup>92</sup> See Ira Berkow, *After Schott Spoke Out, the Air Needed Clearing*, N.Y. TIMES, Mar. 6, 2004, at D3; Gibeaut, *supra* note 49, at 41.

<sup>93</sup> See Berkow, *supra* note 92, at D3.

<sup>94</sup> See *id.*

<sup>95</sup> See Gibeaut, *supra* note 49, at 41. Consistent with previously discussed patterns of arbitrator oversight, an arbitrator reduced this suspension to two weeks and the fine to \$500, which Rocker claims he never paid. See Peter Schmuck, *With Rocker Warming Up, Guillen Is in Need of Relief*, BALT. SUN, June 26, 2006, at 2D.

<sup>96</sup> See Gibeaut, *supra* note 49, at 41.

<sup>97</sup> *Id.* at 102.

<sup>98</sup> Phil Rogers, *MLB Must Not Tolerate Reprobates; Domestic Violence Cases Deserve the Same Attention as Steroid Abuse*, CHI. TRIB., May 27, 2007, at C3.

such as Barry Bonds,<sup>99</sup> Jose Canseco,<sup>100</sup> Darryl Strawberry,<sup>101</sup> Dante Bichette,<sup>102</sup> and Albert Belle<sup>103</sup> were accused of domestic violence—most of them accused in more than one instance. They, and others similarly accused, were not punished by their teams or the league.

The first instance of a MLB team's punishment for domestic violence appears to be the suspension of Wilfredo Cordero by the Boston Red Sox in 1997.<sup>104</sup> Cordero was arrested during a domestic dispute with his second wife, Ana; after the police arrived, and in their presence, Cordero told his wife in Spanish that he would kill her.<sup>105</sup> Though Cordero returned to action immediately after the incident, the following week the *Boston Globe* reported that his 1993 divorce proceedings involving his first wife also included allegations of abuse.<sup>106</sup> In response to this new

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<sup>99</sup> See generally Nack & Munson, *supra* note 12, at 62 (examining incidents of domestic violence involving athletes). Bonds's ex-wife accused him of domestic violence in their marriage. See *id.*; Kinkhabwala, *supra* note 25.

<sup>100</sup> See Donna Pazdera, *Canseco Charged with Battery, Accused of Striking His Wife*, SUN-SENTINEL (Fort Lauderdale, Fla.) Nov. 7, 1997, at 7C; Greg Welter, *Chico Police Respond to Canseco Spat*, CHICO ENTERPRISE-REC. (Cal.), July 20, 2006. Canseco was arrested and charged with aggravated assault after driving his Porsche into his then wife's BMW while she was in the car. See Pazdera, *supra*. The charges were dropped after he agreed to community service and counseling. See John Martin, *The (Exciting) Life and Times of Jose Canseco*, ST. PETERSBURG TIMES (Fla.), Dec. 10, 1998, at 3C. Canseco was also charged with misdemeanor battery on his second wife. See *id.* He pleaded no-contest and was sentenced to one year of probation and twenty-six weeks of counseling. See *id.*

<sup>101</sup> See generally Gordon Edes, *Strawberry's Future in Doubt, Assault Charge Is Latest Trouble*, SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 6, 1993, at 5C. Strawberry was arrested after allegedly striking his girlfriend, Charisse Simons, in the eye. See *id.* The charges were dropped when she refused to press charges. See *Strawberry Won't Face Charges*, CHI. TRIB., Sept. 21, 1993, at 5N. Previously, Strawberry had been arrested on charges of assault with a deadly weapon after he allegedly hit his wife, Lisa Strawberry, and threatened her with a handgun. See Edes, *supra*. These charges were also dropped after he agreed to enter an alcohol rehabilitation program. See *id.* Lisa Strawberry reported that Strawberry broke her nose on another occasion as well. See *id.*

<sup>102</sup> See generally Nack & Munson, *supra* note 12, at 62. Bichette admitted to hitting his pregnant, nineteen-year-old girlfriend, Marianna Peng, who is now his wife. See *id.* at 74.

<sup>103</sup> See generally Michael Kiefer, *Ex-Slugger Belle Given 90 Days in Jail for Stalking*, ARIZ. REPUBLIC (Phoenix), Aug. 25, 2006, at 4. In 2006, Albert Belle, who was retired at the time, was convicted of stalking his ex-girlfriend after going so far as to attach a GPS tracking device to her car. See *id.* He was sentenced to ninety days in jail and five years of probation. See *id.*

<sup>104</sup> See Mark Alesia, *The Story of Wil Cordero's Pattern of Abuse: Three Women, Three Accounts of Repeated Violence*, CHI. DAILY HERALD, Apr. 6, 1998, at 1.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.* His first wife, Wanda Mora, accused him of repeated beatings that left permanent scarring—including one beating while she was pregnant. See *id.* In addition, shortly after the arrest and the publication of the content of the divorce proceedings, a former girlfriend, Yamire Bayron, told reporters that Cordero had been abusive to her as well. See *id.*



information, the Red Sox suspended Cordero on June 27.<sup>107</sup> Though he returned to the line-up on July 11, the Red Sox released him on the last day of the season.<sup>108</sup> Ultimately, Cordero “plead[ed] guilty to four charges: assault and battery, assault and battery with a dangerous weapon (a telephone receiver), making a threat, and violating an emergency restraining order.”<sup>109</sup> He was given a ninety-day suspended sentence and ordered to attend forty weeks of counseling.<sup>110</sup> Cordero went on to play for other teams without any reported incidents for a few years, but he was charged with battery in a domestic violence case again in November 2002.<sup>111</sup>

Since the Cordero punishment, more teams have shown willingness to impose disciplinary action for off-field conduct such as domestic violence. Such was the case with Julio Lugo in 2003,<sup>112</sup> Julio Mateo in 2007,<sup>113</sup> and Alberto Callaspo in 2007.<sup>114</sup> However, team punishment, like league punishment, can be undermined by arbitral review. For instance, although Callaspo was originally suspended and placed on the inactive list by the Arizona Diamondbacks after being arrested for felony criminal damage and misdemeanor assault,<sup>115</sup> the Diamondbacks were forced to take him off the inactive list after nine days as a result of a grievance filed by the Players’ Union.<sup>116</sup> After the grievance was heard, Callaspo was awarded his salary back for six of the nine days.<sup>117</sup>

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<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> Mike Berardino, *Cordero Saga Still Evolving; Marlins First Baseman Ready for Fresh Start, but New Concerns Revive Checkered Past*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 12, 2004, at 1C.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.* These charges were later dropped, and the Florida Marlins, Cordero’s team at the time, did not impose any disciplinary action against him. See *id.*

<sup>112</sup> See generally Lugo Charged with Assault, Wife Treated for Injuries, ESPN.COM, May 1, 2003, <http://sports.espn.go.com/espn/print?id=1547624&type=news>. The Houston Astros released Lugo after a public fight in which he slammed his wife’s head into his car. See *id.*

<sup>113</sup> See generally Rich Rys, *Smack My Bitch Up: Major League Baseball’s Continuing Domestic Abuse Problem*, DEADSPIN.COM, June 24, 2008, <http://deadspin.com/5019197/smack-my-bitch-up-major-league-baseballs-continuing-domestic-abuse-problem>; Kinkhabwala, *supra* note 25; Rogers, *supra* note 98. The Seattle Mariners suspended Mateo for ten games after he was arrested for assaulting his wife, allegedly hitting her in the eye, choking her, and biting her lip after she told him she wanted to end the marriage. See Rogers, *supra* note 98. He was demoted to the inactive list for three weeks while undergoing counseling. See *id.*

<sup>114</sup> See Rys, *supra* note 113; Kinkhabwala, *supra* note 25; Rogers, *supra* note 98.

