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Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL & NBA

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SPORTS SCANDALS FROM THE TOP-DOWN:
COMPARATIVE ANALYSIS OF MANAGEMENT, OWNER,
AND ATHLETIC DISCIPLINE IN THE NFL & NBA

JOSHUA S.E. LEE* & JAIMIE K. MCFARLIN**

This article serves to discuss the current landscape of professional sports discipline and commissioner power in the NFL & NBA, specifically understanding the discipline of management and ownership in the major leagues as compared to player discipline when franchise ownership interests and commissioner power conflict. Furthermore, these particular events illuminate the differences between discipline in professional sports and non-sports contexts.

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I. INTRODUCTION

In the past year, the NFL and the NBA, two of the largest and most prominent American professional sports leagues, have been at the center of discipline disputes and scandals that have made headlines and changed the perception of labor and employee discipline in sports. In the NFL, player and owner scandals, ranging from the saga of former Baltimore Ravens running back Ray Rice to the travails of Indianapolis Colts owner Jim Irsay, have brought intense scrutiny and criticism on the league office and commissioner Roger Goodell. Goodell's NBA counterpart, Adam Silver, has been busy in his first year in office as commissioner, taking strong, decisive positions on several NBA scandals, including those of two owners, former Los Angeles Clippers owner Donald Sterling and soon-to-be former Atlanta Hawks owner Bruce Levenson. With these two leagues holding premier status in America's sports echelon and holding significant promise of growth and expansion into the future, these scandals have implicated a possible shift in sports labor discipline that could echo for years to come.

Previous articles have summarized and analyzed commissioner power within the confines of labor law¹ and antitrust case

1. See, e.g., Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179 (2010); Joshua A. Reece, Note, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 VAL. U. L. REV. 359 (2010); Casinova O. Henderson, *How Much Discretion Is Too Much For The Commissioner To Have Over The Players' Off-The-Field Conduct?*, 17 SPORTS L. J. 167, 180 (2010); Marc Edelman, *Are Commissioner Suspensions Really*

law.² That backdrop serves as great context to discuss the current landscape of professional sports discipline and commissioner power, specifically understanding the discipline of management and ownership in the major leagues as compared to player discipline when franchise ownership interests and commissioner power conflict. Furthermore, these particular events illuminate the differences between discipline in professional sports and non-sports contexts.

What is perhaps the most unique aspect of the league events of 2014 is that the discipline handed down from the commissioners were not solely reserved for players. NBA and NFL players have long been subject to almost unilateral discipline by their respective commissioner offices.³ Dating back to the inception of each of these leagues, the commissioner's office has been imbued with wide-ranging labor management and disciplinary power.⁴ The central importance of sports to American society has been given as a reason for this large spread of power: "If professional sports are to

Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade, 58 CATH. U. L. REV. 631 (2009); David Sirotkin, Note, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 CARDOZO J. CONFLICT RESOL. 289, 292 (2009); Adam B. Marks, Note, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1596 (2008).

2. See, e.g., Christian Dennie, *From Claret to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63 (2007); Scott A. Freedman, Comment, *An End Run Around Antitrust Law: The Second Circuit's Blanket Application of the Non-Statutory Labor Exemption in Claret v. NFL*, 45 SANTA CLARA L. REV. 155 (2004).

3. See Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 576 (2009) (discussing indeterminate and "seemingly boundless discretion" granted to commissioners across major professional sports leagues in considering and meting out discipline).

4. See, e.g., Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1059 n.66 (1996) ("In 1973, NFL Commissioner Pete Rozelle suspended Dallas Cowboys receiver Lance Renzel after two indecent exposure convictions and a drug possession charge. Although both Renzel and the NFL Players Association filed suit challenging the suspension as 'arbitrary, capricious, and discriminatory,' both federal and state courts refused to overturn the Commissioner's action." (citations omitted)). The NBA requires an "arbitrary and capricious" standard of review for commissioner punishments under the NBA Collective Bargaining Agreement, art. XXXI, sec. 8(b). See *In re Nat'l Basketball Players Ass'n on behalf of Player Latrell Sprewell and Warriors Basketball Club and Nat'l Basketball Ass'n*, 591 P.LI/Pat 469, 482-83 (2000). For a detailed discussion of the Latrell Sprewell arbitration for his altercation with a coach, see Sarah D. Katz, Note, "Reputations . . . A Lifetime to Build, Seconds to Destroy": *Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 CARDOZO J. INT'L & COMP. L. 185, 232 (2011).

maintain their revered status in American society, the public must have confidence that the contests it sees are genuine and real.”⁵ The amount of time, money, and emotional involvement that the average American fan puts into sports, combined with the image that success in American professional sports is based on merit, hard work, and, often, luck, emphasizes the importance that league contests, from the regular season through the playoffs, are real, and not based on a pre-written script. The distinction is a fine one, as viewing professional sports can truly be classified as a leisure activity. Yet over time, a public trust, built on these ideals, has developed around professional sports and if that trust is not upheld, interest in sports could theoretically vanish.⁶

In cases of disputes over punishments, courts, arbitrators, and leagues have previously applied an “arbitrary and capricious” standard to commissioner decisions in some major American professional sports leagues.⁷ Commissioner decisions have rarely been found to be in violation of this rather broad test.⁸ The most common reason for upholding these broad commissioner powers has been this idea that a commissioner is entrusted with wide authority to “protect the best interests of the game.”⁹ This idea seems nebu-

5. Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645, 1646-49 (1999).

6. See Kim & Parlow, *supra* note 3, at 580 (discussing MLB commissioners’ use of “best interest” clause to block trade that would have eroded public confidence).

7. See Pollack, *supra* note 5, at 1649; NBA COLLECTIVE BARGAINING AGREEMENT art. XXXI, sec. 9 (2011) [hereinafter 2011 NBA CBA], available at <http://www.nbpa.org/cba/2011> (“A dispute involving (i) a fine of more than \$50,000 and/or a suspension of more than twelve (12) games that is imposed upon a player by the Commissioner (or his designee) for conduct on the playing court, or (ii) an action taken by the Commissioner (or his designee) that (A) concerns the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) results in a financial impact on the player of more than \$50,000, shall be processed and determined in the same manner as a Grievance under Sections 2-7 above; provided, however, that the Grievance Arbitrator shall apply an ‘arbitrary and capricious’ standard of review.”); accord *Finley v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978) (applying “arbitrary and capricious” standard to disciplinary actions of Major League Baseball commissioner).

8. See *Kuhn*, 569 F.2d at 545 (Fairchild, C.J., concurring); *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961) (upholding NBA President Maurice Podoloff’s indefinite suspension of Jack Molinas for gambling on team that drafted him -Fort Wayne Pistons).

9. See CONSTITUTION & BYLAWS OF THE NATIONAL BASKETBALL ASSOCIATION art. 35(d) (2012) [hereinafter NBA CONST.], available at <http://mediacentral.nba.com/media/mediacentral/NBA-Constitution-and-By-Laws.pdf> (granting NBA Commissioner power to discipline “[a]ny Player who, in [the Commissioner’s] opinion, shall have been guilty of conduct prejudicial . . . or detrimental to the [NBA]”); CONSTITUTION & BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. VIII (2006) [hereinafter NFL CONST.], available at <http://www.nfl.com/static/content/>

lous on its face and designed to entrench power in the hands of the current sports elite, namely the franchise owners and the commissioners. In truth, who decides what is best for the game? What if they are wrong?

Despite these legitimate questions, this standard still persists, founded in a somewhat gray area of sporting morals, common sense, and social values.¹⁰ While these leagues are constantly evolving in other aspects, including on important issues such as concussions¹¹ and racial divides,¹² the powers of the commissioners have remained relatively unchanged and unbound by a strict framework. Yet, there has been a rash of unprecedented ownership and player discipline stories during 2014, which threatens to upend our current understanding of commissioner discipline and labor issues in sports. Historical standards have been challenged, for both better and worse, as commissioners Goodell and Silver have taken a new

public/static/html/careers/pdf/co.pdf; cf. NFL COLLECTIVE BARGAINING AGREEMENT app. C, para. 15, 2006-2012 (2006) [hereinafter 2006 NFL CBA] (enabling NFL Commissioner to discipline an athlete who acts in a manner that is “detrimental to the League or professional football”); see also Kim & Parlow, *supra* note 6 at 576 (discussing general grant of indeterminate discretion to the commissioner in considering and meting out discipline based on “best interest” clause); Pollack, *supra* note 5 (discussing best interest power in different professional sports leagues).

10. See Kim & Parlow, *supra* note 6 at 595 (discussing “moral underpinnings of these punitive decisions suggest[ing] that sports leagues embrace governance form of organization—which pursues broad social values over narrow, private goals—further reinforcing its public rather than private conceptualization”); Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1108 (2008) (discussing values that NFL must prioritize in order to properly enforce its conduct policy).

11. For the history of the NFL’s policies and litigation regarding concussions, see generally Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127 (2013); Michael Telis, Note, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1842 (2014); Daniel S. Goldberg, *Mild Traumatic Brain Injury, the National Football League, and the Manufacture of Doubt: An Ethical, Legal, and Historical Analysis*, 34 J. LEGAL MED. 157 (2013). The NBA followed the lead of the other major professional sports leagues and similarly implemented a concussion protocol in December of 2011. See Howard Beck, *N.B.A. Concussion Policy Becomes Major Factor in Series*, N.Y. TIMES (May 27, 2013), http://www.nytimes.com/2013/05/18/sports/basketball/concussion-protocols-loom-large-after-injury-to-pacers-george-hill.html?_r=0.

12. For example, in the NFL, race is implicated in the affirmative action policies for hiring coaches, known as the “Rooney Rule.” See Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to “Level the Playing Field” in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179 (2008); Brian W. Collins, Note, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870 (2007); Michael Corey Dawson, Comment, *A Change Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must Be Eliminated*, 9 SETON HALL J. SPORT L. 551 (1999).

lead on ownership and player discipline. Undoubtedly, the fast-paced, internet culture that dominates today's social conversation has played a huge role.¹³ Scandals and discipline that previously might have taken place behind closed doors, such as the case of Donald Sterling, have played out in the national spotlight and have, in essence, forced each commissioner's hands in addressing and solving these serious discipline issues. With the media further emboldened by these stories, it is conceivable that any future owner or player discipline is going to play out under a new light and under a different paradigm. This paper's ambit is to capture at least some of what this paradigm shift will encompass and what labor discipline will resemble in these leagues as we approach the end of another decade.

In the field of labor law and employee discipline, the professional sports workplace is different. Two key differences emerge with regards to player and management discipline in professional sports as compared to other common workplace environments. The first is the notion of punishment with regards to the power and role of publicity in disciplinary proceedings. The second distinguishing feature stems from the unique labor market of professional sports as a franchised monopoly with high-skilled workers.

So while it is clear that sports employment is different, it has not yet been determined how these new developments and issues will affect the discipline landscape in the NBA and the NFL. Is this the beginning of an entirely new era of sports discipline? One that is more transparent and subject to the influence of the viewing public? It remains to be seen but it appears that these leagues are on a precipice of a drastic change in management and employee discipline. Goodell and Silver have seen the power of their offices expand greatly since 2014 and have used this expansion in power in a familiar manner: in pursuit of what they consider to be in the best interests of the game and the league. The end goals are the same.

13. See, e.g., Laurie Nicole Robinson, Comment, *Professional Athletes Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1327 (1998); see also Jared Chamberlain et al., *Celebrities in the Courtroom: Legal Responses, Psychological Theory and Empirical Research*, 8 VAND. J. ENT. & TECH. L. 551, 565 (2006) ("Research has found that athletes are stereotyped by the public as violent, drug abusing, and lacking intelligence."). One author explores journalists' motivations for covering such stories and what that trend says about popular culture, sports, and news reporting. See Robinson, *supra*, at 1324 (recalling time when the media protected professional athletes as one where athletes and reporters made similar salaries and were both predominantly white); see also generally, David Ray Papke, *Athletes in Trouble with the Law: Journalistic Accounts for the Resentful Fan*, 12 MARQ. SPORTS L. REV. 449 (2001).

But the process utilized by each of these leagues has been markedly different. In the NFL's case, Goodell has kept much of the status quo, doling out punishments underneath an archaic disciplinary system, often with uneven results. He has taken a harsh stand on player discipline, while continuing to maintain his close relationship with league owners and other executives. On the other hand, his NBA counterpart, Adam Silver, has taken drastic, unprecedented steps to discipline team owners and expand the disciplinary powers of his office.

