Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League’s Revised Personal Conduct Policy

ABSTRACT

The National Football League (NFL) is considered to be the premier professional sports league in the United States, if not the world. In order to maintain that prominence, it is necessary for the NFL to address circumstances that may arise periodically that could have a deleterious effect on league revenues. Throughout the history of the NFL, initiatives taken to safeguard its continued prosperity have been within the province of the NFL Commissioner. The behavior of NFL players, whether on the playing field or in their personal lives, presents one such threat to the league’s financial success. In the area of player discipline, the Commissioner has the authority to punish players for “conduct detrimental to the integrity of, or public confidence in, the game of professional football.” It was under this authority that the current NFL Commissioner, Roger Goodell, enacted a new personal conduct policy to be applied to all employees of the NFL. While the previous policy required a conviction or its equivalent before discipline was imposed for conduct occurring away from the playing field, the new policy disposes of this requirement and empowers the Commissioner to punish “[c]onduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”

This Note first examines the relevant provisions of the NFL’s revised personal conduct policy and the reactions to its implementation. It then considers the history of the office of NFL Commissioner, the league documents establishing the scope of his authority, and the treatment of commissioner authority in other professional sports leagues. Finally, this Note evaluates the new personal conduct policy in relation to the scope of the authority granted to the NFL Commissioner and offers a solution capable of alleviating the problems posed by the scope and application of the policy.
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"[T]he one thing we can't forget is that this game was built and made popular by the players. We owe them everything."

- Bert Bell, National Football League Commissioner, 1946-1959

The American public is bombarded on a daily basis with the most lurid details of celebrities’ lives. Realistically, there is no escaping this fact unless you are willing to completely avoid contact with all media outlets. It does not matter whether you are watching CNN or walking through the checkout line at the grocery—this tabloid-style journalism is easy to find. Legal issues, relationship woes, and personal tragedies are occurrences that the average American will face throughout his or her lifetime with little fanfare, but the moment that Britney Spears or Tom Cruise becomes involved in a similar incident, it becomes a matter of public concern. This celebrity fixation, however, is not limited to entertainers; athletes’ lives are scrutinized in much the same way.

The media-driven saturation of our country with celebrity gossip has the capacity to shape and control the way that the public

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4. See generally supra, notes 1-2.
views these famous people.\textsuperscript{6} In no area is the impact of the press more profound than in criminal matters.\textsuperscript{7} The United States criminal justice system is established in such a way that an alleged criminal is to be considered innocent until proven guilty in a court of law.\textsuperscript{8} However, depending upon how the facts are reported and which side receives greater attention, the populace can be led to believe that a celebrity is in fact guilty until proven innocent.\textsuperscript{9} The mass media has exclusive jurisdiction in this court of public opinion and can effectively ruin a person's reputation for life.\textsuperscript{10}

Whenever public figures are under fire from the media, it is not only their reputations that are harmed, but also those of their employers, business partners, and sponsors.\textsuperscript{11} The "guilty until proven innocent" mentality can often lead to celebrities being completely abandoned by those who once supported them and who had once profited from their talents.\textsuperscript{12} This fact is the result of the oft-held belief that a squeaky-clean image is a prerequisite for commercial success.\textsuperscript{13}

During the 2006-07 season, the National Football League (NFL) was faced with the decision to either stand by its players or safeguard its reputation, and it ultimately chose the latter.\textsuperscript{14} This
decision was prompted by a yearlong public relations nightmare that resulted from the sports media’s constant coverage of NFL players’ legal issues.15 Previously, many inside the NFL had thought that the character of its players was not as important as their level of talent.16 Marvin Lewis, the head coach of the Cincinnati Bengals, exemplified this way of thinking, as his choice of troubled yet talented players changed the franchise from a perennial loser to a Super Bowl contender.17 Gambles of this sort can only pay off for so long, however, and in 2006, the Bengals’ luck ran out as nine players on their roster were arrested in just a nine-month period (six of whom had been drafted within the previous two years).18 One of those players, wide receiver Chris Henry, had been arrested four times in three different states in only a fourteen-month period.19 Another example of a talented but troubled player is Adam “Pacman” Jones, then of the Tennessee Titans, and the most publicized ne’er-do-well of the NFL, who police had interviewed on ten separate occasions during the two years before his eventual suspension from the NFL in April 2007.20 Terry “Tank” Johnson, then of the Chicago Bears, was arrested three times in an eighteen-month span, completing this list of infamy.21 The barrage of bad press caused by these off-the-field incidents put many veteran players on the defensive regarding the character of

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15 See id.
17 See id. (“The Cincinnati Bengals are the best example of how draft-day risks can deflate a franchise.”).
18 See id.
the NFL as a whole.\textsuperscript{22} In response to the outcry from players, coaches, and owners, NFL Commissioner Roger Goodell felt compelled to act.\textsuperscript{23} He met with Gene Upshaw,\textsuperscript{24} who was then the executive director of the National Football League Players’ Association (NFLPA),\textsuperscript{25} and created a six-man advisory panel to discuss player conduct and discipline.\textsuperscript{26} The result of these deliberations was the creation of a new personal conduct policy.\textsuperscript{27}

This Note will address the legal issues raised by the different provisions of the new policy and the manner in which Commissioner Goodell has applied the new policy in different cases. Part I details the provisions of the policy, how punishments received under it compare to previous disciplinary actions, and the response to its implementation. Part II considers the history of the NFL commissioner’s office, the scope of his disciplinary authority, and the degree of deference accorded to commissioners in other sports leagues. Lastly, Part III analyzes the provisions of the policy in relation to the scope of the commissioner’s authority and proposes a solution capable of alleviating some of the dilemmas created by its application.

I. THE NFL’S NEW PERSONAL CONDUCT POLICY

The NFL’s previous conduct policy, instituted by Commissioner Goodell’s predecessor, Paul Tagliabue, required a commissioner to reserve judgment until the criminal justice system had run its course.\textsuperscript{28} As such, punishments were not imposed until after a player had received either a conviction or its equivalent, such as a plea of no contest or a plea to a lesser charge.\textsuperscript{29} However, this policy precluded

\begin{itemize}
  \item[23.] See id; see also Players Suggest ‘Three Strikes’ Rule at Meeting, ESPN.COM, Feb. 23, 2007, http://sports.espn.go.com/nfl/news/story?id=2776549 (noting that many players were calling for a hard-line approach to discipline prior to Goodell’s policy modifications).
  \item[24.] See Goodell Strengthens NFL Personal Conduct Policy, supra note 20.
  \item[26.] See Goodell Strengthens NFL Personal Conduct Policy, supra note 20.
  \item[29.] Id.
\end{itemize}
swift action and was thus apparently viewed as insufficient in quelling the rise in incidences of player misconduct and protecting the public image of the NFL.\textsuperscript{30}

The new personal conduct policy, instituted in April 2007, demands accountability for the actions of “[a]ll persons associated with the NFL.”\textsuperscript{31} Contrary to the previous policy, it expressly states that it is no longer enough to “avoid being found guilty of a crime.”\textsuperscript{32} Instead, “as an employee of the NFL or a member club, [one is to be] held to a higher standard and expected to conduct [himself or herself] in a way that is responsible, promotes the values upon which the [NFL] is based, and is lawful.”\textsuperscript{33} Furthermore, “[p]ersons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime.”\textsuperscript{34} The new policy also articulates circumstances that will give rise to disciplinary action, the most notable being “[c]onduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”\textsuperscript{35} Once a violation has occurred, the commissioner is given the power to impose full “discipline as warranted.”\textsuperscript{36} The severity of the punishment varies in proportion to “the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges were filed), and other relevant factors.”\textsuperscript{37}


\textsuperscript{31} See CONDUCT POLICY, supra note 27.

