

17 Tex. Rev. Ent. & Sports L. 43

Texas Review of Entertainment & Sports Law

Fall 2015

Article

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DROPPING THE BALL: HOW THE COMMISSIONER'S EXERCISE OF HIS "BEST INTERESTS" AUTHORITY IS FAILING THE NFL AND WHAT CAN BE DONE ABOUT IT

The NFL Commissioner has had the authority to punish players for "conduct detrimental to the integrity of, or public confidence in, the game of football" since 1960. Yet, he first exercised this "best interests" disciplinary authority to punish a player for a non-gambling-related off-the-field offense in 2002. Since then, the NFL Commissioner has issued over fifty separate disciplinary decisions for players' off-the-field conduct. In the process, the NFL Commissioner's implementation of this broad power has come under fire, with critics claiming that the NFL Commissioner's decisions are inconsistent, unpredictable, and unfair to the players. In response to these criticisms, the current NFL Commissioner, Roger Goodell, passed a series of Personal Conduct Policies. This Article details the history of the NFL Commissioner's "best interests" power, including the recent Personal Conduct Policies. It then describes the NFL's three high-profile scandals of the 2014-15 season--Ray Rice's domestic violence case, Adrian Peterson's excessive child discipline, and the New England Patriots' DeflateGate controversy--in order to explore the problems with how the NFL Commissioner exercises his "best interests" power. This Article then offers a solution: the "Independent Adjudicatory Committee" system. Under this proposal, the NFL Commissioner would take on a prosecutorial role and leave disciplinary decision-making authority to an independent committee of former judges. These judges would adjudicate charges brought by the NFL Commissioner in the form of written opinions, determining the appropriate punishments for various violations and offering much-needed clarity with respect to what constitutes conduct detrimental to the game. This proposal would fix many of the issues with the current system by distancing the NFL Commissioner from the decision-makers and by creating a reliable common law for NFL discipline.

INTRODUCTION

The Collective Bargaining Agreement ("CBA") between the National Football League ("NFL") and the NFL Players Association ("NFLPA")¹ grants the NFL Commissioner unusually broad authority to discipline players for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."² This is colloquially called the NFL *44 Commissioner's "best interests" authority, named after the first clause to grant a sports commissioner that power.³ The NFL Commissioner's "best interests" power is considerable--he is not only the prosecutor, but, if he so chooses, the judge and jury too. In fact, the CBA includes a separate appeals process specifically designed for "conduct detrimental to the game" disciplinary decisions that grants the Commissioner the sole authority to appoint hearing officers.⁴ The Commissioner frequently appoints himself or a party partial to the NFL.⁵

The Commissioner has exercised this power at an increasing rate. The NFL has issued 263 separate suspensions since its inception in 1947, with all but two coming after the NFL adopted its "best interests" clause in 1960.⁶ Sixty of those

instances are categorized as “personal conduct,” meaning off-the-field conduct.⁷ Aside from gambling-related offenses, the first of these occurred in 2002, during which only one suspension was issued.⁸ By comparison, in 2013, six players were suspended for personal conduct, with ten players similarly suspended the prior year.⁹ As the NFL Commissioner exercises this power with increasing frequency, his ability to do so fairly and swiftly has come into question. Recently, three disciplinary decisions--Ray Rice's, Adrian Peterson's, and Tom Brady's for his involvement in the DeflateGate scandal--have been partially or entirely overturned,¹⁰ and the NFLPA, the media, and even the fans criticized the NFL Commissioner for those decisions.¹¹ Some have called for his resignation,¹² and the Commissioner himself even acknowledged that he mishandled the Ray Rice case.¹³

In the wake of the Ray Rice and Adrian Peterson scandals, the NFL unveiled a new domestic violence policy and a new personal conduct policy.¹⁴ Although these policies may help to bring some uniformity to the NFL Commissioner's exercise of his disciplinary authority, more is needed. In Part I of this Article, I discuss the history of the NFL Commissioner's “best interests” disciplinary authority, which is codified in the NFL's Constitution and Bylaws, the CBA, and the NFL's Personal Conduct Policies. In Part II, I *45 describe three scandals that rattled the NFL in 2014--Ray Rice, Adrian Peterson, and DeflateGate--to frame the problems with the NFL Commissioner's recent exercise of his “best interests” authority. In Part III, I offer a possible solution: the creation of an Independent Adjudicatory Committee responsible for determining player discipline, and the subordination of the NFL Commissioner to prosecutor in that process. In Part IV, I analyze how this solution will best solve the problems with the NFL Commissioner's current system. I conclude with some parting words on how and why the parties should adopt this approach.

I. COMMISSIONER POWER: PAST AND PRESENT

A. THE ORIGINS OF THE NFL COMMISSIONER'S “BEST INTERESTS” AUTHORITY

The position of omnipotent sports commissioner that we see in the NFL today has its roots in Major League Baseball (“MLB”). In 1919, the Chicago White Sox and Cincinnati Reds were set to face off in the World Series.¹⁵ Despite the Chicago White Sox being favored, the Cincinnati Reds won the series five games to three.¹⁶ Soon after, it was discovered that eight Chicago White Sox players took bribes from gamblers to throw the World Series.¹⁷ Although many at that time thought gambling infractions occurred in the MLB, no one believed they could reach the sport's biggest stage.¹⁸ This scandal, which eventually became known as the Black Sox Scandal, rattled the MLB and prompted swift, decisive action from the owners to save their sport.¹⁹ The owners realized they needed a strong individual who had the confidence and respect of the public to oversee their league.²⁰ They settled on Judge Kenesaw Mountain Landis,²¹ who accepted the commissioner position under the condition that he wield absolute power.²² The owners agreed, and granted Landis the authority to punish anyone for conduct that he determined was “detrimental to the ‘best interests’ of baseball.”²³

The “best interests” clause was born. However, the NFL would not adopt a similar clause right away. In fact, the NFL's first two commissioners operated without this expansive authority.²⁴ The NFL finally granted “best interests” power to Commissioner Pete Rozelle in 1960, largely as a result of his financial successes with the league.²⁵ Specifically, the NFL's owners granted Rozelle “full, complete, and final jurisdiction and authority over any dispute involving a member or members in the League”²⁶ and the power to punish a player for conduct that he deemed was “detrimental to the integrity of, or public confidence in, the game of *46 professional football.”²⁷ While the NFL's clause never explicitly mentioned “best interests,” it granted the NFL Commissioner substantially the same power as the MLB's “best interests” clause and, therefore, is referred to as such.

B. CURRENT NFL COMMISSIONER POWER

The NFL's "best interests" clause adopted in 1960 survives substantially in the same form today. The NFL Commissioner derives his "best interests" authority from the NFL's Constitution and Bylaws and the NFL's CBA with the NFLPA. The NFL's Constitution and Bylaws grant the NFL Commissioner the complete authority to punish individuals

whenever the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director, or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League or has been or is *guilty of conduct detrimental to the welfare of the League or professional football*²⁸

Although the NFL and NFLPA's current CBA provides additional language for this authority, it offers little clarity. The CBA allows the NFL Commissioner to punish a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."²⁹ Further, the CBA includes a form player contract in Appendix A, which states:

Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he . . . is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.³⁰

Thus, the NFL Commissioner is granted substantially the same authority-- to punish players for conduct detrimental to the game of football--three distinct times.

C. THE NFL'S PERSONAL CONDUCT POLICIES

While most of the major professional sports teams have agreed to limit (or eliminate) their commissioners' "best interests authority" in collective bargaining agreements or similar documents,³¹ the NFL has not done so. Rather, the NFL Commissioner, with ownership approval, has sought to clarify his authority by passing a series of his Personal Conduct Policies. The NFL's first stab at such a policy was created entirely by the owners. In 1998, the owners instituted the Violent Crime Policy, which expressly allowed the NFL Commissioner to *47 punish players who were charged with any violent crime.³² In 2000, the owners, in response to public outrage over the Ray Lewis murder trial,³³ replaced the Violent Crime Policy with the NFL's first true Personal Conduct Policy.³⁴ This policy granted then-NFL Commissioner Paul Tagliabue virtually unlimited power to suspend, fine, and even banish players who had been convicted of a crime or admitted to engaging in any wrongdoing.³⁵ However, in Paul Tagliabue's eight-year reign following the Violent Crime Policy, he suspended only nine players, with most of those suspensions being for only one game.³⁶

Current NFL Commissioner Roger Goodell succeeded Paul Tagliabue in 2006.³⁷ The following year, three NFL players--Chris Henry, Tank Johnson, and Adam "Pacman" Jones--had serious, repeated run-ins with the law.³⁸ Commissioner Goodell acted quickly because he felt that it was his, and the NFL's, responsibility to crack down on this sort of behavior.³⁹ Commissioner Goodell suspended Henry, Johnson, and Jones for eight, eight, and sixteen

games, respectively, and announced a new Personal Conduct Policy,⁴⁰ which would be modified the following year after Commissioner Goodell consulted with NFLPA Executive Director Gene Upshaw.⁴¹ These Policies significantly strengthened the NFL Commissioner's *48 "best interests" authority. First, they clarified what constituted conduct detrimental to the league. The 2007 Policy included "engage[ment] in (or to aid, abet, or conspire to engage in or to incite) violent and/or criminal activity" and offered a list of examples.⁴² The 2008 Policy went even further. It listed the following bullet points for which discipline may be imposed:

Criminal offenses including, but not limited to, those involving: the use or threat of violence; domestic violence and other forms of partner abuse; theft and other property crimes; sex offenses; obstruction or resisting arrest; disorderly conduct; fraud; racketeering; and money laundering;

Criminal offenses relating to steroids and prohibited substances, or substances of abuse;

Violent or threatening behavior among employees, whether in or outside the workplace;

Possession of a gun or other weapon in any workplace setting, including but not limited to stadiums, team facilities, . . . etc., or unlawful possession of a weapon outside of the workplace;

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.⁴³

The Policy also established that players need not be actually convicted of a crime for discipline to be imposed: "the standard of conduct for persons employed in the NFL is considerably higher."⁴⁴ Additionally, it provided that "[d]iscipline may take the form of fines, suspension, or banishment from the League" and granted the NFL Commissioner "full authority to impose discipline as warranted."⁴⁵ Further, both Policies reiterated the appeals procedure for "best interests" discipline. The 2007 Policy stated that "[a]ny person disciplined under this policy shall have a right of appeal, including a hearing, *before the Commissioner or his designee*."⁴⁶ The 2008 Policy confirmed the players' right to appeal their punishments at a hearing, but that the hearing would "be conducted by the [NFL] Commissioner or his designee."⁴⁷

D. CURRENT NFL PERSONAL CONDUCT POLICIES

The 2008 Policy survived in its current form for six years.⁴⁸ In 2014, in the midst of attempting to resolve the Ray Rice⁴⁹ and Adrian Peterson⁵⁰ scandals, the NFL replaced the *49 2008 Policy with two new policies. First, facing considerable public outcry for his admitted mishandling of Ray Rice's discipline after Rice struck his then-fiancé, Commissioner

Goodell announced the NFL's new Domestic Violence Policy in a letter to team owners.⁵¹ Commissioner Goodell reiterated his Policy in a Memorandum to all NFL Personnel, in which he stated:

Violations of the Personal Conduct Policy regarding assault, battery, domestic violence and sexual assault that involve physical force will be subject to enhanced discipline. A first offense will be subject to a suspension of six weeks without pay. Mitigating circumstances will be considered, and more severe discipline will be imposed if there are aggravating circumstances such as the presence or use of a weapon, choking, repeated striking, or when the act is committed against a pregnant woman or in the presence of a child. A second offense will result in banishment from the league; an offender may petition for reinstatement after one year but there is no assurance that the petition will be granted.⁵²

This Policy merely created a punishment floor by mandating a six-game suspension for the listed offenses, which is much longer than previous NFL punishments for domestic violence.⁵³ The consideration of “mitigating circumstances” allows the NFL Commissioner to hand down more severe punishments if he wishes.⁵⁴ Furthermore, because the NFL Commissioner unilaterally adopted this Policy, he likely can repeal it whenever he chooses.