<sup>115</sup> See Rogers, *supra* note 98. His wife alleged that he had kicked and hit her during a fight. See *id.* This incident occurred one week after he allegedly cut the side of his wife’s face with a knife and knocked their infant son against a headboard. See Kinkhabwala, *supra* note 25. His wife returned to Venezuela to be with her family after the incident and the charges were not pursued against Callaspo. See Rogers, *supra* note 98. See also David Martin, *Spin Zones; Maybe if KC Teams Gave up Their Little Choirboy Acts, They’d Win Some Damn Games*, PITCH (Kansas City), Jan. 10, 2008.

<sup>116</sup> See Rogers, *supra* note 98.

<sup>117</sup> See *id.*

Still, some teams have taken a stance against domestic violence. The Seattle Mariners were the first to do so, developing the “Refuse to Abuse” program and implementing a strict one-strike policy against violent players.<sup>118</sup> However, since the league has not taken a stance against domestic violence, team policies remain inconsistent from one club to another. For instance, in the same time period that the Cordero, Lugo, Mateo, and Callaspo punishments were handed down, other teams chose not to punish players accused, charged, or convicted of domestic violence. High-profile examples include Bobby Chouinard,<sup>119</sup> Pedro Astacio,<sup>120</sup> Milton Bradley,<sup>121</sup> Brian Giles,<sup>122</sup> Dmitri Young,<sup>123</sup> Elijah Dukes,<sup>124</sup> and Brett Myers.<sup>125</sup>

The case of Elijah Dukes created a public outcry but still did not result in any team discipline. In May 2007, Dukes’s estranged wife, NiShea Gilbert, played a cell

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<sup>118</sup> See Rys, *supra* note 113. Julio Mateo’s immediate disciplining was an example of the one-strike policy in effect. See *id.*

<sup>119</sup> See generally Gibeaut, *supra* note 49, at 41; Rich Elliott, *Chouinards Rediscover Love, Happiness after ‘Nightmare’*, CONN. POST, June 17, 2003. Chouinard was convicted for aggravated assault after holding a gun to his wife’s head. See Elliott, *supra*. Prior to the conviction, Chouinard asked to be released by the Arizona Diamondbacks; however, he was signed by the Colorado Rockies and was allowed to serve his one-year sentence in a work-release program—released at 7 a.m. to work out with the Rockies and required to return by 5 p.m. each day. See *id.* The court later waived the last six months of his sentence. See *id.*

<sup>120</sup> See generally Gibeaut, *supra* note 49, at 41. Astacio “pleaded guilty to a misdemeanor domestic violence charge for punching his estranged pregnant wife, Ana.” *Id.* However, the Colorado Rockies did not punish him, and he started for them Opening Day. See *id.*

<sup>121</sup> See generally Rys, *supra* note 113. Police were called to Bradley’s home three times after reports of domestic violence. See *id.* He was never arrested and the Dodgers never punished him. See *id.*

<sup>122</sup> See generally Tom Krasovic, *Giles Denies Allegations, Says Suit ‘All about Money’; Padre Says He Didn’t Cause Miscarriage*, SAN DIEGO UNION-TRIB., Dec. 24, 2008, at D1. In a video played on all major sports networks and shows, Giles seemingly dragged his girlfriend, Cheri Olvera, out of a Phoenix bar and began hitting her. He entered into a plea agreement for a misdemeanor domestic violence charge stemming from this recorded incident and agreed to counseling in exchange for the charge being dropped. See *id.* The San Diego Padres did not impose any disciplinary action. See *id.* Olvera has since filed a civil lawsuit claiming that Giles abused her on multiple occasions, including when she was pregnant. See *id.* Giles has countersued and the suit was still pending as of October 8, 2009. See Debbi Baker, *Marcus Giles Facing Charge of Battery*, SAN DIEGO UNION-TRIB., Oct. 8, 2009, at D5 (also detailing a domestic battery charge against Brian Giles’s brother, Marcus, a former Padres player).

<sup>123</sup> See generally Rys, *supra* note 113. Young was charged with domestic violence after his girlfriend accused him of choking her. See *id.* After a couple of months, he was placed on the Detroit Tigers disabled list and later voluntarily left the team for “personal reasons.” *Id.*

<sup>124</sup> See Kinkhabwala, *supra* note 25; Rogers, *supra* note 98.

<sup>125</sup> See Rys, *supra* note 113; Rogers, *supra* note 98. Myers was arrested in Boston after witnesses reported that he dragged and hit his wife, Kim. Rys, *supra* note 113. Despite the arrest and reports of abuse, the Phillies started Myers in the game the next day at Fenway. *Id.* The Phillies granted Myers a paid leave of absence, and charges were ultimately dropped when Kim refused to testify against her husband. Rogers, *supra* note 98.

phone message for the *St. Petersburg Times* in which he threatened her life and that of her children; she also showed the newspaper a photo of a gun that he had sent to her cell phone.<sup>126</sup> Even before this incident, the police had been called on four different occasions to break up domestic disputes at Dukes's residence, and Gilbert had filed for two orders of protection against him.<sup>127</sup> In one public incident, Dukes had to be restrained by a middle school principal and a deputy when he attempted to approach Gilbert at the middle school where she worked.<sup>128</sup> In addition, two other women have accused Dukes of domestic abuse and he has been arrested six times—two of those arrests on charges of battery.<sup>129</sup> Despite this overwhelming evidence of extreme, violent off-field conduct, the Tampa Bay Devil Rays never punished him.<sup>130</sup> Instead, Devil Rays President Matt Silverman called it “a complicated situation” and explained, “I don't want to see him go to jail. He needs help. I really think this is going to help him. One day he will thank me.”<sup>131</sup> However, given the overwhelming evidence against Dukes, including his public outburst at a middle school, the traceable messages on Gilbert's phone, and his prior record, this would appear to be a convincing case for punishment.

Yet, it should not be surprising that teams have failed to take action against players involved in domestic violence when the league itself has not adopted a policy to address such conduct. MLB Commissioner Bud Selig has not taken a stance on domestic violence and the integrity of his league has been undermined. Individual teams do not have a profit-motive to discipline violent players when they know that those players will simply find homes elsewhere, with teams that do not have strict off-field conduct policies. Furthermore, as was evidenced by the Callaspo and Howe arbitrations, the grievance procedure routinely undermines the authority that the commissioner and teams have in disciplining their players, when and if they choose to use it. As we will see in the NBA and the NFL, utilizing the centralized disciplinary powers granted to the commissioner and restricting arbitral review result in a more consistent and fair system.

### B. NBA

The NBA CBA, like the MLB CBA, allows players to appeal their disciplinary action to a neutral arbitrator, who may occasionally undermine the commissioner's authority. Nonetheless, unlike Selig, NBA Commissioner David Stern has not been afraid to use his best interest powers to discipline players for conduct detrimental to

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<sup>126</sup> Kinkhabwala, *supra* note 25.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Rogers, *supra* note 98. The Rays eventually traded Dukes to the Washington Nationals in December 2007 after Dukes was ejected from a game for going after an umpire who called him out on strikes. Peter Kerasotis, *Are Dukes' Troubles Behind Him?*, FLA. TODAY, Feb. 24, 2008, at 1D.

<sup>131</sup> Rogers, *supra* note 98.

the sport—even if the conduct occurs off the court. Stern’s interest in addressing off-court conduct may be a function of the startlingly high arrest rate among NBA players—a records check on forty-two percent of the league’s players in the 2001–2002 season revealed that forty percent of them had either been arrested or recommended by police for indictment for a serious crime.<sup>132</sup> A similar study conducted six years earlier revealed an arrest rate of only twenty-one percent for NFL players.<sup>133</sup> Early in his tenure, Stern used his best interest authority mainly to punish players for drug abuse—for example, Stern suspended Michael Ray Richardson, Mitchell Wiggins, and Lewis Lloyd each for approximately two years after drug infractions.<sup>134</sup> He took a similarly hard stance on alcohol, banning Roy Tarpley for alcohol abuse for approximately three years only to ban him once again after he had returned to the league for a short time.<sup>135</sup> In the 1990s, Stern took action against Dennis Rodman despite the fact that Rodman’s conduct did not involve gambling, drug abuse, or alcohol problems.<sup>136</sup> Stern fined Rodman \$50,000 after he called Mormons “assholes.”<sup>137</sup> Making his stance clear, Stern said “insensitivity or derogatory comments involving race or other classifications are unacceptable in the NBA . . . . [O]ffensive remarks . . . cannot be tolerated or excused.”<sup>138</sup>

Recently, Commissioner Stern has adopted policies targeting off-court behavior, including a dress code policy and a nightclub ban.<sup>139</sup> In September 2005, Stern

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<sup>132</sup> JEFF BENEDICT, *OUT OF BOUNDS: INSIDE THE NBA’S CULTURE OF RAPE, VIOLENCE, AND CRIME* 20 (2004).