\textsuperscript{32} See id.

\textsuperscript{33} Id. (underline in original).

\textsuperscript{34} Id.

\textsuperscript{35} Id. Other offenses punishable under the policy include criminal offenses in general, “[c]riminal offenses relating to steroids and prohibited substances,” “[v]iolence or threatening behavior among employees,” “possession of a gun or other weapon in any workplace setting,” and “[c]onduct that imposes inherent danger to the safety and well being of another person.” Id. (underline in original).

\textsuperscript{36} Id. It further clarifies that “[d]iscipline may take the form of fines, suspension, or banishment from the League and may include . . . conditions that must be satisfied prior to or following reinstatement.” Id.

\textsuperscript{37} Id. (emphasis added). It does note that unless a first-time offense involves “significant bodily harm,” it will generally not warrant disciplinary action. Id. However, “the commissioner may impose discipline on an expedited basis for [subsequent violators] who have [already] been assigned a probationary period.” Id. For repeat offenders, the degree of punishment is to be a factor of “the severity of the initial charge and later charge; the facts underlying the later charge; the length of time between the initial offense and later charge; and the player or employee’s compliance with counseling and other programs.” Id.
With the new policy in place, the commissioner wasted little time in handing down suspensions. Despite the lack of a conviction, Jones was suspended for the entire 2006-07 season without pay and was issued specific conditions that would need to be met before he would be eligible for reinstatement. Additionally, Henry and Johnson were both suspended for the first eight games of the 2006-07 season and also were given prerequisites for their reinstatement.

To put the true harshness of these disciplinary actions into perspective, consider the case of Albert Haynesworth of the Tennessee Titans. In October 2006 Haynesworth received only a five-game suspension for repeatedly stomping on the head of Andre Gurode of the Dallas Cowboys, who was at the time lying on the ground without his helmet. This suspension was the longest in NFL history for on-the-field misconduct—before the Haynesworth incident, no player had ever been suspended for more than four games. An even more noticeable disparity in punishments can be discerned from the fact that in 2006, Chris Henry had been suspended by Commissioner Goodell under the previous policy for only two games following a string of arrests and other legal troubles—if the new policy had been applied, he would have been suspended for eight.

38. See Bell, supra note 19. It bears noting that Jones and Henry were technically suspended prior to the new policy being implemented, but the statements of the commissioner made it clear that they were suspended for harming the league's reputation, which was not punishable under the previous policy. See generally id. (“What the hell rule did he break?”) (quoting Warren Sapp’s reaction after being told that Goodell “invoked ‘conduct detrimental to the game’ powers.”).


40. See Bell, supra note 19. Unlike Jones, Henry had been sentenced to ninety days in jail (though all but two days of his sentence were suspended). Id.

41. Johnson Suspended for Eight Games: Can Be Reduced to Six, ESPN.COM, June 5, 2007, http://sports.espn.go.com/nfl/news/story?id=2892889 [hereinafter Johnson Suspended]. However, unlike Jones, Johnson was actually convicted and had, in fact, just been released from jail when the Commissioner suspended him. Id.

42. See Haynesworth Suspended for Unprecedented Five Games, ESPN.COM, Oct. 3, 2006, http://sports.espn.go.com/nfl/news/story?id=2610577. Haynesworth, who is 6 feet 6 inches tall and weighs 320 pounds, was wearing cleats when the incident occurred, and could have possibly left Gurode with permanent brain trauma or worse, but, luckily for Gurode, he only needed thirty stitches to mend the gash. See generally id.


Almost the entire NFL has expressed support for the policy and its “get tough” stand regarding off-the-field misbehavior.\textsuperscript{45} Tony Dungy, head coach of the Indianapolis Colts, noted that merely fining players and teams is rarely sufficient to deter this behavior, but “when you start talking about playing time and draft picks, that seems to get” the attention of players and teams.\textsuperscript{46} Even teammates of the suspended players have agreed with the commissioner’s actions, viewing them as necessary to prevent future negative publicity and give the NFL a better image.\textsuperscript{47}

However, the policy has not received unanimous approval from all those within the league, as concerns have been voiced regarding its application and reach.\textsuperscript{48} ESPN analyst, and former NFL player, Keyshawn Johnson was troubled by its expansive scope and potential for double standards: “What happens if a coach, [general manager] or owner gets a DUI? Then what? What if an ex-NFL player throws himself through a window in Miami? That still reflects on the NFL’s image.”\textsuperscript{49} Dan Jiggetts, a former vice president of the NFLPA, echoed Johnson’s concerns, cautioning that the commissioner’s disciplinary actions, while seemingly well intentioned, could very well cross the line from improving the NFL to actually impinging upon players’ rights.\textsuperscript{50} Furthermore, after Jones’ suspension was imposed, the NFLPA sent a letter to the commissioner criticizing his choice of punishment.\textsuperscript{51} The union’s letter admonished the commissioner for punishing Jones in a manner that was both “excessive and inconsistent with the treatment of other similarly situated players.”\textsuperscript{52}


\textsuperscript{46} \textit{Goodell Strengthens NFL Personal Conduct Policy}, supra note 20.

\textsuperscript{47} \textit{Id.} (“With all of the things that have been happening recently, I think it will be good and hopefully give the league a little better image.”) (quoting Carson Palmer, Chris Henry’s teammate).

\textsuperscript{48} See Bell, supra note 19.

\textsuperscript{49} See id.

\textsuperscript{50} David Haugh, \textit{Release – With a Catch}, CHI. TRIB., May 16, 2007, at C10 (“It’s one thing that he’s trying to clean up the league and everybody understands that, but he can’t be making unilateral decisions.” (quoting Dan Jiggetts)).


\textsuperscript{52} \textit{Id.} (quoting letter from NFL Players Association to Commissioner Roger Goodell (May 23, 2007)); see also Posting of Rick Karcher to Sports Law Blog, http://sports-law.blogspot.com/2007/05/nflpa-sends-stern-message-to-nfl.html (May 30, 2007, 8:05 EST) (interpreting the NFLPA’s letter to be a statement by the union that while it agreed to this
II. COMMISSIONER AUTHORITY

A. The NFL Commissioner

The NFL, like most other professional sports leagues, operates under a system of government that “allocates significant authority to one person, the league commissioner.” In determining the extent of this authority, it is necessary to consider both the motives behind the creation of the commissioner’s office and the governing documents that outline the commissioner’s powers and responsibilities. It is best to first look at the historical background of the commissioner’s office, as history presumably shaped the provisions of the governing documents and, as such, aids in the interpretation of ambiguous terms in the new policy.

Throughout its history, the NFL has experienced a rich tradition of management stability that is somewhat anomalous for a business of its size and caliber. This legacy began when Joe Carr took over the role of commissioner in 1921, a time when the NFL was in its infancy and far from the staple of American culture that it has since become. His firm adherence to a policy forbidding teams from employing college players until after they had graduated and his lack of tolerance towards teams who broke NFL rules helped the NFL

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55. See id.

56. See Matthew Boyle, The NFL, Post-Tagliabue, FORTUNE, Aug. 7, 2006 at 16 (noting that the NFL has had only three leaders since 1946 as opposed to General Electric’s seven leaders in that same time period).

