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Three Strikes, Yet They Keep on Swinging: Athletes and Domestic Violence

**Victoria Lucido*

I. Introduction

“It’s going to be a lot harder for us to get out of trouble now. Three years ago, you smacked a girl around and people maybe said she asked for it. Now whether she asked for it or not, they’re going to haul you off.”¹ – Bennie Blades, Safety, Detroit Lions

Domestic Violence, generally, is defined as a pattern of abusive behavior in a relationship that is used by one partner to gain or maintain power and control over another intimate partner.² Power and control techniques include, but are not limited to, using coercion and threats, intimidation, and isolation.³ An abuser can use economic abuse as well as emotional abuse, to gain control of his partner.⁴ Generally, domestic abuse exists when the two parties are related by blood, are married, or live within the same household.⁵

Some preliminary statistics to consider, according to the American Bar Association’s Commission on Domestic Violence, include:

- One in four women in the United States will likely experience domestic violence during her lifetime.
- Women account for 85% of the victims of domestic violence.
- Young women, 16-24 years old, experience the highest rates of domestic violence
- The number one killer of African-American women ages 15-34 is homicide at the hands of a current or former intimate partner.
- Each year, an estimated 3.3 million children are exposed to violence by family members against their mothers or female caretakers.⁶

The Supreme Court of Mississippi in 1824, held in *Bradley v. State* that husbands have the right to use “moderate chastisement” against their wives because a husband was held liable for his wife’s “misdeeds.”⁷ *Bradley* was overruled in *Harris v. State* in 1894.⁸ Since then, state

legislatures and the federal government have taken strides towards protecting women from domestic abuse. However, the question still remains, is this enough?

Congress passed the Violence Against Women Act of 2000 (“VAWA 2000”) as part of the Victims of Trafficking and Violence Protection Act.⁹ Through this act, victims of domestic violence can seek different kinds of protective orders. Protective orders are about restraining the batterer and protecting the partner who is the target of abuse.¹⁰ Other protective provisions include “stay away” and “no-contact” orders which require the abusive partner to stay away from his victim’s home, place of work, or other neighborhood locations, or a fixed distance from her at all times.¹¹ Before the 1970’s, battered women had to initiate divorce proceedings before requesting an order, and until 1976, only two states had restraining order legislation specifically designed for battered women. By 1980, forty-five states had implemented legislation, which offered relief to victims of partner abuse.¹²

Though domestic violence is an epidemic that needs attention from society as a whole, the analysis that follows will examine domestic violence through the lens of professional athletes and will demonstrate that these athletes are not being held accountable nearly as often as they should be for their heinous acts of abuse. Part II highlights individual case studies of professional athletes involved in public domestic violence disputes. Part III examines the reasons why domestic violence is not taken seriously among athletes and why it should be. Part IV offers legal remedies to the problem of athletes and domestic violence, while Part V proposes how to implement and strengthen previous attempts of the legal remedies.

II. Case Studies

Frequently victims of domestic violence do not want to proceed with charges against their abusers because they do not want their abusers to suffer severe consequences of the arrest, such as

loss of job or a damaged reputation.¹³ While 35% of emergency-room visits by women are for symptoms that may be the result of spousal abuse, as few as 5% of these victims are ever so categorized.¹⁴ An inordinate number of American women seem to trip and fall into hospitals over things that go bump in the night. “For every story printed, far more remain untold.”¹⁵

This can be especially true in the case of professional athletes. It can be assumed that victims do not want to call the police and have their abusers arrested because they do not want their stories to end up on the 6 o’clock news or on the front page of a gossip magazine. The media began following domestic violence cases more closely after the murder of Nicole Brown Simpson in 1994.¹⁶ Thereafter, there was a growing sense among the public and prosecutors that it was preferable to intervene early in domestic violence cases, rather than wait for a homicide to occur. Federal legislation, such as VAWA, mentioned earlier, encouraged more aggressive prosecutions. “In no other arena, from academia to entertainment, from politics to industry- have more varied men been exposed as batterers than in the relatively small, if highly visible, world of sports.”¹⁷

Biographer Jose Torres quoted Mike Tyson as having said that the best punch he has ever thrown was aimed at ex wife Robin Givens. Tyson also proclaimed “I like to hurt women when I make love to them...I like to hear them scream with pain, to see them bleed...it gives me pleasure.”¹⁸

On July 1, 1999, NFL Hall-of-Famer Jim Brown, then 61 years old, was charged with terrorist threat and vandalism after an argument with his wife, Monique Brown, then 23 years old.¹⁹ According to the testimony of responding police officers, Monique called 911, and reported that her husband had a gun, had vandalized her car with a shovel and had threatened to kill her, after the couple argued about Jim Brown’s alleged infidelity.²⁰ Several police officers responded to the

call. Upon the arrest of Jim Brown, the officers seized the loaded gun. Next to the gun were two knives and a box of ammunition.²¹

The responding police officers subsequently testified that after Jim was arrested, Monique went to the police station for further questioning, where she disclosed that there had been a history of domestic violence in the relationship in the past. The officer also stated on the record that Monique had told the officers that she was afraid for her safety, which is why she placed the 911 call.²² However, once Monique took the stand, her story changed dramatically. Monique stated that she had instigated the fight, and that she was never afraid. She also testified that, in fact, there had never been any incidents of domestic violence.²³

Interestingly enough, Monique Brown stated on “Larry King Live” on August 14, 1999, that she “gave Jim permission to strike her car.” She also stated on the television show that one of the reasons she instigated the argument was due to premenstrual syndrome (PMS).²⁴

After a jury trial lasting three weeks, the jury acquitted Brown of the terrorist threat charge, but convicted him of vandalism. Brown was initially sentenced to three years’ summary probation under various terms and conditions, including completing a 12-month batterer’s counseling program and paying \$1,500 to a battered woman’s shelter. Brown, however, rejected the terms of probation, and was sentenced to six months in jail and a restitution fine of \$100. Brown’s driver’s license was also suspended for one year.²⁵

