

# DISCIPLINING THE DISCIPLINARY SYSTEMS IN PROFESSIONAL SPORTS: AN ATTEMPT TO FIX THE ARBITRARY AND OVERREACHING DISCIPLINARY POWERS OF SPORTS COMMISSIONERS

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## INTRODUCTION

*“[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”<sup>1</sup>*

Imagine a powerful Chief Executive Officer (CEO) of a multi-billion dollar company, such as Coca-Cola. Now imagine that this CEO’s unique skill set only allows him to serve as the CEO for Coca-Cola because his skills are completely non-transferrable to other CEO positions. If this CEO were not running Coca-Cola, he might have to flip burgers at McDonald’s or stock groceries to earn a living. In addition, imagine that this CEO is only physically capable of operating as a CEO for a maximum of fifteen years due to limitations of his physical abilities caused by a debilitating muscular disease.

Imagine also that a single United States government agent is in charge of this CEO’s career, and can, at will, fine, suspend, or ban the CEO from work. The CEO’s business life is completely at the government agent’s mercy. Imagine further that the CEO is being compensated twenty million dollars per year. If the government agent wanted to suspend or terminate the CEO’s employ-

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<sup>1</sup> *In re Nat’l Basketball Ass’n on behalf of Player Latrell Sprewell and Warriors Basketball Club and Nat’l Basketball Ass’n*, 591 P.L.I./Pat (Pub. L. Inst.) 469 (2000) (Feerick, Arb.) [hereinafter *Sprewell Arbitration Case*] (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951)).

ment, should the CEO be accorded any form of due process? Should the government agent be able to terminate the CEO with no appeal rights, kicking the CEO to the curb, leaving him helpless, without any transferrable skills to earn a living in a different industry as his precious skills deteriorate? What else should the CEO do while his valuable skills erode away during this short time period when he is capable of performing his duties?

The above hypothetical illustrates the precise issue that exists in the world of professional sports. Athletes in professional sports leagues often find their professional lives at the mercy of their league's commissioner. Athletes in professional sports leagues are analogous to the CEO in the above hypothetical, while league commissioners are analogous to the government agent. Procedures for commissioner discipline of athletes vary among the professional sports leagues,<sup>2</sup> but every league has policies whereby commissioners can unilaterally discipline their players without players having the opportunity to appeal to neutral grievance arbitrators. While it is easy not to take athletes seriously as employees—they play children's games for millions of dollars—this misses the broader point. Athletes are uniquely skilled laborers whose skills are non-transferable to any other industry and whose physical abilities are transient.

Baseball arbitrator George Nicolau<sup>3</sup> argues that baseball fundamentally errs in justifying punishment of players by holding them out as role models<sup>4</sup> because, although they may be more physically gifted than welders or truck drivers, they are ordinary people.<sup>5</sup> Nicolau says, "I don't know that people look at them as role models . . . [t]hey look at them as great players."<sup>6</sup> In addition, athletes' average job-lives and opportunities for employment are significantly shorter than other workers in the workforce, as they

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<sup>2</sup> The leagues include the National Football League, National Basketball Association, Major League Baseball, and National Hockey League.

<sup>3</sup> George Nicolau served as Major League Baseball's chairman from 1986–1995. NMB.gov, George Nicolau, [http://www.nmb.gov/arbitrator-resumes/nicolau-george-gn\\_res.pdf](http://www.nmb.gov/arbitrator-resumes/nicolau-george-gn_res.pdf).

<sup>4</sup> In a famous Nike commercial, NBA star Charles Barkley explained, "I am not a role model. I'm not paid to be a role model. I am paid to wreak havoc on the basketball court. Parents should be role models. Just because I dunk a basketball doesn't mean I should raise your kids." Youtube.com, Nike Air commercial Charles Barkley (Mar. 9, 2007), <http://www.youtube.com/watch?v=nMzdAZ3TjCA> (last visited Nov. 11, 2009).

<sup>5</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 (2000).

<sup>6</sup> *Id.*

can only perform while they are physically able.<sup>7</sup> Therefore, athletes need to be protected against unilateral rule by powerful league commissioners. This Note will explore where the line must be drawn between unilateral commissioner discipline and arbitration for player grievances in the National Football League (“NFL”), National Basketball Association (“NBA”), Major League Baseball (“MLB”), and National Hockey League (“NHL”).

In the four major American sports leagues, the NFL, NBA, MLB, and NHL, Collective Bargaining Agreements (CBAs)<sup>8</sup> between players and owners govern league conduct.<sup>9</sup> These CBAs discuss the procedures through which discipline is imposed and players’ grievances are handled.<sup>10</sup> Each league CBA grants certain disciplinary authority to league commissioners by which they can exert almost unilateral authority.<sup>11</sup> The CBAs provide that all other grievances where authority is not granted solely to the Commissioner will be brought before arbitration panels.<sup>12</sup> The sports leagues vary in how much authority they grant their commissioners, with the NFL empowering its Commissioner the most.<sup>13</sup>

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<sup>7</sup> While other industries that require physical labor require workers to be “physically able,” the unique physical ability necessary to perform as a professional athlete is far more fleeting than other industries. For example, the average career of a professional baseball player is 5.6 years, and only one percent of professional baseball players play for more than twenty years. Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES, July 15, 2007, at 6, available at <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>. The average length of an NFL career is only 3.5 years. NFL Players Association, NFL Hopeful Frequently Asked Questions, <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=349&pid=0&type=1> (last visited Nov. 11, 2009).

<sup>8</sup> Collective bargaining consists of negotiation between an employer and a group of employees to determine the conditions of employment. The result of collective bargaining procedures is a collective agreement. Employees are often represented in bargaining by a union or other labor organization. Cornell University Legal Information Institute, [http://topics.law.cornell.edu/wex/collective\\_bargaining](http://topics.law.cornell.edu/wex/collective_bargaining) (last visited Feb. 26, 2009).

<sup>9</sup> National Football League Collective Bargaining Agreement (2006), available at <http://www.nflplayers.com> (follow “CBA” hyperlink) [hereinafter NFL CBA]; National Basketball Association Collective Bargaining Agreement (2005), available at [http://www.nbpa.com/cba\\_articles.php](http://www.nbpa.com/cba_articles.php) [hereinafter NBA CBA]; Major League Baseball Collective Bargaining Agreement (2006), available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) [hereinafter MLB CBA]; National Hockey League Collective Bargaining Agreement (2005), available at <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL CBA].

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

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See NFL CBA, *supra* note 9, art. XI. See also NFL Personal Conduct Policy (2008), available at <http://www.nflplayers.com/> (follow “Members Services” hyperlink; then follow “Rules & Regulations” hyperlink; then follow “Player Policies” hyperlink; then follow “Conduct Policy” hyperlink) [hereinafter NFL PCP].

This Note contends that commissioners' abilities to unilaterally discipline players must be checked for the protection of players, and that more grievance appeals should go to neutral arbitrators. Part I outlines the commissioners' powers in the four major American sports leagues as conferred upon them by their respective CBAs.<sup>14</sup> Part II discusses the history of commissioners' power in sports to illustrate how their powers have evolved and expanded over time. Part III distinguishes the NFL Commissioner's power and disciplinary authority from that of the NBA, MLB, and NHL Commissioners, as it displays a particularly egregious example of a commissioner's unilateral authority. Part IV examines two examples of cases where arbitrators have reduced punishments issued by commissioners. These two cases illustrate the real threat of over-sanctioning by commissioners and the need for commissioners to be checked by neutral, removed arbitrators. Part V provides several suggestions for improvements in commissioner disciplinary policies, including a proposed three-part system to impose necessary checks on unilateral commissioner discipline. The first part of the disciplinary system establishes different categories of misconduct and provides reasonable ranges for player punishment. The second part of the disciplinary system requires commissioners to provide detailed, publicly available explanations for the sanctions they impose on players. The third part of the disciplinary system creates a neutral arbitration mechanism to review players' sanctions imposed by the commissioner.

## I. COMMISSIONERS' POWER IN THE FOUR MAJOR SPORTS LEAGUES

### A. NFL Commissioner's Power

The NFL Commissioner is the officer in charge of running the National Football League. The Commissioner derives his power from two documents that govern the NFL: The Collective Bargaining Agreement ("NFL CBA")<sup>15</sup> and the NFL's Player Conduct Policy ("NFL PCP").<sup>16</sup> The CBA is an agreement that constitutes

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<sup>14</sup> See *Do Four Major Professional Sports Face Uncertain Future?*, STREET & SMITH'S SPORTS BUS. DAILY, Apr. 22, 2002, available at <http://www.sportsbusinessdaily.com/article/65233>.

<sup>15</sup> NFL CBA, *supra* note 9.