57. See, e.g., Treat, supra note 1, at 679; Pachman, supra note 54, at 1417 n.55 (“Carr took control at a time when the league was unstable in terms of both membership and finances.”); see also Robert C. Berry, William B. Gould, IV & Paul D. Staudohar, Labor Relations in Professional Sports 89 (1986) (“It was still a shaky enterprise, with one game between the New York Giants and the Chicago Bears drawing only eighty customers.”). Jim Thorpe was actually the first president of the American Professional Football Association, which would later become the NFL, but he was only in his position for one year before being replaced by Joe Carr. NFL History By Decade, 1911-1920, http://www.nfl.com/history/chronology/1911-1920 (last visited Sept. 26, 2008); NFL History By Decade, 1921-1930, http://www.nfl.com/history/chronology/1921-1930 (last visited Sept. 26, 2008). Carr’s title was technically “president,” but the title makes little difference, as his function was equivalent to that of a commissioner. See Pachman, supra note 54, at 1417 n.55. The title was officially changed in 1941. Id.
survive this early growing period. Bert Bell, who became the commissioner in 1946, designed and implemented the NFL’s policy on television broadcasting and, in doing so, helped to make professional football the “fastest growing sport in the United States.” However, it was not until Pete Rozelle, who became the commissioner in 1960, successfully negotiated the merger between the NFL and its competitor, the American Football League, that the NFL’s limitless potential became clear. Paul Tagliabue continued this chain of outstanding leadership throughout his seventeen years as commissioner from 1989 to 2006, a period “marked by soaring franchise values, peaceful labor relations, and lucrative television deals.” Ultimately, the combined efforts of these men paved the way for the prominence and prosperity that the league enjoys today.

Roger Goodell, who has served as the NFL’s commissioner since 2006, has been entrusted with the lofty duty of not only continuing but also protecting the legacy started by these great men. Accomplishing this task requires that he have the power to punish those in violation of NFL rules, but, as with all of the commissioner’s powers, this power is limited to that which he has been affirmatively granted. The NFL commissioner’s disciplinary authority is defined by three documents: the Constitution and By-laws of the National Football League (League Constitution), the Collective Bargaining Agreement (CBA), and the NFL’s standard player contract (SPK).
The League Constitution is the “contract which defines the respective powers of the league and its component clubs.” It states that the commissioner has the authority to impose disciplinary measures against a player or coach who has “violated the Constitution or by-laws of the [NFL], or has been or is guilty of conduct detrimental to the welfare of the [NFL] or professional football.” Though this grant of authority is expansive, the League Constitution implicitly limits the commissioner’s punitive powers by noting that if he should determine that the punishment he could impose under his explicit authority is insufficient or inadequate, he can then refer the matter to the Executive Committee to decide upon his recommendation to impose additional punishment.

While the League Constitution establishes the framework for the operation of the NFL, the CBA codifies the reciprocal transfer of power between the players and the league. The CBA expressly states that the commissioner’s disciplinary authority is one of the rights given to the commissioner by the players. The SPK, which has been incorporated into the CBA, is the means through which the individual players consent to this grant of authority. As for the
scope of the commissioner’s disciplinary authority, the CBA explains that the commissioner is vested with the power to punish two types of conduct: (1) conduct occurring on the playing field; and (2) conduct that is “detrimental to the integrity of, or public confidence in, the game of professional football.”\textsuperscript{75} It also limits the recourse of any player disciplined by the commissioner by stating that a player may only appeal to the commissioner or his designee and that any discipline imposed “may only be affirmed, reduced or vacated by the commissioner.”\textsuperscript{76}

Collective bargaining agreements, such as that of the NFL, establish a system of “industrial self-government” that covers the “whole employment relationship”\textsuperscript{77} and calls into being a new common law: “the common law of a particular industry.”\textsuperscript{78} Thus, while the League Constitution will provide helpful guidance in interpreting the commissioner’s authority, the CBA is the “supreme governing authority” concerning employment with the NFL.\textsuperscript{79} Because the new policy has not been incorporated into the CBA, its legitimacy is dependent upon whether the application of its provisions is consistent with the authority already granted to the commissioner. However, the scope of the commissioner’s disciplinary authority has never been

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\textsuperscript{75} CBA, \textit{supra} note 66, at art. XI, § 1(a).
\textsuperscript{76} \textit{Id.} at art. XI, § 1(c) (emphasis added).
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challenged. Nonetheless, the disciplinary powers possessed by the commissioners of other professional sports leagues have been subjected to scrutiny and, as such, provide guidance as to how the NFL commissioner’s authority should be construed.

B. Treatment of Commissioner Discretion in Other Leagues

Challenges to the Major League Baseball (MLB) commissioner’s authority provide the best examples of the degree of judicial deference afforded to professional sports league commissioners under their respective “best interests” clauses. It has been said that the circumstances and agreements surrounding the office of the commissioner of baseball evidence a clear intent to “endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.” Because the judiciary grants the baseball commissioner a highly deferential standard of review when evaluating his actions, the commissioner has nearly unlimited discretion as long as his actions are not “arbitrary or capricious, or motivated by malice, ill will or anything other than the commissioner’s good faith judgment [that the actions in question] were not in the best interests of” the sport.

Charles O. Finley & Co. v. Kuhn provides the leading example of the generous degree of deference afforded to the MLB commissioner. In that case, a team owner attempted to sell three of his best players to the highest bidder, but the commissioner voided the

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80. This is likely a result of the appeal provisions that would greatly impede a player’s ability to challenge a decision made by the Commissioner. See supra text accompanying note 76.

81. See discussion infra Part II.B.

82. Milwaukee Amer. Ass’n v. Landis, 49 F.2d 298, 303 (N.D. Ill. 1931) (“[T]he commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball.”); see also Matthew G. Conway, Sports Commissioners or Judges: Who Should Make The Call When The Game is Over?, 24 SUFFOLK U. L. REV. 1043, 1049 (1990) (“In each of these leagues there were commissioners and presidents presiding over the players, but nowhere is the evolution of the commissioner’s role better exemplified than in baseball.”).

83. Milwaukee Amer. Ass’n, 49 F.2d at 299.

84. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 539 n.44 (7th Cir. 1978); see also Milwaukee Amer. Ass’n, 49 F.2d at 303 (“As we have seen, the commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball.”); Jason M. Pollack, Note, Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports, 67 FORDHAM L. REV. 1645, 1690-91 (1999) (“As long as a league’s commissioner acted in accordance with the guidelines set forth in that agreement, courts have not interfered with the commissioner’s decisions, absent any arbitrary or capricious actions.”) (emphasis added).

85. Charles O. Finley & Co., 569 F.2d at 527.
Commissioner Bowie Kuhn claimed that these transactions were not in the best interests of baseball because allowing them to proceed would lead to a perception that only the richest teams could compete in baseball, thereby discouraging the growth of the sport into smaller markets. In finding that the commissioner had sufficient authority to void these sales, the United States Court of Appeals for the Seventh Circuit considered the totality of the circumstances surrounding the commissioner’s disciplinary authority, and emphasized that this power was reflected in the commissioner’s previous exercises of similarly broad authority, amendments made to broaden the commissioner’s authority, and the explicit language of the MLB agreement itself.

Even when there has been disparity in the punishments the MLB commissioner has imposed for seemingly comparable offenses, courts have remained deferential to the commissioner if there are even slight distinctions between the offenses. Atlanta Braves’ owner Ted Turner found this out the hard way when the commissioner suspended him for one year for his involvement with negotiations concerning potential free agents in violation of MLB rules, while another owner who had committed a similar transgression was merely fined. In Atlanta National League Baseball Club v. Kuhn, the court sided with the commissioner, noting that there were differences between the two offenses (for example, Turner had already received six warnings) and that with such differences present, “honest minds could, and indeed do, disagree as to what is an appropriate punishment.”