One point worth mentioning is the fact that both on “Larry King Live” and in her court testimony, Monique Brown minimized the incident and placed a great deal of blame on herself.²⁶ Also noteworthy, is the fact that during this Larry King interview, Jim admitted to other acts of domestic violence during previous relationships. Additionally, Jim Brown would rather spend time in jail, than admit to having a problem with anger and violence. There is no doubt that some

act of violence occurred that day, as photographs of the smashed car windows were admitted in evidence.²⁷ Jim Brown, in his version of the facts, stated that he smashed out the windows in the car immediately after a domestic argument because he was “frustrated.”²⁸

Although Jim ultimately served prison time, it was on his own accord, because he refused to accept the plea deal requiring him to recognize his problem with domestic violence. In 2002, film director Spike Lee released the film “Jim Brown: All-American; a retrospective on Brown's professional career and personal life.” On November 4, 2010, Jim was chosen by NFL Network as the second greatest player in NFL history. Today, Jim Brown is not remembered as a batterer; he is remembered as a hero.

In August 2010, Sports Illustrated writer, Jeff Benedict, wrote an article called “A Double Standard When it comes to Athletes and Violence.”²⁹ In this article, Benedict describes three domestic violence disputes that took place among professional athletes in *that week alone*. Indiana Pacers rookie Lance Stephenson, 19, was accused of assaulting his girlfriend by kicking her down the stairs, then slamming her head into a step. In addition, then- Mets closer Francisco Rodriguez (K-Rod) was arrested outside the team's family lounge at Citi Field and charged with assaulting Carlos Pena, the 53-year-old grandfather of his infant twins. The Mets did not punish “K-Rod,” though he was ultimately traded to another team. The same day, former Carolina Panthers linebacker Mark Fields was arrested after he allegedly beat the mother of his 6-year-old daughter outside a childcare facility.³⁰

In his article, Benedict states that “it pays to be an athlete” when it comes to domestic violence. He argues that athletes do not fear consequences, as exhibited by their behavior.³¹ Rodriguez and Fields both committed acts of domestic violence in public places, whereas domestic violence typically occurs behind closed doors. Benedict argues that leagues are afraid to

tackle domestic violence with a degree of seriousness, as exhibited by Bill Parcells, General Manager of the Miami Dolphins, when he failed to suspend player Phillip Merling after he was accused of striking his pregnant girlfriend and barricading her in a bathroom.³²

Jason Kidd, while playing for the Phoenix Suns, was involved in a domestic dispute with his wife in 2001. Kidd's wife told the police that he hit her after an argument about their two-year-old son. Kidd pleaded guilty to spousal abuse, was fined \$200 and ordered to take anger management training. Kidd's off court behavior did not result in direct punishment by his team, though he was later traded to a different team. The couple divorced several years later when Jason filed for divorce in 2007, accusing Joumana Kidd of "extreme cruelty."³³

Other professional athletes who have been tied to domestic violence claims include Brett Meyers, David Justice, O.J. Simpson, Barry Bonds, Jose Canseco, Darryl Strawberry, Dante Bichette and Albert Belle, to name a few.

III. Reasons Why Domestic Violence is Not Taken Seriously, and Why it Should Be

Are athletes more likely to abuse? The information is non-conclusive either way, however a study at two universities, Northeastern and University of Massachusetts, reviewed 107 sexual assault cases reported at 30 Division 1 universities between 1991 and 1993.³⁴ Male college student-athletes were responsible for a significantly higher percentage of the sexual assaults as compared with the rest of the male student population. While male student athletes at ten of those schools made up only 3.3% of the total male population, they were responsible for 19.0% of the assaults.³⁵

It is difficult to gather data on player arrests and corresponding league discipline because the leagues do not publish this data and most of the studies are dated. However, from the data that has been gathered, it appears there are startlingly high arrest rates among NBA players. A records

check on forty two percent of the league's players in the 2001-2002 season revealed that forty percent of them had either been arrested or recommended by police for indictment for a serious crime.³⁶ A similar study six years earlier showed an arrest rate of twenty-one percent for NFL players.³⁷ A player's status as a professional athlete will likely affect the criminal sanctions imposed, such that preferential treatment "may encourage them to exercise less self-control and behave more violently towards woman than would other men."³⁸

Some critics argue athletes are predisposed to commit acts of domestic violence and sexual assault because they are trained to use violence and intimidation for a psychological edge during their games and because sports create a "macho culture" which equates masculinity with violence.³⁹

In a 1992 essay entitled "Male Athletes and Sexual Assault," Merrill Melnick, an associate professor at the State University of New York, wrote about athletes and this macho "sub-culture." He posited that "aggression on the field, sexist language and attitudes used in the locker room and an inordinate need to prove one's maleness can combine in complex ways to predispose some male athletes towards off-the-field hostility."⁴⁰ The pursuit of dominance lies at the heart of all athletic contests, and it happens to be the animating force behind the men who batter their women. Athletes are supposed to be brave, tough, dominant and aggressive. Part of this attitude is not to act like a woman, and not to respect them either.⁴¹

Another theory behind the propensity of athletes to commit acts of violence against women more often than non-athletes is because it is difficult for athletes to "turn off" their aggression after the conclusion of the game.⁴² For example, an incident occurred between Chicago Bulls forward Scotty Pippen and his fiancé Yvette DeLeone, where he grabbed her arm and shoved her into a car in the garage in the home that they shared, the day after Chicago was

eliminated from the playoffs.⁴³ Commentators also believe that athletes may feel that “the game” itself is more important than women or outside relationships. Jimmy Johnson admitted on television that he abandoned his wife of 26 years when he was coaching the Dallas Cowboys because “his commitment to the Cowboys was stronger.”⁴⁴ Even particular league rules may convey to athletes that “the game” is more important than their wives, as demonstrated by the \$125,000 fine Houston Oiler’s David Williams received when he missed a game to aid his wife in childbirth. However the fine was revoked following a strong public outcry.⁴⁵

Another way athletes have celebrated their manhood is through degrading women, making women feel that the world of sports is an unreceptive environment for them.

