

**NOTE: THE NFL MAKES IT RAIN: THROUGH STRICT
ENFORCEMENT OF ITS CONDUCT POLICY, THE NFL
PROTECTS ITS INTEGRITY, WEALTH, AND
POPULARITY**

Robert Ambrose[†]

I. OPENING KICKOFF - INTRODUCTION	1070
II. FIRST DOWN – HANDLING MISCHIEF IN THE NFL	1073
A. <i>Disciplinary Action</i>	1073
B. <i>NFL’s Conduct Policy</i>	1073
1. <i>Categorizing Misconduct</i>	1074
2. <i>Procedure</i>	1075
3. <i>Disciplinary Action</i>	1076
a. <i>April 10, 2007</i>	1076
b. <i>Michael Vick</i>	1078
III. SECOND AND LONG – EVOLUTION OF COMMISSIONERS’ BROAD POWERS.....	1080
A. <i>MLB Shapes Commissioner Authority</i>	1080
1. <i>Kenesaw Mountain Landis, 1921 – 1944</i>	1080
2. <i>Bowie Kuhn, 1969 – 1984</i>	1082
3. <i>Ted Turner & The Atlanta Braves</i>	1083
4. <i>Pete Rose</i>	1083
B. <i>History of the NFL Commissioner</i>	1084
1. <i>Pete Rozelle, 1960 – 1989</i>	1085
2. <i>Paul Tagliabue, 1989 – 2006</i>	1086
C. <i>NFL Present Day</i>	1087
1. <i>Roger Goodell, August 2006 – Present</i>	1087
2. <i>Miscreants in the NFL</i>	1088
IV. THIRD DOWN CONVERSION – ROGER GOODELL’S RULINGS ARE LEGAL, JUST, AND THE BEST FOR THE BUSINESS	1089

[†] The author is a 2009 J.D. candidate at William Mitchell College of Law; B.A. Criminal Justice, Indiana University, 2003. He thanks Chris Ambrose, Shubha Harris, Kevin Warren, Jen Zwilling, and the *William Mitchell Law Review* staff for their insight and assistance during various stages of this article, and his friends and family for their constant love and support.

A.	<i>Legal</i>	1089
1.	<i>Labor Law</i>	1089
2.	<i>Private Association Law</i>	1091
3.	<i>Governing NFL Documents</i>	1091
a.	<i>League Constitution & Bylaws</i>	1091
b.	<i>Collective Bargaining Agreement</i>	1092
c.	<i>Uniform Player Contract</i>	1093
4.	<i>Picking Up the Blitz – Is the NFL Too Strict?</i>	1094
a.	<i>Major League Baseball (MLB) Compared</i>	1094
b.	<i>National Basketball Association (NBA) Compared</i>	1096
c.	<i>National Hockey League (NHL)</i>	1097
d.	<i>NFLPA Compared</i>	1098
B.	<i>Roger Goodell’s Rulings are Just</i>	1100
1.	<i>Past Discipline was Too Lenient</i>	1101
2.	<i>Roger Goodell Gives Players Another Chance</i>	1101
3.	<i>Down-Field Blocking – Due Process and the Separation of League and State</i>	1102
a.	<i>Why Wait for a Legal Ruling?</i>	1103
b.	<i>Landis & Goodell: The Similarities</i>	1104
c.	<i>Vanished Presumption of Innocence</i>	1105
C.	<i>Touchdown – Roger Goodell’s Rulings are the Best for the Business</i>	1106
1.	<i>Economic Impact & Protection of Assets (Players)</i>	1106
2.	<i>Strictly Enforcing the Conduct Policy is in the NFL’s Best Interest</i>	1108
a.	<i>Role Models</i>	1108
b.	<i>Winning is not Everything</i>	1109
V.	<i>OFF-SEASON CONDITIONING - RECOMMENDATIONS</i>	1110
A.	<i>Punishment Disparities</i>	1110
B.	<i>Punishment Guidelines</i>	1111
C.	<i>Neutral Arbitrator & Standard of Review</i>	1111
VI.	<i>CONCLUSION</i>	1112

I. OPENING KICKOFF - INTRODUCTION

“We’re consumers. We are by-products of a lifestyle obsession. Murder, crime, poverty, these things don’t concern me.”¹

1. FIGHT CLUB (Twentieth Century Fox Film Corp. 1999).

Recently, all it took to play in the National Football League (NFL) was superior athletic ability and prowess, as NFL management was reluctant to discipline NFL players involved in criminal acts and other problems off the field.² As late as the 1990s, “murder” was the only criminal offense said to bar an athlete from playing in the NFL.³ This reluctance to discipline players allowed the NFL to continue to feed the public’s obsession with football by showcasing the best physically skilled players on the field.⁴ Feeding this obsession eventually led to the NFL’s emergence as the richest and most profitable sports league in the world.⁵

In today’s information age, however, a player’s off-field misconduct is under the microscope.⁶ The off-field misconduct is subject to increasing scrutiny partly because of the news media’s blasting of the latest scandals and partly because of the nature of the offenses.⁷ Lately, NFL Commissioner Roger Goodell’s docket contains a wide assortment of matters, including Michael Vick’s involvement in illegal dogfighting,⁸ an assistant coach arrested for allegedly driving naked through a fast-food pickup window,⁹ and

2. Cf. Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 176 (1998) (discussing the rare instances in which commissioners used their powers to discipline players involved in sexual assault or domestic violence).

3. JEFF BENEDICT & DON YAEGER, *PROS AND CONS: THE CRIMINALS WHO PLAY IN THE NFL* 40 (1998) (“[T]he authors asked player agent Leigh Steinberg if there were any criminal offenses that would altogether bar a player from playing in the NFL. ‘Murder,’ he replied . . .”).

4. Cf. *id.* at 5 (suggesting that NFL teams will forgive habitual criminal offenders if they can run forty yards in less than 4.3 seconds).

5. In 2006, the NFL’s mean operating income was \$17.8 million out of \$204 million in revenue. Kurt Badenhausen, Michael K. Ozanian & Christina Settimi, *The Business of Football*, FORBES.com, Sept. 13, 2007, http://www.forbes.com/business/2007/09/13/nfl-team-valuations-biz-07nfl_cz_kb_mo_cs_0913nfl_land.html.

6. See Sean Bukowski, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 108 (2001) (noting that athletes are high-profile public figures, in which every aspect of their lives draws media attention).

7. See Stuart Elliott, *Mending a Bruised Image*, N.Y. TIMES, Aug. 30, 2007, at C1 (explaining that news coverage of professional football reads more like a police blotter).

8. See Michael S. Schmidt & Judy Battista, *After Plea, Vick Is Barred Indefinitely by the N.F.L.*, N.Y. TIMES, Aug. 25, 2007, at D1 (reporting that Atlanta Falcons’ star quarterback, Michael Vick, agreed to plead guilty to felony charges stemming from placing dogfighting bets and helping to kill underperforming dogs).

9. See *Sports Briefing*, N.Y. TIMES, Feb. 14, 2007, at D7 (reporting that on August 24, 2007, police stopped Joe Cullen, assistant coach of the Detroit Lions,

the New England Patriots videotaping their opponent's signals during games.¹⁰

Goodell's ability to discipline this wide-range of incidents derives from two categories of conduct listed in the NFL's Collective Bargaining Agreement (CBA): "conduct on the playing field . . . [and] conduct detrimental to the integrity of, or public confidence in, the game of professional football"¹¹ Moreover, to handle players' off-the-field misconduct specifically, the NFL decided to implement a conduct policy in 2000, making it the first among major sports.¹² Since that time, conduct policies are becoming more popular among individual teams in the NFL,¹³ as well as collegiate athletic departments.¹⁴

This article supports the NFL's current enforcement of its conduct policy, and explains its emergence in four parts. First, this note details the NFL's conduct policy and disciplinary action in the NFL.¹⁵ Second, it provides a historical evolution of sports commissioners' broad disciplinary powers.¹⁶ Third, it explains why Roger Goodell's current enforcement of the NFL's conduct policy

and cited him on suspicion of indecent and obscene conduct. The police said he was driving nude. In a separate incident one week later, Cullen was arrested for drunken driving).

10. See Richard Sandomir, *Goodell Defends Punishment and Warns of Other Sanctions*, N.Y. TIMES, Sept. 17, 2007, at D2 (reporting that on September 9, 2007 the New England Patriots used a video camera in violation of league rules to spy on the New York Jets' defensive signals).

11. NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, art. XI, § 1, para. a, at 20 (2006), available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=231&pid=0&type=1> [hereinafter NFL-CBA].

12. See *Plus: Pro Football – Owners Meeting: Changes Approved on Player Conduct*, N.Y. TIMES, May 24, 2000, at D7 (stating that the NFL renamed the Violent Crime Policy the Personal Conduct Policy).

13. In 2005, the Minnesota Vikings implemented a seventy-seven page conduct policy following the Minnetonka Boat Cruise Incident, which resulted in four players being charged with lewd conduct. Mark Maske & Les Carpenter, *Player Arrests Put the NFL in a Defensive Mode: High Number Alarms League as it Works to Protect Its Image*, WASH. POST, Dec. 16, 2006, at A1.

14. Florida State University's Athletic Department used its code of conduct to suspend Geno Hayes and Joe Surratt indefinitely following their arrests for an altercation with the Tallahassee Police Department on September 21, 2007. Andrew Carter, *Bowden Holds Off on Hayes, Surratt*, ORLANDO SENTINEL, Sept. 25, 2007, at D8.

15. See *infra* Part II.

16. See *infra* Part III.

is legal, just, and the best for the business.¹⁷ Finally, the note includes recommendations for the NFL to improve its conduct policy before concluding on the current state of athletes' conduct in major sports.¹⁸

II. FIRST DOWN – HANDLING MISCHIEF IN THE NFL

A. *Disciplinary Action*

The NFL Commissioner may discipline players, coaches, and other employees for misconduct taking place on and off the field.¹⁹ On-the-field misconduct usually includes players being unnecessarily violent or celebrating excessively during games.²⁰ Off-the-field misconduct usually includes players using banned substances, gambling, or engaging in criminal activity.²¹ In response, the commissioner may punish players using any number of various NFL documents in his disciplinary arsenal.²² Currently, NFL Commissioner Roger Goodell's weapon of choice in fighting off-the-field misconduct is the league's conduct policy.

B. *NFL's Conduct Policy*

The NFL and the National Football League Players Association (NFLPA) did not collectively bargain for the conduct policy during labor negotiations. Moreover, the conduct policy is not part of the league's constitution and bylaws. This does not mean, however, that the league unilaterally imposed the conduct policy without any input from the NFLPA.²³ Nevertheless, the NFL's conduct policy is

17. See *infra* Part IV.

18. See *infra* Part V.

19. NFL-CBA, *supra* note 11, art. XI, § 1, para. (a), at 20.

20. "Unnecessary roughness" is a personal foul and "excessive celebrations" are unsportsmanlike conduct; both infractions are fifteen-yard penalties enforced against the offending team. 2006 Official Playing Rules of the National Football League, <http://blogmedia.thenewstribune.com/media/2006%20NFL%20RULEBOOK.pdf>.

21. See Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 177 (1995) (discussing that integrity-related discipline includes issues like gambling, drugs, and other off-the-field conduct).

22. The league constitution, uniform player contract, and the collective bargaining agreement are all governing documents granting the commissioner disciplinary authority over off-the-field conduct.

23. See Ken Murray, *Goodell Gets Tough: Commissioner Looks to Shore Up NFL's Tarnished Image, Cracks Down on 'Pacman' Jones, Henry for Repeated Arrests*, BALTIMORE SUN,

one of the league's rules and regulations.²⁴ Specifically, the conduct policy states in part:

Engaging in violent and/or criminal activity is unacceptable and constitutes conduct detrimental to the integrity of and public confidence in the National Football League. Such conduct alienates the fans on whom the success of the League depends and has negative and sometimes tragic consequences for both the victim and the perpetrator. The League is committed to promoting and encouraging lawful conduct and to providing a safe and professional workplace for its employees.²⁵

1. *Categorizing Misconduct*

The conduct policy categorizes three types of conduct subject to discipline: prohibited conduct, persons charged with criminal activity, and persons convicted of criminal activity.²⁶ First, prohibited conduct entails "covered persons"²⁷ engaging in (or aiding, abetting or conspiring to engage in or to incite) "violent and/or criminal activity."²⁸ The policy also includes a non-exclusive list of examples constituting "violent and/or criminal activity."²⁹

Apr. 11, 2007, at 1E (quoting NFLPA executive director Gene Upshaw, "[w]e believe that these are steps that the commissioner needs to take and we support the policy."); see also David Elfin, *On Top of His Game: Goodell's First Nine Months on Job Have Been Busy*, WASH. TIMES, June 20, 2007, at C1 (discussing that Goodell established a six-player advisory council, in which he receives direct input from the players on various issues. One player on the panel said, "[e]veryone who was in that initial meeting pretty much anticipated what he was going to do about the off-the-field problems that we have been having.").