Juxtaposing the actions taken by these two commissioners in the face of huge disciplinary challenges reveals a new shift in understanding and expanse of sport commissioner power. This shift entails a greater willingness, even an expectation, of the general public to support commissioner discipline in the best interests of the game. It is also a shift that comes during a time of unmatched access and insight of the media and viewing public into the personal scandals of the league, due, in part, to our increasingly invasive digital culture. We will begin in Section B by examining the professional sports labor and discipline system, focusing specifically on what makes the sports workplace different and what defines and gives shape to the disciplinary processes employed by professional sports leagues like the NFL and NBA. Next, in Section C, we will focus on summarizing recent examples of player and management discipline in the NFL and NBA in 2014 and compare and contrast the NFL's approach to discipline to that of the NBA. In Section D, we will view this discussion of sports discipline in a larger context and how sports leagues are a unique workplace compared to other industries in terms of management and employee discipline. Finally, in Section E, we make some predictions as to where this tumultuous year will leave management and employee discipline in sports for decades to come.

II. THE PROFESSIONAL SPORTS LABOR SYSTEM AND PLAYER DISCIPLINE

A. The Sports Workplace

Sports differ from other workplaces. While you often hear players and coaches refer to their positions as "their jobs," which they indeed are, professional sports leagues hold a unique place in the American labor system. Professional sports employ highly, but specifically, skilled workers. As league entities, both the NBA and the NFL are the single largest employers of their respective sports

within the United States.¹⁴ The Seventh Circuit describes the management of professional sports leagues as “an exception, anomaly and aberration.”¹⁵ They are organizations in which a collective entity, the league itself, is co-owned by a group of very rich and powerful owners.¹⁶ Their owners appoint an individual, the commissioner, to make decisions and carry out mandates for the good of the sport as a whole. This commissioner’s power with regards to league-related issues is almost absolute, especially in the case of player discipline.¹⁷ The model for the current day sports commissioner truly began in baseball in the mid-20th century and was soon copied by other leagues, which were hoping for similar success.¹⁸

In the NFL, the commissioner’s current wide-ranging authority was born during the tenure of Pete Rozelle. Rozelle’s work in securing the league’s first television contract and increasing league-wide prosperity prompted a greater expansion of the powers of the office of the commissioner, including “full, complete, and final jurisdiction and authority [over] any dispute involving a member or members in the League.”¹⁹

In the NBA, the current model of discipline emerged with the signing of the 1995 collective bargaining agreement (“CBA”). Previous to that point, and dating back to the inception of the league, the NBA commissioner’s disciplinary decisions were considered final.²⁰ The 1995 CBA changed the grievance mechanism and allowed for an introduction of an arbitrator into the process.²¹ The current NBA CBA melds together two different standards of review. The first standard is the well-established “arbitrary and capricious” review that has been in place through sports discipline for decades. However, the second standard can be articulated as a “just cause” standard: “whether there has been just cause for the penalty imposed.”²² These dual standards provide an extra level of scrutiny

14. See Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1237 (2012) (asserting that “[t]here are no other ‘sellers’ equivalent to professional sports leagues and no equivalent ‘buyers’ for professional athletes’ skills”).

15. Pollack, *supra* note 5, at 1648 (quoting *Finley v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978)).

16. *See id.*

17. *See id.*

18. *See id.* at 1676–79.

19. *See id.*; see also Parlow, *supra* note 1, at 185–89.

20. *See* Pollack, *supra* note 5 at 1676–79.

21. *See id.*

22. *See id.* at 1703–04.

and review for NBA commissioner discipline. Opening the process to a neutral arbitrator lends not only power to the players, but also legitimacy to commissioner discipline and rule.

There is a tension in the relationship between the unique nature of sports and the expansive power of commissioner discipline. It manifests on several fronts. First, it presumes that the private lives of athletes, and owners, are relevant to their on-field careers and conduct. Second, commissioner discipline is often rigid and, especially in the case of the NFL, the last word on the situation. Finally, league commissioners, including those in the NFL and NBA, have developed their powers from negotiations and decisions that seem archaic in today's world. Many of the current entrenched notions of commissioner discipline evolved during the nascent years of sports leagues in America in the 1950s and 1960s.²³ It was during that time that commissioner discipline first began to take shape and little change has been made in the intervening decades. Although the power of the commissioner is supposed to be subject to collective bargaining, much of current power of commissioners, like Silver and Goodell, has not been at the forefront of CBA negotiations but rather has been grandfathered in from this earlier time. This has left commissioner discipline in a somewhat of an awkward fit with today's evolving league landscape and growing scrutiny from a concerned public.

B. Sports Employee Discipline and Labor Law

The commissioners of the major sports leagues in America hold "broad powers to protect 'the integrity of, and public confidence in,' their respective sports, and thus determine the 'best interests' of their leagues."²⁴ Early case precedent, which has been nominally followed by most courts, has given a high level of deference to commissioner decisions that were made in the best interests of the game.²⁵ This "best interests" power most often extends not only to on-court decisions, affecting the rules of the game, but also off-the-court discipline of players and other personnel.²⁶ Under federal labor law, employee and management discipline are terms and conditions of employment and mandatory subjects of collective

23. *See id.* at 1676–79.

24. *Id.* at 1647 (citations omitted).

25. *See* Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 177–78 (1998); *see also* Parlow, *supra* note 1, at 190–91.

26. *See* Pollack, *supra* note 5, at 1646–49.

bargaining.²⁷ The CBAs allow for league individuals to be disciplined by the commissioner and, in the case of most leagues, appeal that discipline to an outside arbitrator.²⁸ When discussing management and employee discipline in professional sports, particularly with the NBA and the NFL, it is key to look first at the CBAs of both leagues, and the power those CBAs give commissioners in terms of player and owner discipline.

The CBA is the “‘supreme governing authority’ concerning employment in professional sports leagues.”²⁹ It offers the commissioner “almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners.”³⁰ Central to the creation of the CBA is the collective bargaining process, engaged in by the players union, ownership, and the league every few years.³¹ The process is provided for by the National Labor Relations Act (“NLRA”).³² The National Labor Relations Board (“NLRB”) has jurisdiction over professional sports leagues and applies the NLRA, allowing player unions to form and negotiate terms of employment. For a CBA to meet the standards of the NLRB, certain conditions and requirements must be met and discussed by the parties in negotiations. For most professional sports leagues, the power of the commissioner, disciplinary measures, and grievance procedures are mandatory parts of the collective bargaining process.³³

In discussing the CBAs of both the NFL and the NBA, several similarities and differences prove illuminative in discussing how each league approaches employee and management discipline.

1. *Presence of Absence of Arbitrator*

The first area is the presence, or absence, of an arbitrator. Similar to the MLB, the CBA of the NBA allows for players to ap-

27. *See id.*

28. *See id.*; *see also* *Out of Bounds: Professional Sports Leagues and Domestic Violence*, *supra* note 4, at 1062–63; Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 168–69 (1995).

29. Parlow, *supra* note 1, at 196 (quoting Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League’s Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008)); *see id.* at 196–202; Stiglitz, *supra* note 28, at 173.

30. Parlow, *supra* note 1, at 186 (quoting Gregor Lentze, Comment, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from A Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 72 (1995)); *see id.* at 185–89.

31. *See id.* at 196–202.

32. *See* Stiglitz, *supra* note 28, at 173–74.

33. *See* Parlow, *supra* note 1, at 196–202; *see also* Stiglitz, *supra* note 28, at 168–69.

peal punishment and discipline to an outside arbitrator.³⁴ The NBA Players Association fought for such a system as an indication that they believe in the idea that “commissioners are biased representatives of management.”³⁵ In contrast, the NFL does not have a system in place for outside arbitrators to review and rule on commissioner-imposed discipline. Indeed, NFL commissioner Roger Goodell’s discipline may only be appealed to his office, and no further.³⁶ Discipline may be handed down by Goodell simply if he believes that the conduct in question is “detrimental to the integrity of, or public confidence in, the game of professional football.”³⁷

There has been some question of whether neutral arbitrators are even essential or necessary in professional sports. Some have argued that arbitration passes best interests authority onto individuals, such as judges, who do not have the specialized knowledge and insight to see what is best for a professional sports league.³⁸ Indeed, arbitrators have demonstrated a pattern of treating commissioner disciplinary decisions, especially in the NBA, with less deference than courts have.³⁹ However, this critique is shortsighted. It is essential for any disciplinary program to have an oversight mechanism. The NBA’s system must be considered today’s gold standard, and allows for a healthy disciplinary structure to exist. Without external review and oversight, in an industry as important and lucrative as professional sports, there is simply a dearth of integrity in the decisions of a league commissioner’s office.

If there is a lack of arbitration, it may well be because arbitrators have recently shown little deference to commissioner discipline that was handed down under the “best interests” clause of the operating agreement. This is a wide departure from the historical legal standard, in which judges have frequently upheld commissioner decisions and shown wide deference to league commissioners, as long as said commissioners have not made decisions that can be considered arbitrary and capricious.⁴⁰

34. See Bethany P. Withers, Comment, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 163 (2010).

35. Pollack, *supra* note 5, at 1648; *see id.* at 1646–49.

36. *See id.* at 1646–49.

37. *Id.* at 1677 (quoting NFL COLLECTIVE BARGAINING AGREEMENT art. XI, sec. 1(a) (1993)); *see id.* at 1676–79.

38. *See, e.g., id.* at 1707.

39. See Parlow, *supra* note 1, at 195–96 (discussing case of former NBA star Latrell Sprewell, whose suspension for choking coach was reduced by neutral arbitrator from 82 games to 68 games on basis of proportionality).

40. *See* Pollack, *supra* note 5, at 1649.

2. *The Source of Commissioner Powers to Discipline*

Second, it is instructive to look at where specifically, in their respective sources, the commissioners of the NFL and the NBA derive the bulk of their disciplinary power.

a. NBA Commissioner's Power to Discipline

Article XXXI of the NBA CBA covers grievance and arbitration procedures with respect to player discipline.⁴¹ Underneath this, player discipline is divided into two categories: suspension of twelve (12) games or less and suspension for more than twelve (12) games. Each class of suspension can be for in-game conduct or for the time-honored notion of "preserving the integrity of the game."⁴² Concerning suspensions of fewer than twelve games, the suspension "shall not give rise to a Grievance, shall not be a subject to a hearing before . . . the Grievance Arbitrator, and shall not be determined by arbitration."⁴³ The player suspended for fewer than twelve games may appeal the ruling to the commissioner but this appeal will constitute a final review of the dispute.

Section 9(b) of this article discusses player suspensions of more than twelve games. Under this section, a player or the union may file a Grievance relative to the suspension. Further, section 9(d) provides the commissioner with substantial power to legislate preservation of the "integrity" of the game:

In the event a matter filed as a Grievance . . . gives rise to issues involving the integrity of, or public confidence in, the game of basketball . . . the Commissioner may, at any stage of its processing, order the matter be withdrawn from such processing and thereafter be processed in accordance with the appeal procedure provided . . . above.⁴⁴

So, per the rules of the CBA, Adam Silver has full authority to discipline and review any player suspended for twelve games and under, while also having substantial powers to discipline for a suspension of more than twelve games, powers that are subject to review by an arbitrator.⁴⁵ Of course, in practice, Silver's disciplinary powers, for both owners and players, exceed this grasp, as his actions during

41. 2011 NBA CBA, *supra* note 7, art. XXXI.

42. See Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 103 (2014).

43. See 2011 NBA CBA, *supra* note 7, art. XXXI, sec. 9(a).

44. *Id.* art. XXXI, sec. 9(d).

45. See Pacifici, *supra* note 42, at 103.

the Donald Sterling scandal demonstrate. Like many other commissioners, Silver has appeared to view the “integrity of the game” clause as a mandate, and has acted accordingly.

b. NFL Commissioner’s Power to Discipline

In contrast to Silver, Commissioner Goodell derives the base of his disciplinary power from the NFL constitution. Article VIII of the Constitution outlines Goodell’s ability to resolve disputes and to take action against an individual affiliated with the NFL, when said person “engages in conduct detrimental to the league.”⁴⁶ With regard to detrimental conduct, the commissioner has the power to:

[T]ake or adopt appropriate legal action . . . [which] he deems necessary and proper in the best interest of . . . the League or professional football, whenever any party . . . employed by . . . connected with the League or any member thereof is guilty of any conduct detrimental either to the League . . . or to professional football.⁴⁷

As this appears to give Goodell wide range in determining discipline,⁴⁸ the CBA attempts to clarify this power. Per Article 46 of the NFL CBA:

[A]ll disputes involving a fine or suspension imposed upon a player for conduct on the playing field . . . or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player . . . [and within three days, the player] may appeal in writing to the Commissioner.⁴⁹

However, despite this further clarification, Goodell’s disciplinary power has been criticized as ill-defined and “ambiguous.”⁵⁰ Indeed, Goodell has the broadest powers of discipline of any major sports

46. *Id.* at 103–04 (citing NFL CONST., *supra* note 8, art. VIII, at 28).