Back in 1978, on the day that the New York Yankees first reluctantly allowed female reporters into their clubhouse, the women who stepped into the hallowed room were greeted by a large cake sitting on a table. That pastry, designed by a Brooklyn baker, commissioned by a player, said all you need to know about the world of the locker room: The two-foot-long cake was in the form of a penis. Chocolate shavings, mimicking public hairs, were sprinkled around the part shaped like testicles. It was an unforgettably foul expression of the group contempt in which the intruders to the male bastion were held, and its message was clearer and more powerful than any homily ever hung on a locker room wall: Women Not Welcome Here-Hostile Territory.⁴⁶

In a similar instance, a high school football coach in Los Angeles painted the picture of a vagina on a tackling dummy to improve his players’ performance.⁴⁷ Further, Bob Knight, Indiana basketball coach from 1971-2000, once put a sanitary napkin in the locker of a player whose maleness he was challenging. Even more startling than his behavior is a comment Knight made during a national television interview in 1998. Knight told Connie Chung that “If rape is inevitable, relax and enjoy it.”⁴⁸ Knight is among the eight members of the Class of 2011 of the National Collegiate Basketball Hall of Fame.⁴⁹ Though these are somewhat dated episodes, it is the foundation of the sexist ideals found among professional sports.

There are arguments refuting the theory that athletes are more prone to commit acts of domestic violence and sexual assault including the fact that it may seem this way because athletes have more opportunities to do so because they tend to be around more women, are often traveling, and can be the target of unfounded claims. It is possible that athletes may be the targets of false claims because of their deep pockets and their accusers wish to gain their “fifteen minutes of fame.”⁵⁰ However, non-athletes are also falsely accused of sexual assault.

Though the evidence is inclusive as to whether or not athletes abuse their wives or girlfriends more often than non-athletes, there is evidence that athletes are not prosecuted by the criminal justice system as harshly or consistently as their general public counterparts.⁵¹ This seemingly preferential treatment from disciplinary authorities may help encourage athletes to exercise less self-control. A comprehensive study by Jeff Benedict, as former director of research at the Center for Sport in Society, found that 172 athletes were arrested for sex felonies between 1986 and 1995, yet only thirty-one percent were successfully prosecuted. The study also concluded that 150 athletes had domestic violence criminal complaints filed against them between 1990 and 1996, yet only twenty-eight resulted in convictions and the majority of cases were not prosecuted. This same study found that domestic violence cases involving athletes resulted in a 36% conviction rate, while the general public had a 75% conviction rate.⁵²

“Often police work harder collecting autographs than evidence.”⁵³ The media and fans, including those on the jury, tend to side with the “icon” over the victim. Whether stopped for a speeding ticket or arrested for battering a woman, the athlete encounters a legal system in which the scales are tipped in his favor. One particularly denotative event occurred when MLB slugger Barry Bonds appeared before a judge in a civil case involving domestic violence allegations. The

judge found in favor of Bonds and then asked for the player's autograph. "No part of our culture seems entirely immune from the awe and fanfare of professional sports."⁵⁴

Benedict suggests that juries may also be partial to athletes, as was demonstrated earlier in the Jim Brown case, where the jury only found him liable for vandalism. Similar to Jim Brown is the case of former Colorado Rocky pitcher, Marcus Moore, who was charged with assaulting and raping his girlfriend.⁵⁵ By the time the alleged assault went to trial, Moore had been sent down to pitch for the Rockies' AAA affiliate minor league team, the Colorado Springs Sky Sox. The jury acquitted Moore of the rape charge because they felt that him being traded down to the minor leagues "was punishment enough."⁵⁶

A common jury misconception is the fact that women "keep coming back for more." The jury, who is often times not educated in the area of battered women, ask themselves "why didn't she just leave?" when the answer is not so simple. This reinforces the archaic idea that "she asked for it." Juries are asking the question "why doesn't she leave" instead of "why doesn't he stop beating her?"⁵⁷

Another reason athletes are not prosecuted as often in cases of domestic violence is because charges are frequently dropped and do not result in conviction. Victims commonly back away from allegations because they fear their abuses or do not want to disrupt their families.⁵⁸

As for punishment by the leagues, it has been a longstanding theory that domestic violence is a private matter that does not belong in the public arena. One study, albeit dated, indicated that out of 141 athletes reported to the police for violence against women between 1989 and 1994, league officials disciplined only one. However, this number has increased since 1994.⁵⁹ Traditionally leagues have not addressed domestic violence because of the presence of the criminal justice system. The leagues did not want to be "playing police," and believed domestic

violence to be a societal problem with laws already in place that govern it. Another argument against league punishment is that violence against women does not affect the game itself the way that drug use or gambling can cause an unfair outcome and ruin the competitive balance of the game. “Gambling and drug use reduce the public’s belief in the honesty and fairness of the athletic contest.”⁶⁰

A concern among athletes themselves is the governmental interest. After a domestic violence dispute between former Houston Oilers quarterback Warren Moon and his wife Felicia, Moon’s agent, Leigh Steinberg said, “He has faced his own conduct. He has admitted it privately and publicly...what societal value is protected by arresting Warren Moon?”⁶¹ The governmental as well as league interest in prosecuting athlete abusers is the fact that these men are regarded as role models and heroes. Athletes, most notably NBA greats Dennis Rodman and Charles Barkley, often argue that they do not wish to be “role models.”⁶² The answer to these athletes is simple, too bad. “Like it or not... their unique place in society requires a unique response.” Too many of these “heroes” have walked away from domestic violence incidents without a mark on their records or damage to their reputation. Athletes are human and they make human mistakes, but too often they are not held to “human” standards but rather “superhuman” ones.⁶³ This standard includes acceptance or indifference by the leagues, teams, coaches, other players, the media, and fans, which allows this epidemic of violence to fester and proliferate.

