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OFF-COURT MISBEHAVIOR: SPORTS LEAGUES AND PRIVATE PUNISHMENT

JANINE YOUNG KIM[*] & MATTHEW J. PARLOW[**]

This Essay examines how professional sports leagues address (apparently increasing) criminal activity by players off of the field or court. It analyzes the power of professional sports leagues and, in particular, the commissioners of those leagues, to discipline wayward athletes. Such discipline is often met with great controversy—from players' unions and commentators alike—especially when a commissioner invokes the "in the best interest of the sport" clause of the professional sports league's constitution and bylaws. The Essay then contextualizes such league discipline in criminal punishment theory—juxtaposing punishment norms in public law with incentives and rationales for discipline in professional sports—and analyzes the legal and cultural limitations to this approach.

I. INTRODUCTION

Hardly a day goes by without news of misbehavior by a professional athlete. In the month of February 2009, for example, the media reported such misbehavior on at least twenty-two out of twenty-eight days.[1] Often, such misconduct involves criminal behavior by an athlete that occurs off the athletic field or court.[2] Some have suggested that professional athletes are particularly prone to criminal behavior.[3] Others have countered that this is

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[1] Copies of these news stories are on file with the authors.

[2] Of the twenty-two stories, twenty-one involved arguably criminal behavior, with only one article involving non-criminal behavior.

[3] *See, e.g.*, Joel Michael Ugolini, *Even a Violent Game Has Its Limits: A Look at the NFL's Responsibility for the Behavior of Its Players*, 39 U. TOL. L. REV. 41, 44-45 (2007)

merely a perception created by greater media scrutiny of professional athletes.[4]

Whether such criminality is perceived or real, sports leagues have begun to take a firmer stand on disciplining athletes for their transgressions. Commissioners of these leagues are imposing harsher and more frequent penalties when athletes commit criminal acts.[5] This trend raises interesting questions regarding the authority of professional sports leagues to punish athletes for such misbehavior. Leagues' exercise of punitive authority over public, criminal acts by individuals also calls for a theoretical analysis that explores the relationship between private and public criminal law in the sports law context.

Part II of this Essay begins this analysis by describing the power of professional sports leagues, and, in particular, the commissioners of those leagues, to discipline their athletes for criminal acts committed off the court or field. In addition, this Part analyzes courts' and arbitrators' treatment of these private acts of punishment. Part III explores the reasons why professional sports leagues discipline their athletes for such misbehavior. Part IV traces the rise of private punishment, as distinct from public law punishment. Part V grapples with the question of whether a professional sports league's discipline of its athletes for off-the-court or off-the-field criminal acts should be construed as public or private punishment, especially in light of the reasons discussed in Part III. Finally, this Essay concludes by reflecting on the significance of this recent development in sports and criminal law.

(casting doubt on a study demonstrating that professional football players are less criminal than other males of the same age and race).

[4] *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 scholar 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 a time when the media protected professional athletes as one where athletes and reporters made similar salaries and were both predominantly white). *See generally* David Ray Papke, *Athletes in Trouble with the Law: Journalistic Accounts for the Resentful Fan*, 12 MARQ. SPORTS L. REV. 449 (2001).

[5] In fact, commissioners of professional sports leagues are beginning to punish athletes for behavior off of the court or field that may not be criminal in nature, but which may bring disrepute and embarrassment to the league. *See infra* Part III. While these instances pose an interesting tension in the context of private punishment, they are outside the scope of this Essay.

II. AUTHORITY AND PROCEDURE

A. SOURCES OF POWER

The power of professional sports leagues to discipline athletes for criminal activity off the court or field is relatively clear and settled, yet highly controversial. Across the four main professional sports leagues,[6] "commissioners and/or presidents of the various professional sports leagues notoriously possess dominant powers in governing league matters."[7] In these sports leagues, the commissioners' powers derive, in part, from league constitutions and bylaws.[8] These general powers include the authority to punish athletes for criminal acts committed outside the scope of play. In particular, constitutions, bylaws, and collective bargaining agreements of the major sports leagues contain provisions granting commissioners the authority to discipline players for acts deemed not in the "best interest" of the sport.[9]

The "best interest" clause developed in Major League Baseball (MLB) in response to the Chicago Black Sox scandal during the 1919 World Series, where gamblers bribed players to throw the coveted baseball championship.[10] After the scandal, MLB consolidated power in a newly created Commissioner[11] and appointed Judge Kenesaw Mountain Landis as

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[6] The four main professional sports leagues are widely understood to be Major League Baseball (MLB), the National Basketball Association (NBA), the National Hockey League (NHL), and the National Football League (NFL).

[7] RAY YASSER ET AL., SPORTS LAW CASES AND MATERIALS 379 (2006).

[8] *Id.* at 380.

[9] *See* MAJOR LEAGUE CONST. art. II, § 2 (authorizing the MLB Commissioner to discipline athletes who act in a manner "not in the best interests of . . . baseball"); NAT'L BASKETBALL ASS'N CONST. & BYLAWS art. XXXV(d) (granting the NBA Commissioner the power to discipline "any Player who, in [the Commissioner's] opinion, shall have been guilty of conduct prejudicial . . . or detrimental to the [NBA]"); NAT'L HOCKEY LEAGUE CONST. & BYLAWS § 17.3(a) (granting the NHL Commissioner the authority to discipline an athlete whose conduct, "whether during or outside the playing season has been dishonorable, prejudicial to or against the welfare of the League or the game of Hockey"); NAT'L FOOTBALL LEAGUE CONST. & BYLAWS art. VIII; NFL MGMT. COUNCIL & NFL PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 app. C, ¶ 15 (2006) (enabling the NFL Commissioner to discipline an athlete who acts in a manner that is "detrimental to the League or professional football"); *see also* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 436 (2005) (noting the best interest of the sport power); Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645 (1999) (discussing the best interest power in different professional sports leagues).

[10] Robert I. Lockwood, Note, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Forefront in the NBA*, 15 SPORTS LAW. J. 137, 141-44 (2008).

[11] *Id.* at 141.

its first Commissioner.[12] Among the powers of the new Commissioner was the authority "to impose punishment and pursue legal remedies for any conduct . . . that [the Commissioner] determined to be detrimental to the best interests of the game . . . ."[13] The MLB Commissioner's broad authority was reinforced in *Milwaukee American Ass'n v. Landis*,[14] where the court acknowledged that "the commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball."[15]

Other professional sports leagues later adopted similar provisions in their respective constitutions and bylaws. The commissioner's power under such a clause varies a bit from league to league, but it is similar in nature, particularly in how it generally grants indeterminate discretion to the commissioner in considering and meting out such discipline.[16] This seemingly boundless discretion, which is further discussed below with regard to arbitration and judicial review, has been the source of much controversy and criticism.[17] It is worth noting that the scope of the commissioner's best interest powers may be limited by the particular league's collective bargaining agreement.[18]

Two additional sources provide commissioners with the power to discipline athletes for misbehavior[19]: individual player contracts and the

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[12] J.C.H. Jones & Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorley Decisions*, 12 SETON HALL J. SPORT L. 165, 194 (2002).

[13] Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1415 (1990). Interestingly, Judge Landis would only accept the newly created position if the MLB Commissioner had such broad authority and power. *See* Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 301 (2005).

[14] 49 F.2d 298 (N.D. Ill. 1931).

[15] *Id.* at 303.