24. Other league rules and regulations include agent regulations, banned substances, and financial advisor regulations. NFL Rules and Regulations, available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=232&pid=0&type=l>.

25. NFL Conduct Policy, available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=336&pid=0&type=n>.

26. *Id.*

27. See *id.* (stating that NFL players under contract are not the only ones considered "covered persons" under the policy). "Covered persons" also includes full-time employees of the NFL or its member teams, rookie players once selected in the NFL College Draft, and all other prospective employees once they commence negotiations for employment. *Id.*

28. *Id.*

29. *Id.* The policy states:

[A]ny crime involving the use or threat of physical violence to a person or persons; the use of a deadly weapon in the commission of a crime;

2008]

THE NFL MAKES IT RAIN

1075

Moreover, the league prohibits using “words or conduct suggest[ing] that criminal conduct is acceptable or condoned within the NFL.”³⁰

Second, persons simply charged with criminal activity are subject to disciplinary action and mandatory clinical evaluations and counseling.³¹ Third, the commissioner may fine or suspend a person convicted of criminal activity.³² Additionally, multiple convictions or violations of the policy result in an automatic suspension or banishment determined at the discretion of the commissioner.³³ The league acknowledges that its players and coaches are public role models and states that the NFL is “committed to promoting and encouraging lawful conduct.”³⁴ By stating this, the league is rationalizing that off-the-field misconduct affects the integrity and popularity of the league.³⁵

2. Procedure

First, the commissioner must discover prohibited conduct. Under the NFL’s policy, the duty of reporting prohibited conduct rests on the violator.³⁶ The violator must report any arrests or charges of prohibited conduct to their clubs or NFL Security.³⁷ In today’s information age, however, access to news around the clock can make reporting an unnecessary procedure. Nevertheless, it is the commissioner’s duty to investigate any reports of prohibited conduct and ultimately decide whether to impose disciplinary action.³⁸ In cases where conduct goes unreported, the

possession or distribution of a weapon in violation of state or federal law; involvement in “hate crimes” or crimes of domestic violence; theft, larceny or other property crimes; sex offenses; racketeering; money laundering; obstruction of justice; resisting arrest; fraud; and violent or threatening conduct.

Id.

30. *Id.* (alteration in original).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See generally NFL-CBA, *supra* note 11, art. XI (describing the commissioner’s disciplinary authority).

commissioner may investigate possible prohibited conduct on his own initiative.³⁹

3. *Disciplinary Action*

Under the conduct policy, the commissioner has discretion to fine, suspend, or banish players.⁴⁰ Upon reaching a decision, the commissioner notifies the player of any disciplinary action through a written letter; the NFL also sends a copy of the letter to the NFLPA.⁴¹ The player disciplined then has the right to appeal the commissioner's decision within twenty days.⁴² The appeal to the commissioner is the offender's only right to appeal in the NFL, unlike other major sports which allow appeals to a neutral third party.⁴³

a. *April 10, 2007*

On April 10, 2007, NFL Commissioner Roger Goodell decided to strengthen the league's conduct policy.⁴⁴ Goodell did not drastically change the policy language, but he put everyone on notice regarding how he would enforce it.⁴⁵ Goodell warned that he would discipline violators with longer suspensions and larger fines.⁴⁶ He also stated that he would hold those employed at the club and league levels accountable under the new policy by

39. NFL Conduct Policy, *supra* note 25.

40. *Id.*

41. *Id.* See also *infra* Parts IV.A.4.a.

42. *Id.*

43. *Id.*

44. See Mike Reiss, *Jones Takes Hit from NFL: Titan Suspended for 2007 Season*, BOSTON GLOBE, Apr. 11, 2007, at 5D (recapping Goodell's press conference regarding the strengthening of the NFL's conduct policy).

45. Compare NFL Conduct Policy, *supra* note 25 (showing that the only major language change in the policy occurs under the subdivision Persons Charged with Criminal Activity, which requires those arrested for or charged with prohibited conduct to undergo, "an immediate, mandatory clinical evaluation and, if directed, appropriate counseling. Such evaluation and counseling must be performed under the direction and supervision of the NFL Vice President of Player and Employee Development.") and NFL Personal Conduct Policy (Mar. 13, 2007), <http://sports.espn.go.com/nfl/news/story?id=2798214> (showing that the language of the policy prior to April 10, 2007 required "a consultation and additional counseling as directed" for persons arrested for or charged with prohibited conduct). Therefore, the policy's only major substantive change is the immediacy of a mandatory clinical evaluation and its supervision by a superior league official for those persons violating prohibited conduct.

46. See Reiss, *supra* note 44 (noting that Goodell promised harsher penalties).

subjecting teams to discipline for club employee violations.⁴⁷ Goodell immediately backed up his words with significant action.

On April 10, 2007, Roger Goodell handed down some of the harshest suspensions for off-the-field misconduct in NFL history.⁴⁸ Goodell suspended Tennessee Titans' cornerback Adam "Pacman" Jones for the entire 2007 season and suspended Cincinnati Bengals' receiver Chris Henry for eight games.⁴⁹ Technically, Goodell suspended Jones and Henry for their numerous encounters with law enforcement prior to April 10, 2007.⁵⁰

47. See Michael O'Keefe, *Pacman Packs it in for Year: Jones Can Return, Victim Never Will*, N.Y. DAILY NEWS, Apr. 11, 2007, at 57 (explaining that a team's punishment could include a loss of draft choices).

48. 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 (discussing the commissioner's suspension of Jones and Henry as two of the harshest suspensions in NFL history for off-the-field conduct).

49. *Id.*

50. Greg Garber, *Pacman Jones Incidents* (Apr. 10, 2007), <http://sports.espn.go.com/nfl/news/story?id=2790090>. Jones' nine separate incidents since being drafted in April 2005:

- 07/13/05: Jones is arrested by Nashville police at Titans headquarters and charged with assault and felony vandalism stemming from a nightclub altercation.
- 09/05/05: Jones has a loud verbal tantrum when told to wait in line for his car and he did not pay for valet service while attending the annual Nashville Sports Council Kickoff Luncheon.
- 10/25/05: State of West Virginia alleges that Jones violated the terms of his probation; a judge extends his probation ninety days.
- 02/06/06: "Jones is arrested in Fayetteville, Ga., and charged with possession of marijuana. He is handcuffed after throwing a punch at an officer . . . and charged with a felony count of obstruction and two misdemeanors of obstructing police." The court dropped the possession of marijuana charge in January 2007; the court still has not set a trial date for the obstruction charge.
- 03/23/06: "A Fayette County drug task force SWAT team serves a search warrant at the Georgia home Jones bought for his mother. . . . Jones admits to police he has been smoking and that it will be several weeks before he is able to pass a drug test."
- 04/18/06: "According to Nashville police, who cite surveillance camera footage, Jones is one of 12 people gathered at a gas station when a fight breaks out and gunshots are fired."
- 08/25/06: "Jones is arrested in Murfreesboro, Tenn., for disorderly conduct and public intoxication. At the Sweetwater Saloon, he is accused of assault by Toya Garth, who says Jones spit in her face and she spit back."
- 10/26/06: "Jones is cited for misdemeanor assault at Club Mystic, a Nashville nightclub, where he allegedly spits in the face of a female college student. He is suspended for one game by the Titans . . ."
- 02/19/07: "Jones is present when an early morning brawl breaks out at Minxx Gentlemen's Club in Las Vegas. Three people are shot. Club co-

Goodell's new strict enforcement laid the groundwork for handling the Michael Vick situation later in 2007.

b. Michael Vick

On July 17, 2007, the news media was abuzz as a federal grand jury indicted Atlanta Falcons quarterback and All-Pro, Michael Vick.⁵¹ The grand jury charged Vick with sponsoring a dogfighting operation named "Bad Newz Kennels."⁵² Six days later, Roger Goodell instructed Vick to stay away from the Falcons training camp until the league reviewed the charges.⁵³ The league also asked the Atlanta Falcons, as a club, to refrain from taking action against Vick until the league completed its investigation.⁵⁴ Although the Falcons had the right to discipline Vick,⁵⁵ the league's disciplinary action supersedes any individual club's action.⁵⁶

On July 26, 2007, Vick pleaded not guilty to the dogfighting charges.⁵⁷ At the time, the commissioner faced two basic concerns that arise when employers discipline employees. First, the

owner Robert Susnar claims the shooter—still at large—acted on Jones' behalf. Jones denies this."

Id. Jones currently faces two felony charges of coercion from this incident. Michael O'Keeffe, *Pacman Backed Into a Corner: Faces Felony Charges in Vegas Shooting*, N.Y. DAILY NEWS, June 21, 2007, at 68. See also James Alder, James' Football Blog: The Chris Henry Weekly Rap Sheet (June 15, 2006), <http://football.about.com/b/a/257717.htm> (describing the nature of Henry's four arrests in a fourteen month span: (1) alleged possession of marijuana; (2) waived a gun at a crowd of people; (3) drove under the influence; and (4) provided alcohol to three females under the age of eighteen).

51. Indictment, *United States v. Michael Vick et al.*, Criminal No. 3:07CR (E.D. Va. July 17, 2007), available at http://assets.espn.go.com/media/pdf/070717/vick_indictment.pdf.

52. See Michael S. Schmidt, *In the Case Against Vick, Dogs Are Held as Evidence*, N.Y. TIMES, Aug. 1, 2007, at D1 (discussing that prosecutors used the fifty-four pit bulls recovered by law enforcement to indict Vick on felony charges).

53. See Clifton Brown & Judy Battista, *Vick Goes to Court as Falcons Go to Camp*, N.Y. TIMES, July 27, 2007, at D1 (describing the commissioner ordering Vick to stay away from camp and the Falcons adjusting to life without Vick).

54. See Judy Battista, *Team Owner Says Falcons Planned to Suspend Vick*, N.Y. TIMES, July 25, 2007, at D2 (explaining Atlanta Falcons' owner Arthur Blank's decision-making process on whether to suspend Vick).

55. See NFL-CBA, *supra* note 11, art. VIII, § 1, para. a, at 11 (noting that the club may discipline a player for conduct detrimental to the club).

56. *Id.* at art. XI, § 5, at 20.

57. Judy Battista, *Without Contact, Vick Takes Hit in the Pocket*, N.Y. TIMES, July 28, 2007, at D1.

commissioner had to afford Vick due process.⁵⁸ This did not mean Goodell had to wait for the legal system to adjudicate Vick, but it did mean Goodell had to grant Vick due process by providing a meaningful notice and hearing.⁵⁹ Second, Goodell had to avoid prejudicing the legal action against Vick.⁶⁰ Completely ignoring these two concerns can lead the commissioner into the court room as a defending party.⁶¹

On August 23, 2007, less than one month after Vick pled not guilty, Vick reconsidered and signed a plea agreement admitting his involvement in the dogfighting operation.⁶² The next day, after the government filed Vick's plea, Goodell suspended Vick indefinitely.⁶³ According to league policy, Goodell notified Vick and the NFLPA of the suspension through the required letter.⁶⁴ In the letter, Goodell explained that Vick violated the league's conduct policy and his player's contract.⁶⁵ Goodell noted that he would review Vick's status following the conclusion of his legal proceedings, and offered Vick the right to appeal.⁶⁶ In the NFL's disciplinary system, the commissioner plays the roles of prosecutor, judge, and jury.⁶⁷ This unusual amalgamation of power is owed to

58. See 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, 1430–32 (1990) (discussing due process constraints on commissioner actions).

59. See *id.* at 1432 (“Where notice and a hearing are not supplied, courts will be quick to condemn commissioner actions.”).

60. See *Rose v. Giamatti*, 721 F. Supp. 924, 928–29 (S.D. Ohio 1989) (issuing a temporary restraining order against the commissioner's investigations and hearing into Rose's alleged gambling because Commissioner Giamatti prejudged Rose's case).

61. *Id.*

62. See Elliot, *supra* note 7, at C1 (noting that Michael Vick pleaded guilty to a felony charge of conspiracy deriving from illegal dog fighting); see also Plea Agreement, *United States v. Michael Vick*, Criminal No. 3:07CR274 (E.D. Va. Aug. 24, 2007), available at <http://assets.espn.go.com/media/pdf/070824/vickplea.pdf>.

63. Michael S. Schmidt & Judy Battista, *After Plea, Vick is Barred Indefinitely by the N.F.L.*, N.Y. TIMES, Aug. 25, 2007, at D1. See also Letter from Roger Goodell, Comm'r, Nat'l Football League, to Michael Vick (Aug. 24, 2007) [hereinafter Goodell Letter], available at <http://assets.espn.go.com/media/pdf/070824/michaelvickletter.pdf>.