The criminal justice system as well as the leagues should enforce domestic violence laws because discipline of athlete abusers may be necessary to protect the public image of the game. Misconduct by the players can be detrimental to the league’s success, which can translate to a financial loss. Further, discipline of athlete-abusers is desirable as a matter of public policy.

“Although awareness is growing, domestic assaults continue to be marginalized as ‘family disputes’ and therefore treated as if they were less reprehensible than other crimes.”⁶⁴

IV. League and Team Intervention

The primary disciplinary authorities in professional sports are the sports leagues and teams. The leagues being considered are the National Football League (“NFL”), The National Basketball Association (“NBA”), and Major League Baseball (“MLB”). Currently the only major professional sports league that has a written formal policy for disciplining athletes accused or convicted of domestic violence or sexual assault is the NFL.⁶⁵ However, it is clear from past league action that certain off-field conduct is a consideration of team and league evaluation and discipline of players.⁶⁶ Leagues have condemned off-field conduct including drug use and gambling. However, domestic violence has been largely ignored.⁶⁷ After O.J. Simpson was accused of domestic violence (before the murder trial), he was not punished by the league or his team, and in fact retained his endorsement deals with Hertz and NBC Sports.⁶⁸ Though after the murders, the NFL sent counselors to twenty-eight team training camps to discuss domestic violence with players. Then-Commissioner Paul Tagliabue adopted the Violent Crime Policy in 1997, which was further revised in 2000, becoming a version of the current Personal Conduct Policy, which is the only policy of its kind among major U.S. sports.⁶⁹

It is in the league’s best interest to be proactive about domestic violence as well as punish domestic abusers. While an argument for vicariously liability would probably fail because domestic abuse does not typically take place within the scope of employment, it is still in the league’s best interest to keep their players out of trouble and to keep focus on the task at hand; which is to win the game and to entertain the public.

The leagues and teams have taken the role of disciplinarian in instances of on-field violence. Off-field criminal conduct should be treated no differently. The rationale for disciplining players who are violent during a game or contest is that they sully the image of game, undermine its integrity, and pose a risk to others. Domestic violence and sexual assault arguably have precisely the same effects on the game.⁷⁰

A. Collective Bargaining Agreements

Collective bargaining is a process by which a group of workers of an industry bargain or negotiate, as a collective unit with the management, to determine working conditions, benefits, and salaries of the industry.⁷¹ The collective bargaining agreement (CBA) is set up to allow the management and labor employees, and in this case players, to co-exist peacefully. The National Labor Relations Act (NLRA) governs collective bargaining. The National Labor Relations Board, (NLRB) enforces the law by policing unfair labor practices committed by either labor or management in the scope of bargaining.⁷² The three principal participants in collective bargaining within the arena of sports are government, the management, and labor. Other participants include the league commissioner and agents, as well as mediators and arbitrators. Collective bargaining in professional sports focuses on two primary areas; first, distribution, as it relates to the division of revenue between owners and players, and second, the desire of the parties to assure competitive balance and the general health of the league and its market opportunity.⁷³

The scope of bargaining is defined in the NLRA as including wages, hours and working conditions. These topics are considered by the NLRB to be mandatory subjects of bargaining that must be negotiated in good faith.⁷⁴ Other contents of the agreement include specification of contract length, compensation, rules for utilization of labor, individual job rights, rights of union and management in the bargaining relationship, methods of enforcing, interpreting and

administering the agreement, and discipline. A major concern in sports has centered on discipline for aberrant behavior such as violence, gambling, and drug abuse.⁷⁵

Under antitrust and labor law, two types of labor exemptions exist, statutory and nonstatutory. The source of the labor exemption is found in the Clayton Act, 15 U.S.C. §§ 17, 29, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113.⁷⁶ The statutory exemption does not extend to agreements or actions between unions and non-labor groups, including employers. The nonstatutory exemption exempts certain anticompetitive union-employer activities from antitrust liability.⁷⁷ A union-employer agreement must meet three requirements to qualify for the exemption. First, the restraint of trade primarily affects only the parties to the collective bargaining agreement, second, the agreement concerns a mandatory subject of bargaining, and third, the agreement is a product of bona fide arm's length bargaining.⁷⁸

CBA agreements and employment contracts require players to agree to abide by the rules that their teams or leagues may adopt. One issue that arises is “whether the player has given his consent to be bound by the particular disciplinary rules.”⁷⁹ One area in which all of the leagues have implemented disciplinary rules is that of drug use, done primarily through collective bargaining.⁸⁰ For example, the Substance Abuse Policy adopted by the NFL in 1990 suggested that it was important to ban drug use by athletes because of the message it sends to young people who may be tempted to use drugs.⁸¹ Also the ban would protect the integrity of the public confidence in the game. Additionally, the MLB drug policy, discussed *infra*, has been collectively bargained for.

Athletes who abuse women also send the wrong message to youth, and the public in general. Specific language and rules pertaining to violence against women should be incorporated into the collective bargaining agreement of each league. This would entail negotiating with the union to

reach a mutually agreeable policy. If a domestic violence policy was the subject of collective bargaining and mutually agreed upon, it would be less susceptible to aggrieved players' claims if the players, through their union, were involved in constructing the policy. This approach also seems attractive because it would give all athletes, the majority of whom are non-violent, the opportunity to participate in combating the problem and make a statement against this violence. It may be inferred that the players who disagree with this type of language being incorporated into the CBA may not want to voice their objections in front of their teammates. How will these players look if they wish to "reserve the right to beat their wives?" It would look incredibly grim for the players who refused to add this type of language; are they then suggesting that they reserve the right to be able to beat their wives and girlfriends without receiving punishment from the leagues?