47. *See* NFL CONST., *supra* note 9, at art. VIII, sec. 8.6.

48. *See* Pacifici, *supra* note 42, at 104.

49. NFL COLLECTIVE BARGAINING AGREEMENT art. 46, sec. 1 (2011) [hereinafter 2011 NFL CBA], available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

50. *See* Pacifici, *supra* note 42, at 104.

commissioner.⁵¹ Yet the NFL's system has been derided as "the worst system of the four [major sports leagues]."⁵²

3. *NBA & NFL Commissioner Authority Beyond CBA's and Constitutions*

Finally, another key area of discipline underneath the umbrella of the CBAs of both of these leagues relates to what disciplinary authority the commissioners have beyond their respective CBAs and constitutions. In the NBA, Adam Silver's mechanism for dealing with detrimental player conduct off the court is simple: the standard NBA player contract contains a "good moral character" clause. It essentially allows a team to "terminate a player's contract if that player acts in a manner that is not consistent with the standards of good morals and citizenship."⁵³ In the past, NBA Commissioners have cited this clause in handing down disciplinary decisions for players.⁵⁴ In fact, the combined mandate laid out by the NBA CBA's "best interests" clause and the "good morals" clause in player contracts grant the NBA Commissioner "'the broadest authority' among the commissioners of the major professional sports leagues."⁵⁵

The NFL's Personal Conduct Policy ("NFL PCP") has, in the past, given Goodell another source of authority in disciplining athletes and other personnel, including owners.⁵⁶ The NFL PCP mandates that "[a]ll persons associated with the NFL are required to avoid 'conduct detrimental to the integrity and public confidence in the [NFL].'"⁵⁷ Types of detrimental conduct include "sexual offenses, domestic violence, crimes related to steroids or other banned substances, dangerous activity that puts others' safety at risk, possessing a weapon in a workplace setting, and 'conduct that undermines or puts at risk the integrity and reputation of the NFL.'"⁵⁸ The document does include a proportionality require-

51. See Withers, *supra* note 34, at 168.

52. Pacifici, *supra* note 41, at 105.

53. Parlow, *supra* note 2, at 187 (citing Sean Bukowski, Note, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 110 (2001)); see *id.* at 185–89.

54. See *id.* at 185–89.

55. *Id.* at 187 (quoting Brian D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L.J. 205, 212 (2007)).

56. See *id.* at 188–89 & nn.67–71 (citing, e.g., Marks, *supra* note 1, at 1584–85 (2008)).

57. *Id.* at 188 (first alteration in original) (quoting NATIONAL FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 1 (2008) [hereinafter 2008 NFL PCP]).

58. *Id.* (quoting 2008 NFL PCP, *supra* note 57, at 1).

ment, which allows some respite for players and personnel judged to have violated the NFL PCP. In late 2014, the NFL PCP was radically amended, with initial decisions on player and management discipline being taken out of Goodell's hands.⁵⁹ New measures adopted by this amendment to the NFL PCP include:

- “Additional NFL-funded counseling and services for victims, families, and violators”;
- “A more extensive list of prohibited conduct”;
- “Independent investigative procedures”;
- “Specific criteria for paid leave for an individual formally charged with a crime of violence, including domestic violence, sexual assault and child abuse”;
- “An expert group of outside advisors to review and evaluate potential violations and consult on other elements of the policy”; and
- “A baseline suspension of six games without pay for violations involving assault, battery, domestic violence, dating violence, child abuse, other forms of family violence, or sexual assault, with consideration given to possible mitigating or aggravating circumstances.”⁶⁰

Yet perhaps the most important portion of the amended NFL PCP creates positions for disciplinary officers who will “oversee [NFL] investigations and decide the discipline for violations of the policy.”⁶¹ The NFL recently hired Todd Jones, the former director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and Lisa Friel, a former New York District Attorney, to fill the positions of Special Counsel for Conduct and Special Counsel for Investigations, respectively.⁶² This change takes the initial disciplinary decision out of Goodell's hands and adds another layer of disciplinary

59. See Ken Belson, *N.F.L. Sets Strict Rules for Actions Off Field*, N.Y. TIMES, Dec. 11, 2014, at B13, available at http://www.nytimes.com/2014/12/11/sports/football/roger-goodell-wont-assess-penalties-under-revised-conduct-policy.html?_r=0.

60. National Football League, *NFL Owners Endorse New Personal Conduct Policy*, NFL.COM (Dec. 10, 2014, updated Dec. 19, 2014, 10:35 AM), <http://www.nfl.com/news/story/0ap3000000441758/printable/nfl-owners-endorse-new-personal-conduct-policy>; see also NATIONAL FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY (Dec. 2014) [hereinafter 2014 NFL PCP], available at <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

61. Joe Calabrese, *NFL Personal Conduct Policy: What the League Changed*, HEAVY (Dec. 10, 2014, 5:46 PM), <http://heavy.com/sports/2014/12/nfl-owners-vote-personal-conduct-policy-changes-roger-goodell/> (quoting Roger Goodell's comments on policy change).

62. See Adam Schefter, *NFL to Hire Ex-ATF Boss Todd Jones*, ESPN (Mar. 23, 2015), http://espn.go.com/nfl/story/_/id/12544015/todd-jones-former-atf-director-join-nfl-conduct-czar.

procedures to the NFL's apparatus. This change has already faced harsh criticism for disregarding Fifth Amendment protections.⁶³ Creating an office to standardize investigations and participate in the adjudication of punishments may provide a tier of "procedural due process" for those facing NFL punishment. However, many view this as solely a public relations move as Goodell maintains his power as the ultimate adjudicator and arbitrator of punishment appeals unless he unilaterally decides to appoint a neutral arbitrator.⁶⁴ Future disciplinary proceedings should be analyzed for effects and limitations in implementing the new NFL conduct policy and disciplinary process.

C. Commissioner Power to Discipline Owners

For the NBA, the power to discipline owners is derived from the "best interest clause" in the NBA Constitution and bylaws.⁶⁵ The NBA Constitution was only recently made public following the discipline of Donald Sterling, so previously the public assumed that the NBA Commissioner's authority was embedded into his office's inherent power.⁶⁶ Specifically, the NBA Constitution empowers the Commissioner with the ability to suspend,⁶⁷ and fine owners.⁶⁸ In

63. See Mike Florio, *New Personal Conduct Policy Disregards Fifth Amendment Protections*, NBC SPORTS (Dec. 10, 2014, 4:23 PM), <http://profootballtalk.nbcsports.com/2014/12/10/new-personal-conduct-policy-disregards-fifth-amendment-protections/>.

64. See, e.g., Erik Matuszewski, *NFL Union Demands Independent Arbitrator for Peterson Appeal*, BLOOMBERG (Nov. 20, 2014, updated Nov. 21, 2014, 12:23 AM), <http://www.bloomberg.com/news/articles/2014-11-20/nfl-union-demands-arbitrator-over-goodell-for-peterson-appeal>; Lindsay H. Jones, *NFL Names Former U.S. Judge As Arbitrator for Ray Rice Appeal*, USA TODAY (Oct. 2, 2014, 1:35 PM), <http://www.usatoday.com/story/sports/nfl/ravens/2014/10/02/nfl-names-former-us-judge-as-arbitrator-for-ray-rice-appeal/16588557/>.

65. See generally NBA CONST., *supra* note 8.

66. See Barry Petchesky, *That 'Secret' NBA Constitution is Now Online*, DEADSPIN (Apr. 29, 2014, 5:54 PM), <http://deadspin.com/that-secret-nba-constitution-is-now-online-1569509012>.

67. See NBA CONST., *supra* note 65, art. 24(i). Article 24(i) reads:

The Commissioner shall have the power to suspend a Player, Coach, Member, Owner, or other person subject to the Commissioner's jurisdiction for a definite or indefinite period and to impose such fines and other penalties as are authorized by Article 35, 35A or any other Article or Section relating thereto of this Constitution and By-Laws. . . .

Id.

68. See *id.* art. 24(l). Article 24(l) reads:

The Commissioner shall, wherever there is a rule for which no penalty is specifically fixed for violation thereof, have the authority to fix such penalty as in the Commissioner's judgment shall be in the best interests of the Association. Where a situation arise which is not covered in the Constitution and By-Laws, the Commissioner shall have the authority to make such decision, including the imposition of a penalty, as in his judgment

the NBA Constitution's current state, Article 24(1) also includes a "best interests of the Association" clause that essentially gives Silver the power to levy any punishment he sees fit when a violation is not specifically covered elsewhere.⁶⁹ During the tenure of David Stern, the power of the commissioner was expanded most likely using the "best interest clause" for off-the-court behavior, including behavior of owners.⁷⁰ Through the best interest power, Stern also regulated comments critical of the referees by fining Mark Cuban, the current owner of the Dallas Mavericks.⁷¹ The rise of the NFL commissioner's power to discipline owners occurred during the Rozelle era. In 1988, the owners amended the NFL Constitution granting the commissioner "full, complete, and final jurisdiction and authority [over] any dispute involving a member or members in the League."⁷² The current NFL Constitution's Article 8 empowers the NFL commissioner to discipline, including fine or suspend, "an owner, shareholder, partner or holder of an interest in a member club . . . [who] has [] violated the Constitution and Bylaws of the League."⁷³

Both the NBA and NFL have comprehensive processes and structures in place to deal with management and employee discipline. For leagues that generate billions of dollars in revenue each year and have incredible media exposure, it is imperative that they have such systems in place to deal with important disciplinary matters.⁷⁴ An overview of these systems reveals how player and owner discipline are treated, with owner discipline primarily provided for through each leagues' constitutions and player discipline nominally handled through the CBAs. In 2014, both leagues were tested by unprecedented personnel scandals, which rocked the entire sports landscape. These scandals, detailed below, have not only tested

shall be in the best interests of the Association. The penalty that may be assessed under the preceding two sentences may include, without limitation, a fine, suspension, and/or the forfeiture or assignment of draft choices. No monetary penalty fixed under this provision shall exceed \$2,500,000.

Id.

69. *See id.*

70. *See* Jeremy R. Abrams, Comment, *Making the Right Call: Why Fairness Requires Independent Appeals in U.S. Professional Sports Leagues*, 97 MARQ. L. REV. 469, 489 (2013).

71. *See id.* at 490; Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 59–60 (2010).

72. Ambrose, *supra* note 10, at 1086 (alteration in original) (quoting Pollack, *supra* note 5, at 1677, citing NFL CONST § 8.3 (1988)).

73. NFL CONST., *supra* note 47, art. VIII, sec. 8.13(A).

74. *See* Pollack, *supra* note 5, at 1646–49.

commissioners Goodell and Silver, but also brought the prospect of a changing paradigm in sports discipline.

III. DISCIPLINE IN THE NBA AND NFL IN 2014

2014 was an unprecedented year in employee and management discipline in the NFL and NBA. It was not only the number of stories that made the headlines, but also the parties involved. In the NFL, some of the league's brightest stars found their careers and livelihoods derailed by heinous personal incidents. While in the NBA, two teams changed ownership as a result of personal scandals involving their owner and his backwards views on race. The most illustrative examples help contextualize what changes this area has experienced.

A. Examples of Owner and Management Discipline

1. *Donald Sterling (NBA)*

For decades, Donald Sterling, the former owner of the NBA's Los Angeles Clippers, was held up as an example of perhaps the worst ownership situation in sports.⁷⁵ Sterling, who made his fortune in California real estate, had long faced allegations of discrimination and racism, including several lawsuits relating to unfair housing practices against minorities.⁷⁶ On the court, Sterling was notorious for always eyeing the bottom line, making inappropriate comments about his players, and doing little to stop the team's slide into obscurity and irrelevance.⁷⁷ In April 2014, the allegations and conjecture bubbled over the top as tabloid website TMZ.com released audio recordings of Sterling in a heated argument with his mistress, V. Stiviano.⁷⁸ The tapes, recorded covertly by Stiviano as part of an effort to get revenge on Sterling for some of his actions, showed Sterling making derogatory and racist comments about blacks and other minorities, including LA Lakers legend Magic

75. See Tom Ziller, *The NBA is Full of Horrible Owners*, SB NATION (Sept. 10, 2012, 9:46 AM), <http://www.sbnation.com/2012/9/10/3307403/nba-worst-owners-maloofs-james-dolan-donald-sterling-hook>.

76. See Scott Glover, *Donald Sterling to Pay \$2.725 Million to Settle Housing Discrimination Lawsuit*, L.A. NOW (Nov. 3, 2009, 9:54 AM), <http://latimesblogs.latimes.com/lanow/2009/11/donald-sterling-to-pay-2725-million-to-settle-housing-discrimination-lawsuit.html>.