<sup>133</sup> *Id.* The NBA and the NFL have disputed these figures. See Jason Lewis, *Blacked Out*, L.A. SENTINEL, July, 17, 2008, available at <http://www.lasentinel.net/Blacked-Out.html> (discussing the perception of black athletes and the inaccurate reports of athlete criminal behavior that may result from bias). The NBA claimed that a study of only forty percent of players is incomplete and inaccurate. *Id.* Similarly, the NFL claimed that the study of its players unfairly included arrests that occurred during players’ college careers. *Id.* The NFL also highlighted that the its arrest rate is no different than any other group—a point mentioned earlier in this article. *Id.* Regardless of these valid criticisms, these studies—with their inadequacies—remain the only reports that shed any light on the arrest rate of professional athletes. This is, undoubtedly, also due to the fact that the leagues do not make information available regarding player arrests and league punishments, making it difficult to accurately report arrest and punishment statistics. Still, the studies suggest that the NBA has a higher arrest rate than the NFL and the general public.

<sup>134</sup> Lockwood, *supra* note 28, at 151.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 151–52.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 152. Commissioner Stern later backed up this statement by fining New Jersey Nets Coach John Calipari and Miami Heat Broadcaster David Halbertstam for insensitive remarks they made. *Id.*

<sup>139</sup> Lockwood, *supra* note 28, at 158–59; Brent D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 205 (2007). It should be noted that Stern has been criticized for adopting policies and punishments that are too selective and do not provide adequate due process notice to the players. Lockwood, *supra* note 28, at 166. Further, it has been argued that the unilateral imposition of these policies may not

announced a dress code policy, which requires players to wear business casual attire when engaged in team or league business and explicitly enumerates both satisfactory and unsatisfactory clothing items.<sup>140</sup> Stern implemented this policy using his best interest authority in an attempt to “soften the NBA’s hip-hop image and increase the league’s appeal to its fans.”<sup>141</sup> Likewise, in January 2007, Stern ordered the NBA’s security personnel to generate a list of nightclubs to be off-limits to players in response to a slew of shootings involving professional athletes.<sup>142</sup>

In addition to these unilaterally imposed policies, Stern has been pivotal in reshaping the CBA in recent bargaining negotiations. As mentioned previously, the CBA now includes provisions regarding team and league discipline for unlawful violence and violent misconduct that occurs off-court.<sup>143</sup> Article VI, Section 8(a) specifically identifies sexual assault and domestic violence as instances of punishable violent misconduct. Under Stern’s governance, a provision regarding firearms has also been added to the CBA—the policy requires that, “Whenever a player is physically present at a facility or venue owned, operated, or being used by a Team, the NBA, or any League-related entity, and whenever a player is traveling on any NBA-related business . . . such player shall not possess a firearm of any kind.”<sup>144</sup> Commissioner Stern has said that players should have a gun only for protecting their homes and should not be walking the streets with a weapon, even if legal and properly registered.<sup>145</sup> In anticipation of both league and team punishment, given the expanded categories of punishable behavior, the NBA CBA now includes a provision that mandates league action supersede any team discipline, thereby avoiding a case of double penalty.<sup>146</sup>

As in baseball and football, NBA athletes who were charged with or convicted of domestic violence offenses were not punished in earlier years. Prime examples

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be valid—the dress code and nightclub restrictions could be considered conditions of employment and as such would be mandatory subjects of collective bargaining. *See Showalter, supra*, at 220. If these policies cover mandatory subjects of bargaining, the policies would be subject to antitrust review since they were implemented without the benefit of collective bargaining. *See* Michael McCann, *NBA Activates Its “Security Forces” to Prohibit Players from Frequenting Nightclubs*, SPORTS LAW BLOG, Jan. 21, 2007, <http://sports-law.blogspot.com/2007/01/nba-activates-its-security-forces-to.html>. There has been no such challenge to date—likely because the policies have not yet resulted in any significant fine to a player.

<sup>140</sup> Lockwood, *supra* note 28, at 158–59.

<sup>141</sup> Showalter, *supra* note 139, at 210.

<sup>142</sup> McCann, *supra* note 139.

<sup>143</sup> NBA CBA, *supra* note 58, at art. VI, §§ 7–8.

<sup>144</sup> *Id.* at art. VI, § 9.

<sup>145</sup> Lockwood, *supra* note 28, at 162.

<sup>146</sup> NBA CBA, *supra* note 58, at art. VI, § 10(a). This provision helps avoid situations like that found in the Sprewell arbitration where the arbitrator reduced Sprewell’s suspension after finding that punishment from both the team and league was unfair. However, the NBA CBA does allow for double penalty where the player’s act or conduct is so egregious as to warrant it. *Id.* at art. VI, § 10(b).

include Robert Parish,<sup>147</sup> Marcus Webb,<sup>148</sup> Duane Causwell,<sup>149</sup> Scottie Pippen,<sup>150</sup> and Olden Polynice.<sup>151</sup> Parish, Webb, and Pippen were documented repeat offenders.<sup>152</sup> The frightening story of Parish's ex-wife, Nancy Saad, was detailed in a 1995 *Sports Illustrated* article.<sup>153</sup> During one particular incident in 1987, Saad went to Parish's hotel room to discuss their son—at the time, Saad had been estranged from Parish for a year, having left him after an incident in which he reportedly threw her down the stairs of their home and kicked her out the front door.<sup>154</sup> When she arrived at the hotel room, Parish allegedly threatened to kill her, grabbed her by the throat, threw her into the hallway, and then punched and kicked her.<sup>155</sup> Saad cannot remember many of the details after falling in the hallway, as she suffered a “closed head injury” and impaired vision, which led to chronic headaches and convulsions.<sup>156</sup> William Nack and Lester Munson, authors of the *Sports Illustrated* article, observed that Saad's

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<sup>147</sup> See Nack & Munson, *supra* note 25.

<sup>148</sup> See Moser, *supra* note 20, at 78–80. In 1993, Webb was arrested for physically assaulting the mother of his child just one week after his former girlfriend, a student at Boston College, filed rape charges against him. Webb ended up pleading guilty to a lesser charge of sexual misconduct (instead of rape) and received a thirty-day jail sentence. During his jail sentence, Webb was allowed to leave prison to stand trial for the charges of assault and battery against the mother of his child, and he eventually received a one-year suspended sentence as well as fifty-nine days of jail time, which were later dropped. Webb ultimately served only twenty-eight days for the two incidents. *Id.* Although Webb's contract with the Boston Celtics was not extended at the end of the season, it is unclear whether this was punishment or a routine business decision. See *Webb Waived by Celtics, then Arrested*, N.Y. TIMES, Mar. 19, 1993, at B12.