On December 10, 2014, Commissioner Goodell, with the owners' approval,⁵⁵ unveiled his new eight-page Personal Conduct Policy.⁵⁶ The NFL also released a one-page flowchart that highlights the most important new features of the 2014 Policy.⁵⁷ Similar to the NFL's past Personal Conduct Policies, this Policy evokes “the Commissioner's authority under the [[[NFL] *50 Constitution and Bylaws to address and sanction conduct detrimental to the league and professional football.”⁵⁸ The Policy further explains:

If you are convicted of a crime or subject to a disposition of a criminal proceeding (as defined in this Policy), you are subject to discipline. But even if your conduct does not result in a criminal conviction, if the league finds that you have engaged in any of the following conduct, you will be subject to discipline.⁵⁹

The Policy then offers a bulleted list of potentially-disciplinary conduct, ranging from “[a]ctual or threatened physical violence against another person” to possession of illegal substances or weapons.⁶⁰ The list culminates in a catchall provision prohibiting “[c]onduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel.”⁶¹ This list undoubtedly adds some additional clarity to what constitutes conduct detrimental to the game, but this clarity is tempered by the inclusion of the final catchall provision.

The new Policy does change the 2008 Policy's procedure in important ways, at least facially. Probably the biggest change is the NFL Commissioner ceding initial disciplinary decision-making authority to a disciplinary officer, who is described as “a member of the league staff who will be a highly-qualified individual with a criminal justice background.”⁶² Notably, the NFL's flowchart depicting this Policy does not mention the creation of this new position.⁶³ It is important to note that the initial decision maker is still an employee of the NFL Commissioner and that the NFL Commissioner retains control over the appeals process.⁶⁴ The second noteworthy new feature of the 2014 Policy is that the NFL Commissioner expressly codified his apparent right to place players on paid leave during investigation. The Policy allows the NFL Commissioner to do this when a player is “formally charged with a crime of violence,” “if an investigation leads the Commissioner [but not the disciplinary officer] to believe that [the player] may have violated this Policy” or “[i]n cases in which a violation relating to a crime of violence is suspected but further investigation is required”⁶⁵ A

player placed on paid leave will generally remain as such until the final disposition of his case, including his appeal.⁶⁶ The NFL's flowchart summarizes the paid leave aspects of the Policy as follows:

An individual may be put on paid leave if formally charged with a violent crime or sexual assault, or if the NFL investigation finds sufficient credible evidence that it appears a violation of the policy has occurred.

Paid leave will *51 last until the completion of the NFL investigation or disposition of a criminal charge.⁶⁷

Last, if the player decides to exercise his right to appeal the disciplinary officer's decision, the appeal is first heard by the NFL's newly-created Expert Panel. As the flowchart explains, “[t]he appeal process will include a review panel of three outside experts to make recommendations to the Commissioner or his designee on an appeal ruling that will be decided by the Commissioner or his designee.”⁶⁸ However, the NFL Commissioner or his designee retains final decision-making authority on appeal.⁶⁹ Thus, the NFL Commissioner remains integral to the disciplinary process and may have even expanded his power by expressly codifying his paid-leave authority. Needless to say, the NFLPA denounced this new Policy, decrying that Commissioner Goodell did not let them review the Policy before it was unveiled and did not grant their demand for neutral arbitration of appeals.⁷⁰ The NFLPA went so far as to claim that the Policy is invalid because it is inconsistent with the parties' 2011 CBA and was not bargained-for and mutually agreed to.⁷¹

In summary, the 2014 Personal Conduct Policy offered some clarity to what constitutes conduct detrimental to the league. More importantly, the Policy made substantial changes to the disciplinary process. The Policy delegates initial disciplinary authority to a disciplinary officer, rather than the NFL Commissioner. The Policy further institutes an appellate review by an Expert Panel, which makes recommendations to the NFL Commissioner or his designee. However, the NFL Commissioner retains ultimate control over the resolution of the appeal.

II. THE NFL'S 2014-15 SCANDALS

This past year, the NFL has been the subject to two scandals involving off-the-field conduct--those of Ray Rice and Adrian Peterson--and one involving on-the-field conduct: DeflateGate. Commissioner Goodell invoked his “best interests” disciplinary authority to investigate each of these matters and dole out punishments. The processes by which these scandals have, or have not, been adjudicated exemplify the issues the NFL currently faces as a result of Commissioner Goodell's exercise of his exceptionally broad disciplinary authority. In this Part, I will first describe these three scandals, and then use them to explain the problems with the NFL current disciplinary system.

A. RAY RICE

On February 15, 2014, Baltimore Ravens' star running back Ray Rice was arrested and charged with assault after an incident in which he allegedly struck his then-fiancé (now-wife), Janay Palmer (now-Janay Rice).⁷² Rice resolved this arrest in a courtroom on May 20, 2014.⁷³ *52 On June 16, 2014, Commissioner Goodell suspended Rice for the first two weeks of the 2014-15 NFL season.⁷⁴ On September 8, just after the first week of the 2014-15 NFL season, TMZ released a second video of the assault, which graphically showed Ray Rice punching his wife in the face.⁷⁵ As a result, the Ravens terminated Rice's contract, and the NFL suspended him indefinitely.⁷⁶

Ray Rice appealed his indefinite suspension.⁷⁷ In the face of significant pressure from the public, NFLPA, and womens' rights organizations, Commissioner Goodell agreed to work with the NFLPA to appoint a neutral arbitrator to hear Ray Rice's appeal.⁷⁸ The parties settled on Judge Barbara Jones, who, on November 28, overturned Rice's indefinite

suspension and ordered the NFL to reinstate him.⁷⁹ Judge Jones concluded that Rice had not lied to Commissioner Goodell at their June 16 meeting, and as a result, ruled that his second punishment was arbitrary, and thus, must be vacated.⁸⁰ However, by this point, the NFL had already begun week thirteen of its seventeen-week regular season.⁸¹ Given Judge Jones's ruling that Rice's second punishment was improper, Rice should have been eligible to return after week two. But, because Rice was improperly ineligible for the first nine weeks of the NFL season, he ultimately never played a snap during the 2014-15 season.⁸²

B. ADRIAN PETERSON

Meanwhile, on September 12, 2014, Minnesota Vikings' star running back Adrian Peterson was indicted for reckless or negligent injury of a child.⁸³ Specifically, Peterson allegedly whipped his child with a switch, which resulted in cuts and bruises on the child's back, legs, arms, and buttocks.⁸⁴ Initially, the Minnesota Vikings deactivated Peterson for one game.⁸⁵ On September 15, 2014, another allegation of child abuse against Peterson came to light, and the Vikings placed him on the exempt/commissioner's permission list,⁸⁶ which operated as an indefinite suspension with pay.⁸⁷ Peterson's sponsors also suspended their contracts with him.⁸⁸ *53 On November 4, 2014, Peterson resolved his criminal charges by entering a no contest plea to a misdemeanor child injury charge.⁸⁹ However, on November 18, 2014, Commissioner Goodell suspended Peterson for the remainder of the 2014-15 NFL season.⁹⁰ Despite the fact that the underlying incident occurred before the NFL's Domestic Violence Policy became effective, Commissioner Goodell punished Peterson pursuant to it.⁹¹ Similarly to Rice, Peterson appealed his suspension, and the NFLPA requested Commissioner Goodell appoint an independent arbitrator to hear Peterson's appeal.⁹² This time, Commissioner Goodell ignored the NFLPA's request and appointed Harold Henderson, a former NFL executive who regularly handles appeals for the NFL, to handle Peterson's appeal. The NFLPA believed that Henderson, given his strong ties to the NFL and Commissioner Goodell, could not be neutral.⁹³ On December 12, 2014, Henderson denied Peterson's appeal of his suspension,⁹⁴ concluding that Commissioner Goodell's broad authority allowed him to retroactively apply the NFL's new Domestic Violence Policy against Peterson, and that Commissioner Goodell's disciplinary decision was consistent with the previous Policy.⁹⁵

The NFLPA, on Peterson's behalf, challenged Henderson's arbitration award in the United States District Court of Minnesota.⁹⁶ On February 26, 2015, Judge David Doty, in a sixteen-page opinion, vacated Henderson's arbitration decision.⁹⁷ Judge Doty concluded that Henderson's decision to uphold Commissioner Goodell's retroactive application of the NFL's new Domestic Violence Policy violated the "established law of the shop," that is, the "industrial common law,"⁹⁸ and that Henderson exceeded his authority by considering the issue of whether Commissioner Goodell's disciplinary decision was consistent with the NFL's previous Personal Conduct Policy despite the NFLPA not asking Henderson to do so.⁹⁹ *54 Notably, Judge Doty explicitly refused to determine "whether Henderson was evidently partial or whether the award violates fundamental fairness."¹⁰⁰ The NFL appealed to United States Court of Appeals for the Eighth Circuit,¹⁰¹ but, Peterson's suspension ended and he was reinstated before they could hear the appeal, effectively rendering it moot.¹⁰²

C. DEFLATEGATE

On January 18, 2015, the New England Patriots defeated the Indianapolis Colts 45-7 in the AFC Championship Game, thereby advancing to Super Bowl XLIX.¹⁰³ Shortly after the game, reports surfaced accusing the Patriots of deflating some of the footballs that they used in the game against the Colts.¹⁰⁴ Although most agree that the Patriots would have

won the game regardless of how much air was in their footballs,¹⁰⁵ the NFL responded by hiring Ted Wells of the New York law firm Paul Weiss¹⁰⁶ to lead a full investigation alongside NFL Executive Vice President Jeff Pash.¹⁰⁷ Notably, both the NFL, in its press release announcing the investigation, and Commissioner Goodell, in statements regarding the investigation, repeatedly invoked the CBA Art. 46, §1(a) language that endows the NFL Commissioner with the power to protect the “integrity of the game” to justify the investigation.¹⁰⁸

Ted Wells announced his findings on May 6, 2015, almost four months after the scandal broke, in a 243-page report.¹⁰⁹ Wells concluded that “it [was] more probable than not” that the *55 New England Patriots personnel released air from game balls prior to the AFC Championship game in violation of NFL playing rules and “that Tom Brady was at least generally aware of the inappropriate activities of [the Patriots personnel] involving the release of air from Patriots game balls.”¹¹⁰ Based on Wells's findings, Commissioner Goodell fined the New England Patriots one million dollars, took away their 2016 first round draft pick and 2017 fourth round draft pick, and suspended Tom Brady for four games.¹¹¹