B. Uniform Player Contracts and Individual Player Contracts

The power given to individual teams to take disciplinary actions against athletes for domestic violence and sexual assault arises from employment contracts with the players.⁸² However, teams seldom discipline a player unless his crime was particularly egregious. For example, Tim Barnett was disciplined by the Kansas City Chiefs only after he was arrested on a third sexual assault charge, one that involved a fourteen-year-old girl.⁸³ Teams can address the issue of domestic violence directly in the players' employment contracts through the use of the morals clause.

A morals clause is a contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behavior or conduct that may negatively impact his or her public image and, by associate, the public image of the contracting company.⁸⁴

In 1998, Ellen E. Dabbs, author of *Intentional Fouls: Athletes and Violence Against Women*, proffered that teams should move towards including morals clauses in all players' employment contracts, similar to those in sportscasters' contracts.⁸⁵ She then stated, "Critics suggest that it is unlikely that athletes' contracts will ever include morals clauses because, unlike sportscasters, athletes are not replaceable."⁸⁶ Though Dabbs' predictions were wrong and player contracts do indeed include morals clauses today, the question to be answered is whether or not these player clauses are enforced as harshly as broadcasters.

In January 2011, ESPN fired veteran broadcaster Ron Franklin for calling a female colleague "sweet baby." Franklin had worked at ESPN for nearly 24 years, primarily as a play-by-play announcer on college football and basketball games.⁸⁷ Similarly in May 2011, Toronto broadcaster Damian Goddard was fired after posting on Twitter that he was anti-gay marriage. Goddard wrote, "I completely and whole-heartedly support Todd Reynolds and his support for the traditional and TRUE meaning of marriage."⁸⁸ Dabbs was right, however, by stating that sportscasters are replaceable. There are many men who can look nice in a suit and speak eloquently about sports. However, how many Kobe Bryant's are out there?

The NBA is vested with the power to punish players through its constitution and a "good moral character" clause of the standard player contract.⁸⁹ Players who do not conform their personal conduct to standards of good morals and citizenship can be sanctioned for their actions in an effort to protect the best interests of the game. The NFL and MLB each have similar clauses.⁹⁰

Some individual MLB teams have taken a stance against domestic violence, for example the Seattle Mariners developed the "Refuse to Abuse" program implementing a strict one-strike policy against violent players.⁹¹ However, policies remain inconsistent from team to team. Since

the league itself has not adopted a policy to address such conduct, it is not surprising that the individual teams do not take it upon themselves to implement such policies. There must be uniformity. “MLB Commissioner Bud Selig has not taken a stance on domestic violence and the integrity of his league has been undermined. Individual teams do not have a profit-motive to discipline violent players when they know that those players will simply find homes elsewhere, with teams that do not have strict off-field conduct policies.”⁹²

Morals clauses allow teams to discipline players for off-the-field conduct that could damage the goodwill or reputation of the team. Because teams are driven by economic incentive to keep their best players actively participating in competition, teams do not uniformly use this power.

C. Commissioner’s Unilateral Rule Making Authority

The commissioners or presidents of the various professional sports leagues notoriously possess dominant powers in governing league matters. The creation of the commissioner was the result of the ruling in *American League Baseball Club of New York v. Johnson*. MLB created the commissioner position as an autonomous entity, separate from the league, with authority to discipline players for off the field conduct.⁹³ *American League Baseball Club* held that the president was authorized to enforce the playing rules of the game and could suspend a player for violation of those rules, but the president did not have the authority to discipline a player for conduct committed off the field.⁹⁴

The source of the commissioner’s powers is the league constitution and bylaws.⁹⁵ Thus, a dispute concerning the scope of a commissioner’s authority requires construction of the intent of league members in drafting and adopting the league constitution. The collective bargaining agreement between management and labor may modify, limit, or otherwise affect the power of the commissioner as established by the league constitution.⁹⁶ For example, commissioner decisions in

player disciplinary matters are usually subject to review through arbitration.⁹⁷ The constitutions and bylaws of most professional sports leagues broadly authorize the commissioners to take discretionary action in many areas, particularly disciplinary matters involving players, clubs, front office personnel, owners, and others.⁹⁸ League commissioners may use their authority to deal with individual instances of sexual assault or domestic violence, but there are few examples of them doing so. For example, former NFL Commissioner Paul Tagliabue disciplined only one player for violence against a woman; former Eagles offensive tackle Kevin Allen, who was denied reentry into the NFL in 1990 after serving a 33-month prison term for rape.⁹⁹

Commissioners are also granted an independent disciplinary authority. “Because players agree to abide by league bylaws, constitutions, and collective bargaining agreements, the commissioner generally has the authority to investigate and punish players for “conduct detrimental to the integrity of, or public confidence, in the game.”¹⁰⁰ In *Milwaukee American Ass’n. v. Landis*, the commissioner was granted an almost unlimited discretion in the determination of whether or not a certain set of facts creates a situation detrimental to the national game of baseball.

Under the Major League agreement the office of commissioner was created, and his functions were defined as follows: "(a) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball; with authority to summon persons and to order the production of documents; and, in case of refusal to appear or produce, to impose such penalties as are hereinafter provided. "(b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be."¹⁰¹

The commissioner could find that acts of domestic violence are acts that are detrimental to the best interests of the game, which would result from impairment of public confidence. There should be public support for penalizing a player who was found to have committed an act of

domestic violence or sexual assault by a commissioner acting under his independent disciplinary authority.