[16] *See* Kimberly M. Trebon, Note, *There Is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 J. SPORTS L. & CONTEMP. PROBS. 65, 91-93 (2007). *But see* Pachman, *supra* note 13, at 1415.

[17] *See* Brent D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205 (2007); Michael A. Mahone, Jr., Note, *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181 (2008); 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 (2008).

[18] *See* Lockwood, *supra* note 10, at 154 (noting that the 1995 NBA collective bargaining agreement limited the commissioner's power to discipline as compared to the previous collective bargaining agreement).

[19] These sources of commissioner power are noteworthy because they derive from collective bargaining between the leagues and their respective players' unions. *See* Matthew

collective bargaining agreements of each league.[20] For example, the standard NBA player's contract contains a "good moral character" clause.[21] This clause allows a team to terminate a player's contract if the player's conduct and actions do not comport with standards of good morals and citizenship.[22] However, the NBA Commissioner has also used this clause to impose punishment for player transgressions.[23] In addition, through collective bargaining, some professional sports leagues have adopted more specific provisions covering their commissioners' authority to discipline players for acts committed outside the course of play. While MLB and the NBA have not adopted such policies, the NFL and NHL have done so.[24]

In 2007, the NFL implemented its new Personal Conduct Policy (NFL PCP).[25] The NFL PCP requires that "[a]ll persons associated with the

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J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 103-04 (2008). In this regard, as noted above, the scope of the commissioner's authority to discipline stemming from these documents is agreed upon by both management and labor (that is, by the league and the players' union).

[20] *See* Pachman, *supra* note 13, at 1418-19. Some professional sports leagues also have policies related to drug use—both performance-enhancing substances, like steroids, and recreational drugs, such as cocaine—that impose mandatory punishment on the athlete that has violated the policy. The reasons for these policies and the controversies surrounding them have been extensively written about elsewhere. *See* Mark M. Rabuano, Note, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439 (2002); Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues*, 17 MARQ. SPORTS L. REV. 651 (2007); David M. Wachutka, Note, *Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies*, 8 PEPP. DISP. RESOL. L.J. 147 (2007). As these topics relate only tangentially to the topic of this Essay, we have excluded them from our analysis.

[21] *See* Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS LAW. J. 69, 75 (2004).

[22] *See* Sean Bukowski, Note, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 110 (2001) (explaining that a former NBA team, the Golden State Nuggets, was able to void the contract of one of its players after he choked the team's coach).

[23] *See* Trebon, *supra* note 16, at 92.

[24] *See* Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1094-1100 (2008) (comparing and contrasting the disciplinary powers of the four major sports leagues).

[25] *See* NFL PLAYERS ASS'N, PERSONAL CONDUCT POLICY (2007), *available at* http://www.nflplayers.com/images/fck/NFL Personal Conduct Policy 2008.pdf; Mahone, *supra* note 17, at 181. The NFL Personal Conduct Policy (NFL PCP) replaced the NFL's Violent Crime Policy, which granted the commissioner the authority to discipline players charged with any crime of violence. *See* Ambrose, *supra* note 24, at 1086-87. Interestingly,

NFL," including the players, "avoid 'conduct detrimental to the integrity of and public confidence in the National Football League.'"[26] An athlete can be punished for such detrimental conduct, even if his actions do not result in a criminal conviction.[27] This approach is in stark contrast to the NFL's previous conduct policy, which required the NFL Commissioner to withhold punishment of an athlete unless there was a conviction or some form of plea by the athlete.[28]

With the new NFL PCP in place, the Commissioner may discipline the athlete at any time—once the league has conducted an investigation—so long as he satisfies a proportionality requirement: "The specifics of the disciplinary response will be based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges were filed), and other relevant factors."[29] Such discipline may include probation, fines, suspension, or even banishment from the league.[30] In addition, the Commissioner may, separate and apart from any punishment he imposes, require the misbehaving athlete to participate in counseling and other education programs.[31] However, the athlete does have the right to appeal any discipline imposed by the Commissioner through Article XI of the collective bargaining agreement and the NFL Constitution and Bylaws.[32]

The NHL has also adopted a similar type of policy in its Behavioral Health Program (BHP).[33] This policy allows the NHL Commissioner to require a player to attend counseling sessions if he has a history of criminal behavior.[34] Interestingly, the Commissioner not only has sole discretion in

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the NFL PCP was not collectively bargained, though it appears that the NFL Players Association did acquiesce to the policy. *See* Marks, *supra* note 17, at 1584-85.

[26] NFL PLAYERS ASS'N, *supra* note 25, at 1. Such detrimental behavior includes domestic violence, theft, sex offenses, disorderly conduct, fraud, possessing a weapon in any workplace setting, criminal offenses related to steroids and other prohibited substances, dangerous actions that put the safety of another person(s) at risk, and "conduct that undermines or puts at risk the integrity and reputation of the NFL." *Id.* at 1-2.

[27] *Id.* at 1 ("Persons who fail to live up to this standard of conduct are guilty of conduct detrimental [to the league] and subject to discipline, even where the conduct itself does not result in conviction of a crime.").

[28] *See* Mahone, *supra* note 17, at 185.

[29] NFL PLAYERS ASS'N, *supra* note 25, at 2.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 3.

[33] *See* Trebon, *supra* note 16, at 91.

[34] *See The Clean Sports Act of 2005 and the Professional Sports Integrity and Accountability Act: Hearing on S. 1114 and S. 1334 Before the S. Comm. on Commerce, Science, and Transp.*, 109th Cong. 47 (2005) (statement of Ted Saskin, Executive Director, National Hockey League Players Association).

deciding whether to require such counseling, but his decision is not reviewable by an arbitrator, as is the case with other NHL disciplinary decisions.[35] The BHP has four stages. In the first stage, the player attends counseling, but is not subject to any other penalty.[36] In the second stage, the player continues treatment, but the NHL can suspend the player without pay.[37] In the third stage, the NHL automatically suspends the player for six months.[38] In the final stage, the NHL suspends the player without pay for one year with no guarantee of reinstatement.[39]

Once an athlete is disciplined in one of the main professional sports leagues, the athlete can appeal the decision—depending on the league—to a neutral arbitrator, to the commissioner, or to the judicial system after these administrative appeals have been exhausted.[40] However, as the next section suggests, the commissioners' authority in disciplinary matters has been, and in many ways continues to be, plenary in nature.[41]

B. JUDICIAL AND ARBITRATOR REVIEW OF COMMISSIONER-IMPOSED PUNISHMENT

Not many cases challenging commissioners' authority have made their way to the courts, but those that have suggest significant judicial deference to commissioner determinations. For example, in *Molinas v. NBA*,[42] the court upheld NBA President Maurice Podoloff's indefinite suspension of Jack Molinas for gambling on the Fort Wayne Pistons, the team that drafted him.[43] Molinas sued to be reinstated to the NBA, but the court found for Podoloff, reasoning that eliminating gambling from the NBA was important enough to justify the punishment.[44] While the NBA did not have a best interests clause at that time, the court's reasoning in the case demonstrates a deference to the NBA President's determinations—at least so far as gambling is concerned.

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[35] *Id.*

[36] *See NHL Round-Up*, LCS: GUIDE TO HOCKEY, http://www.lcshockey.com/issues/54/news.asp (last visited May 15, 2009).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See* Pollack, *supra* note 9, at 1648-49 (noting the differences in the professional sports leagues in terms of players' ability to appeal to a neutral arbitrator).