64. *Id.*

65. *Id.*

66. *Id.*

67. See Bukowski, *supra* note 6, at 113 (noting that an NFL commissioner can act as the “judge, jury, and executioner.”).

Major League Baseball, which shaped the broad commissioner authority seen in professional sports today.⁶⁸

III. SECOND AND LONG – EVOLUTION OF COMMISSIONERS’ BROAD POWERS

A. *MLB Shapes Commissioner Authority*

Baseball created the office of the commissioner in 1921,⁶⁹ and its eventual success with the position ultimately led other major sports to follow suit and create their own commissioners.⁷⁰ But, baseball is the sport primarily responsible for shaping today’s commissioners’ powers, partly due to various legal battles testing the scope of the commissioners’ authority.⁷¹

1. *Kenesaw Mountain Landis, 1921 – 1944*

“In the early days of baseball, open gambling was as common as a well-executed sacrifice bunt. Gamblers filled the stands and bet on everything, including individual at bats.”⁷² This type of behavior, including the infamous Black Sox Scandal⁷³ and the case *American League Baseball Club of New York v. Johnson*,⁷⁴ gave baseball’s

68. See Pachman, *supra* note 58, at 1413 (noting that “baseball, of all the sports, is the best vehicle to examine the genesis of the commissioner’s office.”).

69. See *id.* at 1413 n.19 (stating that Landis was appointed the first commissioner of major league baseball in 1921).

70. See *id.* at 1417 n.55 (stating that the NFL changed its president’s title to commissioner in 1941, and the NBA named Maurice Podoloff its first commissioner in 1949); see also Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645, 1647 n.14 (1999) (explaining that the National Hockey League did not name its first commissioner, Gary Bettman, until 1992).

71. Pachman, *supra* note 58, at 1420–27.

72. Wayne S. Quirk, *Baseball’s Big Inning: The Sacrifice of the 1919 Black Sox*, in *SPORTS AND THE LAW, MAJOR LEGAL CASES* 111, 113 (Charles E. Quirk ed., 1996).

73. See Pachman, *supra* note 58, at 1413–14 & n.20, (citing *ELIOT ASINOF, EIGHT MEN OUT* 39–121 (Henry Holt & Co. 1963) (1987) (explaining the Black Sox scandal, which involved eight Chicago White Sox players who were accused of accepting gamblers’ money to “throw” the 1919 World Series)).

74. 179 N.Y.S. 498 (N.Y. Sup. Ct. 1919). In 1919, Boston Red Sox pitcher Carl Mays unknowingly tested the powers of the Major League Baseball’s commission when he walked off the field in the middle of a game. *Id.* at 499–500. This resulted in the Boston Red Sox selling Mays to the New York Yankees and the major league baseball commission subsequently suspending Mays for deserting his team. *Id.* at 501. *American League Baseball Club of New York v. Johnson* immediately ensued and the court held that the league could only discipline a player for his

image a black eye and prompted Baseball to create the commissioner position.⁷⁵ Baseball wanted the commissioner to be a separate entity from the league with the authoritative ability to clean up the game.⁷⁶ United States District Court Judge Kenesaw Mountain Landis fit the bill, and baseball named him its first commissioner in 1921.⁷⁷

Judge Landis accepted the position only after the league agreed to grant him broad powers to discipline players based upon the “best interests” of the game.⁷⁸ Landis did not waste any time wielding his new-found powers.⁷⁹ During his twenty-four year tenure, Landis banned thirteen players from the game for life,⁸⁰ including the eight players involved in the Black Sox scandal, even though a conciliatory grand jury cleared the players of any wrongdoing.⁸¹

Landis even butted heads with Babe Ruth when Ruth violated the prohibition of “barnstorming.”⁸² Landis did not back down to baseball’s biggest superstar⁸³ and suspended Ruth for the first six weeks of the 1922 season.⁸⁴ Landis’ suspensions were all within his authority because the league’s agreement granted him the broad power to “impose punishment and pursue legal remedies for any

playing of the game on the field. *Id.* at 504–05.

75. Pachman, *supra* note 58, at 1413–14.

76. *Id.*

77. *Id.* at 1414.

78. See Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L.J. 277, 303–04 (2005) (describing Landis’ negotiations with major league baseball for the commissioner’s position).

79. See *infra* notes 80–88 and accompanying text.

80. See Pachman, *supra* note 58, at 1415 (“[for] violations ranging from gambling to the suggestion by a pitcher that he would leave his club so that it would not win the pennant.”) (alteration in original).

81. Sigman, *supra* note 78, at 305.

82. See Pachman, *supra* note 58, at 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))).

83. Babe Ruth’s hall of fame career included 714 homeruns, a lifetime batting average of .342, ninety-four wins as a pitcher, including seventeen shut-outs, and a member of seven World Series championship teams. These statistics are available at <http://www.baberuth.com/flash/about/stats.html>.

84. See Sigman, *supra* note 78, at 310–12 (detailing Landis’ battle with Babe Ruth).

conduct of league personnel that he determined to be detrimental to the best interests of the game.”⁸⁵

In 1931, *Milwaukee American Association v. Landis*⁸⁶ provided the first and only legal test to Landis’ broad authority.⁸⁷ The court held that Landis acted within his authority and specifically stated, “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.”⁸⁸ This single legal test of Landis’ authority may have been indicative of the general attitude toward authority at that time.⁸⁹

2. *Bowie Kuhn, 1969 – 1984*

*Charles O. Finley & Co. v. Bowie Kuhn*⁹⁰ provided another opportunity for the legal system to define the scope of the commissioner’s authority, forty-five years after *Landis*.⁹¹ In 1976, Oakland Athletics’ flamboyant owner Charles O. Finley⁹² sparked a court battle when he sold three of his star players before the trade deadline.⁹³ Baseball Commissioner Bowie Kuhn rejected the transactions, causing Finley to immediately bring suit. Once again, a commissioner acting in the “best interests” of the game reigned

85. Pachman, *supra* note 58, at 1415.

86. 49 F.2d 298 (N.D.Ill. 1931).

87. See PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW, TEXT, CASES, PROBLEMS 14 (3d ed., Thomson West 2004) (1993) (explaining that *American Association v. Landis* arose out of Landis’ refusal to approve a St. Louis Browns’ transaction involving, “a player named Fred Bennett [who] had been transferred several times between the St. Louis Browns and several minor league teams, but all the clubs were secretly controlled by Browns’ owner Phil Ball.”).

88. *Landis*, 49 F.2d at 302.

89. “Former Baseball Commissioner Bowie Kuhn has pointed out that, at the time Landis served as commissioner, people tended to accept quietly the acts of those in leadership positions, but that after World War II ended, baseball owners became increasingly willing to challenge commissioner authority.” Pachman, *supra* note 58, at 1416.

90. 569 F.2d 527 (7th Cir. 1978).

91. *Landis*, 49 F.2d 298.

92. See C.W. Nevius, *Flamboyant Ex-A’s Owner Finley Dies, His Teams Won Three Straight World Series*, S.F. CHRON., Feb. 20, 1996, at A1 (describing Finley’s flamboyancies, including being responsible for changing Oakland’s uniform colors to “kelly green, wedding gown white and California gold.”).

93. *Finley*, 569 F.2d at 531. Finley sold stars Joe Rudi and Rollie Fingers to the Boston Red Sox for \$2 million and Vida Blue to the New York Yankees for \$1.5 million. Commissioner Kuhn disapproved of the assignments stating they were “inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it.” *Id.*

supreme as the court held 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.”⁹⁴

3. *Ted Turner & The Atlanta Braves*

Also in 1976, the Atlanta Braves and its owner Ted Turner found themselves testing the commissioner’s authority in the courtroom. Commissioner Kuhn suspended Turner for one year for commenting on a potential free agent in violation of league rules.⁹⁵ Furthermore, Kuhn took away the Braves’ first round draft choice in the upcoming amateur draft.⁹⁶ The Atlanta Braves and Ted Turner immediately filed a complaint against the commissioner seeking to enjoin Kuhn from imposing the sanctions.⁹⁷

Once again, the court upheld a commissioner’s authority and held that, “the defendant Commissioner had ample authority to punish plaintiffs in this case, for acts considered not in the best interests of baseball.”⁹⁸ The court, however, limited the scope of the commissioner’s authority and decided that taking away the Braves’ draft pick was excessive.⁹⁹

4. *Pete Rose*

In 1989, Pete Rose, manager of the Cincinnati Reds, gambled on his own team to win and found himself subject to the

94. WEILER & ROBERTS, *supra* note 87, at 23 (internal quotation marks omitted).

95. *See id.* at 25 (describing that in September of 1976, Kuhn discovered that the Atlanta Braves’ General Manager violated Major League Rule 3(g), which prohibited tampering when he made improper contact with potential free agent Gary Matthews. Kuhn fined the Braves \$5,000 and took away their first pick in the amateur draft. Then in October 1976, Atlanta Braves’ owner Ted Turner told San Francisco Giants’ owner Bob Lurie that “the Braves would go as high as necessary to get Matthews” thus violating the tampering rule again).

96. *Id.*

97. Atlanta Nat’l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (D. Ga. 1977).

98. *Id.* at 1220.

99. *See id.* at 1226 (“The deprivation of a draft choice was first and foremost a punitive sanction, and a sanction that is not specifically enumerated . . . [a]ccordingly, the court concludes that the Commissioner was without the authority to impose that sanction, and its imposition is therefore void.”) (alteration in original).

commissioner's discipline.¹⁰⁰ When Commissioner Giamatti caught wind of the rumors involving Rose's gambling habits, he hired John Dowd, a Washington lawyer, to investigate the rumors.¹⁰¹ Once Rose learned of Giamatti's investigation, he filed suit in state court to enjoin the commissioner's actions.¹⁰² Jurisdictional disputes followed and Giamatti eventually removed the case to federal court.¹⁰³ Ultimately, the case settled out of court and resulted in Rose's ban from baseball.¹⁰⁴ Although the case settled, "the judicial opinion in *Rose v. Giamatti* . . . laid bare the reality . . . that Major League Baseball is a unique organization . . . [with] extraordinary power invested in the Commissioner."¹⁰⁵

B. History of the NFL Commissioner

The Associated Press donned Jim Thorpe as the greatest athlete in the first half of the twentieth century.¹⁰⁶ Thorpe's stardom led the American Professional Football Association (renamed the NFL in 1922) to name him its first president in 1920.¹⁰⁷ Joe Carr became president after Thorpe's lone year in the position, and he served as president until 1939.¹⁰⁸ Carl Stock followed Carr as president until 1941 when the NFL formally changed the title of its "president's" position to "commissioner"¹⁰⁹ and appointed Elmer Layden to that post.¹¹⁰ Layden served as the

100. See PETE ROSE & RICK HILL, MY PRISON WITHOUT BARS 147-48 (2004) (describing why he lied about gambling on his own team to win).

101. *Id.* at 149.

102. *Id.* at 166.

103. *Rose v. Giamatti*, 721 F. Supp. 906, 908 (D. Ohio 1989).

104. See WEILER & ROBERTS, *supra* note 87, at 9 ("Rose agreed on August 23, 1989 to settle the case on the terms that Rose would withdraw his suit, accept the Commissioner's jurisdiction and penalty, but neither admit nor deny having bet on baseball.").

105. *Id.* (citing *Rose v. Giamatti* at 917) (alteration in original) (internal quotation marks omitted).

106. See Hal Bock, *100 Years That Transformed Sports*, SEATTLE TIMES, May 30, 1999, at D1 ("[Thorpe was named] the world's greatest athlete [by the Associated Press, because] . . . he won the pentathlon and decathlon in the 1912 Olympics, played professional baseball and football for 20 years and was commissioner of the football league that became the NFL.").

107. MICHAEL MACCAMBRIDGE, AMERICA'S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION 7 (2004).

108. See *id.* at 7-9 (detailing Joe Carr's years as NFL president).

109. See Pachman, *supra* note 58, at 1417 n.55 (noting that the NFL changed the title of "president" to "commissioner" in 1941).

110. MACCAMBRIDGE, *supra* note 107, at 9.

NFL's commissioner for five years, followed by Bert Bell who took over the office in 1946 until his death in 1959.¹¹¹ No notable suspensions for off-the-field misconduct took place, however, until NFL Commissioner Pete Rozelle investigated player gambling in 1963.