77. See Billy Witz, *Vortex of Outrage Trails Clippers' Owner*, N.Y. TIMES, Apr. 28, 2014, at D1, available at http://www.nytimes.com/2014/04/28/sports/basketball/clippers-owner-donald-sterling-has-public-record-of-bad-behavior.html?_r=0.

78. See Nathan Fenno, *A Timeline on the Donald Sterling Saga*, L.A. TIMES (Aug. 12, 2014, 5:41 PM), <http://www.latimes.com/sports/clippers/la-sp-clippers-sale-timeline-20140530-story.html#page=1>.

Johnson.⁷⁹ Sterling was widely excoriated in the media and general public.⁸⁰ As the firestorm grew, sponsors began to drop the Clippers and Sterling's own players, including NBA All-Stars Chris Paul and Blake Griffin, began staging public protests against his continued ownership.⁸¹ On April 29, 2014, a mere four days after these videos became public, commissioner Silver took action: banning Sterling for life, fining him \$2.5 million, and working in collusion with the NBA Board of Governors to remove him of his majority ownership stake.⁸² Despite threats of litigation and public refusals to sell the team, Sterling passed his ownership stake to former Microsoft CEO Steve Ballmer in late May 2014 after the NBA's Board of Governors voted to approve the sale.⁸³ Sterling remains banned from the NBA.⁸⁴

2. *Danny Ferry (NBA)*

Danny Ferry took an indefinite leave of absence after making racially insensitive comments about veteran Miami Heat forward Luol Deng in June, less than two months after NBA commissioner Adam Silver banned Donald Sterling for life.⁸⁵ In a conference call with ownership on June 6, 2014, Ferry said the following:

The rap on him is little bit, um, body is not as torn up as you think, um, although he's played a lot of minutes. If you managed it the right way he'll be fine. He's still a young guy overall, um, but he is also, he is a good guy

79. See Jason Hanna, *Donald Sterling Purportedly Says Jealousy Behind Racist Comments*, CNN (May 12, 2014), <http://edition.cnn.com/2014/05/09/us/nba-donald-sterling-audio-recording/>.

80. See Kevin Spain, *Donald Sterling Drawing Big-Name Criticism Around NBA*, USA TODAY (April 27, 2014, 8:11 PM), <http://www.usatoday.com/story/sports/nba/clippers/2014/04/27/nba-donald-sterling-michael-jordan-magic-johnson-kevin-johnson-adam-silver/8291203/>.

81. See *Sponsors End Clippers Sponsorship*, ESPN (Apr. 28, 2014, 6:19 PM), http://espn.go.com/los-angeles/nba/story/_/id/10851689/sponsors-ponder-deals-los-angeles-clippers-donald-sterling-purported-racist-comments; Arash Markazi, *Clippers Stage Silent Protest*, ESPN L.A. (Apr. 28, 2014, 1:02 PM), http://espn.go.com/los-angeles/nba/story/_/id/10848577/los-angeles-clippers-stage-silent-protest-donald-sterling-hide-team-logo.

82. See Fenno, *supra* note 79.

83. See *id.*

84. See *Donald Sterling Adds Wife to Lawsuit Against NBA*, USA TODAY (Mar. 11, 2015, 6:05 PM), <http://www.usatoday.com/story/sports/nba/2015/03/11/donald-sterling-adds-wife-lawsuit-against-nba/70171256/>.

85. See *Danny Ferry Takes Leave of Absence*, ESPN (Sept. 13, 2014), http://espn.go.com/nba/story/_/id/11514254/danny-ferry-atlanta-hawks-takes-leave-absence; see also Tom Haberstroh, *Luol Deng Forgives Danny Ferry*, ESPN (Sept. 28, 2014), http://espn.go.com/nba/truehoop/miamiheat/story/_/id/11594963/luol-deng-miami-heat-forgives-atlanta-hawks-gm-danny-ferry-racist-comments.

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overall but he's not perfect. He's got some African in him. And I don't say that in a bad way other than he is a guy who will do something behind you. He has a store front out front that's beautiful and great, but he may be selling some counterfeit stuff behind you. And when I say that, I mean for example he can come out and be an unnamed source for a story, and two days later come out and say that was absolutely not me, I can't believe someone said that.⁸⁶

Ferry has claimed he was "repeating" comments he heard and that the comments did not reflect his personal beliefs.⁸⁷ After a three-month investigation of Danny Ferry, the team disciplined him with undisclosed actions. The Ferry incident is an interesting juxtaposition because of the inaction of the NBA head office. In comments regarding the Ferry conference call, Adam Silver explained, "The discipline of a team employee is typically determined by the team, and in this case the Hawks hired a . . . law firm to investigate the circumstances of Danny Ferry's clearly inappropriate and unacceptable remarks. In my view, those comments, taken alone, do not merit his losing his job."⁸⁸ Notably, the Danny Ferry story led to the emergence of the 2012 email written by then-Atlanta Hawks owner, Bruce Levenson.

3. *Bruce Levenson (NBA)*

One of Sterling's biggest critics during his scandal was Levenson, still the co-owner of the NBA's Atlanta Hawks.⁸⁹ Levenson, who made his fortune in communications, became the Hawks co-owner in 2004 after the sale of the team by Time Warner.⁹⁰ In September 2014, Levenson self-reported to the NBA that he was resigning as team owner and selling his interest.⁹¹ The reason behind

86. *Audio Tape of Hawks Conference Call*, AJC.COM (Sept. 11, 2014, 9:33 PM), <http://www.ajc.com/weblogs/atlanta-hawks/2014/sep/11/exclusive-audio-tape-hawks-conference-call/> (providing audio recording of Ferry's conference call).

87. See Haberstroh, *supra* note 87.

88. *Adam Silver: Not Fireable Offense*, ESPN (Sept. 11, 2014), http://espn.go.com/nba/story/_/id/11504904/commissioner-adam-silver-believe-atlanta-hawks-gm-danny-ferry-fired-luol-deng-comments (quoting Adam Silver's comments in USA Today interview).

89. See Cindy Boren, *The Difference Between Bruce Levenson and Donald Sterling*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/09/08/the-difference-between-bruce-levenson-and-donald-sterling/>.

90. See Lauren Raab, *Hawks Owner Bruce Levenson to Sell Team, Apologizes for Racial Email*, L.A. TIMES (Sept. 7, 2014, 1:29 PM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-atlanta-hawks-bruce-levenson-20140907-story.html>.

91. See *id.*

this sudden admission was a racist 2012 email that Levenson sent to Hawks president Danny Ferry.⁹² The email, described by Levenson himself as “inappropriate” and “offensive,” included Levenson’s belief that the Hawks fan base was too heavily African-American and that this was a problem for the team as it “scared away” white fans.⁹³ Levenson’s prompt departure was stunning and was undoubtedly colored by the NBA’s decision on Sterling just a couple of months before.⁹⁴ Public reaction was mixed, as some praised Levenson’s decision to self-report, while others wondered what precedent this would set.⁹⁵ “As Mr. Levenson acknowledged, the views he expressed are entirely unacceptable and are in stark contrast to the core principles of the National Basketball Association,” said Adam Silver in a press release. “He shared with me how truly remorseful he is for using those hurtful words and how apologetic he is to the entire NBA family—fans, players, team employees, business partners and fellow team owners—for having diverted attention away from our game.”⁹⁶ On June 24th, 2015, Levenson sold the Hawks to an ownership group headed by businessman Tony Ressler and former NBA star Grant Hill.⁹⁷ The ripples of his admission, and quick resignation, are still spreading around the league.

4. *Jim Irsay (NFL)*

On March 16, 2014 in Carmel, Indiana, Indianapolis Colts owner Jim Irsay was arrested and initially charged with operating a vehicle while intoxicated and four counts of possession of a controlled substance.⁹⁸ Blood tests revealed “oxycodone and/or

92. *See id.*

93. *See* Ben Cohen & Chris Herring, *Atlanta Hawks Owner to Sell After ‘Offensive’ Email*, WALL ST. J., (Sept. 7, 2014, 7:43 PM), <http://www.wsj.com/articles/atlanta-hawks-owner-to-sell-in-wake-of-offensive-email-1410107014>.

94. *See* Boren, *supra* note 91.

95. *See* Chris Mannix, *What’s Bruce Levenson’s Real Motivation for Selling the Hawks?*, SPORTS ILLUS. (Sept. 8, 2014), <http://www.si.com/nba/2014/09/08/bruce-levenson-racist-email-atlanta-hawks-sale>; *see also* *Fans React to Bruce Levenson’s Email*, AJC.COM (Sept. 10, 2014), <http://www.ajc.com/videos/news/fans-react-to-bruce-levensons-email/vCrbZS/> (video) (Berndt Peterson reporting).

96. Adi Joseph, *Bruce Levenson Will Sell Atlanta Hawks After Releasing Racist Email*, USA TODAY (Sept. 8, 2014, 8:38 AM), <http://www.usatoday.com/story/sports/nba/hawks/2014/09/07/bruce-levenson-racist-email-atlanta-owner-sell-team/15241591/> (quoting Adam Silver’s comments in NBA news release).

97. *See* Des Bieler, *Hawks Officially Sold to Ownership Group That Includes Grant Hill*, WASH. POST (June 25, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/06/25/hawks-officially-sold-to-ownership-group-that-includes-grant-hill/>.

98. *See* Jeff Gray, *Jim Irsay Suspended 6 Games, Fined, Banned from Tweeting About NFL*, SB NATION (Sept. 2, 2014), <http://www.sbnation.com/nfl/2014/9/2/5866029/jim-irsay-colts-owner-suspension>; Gregg Rosenthal, *Colts’ Jim Irsay Suspended Six*

hydrocodone” in his system after police pulled him over for traveling 10 mph in a 35 mph zone.⁹⁹ In addition to bottles of prescription drugs, police found nearly \$30,000 in cash in Irsay’s car, \$12,000 of which was bundled into a laundry bag.¹⁰⁰ On Tuesday, September 2, 2014, Irsay pled guilty to a misdemeanor count of driving while intoxicated.¹⁰¹ The NFL suspended Irsay for six games and fined him \$500,000 for violating the league’s Personal Conduct Policy.¹⁰²

B. Examples of Player Discipline

For the NFL and the NBA, 2014 was also a year of scandals and discipline involving some of their biggest and most promising players. A cursory overview of three of the biggest player disciplinary stories from both leagues, two from the NFL and one from the NBA, would also be instructive. It is no surprise that 2014 was a pivotal year of discipline for off-field incidents in the NFL. As early as 2000, the NFL acknowledged that criminal behavior of players off the field was an important and crucial area of reform.¹⁰³ The discipline of Ray Rice and Adrian Peterson were major cases from 2014.

1. *Ray Rice (NFL)*

Perhaps the most prominent story from the world of sports discipline in 2014 was the tale of Ray Rice, former Pro Bowl running back for the NFL’s Baltimore Ravens. Rice, a centerpiece of the Ravens team, was known as one of the most generous and charitable NFL players and was highly involved in community efforts in and around the greater Baltimore area.¹⁰⁴ In the early morning hours of February 15, 2014, Rice was involved in an altercation with his then-fiancée, Janay Palmer, in an Atlantic City casino eleva-

Games, Fined \$500K, NFL.COM (Sept. 2, 2014, updated Sept. 3, 2014, 11:05 AM), <http://www.nfl.com/news/story/0ap3000000387267/article/colts-jim-irsay-suspended-six-games-fined-500k>.

99. See Gray, *supra* note 98.

100. See *id.*

101. See *id.*

102. See *id.*

103. See Parlow, *supra* note 1, at 182–83.

104. See Baltimore Ravens, *Ray Rice Makes Impact in Youth Community*, BALTIMORERAVENS.COM (Aug. 21, 2012), <http://www.baltimoreravens.com/news/article-1/Ray-Rice-Makes-Impact-in-Youth-Community/3cad2e40-2599-47e6-8e48-83b28a8945be>.

tor.¹⁰⁵ Both were arrested and charged with assault.¹⁰⁶ Four days after the incident, TMZ released video of Rice dragging the unconscious Palmer out of the elevator.¹⁰⁷ The video went viral and prompted a national conversation over its veracity and the truth behind the situation.¹⁰⁸ In March, a grand jury indicted Rice on a charge of third-degree aggravated assault.¹⁰⁹ Rice pled not guilty and entered a program for first-time offenders that can clear him of the charges in one year.¹¹⁰ Soon after, Rice, Palmer, and the Ravens hosted a news conference that was widely mocked and criticized.¹¹¹ On July 24, after meeting with Rice and Palmer, Goodell announced a two game suspension for Rice, beginning August 30.¹¹²

A month later, on August 28, the NFL rolled out a new, harsher domestic violence policy, under which first time offenders would be suspended for six games and repeat offenders would be banned for life.¹¹³ On September 8, TMZ released a second video of footage from inside the elevator, which shows Rice punching Palmer in the face.¹¹⁴ The second video unleashed a firestorm of public criticism and, hours after the video was released, the Ravens terminated Rice's contract and the NFL suspended Rice indefinitely.¹¹⁵ After issuing the suspension, Goodell claimed to not have seen this second video until its release by TMZ, an admission that still drew heavy skepticism by many in the public and media.¹¹⁶

105. See *Key Events in the Ray Rice Story*, CNN (Sept. 16, 2014), <http://edition.cnn.com/2014/09/09/us/ray-rice-timeline/>.