The Patriots decided to accept their punishment and not appeal.¹¹² Tom Brady, on the other hand, had the NFLPA appeal his punishment.¹¹³ Once again, the NFLPA requested Commissioner Goodell appoint a neutral arbitrator.¹¹⁴ Similarly to Peterson's case, Commissioner Goodell rejected this request and appointed himself as arbitrator.¹¹⁵ Acting as arbitrator, Commissioner Goodell upheld Brady's four-game suspension, relying in part on Brady having instructed his assistant to destroy the cell phone Brady had used during the AFC Championship game and shortly thereafter.¹¹⁶

Interestingly, shortly after Commissioner Goodell announced his decision to uphold Brady's suspension, the NFL preemptively filed a lawsuit demanding a declaratory judgment upholding Commissioner Goodell's decision in New York federal court.¹¹⁷ This allowed the NFL to ensure this case would be heard by a New York judge, rather than a judge in Minnesota or Massachusetts who may be more favorable to Brady.¹¹⁸ This ultimately backfired. Judge Richard Berman, who presided over this case, initially urged the parties to settle, which the parties failed to do.¹¹⁹ On September 3, 2015, just one week before the New England Patriots' season opener, Judge Berman issued his 40-page opinion vacating not only Brady's arbitration award, but Brady's punishment as well.¹²⁰ Notably, Judge Berman's decision did not turn on *56 whether Brady was actually involved in the scandal, or whether Roger Goodell was a fair arbiter.¹²¹ Rather, Judge Berman based his decision on:

(A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel Jeff Pash; and (C) denial of equal access to investigative files, including witness notes.¹²²

The NFL appealed on that very day,¹²³ with the Second Circuit set to hear the case in February, 2016.¹²⁴

III. PROBLEMS WITH THE NFL COMMISSIONER'S CURRENT EXERCISE OF HIS “BEST INTERESTS” AUTHORITY

These three scandals, which Commissioner Goodell publicly acknowledged made for a “tough year” and humbled him,¹²⁵ exemplify the myriad of problems with the NFL's current disciplinary system for conduct detrimental to the game. These issues are explained in detail below.

A. THE NFL COMMISSIONER'S PUBLIC PERCEPTION AND HIS CONTROL OVER THE DISCIPLINARY PROCESS ARE SUFFERING

Public confidence in the NFL Commissioner is at an all-time low.¹²⁶ The public perceives the process by which the NFL Commissioner punishes NFL players as political or social pandering and unjust. Commissioner Goodell has been harshly criticized for his recent punishment decisions and for his arbitrator decisions.¹²⁷

The NFL Commissioner's primary problem is his "arbitrator dilemma." When a player appeals a "best interests" disciplinary suspension, the NFL Commissioner must decide whether to appoint a neutral or partial arbitrator. In making that decision, the NFL Commissioner ostensibly weighs two main goals: (1) maintaining the integrity of the NFL Commissioner and NFL, and (2) preserving his power over disciplinary decisions. Unfortunately, either choice has proven to be harmful. When the NFL Commissioner chooses a neutral arbitrator, he presumably values fairness and integrity over his control over the process. As the Ray Rice *57 scandal demonstrated, the neutral arbitrator is the politically popular choice, the choice that the public views as fairer and better.¹²⁸ However, because a neutral arbitrator is more likely to overturn the NFL Commissioner's initial decision, the NFL Commissioner's public perception still suffers as a result.

Consequently, the NFL Commissioner has generally chosen a partial arbitrator. Although such a decision harms the NFL Commissioner's public perception, it protected his control over the disciplinary process because, as evidenced by the Adrian Peterson scandal, a partial arbitrator is more likely to rule in the NFL Commissioner's favor. However, the NFLPA's recent successes in federal court, coupled with the likelihood that, if challenged, the NFL Commissioner's appointment of a partial arbitrator would be overturned by a judge because of the arbiter's partiality, complicates the NFL Commissioner's calculus.

Courts have never directly ruled on whether an NFL Commissioner's choice of a partial arbitrator for a "best interests" disciplinary appeal proceeding violates the Federal Arbitration Act ("FAA"). In *Morris v. New York Football Giants, Inc.*,¹²⁹ the court removed the NFL Commissioner as arbitrator in an individual contract dispute between two players and their team after finding that the NFL Commissioner could not be neutral.¹³⁰ The court reasoned that the NFL Commissioner could not be a neutral arbitrator because he was a named defendant to the ensuing litigation and had advocated against the players' position in the past.¹³¹ However, this was in the context of a contract issue, not a disciplinary proceeding. Further, although Judge Doty did vacate Adrian Peterson's arbitration award, he declined to rule on whether the choice of arbitrator justified vacatur.¹³²

The NFLPA has challenged Commissioner Goodell on this practice in the past. Specifically, the NFLPA challenged Commissioner Goodell's practice of appointing partial arbitrators to overhear disciplinary appeals when it filed suit against Commissioner Goodell for appointing himself as arbitrator in the Bounty Scandal¹³³ punishment appeal hearing.¹³⁴ Although Commissioner Goodell ceded to the NFLPA's demands before the case was adjudicated,¹³⁵ the NFLPA's complaint is instructive. In its complaint, the NFLPA claimed that Commissioner Goodell's appointment of himself as arbitrator violated the FAA's "evident partiality" requirement.¹³⁶ Such a violation allows the judge to vacate an arbitrator's award.¹³⁷ As the NFLPA noted, the Fifth Circuit, the jurisdiction that presided over the NFLPA's claim in the Bounty Scandal proceedings, would find an arbitrator evidently partial "if 'a reasonable person would have to conclude that the arbitrator was partial to one party . . .'"¹³⁸ The *58 NFLPA argued that Commissioner Goodell's repeated attacks on the players and presumption of their guilt in the media defeated his neutrality,¹³⁹ even though it explicitly stopped short of arguing that the NFL Commissioner is a *per se* partial arbitrator in violation of the FAA.¹⁴⁰ Nevertheless, the NFL Commissioner frequently holds press conferences about disciplinary decisions, especially for high-

profile cases.¹⁴¹ His unique position of making disciplinary decisions and arbitrator appointments casts doubt on his partiality as the arbitrator. This is equally true when the NFL Commissioner appoints one of his employees (*e.g.*, Harold Henderson in Adrian Peterson's case) as the arbitrator. Thus, the NFL Commissioner is at significant risk of having his hand-picked arbitrator's award vacated.

Prior to the Bounty Scandal, the NFL Commissioner generally appointed himself or an associate to hear appeals.¹⁴² In the last few years, specifically in response to the filing of litigation during the Bounty Scandal appeal¹⁴³ and to public pressure in the Ray Rice case,¹⁴⁴ the NFL Commissioner tried appointing neutral arbitrators. When he did not, as in the Adrian Peterson and DeflateGate cases, he ultimately lost in federal court, albeit on other grounds.¹⁴⁵ As a result, the NFL Commissioner, who had already suffered a loss of public confidence by choosing a partial arbitrator, also saw his power over the disciplinary process diminish. Worse, this perhaps confirmed the public's opinion that his choice of partial arbitrators is unfair and harmful to the players. Worst of all, it indicated to future players that they may be able to find success in disciplinary proceedings in court. This likely contributed to the NFL pre-emptively filing for a declaratory judgment in regards to Brady's DeflateGate punishment.

This places the NFL Commissioner between the proverbial rock and a hard place. Either decision will likely lead to a loss in both public confidence and power over the disciplinary process. The NFL Commissioner seemingly experimented with both options last year in the Ray Rice and Adrian Peterson scandals; he came out on the losing end of both. Critics may argue that the NFL Commissioner can salvage both interests by getting the initial disciplinary decision correct in the eyes of the public, and the arbitrator. However, the NFL Commissioner has consistently been unable to do so, and likely cannot do so, given the general public's wide range of viewpoints on most topics. A better process, by which the NFL Commissioner relinquishes some of his or her power, is warranted.

B. THE NFL COMMISSIONER'S DISCIPLINARY PROCESS HURTS THE NFL AS A BUSINESS

The NFL Commissioner's disciplinary process hurts the NFL by undermining its product. The NFL's two main products are its games and its players. The fact that the NFL sells football games is self-evident,¹⁴⁶ but the NFL is also involved in the business of marketing and promoting the stars of the games, namely, the players. The NFL intentionally cultivates *59 within its fans loyalty to, and admiration and respect for, its players. It accomplishes this by requiring widespread media availability of its star players,¹⁴⁷ popularizing the Pro Bowl,¹⁴⁸ the NFL Combine,¹⁴⁹ the NFL Draft,¹⁵⁰ and the Super Bowl,¹⁵¹ as well as selling player-specific merchandise,¹⁵² bargaining for protections for teams to retain specific players (*e.g.*, the franchise tag),¹⁵³ and airing NFL Films specials about specific players.¹⁵⁴ As a result, the NFL bolsters its fans' loyalty and game-day experience, and profits considerably.¹⁵⁵

By removing its players from the field for any reason, the NFL suffers a loss. When the NFL suspends a player for a disciplinary reason, the NFL effectively loses part of its product. As a result, the NFL loses a calculable amount of revenue because both the quality of the game that player's team plays and the popularity of the player into which the NFL has already invested suffer.¹⁵⁶ As a rational business actor, the NFL knows this and has concluded that the benefits from disciplining a player for certain conduct-- which likely include avoidance of bad press and ill will from its fans-- outweigh the lost revenue.¹⁵⁷ As a result, the NFL has decided *60 to punish its players for their off-the-field misconduct.¹⁵⁸ When the NFL handles its discipline properly, the NFL likely minimizes its losses as it anticipated.¹⁵⁹ The problem for the NFL, though, is that this backfires when it mismanages its discipline process. Thus, from a business/financial perspective, the NFL has a stake in maintaining accuracy and fairness in its disciplinary process. As evidenced by the significant backlash Commissioner Goodell faced as a result of his handling of the Ray Rice, Adrian Peterson, and DeflateGate scandals,¹⁶⁰ the current process is not achieving those intended goals.

Further, when the NFL Commissioner mismanages his discipline, the NFL's integrity--which is exactly what the NFL Commissioner tries to protect when he doles out punishments for off-the-field misconduct--suffers. The NFL has determined that the integrity of its game and brand are valuable and that it has an interest in protecting them. It has entrusted the NFL Commissioner with the responsibility to do so.¹⁶¹ When the NFL Commissioner imposes discipline that the public views as incorrect, as Commissioner Goodell did in the Ray Rice scandal, the NFL Commissioner loses the trust and faith of the fans. As a result, the NFL's integrity is undermined.

Commissioner Goodell attempted to solve some of these issues by passing the 2014 Domestic Violence and Personal Conduct Policies. While some have heralded these Policies as a step in the right direction, most have argued that they only serve to embolden the NFL Commissioner's already extraordinary power.¹⁶² These Policies will likely do little to alleviate the NFL's current problems. Most crucially, the appointment of a disciplinary officer to make the initial disciplinary decision changes little when the NFL Commissioner has unbridled power to place players on paid leave, and the NFL Commissioner still retains final authority over choice of arbitrator and, therefore, final disposition of disciplinary decisions.¹⁶³ The Expert Panel, with the mere purpose of making recommendations to the NFL Commissioner,¹⁶⁴ adds little fairness to the process. Worse, both the disciplinary officer and the Expert Panel are chosen and paid by the NFL.¹⁶⁵ Thus, similarly to how in baseball disciplinary arbitrations each party's chosen arbitrator is partial to its side,¹⁶⁶ the disciplinary officer and Expert Panel members are likely to be biased to the wishes of their boss, the NFL Commissioner.