<sup>16</sup> NFL PCP, *supra* note 13.

the sole and exclusive bargaining unit between the NFL Management Council and the NFL Players Association (“NFLPA”).<sup>17</sup> The NFL PCP was created by the Commissioner to comport with the NFL CBA and approved by the Executive Director of the NFLPA.<sup>18</sup>

Article IX of the NFL CBA discusses the process by which non-injury grievances are brought.<sup>19</sup> Players can file claims for disputes and have such disputes heard by an arbitrator or a panel of impartial arbitrators agreed upon by the NFLPA and the NFL’s Management Council.<sup>20</sup> Decisions by these arbitrators are final and binding.<sup>21</sup> Despite an elaborate arbitration system set out in the NFL CBA, cases only go to arbitration under Article IX, “[e]xcept wherever another method of dispute resolution is set forth elsewhere in this Agreement . . . .”<sup>22</sup> Article XI of the NFL CBA establishes the Commissioner’s disciplinary powers, and explains in Section 1(a) that:

All disputes involving a fine or suspension imposed upon a player for conduct on the playing field other than as described in Subsection (b) below, or involving an action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows . . . .<sup>23</sup>

Article XI goes on to explain that the Commissioner or his appointee will determine the fine or suspension to be imposed on a player.<sup>24</sup> In these instances, arbitration is not available to disciplined players.

In 2007, Roger Goodell, upon appointment as Commissioner of the NFL, instituted a new PCP that was not collectively bargained, but was approved by the NFLPA.<sup>25</sup> The NFL PCP does not conflict with any provisions of the CBA. The PCP, however, gives the NFL Commissioner extremely broad power to discipline

<sup>17</sup> NFL CBA, *supra* note 9, pmb1.

<sup>18</sup> Adam B. Marks, Note, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members by Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1584 (2008).

<sup>19</sup> NFL CBA, *supra* note 9, art. IX.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* art. IX sec. (1)(a).

<sup>23</sup> *Id.* art. XI sec. (1)(c).

<sup>24</sup> *Id.* art. XI.

<sup>25</sup> NFL PCP, *supra* note 13.

players for both on and off the field conduct.<sup>26</sup> For example, the Commissioner can fine or suspend a player for alleged criminal activity even if the player has not been convicted.<sup>27</sup> If a player wants to appeal a PCP fine or suspension, the appeal goes directly to the Commissioner, the very person who imposed the fine or suspension in the first place.<sup>28</sup>

Equipped with unchecked disciplinary power, Commissioner Goodell has levied many hefty suspensions, including a full-season suspension of Adam “Pacman” Jones<sup>29</sup> in 2007 for a shooting incident in a strip club, when, at the time of the suspension, Jones had neither been arrested for nor charged with any criminal activity.<sup>30</sup> In 2007, Commissioner Goodell pushed the limits of his power by suspending Cincinnati Bengals defensive end Frostee Rucker for a domestic violence incident that occurred in 2005 while Rucker was in college.<sup>31</sup> Retroactive punishment for a player’s behavior before becoming part of the NFL was unprecedented.<sup>32</sup> Had Jones or Rucker wished to appeal their suspensions, their only method of doing so was to appeal to the Commissioner.<sup>33</sup> Therefore, the Commissioner would be reviewing the very suspension that he himself imposed. Having their appeals heard before a neutral NFL grievance arbitrator was not an option.

## B. NBA Commissioner’s Power

The NBA Collective Bargaining Agreement (“NBA CBA”) governs the NBA’s disciplinary process.<sup>34</sup> The NBA’s disciplinary

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<sup>26</sup> Marks, *supra* note 18, at 1584.

<sup>27</sup> NFL PCP, *supra* note 13, at 1.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> Adam “Pacman” Jones, a talented NFL cornerback, has a long history of suspensions and has been named in over twelve off-field incidents since being drafted in 2005. Some of these incidents include: involvement in a strip club shooting which left a club bouncer paralyzed; marijuana possession charges; several fights at night clubs; involvement in a drug trafficking scheme; a gas station shooting incident; spitting on another person; and fighting with his own bodyguard appointed to him by his team, the Dallas Cowboys. ESPN News Service, *Pacman Suspended At Least 4 Games for Violating Conduct Policy*, Oct. 15, 2008, <http://sports.espn.go.com/nfl/news/story?id=3643240>.

<sup>30</sup> Mark Maske, *Commissioner Goodell Has Great Expectations for NFL*, WASH. POST, Sept. 2, 2007, at D11, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/09/01/AR2007090101156.html>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> NFL PCP, *supra* note 13.

<sup>34</sup> See generally NBA CBA, *supra* note 9.

procedures grant the NBA Commissioner less power than that afforded to the NFL Commissioner. Article XXXI of the NBA CBA discusses the grievance and arbitration procedure and sets forth the Commissioner's authority to discipline players.<sup>35</sup> The NBA CBA vests authority to resolve disputes about punishment exclusively in a grievance arbitrator.<sup>36</sup>

Section 8 of Article XXXI sets forth special procedures with respect to player discipline.<sup>37</sup> This section establishes disciplinary situations under which a player is not entitled to appeal to an independent arbitrator and appeals go solely to the NBA Commissioner.<sup>38</sup> Section 8 reads:

(a) Any dispute involving (i) a fine of \$50,000 or less or a suspension of twelve (12) games or less (or both such fine and suspension) imposed upon a player by the Commissioner (or his designee) for conduct on the playing court (as defined in Section 8(c) below), or (ii) action taken by the Commissioner (or his designee) (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 player of \$50,000 or less, shall not give rise to a Grievance, shall not be subject to a hearing before, or resolution by, the Grievance Arbitrator, and shall not be determined by arbitration; but instead shall be processed exclusively as an "Appeal" before the Commissioner (or his designee).<sup>39</sup>

Article 35 of the NBA Constitution, in which players agree to abide by their uniform player contracts,<sup>40</sup> expressly states the conditions under which the Commissioner can fine or suspend a player.<sup>41</sup> Specifically, the Constitution states:

The Commissioner shall have the power to 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

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<sup>35</sup> NBA CBA, *supra* note 9, art. XXXI.

<sup>36</sup> *Id.* art. XXXI sec. (1)(b) ("The Grievance Arbitrator shall also have jurisdiction over disputes involving player discipline to the extent set forth in Section 8 below . . .").

<sup>37</sup> NBA CBA, *supra* note 9, art. XXXI sec. 8.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> NBA CBA, *supra* note 9, Exhibit A, available at [http://www.nbpa.com/cba\\_exhibits/exhibitA.php](http://www.nbpa.com/cba_exhibits/exhibitA.php).

<sup>41</sup> NAT'L BASKETBALL ASS'N CONST., available at [http://www.nbpa.com/cba\\_exhibits/exhibitA-excerpt.php](http://www.nbpa.com/cba_exhibits/exhibitA-excerpt.php).

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>42</sup>

Section (g) of Article 35, however, gives players fined or suspended under section (d) the ability to appeal before the NBA Grievance Arbitrator, as established in Article XXXI of the CBA, so long as the suspension is not for gambling on NBA games.<sup>43</sup> The standard of review on appeal to the arbitrator is “arbitrary and capricious” for actions taken by the Commissioner to “preserve the integrity of the league.”<sup>44</sup> An arbitrary and capricious standard of review effectively gives the Commissioner more authority to take action to preserve integrity of the league. The Grievance Arbitrator reviews actions taken by the Commissioner regarding discipline under a “just cause” standard.<sup>45</sup>

### C. MLB Commissioner’s Power

Major League Baseball was the first sport to institute a commissioner to oversee and run a professional sports league.<sup>46</sup> The MLB Commissioner’s powers and responsibilities have fluctuated over time. Today, the MLB Commissioner’s power is similar to that of the NBA Commissioner. Appeals and arbitration processes are similar as well.

The Commissioner’s powers are laid out in the MLB Collective Bargaining Agreement (“MLB CBA”).<sup>47</sup> Article XI of the MLB CBA sets out the grievance procedure for MLB players and teams.<sup>48</sup> Where arbitration is permissible, parties can choose to have a single impartial arbitrator preside over their issue or panel of three arbitrators.<sup>49</sup> Article XI section C, “Special Procedure with Regard to Certain Disciplinary Action,” grants the Commissioner the power to fine or suspend players for conduct on the

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<sup>42</sup> *Id.*

<sup>43</sup> NBA CBA, *supra* note 9, art. XXXI.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* art. XXXI sec. (14)(c).

<sup>46</sup> Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645, 1650–52 (1999).

<sup>47</sup> MLB CBA, *supra* note 9.

<sup>48</sup> *Id.* art. XI (B)(1).