106. See *id.*

107. See *id.*

108. See SI Wire, *NFL Players, Media Members React to New Ray Rice Video on Twitter*, SPORTS ILLUSTRATED (Sept. 8, 2014), <http://www.si.com/nfl/2014/09/08/ray-rice-suspension-twitter-reaction>.

109. See D'Arcy Maine, *A Timeline of the NFL's and Ravens' Reactions to Ray Rice Incident*, ESPN (Sept. 10, 2014), <http://espn.go.com/espnw/news-commentary/article/11489146/a-timeline-nfl-ravens-reactions-ray-rice-incident>.

110. See *id.*

111. See *id.*

112. See *id.*

113. See Josh Levs, *NFL Toughens Policy Addressing Assault and Domestic Violence*, CNN (Dec. 10, 2014, 10:45 PM), <http://www.cnn.com/2014/12/10/us/nfl-conduct/>.

114. See *Ray Rice Elevator Knockout: Fiancee Takes Crushing Punch* (Video), TMZ SPORTS (Sept. 8, 2014, 1:00 AM), <http://www.tmz.com/2014/09/08/ray-rice-elevator-knockout-fiancee-takes-crushing-punch-video/>.

115. See *Ray Rice Cut, Then Suspended by NFL*, ESPN (Sept. 9, 2014), http://espn.go.com/nfl/story/_/id/11489134/baltimore-ravens-cut-ray-rice-new-video-surfaces.

116. See CBS This Morning, *Roger Goodell: We didn't see full Ray Rice video*, CBSNEWS.COM (Sept. 10, 2014), <http://www.cbsnews.com/news/ray-rice-controversy->

Many called for Goodell to be fired or to resign.¹¹⁷ Following an independent investigation conducted by former FBI director Robert Mueller, Goodell and the league were found to have acted in good faith, but were similarly admonished for their incomplete, shoddy work in conducting the investigation.¹¹⁸ In late November 2014, Rice won his appeal of the indefinite suspension and was reinstated to the NFL.¹¹⁹ Goodell's decision to extend Rice's suspension was characterized by the arbitrator as "an abuse of discretion" and was accordingly vacated.¹²⁰ As of the third week of the free agent signing period, Rice remained unsigned by any NFL team.¹²¹

2. *Adrian Peterson (NFL)*

Later in 2014, on the heels of the Ray Rice debacle, another scandal shook the promising career of another star NFL running back. Adrian Peterson, former Minnesota Vikings All-Pro running back and league rushing champion, saw his 2014-2015 season prematurely end after allegations of child abuse were levied through the media. On May 18, a police report was made public that detailed injuries incurred by one of Peterson's young sons, allegedly resulting from Peterson's use of a whipping switch.¹²² The media frenzy surrounding the report cast a spotlight onto the situation and sparked a national conversation on the effects of child discipline.¹²³ A month later, Peterson testified in front of a grand jury

[commissioner-roger-goodell-defends-nfl-says-league-didnt-see-second-video/](#) (transcribing interview with NFL Commissioner Roger Goodell).

117. See, e.g., *NOW Wants Roger Goodell Out*, ESPN (Sept. 11, 2014), http://espn.go.com/nfl/story/_/id/11500445/terry-oneill-president-national-organization-women-calls-nfl-commissioner-roger-goodell-resign; Maury Brown, *It's Time for Roger Goodell to Resign as Commissioner of the NFL*, FORBES (Sept. 10, 2014, 10:01 AM), <http://www.forbes.com/sites/maurybrown/2014/09/10/its-time-for-roger-goodell-to-resign-as-commissioner-of-the-nfl/>.

118. See ROBERT S. MUELLER III, REPORT TO THE NATIONAL FOOTBALL LEAGUE OF AN INDEPENDENT INVESTIGATION INTO THE RAY RICE INCIDENT (Jan. 8, 2015), available at, <http://i.usatoday.net/sports/nfl/2015-01-07-Mueller-Report.pdf>.

119. See Ray Rice, NFL Arbitration (2014) (Jones, Arb.), available at http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf; see also *Ray Rice Wins Appeal, Eligible to Sign*, ESPN (Dec. 1, 2014), http://espn.go.com/nfl/story/_/id/11949855/ray-rice-baltimore-ravens-wins-appeal-eligible-reinstatement.

120. See *Ray Rice Wins Appeal, Eligible to Sign*, *supra* note 119.

121. See Gary Myers, *With QBs Drew Brees and Philip Rivers Possibly in Mix, Jets Could Make Moves*, N.Y. DAILY NEWS (Mar. 21, 2015), <http://www.nydailynews.com/sports/football/jets/myers-brees-rivers-possibly-mix-jets-article-1.2157881>.

122. See Steve DiMatteo, *A Timeline of the Adrian Peterson Child Abuse Case*, SB NATION (Sept. 17, 2014), <http://www.sbnation.com/2014/9/17/6334793/adrian-peterson-child-abuse-statement-vikings-timeline>.

123. See, e.g., Gregg Doyel, *Adrian Peterson Starts National Dialogue on Discipline and Child Abuse*, CBSSPORTS.COM (Sept. 19, 2014), <http://www.cbssports.com/general/writer/gregg-doyel/24715929/adrian-peterson-starts-national-dialogue-on>

in Montgomery County, Texas.¹²⁴ Two weeks after that, the grand jury decided not to indict Peterson.¹²⁵ However, eight days later on September 12, in the aftermath of a thorough investigation,¹²⁶ Peterson was indicted on charges of reckless or negligent injury to a child.¹²⁷ The Vikings promptly deactivated Peterson, who up to that point had played in only one game for the franchise in the new season.¹²⁸ The outcry over the situation was not just limited to the public, with several sponsors, like Radisson and Anheuser-Busch, expressing their concerns or even pulling their endorsement deals with the franchise and the NFL.¹²⁹ On Wednesday, September 17, 2014, the Vikings placed Peterson on the NFL's exempt/commissioner's permission list, essentially ending his season.¹³⁰ Despite seeking an accelerated trial and eventually avoiding jail time on the charge after reaching a plea agreement with prosecutors, Peterson remained suspended for the entire season.¹³¹ In late 2014, the NFL Players Association filed a lawsuit against the NFL on Peterson's behalf after his suspension stretched throughout the entire season.¹³² It was only in late February 2015 that Peterson was reinstated to the NFL, thanks to a favorable ruling by U.S. District Court Judge David Doty.¹³³ In the lawsuit, the players union had argued that Goodell acted outside of his authority by suspending Peterson for such a substantial amount of time.¹³⁴ The ruling was characterized as the

discipline-and-child-abuse; Gary Washburn, *Adrian Peterson's Actions Reflective of Cultural Differences*, BOSTON GLOBE (Sept. 23, 2014), <http://www.bostonglobe.com/sports/2014/09/22/adrian-peterson-actions-reflective-cultural-differences/oFW7d6LtQ8QziVJfjilhDL/story.html>.

124. See DiMatteo, *supra* note 122.

125. See *id.*

126. See Jeff Gray, *Adrian Peterson Indicted for Reckless or Negligent Injury to Child, Per Report*, SB NATION (Sept. 12, 2014, 4:36 PM), <http://www.sbnation.com/nfl/2014/9/12/6141819/adrian-peterson-arrest-child-injury-houston/in/5906378>.

127. See DiMatteo, *supra* note 122.

128. See *id.*

129. See Press Release, Carlson, Radisson Statement on the Minnesota Vikings (Sept. 15, 2014), *available at* <http://carlson.com/news-and-media/news-releases.do?article=8660785&hootPostID=511dec2099ba9fec719bdc180dd01324>; Darren Rovell, *Nike Ends Deal with Adrian Peterson*, ESPN (Nov. 7, 2014), http://espn.go.com/nfl/story/_/id/11832526/nike-terminates-contract-minnesota-vikings-running-back-adrian-peterson.

130. See DiMatteo, *supra* note 122.

131. See *id.*

132. See *id.*

133. See *Nat'l Football League Players Ass'n v. Nat'l Football League*, 88 F. Supp. 3d 1084 (D. Minn. 2015).

134. See *NFL Players Union Files Lawsuit Challenging Peterson Suspension*, 26 No. 12 WESTLAW J. ENT. INDUS. 11 (2015) (citing Complaint for Petitioner, *Nat'l Football League Players Ass'n v. Nat'l Football League et al.*, No. 14-mc-0075 (D. Minn. filed Dec. 15, 2014)) ("Filed at the U.S. District Court in Minneapolis, the lawsuit

“latest blow to the NFL and commissioner Roger Goodell.”¹³⁵ At the third week of the free agent signing period, Peterson still remains a member of the Vikings and completed a successful 2015-16 season.¹³⁶

3. *Larry Sanders (NBA)*

Although it was generally a quieter year in the NBA vis-à-vis player discipline than its football counterpart, the saga with Larry Sanders stood out amongst the player discipline stories that made the headlines. Sanders, a fifth year player for the Milwaukee Bucks, was one of the rising stars in the league and had just signed a four-year, \$44 million contract in 2013.¹³⁷ However, on April 4, 2014, Sanders was issued a five-game suspension by the league office for violating the NBA’s drug policy after a positive marijuana test.¹³⁸ Several months later, during the 2014–15 season, Sanders was again suspended, this time for ten games, for another drug policy violation.¹³⁹ The suspension was open-ended in nature, reportedly due to Sanders’ continued non-compliance with the league program.¹⁴⁰ For years, there have been stories concerning Sanders drug abuse and his struggles with the mental aspects of playing in the NBA.¹⁴¹ In late February 2015, Milwaukee waived Sanders, citing that doing so was “in the best interests of the team.”¹⁴² After negotiating a

claims arbitrator Harold Henderson, a former NFL executive handpicked by Commissioner Roger Goodell to hear the case, was not impartial.”).

135. See *Vikings Running Back Adrian Peterson Reinstated*, ESPN (Feb. 26, 2015), <http://abcnews.go.com/Sports/adrian-peterson-reinstated/story?id=29247428>.

136. See Kevin Seifert, *Zimmer: ‘Expect’ Peterson with Vikes*, ESPN (Mar. 25, 2015, 2:22 PM), http://espn.go.com/nfl/story/_/id/12555918/adrian-peterson-trade-not-minnesota-vikings-plans-mike-zimmer-says.

137. See Larry Sanders, *Why I Walked Away from the NBA*, THE PLAYERS TRIBUNE (Feb. 25, 2015), <http://www.theplayerstribune.com/larry-sanders-exclusive-interview/>.

138. See Rob Mahoney, *Bucks’ Larry Sanders Suspended Five Games for Violation of NBA’s Anti-Drug Program*, SPORTS ILLUS. (Apr. 4, 2014), <http://www.si.com/nba/point-forward/2014/04/04/larry-sanders-milwaukee-bucks-suspended-drug-program>.

139. See *Larry Sanders Suspended Again*, ESPN (Jan. 16, 2015), http://espn.go.com/nba/story/_/id/12180802/larry-sanders-milwaukee-bucks-suspended-minimum-10-games.