<sup>149</sup> See *Causwell to Enter Diversion Program*, LEDGER (Lakeland, Fla.), Feb. 26, 1995, at 5D. In 1994, Causwell was arrested after grabbing his wife in the presence of officers who had responded to an earlier call and charged with corporal injury to a spouse, battery, false imprisonment, assault, and unlawfully removing a telephone. The charges against Causwell were suspended to allow him to enter a domestic violence diversion program. *Id.*

<sup>150</sup> See Nack & Munson, *supra* note 25; Jerry Urban, *DWI Charges Against Pippen Dismissed for Lack of Evidence*, HOUSTON CHRON., May 15, 1999, at A1. In 1995, Pippen was arrested for allegedly grabbing his fiancée, Yvette DeLeone, by the arm and shoving her against a car the day after his team, the Chicago Bulls, was eliminated from the playoffs. Nack & Munson, *supra* note 25. Pippen was charged with domestic battery but the charges were dropped when DeLeone abandoned the case. Prior to this incident, DeLeone had previously reported fractures in her hand from an incident in which Pippen allegedly threw her out the front door. Pippen's former wife, Karen McCollum, had also reported to the police that Pippen hit and choked her. *Id.*

<sup>151</sup> See *Kings' Polynice Charged with Hitting Girlfriend*, VIRGINIAN-PILOT, Oct. 18, 1996, at C8. In 1996, Polynice was arrested on charges of domestic assault after his girlfriend reported he threw her against a wall. *Id.*

<sup>152</sup> See Nack & Munson, *supra* note 25 (regarding Parish and Pippen); Moser, *supra* note 20 (regarding Webb).

<sup>153</sup> Nack & Munson, *supra* note 25.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

story “demonstrates why domestic violence is viewed not only as one of America’s most critical social issues, as disabling psychologically as it is physically, but also is among the most baffling of social phenomena in its often endless repeated spin cycles of pain, retribution, contrition and more pain.”<sup>157</sup>

Although the league and individual teams began taking a stronger stance against domestic violence during the 1990s, some investigations into off-court conduct still resulted in no punishment against the player or only in indirect disciplinary consequences. For instance, Allen Iverson was not punished after he was arrested on charges for criminal trespass, simple assault, terroristic threats, and gun offenses when he entered his cousin’s apartment without permission looking for his wife who had reportedly gone into hiding after a domestic dispute that ended with Iverson throwing her out of their home.<sup>158</sup> Similarly, Jason Kidd’s and Lee Nailon’s off-court behavior did not result in direct punishment by their respective teams or by the league; however, both found themselves traded to a different team, and Nailon was benched for a period of time before the trade was completed.<sup>159</sup>

Nevertheless, the teams and the league have undertaken direct punishment in several cases. Most recently, Stern suspended Ron Artest for seven games after he pleaded no contest to infliction of injury on his wife, Kimsha Artest.<sup>160</sup> Artest was also sentenced to one hundred hours of community service and ordered to participate in a ten-day work project.<sup>161</sup> The NBA Players’ Association backed Artest and filed a grievance to have the suspension reduced to the “standard three to four games for domestic disputes.”<sup>162</sup> Stern, however, cited Artest’s history and repeat-offender status as justification for the length of the suspension and Artest ultimately served the entire seven-game suspension.<sup>163</sup> Players who have received the “standard” league

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<sup>157</sup> *Id.*

<sup>158</sup> *Sixers Star Iverson Awaits Charges of Terror, Trespass*, SAN DIEGO UNION-TRIB., July 12, 2002, at D1; *Last of Charges Against Iverson Dropped*, UNITED PRESS INT’L, Sept. 12, 2002.

<sup>159</sup> Moser, *supra* note 20, at 73–75; *Former 76er Pleads Guilty*, PHILA. INQUIRER, Sept. 21, 2006, at E6. In 2001, Kidd was arrested for punching his wife, who declined medical attention after telling the police that her injuries were “minor compared to what I normally go through.” Moser, *supra* note 20, at 73. Kidd returned to the court for the Phoenix Suns after missing four games and was traded at the end of the season. *Id.* In 2006, Nailon was arrested for domestic assault and pleaded guilty to harassment. *Former 76er Pleads Guilty*, *supra* note 159. This was not Nailon’s first arrest; in fact, he had been arrested during college after a fight with his girlfriend and had pleaded no contest to a misdemeanor assault charge. Keith Herbert, *Nailon out of Jail but Not with 76ers: The Forward, Charged with Assaulting His Wife, Is Inactive and Will Not Practice, the Team Says*, PHILA. INQUIRER, Jan. 26, 2006, at D7. Nailon was eventually traded from the Sixers to the Cleveland Cavaliers. *Former 76er Pleads Guilty*, *supra* note 159.

<sup>160</sup> Mitch Lawrence, *Artest Fights Suspension*, DAILY NEWS (N.Y.), Oct. 24, 2007, at 72.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* The NBA and the Players’ Association did, however, reach a settlement that Artest would only lose four games’ worth of salary, totaling \$255,000, instead of losing all seven games’ worth, which would have totaled \$450,000. Mitch Lawrence, *Son Not Settling*, DAILY NEWS (N.Y.), Nov. 18, 2007, at 91.

three-game suspension include Glenn Robinson,<sup>164</sup> in 2002, and Jason Richardson,<sup>165</sup> in 2003. Teams have also taken a stand, as in 2002, when the Portland Trailblazers fined Ruben Patterson \$100,000 for “conduct detrimental to the team” after he was arrested for domestic abuse.<sup>166</sup>

These developments in the NBA are encouraging because they represent a movement toward equal disciplinary treatment for conduct detrimental to the league that takes place off the court. The league is no longer sending mixed messages by banning certain off-court conduct and turning a blind eye to other off-court conduct. Further, the discretion afforded Stern to assess individual cases after investigating surrounding circumstances was endorsed by the result of the Ron Artest arbitration. Commissioner investigatory power and ultimate discretion are exceedingly important in domestic violence cases because the frequency of dropped charges make it pivotal that the commissioner be able to conduct his own investigation into the circumstances of the incident and consider repeat-offender status. However, the inconsistent arbitral awards made in the past indicate that there is a potential for the commissioner’s authority to be undermined in the NBA grievance process.

### C. NFL

Of the three leagues, the NFL has granted its commissioner the broadest disciplinary power, and the past two commissioners, Paul Tagliabue and Roger Goodell, have not been afraid to exercise this power. The first significant action regarding off-field player conduct occurred in 1997 when the NFL adopted the violent crime policy under Tagliabue’s leadership.<sup>167</sup> The adoption of this policy, renamed the Personal Conduct Policy in 2000, was largely prompted by the increasingly visible crimes of domestic violence committed by football players.<sup>168</sup> As Tagliabue declared, “I don’t think the issue is one of image. The issue is a substantive one of player conduct.”<sup>169</sup> The policy allowed the commissioner to take disciplinary action on a player charged with any violent crime (felony or misdemeanor) and it required the player to go to counseling and participate in clinical evaluations.<sup>170</sup> The policy did, however, require that the commissioner wait until the criminal justice system had concluded its process before imposing a punishment, thereby precluding

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<sup>164</sup> See *League Suspends 76ers’ Robinson*, L.A. TIMES, Oct. 28, 2003, at D6. Robinson was convicted of domestic battery and assault against his former fiancée. *Id.*

<sup>165</sup> See *Warrior Richardson Suspended Three Games*, DETROIT FREE PRESS, Oct. 23, 2003 at 3F. Richardson was convicted of a misdemeanor domestic violence charge after he assaulted his ex-girlfriend. *Id.*

<sup>166</sup> Phil Tatman, *Blazers Sock It to Patterson, Fans Growing Weary*, ORLANDO SENTINEL, Dec. 7, 2002, at D4 (noting that charges were ultimately dropped).

<sup>167</sup> See Ambrose, *supra* note 9, at 1086–87.

<sup>168</sup> *Id.*

<sup>169</sup> Gibeaut, *supra* note 49, at 39.