1. *Pete Rozelle, 1960 – 1989*

In 1963, NFL Commissioner Pete Rozelle butted heads with the Green Bay Packers' Hall of Fame running back Paul Hornung¹¹² and Detroit Lions All-Pro Alex Karras.¹¹³ In 1962, rumors of gambling by NFL players prompted Rozelle to appoint NFL Treasurer Austin Gunsell to investigate the matter.¹¹⁴ As a result of the investigation, Rozelle suspended Hornung and Karras indefinitely for gambling on football games.¹¹⁵ Rozelle reinstated both players after one year, allowing Hornung to play a significant role on the Packers' NFL championship team in 1965.¹¹⁶

Even without today's broad commissioner powers at his disposal, Rozelle received a great deal of praise for handling the league's gambling crisis in the early 1960s.¹¹⁷ Sports Illustrated even named Rozelle "Sportsman of the Year" in 1963, "[f]or his actions in preserving the integrity of the NFL."¹¹⁸

Notably, Rozelle's ability to land television contracts paved the way for the NFL's future financial success.¹¹⁹ In 1962, Rozelle negotiated the first league-wide television contract with CBS worth \$4.65 million, substantially increasing the league's revenue-

111. See *id.* at 40 (detailing the NFL owners' selection of Bell as commissioner). See also *id.* at 124–26 (detailing Bell's last days as commissioner before he died of a massive heart attack while watching the Philadelphia Eagles play the Pittsburgh Steelers at Franklin Field in Philadelphia).

112. See SPORTS AND THE LAW, MAJOR LEGAL CASES, *supra* note 72, at 85–86 (noting that Hornung was an All-American twice, won the Heisman trophy in college, and was an All-Pro for the Green Bay Packers in 1960 and 1961).

113. See *id.* at 86 (noting that Karras was also an All-American twice in college and an All-Pro for the Detroit Lions in 1960 and 1962).

114. *Id.*

115. See *id.* (“[Hornung] reportedly placed bets ranging from \$100 to \$500 on football games dating back to 1958. From 1959 to 1961, Karras made bets from \$50 to \$100 on NFL games.”).

116. *Id.* at 87.

117. *Id.*

118. *Id.* at 86.

119. See FORBES.com, *supra* note 5 (noting that the NFL is now the richest and most profitable sports league in the world due in part to its multi-billion dollar television contracts).

generating power.¹²⁰ Rozelle's financial accomplishments gave him more leverage at the bargaining table with owners and in 1988 prompted the league to grant him as commissioner "full, complete, and final jurisdiction and authority [over] any dispute involving a member or members in the League."¹²¹ One year later Rozelle would step down as commissioner, allowing a trial lawyer to fill his shoes.

2. *Paul Tagliabue, 1989 – 2006*

Paul Tagliabue is one of many commissioners in sports to carry a legal background into office.¹²² Prior to holding the commissioner's office, Tagliabue represented the NFL as outside counsel in various capacities.¹²³ Specifically, Tagliabue defended the NFL in an antitrust case brought by the USFL in 1988.¹²⁴ Although the NFL technically lost the case, the USFL walked away with a mere \$3.00 in damages.¹²⁵ Tagliabue's years of legal training could be one of the reasons why he created a policy regulating conduct in the NFL.

Originally, the name "conduct policy" sprang from the NFL's "violent crime policy" adopted in 1997.¹²⁶ At the time, football players were being increasingly associated with crimes of domestic violence.¹²⁷ This problematic behavior prompted Tagliabue to

120. MACCAMBRIDGE, *supra* note 107, at 173.

121. Pollack, *supra* note 70, at 1677 (citing NFL CONSTITUTION AND BYLAWS § 8.3, at 17–18 (1988)).

122. Current NBA Commissioner David Stern and current NHL Commissioner Gary Bettman are both attorneys. See NBA.com, David J. Stern, http://www.nba.com/nba101/david_j_stern_bio.html (last visited Feb. 29, 2008); Cornell University—Alumni Profile, <http://www.ilr.cornell.edu/alumni/profiles/alumni/Gary-Bettman.html> (last visited Feb. 23, 2008) (stating that Bettman received his undergraduate degree from Cornell and his law degree from New York University).

123. See MACCAMBRIDGE, *supra* note 107, at 381 (noting that Tagliabue represented the NFL in over fifty cases prior to becoming commissioner).

124. U.S. Football League v. Nat'l Football League, 842 F.2d 1335 (1988).

125. *Id.* at 1341.

126. See 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, 108 (July 2000) ("The violent crime policy came in 1997, amid criticism in some quarters that the NFL had become a league full of criminals.").

127. See Anna L. Jefferson, *The NFL and Domestic Violence: The Commissioner's Power to Punish Domestic Abusers*, 7 SETON HALL J. SPORT L. 353, 353 (1997) ("Fifty-six current and former football players and eighty-five college players were reported to the police for violent behavior toward women between January 1989 and

adopt the policy before the start of the 1997 season, making it the only one of its kind among major U.S. sports.¹²⁸ The violent crime policy allowed the commissioner to suspend and/or fine a player charged with any crime of violence, and required the offender to undergo counseling and clinical evaluations.¹²⁹

Notably, Tagliabue fined Baltimore Ravens' star linebacker Ray Lewis \$250,000 after Lewis pled guilty to a misdemeanor crime of obstructing law enforcement in 2001.¹³⁰ Tagliabue disciplined Lewis to protect the league's image by stating that, "such admitted misconduct clearly contributes to the negative stereotyping of NFL players."¹³¹ Although some viewed Lewis' punishment as weak, at the time it was the largest fine ever in the NFL unaccompanied by a suspension.¹³²

C. NFL Present Day

1. Roger Goodell, August 2006 – Present

In August 2006, the thirty-two NFL owners unanimously elected Roger Goodell as the league's new commissioner.¹³³ Goodell's NFL service dates back to 1982, when he was an intern in the NFL's offices in New York.¹³⁴ After a short stint in the New York Jets public relations office in 1983, Goodell returned to the league's office and continued to climb the NFL's corporate

November 1994.”).

128. See Randy Covitz, *NFL Puts Offenders on Notice: Off-Field Transgressions Won't Be Tolerated by League with New Policy in Effect*, KAN. CITY STAR, July 2, 1998, at D1 (noting that the NFL's violent crime policy is the first among major sports to discipline off-the-field transgressions).

129. See Bukowski, *supra* note 6, at 110 (citing NFL VIOLENT CRIME POLICY, 1998 ROOKIE SYMPOSIUM-TAB 7: LEAGUE POLICIES FOR PLAYERS (1998)).

130. See WEILER & ROBERTS, *supra* note 87, at 99 (describing Lewis' obstruction of law enforcement's investigation involving two stabbing deaths outside an Atlanta nightclub shortly after the 2001 Super Bowl).

131. *Id.*

132. See Brian Lewis, *Rejuvenated Jumbo Will Only Miss One*, N.Y. POST, Aug. 25, 2000, at 100 (discussing that Ray Lewis received the largest ever non-suspension fine in the NFL history).

133. George Vecsey, *Sports of the Times; Bridging the Old N.F.L. With the New*, N.Y. TIMES, Aug. 10, 2006, at D1.

134. See Judy Battista, *Pro Football; Lifetime Spent Preparing for Top Job in the N.F.L.*, N.Y. TIMES, July 30, 2006, at 81 (describing Goodell's career background in the NFL).

ladder.¹³⁵ In 2000, Goodell became Commissioner Paul Tagliabue's right hand man, assuming the positions of NFL Chief Operating Officer and Executive Vice President.¹³⁶ Therefore, when Goodell took the reins of the commissioner's office in 2006, he was no stranger to the inner workings of the NFL's \$6 billion a year industry.¹³⁷ The protection of the NFL's wealth and image quickly became one of Goodell's top priorities, especially since player off-the-field misconduct plagued his first year as commissioner.¹³⁸

2. *Miscreants in the NFL*

During Goodell's first years as commissioner, nine players on the Cincinnati Bengals were arrested during a nine month span, and ten players were arrested in a fourteen month span.¹³⁹ Notably, Bengals' linebacker Odell Thurman served a season-long suspension in 2006 based on an arrest for drunken driving and subsequently missing a scheduled drug test.¹⁴⁰ Thurman applied for reinstatement after one year pursuant to the league's policy.¹⁴¹ Goodell, however, denied Thurman's reinstatement for the 2007 season.¹⁴² As a result, Thurman will miss two seasons of play and salary due to off-the-field misconduct.

Cincinnati's players were not the only ones getting in trouble with Goodell during his first year.¹⁴³ On June 5, 2007, Goodell used the conduct policy again and suspended Chicago Bears' defensive tackle Terry "Tank" Johnson for the first eight games of the 2007 NFL season.¹⁴⁴ Goodell suspended Johnson because in December

135. *Id.*

136. *Id.*

137. *See id.*

138. *See* David Flores, *Ex-Cowboy has Key Job with Team*, SAN ANTONIO EXPRESS-NEWS, Aug. 9, 2007, at 1C ("Goodell has made addressing players' bad off-field behavior one of his top priorities since succeeding Paul Tagliabue a year ago.").

139. *See* Joe Kay, *NFL Teams on Notice: Character Counts*, CHARLESTON GAZETTE (W. Va.), Apr. 26, 2007, at 5B (discussing the Cincinnati Bengals' problems with players' off-the-field run-ins with law enforcement).

140. *See* Alex Marvez, *Assessing the New NFL Commissioner's Job Performance*, S. FLA. SUN-SENTINEL, Dec. 2, 2006 (discussing Thurman's drunken driving arrest and violations under the NFL's drug policy).

141. *See NFL Suspends Bengals CB Joseph for One Game*, PITTSBURGH TRIB. REV., Oct. 10, 2007 (noting that Thurman sat out the 2006 season for violating the NFL's substance abuse policy and that Goodell denied Thurman's reinstatement the next year).

142. *Id.*

143. *See* Flores, *supra* note 138.

144. Clifton Brown, *The Bears' Tank Johnson is Suspended for Eight Games*, N.Y.

2008]

THE NFL MAKES IT RAIN

1089

2006, he violated his probation when the Gurnee Police Department raided his home and found six unregistered firearms, including two assault rifles.¹⁴⁵ As a result of the raid, Tank pled guilty to a misdemeanor weapons charge in May 2007¹⁴⁶ and served jail time for the offense and for his probation violation.¹⁴⁷

In Tank's situation, Goodell waited to suspend Tank until the legal system decided its course of action. But according to the league's policies, the commissioner can discipline a player without waiting for the legal system to determine a player's fate.¹⁴⁸ More importantly, the commissioner need only afford players due process during the commissioner's investigation.¹⁴⁹ The commissioner may not, however, immediately suspend a player without some sort of "investigation, consultation, and deliberation."¹⁵⁰

IV. THIRD DOWN CONVERSION – ROGER GOODELL'S RULINGS ARE LEGAL, JUST, AND THE BEST FOR THE BUSINESS

A. *Legal*

Principles in labor law and private association law protect Goodell's decisions to discipline players and coaches for off-the-field misconduct. Labor law allows sports leagues to collectively bargain with employee unions to reach agreements that govern terms of employment.¹⁵¹ As a result, players are able to negotiate with teams for multi-million dollar contracts in exchange for following league's rules, such as off-the-field conduct.

1. *Labor Law*

Historically, employees in large numbers had difficulty

TIMES, June 5, 2007, at D6.

145. NBC 5 Sports, *Tank Johnson Charged After Police Raid Home*, Dec. 14, 2006, available at <http://www.nbc5.com/sports/10535933/detail.html> (noting that children were also in Johnson's home and some of the guns were loaded during the raid).

146. Brown, *supra* note 144.

147. *Id.*

148. NFL Conduct Policy, *supra* note 25.

149. Pachman, *supra* note 58, at 1430–32.

150. WEILER & ROBERTS, *supra* note 87, at 23.

151. See 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 11:10 (Gary A. Uberstine ed., 2003) (explaining collective bargaining in sports).

negotiating for better working conditions with management.¹⁵² The emergence of labor law helped protect workers' rights by governing the relationship between employers and employees.¹⁵³ Athletes in major sports, however, did not start to receive better wages and conditions until the emergence of unions.¹⁵⁴ Under the National Labor Relations Act (NLRA), unions received the exclusive right to negotiate working conditions on behalf of employees.¹⁵⁵

Importantly, the NLRA grants employers and the employee's exclusive bargaining agent the right to enter into CBAs.¹⁵⁶ Once an agreement is finalized, it supremely governs the terms and conditions of employment.¹⁵⁷ Moreover, once the parties reach an agreement, labor law "precludes . . . employer[s] from changing those terms and conditions without engaging in collective bargaining . . ." ¹⁵⁸ Without these agreements, employers would be able to impose mandatory terms and conditions of employment unilaterally.¹⁵⁹ As a result, these agreements check and balance sports commissioners by not allowing them to change certain rules and regulations without player input.¹⁶⁰ Additionally, in most circumstances private association law allows voluntary associations

152. See JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND AMERICAN LABOR MOVEMENT* 5 (2006) (explaining that in the United States, labor unions have been fighting for better wages and working conditions since the eighteenth century).