The MLB commissioner, however, has not been afforded unbridled discretion by the courts. In Atlanta National League Baseball Club, for example, the court held that the commissioner was limited in the punitive sanctions he could levy against an owner who had violated the league’s rules and directives. The governing MLB agreement enumerated a list of specific punitive measures that could be utilized while at the same time offering no specific remedial or

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86. Id. at 531.
87. Id.
88. Cf. id. at 538-39. However, if the commissioner's actions had been arbitrary, capricious, or made in bad faith, the court may not have been so deferential. See generally id. at 539.
90. Id. at 1222-23.
91. Id. at 1223.
92. Id. at 1226.
93. 432 F. Supp at 1226 (finding that the commissioner could suspend the owner but could not take away the team’s draft picks).
preventative actions he could take.\textsuperscript{94} The court rejected the
commissioner’s argument that the list of punitive measures was
merely “illustrative rather than definitive” and refused to allow a
punishment that was not included among those specifically
mentioned.\textsuperscript{95}

Unlike the judiciary, arbitrators have not been nearly as
deerential to the judgments of commissioners.\textsuperscript{96} In an arbitration
involving pitcher Steve Howe, the arbitrator found that the MLB
commissioner was “without just cause” in permanently banning Howe
from baseball for life.\textsuperscript{97} The arbitrator determined that “no member of
the public could possibly think that the manner in which [drug
offenses had been previously disciplined] imperiled the integrity of the
game” such that a lifetime ban would be required.\textsuperscript{98} Furthermore,
after National Basketball Association (NBA) superstar Latrell
Sprewell attacked and choked his coach, the NBA commissioner
suspended him for one year.\textsuperscript{99} However, as with Howe, an arbitrator
reduced the suspension, noting that fairness should serve to “temper
commissioner-imposed discipline.”\textsuperscript{100} Thus, although it appears that
the judiciary uses an “arbitrary or capricious” standard of review for
commissioner actions,\textsuperscript{101} these arbitration decisions articulate a more
flexible standard that would allow for equitable considerations to limit
the scope of a commissioner’s powers.\textsuperscript{102}

III. ANALYSIS

Deference to commissioner authority in other professional
sports leagues provides helpful guidance and suggests that a fairly
broad interpretation of the NFL commissioner disciplinary power is
appropriate,\textsuperscript{103} but this power is not an all-encompassing one, and

\textsuperscript{94} \textit{Id}. at 1224.
\textsuperscript{95} Id. at 1223-24, 1226 (explaining that if the commissioner is to have this
“unlimited punitive authority as he says is needed to deal with new and changing
tuations,” then the NBA agreement should be changed to reflect that need).
\textsuperscript{96} See generally Pollack, \textit{supra} note 84, at 1691.
\textsuperscript{97} \textit{Id}. at 1696. This lifetime ban was not imposed until after Howe had been
suspended from baseball six times for drug abuse. \textit{See id}. at 1692.
\textsuperscript{98} \textit{Id}. at 1695 (internal quotation omitted).
\textsuperscript{99} \textit{Id}. at 1699-1700.
\textsuperscript{100} \textit{Id}. at 1700, 1703.
\textsuperscript{101} See \textit{supra} text accompanying note 84.
\textsuperscript{102} See \textit{supra} text accompanying notes 96-100; see also Pollack, \textit{supra} note 84, at
1705 (“Arbitrators disregard applicable standards upon which to review commissioner
disciplinary decisions and merely impose the punishments which they view as fair.”).
\textsuperscript{103} See, \textit{e.g.}, Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 539 n.44 (7th Cir.
1978).
should not be interpreted as such. This section first considers the scope of the commissioner disciplinary authority (and its limitations), and whether the provisions of the policy, in addition to the punishments imposed under it, are consistent with those powers. This section will then explain the problems with the policy and propose an alteration to the NFL dispute resolution provisions that is capable of eliminating, or at least alleviating, those concerns.

A. The Scope of Commissioner Goodell’s Authority

The Collective Bargaining Agreement gives the commissioner the power to reasonably judge that particular conduct is detrimental to the “integrity of, or public confidence in,” the NFL. If the provisions of the CBA are to be regarded as establishing the law governing employment with the NFL, the commissioner’s disciplinary authority should not be interpreted in such a manner that would exceed this grant. However, this still leaves open the question of what precisely amounts to a detriment to “integrity and public confidence.” The answer can be found by examining the role played by the commissioner throughout NFL history.

Commissioner Joe Carr was appointed in the hope that he would achieve financial stability for the NFL and pave the way for its prosperity, and each commissioner to follow him has had his place in history defined by his contribution to the financial success of the NFL. This indicates that the intention of those who initially granted the commissioner his power was that one of the commissioner’s priorities would be to maximize the NFL’s bottom line. Thus, one could say that the array of powers afforded to the

104. See THE LAW OF SPORTS supra note 53, § 3.15 at 306-07.
105. See discussion infra Part III.A.
106. See discussion infra Part III.B.
107. See CBA, supra note 66, at art. XI, § 1(a); see also id. at app. C, §15.
109. CBA, supra note 66, at art. XI, § 1(a).
110. See supra text accompanying notes 53-62; see also Pachman, supra note 54, at 1420 (“As in legislative interpretation . . . the intentions of the league founders may [be helpful] in determin[ing] the meaning of ambiguous phrases.”).
111. See supra text accompanying notes 56-62.
112. See id. It bears to note that the MLB commissioner’s office was created in the wake of the “Black Sox” scandal in which eight members of the Chicago White Sox were accused of accepting bribes from gamblers to throw the 1919 World Series. Pachman, supra note 54, at 1414. The intention of the framers of the office was to give the commissioner absolute power over discipline to clean up baseball’s tarnished image. See id. at 1414-15.
commissioner are merely tools to be utilized in order to achieve financial gain; therefore, if the commissioner has been given the power to discipline specific player conduct, it is likely the result of a belief that such behavior will have a negative impact on the NFL’s financial position. In the world of modern sports, the success or failure of a sports league is dependent upon the size of its fan base. Therefore, behavior capable of negatively impacting the NFL’s finances can be best understood to be behavior that is likely to negatively affect the league popularity. In this regard, the phrase “conduct detrimental to the integrity of, or public confidence in, the game of professional football,” as it appears in the CBA, can be interpreted to encompass any player behavior that is capable of negatively affecting league revenues by causing a decrease in patronage and support for the NFL and its players.

Employing this reasoning, it is not much of a logical leap to conclude that the NFL’s popularity would likely plummet if the NFL was seen as acquiescing in or simply turning a blind eye to criminal behavior. Most people are unlikely to support a sports organization that permits its players to function as though they are above the law simply because they are gifted athletes. Furthermore, this need to punish criminal activity is illustrated by the history of players disciplined for criminal actions provides confirmation of a common understanding that punishing this behavior is within the commissioner’s authority.

As discussed previously, the new policy and actions taken pursuant to it differ significantly from actions taken in the past. For one thing, players were generally disciplined for off-the-field behavior only if it was specifically prohibited by the SPK, such as

This distinguishes the NFL Commissioner from his counterpart in baseball, as the baseball commissioner was empowered as a result of a need for a disciplinarian, while the NFL Commissioner was empowered to, and has since continued to, serve a role more akin to that of a financial officer. See id.

113. This is manifested in the SPK where it expressly states that the “success of professional football depends largely upon public respect for and approval of those associated with the game.” CBA, supra note 66, at app. C, §2; see also CONDUCT POLICY, supra note 27, at 1 (stating that the new conduct policy seeks to punish conduct that “undermines public respect and support for the NFL.”).