<sup>170</sup> See Ambrose, *supra* note 9, at 1087.



immediate action.<sup>171</sup> In the first two years, league officials reported that the number of player arrests for violent crimes dropped from thirty-eight players in 1997 to twenty-six players in 1999.<sup>172</sup>

Tagliabue also used his best interest authority to crack down on other off-field behavior. For instance, he imposed a policy to discipline players for alcohol-related convictions because of the number of drunk-driving incidents involving football players.<sup>173</sup> In many ways, Tagliabue was expanding the footprint left by Commissioner Pete Rozelle who unilaterally implemented a strict drug policy for the NFL in 1986.<sup>174</sup> Though some aspects of the drug policy were struck down when the players challenged it in arbitration, the arbitrator ultimately ruled that Rozelle had the power under the integrity of the game clause to implement the policy, so long as it did not contradict pre-existing CBA terms.<sup>175</sup>

In April 2007, Tagliabue's successor, Roger Goodell, strengthened the Personal Conduct Policy.<sup>176</sup> Though he did not drastically alter the existing conduct policy, Goodell made it clear that violators would receive longer suspensions and larger fines and indicated that he would subject teams to discipline for the violations of their employees.<sup>177</sup> Significantly, before indicating the change in policy, Goodell reached out to Gene Upshaw, then-executive director of the NFL Players' Association, to get his advice.<sup>178</sup> In addition, he sought advice from players and established a panel to facilitate this process.<sup>179</sup> Because of these efforts, the policy has enjoyed support from both league officials and players. On behalf of the Players' Association, Upshaw stated, "We believe that these are steps that the commissioner needs to take and we support the policy."<sup>180</sup> Cincinnati Bengals quarterback Carson Palmer opined, "I think [the policy] will [help]. With all of the things that have been happening recently, I think it will be good and hopefully give the league a little better image. I hope that it works and that guys abide by the rules and do what's right."<sup>181</sup>

Differing from the previous policy, the new Personal Conduct Policy states:

It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is

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<sup>171</sup> See Mahone, *supra* note 78, at 185–86.

<sup>172</sup> Gibeau, *supra* note 49, at 108.

<sup>173</sup> See Jefferson, *supra* note 3, at 361.

<sup>174</sup> See *id.* at 369.

<sup>175</sup> *Id.* at 369–70.

<sup>176</sup> Ambrose, *supra* note 9, at 1076.

<sup>177</sup> *Id.* at 1076–77.

<sup>178</sup> See *Goodell Strengthens NFL Personal Conduct Policy*, USATODAY.COM, Apr. 11, 2007, [http://www.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy\\_N.htm?csp=34](http://www.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm?csp=34).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

responsible, promotes the values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime.<sup>182</sup>

Goodell has made this clear: “To some extent, what we’re looking at is if there are a number of players that have repeat offenses, that will be something that our players and clubs will feel at some point we need to act before the judicial system acts.”<sup>183</sup> Domestic violence is specifically listed as a crime for which discipline may be imposed, as is “conduct that imposes inherent danger to the safety and well being of another person; and [c]onduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”<sup>184</sup>

The policy couples disciplinary action with rehabilitative measures by requiring a formal clinical evaluation for anyone “arrested, charged or otherwise appearing to have engaged in [prohibited] conduct,” and providing for treatment such as counseling where deemed necessary depending on the results.<sup>185</sup> In determining whether certain conduct warrants discipline, the commissioner has the authority to conduct an investigation and, upon its conclusion, he has the “full authority to impose discipline as warranted.”<sup>186</sup> In one of the first punishments handed down under the new policy—a one-year suspension to Adam “Pacman” Jones, despite the fact he had not been convicted of a crime<sup>187</sup>—Goodell stated, “The highest standards of conduct must be met by everyone in the NFL because it is a privilege to represent the NFL, not a right. These players, and all members of our league, have to make the right choices and decisions in their conduct on a consistent basis.”<sup>188</sup> As some have pointed out, this rhetoric and these disciplinary actions are reminiscent of Judge Landis’s early governance of MLB player conduct.<sup>189</sup>

The NFL reported that, in the first year that the new Personal Conduct Policy was in effect, the number of incidents decreased by twenty percent.<sup>190</sup> Six players were suspended and three people were fined.<sup>191</sup> The *San Diego Union-Tribune* confirmed this twenty percent figure, finding that there were sixty-two arrests or

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<sup>182</sup> NATIONAL FOOTBALL LEAGUE, 2008 PERSONAL CONDUCT POLICY 1, *available at* <http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFL%20Personal%20Conduct%20Policy%202008.pdf> [hereinafter NFL Conduct Policy].

<sup>183</sup> Judy Battista, *Goodell Says He’ll Punish NFL’s Problem Players*, N.Y. TIMES, Mar. 27, 2007, at D4.

<sup>184</sup> NFL Conduct Policy, *supra* note 182, at 2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *See* Battista, *supra* note 183. Though Jones had not been convicted of a crime, he had been involved in ten incidents with the police since being drafted in 2005. *Id.*

<sup>188</sup> Lockwood, *supra* note 28, at 164.

<sup>189</sup> Ambrose, *supra* note 9, at 1104.

<sup>190</sup> Paul Kuharsky, *NFL Says Player-Conduct Policy Working*, TENNESSEAN, Mar. 13, 2008.

<sup>191</sup> *Id.* (noting that the six players suspended in the first year were Adam Jones, Chris Henry, Terry “Tank” Johnson, Michael Vick, Fred Evans, and Robert Reynolds).

citations in the first year under the policy compared to seventy-six arrests or citations in the previous year.<sup>192</sup> The *Union-Tribune* also found that certain teams, the San Diego Chargers and the Cincinnati Bengals, had been successful in reining in player misconduct.<sup>193</sup> Much of this impact has been achieved by the new focus that has been brought to the draft and to screening potential recruits. Bengals Coach Marvin Lewis indicated that the team changed its strategy by focusing on character issues, stating, “There’s [sic] too many other guys. We’re spending too much time trying to change habits instead of coaching good guys.”<sup>194</sup>

The impact of the Personal Conduct Policy implemented by Tagliabue is also apparent when comparing league discipline of alleged domestic abusers before the conduct policy was in place to league discipline after the policy was in place. Prior to 1997, no NFL commissioner had disciplined a convicted domestic abuser<sup>195</sup> even though fifty-six current and former NFL players, and eighty-five college players, were reported for violent behavior toward women between January 1989 and November 1994.<sup>196</sup> In 1994, Greg Aiello admitted that Tagliabue had only disciplined one player for a “gender violence-related offense,” and this was when he denied reentry into the league to ex-Eagles offensive tackle Kevin Allen in 1990, after he had finished serving a thirty-three month jail term for rape.<sup>197</sup> Former football greats who have escaped league punishment despite being accused or found guilty of domestic violence charges include Harvey Armstrong,<sup>198</sup> Scott Davis,<sup>199</sup> Mark Gastineau,<sup>200</sup> Vance Johnson,<sup>201</sup> Clarence Kay,<sup>202</sup> Lorenzo Lynch,<sup>203</sup> Warren Moon,<sup>204</sup> Freddie Joe Nunn,<sup>205</sup> Gerald

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<sup>192</sup> Schrottenboer, *supra* note 18.

<sup>193</sup> *Id.*

<sup>194</sup> Sam Farmer, *Character Will Count in the NFL Draft; With a Stricter Conduct Policy, Teams Will Be Cautious About Making the Right Decisions. Drug Use, Violence Are Issues Among Top Prospects*, L.A. TIMES, Apr. 26, 2007, at D3.

<sup>195</sup> Jefferson, *supra* note 3, at 362.

<sup>196</sup> Note, *supra* note 11, at 1050.

<sup>197</sup> Brubaker, *supra* note 5.

<sup>198</sup> *See id.* Armstrong was charged with battery, criminal confinement, and sexual battery against his ex-girlfriend. He pleaded guilty to criminal confinement and received a suspended sentence. *Id.*

<sup>199</sup> *See id.* Davis has been arrested three times on battery charges against women, but has never been convicted and denies the allegations. *Id.*

<sup>200</sup> *See id.* Steve Jacobson, *The Last Word: Gastineau Remains Saddest Sack of All*, NEWSDAY (N.Y.), Aug. 19, 2001, at C25 (discussing Gastineau’s criminal record, including the abuse of multiple women over the span of two decades).