***61 C. THE NFL COMMISSIONER'S DISCIPLINARY PROCESS IS UNFAIR TO THE NFL'S PLAYERS**

The NFL Commissioner's disciplinary process takes significant time, is inconsistent and unpredictable, and often results in litigation; all of these attributes are detrimental to the players. First, the process is a lengthy one, as exemplified by Ray Rice's and Adrian Peterson's cases as well as DeflateGate. Rice's punishable misconduct occurred in February, 2014.¹⁶⁷ Rice was not initially punished until June of 2014, received his second punishment three months later, and had to wait another two-and-a-half months for his arbitration hearing.¹⁶⁸ Admittedly, Rice's case was unique due to his double-punishment. Nevertheless, Rice still had to wait two-and-a-half months for his arbitration hearing.¹⁶⁹ Similarly, Adrian Peterson experienced a one-month delay between his appeal of his suspension and his hearing.¹⁷⁰ DeflateGate lasted even longer, with Tom Brady's conduct occurring four months before his initial punishment and final resolution not expected until over a year after his alleged wrongdoing.¹⁷¹ The NFL's 2014 Personal Conduct Policy will only drag out disciplinary proceedings. The 2014 Policy requires a player appealing his suspension to first have a hearing in front of the NFL's new Expert Panel, which then makes recommendations to the NFL Commissioner or his designee.¹⁷² Presumably, the player then must endure a second hearing in front of the NFL Commissioner or his designee and then also wait for deliberation and a decision.¹⁷³ Thus, under the 2014 Policy's process, the player is required to prepare for, have, and wait for the outcome of two hearings before a decision is finally made. This will undoubtedly extend the time it takes for the player's appeal to finally be resolved. These delays, for which the players have no recourse beyond mere back pay,¹⁷⁴ unduly harm the players.

Being an NFL player is a unique occupation. The average NFL player's career is only 3.3 years,¹⁷⁵ and the season only lasts seventeen weeks, with sixteen games played per team.¹⁷⁶ There are always younger or amateur football players seeking to replace current NFL players.¹⁷⁷ Forcing a player to miss four to ten games while he waits for his appeal to be resolved harms that player's ability to practice his inevitably short career. Ray Rice never stepped foot on the

game-day gridiron during the 2014 season, and Adrian Peterson only played in the season opener.¹⁷⁸ Both players lost considerable time practicing their trade as football players.

*62 This delay also affects the players financially. Despite back pay for weeks unfairly missed,¹⁷⁹ NFL players have little recourse for missing out on other pay-based incentives. Many NFL player contracts include performance-based escalator clauses, most of which are reached near the end of the season, if at all.¹⁸⁰ Missing four to ten games or more due to an unfair suspension essentially precludes them from attaining the on-field performance necessary to earn those incentives. NFL players are also paid for playoff, Super Bowl, and Pro Bowl games.¹⁸¹ A player being forced to miss regular-season games hinders his ability to make the Pro Bowl and his team's ability to compete for the playoffs and Super Bowl. However, if that player's suspension is proven to be unfair, there is no way for that player to prove that he would have been elected for the Pro Bowl, or that his team would have made the playoffs or Super Bowl with him active. Thus, that player misses out on that potential income. Furthermore, NFL players frequently supplement their incomes with endorsement deals.¹⁸² The players who get the most lucrative endorsement deals are the most successful and popular players.¹⁸³ However, players cannot be successful and popular if they are prohibited from the gridiron on game-day. Players who are wrongly punished lose endorsement opportunities, but the value of those opportunities is likely too uncertain to calculate for back pay awards. These problems are exacerbated when the NFL Commissioner exercises his newly-codified authority to place players on paid leave while the disciplinary officer conducts his investigation because the players miss out on more playing time, potentially unfairly if they turn out to not deserve any punishment.¹⁸⁴ This is worsened by the fact that this leave lasts until final disposition of the player's case.¹⁸⁵ Overall, NFL players stand to lose significant income as the result of the NFL Commissioner erroneously punishing them.

The NFL Commissioner's current disciplinary process is also inconsistent and unpredictable, further harming the players. The three scandals explained above are demonstrative of Commissioner Goodell's inconsistencies in applying his "best interests" authority. In Rice's case, Commissioner Goodell initially punished Rice well before the NFL season, and appointed a neutral arbitrator for his appeal.¹⁸⁶ In Peterson's case, Commissioner Goodell also punished him swiftly, but refused to appoint a neutral arbitrator for his appeal.¹⁸⁷ In the DeflateGate scandal, Commissioner Goodell waited a long time to punish Tom Brady and appointed himself, a clearly partial arbitrator, to hear Brady's appeal.¹⁸⁸ Notably, former Commissioner Paul Tagliabue weighed heavily in his opinion overturning Commissioner Goodell's player punishments for the Bounty Scandal the fact that Commissioner Goodell's *63 suspensions of the players involved were inconsistent with how the league has generally treated such misconduct, and this was a dispositive issue in the DeflateGate scandal.¹⁸⁹

The inconsistent nature of these decisions is inherently unfair to the NFL's players. The NFL has assumed the role of punishing its players for any conduct that the NFL Commissioner deems is detrimental to the league's image.¹⁹⁰ Players do not know if, when, or how severely they will be punished for their conduct. This lack of predictability hinders the deterrent effect of the punishments¹⁹¹ because the players cannot make a reasoned decision weighing the punishable conduct against resultant punishment. Although the NFL recently took a step towards predictable punishments with the implementation of its 2014 Personal Conduct Policy, Commissioner Goodell still retains final discretion.¹⁹² The inconsistencies of Commissioner Goodell's recent rulings have also alienated the players. Multiple high-profile players have spoken out against Commissioner Goodell or have engaged in known misconduct apparently as civil disobedience.¹⁹³ Alienating the players can only serve to cause further strife between the NFL's management and its players. The players will likely continue to distrust and challenge Commissioner Goodell even when he takes fair disciplinary action, and future collective bargaining will likely be more contentious than it would otherwise be.

The NFL Commissioner's current disciplinary process also leads to repeated and unnecessary litigation. Adrian Peterson and Tom Brady successfully sued the NFL,¹⁹⁴ and the players in the Bounty Scandal were able to use the filing of a lawsuit to persuade Commissioner Goodell to recuse himself and appoint former commissioner Paul Tagliabue as third-party arbitrator.¹⁹⁵ The NFL is apparently fearful enough of players taking unfavorable “best interests” arbitration awards to court that it preemptively filed against Tom Brady, and lost.¹⁹⁶ In each of these cases, Commissioner Goodell initially appointed a non-neutral arbitrator--for Peterson, a former NFL executive,¹⁹⁷ and for the Bounty Scandal players and Tom Brady in DeflateGate, Commissioner Goodell himself¹⁹⁸--and ultimately saw his decisions overturned *64 after litigation was filed. Given the success of these lawsuits, NFL players who receive what they view to be an unfair punishment and arbitration award are incentivized to sue. This litigation is expensive, usually takes several months, and, at best, should result in more arbitration proceedings,¹⁹⁹ thus further delaying the resolution that the suing players seek.

IV. PROPOSED SOLUTION: THE INDEPENDENT ADJUDICATORY COMMITTEE SYSTEM

A. OTHER PROPOSALS AND CRITIQUES

Given the institutional problems with the NFL Commissioner's current disciplinary process, the process must be updated. This is not a novel idea, as several scholars have addressed revamping the NFL Commissioner's discipline process. The current debate in this field has centered around how much power the NFL Commissioner should retain. At one end of the spectrum are those who argue that the NFL Commissioner's disciplinary decision should be final and binding and not subject to appeal.²⁰⁰ Proponents of this theory contend that the NFL Commissioner is best situated to determine what is best for the sport as compared to arbitrators or judges.²⁰¹ However, this proposal would likely do more harm than good. Players who feel they have been unfairly treated would have only one avenue to challenge the disciplinary decision: litigation. The likely uptick in litigation, even if it provides a “fairly objective answer,”²⁰² is still less efficient than arbitration.²⁰³ Moreover, NFL players would still be subject to unfair treatment and lengthy delays, and the NFL Commissioner would still receive the brunt of public outrage over disciplinary decisions that the public feels are unfair.

On the other end of the spectrum, some have called for the NFL Commissioner to relinquish all authority to punish players for off-the-field conduct. Some argue that such discipline should be left to players' teams, as their employers.²⁰⁴ Others argue that the NFL and the country as a whole functioned well for decades without the NFL policing its players' off-the-field conduct and that, as an entertainment company rather than a policing agency, it should return to that policy.²⁰⁵ Even accepting that the NFL is no more than an entertainment company, the NFL has a vested financial interest in policing its players' off-the-field activities. When Commissioner Goodell first punished Ray Rice, he encountered significant hostility from fans and members of the public for punishing Rice too lightly.²⁰⁶ This undoubtedly cost the NFL revenue. More importantly, Ray Rice and Adrian Peterson lost sponsorship deals as a *65 result of their off-the-field misconduct.²⁰⁷ If the NFL had not taken action against these players, the NFL presumably would have risked losing its sponsorship deals as well.²⁰⁸ In fact, in the aftermath of the Ray Rice and Adrian Peterson scandals, multiple NFL sponsors requested their ads not be shown at games involving the Baltimore Ravens or Minnesota Vikings.²⁰⁹ Further, leaving punishment to the players' teams is insufficient. Teams are incentivized more so than the NFL to discipline players lightly or not at all because the teams have the most to lose (that player's services) and the least to gain (sponsorships and such are generally league business).²¹⁰ The public understands this and expects the NFL to take on the role of disciplinarian. This is evidenced by fan outrage in response to Commissioner Goodell's initial punishment of Ray Rice not meeting their standards.²¹¹ The NFL has much to lose by not conforming to this expectation. Finally, given the recent uptick in off-the-field misconduct discipline and the adoption of the new Personal Conduct Policy, the NFL has made it very clear that it plans to continue punishing players for off-the-field misconduct. Thus, it should strive to do so in the fairest, most efficient way possible.

The most promising proposal commentators have offered thus far is the hybrid system, explained by Adriano Pacifici. The hybrid approach allows the NFL Commissioner to retain initial disciplinary authority but places appeals decisions in the hands of a tripartite panel of independent arbitrators to determine the “reasonableness” of the discipline.²¹² This is close to what the NFLPA has demanded.²¹³ Pacifici specifies that the arbitrators should come from the American Arbitration Association and be bound by its procedural rules.²¹⁴ For each appeal, nine arbitrators would be presented to the parties, who would then choose three, similar to *voir dire* in jury trials.²¹⁵ Pacifici believes that this arbitrator selection process would avoid problems of arbitrator bias.²¹⁶

Pacifici's hybrid system deserves considerable praise as it creates a much fairer process for NFL players to appeal their suspensions, eliminates potential abuses by the NFL Commissioner, and greatly reduces the likelihood that players would challenge the arbitration decisions in court (thereby protecting the NFL Commissioner's credibility and saving both parties money). However, this system is not without its flaws, the worst of which being how long these arbitrations would take. Because the NFL Commissioner retains initial disciplinary authority, his punishment decision remains in effect until the arbitrators rule to overturn it, if they choose to do so. By having what amounts to a full-blown jury trial, presumably requiring *66 considerable preparation and trial time and likely additional time for motions and oral argument,²¹⁷ the length of time between the NFL Commissioner punishing the player and the player's arbitral resolution will be long--likely much longer than the one-and-a-half to two months that it already takes.²¹⁸ Given that the NFL regular season is only seventeen weeks long and the unique harms to NFL players who miss games,²¹⁹ any new system for the NFL must have as a goal concluding disciplinary disputes as quickly as possible. Pacifici's hybrid system fails to further that goal.