153. See HAROLD W. DAVEY ET AL., *CONTEMPORARY COLLECTIVE BARGAINING* 2-3 (4th ed. 1982) (explaining the collective bargaining process).

154. See generally *id.* at 28-30 (describing the emergence of unions).

155. See *id.* at 31-32 (explaining that the NLRA, formerly known as the Wagner Act, grants labor unions the power to represent employees exclusively at the bargaining table).

156. *Id.*

157. 2 *LAW OF PROFESSIONAL AND AMATEUR SPORTS*, *supra* note 151, § 11:10.

158. *Id.* (citations omitted).

159. See WEILER & ROBERTS, *supra* note 87, at 227 (noting that under the NLRA, the mandatory subjects of collective bargaining are wages, hours, and working conditions) (citing *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965)).

160. 2 *LAW OF PROFESSIONAL AND AMATEUR SPORTS*, *supra* note 151, § 11:10 ("[A]n arbitrator ruled that Rozelle could not unilaterally impose a new drug program, which included the unscheduled drug testing of players, because that too constituted a unilateral change in the terms and conditions of employment that could only be effectuated through collective bargaining." (citing *Nat'l Football League Players Ass'n & Nat'l Football League Mgmt. Council & the Nat'l Football League (Kasher, Arb.)* (Oct. 25, 1986))).

to handle their own disputes without the legal system's interference.¹⁶¹

2. *Private Association Law*

While labor law governs interactions between employers and employees, private association law grants people the right to create associations, or the employers themselves.¹⁶² Once created, associations have the right to form their own rules and regulations.¹⁶³ Courts will typically not interfere with a private association's rules and regulations, including disciplinary actions, as long as the association follows basic requirements of due process and administrative standards.¹⁶⁴

Sports leagues enjoy the protections of private association law when they create policies, such as a conduct provision, governing employees.¹⁶⁵ However, the various court battles testing the scope of the commissioners' powers provide that private association law is not blanket immunity from the legal system.¹⁶⁶ Therefore, leagues attempt to avoid court battles and implement their own governing documents defining responsibilities of the league, clubs, and players.

3. *Governing NFL Documents*

a. *League Constitution & Bylaws*

A sports league's constitution contains its fundamental laws and principles.¹⁶⁷ This foundational document delegates certain powers to the league and commissioner.¹⁶⁸ Sports leagues balance the powers granted in the constitution with other governing league

161. See 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:11.

162. See generally 6 AM. JUR. 2D *Associations and Clubs* § 1 (1999) (describing the general powers of associations).

163. See *id.* at § 6 (explaining associations' rights to create bylaws, rules and regulations).

164. Pachman, *supra* note 58, at 1430-32.

165. See 6 AM. JUR. 2D *Associations and Clubs* § 6 (1999).

166. See *supra* Part III.A.1-4. (detailing legal battles testing commissioners' disciplinary authority); see also 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:11 (explaining court cases testing disciplinary powers of commissioners).

167. 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:6.

168. *Id.*

documents.¹⁶⁹ The CBA is the most important league document governing conditions of employment for the players.¹⁷⁰

b. Collective Bargaining Agreement

During times of labor peace, a CBA governs the terms and conditions of employment for players, league officials, and league employees.¹⁷¹ Strikes and lockouts mainly ensue because of the parties'¹⁷² inability to reach agreement on a new CBA or renew the previous one.¹⁷³ Most CBAs in sports cover the same basic themes, such as drafting of non-league players; standard player contracts; free agency; minimum salaries; pensions; injury protections; drug policies; control of agents; and discipline.¹⁷⁴ After the parties reach an agreement on the issues, they attempt to decide its term of years. The parties come back to the bargaining table roughly two to three years before the CBA expires to give them enough time to reach agreement.¹⁷⁵

In 1958, NFL commissioner Bert Bell officially recognized the NFLPA as a union.¹⁷⁶ Ten years passed, however, until the League and the players finalized a collective bargaining agreement.¹⁷⁷ Initially, the pages of the NFL's CBA were basic and only covered issues such as, "minimum salaries, pensions, injury and other

169. *Id.* § 11:8.

170. *See generally* NFL-CBA, *supra* note 11.

171. *See* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:4 ("When all goes well, there is the collective bargaining agreement, entered into between the union and the league . . .").

172. *See* Claret v. Nat'l Football League, 306 F. Supp. 2d 379, 384 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004) ("Representatives of each of the thirty-two teams . . . comprise the National Football League Management Council ("NFLMC"), the exclusive collective bargaining representative of the League. The 1,400-odd NFL players are exclusively represented by the National Football League Players Association . . .").

173. *See* 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 4:9 (Gary A. Uberstine ed., 2003) (noting that labor strife plagued the NFL in the 1970s and 1980s, with players' strikes in 1974, 1982, and 1987). These strikes were mainly due to the League and players' inability to reach agreement on caps on players' salaries and restrictions on free agency. *Id.* Overall, the players did not achieve the success desired by striking. *See also id.* ("It is impossible to characterize the players as winners, and one is tempted to declare the owners outright victors.").

174. *Id.* § 4:12-20.

175. *See, e.g.,* Elfin, *supra* note 23, at C1 (explaining that Roger Goodell will take part in CBA extension discussions three years before the agreement expires).

176. 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 173, § 4:2.

177. *Id.*

insurance protection, and other conventional wage and conditions of employment issues.”¹⁷⁸

In the 1970s and 1980s, the CBAs attempted to broaden players’ issues such as the draft, free agency through negotiation, and arbitration.¹⁷⁹ Importantly, the terms of these agreements are only valid for durations determined by the parties.¹⁸⁰ While owners and players were arguing over salaries and free agency well into the early 1990s, lesser known regulations regarding discipline were agreed to in the 1993 CBA.¹⁸¹

The CBA is one of the various documents allowing the commissioner to discipline players to protect the “league’s image.”¹⁸² In 1993, the NFL’s CBA provided the foundation for the league’s broad disciplinary authority today.¹⁸³ In 1993, the NFLPA and the NFL reached agreement on two significant articles of discipline: one governing individual club discipline and one governing commissioner discipline.¹⁸⁴

Currently, the NFL’s disciplinary sections detail the league’s and clubs’ available authority to control their players’ misconduct through suspensions and/or fines.¹⁸⁵ The agreement details discipline for two types of behavior: conduct on the playing field, and “conduct detrimental to the integrity of, or public confidence in, the game of professional football.”¹⁸⁶ Furthermore, when players sign their contracts, they agree to the commissioner’s authority to discipline for conduct detrimental to the league.¹⁸⁷

c. Uniform Player Contract

The standard NFL player contract is a basic framework of minimum rights and conditions, which gives players and clubs a foundation to build upon and create contracts.¹⁸⁸ Sometimes

178. *Id.* § 4:3.

179. *Id.*

180. *Id.* § 4:10.

181. See 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:24.

182. See NFL-CBA, *supra* note 11, at art. XI (allowing the commissioner to discipline “for conduct detrimental to the integrity of, or public confidence in, the game of professional football . . .”).

183. 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:24.

184. *Id.*

185. See Stiglitz, *supra* note 21, at 168–69 & n.4.

186. NFL-CBA, *supra* note 11, art. XI, § 1, para. (a), at 20.

187. NFL-CBA, *supra* note 11, app. C, para. 15, at 166.

188. See 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:5.

player contracts include unusual clauses such as Oakland A's owner Charlie Finley offering players \$300 if they grow a mustache,¹⁸⁹ Manny Ramirez's no-trade clause taking effect only after another Red Sox player received one,¹⁹⁰ and the Roger Clemens "family clause."¹⁹¹ These supplementary contract clauses may not conflict with the minimum rights set forth in the CBA.¹⁹²

Significantly, each NFL contract contains an "Integrity of the Game" clause.¹⁹³ Under this clause, the commissioner has the power to fine, suspend, or terminate a player's contract for, "conduct reasonably judged . . . to be detrimental to the League or professional football."¹⁹⁴ This clause also requires the player to recognize "the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or integrity and good character of NFL players."¹⁹⁵ Therefore, when a player signs a NFL contract, he is agreeing to the commissioner's discretionary power to discipline for conduct.¹⁹⁶

4. *Picking Up the Blitz – Is the NFL Too Strict?*

a. *Major League Baseball (MLB) Compared*

Baseball does not have a per se "conduct policy." But, the commissioner of baseball does have the authority to discipline "conduct by Major League Clubs, owners, officers, employees or players that is deemed by the Commissioner to not be in the 'best interests' of Baseball."¹⁹⁷ Players and the Major League Baseball

189. Ron Kroichick, *The Quirks of Perks: Player Contracts Can Run Gamut*, S.F. CHRON., Apr. 29, 2003, at C1 (describing unusual player contract clauses).

190. *Id.*

191. See Ron Chimelis, *All in the Family Clause*, THE REPUBLICAN (Springfield, Mass.), May 21, 2007, at C1 (discussing the family clause that allows Roger Clemens to leave the team in between starts to visit his family).

192. 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 151, § 11:5.

193. NFL-CBA, *supra* note 11, app. C, para. 15, at 166.

194. *Id.*

195. *Id.*

196. See Goodell Letter, *supra* note 63, at 3 (noting that Vick violated the terms of his player contract and that the commissioner is disciplining Vick pursuant to the commissioner's power granted under the CBA).

197. MAJOR LEAGUE BASEBALL CLUBS, MAJOR LEAGUE CONSTITUTION, Art. II § 3 (2005), <http://www.bizofbaseball.com/docs/MLConstitutionJune2005Update.pdf>. See also Stiglitz, *supra* note 21, at 180–81 (noting that baseball initially intended the "best interests" catch-all provision to handle gambling problems in

Players Association (MLBPA) also receive advance notice of any league investigations into player conduct.¹⁹⁸

Furthermore, baseball mandates a “just cause” standard of review for disciplinary actions.¹⁹⁹ The league “makes whole” those players who are found to be improperly disciplined under their grievance procedures.²⁰⁰ Even with all these disciplinary tools in place, baseball still finds it unnecessary to implement a conduct policy. Perhaps it should, considering the sport’s problem with players and coaches driving under the influence of alcohol.²⁰¹

On March 22, 2007, St. Louis Cardinals manager Tony La Russa was arrested on a drunken driving charge after police found him asleep at the wheel of his car while it was partially stopped in an intersection.²⁰² A little over a month later, one of La Russa’s players, Josh Hancock, died when his sport utility vehicle crashed into the back of a tow truck.²⁰³ Hancock’s blood alcohol content was twice the legal limit at the time of the crash.²⁰⁴

Regardless, neither baseball nor its teams suspend or fine players or coaches for drunken driving arrests.²⁰⁵ Rather, baseball is trying to catch-up to the NFL’s drug testing standards and falling behind in regulating conduct. A weak stance on conduct is not a problem solely isolated to baseball.

the sport and not other types of conduct).

198. MAJOR LEAGUE BASEBALL PLAYERS ASS’N, 2007-11 BASIC AGREEMENT BETWEEN MAJOR LEAGUE CLUBS AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, art. XII, § E, at 45 (2006), http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB-CBA].

199. *See id.* art. XII, § A, at 42–43 (“[I]n Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed.”).

200. *See id.* (defining “make whole” to include repaying any fines, paying lost salary including interest, and adjusting player statistics for incentive based contract clauses only).

201. *See* Bill Plaschke, *Baseball is Ripe for a 12-Step Program*, L.A. TIMES, May 13, 2007, at 1 (discussing baseball’s refusal to acknowledge its drinking problem and take actions to curb it).

202. *Id.*

203. *Id.*

204. Chuck Finder, *Baseball Should Dry Up*, PITTSBURGH POST-GAZETTE, May 20, 2007, at C2 (noting that it was also found that Hancock was talking on his cell phone at the time of the crash and the police found marijuana in his car).

205. Plaschke, *supra* note 201, at 1 (“Baseball struts around the national stage fighting steroids, then slips into the shadowy wings to embrace alcohol.”).

b. *National Basketball Association (NBA) Compared*

The NBA has seen its fair share of problems on and off the court, including Latrell Sprewell choking his coach in 1997,²⁰⁶ Ron Artest jumping in the stands to fight rowdy Detroit Pistons fans in 2004,²⁰⁷ and Stephen Jackson firing gun shots outside a strip club in 2006.²⁰⁸ In response to Sprewell's choking incident, the NBA implemented a rule that if a player attacks his coach, then the league will terminate the player's contract.²⁰⁹

The NBA has its own CBA provision handling player conduct.²¹⁰ Additionally, the NBA's constitution and uniform player contract grants the commissioner power to suspend and/or fine any player who makes statements detrimental to the "best interests" of the league or is "guilty of conduct that does not conform to standards of morality and fair play."²¹¹

206. See Gibeaut, *supra* note 126, at 106 (describing the incident at a Golden State Warriors' practice in 1997, in which Latrell Sprewell choked his head coach, P.J. Carlesimo).