<sup>49</sup> *Id.* art. XI (A)(9).

playing field or in the ballpark.<sup>50</sup> Players disciplined for conduct on the field can only appeal to the Commissioner, and not to the Grievance Arbitrator.<sup>51</sup> Article XII, entitled “Discipline,” explains that the issue to resolve in player grievance appeals regarding discipline of players is whether or not there has been, “just cause for the penalty imposed.”<sup>52</sup>

#### D. NHL Commissioner’s Power

The NHL Commissioner’s disciplinary powers are very similar to those of the NBA and MLB Commissioners. The NHL Commissioner’s disciplinary powers are laid out in Article 18 of the NHL Collective Bargaining Agreement (“NHL CBA”).<sup>53</sup> Article 18 details the Commissioner’s power to discipline players for “on-ice” and “off-ice” conduct.<sup>54</sup> In addition, Article 18.4 establishes a detailed procedure for commissioner discipline for “off-ice” conduct or “on-ice” conduct where the Commissioner relies on any evidence, other than videotapes, of an “on-ice incident.”<sup>55</sup> League investigations into player conduct require immediate notification to the player and the National Hockey League Player’s Association [hereinafter “NHLPA”] upon the initiation of an investigation that may result in player discipline.<sup>56</sup> Moreover, players are entitled to a hearing in which the NHLPA can present evidence and testimony and argue on the players’ behalf before discipline is assessed.<sup>57</sup>

The Uniform NHL Players Contract signed by all players, requires that they refrain from “conduct detrimental to the best interest of the Club, the League or professional hockey generally.”<sup>58</sup> Similar provisions exist in all of the uniform player contracts of the other major sports.<sup>59</sup>

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<sup>50</sup> *Id.* art. XI (C)(1).

<sup>51</sup> *Id.* art. XI (C)(3).

<sup>52</sup> *Id.* art. XII (A).

<sup>53</sup> NHL CBA, *supra* note 9, art. 18.

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* Exhibit 1, para. 2.

<sup>59</sup> NHL CBA, *supra* note 9, Exhibit A, para. (5)(b); NFL CBA, *supra* note 9, Appendix C, para. 2; MLB CBA, *supra* note 9, Schedule A, para. 9.

## II. HISTORY OF COMMISSIONER'S POWER IN SPORTS

Major League Baseball created the Commissioner's office in 1921 in response to a public scandal.<sup>60</sup> In 1919, eight members of the Chicago White Sox<sup>61</sup> were accused of accepting money to "throw" the 1919 World Series.<sup>62</sup> Public confidence in the league was diminished, and the committee system for league regulation was not working.<sup>63</sup> Several club owners called for replacing the three-person "National Commission" with a commissioner, "a single leader of unquestionable reputation who was in no way connected with baseball and whose 'mere presence would assure that public interests would first be served, and that . . . as a natural sequence, all existing evils would disappear.'"<sup>64</sup> United States District Court Judge Kenesaw Mountain Landis<sup>65</sup> was appointed to serve as the first commissioner of the MLB in 1921.<sup>66</sup>

MLB owners granted Commissioner Landis broad disciplinary powers to act within the "best interests" of the game.<sup>67</sup> In Landis' twenty-four year tenure, he banned thirteen men from baseball for life, including eight for their involvement in the "Black Sox" scandal.<sup>68</sup> Landis was a harsh disciplinarian and did not hesitate to sus-

<sup>60</sup> Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1413 (1990).

<sup>61</sup> The eight members of the White Sox who were accused of "throwing" the 1919 World Series are infamously referred to as the "Black Sox." 1919 Black Sox.com, <http://www.1919blacksox.com/index2.htm> (last visited Nov. 11, 2009).

<sup>62</sup> See Pachman, *supra* note 60, at 1414 (discussing the "Black Sox" scandal and how it drove baseball to create the Commissioner's office).

<sup>63</sup> In 1919, a commission of interested parties, including club owners and team presidents, governed MLB. August Herrmann, the commission chairman, was the president of the Cincinnati Reds, the team who beat the White Sox in the 1919 World Series. He was harshly criticized for not sufficiently investigating the World Series betting scandal. *Id.* at 1414.

<sup>64</sup> *Id.* at 1414.

<sup>65</sup> Kenesaw Mountain Landis grew up an avid baseball fan. In 1905, Landis was appointed by President Theodore Roosevelt to serve as United States District Judge for the Northern District of Illinois. In 1914, he presided over the Federal League's injunction suit against the Major Leagues. During his involvement with the suit, Landis spent a great deal of time studying baseball history. This, along with his legal background, made him a prime candidate to serve as the first commissioner of Major League Baseball. MLB.com, *Kenesaw Mountain Landis*, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_1](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_1) (last visited Nov. 11, 2009).

<sup>66</sup> Pachman, *supra* note 60, at 1414.

<sup>67</sup> *Id.* at 1409, 1415–16 (discussing the broad disciplinary power given to Landis in order to clean up the game of baseball).

<sup>68</sup> *Id.* at 1409, 1415.

pend superstar Babe Ruth<sup>69</sup> when he violated a league prohibition against “barnstorming.”<sup>70</sup>

Landis’s broad disciplinary authority was only challenged once by the 1931 case of *Milwaukee American Assn v. Landis*.<sup>71</sup> The District Court held that Landis did not exceed his authority as Commissioner, and that “the commissioner is empowered to investigate upon his own initiative any act, transaction, or practice charged or alleged to be detrimental to the best interests of baseball.”<sup>72</sup> Landis paved the way for commissioners to act in the “best interests” of their sport.<sup>73</sup>

The MLB Commissioner continued to enjoy broad authority for years to come. In the 1978 case of *Charles O. Finley & Co. v. Bowie Kuhn*,<sup>74</sup> the District Court determined that it was within the Commissioner’s power to prevent Oakland Athletics owner Charles Finley from selling three of his star players just before the trade deadline.<sup>75</sup> The court upheld the broad power of the Commissioner to act in the best interest of baseball, explaining that the Commissioner “acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball.”<sup>76</sup>

The Commissioner’s disciplinary authority was first limited in 1976, when a U.S. District Court found that Commissioner Kuhn’s punishment of Atlanta Braves President Ted Turner for a violation of league rules was excessive.<sup>77</sup> The MLB Commissioner, however,

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<sup>69</sup> Babe Ruth, considered by many to be the greatest baseball player of all time, had career statistics of 714 home runs, a lifetime batting average of .342, ninety-four wins as a pitcher, and was a member of seven World Series Championship teams. The Official Babe Ruth Website, *Stats*, <http://www.baberuth.com/about/stats.html> (last visited Nov. 11, 2009).

<sup>70</sup> Pachman, *supra* note 60, at 1409, 1415–16 (“Barnstorming involves [players] playing exhibition games in small towns that do not have their own teams. Barnstorming was frowned upon by major league owners who feared that their best players might be hurt playing in such games.” (quoting P. DICKSON, *DICKSON BASEBALL DICTIONARY* 30–31 (1989))).

<sup>71</sup> 49 F.2d 298 (N.D. Ill. 1931).

<sup>72</sup> 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, 1082 (2008) (quoting *Milwaukee Am. Ass’n.*, 49 F.2d at 302).

<sup>73</sup> See Pachman, *supra* note 60, at 1409, 1415–16 (discussing the breadth of the commissioner’s “best interests” power).

<sup>74</sup> 569 F.2d 527 (7th Cir. 1978).

<sup>75</sup> Ambrose, *supra* note 72, at 1069, 1082.

<sup>76</sup> *Finley*, 569 F.2d at 539.

<sup>77</sup> Commissioner Kuhn sought to strip the Atlanta Braves of their first round draft pick for team president Ted Turner’s violations—commenting on free agents—but the court found this punishment to be excessive. *Atlanta Nat’l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (D. Ga. 1977).

was back in the spotlight with broad authority in 1989, when Commissioner A. Bartlet Giamatti<sup>78</sup> banned Pete Rose<sup>79</sup> from baseball for life for gambling on baseball.<sup>80</sup> While the Commissioner's office no doubt enjoys extremely broad authority, the Commissioner's power in the NFL today is greater than ever.