[41] *See* Wm. David Cornwell, Sr., *The Imperial Commissioner Mountain Landis and His Progeny: The Evolving Power of Commissioners over Players*, 40 NEW ENG. L. REV. 769, 772 (2006).

[42] 190 F. Supp. 241 (S.D.N.Y. 1961).

[43] *Id.* at 241.

[44] *Id.* at 244.

While seminal cases do not involve challenges to commissioners' imposition of disciplinary measures, they are indicative of how courts might treat such actions. For example, in *Charles O. Finley & Co. v. Kuhn*,[45] the Seventh Circuit Court of Appeals upheld MLB Commissioner Bowie Kuhn's denial of Oakland Athletics owner Charles Finley's attempt to sell the contracts of many of his marquee players in light of their impending free agency.[46] Finley had attempted to trade players such as Vida Blue, Rollie Fingers, and Joe Rudi—those that the team would not be able to afford when they became free agents—to other teams in order to use the added resources to invest in the team's farm system.[47] Commissioner Kuhn blocked this move, explaining that it ran contrary to the best interests of baseball, the integrity of the game, and the public confidence in it.[48] The Seventh Circuit held in favor of Commissioner Kuhn, citing the best interests clause.[49]

In *Atlanta National League Baseball Club, Inc. v. Kuhn*,[50] the court upheld Commissioner Kuhn's year-long suspension of Atlanta Braves owner Ted Turner for tampering with the San Francisco Giants' exclusive bargaining rights with outfielder Gary Matthews.[51] The court again pointed to the nearly unbridled authority of the MLB Commissioner: "[We have] no hesitation in saying that the defendant Commissioner had ample authority to punish plaintiffs in this case, for acts considered not in the best interests of baseball."[52] However, the court did note that the Commissioner's discretion to impose punitive sanctions against an owner who violated MLB rules and directives was limited to the enumerated list of punishments in the Major League Agreement.[53] Despite this limitation, the case was seen as yet another victory for broad commissioner authority and power.

Commissioners have not fared quite so well, however, with arbitrators.[54] The highly publicized case of Steve Howe is a good example. In 1991, after six previous recreational drug violations, Howe entered an *Alford* plea—pleading guilty without actually admitting guilt—on charges

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[45] 569 F.2d 527 (7th Cir. 1978).

[46] *Id.* at 530-31.

[47] *Id.* at 531.

[48] *Id.*

[49] *Id.* at 539.

[50] 432 F. Supp. 1213 (N.D. Ga. 1977).

[51] *Id.* at 1217.

[52] *Id.* at 1220.

[53] *Id.* at 1225.

[54] The players' right to arbitral review arises out of the respective league's collective bargaining agreement. *See, e.g.*, Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going . . . Gone!*, 20 NOVA L. REV. 1231, 1244 (1996) (noting that MLB players' right to arbitration was gained through the collective bargaining agreement).

of attempting to purchase cocaine and possession of cocaine.[55] In response, Commissioner Vincent suspended Howe for life.[56] Howe, through the Major League Baseball Players Association, filed a grievance before MLB's arbitrator challenging the lifetime ban.[57] The arbitrator determined that Commissioner Vincent's lifetime suspension of Howe was "without just cause"[58] and amended Howe's punishment to a year-long suspension and a stringent drug-testing and drug-education program.[59] The arbitrator noted that while the Commissioner had a "reasonable range of discretion" in addressing such drug violations, the punishment was not commensurate with Howe's transgressions, particularly in light of Howe's psychiatric illness.[60] The arbitrator reached this decision despite recognizing the importance of eradicating drug use in MLB.[61] While this decision gives far less deference to the Commissioner's actions, it is because drug-related offenses were then—as they continue to be for the most part now—governed by different disciplinary standards and punishment than other misbehavior committed by players.[62]

The case of former NBA star Latrell Sprewell provides another example of how arbitrators are less willing to give commissioners the same degree of deference as the judiciary. While playing for the Golden State Warriors, Sprewell attacked and choked his coach, P.J. Carlesimo, during practice on December 1, 1997.[63] In response, NBA Commissioner David Stern suspended Sprewell for one year.[64] Sprewell, through the National Basketball Players Association, appealed the decision to an arbitrator. The

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[55] Pollack, *supra* note 9, at 1692-93. From 1982-1988, Howe was suspended six times for recreational drug violations. *Id.* at 1692. In 1988, upon Howe's sixth offense, Commissioner Kuhn gave Howe a lifetime suspension. *Id.* A couple of years later, Commissioner Fay Vincent—who succeeded Commissioner Kuhn—reinstated Howe under certain stringent conditions centering around a drug aftercare program. *Id.*

[56] *Id.* at 1693; Major League Baseball Players Ass'n v. Comm'r of Major League Baseball (Steve Howe Arbitration Decision), *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2000, at 579, 582 (PLI Intellectual Prop., Course Handbook Series No. G-591, 2000) [hereinafter Steve Howe Arbitration Decision].

[57] Steve Howe Arbitration Decision, *supra* note 56.

[58] *Id.* at 583.

[59] *Id.*

[60] *Id.* at 598-603.

[61] *Id.* at 618.

[62] At that time, the MLB collective bargaining agreement allowed the arbitrator to overturn the Commissioner's punishment if the arbitrator found that there was no "just cause" for the punishment. *See* Pollack, *supra* note 9, at 1693.

[63] Nat'l Basketball Players Ass'n *ex rel.* Sprewell v. Warriors Basketball Club, *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2000, *supra* note 56, at 469, 481.

[64] *Id.* at 482.

arbitrator reduced the one-year suspension to the remainder of the 1997-98 NBA season.[65] In justifying the reduction, the arbitrator explained that the reduced punishment was more commensurate with the seriousness of Sprewell's actions.[66] The arbitrator also reinforced the notion that the Commissioner's punishment should be fair in light of the circumstances.[67] In this regard, though the reduction was not as drastic as the *Howe* case—nor was it a significantly fewer number of games—the change in discipline was noteworthy in that the arbitrator did not grant the Commissioner the degree of deference that a court would likely have afforded him.

Finally, the case of former MLB pitcher John Rocker provides an interesting example of where an arbitrator upheld a commissioner's disciplining of an athlete for off-the-court or off-the-field, non-criminal behavior, while reducing the severity of the sanction.[68] Following a series of escalating, antagonistic interactions with baseball fans in New York City, Rocker made "certain profoundly insensitive and arguably racist statements" to a *Sports Illustrated* reporter.[69] In response, MLB Commissioner Bud Selig suspended Rocker from spring training for the 2000 MLB season; suspended him, with pay, from the opening day of the 2000 MLB season through May 1, 2000; required him to donate $20,000 to either the National Association for the Advancement of Colored People (NAACP) or another organization that promoted diversity efforts; and required him to participate in a diversity training program before being allowed to play again.[70] Rocker, through the MLB Players Association, filed a grievance with the MLB arbitrator, challenging the imposed sanction.[71]

The arbitrator affirmed the Commissioner's authority to discipline players for off-the-field, speech-related, and non-criminal behavior.[72] However, the arbitrator noted that while the Commissioner has a "'reasonable range of discretion'" related to imposing such discipline, the penalty must be "'reasonably commensurate with the offense'" and "'appropriate, given all circumstances.'"[73] Based on this standard of

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[65] *Id.* at 576 (reducing his suspension from eighty-two games to sixty-eight games).

[66] *Id.* at 574.

[67] *Id.* at 573.