B. PROPOSED INDEPENDENT ADJUDICATORY COMMITTEE SYSTEM TO IMPROVE THE NFL'S OFF-THE-FIELD DISCIPLINE

The NFL and NFLPA should mutually agree to implement a system that roughly mirrors the United States criminal court system, minus juries. Under this “Independent Adjudicatory Committee” approach, the NFL Commissioner (or his designee, such as the disciplinary officer) would relinquish disciplinary authority and act as a prosecutor. He would retain complete authority to investigate, including meeting with players, with their lawyers present if they wish (although there would be no criminal procedure protections such as *Miranda* warnings or Fifth Amendment self-incrimination protections unless the parties mutually decided to adopt them), and compiling evidence against the players. If the NFL Commissioner believes that a player engaged in punishable misconduct, he would file a charge with the Independent Adjudicatory Committee, stating, with specificity, the misconduct in which the player allegedly engaged, the evidence against the player, and the recommended punishment. The Committee would then conduct a hearing, bound by the evidentiary, procedural, and substantive rules the NFL and NFLPA include in their amended CBA,²²⁰ and it would release a written opinion explaining its ruling and reasoning. As more and more cases are adjudicated, the resulting opinions will form an NFL disciplinary common law. The Committee would have the authority to stray from its past rulings, but will be encouraged in the CBA to follow *stare decisis* principles.²²¹ Of course, the NFL and NFLPA could always mutually agree to overturn Committee precedent by amending their CBA, similarly to how Congress occasionally overturns Supreme Court interpretations of its legislation.²²²

*67 The Committee would consist of three independent former judges, each of which the parties mutually agree to in order to ensure independence.²²³ To further this goal, the Committee members would receive a fixed annual salary, determined by the NFL and NFLPA together, so that the Committee members would not feel obligated to one party because of their pay structure. The NFL and NFLPA would determine the specifics of the members' terms during

collective bargaining. For instance, the parties could agree that committee members serve staggered six-year terms (one replaced every two years), and each member would be eligible to serve up to two terms.

The Committee would also be bound by the evidentiary, procedural, and substantive rules to which the NFL and NFLPA agree. To this point, the parties would want to determine the broad evidentiary and procedural rules--for instance, the admissibility of hearsay, statute of limitations and other time constraints, the standard of proof, and the types of pre-hearing motions available and how they could be resolved--but leave specific details to the Committee members. The benefit of choosing former judges as members of the Committee is that they are experienced in and comfortable with filling gaps in evidentiary and procedural rules.²²⁴ Thus, the NFL and NFLPA would simply include a provision allowing the Committee members to create such rules so long as they are not inconsistent with the CBA. The NFL and NFLPA could also always overturn a Committee rule through mutual agreement and CBA amendment.

The thorniest question regarding this proposal is how to define the substantive rules to which the Committee is bound. As it stands, NFL players are disciplined for off-the-field conduct that is “detrimental to the integrity of, or public confidence in, the game of professional football.”²²⁵ This vague standard is supplemented by the NFL's Personal Conduct Policy, which the owners imposed without any input from the NFLPA, and which offers little additional guidance as to what constitutes misconduct.²²⁶ The NFL and NFLPA have three possible avenues to resolve this issue: (1) they could leave it entirely up to the Committee to define “conduct detrimental to the game;” (2) they could allow either party to unilaterally define the term;²²⁷ or (3) they could do so together through collective bargaining. Ideally, the NFL and NFLPA would successfully pursue the third option. However, this is unrealistic as drafting a comprehensive NFL player disciplinary policy would be an onerous undertaking. Drafting such a policy to which the NFL and NFLPA would then agree is near impossible. The parties have met at the bargaining table on numerous occasions²²⁸ and have presumably discussed player discipline without reaching an agreement. Otherwise, they would have *68 implemented one. Thus, the parties would be best served by choosing the first option: allowing the Committee, after hearing NFL Commissioner recommendations and player responses at individual hearings, to craft the policy through its written opinions. The parties could then collectively bargain over specific decisions that the Committee makes and mutually agree to change them as they see fit.

Last, it is important to keep in mind that the Committee would essentially be a highly specialized arbitration framework. Thus, the Committee would remain subject to the Federal Arbitration Act and other similar laws.²²⁹ This affords both parties additional protection. If the Committee truly fails in its duties to fairly and impartially adjudicate disputes, the wronged party could still challenge the result in federal court, similarly to how Adrian Peterson and Tom Brady successfully litigated their discipline.²³⁰ However, given the structure of the Committee, litigation similar to Peterson's and Brady's will be reduced.

Admittedly, by calling on the NFL to relinquish significantly more power, this proposal is more radical than Pacifici's hybrid system. However, the NFL would ultimately benefit from doing so. The NFL's face, its Commissioner, would be much better protected and insulated from unpopular disciplinary decisions. The NFL would also repair its relationship with arguably its most valuable product, its players. Last, it may ultimately help to deter future misconduct. Currently, players do not know for what or how severely they may be punished for specific conduct. The creation of a predictable common law will remedy that issue. As a result, players may begin to consider the punishment before doing the crime.

V. THE INDEPENDENT ADJUDICATORY COMMITTEE SYSTEM SOLVES THE ISSUES FROM WHICH THE NFL'S CURRENT DISCIPLINARY SYSTEM SUFFERS

A. IMPROVING THE COMMISSIONER'S PUBLIC IMAGE AND SOLVING HIS “ARBITRATOR'S DILEMMA”

As a result of the NFL's response to the scandals that recently rattled it, the NFL Commissioner's public perception and control over his disciplinary process has suffered. The public perceives the NFL Commissioner's application of his "best interests" disciplinary authority as unfair, and the NFL Commissioner is trapped in the "arbitrator's dilemma."²³¹

Relinquishing some of his authority is the best way for the NFL Commissioner to solve his arbitrator's decision. Right now, the NFL Commissioner risks losing control over the disciplinary process and public confidence every time he chooses an arbitrator to hear player appeals of disciplinary decisions, whether or not that arbitrator is impartial.²³² The Independent Adjudicatory Committee proposal solves this problem. As prosecutor, the NFL Commissioner would retain considerable control over the process, and that control would remain constant regardless of the final outcome of the disciplinary proceedings. Further, the NFL Commissioner would not have to worry about having his disciplinary decision overturned (and losing the public's confidence) as he would not make a binding decision nor would he be concerned that his arbitrator choice fails the "evident partiality" test because he would not choose the arbitrator. In fact, as described in more detail *infra*,²³³ eventually the Committee *69 would create a reliable common law. Thus, the NFL Commissioner could predict with more certainty what charges and punishments would be successful and choose to either bring those or suggest that the Committee revisit its precedent. The player would also have the opportunity to challenge precedent in front of the Committee. In essence, this proposal allows the NFL Commissioner to retain the most authority possible without subjecting him to repeated reversals, thereby protecting the integrity and respect of his office, without harming the NFL's brand.

B. PROTECTING THE NFL AS A BUSINESS

The NFL Commissioner's recent exercise of his "best interests" disciplinary authority has harmed the NFL's bottom line by undermining its product. The NFL is financially incentivized to keep its players on the field, unless they have done something so egregious that the NFL believes it will be better off by removing them. The current disciplinary system sometimes fails to do this by suspending players who do not deserve it or not suspending players who do. This costs the NFL money and alienates its fans.

The Independent Adjudicatory Committee system will ameliorate these problems. By adjudicating cases quickly, efficiently, and accurately, and creating reliable common law as a result, this system protects the NFL in two important ways. First, it reaches what more people will view as the objectively correct result. Because neutral former judges will be making the decisions, and the NFL and NFLPA can choose to change principles established by the Committee's opinions, it is more likely that only players that deserve to be suspended will be suspended. The NFL will no longer lose revenue from erroneously prohibiting players from playing. Equally importantly, the NFL will no longer alienate its fans by disciplining players in ways the fans feel are unjust. Second, even if the Committee reaches a conclusion that fans feel is unfair, the NFL will be distanced from that decision. The Committee would take the brunt of the public's backlash, not the NFL. Although the NFL would undoubtedly still face some fan outrage as the result of a bad decision by the Committee, that harm will be assuaged by the independent decision-making and predictability the Committee will inject into the disciplinary proceedings.

C. CREATING A FAIRER PROCESS FOR THE NFL'S PLAYERS

The NFL Commissioner's current disciplinary process takes significant time, which often unfairly costs the players playing time and money, is inconsistent and unpredictable, and often results in litigation, all to the players' detriment.²³⁴ The Independent Adjudicatory Committee system will alleviate these problems. The main reason why the current process takes so long is because of the many steps it requires. After investigation, the NFL's disciplinary officer imposes discipline. The player then has to formally appeal, wait and prepare for two hearings (one with the Expert Panel, one with the NFL Commissioner or his designee), take the case through the hearings, and then wait for the NFL Commissioner or

his designee's decision.²³⁵ Throughout this process, the NFL Commissioner's punishment remains in effect. Worse, in the 2014 Personal Conduct Policy, the NFL Commissioner assumed the power to place players on paid leave during the initial investigation.²³⁶ Thus, even if the arbitrator ultimately rules in favor of the player, the player will have already been unfairly punished while awaiting the *70 arbitrator's decision. This problem similarly exists with Pacifici's hybrid system.²³⁷ Under the Independent Adjudicatory Committee system, the player will not serve a sentence until his case is heard by the Committee. Therefore, the player is not at risk of serving a sentence that is ultimately revoked and suffering the unrecoverable losses that come with unfair punishment.²³⁸ Further, if the NFL Commissioner wishes to expedite a player's punishment, he can hurry his investigation and bring charges quickly. In fact, the Committee, or the NFL and NFLPA through collective bargaining, could establish a process similar to temporary restraining orders or preliminary injunctions for the most egregious cases. Because the Committee is a stable body of individuals tasked solely with adjudicating NFL "best interests" discipline, hearings should operate swiftly and efficiently. In all, the Independent Adjudicatory Committee system is designed to operate as efficiently as possible, while still maintaining accuracy.

The NFL Commissioner's current disciplinary track record is inconsistent at best.²³⁹ As a result, players do not know for what conduct they will be punished, nor the severity of those punishments.²⁴⁰ Former NFL Commissioner Paul Tagliabue stressed these concerns in his arbitration award overturning Commissioner Goodell's Bounty Scandal discipline decision,²⁴¹ Judge Doty touched on the importance of this concept when he discussed the NFL's "law of the shop,"²⁴² and Judge Berman found this to be a dispositive issue in overturning Tom Brady's arbitration award when he concluded that Brady did not have adequate notice that he would be punished as severely as he was because the NFL had never previously punished players so harshly for similar offenses.²⁴³ My proposed system would help to ensure consistency and predictability in punishment. By creating a common law, protected by the basic principles of *stare decisis*, NFL players will have a much better understanding of what to expect when it comes to discipline for their off-the-field conduct.