### III. POWER AND DISCIPLINARY AUTHORITY OF THE NFL COMMISSIONER VERSUS NBA, MLB, AND NHL COMMISSIONERS

#### A. Conduct on the Court

The NFL's disciplinary procedures can be distinguished from the other sports procedures in numerous ways. One major difference is that the NBA Commissioner can only levy fines or suspensions that are appealable solely to him for conduct "on the court," as opposed to the NFL, where the Commissioner is the sole appellate body for all player discipline grievances.<sup>81</sup> This "conduct on the court" language of the NBA CBA has been the subject of much disagreement, and even led to a major federal court decision regarding the arbitrability of players' appeals of their suspensions.<sup>82</sup> Commissioner discipline of NBA players not stemming from "on the court" incidents can be appealed by disciplined players to a grievance arbitrator.<sup>83</sup> This is a major difference from the NFL, where the Commissioner can discipline a player for any conduct on or off the field.<sup>84</sup> The NFL Commissioner's power to unilaterally discipline players for off-the-field conduct equips the NFL Commissioner with tremendous unchecked power over players.<sup>85</sup> This

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<sup>78</sup> A. Bartlet Giamatti was elected baseball's seventh commissioner in 1988. MLB.com, *A. Bartlet Giamatti*, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_7](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_7) (last visited Feb. 26, 2009).

<sup>79</sup> Pete Rose is baseball's all-time hits leader (4,256), and holds several other records including most games played (3,562), most at bats (14,053), and most seasons of 200 or more hits (10). PeteRose.com, *Records*, <http://www.peterose.com/Records.aspx> (last visited Nov. 11, 2009).

<sup>80</sup> Pachman, *supra* note 60, at 1409–12.

<sup>81</sup> NBA CBA, *supra* note 9, art. XXXI; NFL CBA, *supra* note 9, art. XI sec. (1)(b).

<sup>82</sup> Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

<sup>83</sup> NBA CBA, *supra* note 9, art. XXXI sec. (8)(b).

<sup>84</sup> NFL PCP, *supra* note 13, at 1.

<sup>85</sup> See Maske, *supra* note 30.

enormous power has been abused to the immense detriment of players, as will be more thoroughly discussed later in this Note.<sup>86</sup>

An example of the NFL Commissioner wielding his authority involves the suspension of Cincinnati Bengal Chris Henry for eight games<sup>87</sup> for numerous violations of the NFL Player Conduct Policy.<sup>88</sup> Henry was arrested four times within a two-year period.<sup>89</sup> The player had no opportunity to appeal his suspension to a grievance arbitrator. This suspension cost Henry eight weeks of salary (\$204,705.88).<sup>90</sup> As NFL players are paid per game played and the season is only sixteen games, Henry lost one-half of his season salary. In 2007, Commissioner Goodell also suspended NFL player Terry “Tank” Johnson for eight games for violating his probation regarding gun-related charges.<sup>91</sup> Johnson had no opportunity to appeal the suspension to a neutral arbitrator and lost one-half season’s pay.<sup>92</sup> Most remarkably, Commissioner Goodell’s punishment of NFL player Frostee Rucker for alleged offenses prior to his becoming part of the NFL was a notable stretching of the NFL Commissioner’s power.<sup>93</sup>

Limiting the Commissioner’s power to unilaterally discipline solely to “on the court”<sup>94</sup> conduct is a necessary and important check on the Commissioner’s power. A player’s misconduct “on the court” has a direct impact on the sport because the action was taken while that athlete was performing in his professional capacity.

<sup>86</sup> See *id.*

<sup>87</sup> Eight NFL games is one half of the regular season, the equivalent of a forty-one game suspension in the NBA or an eighty-one game suspension in the MLB.

<sup>88</sup> Henry’s violations included arrests for misdemeanor marijuana possession and felony gun charges, three tickets for traffic violations for driving with a suspended license, a reckless operation of a vehicle charge (which he pleaded down from a possible drunk driving charge), and a charge for allowing minors to drink alcohol in his hotel room. ESPN News Service, *Goodell Suspends Pacman, Henry for Multiple Arrests*, <http://sports.espn.go.com/espn/print?id=2832015&type=story>, Apr. 10, 2007; Geoff Hobson, *Henry Gone for First Half of Season*, Apr. 10, 2007, available at [http://www.bengals.com/news/news.asp?story\\_id=5976](http://www.bengals.com/news/news.asp?story_id=5976).

<sup>89</sup> Joe Kay, *WR Chris Henry Rejoins Bengals After Completing 8-Game Suspension*, USA TODAY, Nov. 11, 2007, available at [http://www.usatoday.com/sports/football/2007-11-05-3189888112\\_x.htm](http://www.usatoday.com/sports/football/2007-11-05-3189888112_x.htm).

<sup>90</sup> The suspension would have cost Henry \$230,294.12, but the Bengals’ bye week was during the fifth week of the season, during the period of Henry’s suspension. Players are not paid for bye weeks. *Id.*

<sup>91</sup> Sam Farmer, *NFL Issues Another Tough Suspension*, L.A. TIMES, June 5, 2007, available at <http://articles.latimes.com/2007/jun/05/sports/sp-nfl5>.

<sup>92</sup> See *id.*

<sup>93</sup> Maske, *supra* note 30.

<sup>94</sup> NBA CBA, *supra* note 9, art. XXXI sec. 8.

What actually constitutes “conduct on the court” is unclear, and has been challenged in several cases.<sup>95</sup> The “conduct on the court” language was challenged in 1997, when Knicks players left the bench during a playoff brawl.<sup>96</sup> Several Knicks players were suspended for violating an NBA rule prohibiting players from leaving their benches and stepping onto the court during an in-game melee.<sup>97</sup> The suspensions were appealed, and their arbitrability was contested in federal court, where the judge ruled that the Commissioner was the final authority on the discipline that occurs on the basketball court, referring to CBA Article XXXI Section 8 as “so plain, so clear, so unequivocal, so on-point to the dispute that underlies this controversy.”<sup>98</sup>

Another controversy regarding an interpretation of “on the court” behavior occurred in 1998, when the NBA Commissioner suspended Latrell Sprewell for one year for attacking his coach during practice.<sup>99</sup> A grievance arbitrator reduced Sprewell’s suspension to sixty-eight games.<sup>100</sup> This case was found to be arbitrable because the incident happened during practice, not during a game, and thus was not considered “on the court.”<sup>101</sup>

Finally, in 2004, Ron Artest, Jermaine O’Neal, and Steven Jackson appealed their suspensions for a brawl during a game where the players climbed into the stands and attacked fans.<sup>102</sup> The NBPA appealed the suspensions on behalf of the players to the league’s grievance arbitrator, who ruled that he had jurisdiction

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<sup>95</sup> See *NBA v. NBPA* (2005), *supra* note 82 (explaining that the New York Knicks challenged whether players leaving their benches during a brawl constituted “conduct on the court”); see also *Sprewell Arbitration case*, *supra* note 1 (NBA player Latrell Sprewell challenged whether his choking his coach during practice constituted “conduct on the court”).

<sup>96</sup> See Mike Wise, *5 Knicks Barred For Melee; 3 to Miss Game 6*, N.Y. TIMES, May 16, 1997, at A1, available at <http://www.nytimes.com/1997/05/16/sports/5-knicks-barred-for-melee-3-to-miss-game-6.html?pagewanted=2>.

<sup>97</sup> The rule was later amended to explicitly prohibit “benched players” from leaving the “immediate vicinity of their benches.” Marc Stein, *NBA Suspends Stoudemire, Diaw for Leaving Bench*, ESPN.com, May 16, 2007, <http://sports.espn.go.com/nba/playoffs2007/news/story?id=2871615>.

<sup>98</sup> ESPN.com News Service, *Union Director Suggests 35-game Maximum*, Nov. 23, 2004, <http://sports.espn.go.com/espn/print?id=1930077&type=story> [hereinafter *Union Director Suggests 35-game Maximum*].

<sup>99</sup> See Thomas A. Baker, III & Dan Connaughton, *Symposium: Alternative Dispute Resolution in Sports: The Role of Arbitrability in Disciplinary Decisions in Professional Sports*, 16 MARQ. SPORTS L.J. 123, 150–51 (2005).

<sup>100</sup> *Id.* at 150–53.

<sup>101</sup> *Id.*

<sup>102</sup> *Union Director Suggests 35-game Maximum*, *supra* note 98.

over the issue.<sup>103</sup> The league strongly resisted this ruling, claiming that this incident fell clearly within the parameters of “on the court” conduct.<sup>104</sup> The NBA filed for declaratory judgment in the Southern District of New York, asking the Court to rule that the arbitrator had no jurisdiction to hear the dispute.<sup>105</sup> The Court, however, found that the dispute was arbitrable because it was not considered “on the court.”<sup>106</sup>

### B. Source of Commissioner Power

A second distinction between the NFL Commissioner’s powers and the NBA, MLB, and NHL Commissioners’ powers is that the latter’s authority is conferred exclusively by the league CBAs, whereas the NFL Commissioner garners some of his authority through the NFL PCP, independent of the NFL CBA. The NFL PCP was agreed to by the NFL Players Association acting in concert with the NFL Commissioner.<sup>107</sup> The NBA and MLB, which have stronger unions, would be unlikely to agree to a similar PCP empowering the Commissioner of their leagues as much.<sup>108</sup> The NFL has a “relatively tranquil” players union that allows disciplinary policies to reach far beyond the field, while the NBA and MLB’s unions are “aggressive,” which creates confrontation with “inflexible management.”<sup>109</sup> Confrontation with management can be effective, as it forces difficult issues to be resolved through negotiation or strikes.