The NFL, NBA, and MLB all have provisions in their respective constitutions that allows a commissioner to act in the best interests of the game.¹⁰² The NFL Constitution allows the commissioner to bar anyone from professional football if he or she is guilty of conduct detrimental to the best interests of football.¹⁰³ The NBA Constitution grants the commissioner power to fine and suspend a player on similar grounds. MLB commissioners have historically had broad disciplinary powers, which have been used to protect the sanctity of the game while preserving a “competitive balance in baseball.”¹⁰⁴ Adjudication of the “detrimental” conduct is not necessarily a requirement for commissioners to exercise their independent disciplinary authority.¹⁰⁵

The MLB’s commissioner has expansive authority to take disciplinary action that is detrimental to the best interests of the game.¹⁰⁶ “The uniform player contract (UPC) incorporated by reference to the Basic Agreement (MLB’s collective bargaining agreement (CBA)) in Article III, pledges players to ‘abide by and comply with all provisions of the Major League Constitution.’”¹⁰⁷ These broad powers have been constrained by the implementation of the impartial arbitrator who will use “just cause” as the standard of review. Players can challenge a commissioner’s decision to sanction him based on the fact that the commissioner was acting arbitrarily or fraudulently. However, this independent arbitrator can somewhat undermine the authority of the commissioner.¹⁰⁸ For example, in an arbitration dealing with Los Angeles Dodgers relief pitcher Steve Howe, Arbitrator George Nicolau reduced Howe’s sentence from banishment from the sport to a one-year suspension, after Howe’s seventh incident of illegal drug

use during the span of his twelve-year career.¹⁰⁹ The grievance procedure routinely undermines the authority that the commissioner and teams have in disciplining their players.

Traditionally the courts have granted the commissioner “almost unlimited discretion in the determination of whether or not a certain set of facts creates a situation detrimental to the national game of baseball.”¹¹⁰ In *Charles O. Finley & Co. v. Kuhn*, the court said, “While it is true that professional baseball selected as its first Commissioner a federal judge,¹¹¹ it intended only him and not the judiciary as a whole to be its umpire and governor.” This broad discretion granted to the commissioner from the courts can be extended to disciplinary actions.

The NBA CBA includes sentencing guidelines regarding off-court conduct when a player is convicted of a violent felony.¹¹² This includes a plea of guilty, no contest, or nolo contendere. “The NBA, for a minimum of ten games, shall immediately suspend the player.”¹¹³ Here, the main difference from the NFL Personal Conduct Policy, discussed *infra*, is that a player must be convicted, not just accused. Sexual assault and domestic violence are specifically enumerated as examples of this violent conduct. Also, “When the NBA and the Players Association agree that there is reasonable cause to believe that a player has engaged in any type of off-court violent conduct, the player will be required to undergo a clinical evaluation and, if deemed necessary by such expert, appropriate counseling.”¹¹⁴ While this may prove helpful, this is not discipline.

The NBA has seen similar impingements on the authority of the commissioner through the independent arbitrator.¹¹⁵ The independent arbitrator can decide if a punishment is too severe. For example, Latrell Sprewell of the Golden State Warriors had his contract terminated with the team and was given a one-year unpaid suspension from Commissioner Stern after threatening to kill and strangling his coach for ten to fifteen seconds. Arbitrator John Feerick concluded that

“fairness dictated that the sentence was too severe” because he had been punished by both his team and the league, and reduced Sprewell’s suspension to sixty-eight games.¹¹⁶

NBA Commissioner David Stern has used his best interests powers to discipline players for conduct detrimental to the sports, even if the conduct occurs off the court. The CBA now includes provisions regarding team and league discipline for unlawful violence and violent misconduct that occurs off-court. Article VI, Section 8(a) specifically identifies sexual assault and domestic violence as instances of punishable misconduct. Teams and leagues have undertaken some direct punishment in several cases.¹¹⁷ Metta World Peace, formerly known as Ron Artest, was suspended for 7 games after he pleaded no contest to infliction of injury on his wife, Kimsha Artest. He was also sentenced to one hundred hours of community service and ordered to participate in a ten-day work project.¹¹⁸

However in the NFL, according to the NFL CBA, any action taken against a player for conduct detrimental to the integrity of the game may only be appealed to the commissioner. Hence, there is no independent arbitrator to possibly undermine the commissioner’s disciplinary action for off-field conduct. Therefore, the NFL commissioner has the most authority in disciplining players for their off-field conduct.¹¹⁹

MLB and NBA players who are unhappy with disciplinary rules by the commissioner can appeal to an independent arbitrator, or players can file antitrust suits against the league in federal court. However these actions have not been very successful because of the non-statutory labor exemption that has emerged and has been used by management to avert antitrust claims.¹²⁰

Note, baseball enjoys a unique exemption from antitrust laws because the sport is local in nature and therefore not subject to Congressional regulation under the interstate commerce clause.¹²¹

1. NFL Personal Conduct Policy as Compared to

The NFL's controlling documents, including the CBA, the League's Constitution and Bylaws, and the NFL's Uniform Player Contract, provide the foundations for the commissioner's authority to discipline players for misconduct occurring off the field. All of these documents authorize the commissioner to take disciplinary action whenever a player's conduct is found to be "detrimental to the integrity of, or public confidence in, the game of professional football."¹²² The Uniform Player Contract in the CBA require players to contractually agree that the commissioner has the right to discipline a player if the player is guilty of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.¹²³ The major difference between the Personal Conduct Policy and the previous Violent Crime Policy from 1997 is the former does not require a commissioner to wait until the criminal justice system has disposed of a matter.¹²⁴ The policy requires a player to act in "a way that is responsible, promotes values upon which the League is based, and is lawful."

The policy states:

"It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime."¹²⁵

Domestic violence is specifically listed as a crime for which discipline may be imposed, as is "conduct that imposes inherent danger to the safety and well being of another person; and

conduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”¹²⁶

Prior to 1997, no NFL commissioner had disciplined a convicted domestic abuser even though fifty-six current and former NFL players were reported for violent behavior toward women between January 1989 and November 1994. The policy enables the league to take action and thereby reduces erratic and inconsistent punishments, like those found in baseball. The fact that commissioner decisions may not be appealed to an impartial arbitrator also enables the system to run efficiently and prevents the commissioner’s authority from being undermined.¹²⁷

The NFL’s Personal Conduct Policy in 2000 was largely prompted by domestic violence crimes committed by football players. The policy originally allowed the commissioner to take disciplinary action on a player charged with any violent crime (felony or misdemeanor) and it required the player to go to counseling and participate in clinical evaluations. The policy also required the commissioner to wait until the criminal justice system had concluded its process before imposing punishment, precluding immediate action. In the first two years, league officials reported that the number of player arrests for violent crimes dropped from 38 players in 1997 to 26 players in 1999.¹²⁸

Specific acts requiring disciplinary measures include the use or threat of violence, domestic violence and other forms of partner abuse, and sex offenses, in addition to other criminal offenses and substance abuse violations.