114. See CBA, supra note 66, at art. XI, § 1(a).


substance abuse or gambling.\footnote{117} If the behavior in question was not covered in the SPK, the NFL did not impose discipline unless the player had either been convicted of or pled guilty to criminal charges.\footnote{118}

Under the new policy, a less clear issue remains as to whether the commissioner’s disciplinary power may be used against players who have not been convicted of a crime or found to be in violation of any other specific NFL rules, such as Adam “Pacman” Jones.\footnote{119} To say that the NFL cannot condone criminal behavior is a far cry from saying that it is free to punish its players for merely causing the NFL to incur bad publicity that “sullies the reputation of others involved in the game.”\footnote{120} A judgment in the court of public opinion is often binding in the minds of the American people, but that does not automatically mean that the NFL should transcend fairness and reason by simply confirming this judgment. Nonetheless, the reality is that there may be times when protecting the future prosperity of the NFL requires actions that might otherwise be deemed unreasonable or unfair.

The determinative issue, therefore, is whether harm to the NFL’s reputation is capable of decreasing fan support for the league.\footnote{121} This must be evaluated through the eyes of the public, which, for the purpose of business expansion, can be divided into three classes: (1) those who are avid fans of the NFL; (2) those who are occasional fans; and (3) those who are not currently fans, but who could potentially become interested in the league. It is unlikely that


\footnote{118} Karcher, supra note 28.

\footnote{119} See CONDUCT POLICY, supra note 27; Bell, supra note 19 (“[Keyshawn] Johnson and [Warren] Sapp . . . expressed bewilderment that Jones was disciplined before his legal cases were resolved.”); see also Clay Travis, Goodell’s No Lawyer . . . So Why Take The Law in His Own Hands?, CBS SPORTS, May 28, 2007, http://www.sportsline.com/spin/story/10201015 [hereinafter Goodell’s No Lawyer] (noting that “none of this bad news surrounding [Jones] has resulted in a single conviction for him since he started receiving paychecks from the Tennessee Titans.”).

\footnote{120} See CONDUCT POLICY, supra note 27, at 1.

\footnote{121} See supra text accompanying note 113.
bad publicity is going to change the opinion of avid fans; however, the occasional or fair-weather fans may find the negative news stories disheartening, which could cause these fans to lose interest altogether. For those who are not fans, it is not at all unrealistic to assume that they could be dissuaded from ever embracing the sport if they were to see the NFL completely ignoring the character of its players and their irresponsible actions.\footnote{122} Moreover, it bears repeating that it is not as though the public can easily remain unaware of these actions, as one can learn about the latest exploits of professional athletes from a variety of mass media sources.\footnote{123} This combination of easily accessible information and a potentially negative impact on the size of the NFL’s fan base could be viewed as a viable threat to the NFL’s financial position, sufficient to come within the ambit of the integrity and public confidence clause of the CBA.\footnote{124}

Contrarily, one could always point out that Adam “Pacman” Jones and the other players involved in the scandals of the 2006-07 season did not single-handedly tarnish the good name of the NFL.\footnote{125} Indeed, the NFL is no stranger to bad publicity.\footnote{126} In 2000, for example, future Hall of Fame linebacker Ray Lewis was accused of and tried for murder, although the charges were later dropped.\footnote{127} At the time of his legal troubles, Lewis was considered one of the best and most popular players in the NFL, and, consequently, his trial received significantly more media attention than that given to, for example, the Adam “Pacman” Jones’ debacle in Las Vegas and other exploits, who was at the time only in his third year in league.\footnote{128}

\footnote{122} This is especially true for the large number of people who are not fans of professional sports in general because they view professional athletes as more focused on making an inordinate amount of money than on playing the game to the best of their ability.

\footnote{123} See supra text accompanying notes 2-3.

\footnote{124} See supra text accompanying note 113; see also Bell, supra note 19 (“There are a lot of choices out there for people to be entertained or have business relationships with.” (quoting New England Patriots’ owner Robert Kraft)).


\footnote{126} See id.; see also Greenberg Traurig, supra note 115 (containing a twenty-one page list of players arrested in the previous eight years).


\footnote{128} See generally id. The extent of his popularity is exemplified by the fact that, at the end of the previous season (1999-2000), he had received two of the highest awards in professional football: selection to his third-straight Pro Bowl (which coincidentally was to be played only one week after his arrest) and to the AP All-Pro first team for the second straight year. Ray Lewis Official Website, http://www.raylewis52.com/stats.shtml (last visited Sept. 26, 2008).
Subject to the previous policy, Lewis was fined, but not suspended for even a single game.129 Lewis was certainly not the only player who has caused harm to the league’s reputation, as numerous other NFL players have also received media coverage for their run-ins with law enforcement.130 However, despite all of this bad press, there has been no adverse impact on revenue or loss of patronage; quite to the contrary, 2007 marked the fifth year in a row that the NFL set a new paid-attendance record.131 Thus, it could be that future instances of player misconduct will similarly have little effect on the opinions of fans or potential fans and profits will continue to increase.132

Opponents of the policy could also claim that punishing players for their harm to the NFL’s reputation is pointless because the NFL has gained its popularity from what occurs between the sidelines every Sunday, not from featuring players that serve as model citizens. This argument allows for a distinction to be drawn between reputational harm to the NFL and the behavior at issue in cases where the commissioner’s authority has been challenged and subsequently upheld.133 The former instances generally involved conduct that, while technically occurring off the field, was of such a nature that it could have had an adverse impact on the competitive balance of the sport.134 On the other hand, a player’s off-the-field actions that do no more than make the league appear foolish are arguably too attenuated from the game itself to have any impact on what occurs on the playing field. Consequently, one could assert that these actions will have no adverse effect upon the size of the NFL’s fan

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129. See Carter, supra note 127; Greenberg Traurig, supra note 115.
130. See Greenberg Traurig, supra note 115.
134. See Charles O. Finley & Co, 569 F.2d at 531 (MLB commissioner’s decision to void a sale of players because he believed that it would deter expansion of the game and posed a great danger to fair competition); Atlanta Nat’l League Baseball Club, Inc., 432 F. Supp. at 1217 (MLB commissioner’s suspension of an owner for persistently disregarding the rules surrounding proper conduct in the pursuit of free agents); Milwaukee Am. Ass’n, 49 F.2d at 303 (MLB commissioner’s refusal to approve a player’s contract in order to prevent an owner from monopolizing that player’s talent and preventing him from entering the free agent market).
base because the strength of its ultimate product—the games that fans pay to watch—will not diminish.135

While these counterarguments make valid points, the fact remains that the deluge of bad press received by the NFL during the 2006-07 season was unprecedented.136 This period was not marked with a single high-profile incident, but was rather marred by an almost endless cycle of arrests, accusations, and other legal problems.137 While an individual player’s indiscretions (such as those of Ray Lewis) may make little difference to the public, a slew of bad actions creates the appearance of an emerging pattern of behavior that shifts the focus away from individuals, and instead reflects on the character of the league as a whole.138 Furthermore, it is certainly not unreasonable to assume that the pervasiveness of this negative publicity could have actually had an impact on the mental states of other players, and therefore the negative publicity may not have been as attenuated from the game itself.139 Nonetheless, and regardless of any impact on fair competition, the cumulative effect of this misconduct could be viewed as a serious danger to the credibility of the league and a threat to its future viability.140

In light of these considerations and the tremendous deference afforded to other league commissioners,141 it does not appear that the new policy’s provisions allowing NFL Commissioner Roger Goodell to protect the NFL’s reputation by imposing sanctions, even where there has been no conviction or violation of a separate league rule, surpass the power granted to him.142 However, having the ability to punish this type of behavior does not empower the commissioner to punish a player to any extent imaginable.143 On the contrary, the commissioner