<sup>201</sup> *See* Brubaker, *supra* note 5. Johnson was arrested and jailed after ramming his car into his estranged wife’s car while she was inside. He has since admitted to repeatedly beating his first two wives. *Id.*

<sup>202</sup> *See id.* Kay was arrested in 1990 on domestic violence charges, but the case was later dismissed. In 1993, his ex-girlfriend, who had reported the incident in 1990, contacted police to report numerous incidents in which he had broken into her apartment and assaulted her. She obtained a temporary restraining order and, when Kay violated it, he was placed on probation. *Id.*

Perry,<sup>206</sup> O.J. Simpson,<sup>207</sup> John Stephens,<sup>208</sup> Aaron Wallace,<sup>209</sup> Dan Wilkinson,<sup>210</sup> and Otis Wilson.<sup>211</sup>

Though the league was not punishing players such as these prior to the implementation of the Personal Conduct Policy, some teams led the way by imposing punishments of their own. In 1994, the Kansas City Chiefs released Tim Barnett shortly after he was arrested on a third sexual assault charge that involved a fourteen-year-old girl.<sup>212</sup> In 1995, the Miami Dolphins took an unprecedented stance by placing Irving Spikes on probation after his *first* arrest on domestic battery charges.<sup>213</sup> Coach Don Shula said, “[T]he Dolphins will not tolerate that type of behavior” and

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<sup>203</sup> See Dabbs, *supra* note 1, at 185; Brubaker, *supra* note 5. Lynch was sentenced to a work-release program after violating his probation by injuring his girlfriend. Brubaker, *supra* note 5. The Arizona Cardinals assistant coach Rob Ryan visited and reviewed game strategies with Lynch while he was in jail. *Id.*

<sup>204</sup> See Kate Murphy, *Jury Rapidly Acquits Moon of Spousal Abuse Charges*, N.Y. TIMES, Feb. 23, 1996, at B12; Nack & Munson, *supra* note 25; Note, *supra* note 11, at 1048–49. Moon was acquitted of domestic violence charges after his wife, Felicia Moon, urged the prosecutor to drop the charges and later altered her testimony on the stand. Murphy, *supra* note 204. Moon was acquitted despite the fact that he had publicly stated “this was a case of domestic violence.” Note, *supra* note 11, at 1049. One of the jurors later stated, “There’s some sort of slapping in most marriages.” Murphy, *supra* note 204.

<sup>205</sup> See Brubaker, *supra* note 5. Nunn was arrested and charged with misdemeanor assault against his estranged wife, but the charge was dismissed when Nunn agreed to enter an anger-control program. *Id.*

<sup>206</sup> See *id.* Perry served jail time and was involved in two civil lawsuit settlements—each involving the abuse of women. *Id.*

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* His ex-wife, Kim Williams, has accused him of repeated domestic violence. *Id.* He was later charged with raping a woman in Kansas City, which resulted in a conviction of sexual assault, five years’ probation, and a requirement that he register as a sex offender. Taibbi, *supra* note 26.

<sup>209</sup> See Brubaker, *supra* note 5. Wallace made a \$60,000 settlement with a woman who alleged he had sexually assaulted her. *Id.*

<sup>210</sup> See Alex Marvez, *Dan ‘Big Daddy’ Wilkinson’s Career is at the Crossroads*, DAYTON DAILY NEWS, July 5, 1996, at 1D. Wilkinson pleaded no contest to a domestic violence charge and received a six-month suspended sentence and two years probation. *Id.*

<sup>211</sup> See *Ex-Bear Otis Wilson Pleads Guilty to Spouse Abuse*, JET, Oct. 17, 1994, at 51. Wilson pleaded guilty to domestic battery after striking his wife in the face. *Id.* He was fined \$500 and was required to attend counseling. *Id.*

<sup>212</sup> Brubaker, *supra* note 5. Prior to this incident, he had received a 10-day sentence for receiving a second domestic violence-related conviction in thirteen months. *Id.*

<sup>213</sup> See Note, *supra* note 11, at 1055 n.54; Donna Pazdera, *Spikes Must Avoid Wife, Get Counseling: Back Jailed For Night On Battery Charge; Shula Orders Probation*, SUN-SENTINEL (Fort Lauderdale, Fla.), Aug. 28, 1995, at 1C. The Dolphins also required Spikes to enter counseling and reserved the right to further discipline him depending on the outcome of the criminal charges. Note, *supra* note 11, at 1055 n.54. However, in the end, Spikes did not miss a game. *Id.*

deemed Spikes's actions to be "conduct detrimental to the team."<sup>214</sup> In 1997, Patrick Bates was released by the Atlanta Falcons after charges were filed against him for abuse against a woman.<sup>215</sup>

Since 2000, many more players have been punished by their teams or by the league. In 2000 alone, Corey Dillon, Rod Smith, and Dana Stubblefield were fined and Mario Bates, Mustafah Muhammad, and Denard Walker were suspended for one or two games—all for domestic violence incidents.<sup>216</sup> In a much-publicized incident, Michael Pittman was suspended for three games in 2004 after ramming his Hummer into a car driven by his wife and also carrying his infant child and babysitter.<sup>217</sup> Since Pittman's arrest and punishment, eight more players have received suspensions by the league for domestic violence.<sup>218</sup>

At the beginning of the 2008 season, Denver Broncos' receiver Brandon Marshall was suspended for incidents related to domestic violence.<sup>219</sup> The NFL suspended him for three games when he was charged with misdemeanor battery against his former girlfriend, but this suspension was reduced to one game upon appeal.<sup>220</sup> Though the incident occurred in March, charges were not officially filed until September.<sup>221</sup> The NFL indicated that further punishment could be warranted depending on the outcome of the case;<sup>222</sup> however, Marshall was ultimately acquitted of the two misdemeanor battery charges in August 2009.<sup>223</sup> While this was the first

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<sup>214</sup> Pazdera, *supra* note 213. Shula indicated he made the decision "based on what [he knew] about the case" and said he "[hoped] it [would] send a message." *Id.*

<sup>215</sup> *Falcons Dump Safety*, N.Y. TIMES, Apr. 24, 1997, at B20. *But cf.* Ron Cook, *Bennett Shines in Light of His Second Chance*, PITTSBURGH POST-GAZETTE, Jan. 26, 1999, at C1 (also detailing Atlanta Falcon Cornelius Bennett's non-punishment in 1997 after being charged with rape, sodomy, unlawful imprisonment, and sexual abuse and pleading to a reduced charge of sexual misconduct).

<sup>216</sup> *See NFL Players Arrested in 2000*, SAN DIEGO UNION-TRIB., Jan. 22, 2001, at D4.

<sup>217</sup> Gerry Dulac, *Domestic Violence Difficult to Gauge; Dropped Charges, Few NFL Penalties*, PITTSBURGH POST-GAZETTE, Mar. 12, 2008, at D1.

<sup>218</sup> *See id.* (reporting that seven players received one-game suspensions between Pittman's suspension and when the article was written, in March 2008). Since March 2008, Brandon Marshall has also received a suspension. Lindsay H. Jones, *Marshall Charged in March Case*, DENVER POST, Sept. 19, 2008, at CC1.

<sup>219</sup> Even more recently, in 2009, Larry Johnson was given a two-week suspension by the Kansas City Chiefs for conduct detrimental to the team after he criticized the coaching staff and used a homophobic slur. Rich Campbell, *Grossman Signing Allows 'Skins QB Options*, FREE LANCE-STAR (Fredericksburg, VA), Mar. 18, 2010. However, perhaps playing into this decision, Johnson had previously been arrested four times for incidents related to domestic violence and pled guilty to two counts of disturbing the peace for separate incidents involving women at nightclubs. *Id.*

<sup>220</sup> Jones, *supra* note 218.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Lindsay H. Jones, *Marshall Cleared of Battery*, DENVER POST, Aug. 15, 2009, at C1. It should, however, be noted that the jury came to this conclusion despite the fact that seven photographs of the mouth, face, neck, eye, and thigh of Rasheedah Watley, the alleged victim,

time Marshall faced trial on domestic abuse charges, it was by no means the first reported incident.<sup>224</sup> The police had been called to Marshall's house on seven prior occasions involving domestic disputes—he was charged with domestic violence and false imprisonment on one of those occasions, but the charges were later dropped.<sup>225</sup> This is a familiar pattern and one that Commissioner Goodell undoubtedly took into consideration in handing down his initial three-game suspension prior to a conviction. As addressed below in Part V of this paper, a pattern of abusive behavior (or a pattern of any criminal conduct that does not result in a conviction for any number of reasons) can guide a commissioner's decision to punish in much the same way as a conviction can—both decrease the likelihood that a player will be punished for conduct he did not commit.

Though the NFL's conduct policy inevitably grants considerable discretion to the commissioner, this discretion is what enables the commissioner to assess each situation on its own merits and take into consideration patterns of abusive behavior and criminal conduct—even when there have not been convictions. While not undermining a team's individual ability to discipline its players, the policy enables the league to take action and thereby reduces erratic and inconsistent punishments, like those found in baseball. The fact that commissioner decisions may not be appealed to an impartial arbitrator also enables the system to run efficiently and prevents the commissioner's authority from being undermined. Nonetheless, the ability of a player to appeal directly to the commissioner allows some leeway for players as evidenced by the fact that Commissioner Goodell heard Marshall's appeal and was convinced by what he heard that the three-game suspension should be reduced to one. Since the disciplinary measures are coupled with rehabilitative tactics, such as counseling, the NFL's policy is both strict and compassionate—unruly, violent players are not allowed to play in the NFL; however, second chances exist.

#### **IV. POTENTIAL PROBLEMS WITH THE NFL'S PERSONAL CONDUCT POLICY**

Though it is tempting to simply advise MLB and the NBA to adopt a policy similar to the NFL's Personal Conduct Policy, there are some potential problems with the policy and, therefore, some improvements that can be made. Criticisms of the policy include the fact that the policy was never incorporated into the NFL's CBA, convictions are not necessary for punishment, and due process rights are not expressly ensured.

Although Goodell reached out to the Players' Association and received feedback from the players and then-executive director Gene Upshaw, the current conduct policy was never incorporated into the CBA. Since this is a bargaining relationship

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taken on two different occasions were entered as evidence of Marshall's guilt. *Id.* In addition, Watley had sought a temporary protective order against Marshall. *Id.* According to reports, the defense argued that Watley was volatile and trying to extort money. *Id.*

<sup>224</sup> See Lindsay H. Jones et al., *Marshall's Transgressions*, DENVER POST, June 29, 2008, at C4.

<sup>225</sup> See *id.*

governed by labor law, the commissioner may unilaterally implement rules regarding permissive subjects, but cannot unilaterally implement rules regarding mandatory subjects—wages, hours, and other terms and conditions of employment.<sup>226</sup> Failure to negotiate with the Players' Association regarding mandatory subjects is “a violation of the duty to collectively bargain and is an unfair labor practice.”<sup>227</sup> Though it is often unclear whether rules affect “other terms and conditions of employment,”<sup>228</sup> case law indicates that an employer's ability to enact a policy that would result in suspensions or fines is a term or condition of employment.<sup>229</sup> Despite this likely interpretation, the commissioner has a good argument that the Players' Association “waived its right to bargain collectively over such a policy” because it granted the commissioner authority to discipline players and enact such policies under Article XI of the CBA and under the NFL player contract.<sup>230</sup> Thus, a challenge to the player conduct policy would likely be denied; however, the policy would be decidedly less likely to be challenged if it were incorporated into the CBA.

Another common concern is that the new conduct policy allows the commissioner to discipline players who have not been convicted of a crime.<sup>231</sup> There have been examples when league commissioners have preemptively punished players only later to find the players were innocent. For example, in 1986, Green Bay Packers' wide receiver James Lofton faced rape charges.<sup>232</sup> The NFL suspended him for the last game of the regular season, though he was acquitted in the off-season.<sup>233</sup> Similarly, in 1997, Dallas Cowboys Michael Irvin and Erik Williams were accused of sexual assault and later found innocent.<sup>234</sup> Though the league did not punish them prior to the determination of their innocence, which occurred when the woman recanted her story,<sup>235</sup> the league would likely have suspended them under the current

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<sup>226</sup> See Showalter, *supra* note 139, at 218.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Jefferson, *supra* note 3, at 364.

<sup>230</sup> *Id.* at 366.

<sup>231</sup> See Jarrett Bell, *NFL Comes Down Hard on Jones, Henry: Titan Suspended for Season, Bengal for Eight Games*, U.S.A. TODAY, Apr. 11, 2007, at 1C (noting that Warren Sapp openly wondered aloud what rule Pacman Jones had broken when Commissioner Goodell suspended him for a year after ten run-ins with the police but without any convictions).

<sup>232</sup> Ambrose, *supra* note 9, at 1105.

<sup>233</sup> *Id.* The league acknowledged its mistake and paid Lofton's salary for the missed game. *Id.*

<sup>234</sup> See Sam Howe Verhovek, *A Woman's False Accusation Prompts Reflection*, N.Y. TIMES, Jan. 13, 1997, at C1.

<sup>235</sup> *Id.* The police announced that they “determined conclusively that the allegations [were] not true” after finding inconsistencies in the woman's story and after she recanted. It was shown that Irvin was not at Williams's house on the night of the alleged incident. *Id.* However, some friends of the woman, Nina Shahravan, believe that she was indeed assaulted—medical reports showed bruising and abrasions “possibly consistent” with rape. *Id.* Williams had been charged with rape on a prior occasion but reached an out-of-court settlement with the victim who declined to press criminal charges. *Id.*

conduct policy. Given that domestic violence charges frequently result in dropped charges or in no charges at all, many domestic violence advocates would support a policy under which the commissioner could punish alleged abusers when there is evidence suggesting abuse occurred, such as medical injury reports or multiple 911 calls. Nonetheless, the fear of an innocent player losing valuable playing time and receiving public scorn is valid.

Lastly, leagues must grant players certain due process rights in disciplinary proceedings. Though leagues are not bound by constitutional due process, commissioners must still act with “inherent fairness and consistency with past practice.”<sup>236</sup> This is particularly important for the commissioner’s investigation into alleged off-field conduct. The commissioner may not suspend or fine a player without “investigation, consultation, and deliberation.”<sup>237</sup> The commissioner must also complete his duties impartially, which requires that rules are applied uniformly.<sup>238</sup>

## V. PROPOSALS FOR LEAGUE-WIDE PERSONAL CONDUCT POLICIES

While the NFL’s Personal Conduct Policy has largely been viewed as a success, the constraints and potential problems discussed above suggest that a few alterations may enhance the policy’s perceived fairness and overall effectiveness. Like the NFL, MLB and the NBA should implement league-wide policies that address violent off-field conduct; however, these policies should limit the commissioner’s discretion by providing sentencing guidelines and incorporate provisions that ensure due process and prohibit double jeopardy. These policies should be incorporated into the CBAs of the respective leagues.

As exemplified by the inconsistent punishments doled out by MLB clubs for various off-field conduct, domestic violence and other off-field violent behavior is most efficiently dealt with by league-wide policies and punishment. Leagues are more likely to have the capacity to “establish a system with adequate due process protections,”<sup>239</sup> and they are more likely to retain internal consistency from case to case. While clubs may certainly have their own initiatives to combat domestic violence,<sup>240</sup> it is against their economic interest to discipline players who have been contributing to team success—league punishment, on the other hand, reduces the temptation to grant leniency to some players while not to others.<sup>241</sup> One thing that

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<sup>236</sup> Gibeaut, *supra* note 49, at 102.

<sup>237</sup> Ambrose, *supra* note 9, at 1089.

<sup>238</sup> See Mahone, *supra* note 78, at 201–02.

<sup>239</sup> Note, *supra* note 11, at 1056.

<sup>240</sup> For instance, the Cincinnati Bengals enlisted a psychologist to address the team after a player was arrested for abusing his pregnant girlfriend. Moser, *supra* note 20, at 84. The Seattle Mariners have implemented a “Refuse to Abuse” program, bringing awareness to the issue of domestic violence. Rys, *supra* note 113.

<sup>241</sup> It is important to note that the NFL is a revenue-sharing league, so one could certainly argue that the league as a whole may still show leniency toward its better players in order to keep overall revenue up. However, the overall impact of the suspension of one player on the



individual clubs might choose to do is to add special conduct clauses to individual contracts for players that have previously been charged with certain offenses, including violence against women.<sup>242</sup> Regardless of such possible team action, the league is in the best position to uniformly implement a policy against violent off-field conduct.

While granting the commissioner discretion to investigate and address player misconduct is necessary in combating off-field player violence and in instituting punishment, it is possible to narrow this discretion. Neither the NFL Personal Conduct Policy nor the NBA CBA provision addressing violent conduct provides sentencing guidelines.<sup>243</sup> One author has suggested that “the [NFL] could detail that a player committing a minor offense under the conduct policy is subject to a one to four game suspension with a fine of no more than \$100,000. For more serious offenses, a player would receive a suspension of four to eight games and a fine no larger than \$250,000, and so forth. The league could then detail non-exclusive lists of what constitutes minor and serious offenses.”<sup>244</sup> The lists distinguishing minor offenses from serious offenses should use as guidance the generally accepted distinction between misdemeanors and felonies. Unfortunately, under this system alone, the only off-field conduct punished is that which results in a conviction.

In order to remedy this problem, the personal conduct policy should include additional sentencing guidelines for reprehensible conduct that does not result in conviction. For such conduct, the league should implement a “three strikes, you’re out” policy under which a player would be suspended for a minimum of one game following a third transgression.<sup>245</sup> A “transgression” should include incident reports and arrests, even when charges are later dropped, and convictions. Upon a fourth transgression, the player would be suspended for a minimum of two games, for a minimum of three games upon a fifth transgression, and so forth—though it should be noted that the number of games missed may vary by league to make the penalty proportionate.<sup>246</sup> Given the shorter season, missing two NFL games is undoubtedly a more severe punishment than missing two MLB games.

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league is significantly less than the impact that player’s absence would have on his particular team.

<sup>242</sup> Dabbs, *supra* note 1, at 185.

<sup>243</sup> Note that the NBA CBA does provide a guideline for violent felony convictions, mandating a minimum ten-game suspension. NBA CBA, *supra* note 58, at art. VI, § 7.

<sup>244</sup> Ambrose, *supra* note 9, at 1111. See also Joel Michael Ugolini, *Even a Violent Game Has Its Limits: A Look at the NFL’s Responsibility for the Behavior of Its Players*, 39 U. TOL. L. REV. 41, 54 (2007) (comparing the specific provisions of the NFL’s drug policy to the vague language of the personal conduct policy).

<sup>245</sup> This, of course, would not prevent the league or a team from punishing a player before three transgressions when there is ample evidence of criminal behavior. Rather, it provides a mandatory punishment upon three transgressions, regardless of prior punishment.

<sup>246</sup> The three-strikes policy for conduct deemed detrimental to the league but that does not result in conviction would operate in conjunction with the standard guidelines for criminal convictions. A player would not be punished under both systems; however, a conviction that results in punishment would count as a transgression for the purposes of tallying the minimum

NFL players have already voiced support for a three-strikes policy.<sup>247</sup> Since domestic violence charges rarely result in conviction, a three-strikes policy would be particularly effective for this offense. While there is always the fear that, without conviction, an innocent player may be punished, a three-strikes policy would help eliminate the chances of this occurring.<sup>248</sup> By narrowing the commissioner's discretion through the use of sentencing guidelines, the availability of appeal to a neutral arbitrator would not be necessary and should not be allowed, which means the grievance procedure in the MLB and NBA CBAs would need to be restructured. This structure would enhance the commissioners' authority while limiting the ultimate discretion at his disposal.

In addition to limiting the commissioner's discretion by implementing sentencing guidelines and a three-strikes rule, the policy should expressly address due process and double jeopardy concerns. As mentioned earlier, double jeopardy is already explicitly addressed in the NFL and NBA CBAs and should be included in the MLB policy as well. A simple provision dictating that league action supersedes team action will attend to any concern that a player will be punished by both team and league. Inclusion of due process rights is slightly more complicated, given that the standards by which leagues are held are much vaguer than traditional, constitutional due process rights. Still, any league disciplinary policy should ensure that it will be applied uniformly and that punishment may not be imposed without investigation, consultation, and deliberation. Establishing sentencing guidelines is the best way to ensure that the policies are applied uniformly, though the policy should also expressly state that the commissioner must consider past punishments for similar offenses in determining the ultimate punishment in any given case. The policy should also indicate that thorough investigation and consultation will include a discussion with the player, in order for the player to present his account of the incident, as well as consideration of any evidence the player presents that runs contrary to the allegations.

The policy will be safe from judicial challenge if it is incorporated in the MLB, NBA, and NFL CBAs, like the current violent conduct provision in the NBA CBA. Since the Players' Associations would be able to bargain for other objectives in return

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number of games by which the player would be suspended. For instance, if the police file three incident reports after having been called to a player's house in response to reports of abuse, that player will be punished for a minimum of one game under the three-strikes policy. If, then, the player is convicted of a separate crime, he will be punished under the conviction policy. If, yet again, the player has a police report filed upon reports of abuse, he will have five strikes against him and will be subject to a minimum suspension of three games under the three-strikes policy.

<sup>247</sup> Ugolini, *supra* note 244, at 56.

<sup>248</sup> Again, the commissioner could always punish a player after just one incident if, upon investigation, the commissioner finds the evidence to require such punishment. However, the three-strikes policy would ensure that a player could not continue abuse, even if prior incidents have been deemed minor and therefore have not been punished. For instance, Brandon Marshall, who had police come to his house on seven occasions after reports of domestic disputes, would have been punished more than once prior to his most recent transgression, which resulted in his first one-game suspension.

for agreeing to the conduct policy's inclusion in the CBA, the policy would be safely protected from antitrust law by the non-statutory labor exemption and it would be less likely to be challenged by the players because they would have consented to it through the Association. In addition, allowing the policy to be negotiated gives the players an opportunity to help shape the domestic violence policy and the rules that will govern their behavior.<sup>249</sup> The disciplinary reform would then be a collaborative effort and would hopefully lead to a policy by which the players will be more likely to abide.

## VI. CONCLUSION

Though the O.J. Simpson trial brought attention to the problem of domestic violence and athletes over a decade ago, there remains much to be done in deterring such behavior. While the leagues continue to punish gambling, drug abuse, and derogatory remarks, other off-field conduct, such as domestic violence, has been largely ignored. It is clear that MLB has done the least in confronting this problem, having yet to punish a player for domestic violence. One wonders whether Commissioner Selig has learned his lesson from baseball's "Steroid Era," which emerged after he refused to take any significant action against substance abuse despite the evidence of its prevalence in his league. Commissioner Stern has followed the NFL's lead in cracking down on player conduct; however, the NBA would be better served by adopting a more specific league-wide policy and by eradicating the inconsistency that results from the current grievance procedure. The NFL and, specifically, Commissioner Goodell have paved the way for the existence of a better sports league—one that celebrates its players' greatness but does not ignore criminal behavior. While domestic violence remains a difficult issue for professional sports leagues to tackle, given the frequency of dropped charges and its image as a private affair, it may nonetheless be addressed through specific policies and through the use of commissioners' authority to preserve the integrity of the game.

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<sup>249</sup> Admittedly, NFL players did have an opportunity to help shape the Personal Conduct Policy since Commissioner Goodell sought their advice.