Infusing the NFL "best interests" disciplinary system with common law principles will ultimately limit how often the players will file suit against the NFL. The NFL is visibly fearful of player litigation, as evidenced by its pre-emptive filing against Tom Brady.²⁴⁴ Labor law disfavors litigation regarding collective bargaining agreements, and courts' ability to overturn arbitration awards is limited.²⁴⁵ Yet, the NFLPA frequently challenges arbitration awards in court.²⁴⁶ This generally occurs either because the NFL Commissioner chooses an arbitrator who the NFLPA believes fails the evident partiality test, or because the NFLPA feels the outcome is facially unfair.²⁴⁷ Surprisingly, the NFLPA often wins,²⁴⁸ and the limited remedies generally available could extend an already lengthy process. By creating a system that *71 implements truly independent adjudicators who create a consistent and known body of law, both of these litigious issues are mitigated.

The obvious consequence of a fair, consistent common law is that many cases will never even make it to the hearing stage, let alone a courtroom. Similar to a prosecutor and a defendant entering into a plea bargain, the NFL Commissioner and NFL player may reach a disciplinary agreement if they so choose. Right now, given the uncertainty in what constitutes "conduct detrimental to the game," what a fair punishment for misconduct is, and how vast the NFL Commissioner's extraordinary disciplinary authority actually is, NFL players and the NFL Commissioner alike have little incentive to settle. This is exceptionally relevant today, given the NFL and the NFLPA/Brady's failure to reach a settlement regarding Brady's DeflateGate punishment despite Judge Berman's insistence that they do.²⁴⁹ Once common law principles are established, the likelihood of settlement will naturally increase. For the players, this further promotes efficient, fair outcomes that will not need to be litigated. For the NFL Commissioner, this bolsters his public image, rids him of the shame and embarrassment of having his decisions overturned, and allows him to focus his time on improving the NFL.

VI. CONCLUSION

The NFL Commissioner's current exercise of his "best interests" disciplinary authority is plagued with problems. Commissioner Goodell's recent exercise of this authority has damaged his credibility in the eyes of the public and has ultimately hurt the NFL's bottom line. Worse, the execution of his authority has been unnecessarily detrimental to the players and has, on increasing occasion, necessitated court action. However, the Independent Adjudicatory Committee system, under which the NFL Commissioner takes a prosecutorial role and leaves disciplinary decision-making authority in the hands of a neutral panel of three former judges, would solve many of these problems.

Still, neither party can unilaterally adopt the system, because doing so runs contrary to the parties' CBA. Thus, the parties would have to amend their CBA.²⁵⁰ Because the parties currently have a CBA in place that discusses this subject, neither party is required to collectively bargain about this topic during the life of the agreement.²⁵¹ Moreover, the parties executed a "zipper" clause in their current CBA, meaning they waived all rights to bargain about any subjects covered or not covered in the CBA.²⁵² Nevertheless, if both parties agree to bargain, they can overcome their "zipper" clause. However, the parties will only agree to implement this system if it is truly in their best interests. Because this approach best solves the many issues with the current system, it is in both parties' best interests to do so. The ball is now in the NFL and NFLPA's field; it is their turn to act.

Footnotes

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¹ The NFLPA is the union elected by the NFL players to represent them in collective negotiations with the NFL. *See About the NFLPA*, NFLPA.COM, <https://www.nflpa.com/about> (last visited Jan. 3, 2016).

² NFL CONST. & BYLAWS, Art. VIII, § 8.13(A) (Feb. 1, 1970) (revised 2006), *available at* http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf; NFL COLLECTIVE BARGAINING AGREEMENT, Art. 46, § 1(a) (Aug. 4, 2011), *available at* <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [hereinafter NFL CBA].

³ *See infra* Part I.A.

⁴ NFL CBA, *supra* note 2, Art. 46, §1(b).

⁵ Michel O'Keeffe, *Ray Rice's Appeal of Indefinite Ban from NFL To Be Heard by ex-Manhattan Federal Judge Barbara S. Jones*, N.Y. DAILY NEWS (Oct. 2, 2014, 10:40 PM), <http://www.nydailynews.com/sports/football/ray-rice-appeal-nfl-ban-heard-ex-manhattan-federal-judge-barbara-s-jones-article-1.1961075>.

⁶ Allison McCann, *The NFL's Uneven History of Punishing Domestic Violence*, FIVETHIRTYEIGHT.COM (Aug. 28, 2014 8:13 PM), <http://fivethirtyeight.com/features/nfl-domestic-violence-policy-suspensions/> (the report is current through September 22, 2014, and excludes, for instance, Adrian Peterson's suspension).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

- 10 *See infra* Part II.
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- 27 *Id.* (citing Lockwood, *supra* note 17, at 146 (citing NFL COLLECTIVE BARGAINING AGREEMENT, Art. XI, § 1(a) (1993))).
- 28 NFL CONST. & BYLAWS, *supra* note 2, Art. VIII, § 8.13(A) (emphasis added).
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- 31 Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 105 (2014).
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- 35 *Id.* at 637.
- 36 *Id.* All of Paul Tagliabue's suspensions were for one game, except for one two-game suspension, and one three-game suspension. See McCann, *supra* note 6.
- 37 Jim Corbett, *Tagliabue Hands Off to Goodell as NFL Commissioner*, USA TODAY (Aug. 9, 2006, 6:00 PM), http://usatoday30.usatoday.com/sports/football/nfl/2006-08-08-goodell-commissioner_x.htm.
- 38 *Goodell Strengthens NFL Personal Conduct Policy*, USA TODAY (updated Apr. 11, 2007, 8:28 AM), http://usatoday30.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm. Chris Henry had been arrested four times in a fourteen-month span for various offenses and had already been suspended for two games as a result. *Goodell Suspends Pacman, Henry for Multiple Arrests*, ESPN (May 17, 2007), <http://sports.espn.go.com/nfl/news/story?id=2832015>. Jones faced ten separate incidents in which he was interviewed by police. *Id.* Johnson, already on probation, had six unregistered firearms in his home that were found during a police raid. *Johnson Suspended for Eight Games; Can Be Reduced to Six*, ESPN (June 5, 2007), <http://sports.espn.go.com/nfl/news/story?id=2892889>.
- 39 *Goodell Strengthens NFL Personal Conduct Policy*, *supra* note 38. As Commissioner Goodell explained when announcing the suspensions and subsequent new Personal Conduct Policy:
It is important that the NFL be represented consistently by outstanding people as well as great football players, coaches, and staff. We hold ourselves to higher standards of responsible conduct because of what it means to be part of the National Football League. We have long had policies and programs designed to encourage responsible behavior, and this policy is a further step in ensuring that everyone who is part of the NFL meets that standard.
- 40 *Id.*
- 41 2008 NFL PERSONAL CONDUCT POLICY (2008), available at http://www.prostaronline.com/draftee/personal_conduct_policy.pdf. Executive Director Upshaw took considerable flack for allowing the NFL to implement a Personal Conduct Policy that gave the NFL Commissioner virtually unlimited power, with one commentator even exclaiming that President Upshaw "failed" the NFLPA's members. See Adam Marks, Note, *Personnel Foul on the National Football League Player's 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).
- 42 2007 NFL PERSONAL CONDUCT POLICY (Mar. 13, 2007), available at <http://sports.espn.go.com/nfl/news/story?id=2798214>.
- 43 2008 NFL PERSONAL CONDUCT POLICY, *supra* note 41, at 1-2.
- 44 *Id.* at 1.
- 45 *Id.* at 2.

- 46 2007 NFL PERSONAL CONDUCT POLICY, *supra* note 42 (emphasis added).
- 47 2008 NFL PERSONAL CONDUCT POLICY, *supra* note 41, at 3.
- 48 Interestingly, the 2008 Personal Conduct Policy continued after the NFL and NFLPA negotiated a new CBA. The CBA was silent on the matter. Some question whether the 2008 Personal Conduct Policy, and its predecessors and successors for that matter, are valid. See Edelman, *supra* note 34; Doug Farrar, *NFLPA Executive: New Player Conduct Policy Could be A Violation of CBA*, SPORTS ILLUSTRATED (Dec. 11, 2014), <http://www.si.com/nfl/2014/12/11/nfl-personal-conduct-policy-nflpa-george-atallah-cba-violation>. Cf. Kelly M. Vaughan, Note, *First and Goal: How The NFL's Personal Conduct Policy Complies with Federal Antitrust Law*, 96 CORNELL L. REV. 609 (2011). Because the NFL treats them as valid and follows them as such, this Article assumes their validity for purposes of its argument.
- 49 For a detailed explanation of the Ray Rice scandal, see *infra* Part II.A.
- 50 For a detailed account of the Adrian Peterson scandal, see *infra* Part II.B.
- 51 Almasy & Nichols, *supra* note 14.
- 52 Tom Pelissero, *NFL Toughens Its Stance on Domestic Violence*, USA TODAY (Aug. 28, 2014, 4:06 PM), <http://www.usatoday.com/story/sports/nfl/2014/08/28/nfl-toughens-its-stance-on-domestic-violence/14746187/>. Notably, Commissioner Goodell again consulted with the NFLPA while drafting this new Policy. *Id.*
- 53 Before the Domestic Violence Policy, the NFL's punishment for player off-the-field conduct violations was, on average, a three game suspension, while, for domestic violence specifically, was only 1.5 games. McCann, *supra* note 6.
- 54 Although the “mitigating circumstances” language may allow the NFL Commissioner to grant less severe punishments, this does not appear to be consistent with the Policy's spirit to establish a floor for domestic violence suspensions. See Pelissero, *supra* note 52. Yet, Commissioner Goodell showed his willingness to suspend players accused or convicted of domestic violence for more than six games when he suspended Greg Hardy for ten games. See Jane McManus, *How NFL's Roger Goodell Got It Right with Greg Hardy*, ESPN (Apr. 23, 2015), <http://espn.go.com/espnw/news-commentary/article/12745022/how-nfl-roger-goodell-got-right-greg-hardy-suspension>. However, Commissioner Goodell personally heard Hardy's appeal and reduced his suspension to four games. Josh Apler, *Greg Hardy Suspension Reduced to Four Games*, NBC SPORTS PRO FOOTBALL TALK (JULY 10, 2015, 2:31 PM), <http://profootballtalk.nbcsports.com/2015/07/10/greg-hardy-suspension-reduced-to-four-games/>.
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- 58 2014 NFL PERSONAL CONDUCT POLICY, *supra* note 56, at 1.
- 59 *Id.* at 2.
- 60 *Id.*
- 61 *Id.*
- 62 *Id.* at 5. The NFL appointed Todd Jones, the former director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, to “apply and administer the personal conduct policy that applies to NFL employees,” and Lisa Friel, a former New York District Attorney's office sex crimes prosecutor, who “will professionalize the investigations process.” Adam Schefter, *NFL to Hire ex-ATF Boss Todd Jones*, ESPN (updated Mar. 23, 2015, 1:47 PM), http://espn.go.com/nfl/story/_/id/12544015/todd-jones-former-atf-director-join-nfl-conduct-czar.