135. See supra text accompanying note 113.
136. See, e.g., Maske & Carpenter, supra note 14.
137. Id. ("At least 35 NFL players [had] been arrested [in 2006] on charges ranging from disorderly conduct to felony burglary.").
138. Id. ("Absolutely it’s a reflection of the players and a reflection on the organization.") (quoting San Diego Charger’s General Manager A.J. Smith).
140. See Maske & Carpenter, supra note 14.
141. See discussion supra Part II.B.
142. See CONDUCT POLICY, supra note 27.
143. One could make an argument that the appeals provisions of the CBA evidence an intention to give the commissioner absolute authority over discipline. Cf. CBA supra note 66. However, when the CBA was amended in 2006, the new policy could not possibly have been foreseen. Cf. NFLPA.com, NFL Players Association – About Us, supra note 25.
is constrained by the expectation that he will be impartial in the
execution of his duties, which requires that all rules be applied
uniformly and all personnel be treated equally with respect to their
vulnerability to disciplinary action.144 Furthermore, as a man of
“unquestioned integrity,” the NFL commissioner should not only be
impartial but should be fair as well.145

For the commissioner to remain both impartial and fair in the
course of punishing NFL employees, the punishments imposed should
be narrowly tailored to the underlying offense. Thus, if the offense is
classified as conduct detrimental to integrity and public confidence,146
the resulting punishment should not exceed that which is necessary to
restore the integrity or public confidence endangered or lost by a
player’s actions. In other words, and consistent with the previously
articulated interpretation of the integrity and public confidence
clause,147 the punishment should be proportional to the potential loss
of fan support caused by the player’s misconduct. However, an
analysis of the punishments imposed under the current policy leads
one to the realization that this proportionality is nowhere to be
found.148 Adam “Pacman” Jones’ suspension serves as an illustration
of both the unfair results that the new policy has produced, and the
existence of double standards that demonstrate a lack of the requisite
impartiality.149

Assuming that Jones’ actions could have actually had an
adverse effect on fan support for the NFL, disciplinary actions taken
by the previous commissioner cast considerable doubt upon whether a
year-long suspension was actually warranted for his behavior.150 In
2004, for instance, running back Jamal Lewis, who at the time was
playing for the Baltimore Ravens, pled guilty to conspiracy to possess
and distribute cocaine after using a cell phone to try to set up a drug

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Moreover, the letter that the NFLPA sent to the commissioner after Jones’ suspension was
announced indicates that while the commissioner will be regarded as the final authority on
disciplinary matters, he is expected to exercise his authority in a fair and consistent
manner. Cf. Wyatt, supra note 51 (noting that Jones’ attorneys “made it clear that a
lawsuit is possible if the suspension is not reduced.”).

144. See generally LAW OF SPORTS, supra note 53, § 4.19 at 443.
145. LEAGUE CONSTITUTION, supra note 65 at art. VIII, § 8.1; see also TREAT, supra
note 1, at 681 (“Bert [Bell] was a strong man and an intelligent one, and, above all, a fair
man.” (citing TEX MAULE, THE PROS (1960) (emphasis added)).
146. See CBA, supra note 66, at art. XI, § I(a).
147. See supra text accompanying note 113.
148. See infra text accompanying notes 151-172.
149. Cf. Bell, supra note 19.
150. See e.g., Greenberg Traurig, supra note 115; see also Wyatt, supra note 51
(noting that the NFLPA had expressed concern regarding the disparity between Jones’
suspension and those imposed by players under the previous policy).
deal, and, as a result, was sentenced to four months of the off-season in federal prison.\(^{151}\) His legal troubles were highly publicized due to the fact that he was one of the league’s marquee players, but he was only suspended for two games of the following season.\(^{152}\) Moreover, as previously noted, Ray Lewis’ popularity could not have been any higher when he was arrested and tried for murder, yet he was only fined by the commissioner and did not miss a single game.\(^{153}\) In spite of the negative publicity received for both of these highly publicized legal battles, there was no tremendous media or fan backlash against the NFL for being too lenient; rather, the NFL, as stated above, became even more popular as it continued to set attendance records.\(^{154}\) Thus, if a two-game suspension and a fine were sufficient to rectify the harm inflicted upon the NFL’s reputation by one premier player’s drug-dealing conviction and another’s murder trial, a yearlong suspension appears unnecessary to make the American public forget what “make it rain” means.\(^{155}\)

In spite of this obvious disparity, each commissioner has his own set of unique values, so it might be unfair to condemn Commissioner Goodell’s choice of punishment merely because it did not comport with those imposed by his predecessor. Perhaps Commissioner Goodell is merely trying to set his own precedent, as he may truly believe that these penalties must be imposed to protect the NFL’s image and ensure that the league continues to be highly regarded by the public at large.\(^{156}\) However, the validity of this argument becomes dubious at best when Jones’ suspension is compared with subsequent punishments under the policy, such as the suspension of Terry “Tank” Johnson that occurred during the same

\(^{151}\) See id.; see also Deal: Lewis’ Sentence to be Served in Offseason, ESPN.COM, Oct. 8, 2004, http://sports.espn.go.com/nfl/news/story?id=1897106 [hereinafter Lewis’ Sentence to be Served in Offseason].

\(^{152}\) Lewis’ Sentence to be Served in Offseason, supra note 151. He had just broken the single-game rushing record and finished the season less than fifty yards away from breaking the single-season rushing record. See NFL Records, http://www.nfl.com/history/rendf/records/indiv/rushing (last visited Sept, 26, 2008).

\(^{153}\) See supra text accompanying notes 128-129.

\(^{154}\) Attendance Record, supra note 131.

\(^{155}\) Cf. Greenberg Traurig, supra note 115; Hruby, supra note 20.

\(^{156}\) See, e.g., Bell, supra note 19 (“In issuing the suspensions . . . Goodell said he was protecting the NFL’s integrity.”); Maske & Carpenter, supra note 14 (“[S]ome league officials are concerned that the repeated reports of player arrests could alienate fans and drive away sponsors of what has become by far the nation’s most popular and prosperous sports attraction.”); Wilner, supra note 30 (“We hold ourselves to higher standards of responsible conduct because of what it means to be part of the National Football League.”) (quoting NFL Commissioner Roger Goodell).
Johnson, who had actually been incarcerated for two months during the off-season for violating his probation by illegally possessing firearms, was only suspended for eight games. Jones, on the other hand, had not been convicted of any offense, but was still suspended for a full year. From an objective standpoint, the fact that Johnson spent time in jail, in addition to the nature of Johnson's offense, would make Johnson's transgression at the very least equal to, if not more severe than, Jones' transgressions.

The disciplinary treatment of Bill Belichick, head coach of the New England Patriots, provides another enlightening comparison between Jones' suspension and another precedent set by Commissioner Goodell. Belichick was fined, but not suspended, for having an assistant coach use a handheld camera to steal another team's defensive signals during a game. While Jones' actions may have embarrassed the league, it is hard to imagine that any off-the-field behavior could be more damaging to the public's perception of the NFL than a belief that the game itself does not represent fair

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157. See Bell, supra note 19; see also Larry Mayer, NFL Announces Tank Johnson Suspension, CHICAGO BEARS.COM, June 4, 2007, http://www.chicagobeans.com/news/NewsStory.asp?story_id=3492. Additionally, Brandon Marshall of the Denver Broncos recently received a mere three-game suspension after his arrest stemming from domestic violence allegations as well as other alcohol-related incidents, including an arrest for driving under the influence. Marshall Gets Three-Game Suspension for Violating Conduct Policy, ESPN.COM, Aug. 6, 2008, http://sports.espn.go.com/nfl/news/story?id=3520985. While this may not demonstrate a pattern of behavior similar to that of Jones, it seems that, with the bar set by the suspensions of both Jones and Henry, the commissioner should have been expected to discipline Marshall more severely. Id. But see John Clayton, Marshall's Appeal Successful as Suspension Reduced to One Game, ESPN.COM, Aug. 28, 2008, http://sports.espn.go.com/nfl/news/story?id=3558702 (noting that Brandon Marshall was able to have his three-game suspension reduced to one game after winning his appeal of the discipline imposed by Commissioner Goodell).

158. See Mayer, supra note 157.

159. See Bell, supra note 19.

160. The fact that Johnson's charges involved firearms could clearly be seen as making his offense even more damaging to the NFL's reputation, especially considering that his legal troubles took place in the wake of the tragic murder of Denver Broncos' Cornerback Darrent Williams. See Kirk Mitchell & Bill Williamson, City, Team, Kin Reel from Brutal Killing, DENVER POST, Jan. 1, 2007, available at http://www.denverpost.com/broncos/ci_4931937. Before Johnson was suspended by the League in June 2007, Professor Rick Karcher noted that if Johnson were suspended for less than one year it "would definitely strengthen [Jones's] argument that it's arbitrary . . . . [T]he commissioner is setting a precedent here. It's just that he jumped so far to make it a year, and now it's like here's the starting point. I'd be surprised if [Johnson] got less than a year." See Symposium, Regulation of Coaches' and Athletes Behavior and Related Contemporary Considerations, 4 DEPAUL J. SPORTS L. CONTEMP. PROBS. 141, 152 (2007) [hereinafter Symposium].


162. Id.
competition because one team could possibly have an unfair competitive advantage over its opponent.\textsuperscript{163} Even though Belichick was fined, the fact that Jones was suspended \textit{without pay} had the exact same financial impact as a monetary fine, but it took the extra step of keeping him away from the game.\textsuperscript{164} The commissioner’s willingness to permit a coach to be on the field with his team the weekend after he is caught cheating, while at the same time forbidding Jones from even setting foot within his team’s facilities, is strong indicia of a lack of fair dealing, and perhaps even of an emerging double-standard in the commissioner’s crusade to safeguard the NFL’s “shield”.\textsuperscript{165}

An argument could still be made that while Jones’ suspension was severe, it was necessary because it sent a message to other players that this sort of conduct will not be tolerated.\textsuperscript{166} However, this argument misses the point: the CBA is an agreement governing the NFL’s relations with all players, not just the ones that do not get into trouble.\textsuperscript{167} It cannot be that the commissioner can go beyond his power with respect to one player as a means to upholding the good

\begin{footnotesize}
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\item \textsuperscript{164} See supra text accompanying note 39.
\item \textsuperscript{165} Wilner, supra note 30; Clayton, supra note 163; Dallas Assistant Wants Goodell to Explain Belichick’s Punishment, ESPN.COM, Sept. 14, 2007, http://sports.espn.go.com/nfl/news/story?id=3019472 (expressing concern over the emergence of a double standard). Moreover, further evidence of a double standard can be found in the fact that Philadelphia Eagles’ head coach Andy Reid was not punished at all after his two sons were convicted of drug-related offenses and a judge described the Reid household as “more or less a drug emporium.” Maryclaire Dale, \textit{Judge Critical of Eagles’ Reid’s Home}, ABC NEWS.COM, Nov. 2, 2007, http://abcnwes.go.com/Sports/wireStory?id=3807416; Reid Will Not Be Disciplined for Sons’ Legal Issues, ESPN.COM, Nov. 4, 2007, http://sports.espn.go.com/nfl/news/story?id=3094393. While one can argue that the policy should not apply in this situation, one would think that maintaining a “drug emporium” would nonetheless reflect poorly upon the league, similarly to a player’s misconduct. See generally Bell, supra note 19 (noting Goodell’s commitment to protecting NFL’s reputation); Dale, supra note 165.
\item \textsuperscript{166} See \textit{e.g.} Don Banks, \textit{Time to Get Tough}, SI.COM, March, 20, 2007, http://sportsillustrated.cnn.com/2007/writers/don_banks/03/20/nfl.discipline/index.html (noting that “the NFL is likely to set an example with its punishment of troubled Tennessee Titans cornerbck Adam ‘Pacman’ Jones, suspending him even before the legal process from a Las Vegas strip club brawl in February is complete.”).
\item \textsuperscript{167} See supra text accompanying notes 76-78.
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name of the rest of the league. It must not be forgotten that "deterrence, however laudable an objective, should not be achieved at the expense of fairness."

B. The Need for Independent Review

Jones' suspension illustrates the primary problem with the new personal conduct policy: if its provisions (specifically the commissioner's newfound ability to safeguard the NFL's reputation) are within the scope of the commissioner's authority, then by its very terms, he will be able to punish violations to whatever extent is "warranted." The question then becomes, what exactly is warranted in a given case? Once a player or employee has done something foolish to embarrass the NFL, all that can be determined is that the offense has harmed the league's reputation to some degree. This makes any punishment imposed under the policy the product of a guessing game rather than a standardized procedure capable of repetition.

Reviewing cases that present challenges to commissioner authority and the opinions of various commentators could lead one to conclude that a situation such as this—where the appropriate punishment is difficult to quantify—presents the quintessential set of facts for deference to the commissioner's judgment. The fact

168. When the question of disparate punishments was raised by a panel of sports law scholars at DePaul University Law School, one of the panelists commented that "by [the commissioner] making this statement that he wants to send this big loud message . . . what you hear is . . . I am stepping out of the norm, I did make this up on the fly, and I do have a motive other than just disciplining that guy. And so it sounds arbitrary." Symposium, supra note 160, at 152 (statement of Eldon Ham) (emphasis added).

169. Pollack, supra note 84, at 1695-96 (quoting the arbitrator in the Howe arbitration).

170. CONDUCT POLICY, supra note 27, at 2.

171. The pervasive involvement of the media substantially exacerbates the difficulty of making this determination, as one's reputation cannot be harmed absent publicity, which, in modern society, is substantially obtained through the mass media. While one could say that perhaps the amount of media coverage received by an incident could be a potential measure of damage, this shifts the focus from the culpability of the offender to a decision by the media to either emphasize or ignore a particular event. Thus, evaluating the degree of harm becomes a function of choices that are beyond the player's control.

172. The policy does list factors that will be considered in determining the severity of a punishment but included in that list are "other relevant factors." CONDUCT POLICY, supra note 27, at 2. This omnipotent language can be interpreted to include anything and everything, so this ultimately provides little guidance in selecting the appropriate punishment. See generally id.

173. Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1223 (N.D. Ga. 1977) (noting that the MLB commissioner was intended to have a certain degree of leeway to choose appropriate sanctions and that judicial review of those sanctions would
remains, however, that punishing such an amorphous harm creates a substantial risk of abuse of discretion. If the policy contained specific provisions that limited or qualified the commissioner’s discretion, then one could safely defer to the judgment of the commissioner—but no such limitations exist and Jones’ suspension indicates that a grant of unlimited deference is simply not an appropriate solution in this context. It appears evident that Commissioner Goodell, in his campaign to reclaim the honor of the NFL, has allowed impartiality and fairness to fall by the wayside and has instead resorted to draconian punishments to make examples out of the league’s bad apples—a practice that cannot continue.

It may well be that the commissioner is in the best position to determine if a player’s irresponsible behavior is of such an extreme nature that it poses a threat to integrity and public confidence. However, since gauging the extent of the harm caused by that behavior is a profoundly imprecise science and has already yielded arbitrary results, this determination cannot be left solely to the discretion of one man. Simply put: the commissioner cannot be both the trier of fact and the appellate judge. If (and only if) punishment must be imposed prior to a conviction, there must be some procedure put in place to reduce the potential for abuse.

present an “unworkable system”); Pollack, supra note 84 at 1706-09 (arguing that reviewing commissioner-imposed discipline requires that the court or arbitrator substitute his or her judgment for that of the commissioner, which is contrary to the intentions of league founders to endow the commissioner with the sole authority over disciplinary matters).

174. Cf. Pollack, supra note 84, at 1709-11 (urging players’ unions to trust that the commissioner is imposing just discipline).

175. See supra text accompanying notes 150-169.

176. See generally Symposium, supra note 160, at 152.


178. See Straight Out of Orwell, supra note 117 (“In one fell swoop [the commissioner] has made himself the ultimate arbiter of NFL justice, with absolute power. . . . [but] power tends to corrupt and absolute power corrupts absolutely.”).

179. The ideal solution would be to return to the previous policy and simply reserve judgment until the criminal justice system has run its course. Cf. Straight Out of Orwell, supra note 117; Goodell’s No Lawyer, supra note 119. This would remove the uncertainty associated with determining the damage done by a player’s actions and would also retain the presumption of innocence forgotten by the policy. Cf. Straight Out of Orwell, supra note 117; Goodell’s No Lawyer, supra note 119. Moreover, requiring a conviction negates the possibility for abuse as the commissioner would be precluded from punishing a harm that in reality might not have occurred in the first place. Cf. Straight Out of Orwell, supra note117; Goodell’s No Lawyer, supra note 119.
The most effective check on the commissioner’s authority would be the establishment of an arbitration proceeding to review commissioner-imposed discipline.¹⁸⁰ This review should take the form of an appeal and should only be allowed for punishments based solely upon harm to the league’s reputation (in other words, when there has been no judgment rendered in the criminal justice system).¹⁸¹ Because of the subjective nature of reputational harm, this proceeding should be conducted by a tribunal consisting of multiple arbiters in order to have greater sampling of opinion regarding the severity of the conduct at issue in relation to the punishment imposed. Though the “arbitrary or capricious” standard has frequently been employed by the courts, it is not stringent enough for these circumstances, as the goal of this proceeding should be to provide meaningful review rather than merely to rubberstamp the commissioner’s decision.¹⁸² Instead, the reviewing body should utilize a reasonableness standard that would permit both flexibility and a proper balancing of the respective business and individual interests at stake.¹⁸³

The purpose of implementing a tribunal of this sort is not to usurp the commissioner’s disciplinary authority, but rather to prevent him from imposing discipline behind the veil of absolute impunity that

¹⁸⁰. While judicial proceedings or arbitration would both satisfy this purpose, considerations of judicial economy would most likely lead to a preference for arbitration. See Conway, supra note 82, at 1070-71.

¹⁸¹. One suggestion has been that an external tribunal should be entrusted with deciding matters traditionally within the commissioner’s disciplinary authority. Id. at 1070-71. Within this framework, the commissioner would serve only a prosecutorial role rather than that of both prosecutor and adjudicator. Id. at 1071. However, the downside to having this trial-like proceeding is that it could have a potential chilling effect on the commissioner’s decision to take action with regard to particular behavior. Moreover, if the initial decision to punish is taken away from the commissioner, the commissioner’s role would be greatly diminished and his power diluted. Contrarily, an appellate proceeding preserves his role as disciplinarian while providing an effective check on that authority. See infra text accompanying note 185.

¹⁸². Compare Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 539 n.44 (7th Cir. 1978), with Straight Out of Orwell, supra note 117 (“[T]he commissioner will be considered an arbitrator and that [is] a very deferential standard of judicial review. So, absent gross misconduct no punishment would be likely to be overturned by the civil courts.” (quoting Vanderbilt University Law School Professor Robert Covington)).

¹⁸³. John C. Weistart, Player Discipline in Professional Sports: The Antitrust Issues, 18 WM. & MARY L. REV. 703, 722 (1976). Weistart argues that the use of this standard would curtail the possibility that the “league’s concern for protecting its public image [could] easily be corrupted into rules which regulate player conduct having little connection with what occurs on the field.” Id. This reasonableness standard would consider a multitude of factors, including the prior practice of the NFL, practices of other leagues, testimony of fan and players reactions to similar misconduct, the availability of less restrictive means of controlling this behavior, and the impact of the rule upon those who are disciplined. Id. at 724.
has been created by the appeal provisions of the CBA.  It would still allow the commissioner to use his personal judgment in determining that particular misconduct has harmed the league’s reputation and in imposing whatever punishment he believes to be warranted in a given case. However, the knowledge that his decisions will be subject to further review should help to prevent, or at the very least, deter him from abusing his discretion. This tribunal would therefore do nothing to disturb the historical role of the commissioner as the sole authority in disciplinary matters, while at the same time ensuring that players and other employees disciplined for harming the NFL’s image are treated fairly and that their offenses are evaluated from an impartial perspective.

IV. CONCLUSION

It is an inescapable reality that the National Football League is first and foremost a business, and that its success is entirely dependent upon its ability to increase its share of the market for professional sports. As the league’s history demonstrates, it is the commissioners who have been instrumental in ushering the NFL from its humble beginnings to its current prominence and position atop the world of sports. This status is the direct result of the risks taken by past commissioners in quickly responding to changing times and circumstances, such as Bert Bell’s optimistic view of the future of the television market and Pete Rozelle’s belief that one professional football league would yield greater profits than two competing leagues. Now, NFL Commissioner Roger Goodell has responded to a perceived increase in player misconduct and implemented a preemptive conduct policy that permits punishment prior to a finding of guilt in the criminal justice system. His rationale is that such a policy will put an end to this behavior, stem the rising tide of negative publicity, and ultimately result in a better financial position for the league.

A firm approach to player discipline may in fact be the only way to accomplish these goals, but a man of “unquestioned integrity” should not confuse a firm approach with an unfair or arbitrary one. Such a man would also be wise to remember that regardless of any strategic business decisions made over the years, the NFL enjoys its

184. See CBA, supra note 66, at art. XI, § 1(a).
185. See generally Pachman, supra note 54, at 1420 (noting that a reviewing body should be mindful of the intention of the founders of sports league governance systems while explaining that this mindfulness must be considered in light of the fact that commissioners should not have unbridled discretion).
current popularity because of the individuals who play the game. Consequently, this requires that a balance be struck between the NFL as a business on the one hand and the NFL as a composition of individuals on the other. The manner in which this new conduct policy has been applied, however, exemplifies the fact that the commissioner has ignored this dichotomy and has instead tilted the scale in favor of corporate interests.

While players who pride themselves on being upstanding citizens may indeed want to dissociate themselves from those who are engaging in irresponsible behavior, they must nonetheless consider the long-term consequences of their acquiescence in this expansion of the commissioner’s powers. According to a literal reading of the policy, almost all off-the-field behavior could come within its scope. Even though the policy is still in its infancy, the slippery slope has already started to run its course and will persist unless something is done to stop it. The NFLPA and the players themselves must not docilely stand by and allow the rights of some members of the league to be trampled for an illusory increase in league revenues while others are granted immunity because of their good standing with the commissioner. At the very least, they must use their strength through collective bargaining to demand that some procedure be instituted to check the commissioner’s authority. The NFL’s players are the heart and soul of the league, and while that fact does not necessarily imply that they should be pampered or afforded special treatment, it should, if nothing else, entitle them to a degree of fairness from those who reap the benefits of their abilities, and perhaps some loyalty as well.

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