140. See *id.*

141. See *id.*

142. *Bucks Request Waivers on Larry Sanders*, NBA.COM (Feb. 21, 2015), <http://www.nba.com/2015/news/02/21/bucks-waive-larry-sanders-official-release/>.

buyout with the Bucks that paid him part of his original salary, Sanders has yet to sign with any team and remains a free agent.¹⁴³

C. Comparing Management Discipline and Player Discipline in the NFL & NBA

1. *The NFL Approach*

The examples summarized above capture the current state of the NFL commissioner's power to discipline players and coaches. NFL commissioner Roger Goodell reiterated the reach of the league's personal conduct story in his letter to Irsay. Excerpted in the league's official announcement: "I have stated on numerous occasions that owners, management personnel and coaches must be held to a higher standard than players. We discussed this during our meeting and you expressed your support for that view, volunteering that owners should be held to the highest standard."¹⁴⁴

The disciplinary actions taken in 2014 reveal that Roger Goodell has continued to liberally utilize his power as commissioner just as he did when initially elected.¹⁴⁵ Known colloquially as Commissioner "Gotti," comparing the way he has managed the NFL with the former mob boss John Gotti,¹⁴⁶ Goodell punished off-the-field behavior for eight years under the 2007 PCP.¹⁴⁷ In 2014, under the 2007 PCP, Goodell was the everyday disciplinarian for NFL players while also being able to incorporate ad hoc modifications to the policy, such as adding a violation of the domestic violence statute.¹⁴⁸ With his understanding of the power of public perception,

143. See *Larry Sanders, Bucks Finalize Buyout*, ESPN (Feb. 22, 2015), http://espn.go.com/nba/story/_/id/12361951/milwaukee-bucks-officially-waive-larry-sanders-completing-buyout.

144. *Jim Irsay Suspended for Six Games for Violating NFL Personal Conduct Policy*, HUFFPOST SPORTS (Sept. 2, 2014, 2:54 PM), http://www.huffingtonpost.com/2014/09/02/jim-irsay-suspended-nfl_n_5754292.html (quoting letter from Roger Goodell to Jim Irsay).

145. See Ambrose, *supra* note 7, at 1088 (documenting "the protection of the NFL's wealth and image quickly as one of Goodell's top priorities, especially since player off-the-field misconduct plagued his first year as commissioner").

146. See Kimberly A. Colmey, *Unnecessary Roughness: Why the NFL Should Not Be Flagged for Antitrust Scrutiny in Labor Relations*, 5 J. MARSHALL L. REV. 231, 265 (2011).

147. See *NFL Personal Conduct Policy*, ESPN (Mar. 2, 2009), <http://sports.espn.go.com/nfl/news/story?id=2798214>, ESPN; see also *NFL Owners Endorse New Personal Conduct Policy*, *supra* note 60.

148. See Peter King, *Peterson's Punishment*, THE MONDAY MORNING QUARTERBACK (Nov. 18, 2014), <http://mmqb.si.com/2014/11/18/adrian-peterson-suspension-appeal-roger-goodell/>.

Goodell looked to mold his workforce “so they [the players] play the game the way he [Goodell] wants it played.”¹⁴⁹

Goodell was criticized for using a double standard when punishing players and team owners, something NFL Players Association executive director DeMaurice Smith has called a “credibility gap.”¹⁵⁰ “What troubles our players is the speed and the deliberateness of the punishment that they have seen in the past when it comes to a player,” Smith said in late May of 2014.¹⁵¹ Players around the league also questioned whether there was a double standard for Goodell’s rulings on punishments for owners as opposed to players.¹⁵² One former Colts player noted how Irsay was fined only \$500,000 while Denver Broncos receiver Wes Welker lost \$1.8 million while serving his four-game suspension for breaking the league’s policy on performance-enhancing drugs.¹⁵³ Players have also noted that the league waited months to discipline Irsay.¹⁵⁴ The new PCP responds to some of these concerns and others, such as the lack of transparency and inconsistent punishments.¹⁵⁵

As the new PCP transforms the process and procedures of player discipline and heavily constrains the commissioner’s disciplinary authority, many individual NFL teams have responded by taking a tougher approach to player discipline. Coupling the Ray Rice domestic violence incident and the arrests of eight player between February 2014 to March 2015, the Ravens instituted a strict no-tolerance policy this off-season for player behavior.¹⁵⁶ In the first two months following the Super Bowl, the Baltimore Ravens cut three

149. Danny O’Neil, *Commissioner Goodell Should Pull Back a Bit from Heavy-handed Punishments*, SEATTLE TIMES (Dec. 15, 2012, 9:21 PM), <http://www.seattletimes.com/sports/seahawks/commissioner-goodell-should-pull-back-a-bit-from-heavy-handed-punishments/>.

150. See *Goodell: Don’t Rush to Judgment*, ESPN (June 3, 2014), http://espn.go.com/nfl/story/_/id/11002392/demaurice-smith-nfl-players-association-critical-commissioner-roger-goodell.

151. *Id.* (quoting statement by DeMaurice Smith); see also, Jeff Gray, *Jim Irsay Suspended 6 Games, Fined, Banned from Tweeting about NFL*, *supra* note 100.

152. See Mike Wells, *NFL Players Rip Jim Irsay Punishment*, ABCNEWS.COM (Sept. 3, 2014, 6:27 PM), <http://abcnews.go.com/Sports/nfl-players-rip-jim-irsay-punishment/story?id=25238565>.

153. See *id.*

154. See Jonathan Lehman, *NFL Players See Double Standard in Long Wait for Irsay Punishment*, N.Y. POST (May 29, 2014, 5:52 PM), <http://nypost.com/2014/05/29/nfl-players-see-double-standard-in-long-wait-for-irsay-punishment/>.

155. See Mike Triplett, *Drew Brees: System Not Transparent*, ESPN (Sept. 25, 2014), http://espn.go.com/nfl/story/_/id/11583698/drew-brees-new-orleans-saints-critical-commissioner-roger-goodell.

156. See Greg A. Bedard, *Baltimore’s Big Problem*, THE MONDAY MORNING QUARTERBACK (Mar. 20, 2015), <http://mmqb.si.com/2015/03/20/baltimore-ravens-player-arrests-problem-nfl/>.

players, including running back Bernard Pierce for a DUI arrest, Terrence Cody for a felony animal cruelty charge and misdemeanor drug charges, and cornerback Victor Hampton for a DUI arrest.¹⁵⁷ This corrective mechanism that the Ravens are instituting to change their team culture illuminates a critical view of the NFL that creates flexibility in their disciplinary procedures – almost none of the NFL player contracts are guaranteed.¹⁵⁸ The ability of teams to cut players at will provides considerable flexibility for teams to circumvent the NFL commissioner’s office, even after procedural thresholds were added to the PCP because those thresholds do not apply to team-specific off-season discipline. As Goodell’s power in this area continues to erode, NFL teams can continue to use this secondary and non-legitimate disciplinary process to react to public scrutiny of player behavior.

2. *The NBA Approach*

The NBA and Adam Silver have taken a slightly different approach to player discipline. Whereas, over the past year, Goodell has made headlines for embarrassing player discipline scandals, Silver has made waves by using his “integrity of the game” mandate to clean up the image of basketball and stamp out any perceived impropriety that may threaten the league.¹⁵⁹ What has been most transformative about Silver’s actions is the breadth of his approach. He has not only tackled thorny player disciplinary issues but also brought his mandate to bear upon owners, such as Sterling.¹⁶⁰ A sports commissioner’s power under the “best interests” or “integrity of the game” clause has always been interpreted and upheld quite broadly.¹⁶¹ However, Silver has made new inroads into sports discipline and has taken a hard stand by extending the reach of this power to NBA ownership, the very group to whom he answers.¹⁶²

157. *See id.*

158. *See* Feldman, *supra* note 14, at 1236 (“In the NFL, the vast majority of players have limited job security because most NFL contracts are not guaranteed and do not contain injury protection beyond the season in which the injury occurs.”).

159. *See* Ben Golliver, *Commissioner Adam Silver Discusses Potential Reforms at All-Star Saturday*, SPORTS ILLUSTRATED (Feb. 15, 2015), <http://www.si.com/nba/2015/02/14/adam-silver-press-conference-nba-commissioner>.

160. *See* Lee Jenkins, *New Commissioner Adam Silver is His Own Man*, SPORTS ILLUS. (Dec. 16, 2015), <http://www.si.com/nba/2014/05/20/adam-silver-nba-commissioner-donald-sterling>.

161. *See* Pollack, *supra* note 5, at 1645.

162. *See* Tom Van Riper, *Adam Silver Drops the Hammer on Donald Sterling*, FORBES (Apr. 29, 2014, 2:49 PM), <http://www.forbes.com/sites/tomvanriper/2014/04/29/adam-silver-drops-the-hammer-on-donald-sterling/>; *see also* Ian

Yet while Silver's power appears to be expanding, the NBA has several checks in place to create a balanced disciplinary system. Chief among these is the requirement of an outside arbitrator to review commissioner suspensions that last longer than twelve days.¹⁶³ As previously discussed, outside arbitrators have, historically, been more critical of commissioner power and decisions than the courts.¹⁶⁴ The presence of this additional layer of review is critical to the process. Second, it appears that league discipline has been well-balanced by the discipline meted out by the individual teams, both in terms of management and players.¹⁶⁵ A primary example of this is the case of Danny Ferry, the aforementioned Atlanta Hawks General Manager who was censored for racist comments he made in the course of player management discussions.¹⁶⁶ Ferry was censored primarily by the Hawks and took a voluntary leave of absence.¹⁶⁷ While league discipline was surely likely in the Ferry case before the self-imposed sanctions, NBA teams have also been quick to deal with such problems in-house, a policy that Silver has respected.¹⁶⁸

There is one final balancing piece that completes the NBA discipline puzzle. Over the past several years, the NBA has found a strong counterpart in the form of the NBA Players' Association ("NBPA"). Currently led by Michele Roberts, the NBPA has taken several bold strides in the past several years, both in the media and in practice.¹⁶⁹ These include directly attacking several NBA policies in the media and taking a stand on controversial league issues, such

Begley, *Adam Silver: NBA to Review Policies*, ESPN (Sept. 22, 2014, 7:11 PM), http://espn.go.com/nba/story/_/id/11570243/adam-silver-says-nba-evaluate-disciplinary-policies.

163. See 2011 NBA CBA, *supra* note 9, at 378.

164. See Parlow, *supra* note 1, at 195–96.

165. See Gary Lane, *NBA's Ban on Donald Sterling Draws Widespread Praise*, CBN NEWS (Apr. 30, 2014), <http://www.cbn.com/cbnnews/us/2014/April/NBA-to-Announce-Decision-on-Clippers-Don-Sterling/> (discussing praise NBA, and Silver, received for their handling of difficult situation with Sterling).

166. See Adi Joseph, *Hawks GM Danny Ferry Takes Indefinite Leave in Wake of Racism Controversy*, USA TODAY (Sept. 13, 2014, 9:22 AM), <http://www.usatoday.com/story/sports/nba/hawks/2014/09/12/danny-ferry-indefinite-leave-of-absence-atlanta-racist-scouting-report/15527829/>.

167. See *id.*

168. See David Aldridge, *Hawks Say No More Discipline for Ferry*, NBA.COM (Sept. 9, 2014, 11:59 AM), <http://hangtime.blogs.nba.com/2014/09/09/hawks-say-no-more-discipline-for-ferry/>; see also Kurt Helin, *Hawks GM Danny Ferry to Face Internal Disciplinary Action Over Comment He Repeated*, NBC SPORTS (Sept. 8, 2014, 8:45 AM), <http://probasketballtalk.nbcsports.com/2014/09/08/hawks-gm-danny-ferry-could-face-disciplinary-action-over-comment-he-repeated/>.

169. See Michael Lee, *Union Head Michele Roberts Shows She'll Be Strong Advocate for NBA Players*, WASH. POST (Nov. 9, 2014), <http://www.washingtonpost.com/>

as legalized gambling.¹⁷⁰ The power of the NBPA, and the players themselves, can be attributable to several factors. First, NBA players have more cache and are simply more recognizable and marketable than their NFL counterparts.¹⁷¹ Some of the reasons for this include the global popularity of the sports and its players, the greater longevity of NBA players' careers, and their ability to better build brands based off of their style and personality.¹⁷² There is perhaps no better representation than recently elected NBPA vice president LeBron James.¹⁷³ With James, one of the league's premier stars and perhaps its most recognizable face, now one of the faces of the players association, the NBPA and its constituents are benefitting greatly from the increased exposure and prominence NBA players are afforded.¹⁷⁴

In addition to this, NBA players derive some of their power from the mere fact their skills are more fungible and their contracts

sports/union-head-michele-roberts-shows-shell-be-strong-advocate-for-nba-players/2014/11/09/51580884-6844-11e4-bafd-6598192a448d_story.html.

170. See Blake Murphy, *NBPA's Roberts Clarifies Media Criticism: Not an Effort to Curtail Access*, THE SCORE (Mar. 2, 2015, 3:31 PM), <http://www.thescore.com/nba/news/711657>; David Purdum, *NBPA Exploring Gambling Possibility*, ESPN (Feb. 16, 2015, 3:14 PM), http://espn.go.com/chalk/story/_/id/12334294/michele-roberts-national-basketball-players-association-begins-talks-legalized-sports-gambling.

171. See Ryan Weisert, *Chase Down Block: How the NBA is Catching the NFL*, HP BASKETBALL NETWORK (Nov. 24, 2014), <http://midlevelexceptional.com/2014/11/24/chase-block-nba-catching-nfl/>. As one commentator describes:

[t]he NBA is a stars' league. NBA players don't wear hats or helmets. Their faces are recognizable globally. According to Forbes, of the 65 athletes worldwide who made at least \$1 million in endorsements last year, 15 were NBA players. The NFL has less than half that many players garnering seven figures in endorsements. The best comparison for the NBA in terms of star power is the European soccer, but even the best of those leagues boast only a handful of truly global stars. Put simply, the NBA has more star power than any league on the planet.

Id.

172. See Cork Gaines, *Cristiano Ronaldo is the Most Popular Athlete in the World and it Isn't Even Close*, BUSINESS INSIDER (Dec. 9, 2014, 12:38 PM), <http://www.businessinsider.com/cristiano-ronaldo-popular-athletes-2014-12>; Jeff Nelson, *The Longest Professional Sports Careers*, THE ROOSEVELTS (July 22, 2013), <http://www.rsvlts.com/2013/07/22/longest-sports-careers/>; Anthony J. Fredella, *What the NFL Can Learn From the NBA*, STRAIGHTHOOPS.COM (Sept. 19, 2014), http://straighthoops.com/take_note.html; see also *NBA All-Stars Busy Building Brands Off Court During Weekend in NY*, SPORTS BUS. DAILY (Feb. 16, 2015), <http://www.sportsbusinessdaily.com/Daily/Issues/2015/02/16/Marketing-and-Sponsorship/NBA-Players.aspx>.

173. See Tom Withers & Antonio Gonzalez, *LeBron Excited for New Role with NBA Player's Union*, NBA.COM (Feb. 14, 2015, 6:41 PM), <http://www.nba.com/2015/news/02/14/all-star-notebook.ap/>.

174. See Jeff Zillgitt, *LeBron James Gives Union a Strong Voice*, USA TODAY (Feb. 17, 2015, 10:42 PM), <http://www.usatoday.com/story/sports/nba/allstar/2015/02/13/nbpa-lebron-james-first-vice-president-players-union-michele-roberts/23388971/>.

are guaranteed.¹⁷⁵ Unlike the rough world of the NFL, where careers last, on average, for 3.2 years, the NBA's salary structure has afforded players luxuries and a voice in the debate on player discipline.¹⁷⁶ Finally, there is a perception issue that affects both leagues' status in the public eye. Despite both leagues leading in arrest rates across professional sports, and the NBA suffering the worst sports public relations nightmare of the past twenty years with the "Malice at the Palace" incident, the NFL has a serious perception issue and has been seen, in recent years, as an increasingly violent sport played by violent individuals.¹⁷⁷ Although the league's arrest rates are far lower than those of similar demographics in the national population, the NFL and its players still suffer from this perception, to an extent not experienced by the NBA or its players.¹⁷⁸ These factors combine to create a unique, balanced disciplinary atmosphere within the NBA, one that has responded well to unprecedented disciplinary scandals in the past year.

IV. PROFESSIONAL SPORTS AS A UNIQUE WORKPLACE WITH REGARDS TO PLAYER AND MANAGEMENT DISCIPLINE

From the analysis and examples above, two key differences emerge with regards to player and management discipline in pro-

175. See NFL Total Access, *Barkley: NBA Players More Talented than NFL Players*, NFL NETWORK, <http://www.nfl.com/videos/nfl-network-total-access/09000d5d82ab4642/Barkley-NBA-players-more-talented-than-NFL-players>; see also Stephanie Pelton, *How Guaranteed NFL Contracts Could Change Football*, UTEREVIEW.COM (June 9, 2014), <http://utah.247sports.com/Article/How-guaranteed-NFL-contracts-could-change-football-29044940>.

176. See Dashiell Bennett, *The NFL's Official Spin on Average Career Length is a Joke*, BUSINESS INSIDER (Apr. 18, 2011, 5:18 PM), <http://www.businessinsider.com/nfls-spin-average-career-length-2011-4>; Zillgitt, *supra* note 174.

177. See Abigail Tracy, *NFL, NBA Lead Arrest Rates Across Pro Sports*, VOCATIV.COM (Sept. 15, 2014, 11:31 AM), <http://www.vocativ.com/culture/sport/nfl-arrest-rates/>; Kurt Helin, *Looking Back, Stern Says "Malice at the Palace" Was Hardest Thing He Faced*, NBC SPORTS (Nov. 11, 2013, 5:19 PM), <http://probasketballtalk.nbcsports.com/2013/11/11/looking-back-stern-says-malice-in-the-palace-was-hardest-thing-he-faced/>; Lyons Yellin, *Players Like Brees a Cure for NFL's Perception Problem*, WWLTV.COM (Feb. 23, 2015, 10:01 AM), <http://www.wwltv.com/story/sports/nfl/saints/2014/09/17/new-orleans-saints-lyons-yellin/15810535/>; Leonard Shapiro, *For Too Long, Sports Journalists Glossed Over Football's Violence. I Was One of Them*, WASH. POST (Oct. 18, 2013), http://www.washingtonpost.com/opinions/for-too-long-sports-journalists-glossed-over-footballs-violence-i-was-one-of-them/2013/10/18/b5fc41d2-2f84-11e3-bbed-a8a60c601153_story.html.

178. See *NFL Player Arrests*, USA TODAY, <http://www.usatoday.com/sports/nfl/arrests/> (last visited Feb. 3, 2016); Benjamin Morris, *The Rate of Domestic Violence Arrests Among NFL Players*, FIVETHIRTYEIGHT (July 31, 2014, 12:50 PM), <http://fivethirtyeight.com/datalab/the-rate-of-domestic-violence-arrests-among-nfl-players/>; Fredella, *supra* note 171; KEVIN YOUNG, SPORT, VIOLENCE, AND SOCIETY xi (2012).

fessional sports as compared to the common workplace environments. The first is the notion of punishment with regards to the power and role of publicity in disciplinary proceedings. The second distinguishing feature stems from the unique labor market of professional sports as a franchised monopoly with high-skilled workers.

A. Effect of Publicity on the Workplace

The non-sports workplace has less flexibility with regards to the creation of disciplinary processes and the application of substantive conduct policies than its sports employee discipline counterpart. Implicating employment law in the non-sports context, employer's must avoid the following pitfalls before disciplining an employee such as a blue collar worker: not following usual procedures, making a disciplinary decision at a suspicious time, and treating similarly situated employees differently.¹⁷⁹ In a unionized setting also implicating labor law concerns, an employer must always be cognizant of the potential that a disciplinary action against an employee will result in the assertion that an unfair labor practice has been committed.¹⁸⁰ Generally, employers choose to adopt a comprehensive discipline policy, establish written work rules, or operate on an ad hoc basis.¹⁸¹ The procedures and work rules are drafted to avoid curtailing the employer's right to terminate at-will employees and to avoid any interpretation that employees can be terminated only for cause.¹⁸² The use of a broad morality clause and ad hoc standards to discipline for on-the-field and off-the-field behavior allows for flexibility in behavioral standards for professional athlete discipline that would likely not survive scrutiny in the non-sports employment context.

Indeed, sports commissioners, like Goodell and Silver, have legitimate reasons for disciplining athletes and even owners for off-field conduct. First, there are economic realities to consider. Fans may attend fewer games due to a player's behavior off the field and corporations can drop sponsorships, the latter of which occurred

179. See SHARON P. STILLER, *EMPLOYMENT LAW IN NEW YORK* § 2:76 (2d ed. 2012).

180. See *id.*

181. See Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 351 (2008) (discussing the history of at-will employment and detailing how employers can communicate job security policies and procedures).

182. See *id.*

during the Adrian Peterson scandal.¹⁸³ Misbehavior by players and owners can affect a team's image and profitability unlike any other industry.¹⁸⁴ Part of this is due to the unmatched visibility and influence of not only players, who are among America's biggest role models for children, but also owners.¹⁸⁵ Another part is the growing effect of social media and its role in connecting players and teams to the public at-large in a novel and wholly revolutionary manner.¹⁸⁶ With the rise of social media has come a rise in public interest in not only the actions and conduct of a player on the field but off the field and in the locker room as well.¹⁸⁷ The examples above illustrate that professional sports take a different approach to employee discipline due to their public nature.¹⁸⁸

B. Franchised Monopolies with Highly-Skilled Workers

Both the NFL and the NBA operate through a franchise business structure.¹⁸⁹ Acting as the CEO of the league, the commissioner is elected by the owners and is an employee of the league.¹⁹⁰ Unlike a CEO, the commissioner's powers emanate from the league constitution and the owner's do not delegate authority nor provide direct supervision or control.¹⁹¹ Seemingly, "the employed Commissioner represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners."¹⁹² However, this autonomy has its limitations, and the commissioner's power to discipline in professional sports is limited by the team ownership's ability to hire and fire the commissioner.¹⁹³ This conflict of interest between the commissioner's

183. See Darrell Rovell, *Radisson Parts Ways with Vikings After Adrian Peterson's Ordeal*, ESPN (July 21, 2015), http://espn.go.com/nfl/story/_/id/13296797/radisson-renew-minnesota-vikings-sponsorship-adrian-peterson-ordeal.

184. See Parlow, *supra* note 1, at 182–83.

185. See Kim & Parlow, *supra* note 3, at 594; see also Edelman, *supra* note 2, at 661.

186. See RONALD B. WOODS, *SOCIAL ISSUES IN SPORT* 96 (3d ed. 2016); Zolan V. Kanno-Youngs, *NFL Players Walk Tricky Line Because of Blurry Rules on Social Media*, USA TODAY (July 9, 2015, 12:05 AM), <http://www.usatoday.com/story/sports/nfl/2015/07/08/social-media-policy-twitter-facebook/29477163/>.

187. See MARK WYSOCKI, *THE ROLE OF SOCIAL MEDIA IN SPORTS COMMUNICATION: AN ANALYSIS OF NBA TEAMS' STRATEGY*, 8–10 (2012).

188. For further information on approaches to employee discipline, see *infra* notes 75 to 144 and accompanying text.

189. See Lentze, *supra* note 30, at 68–69.

190. See NFL CONST., *supra* note 8, at art. VIII, § 8.1 (b); see also NBA CONST., *supra* note 8, at § 24(a).

191. See Lentze, *supra* note 30, at 72.

192. *Id.*

193. See *id.* at 68–69. As one commentator has observed:

power to discipline while maintaining his or her own self-interest can pressure the commissioner into taking differing disciplinary actions for players than for owners.¹⁹⁴

The lack of commissioner discipline of Danny Ferry juxtaposes this tension.¹⁹⁵ While Ferry is an employee of the Atlanta Hawks, the NBA commissioner has the power to discipline him for his racist speech during the June conference call.¹⁹⁶ However, the commissioner's office used self-reporting and self-discipline in that instance. Perhaps the commissioner's office allows for internal discipline for two reasons. First, the lack of collective bargaining for NBA management giving leeway for different punishment structures. Second, and more importantly, the role of management in less public-facing is distinct from player actions which directly puts the marketability of the league product at stake.

It is most useful to use analogies to understand the non-sports approach to franchise discipline before further examining the NBA and NFL systems. If Donald Sterling were a McDonald's franchise owner and the owner of an NBA team, his punishment for his private conversation would be not only the maximum fine allowed under his franchise contract, but also revocation of his franchise license by the other franchisees. In a non-sports context, the franchise contract would have to include such a broad standard of conduct for private actions that would have to survive both the contract dispute and any applicable First Amendment scrutiny.¹⁹⁷

The [NFL] Commissioner is elected by the owners and possesses disciplinary power, dispute resolution authority, and decision-making authority, including the power to appoint other officers and committees. . . .

. . . .
 . . . [The NBA and National Hockey League] have an elected Commissioner with similar power and the owners are organized in a common council, called the "Board of Governors."

Id.

194. *See Id.* at 81. As one author summarizes:

On the one hand, the Commissioner has the power to supervise, sanction, and even suspend team owners under the power of the 'best interests' clause. On the other hand, the Commissioner is an employee of the league and, thus, employed and elected by the owners who determine the Commissioner's term and compensation. Ironically, the Commissioner, as an employee, has the disciplinary power over his own employer.

Id.