[68] Major League Baseball Players Ass'n v. Comm'r of Major League Baseball (John Rocker Arbitration Decision), *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2001, at 765 (PLI Intellectual Prop., Course Handbook Series No. G-638, 2001).

[69] *Id.* at 769 (quoting Bud Selig, MLB Comm'r).

[70] *Id.* at 770.

[71] *Id.* at 769.

[72] *Id.* at 802-03.

[73] *Id.* at 804 (citing *Nixon* (Panel Decision 84, Nicolau, 1992)).

review, the arbitrator found the Commissioner's disciplinary measures to be excessive.[74] The arbitrator noted, in particular, that the seventy-three-game suspension was met or exceeded previously only in a handful of cases involving serious drug offenses by repeat offenders.[75] The arbitrator also stated that the Commissioner provided no persuasive rationale as to why Rocker's offense warranted such a severe penalty.[76] Accordingly, the arbitrator reduced Rocker's suspension to fourteen days (from opening day until April 17, 2000) and his fine to $500.[77] The arbitrator did, however, sustain the diversity training program requirement.[78]

These decisions demonstrate that some arbitrators are less deferential toward commissioners than courts have been. At the same time, even these less friendly decisions reinforce the significant power of the respective commissioner to discipline players, even if they reduce the severity of the punishment. Moreover, other arbitrators have mirrored the type of deference that courts have given commissioners' actions with regard to discipline and punishment of players. This, coupled with the deferential treatment by the judiciary, helps solidify significant power and authority in professional sports league commissioners, as their broad powers detailed above are largely upheld by any reviewing entity.

III. THE BOTTOM LINE AND BELOW: MONEY AND FANS

Armed with plenary power, professional sports league commissioners have begun increasingly to flex their best interest muscles to discipline players who commit criminal acts off the court or field. There are many compelling reasons why these commissioners are paying more attention to athletes' off-court and off-field behavior and responding accordingly. Of primary importance may be the fact that when a league's player commits criminal acts off the court or field, the league's image and profitability can be significantly harmed.[79] When players misbehave, fans may buy fewer tickets and less merchandise, and advertising revenue may decrease, as sponsors may not want to be affiliated with such criminal activity.[80] Indeed, "[i]f and when fans replace admiration with disgust as a result of the actions of certain players, the star quality of athletes ceases to be a

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[74] *Id.* at 805-06.

[75] *Id.* at 805.

[76] *Id.*

[77] *Id.* at 806.

[78] *Id.*

[79] Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1051 (1996) [hereinafter "*Out of Bounds*"].

[80] *See* Bukowski, *supra* note 22, at 107-08.

useful commodity for the league."[81] This potential problem may be exacerbated by the increased media attention that athletes' criminal activities receive.[82] In light of this situation, it is understandable that commissioners will impose more frequent and severe punishment to publicize their respective league's disapproval of such behavior, and thereby minimize bad publicity and attendant financial damage.

While a league's best interest could be limited to its bottom line, according to the leagues themselves, private punishment of athletes also seems to be motivated by broader social concerns.[83] Interestingly, these concerns appear to track those that traditionally justify public criminal punishment—namely, retribution, deterrence, rehabilitation, and individual virtue. In particular, a league's punitive response to fan outrage over an athlete's criminal acts is likely to constitute a response to retribution- or deterrence-oriented demands. Even if an athlete is punished by the public criminal justice system, fans may demand action by leagues because of the perception that athletes are favorably treated by the criminal justice system—by police, judges, and juries[84]—or that public punishment will fail to have the intended retributive or deterrent effect.[85] In imposing punishment, leagues not only refer to sources of power such as their best interest authority, but also engage in general moral denunciation of athlete misconduct.[86]

Leagues also embrace rehabilitative goals of punishment to help their players learn to separate on-court aggression from off-the-court or off-the-field situations and relationships. In order to reach the elite level of play in the professional leagues, most athletes must adopt a certain level of aggression, intimidation, and even violence.[87] Unfortunately, this aggression and violence sometimes seeps into their personal lives, in the

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[81] *Id.* at 108.

[82] *See* Robinson, *supra* note 4, at 1323-25.

[83] See Jim Rose et al., *Regulating Coaches' and Athletes' Behavior off the Field*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 141, 142 (2007) (discussing whether off-court and off-field misconduct causes fans to become more cynical about the sport).

[84] *See* Michael M. O'Hear, *Blue-Collar Crimes/White-Collar Criminals: Sentencing Elite Athletes Who Commit Violent Crimes*, 12 MARQ. SPORTS L. REV. 427, 432 (2001).

[85] League punishment in the form of fines and suspensions may have significant financial effect on the player, achieving retributive goals more effectively than traditional public punishment. In addition, league punishment may come swifter and more certain than public punishment—qualities that enhance punishment's deterrent effect. *See* Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 813 (2007). Such private punishment may have both specific and general deterrent effects. *See* Bukowski, *supra* note 22, at 108.

[86] *See infra* notes 137-44 and accompanying text.

[87] *See* Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 170 (1998).

form of crimes such as domestic violence and sexual assault.[88] Understandably, leagues do not want to become "breeding ground[s] for domestic violence and sexual assault scandals."[89] Thus, leagues punish their players in an effort to send a strong message that such behavior is unacceptable and that athletes must channel their feelings of dominance into their sport, not their personal lives.[90] Leagues may also want their players to get better, heal, and learn from their mistakes.[91] Accordingly, commissioners will also hand down punishment that includes counseling to help the players address the issues that led them to commit such criminal acts.[92]

Finally, leagues are also concerned with the individual character of their athletes. For better or worse, players are role models for millions of kids.[93] The public criminal justice system sometimes takes this fact into account in imposing punishment against criminal athletes.[94] Sports leagues also recognize the public status that athletes enjoy, and attempt to maintain a good image through regulatory measures such as background checks and dress codes.[95] When commissioners punish players for criminal activity off the court or field, it reinforces the requirement of good character that is projected to the public.

In sum, sports leagues impose private punishment by appealing to purposes that are more easily recognized as public in nature. They appear to do this even though they clearly have ample powers to punish through the private authorities discussed above in Part II.A. This suggests that

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[88] *See* Moser, *supra* note 21, at 70.

[89] *See id.*; *see also* O'Hear, *supra* note 84, at 430-31; Robinson, *supra* note 4, at 1321.

[90] *See Out of Bounds*, *supra* note 79, at 1052 ("Particularly in sports such as football and hockey, '[w]here assaults that would be illegal off the field become an accepted, even celebrated' part of the game, it is imperative that the league send a message that such conduct is inappropriate outside the confines of the game.").

[91] *See* Bukowski, *supra* note 22, at 111, 117.

[92] *See, e.g.*, NAT'L BASKETBALL PLAYERS ASS'N, NBPA COLLECTIVE BARGAINING AGREEMENT art. VI, § 5 (2005), *available at* http://www.nbpa.com/cba_articles.php (requiring players who commit off-court violent acts to undergo a clinical evaluation and, if warranted, counseling to address such behavior); *see also* Bukowski, *supra* note 22, at 117 (describing a similar counseling program in the NHL).

[93] *See* Holly M. Burch & Jennifer B. Murray, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAW. J. 249, 250-51 (1999).

[94] *See infra* note 138.