- 63 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.
- 64 2014 NFL PERSONAL CONDUCT POLICY, *supra* note 56, at 7 (“Appeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement for players or pursuant to the applicable league procedures for nonplayers.”).
- 65 *Id.* at 4-5.
- 66 *Id.* at 5.
- 67 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.
- 68 *Id.*
- 69 2014 NFL PERSONAL CONDUCT POLICY, *supra* note 56, at 7; 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.
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- 72 CNN Staff, *Key Events in the Ray Rice Story*, CNN (updated Sept. 16, 2014, 10:34 AM), <http://www.cnn.com/2014/09/09/us/ray-rice-timeline/>.
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- 75 *Id.*; TMZ Staff, *Ray Rice Elevator Knockout: Fiancée Takes Crushing Punch*, TMZ (Sept. 8, 2014, 1:00 AM) <http://www.t TMZ.com/2014/09/08/ray-rice-elevator-knockout-fiancee-takes-crushing-punch-video/>.
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- 77 *Id.*
- 78 O’Keefe, *supra* note 5.
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- 80 In the Matter of Ray Rice, Arbitration Decision (Nov. 28, 2014) (Hon. Jones, Arb.), *available at* http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf. Rice also demanded \$3.529 million from the Baltimore Ravens, which reflected the amount he would have earned for the fourteen games he should have been allowed to play. *Report: Ray Rice Gets \$1.588 Million*, ESPN (updated Mar. 3, 2015, 10:56 AM), http://espn.go.com/nfl/story/_/id/12412931/ray-rice-baltimore-ravens-reach-settlement-1588-million. Rice finally settled with the Ravens for \$1.588 million. *Id.*
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- 96 Order Vacating Arbitration Award, Nat'l Football League Players Ass'n v. NFL, Civ. No. 14-4990 (DSD/JSM) (D. Minn. Feb. 26, 2015), *available at* <http://a.espn.com/pdf/2015/0226/DotyPetersonruling.pdf> [hereinafter *Adrian Peterson's Order Vacating Arbitration Award*].
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- 98 *Id.* at 11-14 (citing *Bureau of Engraving, Inc. v. Graphic Commc'ns Int'l Union, Local 1B*, 164 F.3d 427, 429 (8th Cir. 1999); *United Steelworkers of Am. V. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)).
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- 129 *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013 (Sup. Ct. N.Y. 1991).
- 130 *Id.* at 1016-17.
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- 137 9 U.S.C. § 10(a)(2).
- 138 NFL Complaint, *supra* note 134, at 40 (quoting *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 549 (N.D. Tex. 2006)).
- 139 *Id.* at 40-47.
- 140 *Id.* at 47.

- 141 See, e.g., Tony Manfred, *Roger Goodell Apologizes for Ray Rice Fiasco, Promises New Policies in Press Conference*, BUSINESS INSIDER (Sept. 19, 2014), <http://www.businessinsider.com/live-roger-goodell-press-conference-2014-9>.
- 142 See O'Keeffe, *supra* note 5.
- 143 Pacifici, *supra* note 31, at 110.
- 144 See *supra* Part II.A.
- 145 See *supra* Part II.B-C.
- 146 This is also codified in the NFL's Constitution, which explains, "the purpose and objects for which the League is organized are... [t]o promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States." NFL CONST. & BYLAWS, *supra* note 2, Art. II, § 2.1(A). Given that each NFL team, as a football team, must have the purpose of having football games, the NFL's purpose is to "promote and foster" those games.
- 147 See NFL CBA, *supra* note 2, Art. 51, §4, Appendix A, P4. One way the NFL has advertised its players is through its "Hard Knocks" series produced in collaboration with HBO. See Jason Gallagher, *Guts, Glory and Goddamn Snacks: A History of 'Hard Knocks'*, THE ROLLING STONE (Aug. 5, 2014), <http://www.rollingstone.com/culture/news/hbo-hard-knocks-history-guts-glory-and-goddamn-snacks-20140805>.
- 148 The NFL recently updated the Pro Bowl in an attempt to make it more exciting and marketable. See Martin Pengelly, *NFL Announces New Format and Player Draft for 2014 Pro Bowl*, THE GUARDIAN (July 31, 2013, 3:56 PM), <http://www.theguardian.com/sport/2013/jul/31/nfl-pro-bowl-draft-new-format>.
- 149 The NFL has dedicated an entire section of its website to the NFL Combine. See NFL COMBINE, <http://www.nfl.com/combine> (last visited Jan. 3, 2016).
- 150 The NFL has changed its draft from a simple, one-day event held in a hotel, to a three-day, nationally-televised affair held in a major concert venue, such as Radio City Music Hall in New York City. See *NFL Draft Locations*, FOOTBALL GEOGRAPHY, <http://www.footballgeography.com/nfl-draft-sites/>, (last visited Jan. 3, 2016).
- 151 The NFL Super Bowl seemingly sets new ratings records every year. See, e.g., Dominic Patten, *Touchdown! NBC's Super Bowl Scores Record-Smashing Viewership*, DEADLINE (Feb. 2, 2015, 1:30 PM), <http://deadline.com/2015/02/super-bowl-ratings-patriots-seahawks-2015-superbowl-xlix-1201364688/>.
- 152 See, e.g., NFL SHOP: JERSEYS, <http://www.nflshop.com/Jerseys?ab=bn-nflcms-TopNav-Jerseys-2.6.14> (last visited Jan. 3, 2016).
- 153 See Albert Breer, *Prison Tag? Franchise Tag Has Changed Over The Years*, NFL.COM (updated Aug. 3, 2012, 1:37 AM), <http://www.nfl.com/news/story/09000d5d82aa478e/article/prison-tag-franchise-designation-has-changed-over-the-years>.
- 154 See ABOUT NFL FILMS, <http://www.nflfilms.com/about.html> (last visited Jan. 3, 2016).
- 155 Despite its disciplinary struggles, the NFL earned record profits last year. See Chris Isidore, *NFL Earns Record Profits Despite Ugly Image*, CNNMONEY (Jan. 20, 2015, 6:24 AM), <http://money.cnn.com/2015/01/20/news/companies/nfl-profits/>.
- 156 Although the economic value of NFL players has not been studied rigorously, player value in terms of wins has. In one study, the value of each position to a team's ability to win was calculated by determining "positional wins above replacement," which "measures the value of players in the NFL, by position, in terms of generating wins." See Andrew Hughes, Cory Koedel & Joshua A. Price, *Positional WAR in the National Football League*, Department of Economics, University of Missouri-Columbia Working Paper Series 14, 10 (June 2014), available at http://economics.missouri.edu/working-papers/2014/WP1410_koedel.pdf. Websites, such as ProFootballFocus.com, purport to calculate the value of each player in comparison to others in his position. See PRO FOOTBALL FOCUS ABOUT, <https://www.profootballfocus.com/about/> (last visited Jan. 3, 2016). The value a player adds in terms of wins sheds some light on the economic value that player adds to the NFL. The NFL's own marketing analytics would likely shed more light. Given that the data exists to calculate the value of each player to the NFL, and that the NFL likely has it, the NFL must have an estimate of what it gains to make or

lose from each suspension. Commissioner Goodell may have taken this under consideration when he waited to punish anyone as a result of DeflateGate. Some have argued that Commissioner Goodell did not want DeflateGate punishments to tarnish one of the NFL's most profitable games, the Super Bowl. *See Rosenberg, supra* note 11.

157 This is further evidenced by the fact that, historically, the NFL strengthened its disciplinary process only after the public condemned the NFL for its disciplinary response to a player's conduct. *See supra* Part I.C-D.

158 This economics argument has also been presented by Matthew Parlow, *supra* note 15, at 182 (citing Bukowski, *supra* note 32, at 106-08).

159 For instance, there appears to be some consensus that Commissioner Goodell suspending Donte Stallworth for one year after he pled guilty to DUI manslaughter was warranted. As a result, Commissioner Goodell and the NFL were actually praised for Commissioner Goodell's handling of that tragedy. *See, e.g., Erin McLaughlin, Donte Stallworth's Sentence Was No Slap on The Wrist*, BLEACHER REPORT (Jun. 16, 2009), <http://bleacherreport.com/articles/200684-donte-stallworths-sentence-was-no-slap-on-the-wrist>.

160 *See supra* Part II.

161 *See* NFL CBA, *supra* note 2, Art. 46, §1(a).

162 *Compare* CNN Staff, *supra* note 72, and Mel Robbins, *NFL's Personal Conduct Policy Fail*, CNN (updated Dec. 13, 2014, 4:08 PM), <http://www.cnn.com/2014/12/11/opinion/robbins-nfl-domestic-violence-rules/>, with Smith, *supra* note 14.

163 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

164 *Id.*

165 *See Id.*; Schefter, *supra* note 62.

166 *See* Pacifici, *supra* note 31, at 114 (citing Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 47 FORDHAM L. REV. 1645, 1706 (1999)).

167 *See supra* Part II.A.

168 *Id.*

169 *Id.*

170 *See supra* Part II.B.

171 *See supra* Part II.C.

172 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.

173 This is required under the CBA. *See* NFL CBA, *supra* note 2, Art. 46.

174 The Back Pay Act allows for the recovery of back pay if an employee is found to "have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C.A. § 5596(b)(1) (West 2014).

175 *Average Playing Career Length in the National Football League (in Years)*, STATISTA, <http://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/> (last visited Jan. 3, 2016).

176 *See* NFL CBA, *supra* note 2, Art. 31.

177 Every season this turnover occurs on NFL rosters. *See, e.g., Albert Breer, Colin Kaepernick Over Alex Smith: The Truth About a Bold Move*, NFL.COM (Jan. 30, 2013, 11:56 AM), <http://www.nfl.com/superbowl/story/0ap1000000132169/article/colin-kaepernick-over-alex-smith-the-truth-about-a-bold-move>.