195. For further discussion regarding Danny Ferry, see *supra* notes 84-89.

196. *See id.*

197. *See* Deborah S. Coldwell et al., *Franchise Law*, 59 SMU L. REV. 1349 (2006) ("Franchisors are frequently confronted with legal challenges from franchisees when they attempt to terminate a franchise too quickly or without just cause. . . ."). *But see* Darren A. Heitner & Richard Bogart, *Personal Foul: Conduct Detrimental to the Team. Penalty Declined?*, 5 HARV. J. SPORTS & ENT. L. 215, 220 (2014) (citing *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976)) (discussing in player discipline con-

In the professional sports context, even when the outcome of disciplinary action against an owner is harsh, the commissioner's power to discipline is not foolproof delegation. In simple terms, the delegation comes with strings attached because the owners are still the commissioner's bosses. At first glance, the discipline of Donald Sterling would be an instance of the commissioner's ability to utilize the "best interest of the game" power to discipline a franchise owner.¹⁹⁸ However, the Donald Sterling incident exemplifies the impact of ownership power on disciplinary process, as there were numerous behind the curtain discussions of the owners before discipline was handed down to Sterling.¹⁹⁹ Essentially, the owners themselves disciplined Sterling, utilizing the commissioner as the tool for their collective voice. Continuing the McDonald's franchise analogy above, the organization of sports leagues creates a specific owner-to-owner disciplinary pressure dissimilar to other franchise models.

For professional athletes, the unilateral discipline schemes of the NFL and NBA commissioners' offices provide a unique contrast between the positions of management and workers. Unlike employees in traditional, non-sports workplace settings, "[a]thletes are uniquely skilled laborers whose skills are non-transferable to any other industry and whose physical abilities are transient."²⁰⁰ The players unions most resemble those in the "entertainment industry where the membership consists of highly skilled professionals with needs,[such as free agency and salary caps,] not typically shared by the stereotypical blue collar worker."²⁰¹ Regardless of the ability of the NFLPA or NBPA to negotiate terms for their members, the NBA's and NFL's monopolies and monopsony in the labor market for their respective sports in the United States create limited oppor-

text that First Amendment free speech protection does not extend to private entities).

198. See Pollack, *supra* note 5, at 1645.

199. See Eliana Dockterman, *NBA Owners Meet to Discuss Donald Sterling Problem*, TIME (May 1, 2014), <http://time.com/85311/nba-owners-meet-donald-sterling-clippers-ownership/>; see also Elliot Hannon, *NBA Owners Panel Unanimously Approves Sterling Termination Plan*, SLATE (May 2, 2014, 12:08 AM), http://www.slate.com/blogs/the_slatest/2014/05/02/nba_owners_approve_plan_to_oust_donald_sterling.html/.

200. David Sirotkin, Note, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 CARDOZO J. CONFLICT RESOL. 289, 290 (2009).

201. Alfred G. Feliu, *Foreword: Discipline in Professional Sports*, 17 HOFSTRA LAB. & EMP. L.J. 129, 130 (1999) (citing Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, & Team Sports: The Contingent Choice of Broad Exemption*, 58 WM. & MARY L. REV. 1663, 1710 (1997)).

tunities for athletes to sell or market their skills.²⁰² Due to the inherent constraints of this workplace and the market for athlete labor, the current structure of player discipline suffers from a unique inherent failure of complete work deprivation.

A comparison of the Jim Irsay fine and the Ray Rice suspension illustrate this critical difference ownership and player punishments in professional sports. The suspension of a player not only removes the player from the field of play, but it also docks that player for his salary for those games.²⁰³ Jim Irsay was fined \$500,000 for his behavior; however, initially levying an indefinite suspension upon Ray Rice was effectively fining him \$233,333 per game or about \$4 million for the entire season.²⁰⁴ When the Commissioner of a league suspends, fines, or expels players, the Commissioner is effectively eliminating players' abilities to earn a living in that sport for a period of time.²⁰⁵

V. THE FUTURE OF PROFESSIONAL SPORTS EMPLOYEE DISCIPLINE

It is well established that, from a labor context, professional sports leagues in America are indeed treated in a special manner.²⁰⁶ Whether by legal victories or general custom, leagues like the NFL and the NBA have developed this small niche in labor law and are able to operate in a different manner from almost any other management and employee context.²⁰⁷ But what is the effect of this special distinction in today's evolving world? Where is commissioner discipline heading in the aftermath of the tumultuous year of commissioner discipline in 2014?

For the NBA and the NFL, the headline-grabbing personnel stories from the past year demonstrate the effect that the growing reach of the media and digital expansion is having on sports disci-

202. See Jocelyn Sum, Note, *Clarett v. National Football League*, 20 BERKELEY TECH. L.J. 807, 824, 824 n.121 (2005); see also Marks, *supra* note 1, at 1598. The "Ricky Williams Rule" also prohibits a player suspended by the NFL to play in the Canadian Football League. See Marks, *supra* note 1, at 1604.

203. See Parlow, *supra* note 1, at 181–183 (detailing manner in which players are suspended and wide range of "punishable material" that supports such suspensions).

204. See Jamison Hensley, *Ray Rice, Ravens Reach Settlement*, ESPN (Jan. 16, 2015), http://espn.go.com/nfl/story/_/id/12171911/ray-rice-baltimore-ravens-reach-settlement-regarding-back-pay.

205. See David Sirotkin, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 CARDOZO J. CONFLICT RESOL. 289, 304-05 (2009).

206. See Pacifici, *supra* note 42, at 93-95 (discussing the power of sports commissioners moving into "uncharted" territory).

207. See *id.*

pline and scandal in the 21st century. Juxtaposing the two positions of the leagues as we have done highlights how these organizations are handling this change and adapting for an unknown future. In the NFL, player discipline on the part of commissioner Roger Goodell has continued unabated and has generated headlines, including ones particularly damaging for the commissioner himself.²⁰⁸ The photographs of Jim Irsay's arrest, the Ray Rice video tape and the photographs of Adrian Peterson's abusive behavior were splashed across the headlines in a manner unlike any sports scandal previously. In response, Goodell was left, in some respects, scrambling to keep up with the speed, complexity, and reaction to the information being released.²⁰⁹ The NFL commissioner's office has been heavily criticized for their handling of each of these cases.²¹⁰ While there have been some post-hoc updates to their disciplinary system, particularly involving domestic abuse cases, the NFL's system of discipline has been criticized as lacking and it appears that the commissioner office is playing a dangerous game of catch-up in a league, and indeed a world, where scandals can erupt quickly.²¹¹

In parallel, NBA commissioner Adam Silver has been lauded for his handling of several NBA scandals in 2014.²¹² The action the commissioner took in the Donald Sterling case was described as

208. Bob Glauber, *Roger Goodell's Bungled Discipline of Ray Rice Has Put Commissioner in the Spotlight*, NEWSDAY (Nov. 29, 2014), <http://www.newsday.com/sports/columnists/bob-glauber/roger-goodell-s-bungled-discipline-of-ray-rice-has-put-commissioner-in-spotlight-1.9665555>.

209. See Margaret Hartmann, *NFL Shares New Goodell Excuse, CBS Tries Less Offensive Ray Rice Response*, N.Y. MAGAZINE (Sept. 12, 2014, 2:45 AM), <http://nymag.com/daily/intelligencer/2014/09/after-new-goodell-excuse-cbs-sets-example.html>; Matt Carroll, *Roger Goodell Responds to NFLPA Criticism*, HUFFINGTON POST (May 29, 2014, 10:45 PM), http://www.huffingtonpost.com/2014/05/29/roger-goodell-nflpa-criticism_n_5414847.html.

210. See, e.g., Steve Almasy & Ashley Fantz, *NFL Chief Roger Goodell Faces Intense Criticism After Ray Rice Video*, CNN (Sept. 16, 2014), <http://edition.cnn.com/2014/09/09/us/nfl-ray-rice-criticism/>; *Criticism of NFL Grows in Wake of Ray Rice Case*, NPR (Sept. 12, 2014, 4:21 PM), <http://www.npr.org/2014/09/12/348010285/criticism-of-nfl-grows-in-wake-of-ray-rice-case>.

211. See Ryan Wilson, *NFLPA President: Goodell's Credibility 'Definitely Lacking' with Players*, CBSSPORTS.COM (Nov. 30, 2014, 9:51 AM), <http://www.cbssports.com/nfl/eye-on-football/24851272/nflpa-president-goodells-credibility-definitely-lacking-with-players>.

212. See Nina Mandell, *NBA Team Owners Applaud Adam Silver's Decision*, USA TODAY (Apr. 29, 2014, 2:58 PM), <http://ftw.usatoday.com/2014/04/nba-team-owners-applaud-adam-silvers-decision>; see also Larry Fine, *NBA Commissioner Silver Passes Test with Decisive Clippers Action*, CHI. TRIB. (Apr. 29, 2014), http://articles.chicagotribune.com/2014-04-29/news/sns-rt-uk-nba-clippers-silver-20140429_1_nba-commissioner-adam-silver-donald-sterling-los-angeles-clippers.

“swift” and unrelenting.²¹³ The uncompromising nature of the discipline further forced other owners, including Bruce Levenson, to examine the situation and make their own admissions.²¹⁴ Whether by legal victories or general custom, leagues like the NFL and the NBA have developed this small niche in labor law and are able to operate in a different manner from almost any other management and employee context.²¹⁵ But what is the effect of this special distinction in today’s evolving world? Where is commissioner discipline heading in the aftermath of the tumultuous year of commissioner discipline in 2014?

Silver’s decisive actions have benefitted the league immensely and have solidly upheld the commissioner’s mandate to protect the best interests of the game and ensure its healthy perpetuation.²¹⁶ As Goodell has appeared to falter on the question of discipline and in reaction to quickly-developing scandals, Silver has taken the sort of action that is required of sports commissioners in today’s fast-moving world.

There are two practical reasons behind Silver’s ability to address these new-age problems: his well-defined authority and the unparalleled process of arbitration afforded NBA players and owners.²¹⁷ These two characteristics of the NBA’s disciplinary process undoubtedly play a huge role in Silver’s ability to address threats quickly and with the integrity that comes with a system of true due process. On the other hand, Goodell appears hamstrung by the structure of discipline currently in place within the NFL, which was overhauled in late 2014.²¹⁸ Goodell certainly has the broadest powers of the four major professional sports leagues commissioners.²¹⁹ However, the integral role of the NFL Executive Committee, the lack of outside oversight, the recently overhauled disciplinary process, and the messy appeals structure has led to a broken system of

213. See Craig Wolff, *Donald Sterling Scandal: Adam Silver’s Swift, Severe Actions Receive Praise from League*, NJ.COM (Apr. 29, 2014, 10:33 PM), http://www.nj.com/nets/index.ssf/2014/04/donald_sterling_scandal_adam_silvers_swift_severe_actions_receive_praise_from_league.html; see also Scott Ostler, *Adam Silver’s Ruling on Donald Sterling was Swift and Sure*, SF GATE (Apr. 30, 2014, 6:36 AM), <http://www.sfgate.com/sports/ostler/article/Adam-Silver-s-ruling-on-Donald-Sterling-was-swift-5440311.php>.

214. See Brandon Schlager, *Danny Ferry to be Disciplined in Fallout of Levenson Email*, SPORTING NEWS (Sept. 8, 2014, 11:09 PM), <http://www.sportingnews.com/nba/story/2014-09-08/danny-ferry-will-be-disciplined-in-levenson-email-fallout>.

215. See *id.*

216. See Zillgitt, *supra* note 173.

217. See Parlow, *supra* note 1, at 185–89.

218. See Myers, *supra* note 121.

219. See Pacifici, *supra* note 42, at 105.

discipline within the NFL, one that has been described as “flawed.”²²⁰ The complex scandals that rocked in the league in 2014 were the first cracks in the armor and displayed how unprepared the NFL seems to deal with a changing sports consumer and media marketplace.

Sports commissioners are entrusted with a special brand of disciplinary authority. Due to the special status of sports leagues, not only in labor and antitrust law but also in the public consciousness, much of employee and management discipline comes down to the office of the commissioner and the power rests on the shoulders of one person.²²¹ It is a unique system and one that has, in the past, generated significant debate, analysis, and criticism.²²² And as we experience a rise of the success and ubiquity of an invasive, digital media and swift public reaction, it is only more imperative that commissioner approach management and employee discipline and punishment from a new and evolving light. No longer are conversations being had behind closed doors. Personal scandals, such as those of Donald Sterling and Ray Rice, are now playing out in full public view.²²³ We are experiencing an evolution in sports discipline, one that maintains many of the principles that make it unique while also reacting to greater public awareness and consumption. It is a brave new world and league commissioners must be ready and willing to embrace and solve the problems that are yet to come.

220. *See id.* at 106.

221. *See* Pollack, *supra* note 4, at 1646–49.

222. *See* Parlow, *supra* note 1, at 183.

223. Abraham Madkour, *Will Scandal Permanently Alter NFL's Public Image?*, SPORTS BUS. J. (Sept. 15, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/15/Opinion/From-the-Executive-Editor.aspx>.