[95] *See* Scott Burnside, *Dress Code Suits NHLers Just Fine*, ESPN.COM, Oct. 20, 2005, http://sports.espn.go.com/nhl/columns/story?id=2198862 (referring to the NHL dress code included in the collective bargaining agreement); Nat'l Basketball Ass'n, NBA Player Dress Code, Oct. 20, 2005, http://www.nba.com/news/player_dress_code_051017.html; *infra* note 136.

leagues believe such public purposes are necessary to justify their punitive decisions, despite the existence of contractual authority to accomplish the same.[96] In doing so, sports leagues seemingly punish under the conceit that punishment serves broader social aims rather than mere monetary interest. On the one hand, we should applaud a private entity that takes such aims into account in its decision making. On the other hand, it is unclear whether and how such public purposes should be used in the private context to engage in an act as fraught as punishment. To begin addressing this question, we explore below the relationship between private and public punishment, and consider whether league punishment may be conceptualized as either one or the other. Although, as a general matter, private entities like sports leagues are free to rationalize their decisions and actions in whatever way they choose, we suggest that public purposes fall short of full justification (that is, to the extent they are even necessary) due to both legal and cultural limitations that exist in most private contexts.

IV. THE RISE OF PRIVATE PUNISHMENT

We begin by emphasizing that punishment of a criminal athlete by a sports league *is* punishment, although imposed privately rather than by the state through its laws. Although in much of criminal law scholarship the term *punishment* primarily refers to that imposed by the state, it is in fact a much broader concept. As Kent Greenawalt defines it, "punishment" occurs whenever "persons who possess authority impose designedly unpleasant consequences upon, and express their condemnation of, other persons who are capable of choice and who have breached established standards of behavior."[97]

Increasingly, this broader understanding of punishment has entered criminal law scholarship over the past several decades, encompassing topics as diverse as regulation through social norms, restorative justice, and private policing.[98] This scholarship tends to divide into one of two models

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[96] It is important to distinguish between public purposes that purportedly justify the contractual provisions of punishment—which remains a completely private matter between a league and its athletes—and public purposes that directly justify the imposition of punishment itself.

[97] *See* Kent Greenawalt, *Punishment*, *in* FOUNDATIONS OF CRIMINAL LAW 48, 48 (Leo Katz et al. eds., 1999).

[98] *See generally* Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859 (1999) (discussing social norms); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911 (2007) (addressing private policing and restorative justice); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) (detailing private policing). Private punishment that does not enjoy an appreciable level of normative desirability or legitimacy, like vigilantism, is not part of our discussion here. *Cf.* Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L.

of privatization: (1) cooperative or (2) exclusive. The cooperative model posits that the continued vitality of public criminal law depends on the active participation of private individuals or groups that have a stake in the law's effectiveness.[99] This is particularly true in those areas of the country, like the inner cities of Boston and Chicago, where tension and distrust between the police and the community run so high that the state has lost its moral legitimacy.[100] Boston's Ten Point Coalition and Chicago's prayer vigils, wherein Black churches utilize their moral authority to legitimate state-sponsored, anti-crime programs, are examples of cooperative approaches that seek to counteract the effect of state delegitimization and secure citizen cooperation.[101] Although it can be said that the law often encourages and relies on private entities—to report crime, identify criminals, testify in court, and even participate to varying degrees in the capture of perpetrators[102]—the new privatization thesis takes a much stronger position in critiquing public criminal justice. Its advocates assert that private cooperation is "essential" to the future viability of public criminal law to control crime precisely because of the public, or state-centered, nature of that law.[103]

The other dominant model of privatization focuses not on cooperation, but exclusion. While the cooperative model offers a framework for private entities to opt in to the public criminal justice system where the incentives and pressures to opt out are powerful,[104] the exclusive model represents an opt-out in favor of private resolution that better suits the parties involved in the crime. Restorative justice and private policing are two well-known examples of the exclusive model.[105] Restorative justice, in its strongest

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REV. 573, 583 (excluding vigilantism from the definition of "private policing" because of its "lack of a close connection to formal law").

[99] *See, e.g.*, Kahan, *supra* note 98, at 1862 (arguing that private groups like the Black church or juvenile groups may be more effective in controlling crime in the inner city than the state).

[100] *See id.* at 1861.

[101] *See id.* at 1863-66.

[102] The Supreme Court has been careful to allow the police room to obtain citizen cooperation. *See* Illinois v. Lidster, 540 U.S. 419, 425 (2004) (acknowledging that citizen cooperation is "vital" to effective policing); Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971) ("But it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."); *see also supra* Part IV (discussing private policing).

[103] Kahan, *supra* note 98, at 1860.

[104] Thus, Kahan's thesis is most applicable to crime-ridden, inner-city communities, where he observes that the moral authority of the state has been "enfeebled." *Id.* at 1861.

[105] *See* Simmons, *supra* note 98, at 911 (proposing that restorative justice and private policing are "forging an alternative private criminal justice system"). As we describe below,

form, contemplates a community-based response to crime that precludes public punishment (and process) in the conventional sense of that term.[106] The modern movement is based on the premise that public criminal law both neglects the needs of the victim and excessively punishes the offender.[107] Instead, the community should directly address the reintegration of both the victim and offender so as to heal the rift that has been created by crime.[108]

Private policing is also a means of accessing direct resolution of crime that bypasses the public criminal justice system. Recent scholarship on private policing has revealed that the phenomenon of private policing has grown rapidly and may now be seen as overtaking public policing in some measures.[109] Private security guards hired by corporations and other private organizations are the most common examples of private policing at work today.[110] When private security—for example, a guard at a department store—detects a crime (such as theft of merchandise), the victim—in this case the department store—has the choice to call the police and instigate public prosecution, or to handle the matter itself by seeking a private remedy, such as repayment for lost property[111] or ejection from the store.[112] For private entities that seek to avoid the publicity and other costs of

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discipline in the employment context may also be classified as an instance of private punishment. *See infra* notes 122-129 and accompanying text.

[106] *See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 264 (2000) (observing that some proponents of restorative justice view it as "an ideal of individualized and informal justice in which people handle their conflicts without state interference"); *cf.* Kenworthey Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1061 (2007) (positing that our willingness to delegate revenge to a third-party—often, the state—must be explained). Such strong forms of restorative justice are traced back to practices of indigenous tribes and ancient civilizations. *See id.* at 1095-96. The weaker forms that are currently found in the United States usually involve rehabilitative or diversionary programs relating to mostly minor offenses and juveniles only. *See* Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 101-10 (2006) (describing programs in Wisconsin, Iowa, Virginia, and New York).

[107] *See* Simmons, *supra* note 98, at 913-16.

[108] *See* Kurki, *supra* note 106, at 263.

[109] *See* Joh, *supra* note 98, at 575 (noting that private police are sometimes considered "the first line of defense in the war against terrorism"); Simmons, *supra* note 98, at 920-21 (observing that spending on private security doubles that on public police); David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 89 (2006) ("Today private guards greatly outnumber sworn law enforcement officers throughout the United States, and the gap continues to widen."). As Sklansky and Joh point out, private policing takes varied forms. *See* Joh, *supra* note 98, at 610 tbl.1; Sklansky, *supra*, at 92-94.

[110] *Cf.* Sklansky, *supra* note 98, at 1168 (describing the explosive growth of the private security industry).

[111] *See* Simmons, *supra* note 98, at 939-40 (discussing restitution-demand letters).

[112] *See* Joh, *supra* note 98, at 589 (discussing a case of banishment from Macy's).

pursuing public prosecution, such remedies offer an attractive solution to the problem of crime.[113]

Although grouped together as models and examples of privatization, each of the approaches described above differs from the other in significant ways. Two points of distinction are particularly noteworthy: the level of privatization that the examples display and, relatedly, the purposes that they pursue.

Of the three, the cooperative programs in Boston and Chicago are obviously the least private. Although they emphasize and depend on private participation, the goal of each program is ultimately to bolster the effectiveness of the public criminal justice system by highlighting the common ground that exists between the community and the state—that is, the desire to reduce violence and crime. That common ground, however, is decidedly publicly oriented in the sense that both the state and the private entities that cooperate with the state seek to place offenders within the public criminal justice system, which pursues the broad societal goals of criminal law such as retribution. Thus, cooperative programs seemingly espouse the governance model of organization—concerned with "values such as integrity, the accommodation of interests, and morality"—as does the public police.[114]

The restorative justice movement has more "private" features than the cooperative programs of Boston and Chicago, but it also embraces public characteristics as well. On the one hand, its rejection of state-imposed retributive punishment in favor of private resolutions that meet the specific needs of the victim and the offender suggests that achieving restorative justice is a highly private affair.[115] Most notably, unlike in the traditional public system, the victim has a more significant role in the restorative process.[116] At the same time, the role of the public—here, the community—is also emphasized in the course of promoting reintegration of

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[113] *See id.* at 590.

[114] *See id.* at 591 (referring to Philip Selznick's distinctions).

[115] *See, e.g.*, *A Healing Circle in the Innu Community of Sheshashit*, JUSTICE AS HEALING: A NEWSLETTER ON ABORIGINAL CONCEPTS OF JUSTICE (Native Law Centre, Saskatoon, Saskatchewan, Can.), Summer 1997, *available at* www.usask.ca/nativelaw/publications/jah/1997/Heal_Circle_Innu.pdf (describing how the circle consisted of ten members, including the victim, the offender, five family members, two facilitators, and one court liaison).

[116] *See, e.g.*, *id.* (describing how a "circle of concern and support" organized by the Innu Community in Canada took pains to provide a rape victim with "an opportunity to say what needed to happen for her to feel that the situation was being made more right," as well as to allow the offender "an opportunity to acknowledge responsibility for his actions"); *see also* Kurki, *supra* note 106, at 266 (rejecting the suggestion that restorative justice is a part of the victims' rights movement, which has been used mainly to increase punishment of offenders).

both the victim and the offender. Moreover, the movement emphasizes values such as restitution, reintegration, and community-building as more appropriate purposes of the criminal justice system.[117] Accordingly, one could fairly characterize restorative justice as also engaged in the purposes and values of a governance model.

Private policing is the most private of the three examples of privatization. Private policing addresses the needs of a "client," not a publicly minded, community group. Its processes and goals may be entirely private, tailored specifically for the customer that the security force is paid to serve.[118] Thus, the legal context for private policing involves not only criminal law, but, more prominently, property law.[119] Both the process—excluding the participation of public police and prosecutors—and the goals—vindicating private property rights—render private policing quite distinct from the other privatization examples described above.[120] In this way, private policing follows a managerial form of organization that emphasizes "efficiency and goal-achievement" over the pursuit of more universal values.[121]

A league's punishment of its athletes is an instance of employment-related punishment, which resembles private policing.[122] Like the department store that opts for repayment by, or ejection of, shoplifters, employment-related punishment may substitute private restitution for public prosecution. Especially when the crime is work-related, such as embezzlement, many employers tend to forgo criminal prosecution.[123] Indeed, one scholar has observed that embezzlement has become a "merely

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[117] *See* Kurki, *supra* note 106, at 265-66.

[118] *See* Joh, *supra* note 98, at 587 ("Perhaps the most central feature of private policing . . . is its client-driven mandate. . . . [W]hat counts as deviant or disorderly behavior for private police is defined not in moral terms but instrumentally, by a client's particular aims: a pleasant shopping experience, a safe parking area, or an orderly corporate campus.").

[119] *See id.* (observing that private policing is conceptualized in terms of "loss" rather than "crime").

[120] *Id.*; *see infra* Part V.

[121] *See* Joh, *supra* note 98, at 591.

[122] Although there is little written specifically about employment-related punishment as a form of private criminal punishment, the idea is often implied. *See* Greenawalt, *supra* note 97, at 48; Joh, *supra* note 98, at 589-90 & n.109.

[123] *See* Joh, *supra* note 98, at 588. The preference for restitution over public prosecution may be driven by the employer's attempt to avoid bad publicity, which is particularly important to large or well-established financial institutions that highly value their reputations. Or it may reflect reluctance on the part of the employer to lose the employee's services. *See id.* at 590.

private transaction" in light of the widespread preference for restitution.[124] Such private resolution may seem unremarkable; after all, misbehavior on the job—where the victim is the employer or other employees—surely implicates primarily the employer-employee relationship, which is usually a private one governed by contract. Interestingly, even if the criminal conduct occurs outside of work, suspending or firing a criminal employee is considered to be an ordinary function of workplace management.[125] Such misbehavior may be considered, for example, to diminish the employee's ability to carry out her duties or to affect adversely the reputation of the employer—reasons for discipline that are ostensibly found in the employment contract.[126] In this setting, punishment is grounded in both property and contract principles, and may be highly private and managerial in approach. It should be noted, however, that when an employee commits a crime outside of work, the employer may lose its ability to exclude completely the public criminal law. After all, most employers are unlikely to exercise enough influence on unrelated victims to avoid the public prosecution of its employees. In this sense, any private punishment imposed by employers for the off-duty crimes of employees may serve to supplement, but not supplant, public punishment of the offender.[127]

Punishment by sports leagues may similarly be viewed as largely private and managerial, grounded mainly in contract and property law.[128] Certainly, punishment is being imposed by an authoritative private entity rather than the state. The league can easily justify its decision under contract law (pointing to the terms of players' contracts, the league constitution, by-laws, and collective bargaining agreements) as well as property law (arguing loss of good reputation and will, and decreasing ticket or merchandise sales) for misbehavior on and off the court or field.[129] And like other instances of employer-employee punishment, sports leagues possess an imperfect ability to exclude public criminal law when the criminal act occurs off the court or field.

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[124] *See* JEROME HALL, THEFT, LAW, AND SOCIETY 311 (1952); *see also* Douglas H. Frazer, *To Catch a Thief: Civil Strategies for Handling Embezzlement Cases*, 75 WIS. LAW. 6 (2002) (describing the motivation to avoid public criminal law in embezzlement cases).

[125] *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 616-17.

[126] *Id.*

[127] This is not to suggest that private punishment is "lighter" than its public counterpart. *See* Joh, *supra* note 98, at 589-90.

[128] Courts appear to view league punishment this way, generally applying minimal review of league decisions under the loose requirements of private association law. *See* Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 174 (1994).

[129] *See supra* Parts II.A & III.

But there are certain features of league punishment, absent in other employment and private policing contexts, which tilt such decisions toward a public, rather than private, understanding of the phenomenon. These include: (1) the public nature of punishment, (2) the sense of direct accountability to fans, and (3) the assertion of independent *moral* authority to punish by sports leagues or commissioners. These features should give pause to anyone who would reflexively treat league punishment as a purely private and managerial matter. In the remainder of this Essay, we consider each of these features in greater detail and discuss their theoretical ramifications.