- 178 *See supra* Part II.A-B.
- 179 *See* accompanying text, *supra* note 174.
- 180 *See, e.g.*, Joel Corry, *Agent's Take: Notable Players who Cashed in on Performance Bonuses*, CBSSPORTS.COM (Dec. 30, 2014, 2:55 PM), <http://www.cbssports.com/nfl/eye-on-football/24923980/agents-take-notable-players-who-cashed-in-on-performance-bonuses>.
- 181 Joel Corry, *What Are Players Paid During The Playoffs?*, NATIONALFOOTBALLPOST.COM (Jan. 2, 2015), <http://www.nationalfootballpost.com/what-are-players-paid-during-the-playoffs/>; Teresa Ambord, *Super Bowl Money and Tax Facts You May Not Know*, ACCOUNTINGWEB.COM (Jan. 31, 2014), <http://www.accountingweb.com/article/super-bowl-money-and-tax-facts-you-may-not-know/223009>.
- 182 *See, e.g.*, Jordan Teicher, *How NFL Players Are Winning The Game for Micro Endorsements: On-Demand Merchandise*, ADWEEK.COM (Sept. 15, 2014, 11:38 PM), <http://www.adweek.com/brandshare/how-nfl-players-are-winning-game-micro-endorsements-160065>; Kurt Badenhausen, *The NFL's Highest-Paid Players 2014*, FORBES (Aug. 20, 2014, 9:56 AM), <http://www.forbes.com/sites/kurtbadenhausen/2014/08/20/the-nfls-highest-paid-players-2014/>.
- 183 Badenhausen, *supra* note 182.
- 184 2014 NFL PERSONAL CONDUCT POLICY FLOWCHART, *supra* note 57.
- 185 *Id.*
- 186 *See supra* Part II.A.
- 187 *See supra* Part II.B.
- 188 *See supra* Part II.C.
- 189 In the Matter of New Orleans Saint Pay-for-Performance/“Bounty”, Arbitration Decision, at 18 (Dec. 11, 2012) (Tagliabue, Arb.), available at http://espn.go.com/photo/preview/121211/espn_bountyruling.pdf; *supra* Part II.C.
- 190 NFL CBA, *supra* note 2, at Art. 46. For a discussion regarding whether the NFL should not discipline its players at all, see Josh Levin, *You're Fired, Roger Goodell*, SLATE (Sept. 23, 2014, 7:27 PM), http://www.slate.com/articles/sports/sports_nut/2014/09/nfl_personal_conduct_policy_the_commissioner_has_no_business_punishing_anyone.html.
- 191 One of the suggested reasons for a sports commissioner's exercise of his “best interests” disciplinary authority is to deter other players from engaging in similar conduct. *See* Parlow, *supra* note 15, at 182 (citing Bukowski, *supra* note 32, at 106-08).
- 192 *See supra* I.C.
- 193 *See, e.g.*, Nancy Armour, *Richard Sherman Sees Real Issue in DeflateGate*, USA TODAY (Jan. 25, 2015, 11:52 PM), <http://www.usatoday.com/story/sports/nfl/2015/01/25/richard-sherman-super-bowl-xlix-seattle-seahawks/22326271/>; Pat McManamon, *Joe Thomas Rips Deflategate Probe, Roger Goodell's 'Ridiculous Witch Hunts'*, ESPN (Aug. 23, 2015), http://espn.go.com/nfl/story/_id/13494837/joe-thomas-cleveland-browns-backs-tom-brady-rips-nfl-witch-hunts; David Zirin, *Marshawn Lynch and Roger Goodell: Compare and Contrast*, THE NATION (Jan. 27, 2015, 9:43 PM), <http://www.thenation.com/blog/196257/marshawn-lynch-and-roger-goodell-compare-and-contrast#>; Kevin Patra, *Brees Backs Fujita's Criticism of NFL Commissioner Roger Goodell*, NFL.COM (Oct. 11, 2012), <http://blogs.nfl.com/2012/10/11/brees-backs-fujitas-criticism-of-commissioner-goodell/>; Ryan Parker, *Current, ex-NFL Players Criticize Roger Goodell Over Video Bombshell*, LA TIMES (Sept. 10, 2014, 5:34 PM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-nfl-players-criticize-goodell-20140910-htmstory.html>.
- 194 *See supra* Part II.B-C.
- 195 Pacifici, *supra* note 31, at 110.
- 196 *See supra* Part II.C.

- 197 *See supra* Part II.B.
- 198 Pacifici, *supra* note 31, at 105-12; *supra* Part II.C.
- 199 For example, in Adrian Peterson's case, approximately two-and-a-half months passed between his initial arbitration ruling and Judge Doty's vacatur of his arbitration award. *See supra* Part II.B. Judge Doty's ruling merely vacated the award and remanded for further proceedings consistent with the CBA and the law, and the NFL plans to appeal. *Id.* Thus, Peterson will necessarily experience additional delays before his case is decided. Considering that his suspension was initially to be lifted on April 15, 2015, these delays may ultimately prove Peterson's long court battle to be of little value.
- 200 *See* Pollack, *supra* note 166.
- 201 *Id.* at 1649.
- 202 *Id.* at 1707.
- 203 This criticism is also made by Pacifici. *See* Pacifici, *supra* note 31, at 113. Arbitration is generally considered more efficient than litigation, especially in the labor context. *See, e.g.,* [United Steelworkers of Am. v. Am. Mfg. Co.](#), 363 U.S. 564 (1960); [United Steelworkers of Am. v. Warrior & Gulf Navigation Co.](#), 363 U.S. 574 (1960); [United Steelworkers of Am. v. Enter. Wheel & Car Corp.](#), 363 U.S. 593 (1960).
- 204 *See, e.g.,* Levin, *supra* note 190.
- 205 Tim Marchman, *The NFL's Useful Idiots Want Roger Goodell to Get Tough; They're Wrong*, DEADSPIN.COM (Sept. 17, 2014, 5:06 PM), <http://deadspin.com/the-nfls-useful-idiots-want-roger-goodell-to-get-tough-1635948177>.
- 206 *See supra* Part II.A.
- 207 *See* Daniel Roberts & Benjamin Snyder, *Ray Rice and 11 Other Athletes Who Lost Their Endorsements*, FORTUNE (Sept. 20, 2014, 9:00 AM), <http://fortune.com/2014/09/20/ray-rice-adrian-peterson-tiger-woods-athletes-dropped-endorsements/>.
- 208 *See* Ike Ejoichi, *How the NFL Makes the Most Money of Any Pro Sport*, CNBC (Sept. 4, 2014, 9:32 AM), <http://www.cnbc.com/id/101884818> (“[T]he National Football League and its 32 teams raked in a record-setting \$1.07 billion in sponsorship revenue for the 2013 season, an increase of 5.7 percent over the 2012 season.”).
- 209 Jason B. Hirschhorn, *NFL Sponsors Avoid Ravens, Vikings Due to Off-The-Field Incidents, per Report*, SBNATION.COM (Sept. 24, 2014, 9:45 PM), <http://www.sbnation.com/nfl/2014/9/24/6841787/nfl-sponsors-ravens-vikings-ray-rice-adrian-peterson>.
- 210 *Cf.* David Berri, *America's Socialist Sports League: The NFL*, THE ATLANTIC (Mar. 26, 2015), <http://www.theatlantic.com/business/archive/2015/03/americas-socialist-sports-league-the-nfl/388330/> (reporting on a paper that found that NFL owners share revenues than the National Basketball Association or Major League Baseball). Even so, NFL owners remain committed to fielding the most competitive team possible. *Id.*
- 211 *See supra* Part II.A.
- 212 Pacifici, *supra* note 31, at 113-14.
- 213 *See* Bell, *supra* note 70.
- 214 *Id.* at 114.
- 215 *Id.* at 114-15.
- 216 *Id.* at 115.
- 217 For instance, the American Arbitration Association's Consumer Arbitration Rules, which Pacifici explicitly states the NFL should use, allow for the filing and resolution of written motions only after the parties and arbitrator have held a conference call, which could considerably lengthen an arbitration. *Consumer Arbitration Rules*, AM.

ARBITRATION ASS'N, at R-24 (Sept. 1, 2014), *available at*, https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?_afWindowId=12ua96wc7a_1&_afLoop=2022891065107770&doc=ADRSTAGE2021424&_afWindowMode=0&_adf.ctrl-state=hf27f5iaa_4#%40%3F_afWindowId%3D12ua96wc7a_1%26_afLoop%3D2022891065107770%26doc%3DADRSTAGE2021424%26_afWindowMode%3D0%26_adf.ctrl-state%3D12ua96wc7a_79.

218 *See* Part III.C.

219 *See id.*

220 The only way to implement this approach would be for the NFL and NFLPA to mutually agree to amend their CBA to include it. *See infra* Conclusion.

221 *Stare decisis* is the principle that courts will generally abide to their precedents. *See* LEGAL INFORMATION INSTITUTE STARE DECISIS, https://www.law.cornell.edu/wex/stare_decisis (last visited Jan. 3, 2016). The United States Supreme Court follows this principle unless the prior precedent has been found unworkable due to serious inequity, instability, or societal change that renders the precedent irrelevant. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

222 *See, e.g.*, The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overturning a Supreme Court decision, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (overturning two Supreme Court decisions, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)).

223 The NFL and NFLPA proved capable of doing this in the past when they mutually elected Judge Barbara Jones to hear Ray Rice's appeal. *See supra* Part II.A.

224 Generally, judges are permitted to promulgate local rules for their courtrooms so long as those rules are not inconsistent with any governing law. *See, e.g.*, LOCAL RULES FOR THE 17TH CIRCUIT OF FLORIDA, <http://www.17th.flcourts.org/index.php/rules-and-policies/local-rules> (last visited Jan. 3, 2016); LOCAL RULES FOR THE SIXTH JUDICIAL CIRCUIT, <http://www.jud6.org/LegalCommunity/LocalRules.html> (last visited Jan. 3, 2016).

225 NFL CBA, *supra* note 2, Art. 46, §1(a).

226 *See supra* Part I.C. (explaining that the new NFL Personal Conduct Policy merely addresses the procedure by which the NFL Commissioner disciplines players; it does not clarify what constitutes a violation of the “detrimental to the game” standard).

227 This party would likely be the NFL because the NFL already believes it has the power to do so. *See* Bell, *supra* note 70 (explaining that one of the NFLPA's primary challenges to the NFL's new Personal Conduct Policy is that the NFL could only adopt it through collective bargaining and amending the CBA, with which the NFL disagrees).

228 *See* Associated Press, *NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), http://sports.espn.go.com/nfl/news/story?page=nfl_labor_history; Terrence Caldwell, An Overview and Comparative Analysis of the Collective Bargaining Agreements in the NBA, NFL, and MLB (Fall 2010) (unpublished B.A. thesis, Claremont University), *available at* http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1063&context=cmc_theses.

229 *See* 9 U.S.C.A. §2 (West 2014).

230 *See supra* Part II.B-C.

231 *See supra* Part III.A.

232 *See id.*

233 *See id.*

234 For a more in-depth discussion of these issues, *see supra* Part III.C.

235 *See supra* Part I; NFL CBA, *supra* note 2, Art. 46.

- 236 2014 NFL CONDUCT POLICY FLOWCHART, *supra* note 57.
- 237 *See supra* Part IV.A.
- 238 Critics may argue that the Committee could get the player's sentence wrong. Accuracy in punishment is a concern in any system. Further, it is almost impossible to objectively determine if punishment is "accurate." However, by appointing a panel of former judges, and allowing the parties to overturn their decisions, the Independent Adjudicatory Committee System will better uphold the goal of accuracy than the other possibilities. *See infra* Part IV.B.
- 239 *See supra* Part II-III.
- 240 *Id.*
- 241 *Id.*
- 242 *See* Adrian Peterson's Order Vacating Arbitration Award, *supra* note 96, at 11-14.
- 243 *See supra* Part II.C.
- 244 *See id.*
- 245 *See* David Pluchinsky, *The Basics of Confirming, Vacating, Modifying and Correcting an Arbitration Award Under the Federal Arbitration Act and the Texas Arbitration Act*, BEIRNE, MAYNARD & PARSONS, L.L.P. (Dec. 31, 2002), <http://www.bmplp.com/publications/34-the-basics-confirming-vacating-modifying-correcting-arbitration-award>.
- 246 *See supra* Part III.C.
- 247 *Id.*
- 248 The NFLPA won its lawsuit on behalf of Adrian Peterson, and coaxed Commissioner Goodell into the result it wanted in the Bounty Scandal. *See supra* Part II.A; Pacifici, *supra* note 31, at 105-12.
- 249 *See supra* Part II.C.
- 250 Alternatively, the parties could wait until the current CBA expires and then collectively bargain for the system in the new CBA. However, the new CBA does not expire until 2020. *See* NFL CBA, *supra* note 2, Art. 69, § 1. Thus, the parties would be much better off amending their CBA.
- 251 National Labor Relations Act, 29 U.S.C.A. § 158(d) (West 2014); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951).
- 252 NFL CBA, *supra* note 2, Art. 2, § 4(a). Parties may waive their rights to discuss future matters in their collective bargaining agreement so long as the waiver is clear and unmistakable. *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989). For a discussion about zipper clauses generally, see Note, *Mid-Term Modification of Terms and Conditions of Employment*, 1972 DUKE L.J. 813, 819-22 (1972).

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