The NFL Commissioner has more authority than other league commissioners because the NFL Players Association has not done its job of advocating for the best interests of the players, leaving the Commissioner as the sole authority on all league-wide discipline.<sup>110</sup> In the NBA, the Commissioner was the sole authority on league-wide discipline until 1995, when a new NBA CBA altered the existing grievance mechanism allowing arbitral review of com-

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<sup>103</sup> Pollack, *supra* note 46, at 1707.

<sup>104</sup> *Union Director Suggests 35-game Maximum*, *supra* note 98.

<sup>105</sup> *Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n*, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

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

<sup>107</sup> Marks, *supra* note 18, at 1583–84.

<sup>108</sup> Gibeaut, *supra* note 5.

<sup>109</sup> *Id.*

<sup>110</sup> Marks, *supra* note 18, at 1584.

missioner disciplinary decisions.<sup>111</sup> Moreover, despite the deeply rooted central disciplinary authority of the Commissioner of the MLB, a strong and competent players union insisted on and achieved arbitrability in their CBA.<sup>112</sup>

Reporters who cover the NFL have agreed that the NFLPA has not done its job in protecting players' rights against unfettered discipline from the Commissioner.<sup>113</sup> In fact, Bryant Gumbel, host of the HBO program "Real Sports with Bryant Gumbel," accused the ex-NFLPA Executive Director, Gene Upshaw,<sup>114</sup> of being a "docile head of the players union" and the Commissioner's "personal pet" who maintained labor peace at the expense of his members.<sup>115</sup> An NFLPA Director who passively condones the NFL Commissioner by implementing a PCP that extraordinarily empowers the Commissioner to discipline the players he represents is not doing his job. This failure prevents NFL players from enjoying the same liberties as players in other professional sports leagues who reap the benefits of stronger players unions. As a result, NFL players' job security is far less stable than that of players in the NBA, MLB, and NHL.

#### IV. TWO CASES ILLUSTRATING THE NEED FOR CHECKS ON UNILATERAL COMMISSIONER DISCIPLINE

In leagues like the NFL, NBA, MLB, and NHL, players have unique skill sets as athletes. Athletes have limited opportunities to sell or market their skills, as the four major sports leagues enjoy essential monopolies over their respective sports at the professional level in America. When the Commissioner of a league suspends, fines, or expels players, the Commissioner is effectively eliminating players' abilities to earn a living in that sport for a pe-

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<sup>111</sup> *Id.*

<sup>112</sup> Pollack, *supra* note 46, at 1707.

<sup>113</sup> Associated Press, *NFLPA's Vincent: Gumbel's Criticism 'Inappropriate,'* Aug 24, 2007, <http://sports.espn.go.com/nfl/news/story?id=2557595> [hereinafter *Gumbel*].

<sup>114</sup> Gene Upshaw had a stellar fifteen-year NFL playing career, which included two Super Bowl Championships and seven Pro Bowl Appearances. Upshaw served as executive director to the NFLPA starting in 1983, guided it through the 1987 player strike, and eventually helped to implement free agency in the NFL in 1993. Upshaw died of pancreatic cancer on August 20, 2008. Pro Football Hall of Fame, *Gene Upshaw*, [http://www.profootballhof.com/hof/member.jsp?player\\_id=220](http://www.profootballhof.com/hof/member.jsp?player_id=220) (last visited Nov. 11, 2009).

<sup>115</sup> *Gumbel*, *supra* note 113.

riod of time.<sup>116</sup> Some suspended NFL players used to leave the U.S. to play in the Canadian Football League.<sup>117</sup> In 2007, however, the NFL made an agreement with the Canadian Football League (CFL) that prohibited suspended NFL players from playing in the CFL.<sup>118</sup> These players and their unique, world-class skills enable professional sports leagues to earn billions of dollars and the players, in turn, are paid handsomely. It is important that players hold themselves to high standards of behavior, as each is a reflection on his league. When players misbehave, however, and violate their sports' PCPs and CBAs, it is imperative that they are disciplined fairly and consistently.<sup>119</sup> The current disciplinary system is quite the opposite—unfair and inconsistent.

Equipping commissioners with completely unchecked disciplinary authority can lead to arbitrary and unjust disciplinary actions. Grievance arbitration systems must have an expanded role across the board throughout the various professional sports leagues. It is imperative that players can appeal suspensions and fines to impartial arbitrators. This will serve as a check on commissioners' power and ensure that players are afforded a consistent and fair hearing in front of neutral arbitrators before their ability to earn a living is inhibited.

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<sup>116</sup> After leading the Denver Broncos in rushing in 2006, Tatum Bell could not make an NFL roster in 2008 and was reduced to working at a cellular phone kiosk in a mall for several months until he was re-signed by the Denver Broncos in November 2008. Mike Klis, *Tailback Bell Ready for Prime-Time Chance*, DENV. POST, Dec. 24, 2008, available at [http://www.denverpost.com/popular/ci\\_11299351](http://www.denverpost.com/popular/ci_11299351). Before becoming a two-time NFL MVP and future hall-of-fame quarterback, Kurt Warner stocked groceries in Iowa after he was cut in his rookie season by the Green Bay Packers. Karen Crouse, *Legacy Meets Reality for Kurt Warner*, N.Y. TIMES, Jan. 31, 2009, at 1, available at <http://www.nytimes.com/2009/02/01/sports/football/01warner.html>. John Starks bagged groceries at a Safeway Supermarket in Tulsa, Oklahoma before being signed by the New York Knicks and becoming an NBA All-Star. Mike Wise, *Intense and Erratic, John Starks Can Still Jump-Start the Knicks*, N.Y. TIMES, Jan. 31, 1997, at B9, available at <http://www.nytimes.com/1997/01/31/sports/intense-and-erratic-john-starks-can-still-jump-start-the-knicks.html?sec=&spon=&pagewanted=all>.

<sup>117</sup> ESPN.com News Service, *Williams headed to CFL, signs with Argonauts*, May 30, 2006, <http://sports.espn.go.com/nfl/news/story?id=2461281>. The most famous case was when Ricky Williams, a former NFL rushing champion, played a season with the CFL's Toronto Argonauts after being suspended by the NFL for a season after his fourth violation of the league's drug policy. *Id.*

<sup>118</sup> Canada Broadcasting Corporation, *CFL to Bar Suspended NFL Players*, Nov. 19, 2006, <http://www.cbc.ca/sports/greycup/story/2006/11/16/cfl-rules.html>.

<sup>119</sup> While it is important to note that precedent does not bind arbitrators, arbitrators generally look to persuasive authority. See Ohio Department of Administrative Services, <http://ocbarbs.das.ohio.gov/Default.aspx> (last visited Feb. 25, 2009); see also JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY*, 31–32 (NITA, 2d. ed., 2003).

Lines have been drawn in numerous cases balancing commissioners' powers to discipline with players' abilities to arbitrate grievances.

A. "Malice in the Palace"<sup>120</sup>

The disciplinary authority of the NBA Commissioner was the central issue in *Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n*.<sup>121</sup> In this case, the court found that the players' suspension for brawling with the fans in the stands during a game was arbitrable because it did not involve "conduct on the playing court."<sup>122</sup> This case limited the power of the NBA Commissioner and shifted power back to the players.<sup>123</sup>

In this case, NBA players Ron Artest,<sup>124</sup> Stephen Jackson, and Jermaine O'Neal were suspended by NBA Commissioner David Stern for climbing into the stands and fighting with fans because it pertained to "conduct on the playing court."<sup>125</sup> Artest was suspended for the rest of the season, Jackson for thirty games, and O'Neal for twenty-five games.<sup>126</sup> The three players, represented by the NBPA, appealed their suspensions to NBA Grievance Arbitrator Roger Kaplan.<sup>127</sup> The NBA, however, contended that the Arbitrator had no jurisdiction to hear an appeal on this case and

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<sup>120</sup> "Malice in the Palace" is the nickname for the infamous brawl in which Indiana Pacers players Ron Artest, Stephen Jackson, and Jermaine O'Neal jumped into the stands and attacked fans at the Detroit Pistons' arena, The Palace of Auburn Hills. Hoopedia, *Pacers-Pistons Brawl*, [http://hoopedia.nba.com/index.php?title=Pacers-Pistons Brawl](http://hoopedia.nba.com/index.php?title=Pacers-Pistons+Brawl) (last visited Nov. 11, 2009).

<sup>121</sup> *Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n*, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Ron Artest is one of the best players in the NBA, twice earning a spot on the all-NBA Defensive First team and was an NBA All Star in 2004. NBA.com, *Ron Artest Bio Page*, [http://www.nba.com/playerfile/ron\\_artest/bio.html](http://www.nba.com/playerfile/ron_artest/bio.html) (last visited Nov. 11, 2009). Artest, however, has a long history of gross misconduct and suspensions, including suspensions for smashing video monitors in Madison Square Garden in 2003 and abusing his wife, for which he underwent anger management counseling in 2002; see also Chris Ballard, *The Eye of a Perfect Storm: With his hair-trigger temper and history of eruptions, Pacers All-Star forward Ron Artest was exactly the wrong person in the wrong place at the wrong time*, *SPORTS ILLUSTRATED*, Nov. 29, 2004, available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1114172/index.htm>.

<sup>125</sup> *Union Director Suggests 35-game Maximum*, *supra* note 98.

<sup>126</sup> Associated Press, *NBA Players Testify in Grievance Hearing*, *MICH. DAILY*, Dec. 10, 2004, available at <https://www.michigandaily.com/print/7820> [hereinafter *NBA Players Testify*].

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

refused to participate.<sup>128</sup> Commissioner Stern claimed that this brawl constituted “conduct on the playing court,”<sup>129</sup> not subject to arbitration.<sup>130</sup> The Grievance Arbitrator reduced O’Neal’s suspension from twenty-five games to fifteen games.<sup>131</sup>

The NBA sued the NBPA in federal court, alleging that the Grievance Arbitrator had no jurisdiction or authority to review an appeal of the suspensions imposed by the NBA Commissioner on Artest, Jackson, and O’Neal.<sup>132</sup> The Court found that as a general rule under the NBA Constitution and NBA CBA, player challenges to discipline imposed by the Commissioner “shall be resolved by the Grievance Arbitrator in accordance with the grievance and arbitration procedures of the CBA.”<sup>133</sup> There are only two scenarios in which the Commissioner has exclusive jurisdiction over appeals of disciplinary actions he imposed: (1) conduct that “occurs on the playing court;” and (2) conduct that is harmful to the, “preservation of the integrity of, or the maintenance of public confidence in, the game of basketball . . . .”<sup>134</sup> While the Court noted that the Commissioner unquestionably has the power to take strong, decisive action to discipline players who strike fans, the punishment is arbitrable because striking fans is not behavior that would generally occur “on the playing court.”<sup>135</sup> The Court was unwilling to accept the NBA’s broad interpretation of Article 35(d)

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

<sup>129</sup> The NBA commissioner has exclusive jurisdiction to regulate and hear appeals for an “on-court incident.” This is one of the two exceptions to the general rule that challenges by players for decisions given by the commissioner “shall be resolved [by the Grievance Arbitrator] in accordance with the provisions set forth in the [CBA].” NBA CBA, *supra* note 9, art. XXXI. The difficulty interpreting “on-court incident,” however, led to a specific definition of “conduct on the playing court” in the 2006–12 NBA CBA, defining “conduct on the playing court” as:

conduct in any area within an arena (including, but not limited to, locker rooms, vomitories, loading docks, and other back-of-house and underground areas, including those used by television production and other vehicles) at, during or in connection with an NBA Exhibition, All-Star, Regular Season or Playoff game. (By way of example and not limitation, conduct “at” and/or “in connection with” an NBA game shall include conduct engaged in by a player within an arena from the time the player arrives at the arena for an NBA game until the time the player has left the premises of the arena following the conclusion of such game.) Conduct engaged in by a player outside an arena (such as, for example, in a parking lot adjacent to an arena) shall not constitute “conduct on the playing court.”

*Id.*

<sup>130</sup> *NBA Players Testify*, *supra* note 126.

<sup>131</sup> Baker & Connaughton, *supra* note 99, at 150.

<sup>132</sup> Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

<sup>133</sup> *Id.* at \*5.

<sup>134</sup> *Id.* at \*6.

<sup>135</sup> Baker & Connaughton, *supra* note 99, at 149.

of the NBA Constitution because “to do so would expand the Commissioner’s power to the point where players would be unable to appeal any discipline imposed by the Commissioner to the Grievance Arbitrator.”<sup>136</sup>

### B. Latrell Sprewell Case

Another example of a case limiting the Commissioner’s power to unilaterally discipline was the Latrell Sprewell Case.<sup>137</sup> In this case, NBA player Latrell Sprewell attacked his coach after being kicked out of practice.<sup>138</sup> Sprewell choked his coach for at least ten seconds, threw at least one punch at his coach, and threatened him by yelling, “I will kill you!”<sup>139</sup> NBA Commissioner David Stern imposed a one-year suspension on Sprewell.<sup>140</sup> Stern justified this harsh suspension by claiming that harsh sanctions are necessary to prevent denigrating the public’s confidence in the game of basketball.<sup>141</sup> Additionally, Sprewell’s team, the Golden State Warriors, terminated his contract for violating both the Uniform Player Contract and the Warriors’ team rules.<sup>142</sup> Sprewell appealed the suspension to an NBA Grievance Arbitrator, claiming that the suspension was excessive.<sup>143</sup>

After a nine day arbitration hearing, the Grievance Arbitrator reduced Sprewell’s suspension to end at the conclusion of the 1997–1998 NBA season, effectively reducing the suspension from one year to about seven months.<sup>144</sup> The Grievance Arbitrator ruled that the Commissioner’s discipline was not fundamentally fair, and that “justice and fairness” called for a ruling that would

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<sup>136</sup> *Id.* at 147.

<sup>137</sup> Baker & Connaughton, *supra* note 99, at 150–53; *see also Sprewell Arbitration Case, supra* note 1.

<sup>138</sup> Baker & Connaughton, *supra* note 99, at 151–52; *see also Sprewell Arbitration Case, supra* note 1.

<sup>139</sup> Baker & Connaughton, *supra* note 99, at 150; *see also Sprewell Arbitration Case, supra* note 1.

<sup>140</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

<sup>141</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

<sup>142</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

<sup>143</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

<sup>144</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

allow Sprewell to put the “tragic event behind him.”<sup>145</sup> The Grievance Arbitrator also reinstated Sprewell’s contract with the Warriors, based on the finding that the termination lacked cause.<sup>146</sup> A chief part of the Grievance Arbitrator’s decision was that “there has never been a case of contract termination in the history of the NBA for . . . physical assault.”<sup>147</sup> This case provided another example of arbitrators reviewing and checking the authority of commissioners to suspend players.<sup>148</sup>

### C. Lessons Learned

The players in the above cases undoubtedly exhibited egregious behavior. It is hard to imagine a lawyer choking her boss or attacking clients in the firm’s reception area and *not* being fired, or even disbarred.<sup>149</sup> These two cases show why players need cool-headed, removed arbitrators to check commissioners’ power. There are both procedural and substantive reasons for checking commissioner discipline.

Procedurally, it is imperative that athletes are afforded some sort of due process before being deprived of all or part of their living. Moreover, there is added urgency in the efficient adjudication of athletes’ claims because of the extremely narrow window in which athletes’ physical abilities enable them to earn a living as professional athletes. Unchecked commissioners can have an exorbitantly adverse impact on professional athletes’ careers and earning capacities. For example, if lawyers are fired or disbarred, they can use their skills to excel in a number of other similarly situated white-collar professions. If professional athletes are fired or sus-

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<sup>145</sup> Baker & Connaughton, *supra* note 99, at 151–52; *see also Sprewell Arbitration Case, supra* note 1.

<sup>146</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

<sup>147</sup> Baker & Connaughton, *supra* note 99, at 151; *see also Sprewell Arbitration Case, supra* note 1.

<sup>148</sup> After their suspensions, both Sprewell and Artest went on to have successful NBA careers while mostly staying out of trouble. Sprewell led the New York Knicks to the 1999 NBA Finals and was named an NBA All-Star in 2001. NBA.com, Latrell Sprewell, [http://www.nba.com/playerfile/latrell\\_sprewell/bio.html](http://www.nba.com/playerfile/latrell_sprewell/bio.html) (last visited Feb. 25, 2009). Artest was the top player on the Sacramento Kings for several seasons, leading the Kings in rebounds and steals and finishing second on the team in scoring during the 2006–2007 season. NBA.com, Ron Artest, <http://www.nba.com/kings/stats/2006/index.html> (last visited Feb. 25, 2009).

<sup>149</sup> A lawyer is disbarred if the lawyer is expelled from the practice of law, usually because of some disciplinary violation. BLACK’S LAW DICTIONARY 475 (7th ed. 1999).

pended, however, the skill set that they have spent a lifetime cultivating is not transferable.<sup>150</sup> With every game missed for disciplinary reasons, athletes lose valuable paychecks as well as precious time before their bodies can no longer perform—every single game missed by an athlete is devastating. This demonstrates the urgency for procedural due process to have a removed arbitrator check commissioners from imposing harsh, unilateral disciplinary authority.

Substantively, the results in the *Malice in the Palace*<sup>151</sup> and “Latrell Sprewell”<sup>152</sup> cases illustrate the importance of arbitral review of commissioner sanctions. Despite choking his coach, Sprewell’s suspension was reduced by an arbitrator from one year to seven months.<sup>153</sup> Five months of employment and earnings is a substantial difference. In the *Malice in the Palace*<sup>154</sup> case, Jermaine O’Neal’s suspension, which was reduced from twenty-five to fifteen games, amounted to a difference of \$1,804,878 in salary.<sup>155</sup> Even in bizarre cases such as choking coaches and punching fans, neutral arbitrators came to different results than embedded league commissioners. The disparity in results reached by league commissioners and neutral arbitrators demonstrates the need for arbitral review of unilateral commissioner discipline.

#### V. A PROPOSAL FOR IMPROVEMENTS: A TRANSPARENT THREE-PART DISCIPLINARY SYSTEM

Developing a detailed and transparent disciplinary system with strict guidelines for conduct and punishments is the best way to limit arbitrariness in discipline/punishment and simultaneously protect both the players and the leagues. This Note proposes a three-part system. The first part establishes different categories of misconduct and provides reasonable ranges for punishment. The second part requires commissioners to provide detailed, publicly available explanations for the sanctions they impose on players.

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<sup>150</sup> Klis, *supra* note 116; Crouse, *supra* note 116; Wise, *supra* note 116.

<sup>151</sup> Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

<sup>152</sup> *Sprewell Arbitration Case*, *supra* note 1.

<sup>153</sup> *Id.*

<sup>154</sup> Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

<sup>155</sup> Espn.com News Service, *Suspensions Without Pay, Won’t Be Staggered*, Nov. 22, 2004, <http://sports.espn.go.com/nba/news/story?id=1928540>.

The third part creates a neutral arbitration mechanism to review appeals by players for their sanctions. Much like the CBAs, this system would be instituted through negotiations between league management and players associations.

#### A. Part I: Categories of Misconduct

The proposed disciplinary system would have different categories of misconduct and provide reasonable ranges for punishments. This Note proposes three categories of misconduct: minor, intermediate, and major offenses.

A minor offense would include instances where a player throws a punch, kicks, spits at, or in some other way batters an opposing player in a manner that does not put the targeted player at a substantial risk of physical harm or serious injury. A minor offense would also include excessively rough conduct that is committed within the context of the game. For example, a helmet-to-helmet hit<sup>156</sup> in the NFL or an excessively hard foul in the NBA would constitute a minor offense. Other examples of minor offenses might include mild on-court fights or first time off-court offenses that result in arrests. A minor offense would carry a suspension of between one and five percent of the respective league's total games in a season and a maximum fine of \$150,000.<sup>157</sup> This fine would be in addition to the money lost by the player pro rata for every game he was suspended.

An intermediate offense would include instances where a player punches, kicks, or attacks an opposing player, with clear malicious intent, and in fact causes him substantial physical harm. Intermediate offenses would carry suspensions of between five and twenty percent of the league's total games and fines of up to \$500,000 in addition to lost salary from missed games.

Major offenses would be comprised of the most severe violations. A major offense would include a violent physical attack on

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<sup>156</sup> Associated Press, *Helmet-to-Helmet Hits to Spur Ejections*, USA TODAY, Nov. 11, 2007, available at [http://www.usatoday.com/sports/football/nfl/2007-11-10-helmet-to-helmet\\_N.htm](http://www.usatoday.com/sports/football/nfl/2007-11-10-helmet-to-helmet_N.htm) (describing the dangerous act of defensive players tackling offensive players by leading with their helmets and hitting offensive players in their helmets and explaining that the NFL will be issuing more frequent suspensions for these flagrant acts).

<sup>157</sup> For example, NBA players Stephon Marbury and Allen Iverson each earn \$254,153 per game. Matt Berkshire, *Top Ten NBA Salaries for 2008-09*, Associated Content, Nov. 21, 2008, [http://www.associatedcontent.com/article/1211086/top\\_10\\_nba\\_salaries\\_for\\_20082009.html?cat=14](http://www.associatedcontent.com/article/1211086/top_10_nba_salaries_for_20082009.html?cat=14).

an unsuspecting or defenseless player, official, fan, or other patron in the stadium, which puts the target at a substantial risk of physical harm or serious injury. The range of sanctions for major offenses are anywhere from twenty percent of the league's games to expulsion from the league. An example of conduct constituting a major offense would be a player deliberately stomping on an opposing player's head who lays helmetless on the ground after the conclusion of the play.<sup>158</sup> Another example of a major offense would be a player entering the stands and attacking fans.<sup>159</sup> A maximum fine of \$5,000,000 could be imposed in addition to the player's lost salary for games missed.

Additionally, exceptionally egregious<sup>160</sup> major offenses or multiple major offenses could result in expulsion from a league. An example of an expulsion-worthy offense would be an NFL linebacker putting razor blades in his gloves to severely injure opposing players. To check the discretionary power the Commissioner obtains from the "exceptionally egregious" standard, an expulsion of a player for a one-time offense would also require a majority vote of the league's players. This would add more legitimacy to the process, check the Commissioner, and presumably obtain just results as a league's players would not want to compete in a league with an exceptionally egregious major offender who puts the other players in imminent danger.

Leagues could compound offenses, treat players' second or third minor offenses as an intermediate offense, and sanction under those guidelines. Additionally, leagues could treat multiple offenses more harshly if they occur in close proximity to each other. For example, if a player committed two minor offenses within two months, he could receive mandatory sanctions at the high end of the minor offenses range, and potentially get promoted into the intermediate offenses range.

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<sup>158</sup> This incident actually occurred when Albert Haynesworth, a 6-foot-6-inch, 320-pound defensive lineman for the Tennessee Titans kick-stomped Andre Gurode, an opposing player, causing his helmet to fall off. Haynesworth then kick-stomped him again directly in the head causing the victim to incur a severe head wound from Haynesworth's cleat which required thirty stitches. Haynesworth was suspended for an unprecedented five games, the most ever for on-field behavior in NFL History. ESPN News Service, *Haynesworth Suspended for Unprecedented Five Games*, Oct. 3, 2006, <http://sports.espn.go.com/nfl/news/story?id=2610577>.

<sup>159</sup> See "Malice in the Palace," *supra* note 120.

<sup>160</sup> The "exceptionally egregious" standard would be similar to the "shocks the conscience" standard, as the conduct would have to "offend even hardened sensibilities." *Rochin v. California*, 342 U.S. 165, 210 (1952).

The Commissioner would have discretion to sanction players for their misconduct within the sanctioning guidelines. This would provide players with clear and unambiguous notice of what their punishments would be for specified acts. In addition, players would avoid feeling “picked on,” or arbitrarily discriminated against, as discipline would be applied systematically and uniformly.

## B. Part II: Detailed Explanations of Punishments

Another check in the proposed disciplinary system would require commissioners to provide detailed explanations for their disciplinary actions. The explanations would include why *this* player received *this* suspension for *this* act. If the sanction differed from another sanction for a similar act, the Commissioner would be required to distinguish the two incidents and provide a rationale for the different sanctions. These explanations would be made public, for all members of the respective league to scrutinize.<sup>161</sup>

Public explanations would be beneficial for a number of reasons. First, a detailed rationale explaining why a commissioner disciplined players would provide notice to the entire league of what actions will not be tolerated, and *why* the punishments fall where they do within the sanctioning guidelines. Second, in addition to the punishment categories, this public explanation will further force the Commissioner to be consistent in disciplining players. Duplicitous disciplinary actions by the Commissioner would tarnish the system’s legitimacy and the Commissioner’s reputation. Finally, these explanations will provide valuable references for the neutral arbitral review board and can help to establish some precedent for disciplinary actions. Commissioner explanations will pro-

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<sup>161</sup> One example of a commissioner explanation came after a 2006 brawl between the New York Knicks and Denver Nuggets, when David Stern thoroughly explained his rationale behind his fifteen-game suspension of Carmelo Anthony and his \$500,000 fine of both teams. Stern explained, “Among the factors that influenced my decision . . . [t]eams will be held accountable for the actions of their employees—management and players alike. Players must also take advantage of a break or pause in a heated situation to stop and restore order, instead of escalating the situation. Players must heed directions from referees and others who are trying to maintain order and not continue to put fans, referees and peacemakers in harm’s way.” David Friedman, *Stern Justice: Carmelo Anthony Suspended for 15 Games*, Dec. 19, 2006, available at <http://20secondtimeout.blogspot.com/2006/12/stern-justice-carmelo-anthony.html>. Commissioner explanations of their sanctions are not mandatory, but are helpful in understanding their rationales for particular disciplinary actions.

vide additional transparency and consistency to the disciplinary process in sports leagues.

### C. Part III: Neutral Arbitration Board

After the league commissioner imposed sanctions on players as per the above disciplinary procedures, players would be permitted to appeal their sanctions to a neutral panel of arbitrators. This is unlike the current NFL system, where the Commissioner hears all disciplinary appeals.<sup>162</sup> Since the proposed disciplinary system would check the Commissioner's disciplinary authority, the arbitral board will only amend sanctions that are arbitrary and capricious. Some might argue that such accessible arbitral review of commissioner discipline is costly and excessive. The costs, however, are outweighed by the benefits associated with limiting the unchecked power vested in each league commissioner to deprive a professional athlete of the ability to earn a living.

### D. Examples of Applying the Disciplinary System

The proposed disciplinary system can be applied to remedy a recent sanctioning disparity in the NBA. During a game between the Phoenix Suns and Houston Rockets on November 12, 2008, a fight occurred which resulted in the suspension of three players.<sup>163</sup> The fight was provoked when Suns forward Matt Barnes lowered his shoulder and plowed through a screen set by Rockets guard Rafer Alston.<sup>164</sup> The two got into a shoving match. Suns guard Steve Nash ran over to act as peacemaker between the two players and was punched twice by Alston.<sup>165</sup> The situation escalated quickly, and several members of both teams engaged in a scrum that consisted exclusively of pushing and shoving—no additional punches were thrown.<sup>166</sup> The NBA Commissioner suspended both

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<sup>162</sup> NFL PCP, *supra* note 13.

<sup>163</sup> Marc Stein, *NBA Fight Fallout: Nash, Alston, Barnes Suspended*, Nov. 14, 2008, available at <http://sports.espn.go.com/espn/print?id=3702897&type=story> (the suspended players were Rockets guard Rafer Alston, Suns forward Matt Barnes, and Suns guard Steve Nash).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

Alston and Barnes for two games, and suspended Nash for one game for “escalating the situation.”<sup>167</sup>

Barnes was outraged, as he received the identical two-game suspension for shoving a player as Alston received for throwing two punches at Barnes’ teammate.<sup>168</sup> In voicing his discontent Barnes said, “‘We got in a little pushing match and I get suspended for two games? Rafer gets two games and Rafer threw two punches at Steve. Basically what they’re saying is you might as well throw two punches because you got the same suspension as someone who threw two punches . . . . Ridiculous.’”<sup>169</sup> This type of incongruence in punishment is exactly what the proposed disciplinary system strives to remedy. For example, if the disciplinary system explicitly states that players receive a minimum two-game suspension for throwing a punch, then players know that throwing a punch will cost them a minimum of two games worth of pay. While shoving *may* lead to a suspension, throwing punches is a *guaranteed* suspension. This will deter players from throwing punches by clearly articulating the ramifications.

The recent suspension of NBA player Zach Randolph<sup>170</sup> further illustrates the need for a uniform, transparent disciplinary system to curb arbitrary commissioner discipline.<sup>171</sup> Los Angeles Clippers forward Zach Randolph was suspended two games for knocking Phoenix Suns forward Louis Amundson to the floor and then punching him in the face when Amundson stood up.<sup>172</sup> Randolph’s suspension is the same length as the suspension Matt Barnes received for merely shoving another player.<sup>173</sup> Randolph’s sentence was inexplicably lenient in comparison to Barnes’.<sup>174</sup>

<sup>167</sup> *Id.*

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

<sup>169</sup> Stein, *NBA Fight Fallout*, *supra* note 163.

<sup>170</sup> Zach Randolph has a history of disciplinary problems, including suspensions for throwing his headband at an official, punching a teammate and breaking his eye socket in practice, and frequenting strip clubs while he was on away from his team on “bereavement leave.” Howard Beck, *Like Knicks, Randolph Cannot Shake Troubles*, N.Y. TIMES, Jan. 5, 2008, at 3, available at <http://www.nytimes.com/2008/01/05/sports/basketball/05garden.html>; see also John Eligon, *A Chance to Steady an Up-and-Down-Life*, N.Y. TIMES, Jul. 2, 2007, at 2, available at <http://www.nytimes.com/2007/07/02/sports/basketball/02randolph.html>; Frank Isola, *Knicks Go Low with Randolph*, N.Y. DAILY NEWS, June 29, 2007, available at [http://www.nydailynews.com/sports/basketball/knicks/2007/06/29/2007-06-29\\_knicks\\_go\\_low\\_with\\_randolph-1.html](http://www.nydailynews.com/sports/basketball/knicks/2007/06/29/2007-06-29_knicks_go_low_with_randolph-1.html).

<sup>171</sup> Brett Pollakoff, *Zach Randolph Suspended Two Games*, Feb. 18, 2009, available at <http://www.nbcalosangeles.com/sports/Zach-Randolph-Suspended-Two-Games-for-Throwing-a-Punch.html>.

<sup>172</sup> *Id.*

<sup>173</sup> Stein, *NBA Fight Fallout*, *supra* note 163.

<sup>174</sup> Pollakoff, *supra* note 171.

Randolph's actions, pummeling the defenseless, unsuspecting Amundson seemed far more analogous to the 2006 incident in which NBA superstar Carmelo Anthony punched opponent Mardy Collins in the face and received a fifteen-game suspension<sup>175</sup> than to Barnes' shoving another player.<sup>176</sup> Both Randolph and Anthony threw and landed punches against opposing players, yet Anthony's punishment was more than seven times as severe.<sup>177</sup>

Commenting on the suspension, Anthony's agent Calvin Andrews claimed, "It's not fair if you look at the history of other guys who got in a fight and hit someone and no one got this many games for something like this. [Indiana's] Jermaine O'Neal hit a fan and got 20 [games]. The [action] is not equal to the punishment."<sup>178</sup> This suspension cost Anthony \$782,340 in salary.<sup>179</sup>

Currently, punishments imposed appear to be "the product of a guessing game rather than a standardized procedure capable of repetition."<sup>180</sup> A uniform system would clarify to the rest of the league the severity of suspensions that will result from particular actions. As it stands, it is difficult to understand why Matt Barnes received the same two-game suspension for shoving as Zach Randolph received for punching another player, while Carmelo Anthony received a fifteen-game suspension for punching a player. These wildly disparate sanctions should be reconciled, and the proposed disciplinary system can help to quell the uncertainty created by unchecked and arbitrarily imposed discipline by commissioners.

Commissioners may contend that this systematic disciplinary system will fetter their abilities to effectively act in the "best interests" of the league.<sup>181</sup> They will argue that their disciplinary powers must be more flexible and that certain situations may require them to discipline a player decisively and harshly. There is no evidence that undeterred and unchecked power to discipline vested in a commissioner has had a beneficial effect on professional sports leagues. Moreover, there is no evidence to suggest that a uniform

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<sup>175</sup> Marc J. Spears, *Nuggets Take a Hit: Challenge Looms, but Hope Not Suspended Along With Leader*, *DENV. POST*, Dec. 19, 2006, available at [http://www.denverpost.com/sports/ci\\_4864909](http://www.denverpost.com/sports/ci_4864909).

<sup>176</sup> Stein, *supra* note 163.

<sup>177</sup> Pollakoff, *supra* note 171; *see also* Spears, *supra* note 175.

<sup>178</sup> Pollakoff, *supra* note 171; *see also* Spears, *supra* note 175.

<sup>179</sup> Pollakoff, *supra* note 171; *see also* Spears, *supra* note 175.

<sup>180</sup> Michael A. Mahone, Jr., Note, *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, 206 (2008).

<sup>181</sup> Pachman, *supra* note 60, at 1414.

and just disciplinary system will prevent the Commissioner from acting in the best interest of the league or decrease the deterrent effect of punishment.

#### CONCLUSION

The proposed disciplinary system will eliminate arbitrary and capricious discipline by restraining previously unbridled disciplinary authority vested in Commissioners. The current system has led to inconsistent sanctions and a deprivation of procedural due process. In conclusion, the current fatally flawed system should be remedied with due haste, and the proposed disciplinary system will better serve the interests of all parties concerned.