V. LEAGUE PUNISHMENT: MORE PUBLIC THAN PRIVATE?

At the outset, it is worth reiterating that employer-imposed punishment for criminal conduct outside of work cannot be characterized as largely cooperative or exclusive. Instead, such instances of private punishment often stand independently of public law (as opposed to reacting to it); that is to say, there is no reason to think that public conviction and punishment affects either the decision to punish or the kind and amount of private punishment meted out.[130] This is because employers typically exercise authority under property or contract law, thereby operating outside the principles that guide punishment under criminal law.

On the other hand, the private law versus public law distinction should not be overdrawn. An accurate understanding of any form of punishment requires sensitivity to its nature and context in each case. For example, we have observed that league punishment is different from typical instances of employer-imposed punishment because punishment by a sports league tends to be public. By this we mean that a league's decision to punish is highly *publicized*. This is a far cry from the discretion that many employers seek to exercise through avenues like restitution and termination when employees commit crimes.[131] And even when the employer is unconcerned about privacy and makes no effort to preserve it, typical employer-imposed punishment does not usually enter the wider public's consciousness. In

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[130] In fact, the first significant punitive action taken by a sports league was marked by independence from decisions of the public criminal law. Judge Kenesaw Mountain Landis, the first commissioner of baseball, banished the eight players involved in the 1919 "Black Sox" scandal even after their acquittal by a jury. *See* Sigman, *supra* note 13, at 305-06. In so doing, Landis declared independent authority to punish.

There appears to be, however, at least one instance where the public prosecution was affected by league punishment. Marcus Moore, a player for the Colorado Rockies, was acquitted of rape and sexual assault, apparently because at least one juror believed that "being traded down to the minors was punishment enough." Chamberlain et al., *supra* note 4, at 556.

[131] *See supra* notes 107-110 and accompanying text.

contrast, league punishment has public, social effects that render it less like other forms of private punishment and more comparable to state-imposed punishment; through coverage by the media and, indeed, the public statements of the league itself, league punishment sparks public discourse about its occurrence and appropriateness.[132]

Why is league punishment so public in nature? Obviously, part of the reason is that professional sports generally attract media attention and the criminal conduct of athletes is, for better or worse, of intense interest to the public.[133] Thus, publicity is almost unavoidable. But this does not explain why a league engages in very public acts of punishment rather than treating punishment as a private, employment-related matter. This approach appears to stem from the notion that the league is accountable to the public for the misbehavior of its athletes. Moreover, this notion seems to be shared by the league and the public alike.[134] The belief in public accountability is a second feature of league punishment that resembles public, rather than private, punishment regimes. Sports leagues tend to be responsive to the beliefs and demands of the fans much as public criminal law is responsive to the beliefs and demands of the political constituency (again, for better or worse).[135] The commissioner, like a politician or a public prosecutor, typically holds press conferences and makes official statements aimed at reassuring the public that athlete misconduct is being

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[132] This holds true even if we compare league punishment to restorative justice. As discussed *supra*, restorative justice has a public aspect to it–community involvement–but it is public on a much smaller scale. It is theoretically critical of the large-scale, professional approach to crime, choosing instead to resolve disputes in an intimate setting with punishment tailored to the offender's and the victim's needs. In contrast, league punishment reaches a broad public; and while there is some emphasis on individual rehabilitation, punishment typically takes the standard forms of fines, suspensions, and terminations. *See supra* note 29.

[133] *See* Ambrose, *supra* note 24, at 1071; Robinson, *supra* note 4, at 1313.

[134] *See, e.g.*, Ambrose, *supra* note 24, at 1074 (stating that criminal misconduct by players is "'detrimental to the integrity of and public confidence in the National Football League'" (quoting NFL PLAYERS ASS'N, *supra* note 25)); *cf.* Ugolini, *supra* note 3, at 42 (observing that the NFL "will ultimately be held responsible, whether in the court of law or in the court of public opinion" when players misbehave).

Some scholarship in this field suggests that league punishment is appropriate because the public criminal law insufficiently punishes professional athletes for their crimes. *See, e.g.*, Moser, *supra* note 21, at 71 (noting that domestic violence cases involving athletes have a 36% conviction rate, while the rate for the general public is at 75%); *cf.* Chamberlain et al., *supra* note 4, at 552 (observing that there is widespread belief that celebrity criminals are more likely to be acquitted or receive a lighter sentence than non-celebrities).

[135] *See* Simmons, *supra* note 98, at 975 (blaming populist politics for increasing criminalization and harsher punishments); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (explaining that expansion of criminal law has much to do with politics and public opinion).

taken seriously—both before and after such misconduct occurs[136]—and that the offender will suffer appropriate consequences.

As we described above, the contractual sources of league punishment often refer to notions such as "integrity," "public confidence," "standards of morality," and "fair play."[137] Athletes are also referred to as "role-models," a status that demands moral rectitude and upstanding behavior.[138] Such rhetoric suggest that something more than simple financial well-being is implicated in the league's policies; accountability to the public includes not only bare preservation of the league for the sake of entertaining fans, but also the projection of a positive moral image of the sport and its participants.[139] Indeed, allowing an allegedly criminal athlete to continue to collect multimillion-dollar paychecks without interruption would fly in the face of commonsense justice and morality (private and public), not to mention constitute a very poor life lesson for watchful children.

Moreover, a league's moral rhetoric often extends beyond the reasons that underlie contractual language. For example, when NFL Commissioner Roger Goodell imposed an indefinite suspension on Michael Vick for dogfighting and gambling, the letter he issued did not limit itself to the various agreements or employment conditions that surely would have sufficed to justify his decision. Commissioner Goodell went further, calling Vick's actions "illegal, . . . cruel and reprehensible," and his association with betting as exposing him to "corrupting influences."[140] In his letter to

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[136] *See, e.g.*, Darin Gantt, *Teams Wary of Troublemakers in Draft*, THE HERALD (S.C.), Apr. 22, 2007, at 1D (reporting new emphasis on background searches for the NFL draft).

[137] *See supra* Part II.A.

[138] *See* Chamberlain et al., *supra* note 4, at 557 (referring to a 1983 case involving three Kansas City Royal baseball players who received a higher-than-normal sentence for attempted cocaine possession); Robinson, *supra* note 4, at 1328 (arguing that professional athletes are sometimes held to higher standards and expected to "conform to the public's image of 'flawless human beings'").

[139] *See Goodell Suspends Pacman, Henry for Multiple Arrests*, ESPN.COM, May 17, 2007, http://sports.espn.go.com/nfl/news/story?id=2832015 (quoting Roger Goodell, NFL Comm'r) ("'We must protect the integrity of the NFL . . . . The highest standards of conduct must be met by everyone in the NFL because it is a privilege to represent the NFL, not a right. These players, and all members of our league, have to make the right choices and decisions in their conduct on a consistent basis.'"); *see also* Robert L. Bard & Lewis Kurlantzick, *Knicks-Heat and the Appropriateness of Sanctions in Sport*, 20 CARDOZO ARTS & ENT. L.J. 507, 512-14 (2002) (describing three sets of rules in the NBA: (1) "rectificatory rules," such as awarding free throws for fouls; (2) rules empowering referees to control the game, such as awarding free throws for technical fouls; and (3) rules designed to preserve the aesthetics or reputation of the game, such as behavior or appearance rules).