The current NFL Personal Conduct Policy allows the NFL to impose “longer suspensions and larger fines.”¹²⁹ Ben Roethlisberger’s suspension in 2010 (for the first four games of the 2010 season, reduced originally from six games) was not imposed on the basis of a conviction, criminal charges or even an arrest, but instead, was imposed on the basis of a victim’s allegation of sexual

assault. Due to insufficient evidence, prosecutors determined the allegations could not be proven beyond a reasonable doubt. However, the NFL decided to discipline Roethlisberger under the League's Personal Conduct Policy because this particular incident with a 20-year-old college student was part of a larger pattern of his conduct with women.¹³⁰

“The League's Personal Conduct Policy does not require the NFL's commissioner to prove that a player committed misconduct under either the criminal standard of ‘beyond a reasonable doubt’ or even the lesser civil burden of ‘by a preponderance of the evidence.’ Rather, under the NFL's Personal Conduct Policy, discipline may be imposed whenever a player's misconduct is found to be ‘detrimental to the integrity’ of the League.”

The determination as to whether or not conduct is considered “detrimental” to the League is left to the commissioner's discretion.

In 2004 Tampa Bay Buccaneers running back Michael Pittman was suspended for three games after forcefully driving his Hummer into a car driven by his wife, carrying his two-year-old child and a babysitter.¹³¹

In the NFL, the commissioner's disciplinary action will preclude or supersede any action taken by the clubs. The NFL has no independent arbitrator available to review, and possibly undermine, the commissioner's disciplinary action for off-field conduct.¹³² As previously mentioned, in other leagues, such as the NBA and MLB, players can appeal to independent arbitrators if they are not happy with the commissioner's disciplinary authority. In support of the policy, NFL Commissioner Goodell he has stated, “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.”¹³³ The NFL reported that, in the first year the new Personal Conduct Policy was in effect, the number of incidents decreased by twenty percent. “Since the disciplinary measures are coupled with

rehabilitative tactics, such as counseling, the NFL's policy is both strict and compassionate—unruly, violent players are not allowed to play in the NFL; however, second chances exist.”

While the NFL's Personal Conduct Policy is without a doubt a large leap in the right direction of tackling the issue of domestic violence, it is not without fault. First, it has not been incorporated into the NFL's CBA. Arguably, fines for domestic violence can fall within mandatory subjects of bargaining. Also, convictions are not necessary for punishment. Before implementing the policy, Commissioner Goodell reached out to the Players' Association and then-executive director Gene Upshaw for guidance. The fact that he did this gives him a strong basis against challenges to the policy, however the policy would be less open to challenge if it were incorporated into the CBA.¹³⁴

V. Proposals; Three Strikes and You're Out, Really!

MLB and the NBA should implement league-wide policies addressing violent off-field conduct similar to the NFL's Personal Conduct Policy. However, these policies should limit commissioner discretion by providing sentencing guidelines. Punishments need to be defined to ensure that there are no arbitrary sentences based on veteran players. More importantly, the policies should then be incorporated into the CBA of the respective leagues, rather than place the burden of disciplining domestic violence on the teams, thereby reducing the temptation of teams to grant leniency to some players while not to others.

Specific guidelines for disciplining domestic violence should mirror MLB's steroid policy. This would shift the focus from retroactive punishment to proactive policies that will spell out specific penalties and procedures. According to the MLB's Joint Drug Prevention and Treatment Program, a player who tests positive for a performance enhancing substances will receive the

following punishments; the first positive test result will result in a 50 game suspension. The second positive test will result in a 100 game suspension. The third positive test will result in lifetime ban from MLB, provided, however, that a player so suspended may apply, no earlier than one year following the imposition of the suspension, to the commissioner for discretionary reinstatement after a minimum period of two years.¹³⁵ All suspensions are without pay. Game suspensions should be in proportion with games played in a season. For example, a first offense fifty game suspension in the NFL would be equivalent to more than three years of suspension. This type of policy will put players on notice of what will happen to them if they are in violation of these rules.

Another avenue of prevention would be to add special conduct clauses to individual contracts for players that have previously been charged with certain offenses, including violence against women. However this might be difficult because more experienced and well known players with “superstar” agents may be able to negotiate their way around this.

Finally, a burden should be placed on the general public to place external pressure on the leagues and teams to punish this type of behavior by not buying tickets and merchandise and forcing player endorsements to suffer. Greater outrage should be heard among fans and endorsements should go unoffered because domestic violence is detrimental to the best interests of the game. For example, when Jason Kidd returned from a four game (voluntary) absence after a domestic violence dispute, Kidd was booed repeatedly by opposing team fans when he came anywhere near the ball.

The best way to implement policies similar to the NFL’s Personal Conduct Policy is through the collective bargaining process. All of the professional sports leagues should combine what the NFL did with the Personal Conduct Policy, with what the MLB has done with their

steroid policy. Though the commissioner may unilaterally implement rules regarding permissive subjects, however he cannot unilaterally implement rules regarding mandatory subjects of bargaining, which include wages, hours, and other terms and conditions of employment. “Failure to negotiate with the Players’ Association regarding mandatory subjects is a violation of the duty to collectively bargain and is an unfair labor practice.” For this reason, collective bargaining a domestic violence policy that abides by “three strikes and you’re out!” will ensure strict enforcement.

VI. Conclusion

While domestic violence remains a difficult societal issue, “The average wife beater or serial sex offender, if there is such a thing, does not endorse Nike shoes or make public services announcements.” Though professional athletes do not lead average lives, they are not entitled to escape average punishments. Teams, leagues, and commissioners all possess the legal authority to discipline athlete abusers. However, incorporating domestic violence policies outlining specific disciplinary action that ends a player’s athletic career after “three strikes” into the collective bargaining process would be the most effective way to diminish domestic violence in professional sports.