207. See Liz Robbins, *N.B.A. Bars 4 After Brawl Involving Fans*, N.Y. TIMES, Nov. 21, 2004, at 11 (describing the brawl between players and fans during a game between the Indiana Pacers and Detroit Pistons in Auburn Hills, Michigan, in which Ron Artest jumped into the stands to fight fans after a fan threw a cup of liquid on Artest).

208. See *Union Considers Appeal*, N.Y. TIMES, July 16, 2007 at D6 (describing Jackson's guilty plea to a felony count of criminal recklessness for firing shots outside a strip club).

209. See Mike Wise, *PRO BASKETBALL: NOTEBOOK; Barkley Has Influence on Next Generation*, N.Y. TIMES, Dec. 12, 1999, at D8 (discussing the NBA's rule on player's attacking their coaches).

210. See NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, art. VI (1999), available at <http://www.nbpa.com/downloads/CBA.pdf> [hereinafter NBA-CBA] (including sections pertaining to unlawful violence, counseling for violent misconduct, firearms, league investigations, and mandatory programs).

211. See NBA Player's Association, CBA Exhibit: Excerpt from NBA Constitution (Misconduct), Excerpt from NBA By-laws (Waivers), and Agent Certification, http://www.nbpa.com/cba_exhibits/exhibitA-excerpt.php (last visited Feb. 09, 2008). Article 35(d) states:

. . . (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.

Id.

Similar to baseball's CBA, the NBA's agreement includes a provision that provides a "just cause" standard of review for grievances challenging discipline.²¹² Finally, NBA players have the right to appeal grievances to a grievance panel and even to an impartial arbitrator if the grievance panel does not resolve the matter.²¹³

Double jeopardy presents another interesting issue in the grievance process. For example, the NBA attempted to suspend Latrell Sprewell for an entire season for choking his head coach during a practice in 1997.²¹⁴ Prior to the league suspending Sprewell, his team suspended him for ten games.²¹⁵ The neutral arbitrator used a "just cause" standard of review and determined that the two suspensions constituted double jeopardy.²¹⁶ Accordingly, the neutral arbitrator overturned the NBA's suspension and reinstated Sprewell's contract.²¹⁷ In an attempt to avoid these circumstances in the future, the NBA implemented a provision similar to the NFL's provision, that a league's action supersedes any club action.²¹⁸

c. National Hockey League (NHL)

The NHL's policies regulating misconduct are similar to those found in other sports leagues, including, Article 18 of the NHL's CBA detailing the commissioner's authority to discipline for actions occurring on and off the ice.²¹⁹ The NHL's standard player

212. Compare NBA-CBA, *supra* note 211, art. XXXI, § 14(c) ("[T]he issue to be resolved shall be whether there has been just cause for the penalty imposed.") with MLB-CBA, *supra* note 198, art. XII, § A, at 43 ("[I]n Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed.").

213. Stiglitz, *supra* note 21, at 185.

214. Bukowski, *supra* note 6, at 115; Gibeaut, *supra* note 126, at 106; Pollack, *supra* note 70, at 1698.

215. Bukowski, *supra* note 6, at 115; Gibeaut, *supra* note 126, at 106; Pollack, *supra* note 70, at 1698.

216. See Bukowski, *supra* note 6, at 115 (explaining the double jeopardy dilemma under commissioner and club disciplinary action).

217. See Liz Robbins, *Union and Pacers Set to Fight Suspensions*, N.Y. TIMES, Nov. 23, 2004, at D1 (noting that the arbitrator reduced Sprewell's suspension to sixty-eight games, but did not allow the club to terminate Sprewell's contract).

218. Compare NFL-CBA, *supra* note 11, art. XI, § 5, at 20 (noting that league action precludes or supersedes club action for the same act or conduct) with NBA-CBA, *supra* note 211, art. VI, § 6 (noting that league action precludes or supersedes club action for the same act or conduct).

219. NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT

contract also requires players to acknowledge that they will refrain from “conduct detrimental to the best interest of the Club, the League or professional hockey generally.”²²⁰

Furthermore, the NHL and BASEBALL have similar provisions regulating league investigations into player conduct which require notification of any investigation that may result in disciplinary action to the player and the players’ union.²²¹ The NHL also grants the right to hold a hearing before any discipline takes place and allows a player to introduce evidence in his defense.²²²

It is rare to hear about NHL players’ misconduct off the ice. Unlike baseball, however, the NHL recently took a stand against drunken driving. In September 2006, former San Jose Sharks’ forward Mark Bell was arrested on suspicion of drunken driving and felony hit and run charges.²²³ The NHL responded by placing Bell in its substance abuse program, suspending him indefinitely, and recently tacking on a fifteen game suspension at the beginning of the 2007 season.²²⁴ The NHL’s players’ union said they are going to fight the suspension, something the NFLPA rarely does when the commissioner disciplines under the conduct policy.²²⁵

d. NFLPA Compared

In the 1960s, three of the four major sports recognized players unions,²²⁶ followed by the National Football League Players

BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION, art. 18, at 95 (2005), <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL-CBA].

220. *Id.* Exhibit 1, para. 2, at 245.

221. *Id.* art. 18, § 18.4(a), at 96.

222. *Id.* art. 18, § 18.4(d), at 97 (“[T]he Commissioner or his designee will not impose discipline without holding a hearing. . . . The NHLPA and the Player have the right to present testimony, evidence and argument in the Player’s defense.”).

223. See Damien Cox, *Leaf’s Bell Will Sit 15 Games; Perhaps Drunk Driving Suspension a Sign of New Priorities for NHL*, HAMILTON SPECTATOR (Canada), Sept. 13, 2007, at SP06 (describing the NHL’s response to Bell’s and other NHL players’ incidents with drunken driving).

224. *Id.*

225. See *N.H.L. Suspends Bell 15 Games*, N.Y. TIMES, Sept. 13, 2007, at D5 (stating that the NHL’s players’ union will fight Bell’s suspension).

226. See Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L.J. 651, 654 (2007) (“The first union of players in professional sports was the National Basketball Players Association, which formed in 1964 . . . the Major League Baseball Players Association in 1965. Two years later, the National Hockey League Players Association was formed”) (citations omitted).

Association in 1970.²²⁷ Importantly, the early union leaders laid the ground work for players' rights seen today. Each leader came from a different background and carried with him a different set of fundamental principles.

Marvin Miller, for example, was a highly respected labor economist who directed the MLBPA from 1966–1992.²²⁸ Due to his background of fighting for laborers' rights, Miller focused his efforts on players' individual rights and, therefore, increased minimum salaries and established free agency in baseball.²²⁹ The average salary for a baseball player in 1967 was \$19,000 and increased to \$2.57 million in 2003,²³⁰ which is roughly twice the \$1.25 million average salary NFL players received in 2003.²³¹

In the NFL, Ed Garvey headed the NFLPA from 1971 to 1983.²³² Garvey, a sharp-edged lawyer from Wisconsin, fought primarily for players' equal rights, including free agency.²³³ Player equality reflects the NFL's current cap on players' salaries and mandatory drug testing for performance enhancing substances.²³⁴ By contrast, the MLBPA's individual rights focus does not cap its players' salaries and only recently implemented performance-enhancing drug testing.²³⁵

Players' unions also fight on behalf of the players whenever a club or league suspends, fines, or otherwise reprimands a player.²³⁶ The NFLPA supported Adam "Pacman" Jones' appeal of his season-long suspension in May 2007, which Goodell rejected.²³⁷ Jones

227. *Id.*

228. Major League Baseball Players Association: Miller Biography, <http://mlbplayers.mlb.com/pa/bios/miller.jsp> (last visited Feb. 29, 2008).

229. *Id.*

230. WEILER & ROBERTS, *supra* note 87, at 349.

231. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 383 (S.D.N.Y. 2004), *rev'd in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004) (citations omitted).

232. NFLPA History, available at <http://www.nflplayers.com/user/template.aspx?fmid=182&lmid=239&pid=0&type=1>.

233. *Id.* See also MACCAMBRIDGE, *supra* note 107, at 316–17 (describing the NFLPA's fight against the Rozelle Rule in the early 1970s).

234. See Showalter, *supra* note 226, at 657 (noting that the NFL began drug testing players in 1987).

235. See *id.* at 658 (noting that baseball did not begin drug testing players for steroids until 2002).

236. See Lonnie Wheeler, *Nothing Illegal in Cut for Conduct*, CINCINNATI POST, May 24, 2007, at C1 (noting that the NFLPA is the organization that will protect players from termination).

237. See *Authorities Haven't Carried Out Vick Search Warrant*, ST. PAUL PIONEER PRESS (Minn.), May 30, 2007, at D3 (explaining the NFLPA's support of Jones' appeal).

sought leniency once again when the NFLPA appealed his suspension on December 14, 2007, one month after Goodell denied Jones' request for leniency.²³⁸ Goodell rejected the NFLPA's argument that Jones' punishment was too excessive and planned to review Jones' status at the conclusion of the season.²³⁹

The lack of NFLPA's effective assistance, however, does not mean that it does not care about players' rights. Rather, it means the NFLPA is on board with the league's conduct policy and the commissioner's enforcement of it.²⁴⁰ With the NFLPA on board, it is easier for the commissioner to persuade players that disciplining off-the-field misconduct is the right thing to do.²⁴¹

B. Roger Goodell's Rulings are Just

"[P]ower at its best is love implementing the demands of justice, and justice at its best is love correcting everything that stands against love."²⁴²

Roger Goodell has dedicated his entire professional career to the NFL; he wants to see the league succeed more than anyone.²⁴³ By strictly enforcing the NFL's conduct policy, Goodell is recognizing the problems of the past and is setting precedent for the future, because past discipline for player misconduct was non-existent, or at best, far too lenient.²⁴⁴ Even though Goodell is stricter on players than his predecessors, he has yet to ban a player for life, thus giving them another chance.²⁴⁵ Although Goodell has yet to do so, he promises to reinstate those players that conduct themselves properly during their suspensions.²⁴⁶

238. See *Pac-Man's Appeal Rejected*, PITTSBURGH POST-GAZETTE, Dec. 21, 2007, at D3 (noting the NFLPA's request for leniency on Jones' suspension).

239. *Id.*

240. Murray, *supra* note 23, at E1.

241. Elfin, *supra* note 23, at C1.

242. Martin Luther King Jr., 11th Convention of the Southern Christian Leadership Conference: Where Do We Go from Here? (Aug. 16, 1967), *available at* <http://www.peaceworkmagazine.org/pwork/0412/041216.htm>.

243. See *supra* Part III.C.1.

244. See *infra* Part IV.B.1.

245. See *supra* Part II.B.3.a.

246. See Mark Maske, *NFL Suspends Players, Stiffens Conduct Policy*, WASH. POST, Apr. 11, 2007 ("I must emphasize to you that this is your last opportunity to salvage your NFL career . . . I urge you to take full advantage of the resources available to support you in that effort.") (quoting Roger Goodell's letter to Adam "Pacman" Jones and Chris Henry).

1. *Past Discipline was Too Lenient*

Lenient may be too kind an adjective for the NFL's past discipline; non-existent might fit better. Jeff Benedict and Don Yaeger studied 509 NFL players for the 1996–97 season and found that 109 of those players were formally charged with a serious crime.²⁴⁷ Of the 109 charged, the league did not ban one from the game.²⁴⁸ The list of criminal conduct by players is nearly endless, and the NFL and other sports leagues were previously reluctant to take disciplinary action.²⁴⁹

Currently, the NFL is attempting to direct a ship lost at sea by taking a stand against off-the-field player misconduct. The NFL is standing up to some of its most popular players involved in misconduct, regardless of the revenue some players generate for the league, based on basic moral principles.²⁵⁰ Furthermore, the league believes its stance on player misconduct will actually accelerate revenues by showing its fan base that the NFL will not tolerate certain behavior.²⁵¹ Additionally, the commissioner is teaching current and prospective players, along with NFL fans, something about second chances because he gives players the opportunity to rehabilitate their character.

2. *Roger Goodell Gives Players Another Chance*

Showing that he is no cold-blooded dictator handing down draconian punishments, Roger Goodell gives misbehaving players another chance to get back into the league.²⁵² Goodell laid out conditions for Adam "Pacman" Jones' and Chris Henry's reinstatement in suspension letters to both players.²⁵³ These conditions included such things as complying with any required

247. BENEDICT & YAEGER, *supra* note 3, at 5.

248. *Id.*

249. Elliot, *supra* note 7, at C1.

250. See Dave Hackenberg, *Banishment*, MERRVILLE POST-TRIB. (Ind.), Aug. 22, 2007, at B2 (noting that the NFL is punishing players, such as Michael Vick, for legal and moral misconduct).

251. Cf. Rick Morrissey, *Goodell's Guts Will Result in League's Glory: NFL Commissioner's Crackdown Aims to Win Back Fed-Up Fans*, CHI. TRIB., June 6, 2007, at 1 (discussing the idea that the NFL is a league that depends on its fans embracing the players, and recent player off-the-field misconduct is eroding fans' sentiments towards players).

252. Maske, *supra* note 246.

253. ESPN.com, *Goodell Suspends Pacman, Henry for Multiple Arrests*, May 17, 2007, <http://sports.espn.go.com/nfl/news/story?id=2832015>.

counseling, education and treatment, and no more run-ins with law enforcement.²⁵⁴ Although using a broad term such as “run-ins” is vague and all-encompassing, the term still provides players with expectations regarding future conduct. If players want to play in the NFL, they must abide by the rules. Terry “Tank” Johnson took this to heart: after Goodell suspended Johnson, Johnson told Goodell that he hoped to become NFL’s next “Man of the Year.”²⁵⁵

The jury is out, however, on whether the commissioner will give Michael Vick another chance to get back into the league. He will likely wait for Vick to finish his twenty-three month prison sentence, handed down on December 10, 2007, for his involvement in illegal dogfighting.²⁵⁶ The commissioner thus benefited from Vick’s guilty plea because he did not have to determine Vick’s fate in the NFL while a legal ruling on his guilt hung in the balance.

3. *Down-Field Blocking – Due Process and the Separation of League and State*

Why is a commissioner able to discipline a player for actions pending legal adjudication? Where are players’ rights to due process and an opportunity to be heard? First, it should be noted that the NFL satisfies administrative requirements by providing notice and a hearing to disciplined players.²⁵⁷ Second, one needs to simply distinguish between a league’s rules and state laws. Legal proceedings do not control the NFL’s disciplinary power.²⁵⁸ As Goodell stated in connection with the league’s tougher personal conduct policy, “[w]e must protect the integrity of the NFL. 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.”²⁵⁹

Regardless of a legal proceeding, the CBA, league constitution, standard player contract, and conduct policy all bind a player to

254. *Id.*

255. See Calvin Watkins, *NFL to Review Tank Johnson’s Case Next Week: Cowboys DT Hopes to Have Suspension Reduced to Six Games*, DALLAS MORNING NEWS, Oct. 8, 2007 (discussing Goodell’s conversation with Johnson).

256. Bill Rankin & D. Orlando Ledbetter, *Vick’s Lies Boosted Prison Time*, ATLANTA J. & CONST. Dec. 11, 2007, at A1.

257. See *supra* Part II.B.3.b (noting that Goodell granted Vick due process by providing a meaningful notice and hearing).

258. See *infra* Part IV.B.3.a.2 (discussing Goodell’s statements regarding legal proceedings controlling the league’s discipline).

259. See Steve Serby, *A ‘Pac’ of Lies – NFL Must Ban Titan for Life*, N.Y. DAILY NEWS, June 19, 2007, at 72 (quoting Roger Goodell).

the commissioner's imposed discipline.²⁶⁰ When a player enters the league and signs a contract, the player agrees to defer to the league and clubs' disciplinary powers.²⁶¹ Moreover, as Roger Goodell explicitly stated when he suspended Michael Vick, the league does not have to wait for the legal system to adjudicate a player to suspend him.²⁶²

a. Why Wait for a Legal Ruling?

In 2003 and 2004, Kobe Bryant was on trial for sexual assault.²⁶³ The league, however, did not suspend him during this time.²⁶⁴ The league's inaction allowed Bryant to fly back and forth from the Colorado legal proceedings to practices and games in Los Angeles and other NBA cities.²⁶⁵

The NBA's policy language is not dramatically different than the NFL's. Each league may suspend a player for actions "detrimental to the league."²⁶⁶ But, the key difference is how each league enforces its policies. Ultimately, the judge in Bryant's case dismissed the charges, and the NBA never disciplined Bryant for the incident.²⁶⁷ Therefore, why not afford a player an opportunity to prove his innocence?

The NFL answers this question by inserting its own definitions of right or wrong and not binding itself to legal determinations.²⁶⁸ If a player settles a case out of court because they pay their accuser off, is the player's underlying conduct not "detrimental" to the league? Also, if a jury can find a player guilty on a lesser standard

260. See *supra* Part IV.A.3.a-c.

261. See NFL-CBA, *supra* note 11 (stating that players agree to the commissioner's authority to discipline for conduct detrimental to league).

262. See Goodell Letter, *supra* note 63.

263. See Kirk Johnson, *As Accuser Balks, Prosecutors Drop Bryant Rape Case*, N.Y. TIMES, Sept. 2, 2004, at A1 (discussing the sexual assault case against Kobe Bryant).

264. See Jack McCallum & L. Jon Wertheim, *The Great Unknown: Ten Seasons into a Certain Hall of Fame Career, Kobe Bryant Remains, to Teammates and Opponents, Admirers and Haters, as Big a Mystery as Ever*, SPORTS ILLUSTRATED, Apr. 17, 2006, at 46 (noting that NBA commissioner David Stern did not suspend Kobe Bryant for being charged with sexual assault).

265. See *Regional Scene*, DENVER ROCKY MOUNTAIN NEWS, Dec. 27, 2004, at 17C (noting that Kobe traveled between Colorado for court hearings and made it back in time to play games in Los Angeles).

266. See *supra* Parts IV.A.3, IV.A.4.a.2.

267. McCallum & Wertheim, *supra* note 264, at 46.

268. See Goodell Letter, *supra* note 63 ("Quite apart from whatever sentence is ultimately imposed upon you by the federal court in Virginia, your conduct plainly merits a significant sanction by the NFL.").

than beyond a reasonable doubt, does this mean the player did not violate any league policies? The NFL is not going to defer its rulings to the legal system and get involved in these unpredictable situations. Rather, Goodell is making his own determination on conduct, and at the same time abiding by league policies. Goodell's enforcement was strikingly similar to Judge Kenesaw Mountain Landis' rulings on player gambling in the early 1920s.²⁶⁹

b. Landis & Goodell: The Similarities

Landis and Goodell both took office charged with the task of cleaning up player misconduct in their respective sports.²⁷⁰ Significantly, Landis used "best interests" determinations to punish player misconduct regardless of legal system determinations.²⁷¹ This is exactly how Goodell is currently enforcing the conduct policy in the NFL.

Even as a former judge, Landis disregarded the fact that the court found all eight players innocent in the Black Sox scandal. As Landis stated:

Regardless of the verdict of the juries, no player that throws a game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked gamblers, where the ways and means of throwing games are discussed, and does not promptly tell his club about it, will ever play professional baseball.²⁷²

These comments by Landis were comparable to Roger Goodell's statements to Michael Vick regarding his pending charges on dogfighting. Goodell stated, "While it is for the criminal justice system to determine your guilt or innocence, it is my responsibility as commissioner of the National Football League to determine whether your conduct, even if not criminal, nonetheless violated league policies, including the personal conduct policy."²⁷³

269. *See infra* IV.B.3.a.2.

270. *See supra* Parts III.A.1, III.C.1.

271. Sigman, *supra* note 78, at 304.

272. Quirk, *supra* note 72, at 118.

273. Larry Weisman, *Vick Told to Stay out of Camp*, USA TODAY, July 24, 2007, at 1C.

While Landis received praise for the way he handled baseball's gambling problems,²⁷⁴ it is too early to determine the long-term effects of Goodell's suspensions, as more suspensions are likely to come in the future. Thus far, most critics applaud Goodell as someone who is enforcing the conduct policy and finally standing up against player misconduct off the field.²⁷⁵ Nevertheless, it is not unprecedented for a suspended player to receive an acquittal in the legal system, thus forcing the league to acknowledge they made a mistake.²⁷⁶

c. *Vanished Presumption of Innocence*

"Innocence is a highly overrated commodity."²⁷⁷

Many people have preconceived notions that those standing trial for criminal charges are ultimately guilty of the crime.²⁷⁸ This societal notion could be one of the reasons why people support Roger Goodell's decisions to suspend players prior to legal adjudication. The prime example of a league jumping the gun on a player's conduct is the story of Green Bay Packers' former wide receiver, James Lofton.

In 1986, Lofton faced rape charges.²⁷⁹ Based solely on the charges, the NFL suspended Lofton for the last game of the regular season.²⁸⁰ In the off-season, however, Lofton was acquitted.²⁸¹ The league acknowledged they made a mistake and backdated Lofton's salary for the suspended game.²⁸²

Situations of innocence similar to James Lofton's remain a possibility. Indeed, they could be Goodell's worst nightmare, even

274. Quirk, *supra* note 72, at 118 ("In retrospect, the iron-handed banishment of the eight Black Sox players by Judge Landis served organized baseball well. The exile of the Black Sox restored public confidence in the game.")

275. See generally Morrissey, *supra* note 251 (defending Goodell's enforcement of the conduct policy).

276. Gibeau, *supra* note 126, at 109.

277. THE HURRICANE (Universal Pictures 1999).

278. See Mark Gillespie, *Sympathies for Bryant Developing Along Racial Lines: Similar Patterns with O.J. Simpson Case*, GALLUP NEWS SERVICE, Aug. 12, 2003, available at <http://www.gallup.com/poll/9019/Sympathies-Bryant-Developing-Along-Racial-Lines.aspx> (showing that 35-41% of those polled believed that Kobe Bryant was at least probably guilty of sexual assault in 2003).

279. See Gibeau, *supra* note 126, at 109.

280. *Id.*

281. *Id.*

282. *Id.*

though he has made clear that he will suspend players regardless of legal determinations on guilt.²⁸³ In this event, the league will most likely pay a player his lost salary, or the player may sue the league for lost wages, bonuses, and possibly lost sponsorship money.²⁸⁴

C. *Touchdown – Roger Goodell’s Rulings are the Best for the Business*

1. *Economic Impact & Protection of Assets (Players)*

Currently the NFL is the most popular sport to watch in the world,²⁸⁵ which also makes it the world’s richest sports league.²⁸⁶ The scale of wealth in the NFL ranges from the Dallas Cowboys (worth \$1.5 billion) to the Minnesota Vikings (worth \$782 million).²⁸⁷ The economic success of the league is due largely to the enormous television contracts it receives by granting major television networks the exclusive right to televise NFL games.²⁸⁸ The NFL currently has a \$3.7 billion deal with CBS, a \$4.3 billion deal with FOX, a \$3.6 billion deal with NBC, and a \$1.1 billion deal with ESPN.²⁸⁹ Each team receives an equal share of the television revenues, which the teams use in turn to pay the vast majority of player salaries.²⁹⁰

The most valuable asset of a sports league is its players. The quality of the league fluctuates according to the quality of its players, similar to stocks. Sports leagues want high-quality players

283. Weisman, *supra* note 273, at 1C.

284. See Gibeaut, *supra* note 126, at 109 (“Those are the kinds of things you’ve got to look at when you’re disciplining players, says general counsel Dennis Curran, a former prosecutor. You could end up owing a guy an entire year’s salary.”) (internal quotation marks omitted).

285. See Michael K. Ozanian, *The Business of Football: How ‘Bout Them Cowboys?*, FORBES.com, Sept. 13, 2007, http://www.forbes.com/business/2007/09/13/dallas-cowboys-stadium-biz-07nfl_cx_mo_0913nflintro.html (“Although its television ratings have slipped over the past decade, the NFL still beats the daylights out of other prime-time programming, including every other sport.”).

286. *Id.* The average NFL team is worth \$957 million. *Id.*

287. Monte Burke, *Lifting a Loser: Michael Bidwill Vows to Transform the Cardinals from Laughingstock to Contender in the NFL*, FORBES, Oct. 1, 2007, at 97.

288. See Ozanian, *supra* note 285 (discussing how the NFL’s television contracts fuel the league’s revenue).

289. *Id.*

290. See Pepper Brill, *Major League Soccer or Major League Sham? Players Bring Suit to Bite the Hand That Feeds Them*, 1999 COLUM. BUS. L. REV. 585, 585 (1999) (explaining that player salaries capture a growing percentage of revenues earned through league television contracts).

competing at optimal levels to create attractive and popular games for the fans to watch. Without high-quality players, minor sports leagues would spring up with similarly-skilled players to compete with the major sports leagues. This would eventually force the major sports leagues to disintegrate into multiple smaller sports leagues competing for fan attraction.

The current state of NFL competition, however, demands the highest quality players. Quality includes not only on-the-field athletic prowess, including speed and strength, but also high quality players off the field. The league holds the players to a high standard off the field because player conduct is representative of the league, their team, and its surrounding community. This representation correlates with fan sentiment towards players and teams, which in turn affects the league's economic success.

Lowering the quality of players would create a domino effect. Lower quality players equal lower quality teams competing in less exciting games to watch. Less fan interest equals less lucrative television contracts for the league, as well as sponsors.

Numerous sponsors immediately dropped Michael Vick following his felony indictment for dogfighting;²⁹¹ sponsors similarly dropped Kobe Bryant as a result of simply being charged with sexual assault.²⁹² Imagine if the league did not suspend Vick, and let him play; it is likely that these sponsors would drop the Atlanta Falcons or possibly the league. Also, consider the amount of people that were willing to stop attending Falcons' games solely due to Vick's involvement in dogfighting.²⁹³ The totality of these circumstances would be detrimental to the league's image, which would create less economic success and decrease the money available for players' salaries.

291. See Richard Sandomir, *In Endorsements, No Athlete is a Sure Thing*, N.Y. TIMES, Aug. 1, 2007, at D5 (noting that Nike, Rawlings, and AirTran Airways dropped Vick as their pitchman and Upper Deck, and Donruss pulled Vick memorabilia from their product lines).

292. See *id.* (noting that Kobe lost nearly all his sponsors before the sexual assault charge against him was dropped).

293. See Tim Tucker, *'Tarnished' Club Tries to Rehab Brand*, ATLANTA J. & CONST., Sept. 2, 2007, at F1 (noting that an unusually large number of Atlanta Falcons' ticket holders were attempting to sell their tickets on the internet following the news of Vick's alleged involvement in dogfighting).

2. *Strictly Enforcing the Conduct Policy is in the NFL's Best Interest*

The NFL has been called America's new national pastime, America's game, or the premier sports league in the United States.²⁹⁴ It is in the NFL's best interests to protect this status through strictly enforcing its conduct policy. First, the NFL laid the blueprint for economic success in sports in the 21st century.²⁹⁵ Now, the NFL is setting the standard for discipline for other leagues to recognize and follow.

NFL player misconduct was already out of hand by the mid to late 1990s,²⁹⁶ and when Goodell took office in 2006 he quickly recognized that the problem could ultimately cripple the sport's image. In April 2007, Goodell sent a warning shot to players during a news conference which laid the groundwork for the conduct policy.²⁹⁷ This foresight allowed Goodell to seamlessly handle the Michael Vick situation. When the news broke regarding Vick's involvement in illegal dogfighting, most people already knew what the commissioner was going to do under the league's conduct policy.²⁹⁸ The league was able to take this possible hit to its image and respond forcefully because it had a strategy in place to handle this kind of situation. The NFL will not tolerate this behavior, because whether players like it or not, children look up to NFL players as role models.

a. *Role Models*

It is impossible to calculate the effect that players have on society, especially on youth across America. Children often emulate their favorite players in backyards and playgrounds while wearing their favorite players' jerseys, possibly even Michael Vick's jersey, which was among the NFL's top-five selling jerseys since 2001.²⁹⁹ The NFL is sending a clear message to these youth that if they want to play in the NFL they cannot get into trouble like

294. See MACCAMBRIDGE, *supra* note 107, at xiv-xix (describing the NFL's passing of MLB as the most popular sport in the United States).

295. *Id.*

296. See *supra* Part IV.B.1.

297. See *supra* Part II.B.3.a.

298. See Gary Myers, *Suspension Suspense. Signs Point to NFL Banning Vick for Entire Season*, DAILY NEWS (New York), July 29, 2007, at 73 (noting that most believed Goodell would suspend Vick).

299. William C. Rhoden, *The Elusive Vick Takes His Hardest Hit*, N.Y. TIMES, July 20, 2007, at D2.

Michael Vick, “Pacman” Jones, Chris Henry, or “Tank” Johnson. It is already bad enough for the NFL that parents have to explain to those children too young to understand why their favorite player is not on the field this year. For those old enough to understand, it is a harsh realization to learn that their favorite player is going to be behind bars instead of on the playing field.

b. Winning is not Everything

Winning is like a drug for a lot of coaches: they will do almost anything for it. Some coaches even desire players who have a history of fighting.³⁰⁰ Former NFL head coach Dick Vermeil once commented about the character of a player his team drafted, “I like the guys that don’t start it but finish it. I like those kind of guys. This is a physical contact game.”³⁰¹ The player Coach Vermeil was describing had recently been involved in the brutal beating of a fellow student.³⁰² The player, along with three teammates, beat the student so badly it caused him paralysis and permanent brain damage.³⁰³ Today, NFL coaches must hesitate in their aggressive player scouting since Roger Goodell stepped in and decided winning is not everything.

Now, coaches do not just want players to be fighters, they also want fighters who have not been in trouble with the law.³⁰⁴ This changes the way organizations put teams together.³⁰⁵ Extensive investigation into a player used to include a player’s strength, speed, quickness, and skills on the field.³⁰⁶ Now, teams with the

300. See, e.g., Mathew P. Barry, et. al., *Judicial Opinion on The Criminality of Sports Violence in The United States*, 15 SETON HALL J. SPORTS & ENT. L. 1, 7 (2005) (stating that players are encouraged to engage in violent acts on the field both legal and illegal).

301. BENEDICT & YAEGER, *supra* note 3, at 4.

302. *Id.* at 2–3.

303. *Id.*

304. See Ken Murray, *Teams Choose to be Pickier; New Policy Might Steer NFL Clubs Away from Troublemakers*, BALT. SUN, Apr. 28, 2007, at 1C (discussing the Baltimore Ravens’ strategy of removing players off its draft board due to character issues).

305. 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, 48 (2007) (“teams have spent millions of dollars scouting, administering physical and psychological tests and performing background checks on potential draftees, as the question of a player’s character was never more of an issue than it is today” (quoting *NFL Checks Draftees in Wake of Off Field Incidents: Spent Millions in Background Checks, Psychological Testing*, SportsLawNews.com, Apr. 11, 2000, <http://www.sportslawnews.com/archive/Articles%202000/NFLDraftexams.htm>)).

306. *Id.*

help of the league, must thoroughly research players in search of past, present, or future character flaws.³⁰⁷

In preparation for last year's NFL draft, the league administered a questionnaire to prospective players, which included a question regarding past use of marijuana.³⁰⁸ The responses were supposed to be confidential, but unfortunately the media caught wind of some of the players' responses.³⁰⁹ As a result of the mix-up, Goodell spoke with each player in person and apologized.³¹⁰ This fault is not the only wrinkle the commissioner needs to iron-out.

V. OFF-SEASON CONDITIONING - RECOMMENDATIONS

A. *Punishment Disparities*

Despite the positive steps Goodell has taken, there is currently a disparity in the punishments he has handed down in the NFL. New England Patriots' head coach Bill Belichick received a \$500,000 fine for videotaping his opponents' signals during a game, but Belichick was not suspended for the violation.³¹¹ The league suspended Dallas Cowboys' assistant coach Wade Wilson for five games and fined him \$100,000, however, for violating the league's substance abuse policy.³¹² Wilson's violation and Belichick's are not the same, but one would have to assume that Wilson would rather pay the fine without the suspension, and all the players disciplined under the conduct policy would most likely desire a fine over a suspension. Goodell could eliminate this type

307. See *id.* (noting that the NFL's security department conducts background checks on the incoming draft class and makes the results available to the teams).

308. See 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 (discussing the leak of information about draft prospects' drug use).

309. *Id.*

310. See Megan Manfull, *NFL DRAFT; Big Brother will be Watching Okoye; Older Sibling will be there for Texas' Teen Pick*, HOUSTON CHRON. (Tex.), Apr. 30, 2007, at 1 (noting that Goodell personally met with the players to apologize for the information leak regarding the players' past marijuana use).

311. See Ed Werder, *Dallas Assistant Wants Goodell to Explain Belichick's Punishment*, ESPN.com, <http://sports.espn.go.com/nfl/news/story?id=3019472> (explaining the punishments received by Belichick and the Patriots for the videotape scandal).

312. See *id.* (noting that Wilson violated the league's substance abuse policy by buying human growth hormone, allegedly for his diabetic condition).

of disparity by implementing punishment guidelines, similar to sentencing guidelines used by judicial systems.

B. Punishment Guidelines

Expectations of punishment and overall fairness to players and coaches would increase if the league's disciplinary policies included punishment guidelines. The disciplinary policies already include the type of conduct punishable, but the length of suspensions and size of fines need to be more specific. For example, the league 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. This would still grant the commissioner discretionary power to determine punishment, and at the same time players and coaches would not feel singled out because they would know what type of punishment to expect.³¹³

C. Neutral Arbitrator & Standard of Review

The NFL commissioner as prosecutor, judge, and jury is a very dangerous concept, and negotiating with a commissioner to relinquish this broad power would be very difficult. But, this broad power allows Roger Goodell to impose punishments as he sees fit. A dictatorial commissioner in the future, however, could abuse this power exponentially. Therefore, allowing players and coaches to appeal their punishments to a neutral arbitrator would safeguard the league. But to discipline players effectively, the league should also provide strict guidelines for arbitrators.

Only if the NFL has punishment guidelines in place should it consider allowing players and coaches to appeal to a neutral arbitrator. The arbitrator would then be able to evaluate punishments according to the guidelines already in place. Also, the league should place strict limits on arbitrators by requiring

313. See also Ugolini, *supra* note 305, at 54 ("A detailed code of conduct with set penalties would put all players on notice of the consequences for their actions while avoiding the appearance of arbitrariness and favoritism that can accompany decisions made on a case by case basis." (citing Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1052 (1996))).

them to use an “arbitrary and capricious” standard of review over a “just cause” standard of review used by other sports leagues.

Arbitrators in the NBA and BASEBALL use a “just cause” standard of review.³¹⁴ A more effective standard for the NFL would be “arbitrary and capricious.” An “arbitrary and capricious” standard of review requires an arbitrator to look at whether a commissioner’s decision was founded on prejudice rather than reasons or facts.³¹⁵ This standard would place a firm check on a commissioner’s disciplinary authority. Additionally, the league could require a tripartite arbitration panel and even an appellate arbitration system.³¹⁶ These checks and balances would further the level of fairness to players and coaches.

VI. CONCLUSION

The NFL’s problem with player off-the-field misconduct went on for much too long. Now, Roger Goodell is taking a stand against this misconduct and showing society that there is more to football than putting the best athlete on the playing field. Now, not only must the players have talent, but also solid moral character.

The NFL is able to raise the standards of player morality by strictly enforcing its conduct policy, something which all the other major sports fail to do. The NFL is the only sport to retain the traditional model of powers granted to commissioners dating back to Judge Kenesaw Mountain Landis. While all other sports leagues hesitate to discipline players for conduct, the NFL is not holding back, regardless of legal adjudications. The NFL believes its stance on conduct is in the best interests of the sport. Not only is that stance the best for its business, but also legal and just.

The NFL’s disciplinary system, however, still needs to iron out a few wrinkles. Implementing punishment guidelines would eliminate the disparity in punishments, ease the commissioner’s judgment on severity, and increase player expectations. Moreover, the NFL could alter its appeal process by allowing players to appeal

314. See *supra* Parts IV.A.4.a.i, IV.A.4.a.ii.

315. See Matthew McKelvey, *Separating Sports and Real Life: How Professional Sports Leagues’ Collective Bargaining Agreements Keep Athletes Out of the Criminal Justice System*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 91, 115 (2001) (“[T]he appropriate standard of review should be whether the discipline imposed was arbitrary and capricious, not whether there was just cause for the discipline.”).

316. See *id.* at 123 (explaining the advantages of tripartite arbitration panels).

2008]

THE NFL MAKES IT RAIN

1113

to a neutral arbitrator using an “arbitrary and capricious” standard of review.

In conclusion, the impact on society is too detrimental to allow NFL players to play by the rules on the field, while they are not playing by the rules off it. Our society is already one of the most violent in the world,³¹⁷ and we do not want to send the wrong message to America’s youth. A lasting impression left on kids should not include winning at all costs.

“Success may result in winning, but winning does not necessarily mean you are a success.”³¹⁸

317. See Kathleen Antonia, *A Lesson Before Living – America Remains a Violent Society in which Stereotypes are too often Applied*, HUMANIST, March 2001, available at http://findarticles.com/p/articles/mi_m1374/is_2_61/ai_72274472 (noting that the United States remains one of the most violent and lawless societies in the world).

318. JOHN WOODEN & STEVE JAMISON, *THE ESSENTIAL WOODEN: A LIFETIME OF LESSONS ON LEADERS AND LEADERSHIP* xvi (2007).