[140] *See Vick Suspended Indefinitely by NFL*, ESPN.COM, Aug. 24, 2007, http://sports.espn.go.com/nfl/news/story?id=2990157. Commissioner Goodell went on to write: "I hope that you will be able to learn from this difficult experience and emerge from it

Adam "Pacman" Jones regarding suspension, Commissioner Goodell referred to a "disturbing pattern of behavior."[141] In 2007, along with the fifteen-game suspension that he handed down to Mark Bell of the Toronto Maple Leafs for drunk driving and hit-and-run charges, NHL Commissioner Gary Bettman stated, "'Playing in the National Hockey League is a privilege, and with that privilege comes a corresponding responsibility for exemplary conduct off the ice as well as on it . . . .'"[142] In 2001, when Ruben Patterson was suspended by NBA Commissioner David Stern for five games after pleading guilty to attempted rape, Seattle Sonics team president Wally Walker commented, "The league is sending a message. Much like the NFL, the NBA is holding its players accountable for their off-court actions."[143] The moral underpinnings of these punitive decisions suggest that sports leagues embrace a governance form of organization—which pursues broad social values over narrow, private goals—further reinforcing its public rather than private conceptualization.[144]

If we are correct, and league punishment can be understood, at least in significant part, as enforcing public values, the system raises some serious concerns. The first has to do with process. Although the public is no doubt concerned about the preservation of its moral values, our society also recognizes the importance of ideals such as equality, fairness, and consistency, especially in the context of punishment. Many commentators have noted the absence of any rigorous mechanism to apply these ideals in

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better prepared to act responsibly and to make the kinds of choices that are expected of a conscientious and law abiding citizen." *Id.*

[141] *Pacman Suspended at Least 4 Games for Violating Conduct Policy*, ESPN.COM, Oct. 15, 2008, http://sports.espn.go.com/nfl/news/story?id=3643240. Jerry Jones, the owner of the Dallas Cowboys, expressed the hope that Adam "Pacman" Jones "intensify his approach to getting better with his social conduct." *Id*. Because the suspension was not based on any criminal conviction, but a pattern of misbehavior, some have argued that it was based on the "morals clause" in his contract rather than on any specific violation of the NFL's conduct policy. *See* Rose et al., *supra* note 83, at 142.

[142] *See Maple Leafs' Bell Suspended 15 Games*, CBC SPORTS, Sept. 12, 2007, http://www.cbc.ca/sports/hockey/story/2007/09/12/bell-suspension.html.

[143] *See* Ronald Tillery, *Patterson Sentenced to Jail*, SEATTLE POST-INTELLIGENCER, May 16, 2001, at D1.

[144] Sports leagues even punish for non-criminal, but otherwise immoral, conduct by their players. In 2000, Atlanta Braves pitcher John Rocker was suspended for bigoted statements that he made about minorities in New York City. *See Rocker On: Braves Closer Gets Suspension and Fine Reduced*, CNNSI.COM, Mar. 2, 2000, http://sportsillustrated.cnn.com/baseball/mlb/news/2000/03/01/rocker_suspension_ap/. In 2008, hockey player Sean Avery was suspended and then cut from his team, the Dallas Stars, after referring to an ex-girlfriend as "sloppy seconds." *Sean Avery Cut from Dallas Stars*, USMAGAZINE.COM, Dec. 15, 2008, http://www.usmagazine.com/news/sean-avery-cut-from-dallas-stars.

the league punishment context.[145] The decision to punish, and how much to punish, appears to lie entirely in the hands of the individual commissioner with little oversight as to the integrity of that decision.[146] Without formal procedural protections or punishment guidelines, it is inevitable that league punishment will lack uniformity among commissioners and among leagues.

Perhaps even more fundamentally problematic are the ways in which wayward athletes are identified for punishment. Sports leagues have no independent means of detecting the criminal misconduct of their athletes; they seem to rely on the ever-present media to alert them to such incidents. Media reports of misconduct sometimes lead to public outcry, which one commentator has argued "could well be the most effective tool" in reducing the incidence of athletes' criminal misconduct.[147] Public outcry for punishment no doubt generates more prompt, and probably more severe, response by sports leagues. This kind of accountability to the public exacerbates the problems that are created by a punitive system that lacks procedural protections for offenders.

Moreover, reliance on public outcry tends to reinscribe the cultural limitations that are inherent in any system that reflects popular values. One cannot help but notice how much more outrage there was over Vick's dogfighting incident than over the countless domestic abuse incidents that have plagued professional sports.[148] And while wife-beating is often

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[145] *See* Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17, 28-29 (2002); Bukowski, *supra* note 22, at 112-16; Lockwood, *supra* note 10, at 166; *see also* Sklansky, *supra* note 98, at 1230-33 (explaining that courts have generally held the Fourth, Fifth, and Sixth Amendments to be inapplicable to private police).

[146] *See* Gwen Knapp, *NFL Did What It Had to Do with New Conduct Policy*, S.F. CHRON., Apr. 12, 2007, at D1 (observing that the NFL's conduct policy "licenses [the commissioner] to be equal parts Wyatt Earp and [Justice] Potter ('I know it when I see it') Stewart"); *see also supra* Part II.B (describing the generally high degree of deference by courts and arbitrators to commissioners' punitive decisions).

[147] *See* Moser, *supra* note 21, at 86 (discussing public outcry in the context of deterring domestic abuse).

[148] *See* Tracy Clark-Flory, *Wife Abuse v. Dog Abuse*, SALON.COM, Aug. 17, 2007, http://www.salon.com/mwt/broadsheet/2007/08/17/vick; Sandra Kobrin, *Beat a Woman? Play On; Beat a Dog? You're Gone*, WOMEN'S ENEWS, Aug. 21, 2007, http://www.womensenews.org/article.cfm?aid=3285.

Carrie Moser has argued that the public does express disapproval of domestic abuse, referring to fan reaction against then New Jersey Nets player, Jason Kidd, during the 2003 playoff series against the Boston Celtics (Kidd committed the domestic violence as a member of the Phoenix Suns in 2001). *See* Moser, *supra* note 21, at 74-75. In that case, however, the critical fans appear to have been Celtics supporters, making it questionable whether the reaction was genuine moral disapproval or merely fan partisanship. *See also* Knapp, *supra* note 146 (reporting that despite public clamor, the NFL did not become involved in the domestic abuse case against Colts cornerback Steve Muhammad until he was convicted).

ignored or treated lightly by sports leagues, Vick has been suspended indefinitely (with the possibility of banishment) for dog-beating.[149] Where there is no systematic way to address the criminal misconduct of offenders, and public outrage is the impetus for punishment, these types of inconsistent and normatively problematic results are likely to continue to occur.

VI. CONCLUSION

Punishment by professional sports leagues cannot be cleanly defined as either purely private or public in nature. Nor can the incentives and rationales for such discipline be understood solely through one or the other lens. Rather, punishment in professional sports leagues represents a hybrid form of criminal punishment that does not fit neatly into any existing paradigm. Such uncertainty raises serious concerns about the appropriateness of league punishment, not just in terms of consistency and proportionality, but also of its social function and justification.

In this Essay, we have sought to launch a discussion about league punishment that situates it within criminal law scholarship's recent interest in private punishment as well as its long-standing struggle with theories of public punishment. We believe that the tensions and potential pitfalls of league punishment warrant further reflection by sports leagues to better define and structure their approaches to punishment.

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[149] *See* Mike Bianchi, *Ignoring Domestic Abuse Is the Shame of the Sports World*, ORLANDO SENTINEL, Aug. 5, 2007, at C1.