¹ Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 Harv. L. Rev. 1048, 1050 (1996).

² Elizabeth M. Schneider et al, Domestic Violence and the Law: Theory and Practice (2nd ed., 2008).

³ *Id.* at 7.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 10.

⁷ *Id.* at 14.

⁸ *Id.* at 15.

⁹ *Id.* at 235.

¹⁰ *Id.* at 210.

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- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.* at 61.
- ¹⁴ William Nack & Lester Munson, *Special Report: Sports' Dirty Secret*, SPORTS ILLUSTRATED, (Jul. 31, 1995), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1006884/2/index.htm>
- ¹⁵ *Id.* at 4.
- ¹⁶ Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, Harv. J. SEL. Vol. 1 (2010).
- ¹⁷ Nack & Munson, *supra* note 14.
- ¹⁸ *Id.*
- ¹⁹ Schneider, *supra* note 2, at 315.
- ²⁰ *Id.* at 316.
- ²¹ *Id.* at 317.
- ²² *Id.*
- ²³ *Id.* at 320.
- ²⁴ *Id.* at 321.
- ²⁵ *Id.* at 315.
- ²⁶ *Id.* at 326.
- ²⁷ *Id.* at 317.
- ²⁸ *Id.* at 323.
- ²⁹ Jeff Benedict, *A Double Standard when it Comes to Athletes and Domestic Violence*, SPORTS ILLUSTRATED, (Aug. 18, 2010), available at http://sportsillustrated.cnn.com/2010/writers/jeff_benedict/08/18/krod.stephenson/index.html.
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.*
- ³³ Associated Press, *Kidd files for divorce from wife Joumana of 10 years*, (Jan. 10, 2007), available at <http://sports.espn.go.com/nba/news/story?id=2725524>
- ³⁴ Nack & Munson, *supra* note 14.
- ³⁵ *Id.*
- ³⁶ Withers, *supra* note 16 at 164.
- ³⁷ *Id.*
- ³⁸ Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 Colum. J.L. & Soc. Probs. 167 (1998).
- ³⁹ *Out of Bounds*, *supra* note 1.
- ⁴⁰ Nack & Munson, *supra* note 14.
- ⁴¹ *Id.*
- ⁴² Dabbs, *supra* note 38.
- ⁴³ Nack & Munson, *supra* note 14.
- ⁴⁴ Dabbs, *supra* note 38.
- ⁴⁵ Nack & Munson, *supra* note 14.
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*

48 *Id.*
49 <http://sports.espn.go.com/ncb/news/story?id=6166817>
50 Dabbs, *supra* note 38.
51 Withers, *supra* note 16.
52 Jeff Benedict, *Public Heroes, Private Felons: Athletes and Crimes Against Women* 80 (Northeastern Univ. Press 1997).
53 Nack & Munson, *supra* note 14.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 Schneider, *supra* note 2
59 Withers, *supra* note 16.
60 *Id.*
61 Nack & Munson, *supra* note 14.
62 Carrie A. Moser, *Penalties, Fouls and Errors: Professional Athletes and Violence against women*, 11 Sports Law. J. 69, (2004).
63 *Id.*
64 *Id.*
65 Withers, *supra* note 16.
66 *Id.*
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68 *Id.* at 147.
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73 *Id.*
74 *Id.* at 381.
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77 *Id.*
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79 Dabbs, *supra* note 38.
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81 *Id.*
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84 Brenda H. Saunders, Seton Hall Law, class lecture presentation (March 28, 2012).
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88 http://articles.businessinsider.com/2011-05-12/sports/29998253_1_support-twitter-true-meaning#ixzz1t0F5TaUY

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⁹¹ *Id.*
⁹² Withers, *supra* note 16.
⁹³ Am. League Baseball Club v. Johnson, 179 N.Y.S. 498, 504 (Sup. Ct. 1919).
⁹⁴ *Id.*
⁹⁵ Yasser, *supra* note 71 at 360.
⁹⁶ *Id.*
⁹⁷ *Id.*
⁹⁸ *Id.* at 361.
⁹⁹ Dabbs, *supra* note 38.
¹⁰⁰ Milwaukee American Ass'n. v. Landis, 49 F.2d 298, 299 (N.D. Ill 1931).
¹⁰¹ *Id.*
¹⁰² Moser, *Penalties, Fouls and Errors*, *supra* note 62.
¹⁰³ *Id.*
¹⁰⁴ *Id.*
¹⁰⁵ *Id.*
¹⁰⁶ Withers, *supra* note 16.
¹⁰⁷ *Id.*
¹⁰⁸ *Id.*
¹⁰⁹ *Id.*
¹¹⁰ *Id.*
¹¹¹ Kenesaw Mountain Landis
¹¹² Withers, *supra* note 16.
¹¹³ *Id.*
¹¹⁴ *Id.*
¹¹⁵ *Id.*
¹¹⁶ *Id.*
¹¹⁷ *Id.*
¹¹⁸ *Id.*
¹¹⁹ *Id.*
¹²⁰ *Id.*
¹²¹ See Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball clubs, 259 U.S. 200 (1922). Aff'd in Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).
¹²² Suzanne Janusz, Comment, *The NFL's Strict Enforcement of its Personal Conduct Policy For Crimes Against Women: A Useful Tool for Combating Violence or an Attempt to Punish Morality?* 22 Seton Hall J. Sports & Ent. L. 93 (2012).
¹²³ *Id.* at 112.
¹²⁴ *Id.* at 114.
¹²⁵ *Id.*
¹²⁶ *Id.*
¹²⁷ Withers, *supra* note 16.
¹²⁸ *Id.*
¹²⁹ Janusz, *supra* note 122.
¹³⁰ *Id.* at 96.

¹³¹ *Id.*

¹³² Withers, *supra* note 16.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM