

Throwing the Flag on the NFL Disciplinary Process

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I. INTRODUCTION

A few years ago, the National Football League (NFL) was atop news headlines for the actions of one of the league’s star quarterbacks—Deshaun Watson. Watson had engaged in inappropriate sexual conduct with masseuses.¹ This misconduct resulted in the NFL initiating disciplinary proceedings against Watson for violating the NFL Personal Conduct Policy (Policy).² Shortly before Watson’s proceedings, however, the NFL and NFL Players Association (NFLPA) agreed to a new Collective Bargaining Agreement (CBA) that modified the league’s disciplinary process.³ Therefore, the Watson proceedings came at a salient time for the NFL. Indeed, the Watson proceedings served as the benchmark for the NFL’s new disciplinary process.

This Note will accomplish three things. First, this Note will detail the events that brought on the Watson proceedings. It will pay specific attention to the NFL’s recent

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1. Jenny Vrentas, *How the Texans and a Spa Enabled Deshaun Watson’s Troubling Behavior*, N.Y. TIMES (June 7, 2022), <https://www.nytimes.com/2022/06/07/sports/football/deshaun-watson.html> (on file with the *Journal of Corporation Law*).

2. *Browns QB Deshaun Watson’s Hearing Before Disciplinary Officer Will Begin Tuesday*, NFL (June 25, 2022), <https://www.nfl.com/news/browns-qb-deshaun-watson-s-hearing-before-disciplinary-officer-will-begin-tuesda> [<https://perma.cc/6495-DSB2>].

3. Grant Gordon, *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL (Mar. 15, 2020), <https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246> [<https://perma.cc/8QDU-3NNG>].

attempts at managing player conduct. Second, this Note will analyze the resulting opinion from the Watson proceedings. Most notably, it will outline the issues that the opinion revealed about the NFL's current disciplinary process. Finally, this Note will suggest changes to the NFL's disciplinary process. These changes would provide clarity, ensure equitable and consistent results, and protect stakeholders' interests.

II. BACKGROUND

The NFL is king. The league ranks number one in revenue among sports leagues around the world, bringing in \$16 billion in revenue in 2020.⁴ Despite already being the leading professional sports brand, the NFL anticipates massive growth in the future.⁵ The NFL already aims to bring in as much as \$25 billion in revenue by 2027.⁶ The massive revenue and absence of substantial competition likely makes the NFL too big to fail. However, the NFL is not without its concerns. Of the issues the NFL faced in 2021 and 2022, player discipline—primarily discipline related to the abuse of women—was among the most important. To understand why, one needs to understand the history of the NFL.

A. Structure, History, and the CBA

In 1920, the American Professional Football Association was born,⁷ but the APFA label was not long for this world. The APFA became the National Football League just two years later.⁸ With this change in name came the addition of franchises.⁹ The league started with only fourteen franchises.¹⁰ In roughly 100 years, that number more than doubled to 32 franchises spread across the United States.

The NFL is a unique form of business entity: a trade association.¹¹ Because the NFL is a trade association, no person or persons own the NFL.¹² Instead, the owners of all NFL franchises band together to create opportunities within the realm of professional football.¹³

4. *Top 10 Largest Sports Leagues by Revenue 2020, Which Sport Makes the Most Money*, BIZVIBE BLOG (July 29, 2020), <https://blog.bizvibe.com/blog/largest-sports-leagues-by-revenue> [https://perma.cc/4LKJ-GWSK].

5. Eben Novy-Williams, *Booming NFL Looks Ahead with 'Healthy Paranoia' After Media Deals*, SPORTICO (Feb. 6, 2023), <https://www.sportico.com/leagues/football/2023/nfl-revenue-whats-next-1234708609> [https://perma.cc/9L4N-SV3H].

6. *Id.*

7. *National Football League*, BRITANNICA (Aug. 18, 2022), <https://www.britannica.com/topic/National-Football-League> [https://perma.cc/T6WU-MU82].

8. *Id.*

9. *National Football League Franchise Histories*, PRO FOOTBALL H.O.F., <https://www.profootballhof.com/football-history/national-football-league-franchise-histories> [https://perma.cc/E2RV-SPKL] (showing the teams that participated in the NFL during the year 1922).

10. *Id.*

11. Jakob Eckstein, *How the NFL Makes Money*, INVESTOPEDIA (Feb. 1, 2024), <https://www.investopedia.com/articles/personal-finance/062515/how-nfl-makes-money.asp> [https://perma.cc/VD3L-64VP].

12. *Id.*; see also Ryan Gosling, *Who Owns the NFL and Its Brand?*, PRO FOOTBALL NETWORK (Feb. 7, 2023), <https://www.profootballnetwork.com/who-owns-the-nfl-and-nfl-brand> [https://perma.cc/V8MP-WSKT].

13. *Trade Association*, BRITANNICA, <https://www.britannica.com/money/trade-association> [https://perma.cc/R4WV-GXTC] (defining trade association as “voluntary association of business firms

That means the owners—by virtue of their interest in the game of professional football as it relates to the NFL—serve as the NFL’s stakeholders.¹⁴

To ensure that each franchise has an equal say in league matters, the owners have periodical meetings.¹⁵ Each franchise selects a representative (usually an owner) who serves on the NFL’s executive committee.¹⁶ The executive committee is charged with making “big picture” decisions for the league—including policy changes.¹⁷ The executive committee also elects a league commissioner, who represents the interests of owners and runs day-to-day operations.¹⁸

While the owners’ interests and powers are clearly discernible, we must turn to law to see how player power¹⁹ fits into the equation. The story of player power begins in 1890 with the passage of the Sherman Act.²⁰ The Sherman Act was a federal effort to combat agreements that restrained trade or monopolized markets.²¹ Before the 1950’s, the NFL was not subject to the Act.²² During the 1950’s, however, the NFL and franchise owners became increasingly concerned with the possibility of violating antitrust laws.²³ In 1957, owners’ concerns became a reality.²⁴

In *Radovich v. National Football League*, the U.S. Supreme Court addressed whether the Sherman Act, among other antitrust laws, applied to the NFL.²⁵ The Petitioner, Radovich, was a player for the Detroit Lions.²⁶ Radovich requested a transfer to a team in Las Angeles, but the Lions denied the request.²⁷ After the Lions denied his trade request, Radovich breached his contract with the Lions and went to Los Angeles to join the Los Angeles Dons.²⁸ After two seasons with the Dons, Radovich received an offer to join the San Francisco Clippers where he would act as a player-coach.²⁹

organized on a geographic or industrial basis to promote and develop commercial and industrial opportunities within its sphere of operation”).

14. Jason Fernando, *What Are Stakeholders: Definition, Types, and Examples*, INVESTOPEDIA (Feb. 20, 2024), <https://www.investopedia.com/terms/s/stakeholder.asp> [https://perma.cc/5XPK-39WU] (“A stakeholder is a person or group with an interest in an enterprise.”).

15. See Eric Fisher & David Rumsey, *The NFL’s Power Summit: Ownership, Private Equity, DEI Top Agenda*, FRONT OFFICE SPORTS (Mar. 25, 2024), <https://frontofficesports.com/newsletter/the-nfls-annual-power-meetings> [https://perma.cc/3V8F-WNRF] (detailing the top priorities for the NFL owners’ “annual spring meeting” for 2024).

16. Gosling, *supra* note 12.

17. *Id.*

18. *Id.*; see also *Integrity of the Game*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/nfl-operations/integrity-of-the-game> [https://perma.cc/VAE9-UUVT].

19. The term “player power” refers to the influence that players have on managerial decision makers.

20. Sherman Antitrust Act, 15 U.S.C. §§ 1–2.

21. Sherman Antitrust Act, 15 U.S.C. §§ 1–2.

22. Courts assumed that the NFL was exempt from the Sherman and Clayton Acts under “the baseball rule,” which exempted professional baseball from complying with the Acts. See *Radovich v. Nat’l Football League*, 231 F.2d 620, 622 (9th Cir. 1956), *rev’d* 353 U.S. 931 (1957).

23. Spencer Jackson, Comment, *A Ding to the Head: How Concussions and Domestic Violence Impact the NFL in the Next CBA*, 42 S. ILL. U. L.J. 325, 326 (2018).

24. *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957).

25. *Id.*

26. *Id.* at 448.

27. *Id.* A main motivation for Radovich’s move was to take care of his ill father. *Id.*

28. *Id.*

29. *Radovich*, 352 U.S. at 448.

At that time, the Clippers were a member of the Pacific Coast League—an NFL affiliate.³⁰ When the NFL heard that the Clippers were signing Radovich, it informed the Clippers that Radovich was blacklisted for breaking his contract with the Lions.³¹ The NFL advised the Clippers that any affiliated club would suffer severe penalties if it signed Radovich.³² Resultingly, before Radovich could ink the dotted line, the Clippers reneged their offer.³³

In response, Radovich sued the NFL claiming, *inter alia*, that his blacklisting “was a result of a conspiracy among the [NFL] to monopolize . . . professional football.”³⁴ In *Radovich*, the Court did not determine if the NFL violated antitrust laws regarding Radovich.³⁵ Instead, the Court broadly held U.S. antitrust laws applied to the NFL.³⁶ With that holding, the landscape of NFL labor relations changed forever.

In 1968, roughly one decade after *Radovich* was decided, the NFL recognized the NFLPA as the representative of its players.³⁷ Soon after, the parties agreed to the first NFL-NFLPA CBA.³⁸ Since then, the NFL and NFLPA have a long history of CBA negotiations.³⁹ Those negotiations that have had a significant impact both on and off the field.⁴⁰

Simply put, the CBA, by virtue of collective bargaining, gives the players the power of collective action.⁴¹ What the CBA does not make the NFLPA or its representatives a member of the executive committee. Instead, the NFLPA is relegated to merely giving the NFL its opinion.⁴² However, the CBA does provide the NFLPA value. The CBA serves important functions such as dictating the number of games each season, setting revenue sharing, drug testing policies, and more.⁴³ Arguably the most important function of the

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Radovich*, 352 U.S. at 448.

35. *Id.* at 454.

36. *See id.* at 452 (holding that antitrust “baseball rule” exception is limited to baseball, and the “volume of interstate business involved in organized professional football places is within the provisions of the [Sherman Act]).

37. Associated Press, *NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), https://www.espn.com/nfl/news/story?page=nfl_labor_history [<https://perma.cc/3SG8-L6Q3>].

38. *Id.*

39. *Id.*; *1970s: The NFLPA Becomes a Real Union*, NFLPA, <https://nflpa.com/about/history/1970s-nflpa-becomes-real-union> [<https://perma.cc/GE42-3J5W>]; *1980s: The Fight for Free Agency*, NFLPA, <https://nflpa.com/about/history/1980s-fight-free-agency> [<https://perma.cc/464S-YX3S>]; *2000s: A Landmark CBA*, NFLPA, <https://nflpa.com/about/history/2000s-a-landmark-cba> [<https://perma.cc/4M22-MSR9>].

40. *E.g.*, Marcos A. Abreu & Brandon D. Spradley, *The 2011 National Football League Labor Dispute*, SPORT J. (Aug. 23, 2016), <https://thesportjournal.org/article/the-2011-national-football-league-labor-dispute> [<https://perma.cc/4K9R-359N>] (discussing the “lockout” dispute between players and coaches in 2011 revolving around the NFLPA).

41. *Collective Bargaining*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> [<https://perma.cc/SC39-Z3TK>] (“Unions continue to fight for the intrinsic rights of working people and restore the balance of economic power in our country through collective bargaining agreements.”).

42. Gosling, *supra* note 12.

43. Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [<https://perma.cc/ACE9-G887>].

CBA—especially for the purpose of this Note—is its control over the disciplinary process.⁴⁴

B. The NFL Personal Conduct Policy

The NFL, like all other organizations, has issues with employee/player misconduct. To curb misconduct, the NFL has chosen to punish its players for certain actions.⁴⁵ The actions of players that the NFL may punish fall into two categories: on-field misconduct and off-field misconduct.⁴⁶

On-field misconduct is straightforward and encompasses conduct such as intentional deflation of game balls or paying players to injure players on the other team.⁴⁷ Off-field misconduct is more complex. Because off-field conduct does not directly affect the game, it can be harder to draw a line as to when the NFL should act.⁴⁸ While some actions are clearly culpable (e.g., domestic violence) others are more nebulous (e.g., unintentional

44. NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT 277—80 (2020).

45. See generally NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY (2014), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/2014_Personal_Conduct_Policy.pdf [<https://perma.cc/V8BU-42AZ>] [hereinafter 2014 CONDUCT POLICY] (providing the expected standard of player conduct and discipline).

46. The NFL does not explicitly recognize these two categories of misconduct as distinct. However, the NFL's Personal Conduct Policy has a non-exhaustive list of prohibited conduct. When one looks at that conduct you can distinguish that which would occur on the field of play and that which would occur off the field of play. For example, compare sexual assault with “conduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel.” See NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY: LEAGUE POLICIES FOR PLAYERS 2 (2022), <https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2022-NFL-Personal-Conduct-Policy.pdf> [<https://perma.cc/4G5B-WRAR>] [hereinafter NFL CONDUCT POLICY] (listing these two among other potential infractions). While sexual assault could, theoretically, happen during a game, it is highly unlikely. Conduct that undermines integrity could occur on or off the field. Therefore, we can distinguish the on-field and off-field misconduct, though the Personal Conduct Policy does not.

47. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533–34 (2d Cir. 2016) (detailing how the NFL used the phrase “conduct detrimental to the integrity of, or public confidence, in the game of professional football” to punish Tom Brady for deflating footballs); see also Judy Battista, *N.F.L. Inquiry Says Saints Set Bounty for Hits*, N.Y. TIMES (Mar. 2, 2012), <https://www.nytimes.com/2012/03/03/sports/football/nfl-says-saints-had-bounty-program-to-injure-opponents.html> (on file with the *Journal of Corporation Law*) (detailing a scheme by the New Orleans Saints to pay their players to injure specific opposing players that led to punishment and sanction from the commissioner).

48. While actions like a player gambling on NFL games could affect the on-field product in some way, there is no direct effect on the team by the action itself. Such was the case with former Atlanta Falcons wide receiver Calvin Ridley. See *Falcons' Ridley Banned for Season and Forfeits \$11m Salary After Betting on NFL Games*, THE GUARDIAN (Mar. 7, 2022), <https://www.theguardian.com/sport/2022/mar/07/falcons-ridley-banned-for-season-and-forfeits-11m-salary-after-betting-on-games> [<https://perma.cc/6NKE-DX9X>] (“The NFL found that Ridley made the bets while he was away from the team after stepping away from the league to concentrate on his mental health in November 2021. The league said there was no reason to suggest Ridley had used inside information or influenced the outcome of any games. The NFL also said it was satisfied no other members of the Falcons were involved in the case.”).

consumption of banned substances).⁴⁹ Nevertheless, it all falls under the purview of the Policy.⁵⁰

Complicating matters is the media attention that player misconduct attracts. Because the NFL is so popular, instances of player misconduct are often in the national spotlight. Stories—like Atlanta Falcons quarterback Michael Vick running a dog fighting operation in 2007;⁵¹ Baltimore Ravens running back Ray Rice battering his fiancé in 2014;⁵² and New England Patriots tight end Aaron Hernandez being arrested and later convicted for murder in 2013⁵³—have framed the NFL as an organization unable to effectively regulate player conduct.

The NFL is aware of its reputation and has taken steps to cure it. In 2006 Roger Goodell was elected NFL Commissioner.⁵⁴ Goodell began his time as Commissioner by taking a hard stance on player misconduct. One of Goodell's first acts was suspending a player accused of domestic violence.⁵⁵ Goodell took specific aim at players who were arrested for off-field conduct. Goodell's suspensions were harsh; some lasting an entire season of play.⁵⁶ However, the NFL was not done. The next year, the NFL took the next step when it implemented a new “stronger” Personal Conduct Policy (2007 Policy).⁵⁷

The 2007 Policy prohibited “conduct [that was] detrimental to the integrity of and public confidence in the National Football League.”⁵⁸ The “conduct detrimental” language covered “violent and/or criminal activity.”⁵⁹ The 2007 Policy also prohibited certain categories of behavior like crimes of physical violence, crimes involving a deadly weapon,

49. *Compare Bills LB Von Miller Turns Himself in on Felony Domestic Violence Charge*, NFL (Nov. 30, 2023), <https://www.nfl.com/news/bills-lb-von-miller-turns-himself-in-on-felony-domestic-violence-charge> [https://perma.cc/LC4Y-VVVH] (example of NFL-player domestic violence case where the player intended to do the crime), with Emily Caron, *Titans' Taylor Lewan Gets Emotional Explaining Failed Drug Test, Suspension*, SPORTS ILLUSTRATED (July 24, 2019), <https://www.si.com/nfl/2019/07/24/titans-taylor-lewan-suspended-four-games-failed-drug-test-polygraph> [https://perma.cc/63TS-AZZT] (example of NFL-player banned substance case where the player did not intend to take the substance).

50. NFL CONDUCT POLICY, *supra* note 46, at 2.

51. *NFL Star Michael Vick Pleads Guilty in Dogfighting Case*, HISTORY (Aug. 25, 2020), <https://www.history.com/this-day-in-history/nfl-star-michael-vick-pleads-guilty-in-dogfighting-case> [https://perma.cc/K37A-YX99].

52. Tom Sunderland, *Video of Ray Rice Incident with Wife Janay Palmer Leaked by TMZ*, BLEACHER REP. (Sept. 8, 2014), <https://bleacherreport.com/articles/2190975-video-of-ray-rice-incident-with-wife-janay-palmer-leaked-by-tmz> [https://perma.cc/HT2V-X7E3].

53. Chris Bengel, *Aaron Hernandez's Ex-Cellmate Claims Former NFL Star Had Ties to Fourth Murder in New Book*, CBS (Nov. 7, 2019), <https://www.cbssports.com/nfl/news/aaron-hernandezs-ex-cellmate-claims-former-nfl-star-had-ties-to-fourth-murder-in-new-book> [https://perma.cc/VPW8-RHDY].

54. Adam Augustyn, *Roger Goodell*, BRITANNICA (Mar. 26, 2024), <https://www.britannica.com/biography/Roger-Goodell> [https://perma.cc/XY5X-2VMJ].

55. Jacob Camenker, *NFL Suspensions Under Roger Goodell: Reviewing off-the-Field Bans in Wake of Deshaun Watson's Suspension*, SPORTING NEWS (Aug. 1, 2022), <https://www.sportingnews.com/us/nfl/news/nfl-suspensions-roger-goodell-deshaun-watson/zgepwpyo7fxqomqggegznvz> [https://perma.cc/S98Q-BCZJ].

56. *Goodell Suspends Pacman, Henry for Multiple Arrests*, ESPN (Apr. 10, 2007), <https://www.espn.com/nfl/news/story?id=2832015> [https://perma.cc/P9G8-2CJJ].

57. ASSOCIATED PRESS, *Goodell Strengthens NFL Personal Conduct Policy*, NY DAILY NEWS (Jan. 13, 2019), <https://www.nydailynews.com/sports/football/goodell-strengthens-nfl-personal-conduct-policy-article-1.208593> [https://perma.cc/259T-445S].

58. *NFL Personal Conduct Policy*, ESPN (Mar. 13, 2007), <https://www.espn.com/nfl/news/story?id=2798214> [https://perma.cc/9QYW-CRWP].

59. *Id.*

illegal possession of a deadly weapon, hate crimes, domestic violence crimes, and other behavior.⁶⁰ But because the 2007 Policy only covered criminal or violent behaviors, there were gaps. In addition, under the 2007 Policy Commissioner Goodell served not only as “judge, jury and executioner, but also appeals officer.”⁶¹ Goodell had complete control over guilt, punishment, and the appeal. Of course, this monopolization of power destroyed the purpose of the appeal.

In 2014, in an effort to fix issues with the 2007 Policy, the NFL revised its Personal Conduct Policy.⁶² This revision included “a more extensive list of prohibited conduct.”⁶³ The 2014 Policy stepped away from the criminal activity nexus.⁶⁴ Indeed, the 2014 Policy stated that “even where the [player] conduct itself does not result in conviction of a crime,” the league could still implement punishment.⁶⁵ Player punishment was solely based on the NFL’s finding that a player engaged in prohibited conduct.⁶⁶ Prohibited conduct included “the use or threat of violence; [and] domestic violence.”⁶⁷ The 2014 Policy also required special counsel to investigate and oversee initial discipline.⁶⁸ While this revision removed some of the Commissioner’s power, the Commissioner retained unfettered authority to rule on appeals.⁶⁹

Then, in April 2019, the NFL and NFLPA returned to the table to hash out a new CBA.⁷⁰ After extensive negotiations, the pair agreed on a CBA to last until 2030.⁷¹ With this CBA came key changes: (1) an increase from 16 regular season games per club to 17, (2) an increase in the players’ share of league revenue, and (3) a two team expansion of the NFL playoffs.⁷² Most important, however, were the changes to the NFL’s disciplinary process. Today, the CBA provides for “neutral arbitration for most discipline cases, including personal conduct policy violations.”⁷³ This new arbitration system would seem to curb the Commissioner’s power in the disciplinary process. However, this new process

60. *Id.*

61. Michael Schottey, *NFL New Personal Conduct Policy Seems to Be Just More of the Old*, BLEACHER REP. (Dec. 10, 2014), <https://bleacherreport.com/articles/2295783-nfl-new-personal-conduct-policy-seems-to-be-just-more-of-the-old> [<https://perma.cc/S36Q-T6NR>].

62. Martin J. Greenberg & Aaron Davis, *NFL’s Revised Personal Conduct Policy*, GREENBERG L. OFF. (Dec. 1, 2016), <https://www.greenberglawoffice.com/nfls-revised-personal-conduct-policy> [<https://perma.cc/5X69-PYGQ>]; *NFL Approves “Tough” Personal-Conduct Policy*, CBS NEWS (Dec. 10, 2014), <http://www.cbsnews.com/news/nfl-unveils-tougher-personal-conduct-policy> [<https://perma.cc/2BBF-G4W7>].

63. *NFL Approves “Tough” Personal-Conduct Policy*, *supra* note 62.

64. 2014 CONDUCT POLICY, *supra* note 45, at 2.

65. *Id.* at 1.

66. *Id.*

67. *Id.*

68. NFL, THE NEW NFL PERSONAL CONDUCT POLICY (2014), https://www.cbsnews.com/htdocs/pdf/NFL_domestic_violence_policy.pdf [<https://perma.cc/5WJX-AW7T>].

69. *Id.*

70. See Dan Graziano, *NFL Players Approve New CBA, Runs Through 2030*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28906786/nfl-players-approve-new-cba-2030 [<https://perma.cc/QD5F-NM3N>] (discussing how the deal had been in negotiations since April 2019).

71. *Id.*

72. *Id.*

73. Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [<https://perma.cc/54U8-JNVL>].

would soon be put to the test, and the Commissioner would retain more power than one may initially suspect.

C. The Test Case

With the 12th overall pick in the 2017 NFL Draft, the Houston Texans selected Clemson quarterback Deshaun Watson.⁷⁴ Watson inked a four-year contract worth \$13.8 million, which came with an \$8.21 million signing bonus.⁷⁵ It did not take long for Watson to make an impact as he made his first appearance in the Texans' opening game the following season.⁷⁶ From that point on, Watson solidified himself as the Texans' starter.⁷⁷ Watson went on to be named to the pro bowl in 2018, 2019, and 2020,⁷⁸ and even led the league in passing in 2020.⁷⁹ Watson was on the cusp of greatness, but his career would soon hit a wall.

Following the 2020 season, Watson demanded that the Texans trade him, but the Texans refused.⁸⁰ Whatever interest other franchises had in Watson was short-lived because, shortly after the trade request, sexual assault allegations surfaced.⁸¹ This garnered Watson a different form of national attention.⁸²

In March 2021, Houston attorney Tony Buzbee announced that a lawsuit had been filed against Watson.⁸³ The claims centered on Watson's sexual misconduct while receiving massages.⁸⁴ Watson allegedly subjected masseuses to perform inappropriate

74. 2017 NFL Draft, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2017/draft.htm> (on file with the *Journal of Corporation Law*).

75. Kevin Patra, *Deshaun Watson Signs Rookie Contract with Houston Texans*, NFL (May 12, 2017), <https://www.nfl.com/news/deshaun-watson-signs-contract-with-houston-texans-0ap3000000808349> [<https://perma.cc/RUJ8-XUYC>].

76. *Jacksonville Jaguars at Houston Texans—September 10th, 2017*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/boxscores/201709100htx.htm> (on file with the *Journal of Corporation Law*); Nick Shook, *Deshaun Watson Replaces Tom Savage in Loss to Jags*, NFL (Sept. 10, 2017), <https://www.nfl.com/news/deshaun-watson-replaces-tom-savage-in-loss-to-jags-0ap3000000841691> [<https://perma.cc/9TUA-5ELU>].

77. Brett Whitefield, *Deshaun Watson Named Texans Starting QB*, PFF (Sept. 12, 2017), <https://www.pff.com/news/pro-deshaun-watson-named-texans-starting-qb> [<https://perma.cc/AP5W-VJ4U>].

78. *Deshaun Watson: Biography*, CLEVELAND BROWNS, <https://www.clevelandbrowns.com/team/players-roster/deshaun-watson/logs> [<https://perma.cc/T2CA-KAX5>].

79. *Id.*

80. Kristie Rieken, *AP Source: QB Watson Requests Trade from Houston Texans*, AP NEWS (Apr. 21, 2021), <https://apnews.com/article/nfl-houston-football-deshaun-watson-romeo-crennel-c36a8fdb9dda3517fbc247ef7ccb508e> [<https://perma.cc/L5SK-2Y25>].

81. Madeline Coleman & Daniela Perez, *Deshaun Watson Timeline: What Has Happened Since First Lawsuit Filed*, SPORTS ILLUSTRATED (Aug. 18, 2022), <https://www.si.com/nfl/2022/03/11/deshaun-watson-timeline-what-has-occurred-first-lawsuit-filed> [<https://perma.cc/WQG5-5MEK>].

82. Ken Belson & Ben Shpigel, *Deshaun Watson Accused of Sexual Assault in Civil Suits*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/sports/football/deshaun-watson-sexual-assault-lawsuit-allegations.html> (on file with the *Journal of Corporation Law*).

83. Madeline Coleman, *Sexual Assault Lawsuit Filed Against Deshaun Watson*, SPORTS ILLUSTRATED (Mar. 17, 2021), <https://www.si.com/nfl/2021/03/17/deshaun-watson-sexual-assault-lawsuit> [<https://perma.cc/B354-DZR2>].

84. Belson & Shpigel, *supra* note 82.

sexual behavior during massage sessions.⁸⁵ More specifically, Watson allegedly pressured the masseuses to perform sex acts on him, grabbed their privates, intentionally exposed his privates, and manipulated his body to cause his privates to contact the masseuses.⁸⁶

The allegations resulted in 24 women filing civil lawsuits against Watson and several failed attempts at criminal indictment.⁸⁷ Contemporaneously, the NFL opened its own investigation into Watson.⁸⁸ During the NFL's investigation, Watson retained his status as an NFL player.⁸⁹ Indeed, Watson remained on the Texans roster and off the Commissioner's Exemption list.⁹⁰ Nevertheless, Watson did not appear in any games during the 2021 season.⁹¹ He was cited as sitting out due to "non-injury reasons/personal matter."⁹² Following the 2021–22 season, with the allegations still floating around, Watson's future remained uncertain.⁹³

The uncertainty around Watson began to recede in March 2022 when reports began to surface that teams were interested in trading for the quarterback.⁹⁴ These reports culminated in a trade between the Houston Texans and the Cleveland Browns.⁹⁵ The Browns traded a plethora of draft picks—including three first rounders—to obtain

85. Jenny Vrentas, *A Massage Therapist on Her Session with Deshaun Watson*, SPORTS ILLUSTRATED (Mar. 29, 2021), <https://www.si.com/nfl/2021/03/29/first-hand-story-of-deshaun-watson-inappropriate-behavior-not-in-lawsuit> [<https://perma.cc/BY7U-NVL2>].

86. Ben Shpigel, *What to Know About the Sexual Misconduct Lawsuits Against Deshaun Watson*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/will-deshaun-watson-play.html> (on file with the *Journal of Corporation Law*).

87. Aaron Reiss, *Deshaun Watson Timeline: QB Makes Browns Debut vs. Texans*, THE ATHLETIC (Oct. 18, 2022), <https://theathletic.com/2496073/2022/08/18/deshaun-watson-sexual-assault> [<https://perma.cc/45DN-A6L6>]; Jeffrey May, *Why Did the Grand Jury Decline to Indict Deshaun Watson?*, DIARIO AS (Mar. 11, 2022), https://en.as.com/en/2022/03/12/nfl/1647046776_834750.html [<https://perma.cc/B4CC-37D8>].

88. Coleman & Perez, *supra* note 81.

89. Charean Williams, *NFL Won't Use Commissioner Exempt List for Deshaun Watson, but a Suspension Is in Play*, PRO FOOTBALL TALK (Mar. 29, 2022), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/nfl-wont-use-commissioner-exempt-list-for-deshaun-watson-but-suspension-is-in-play> (on file with the *Journal of Corporation Law*).

90. *Id.*

91. See *Deshaun Watson: Career Stats*, NFL, <https://www.nfl.com/players/deshaun-watson/stats/career> [<https://perma.cc/B2BP-ZUTT>] (showing that Watson did not appear in any games in the 2021 season).

92. *Texans' Deshaun Watson: Sitting Again Sunday*, CBS SPORTS (Jan. 7, 2022), <https://www.cbssports.com/fantasy/football/news/texans-deshaun-watson-sitting-again-sunday> [<https://perma.cc/9KVX-S3E3>].

93. See Joseph Zucker, *Lovie Smith Wants Deshaun Watson's Future with Texans Resolved 'as Soon as Possible'*, BLEACHER REP. (Feb. 14, 2022), <https://bleacherreport.com/articles/10027027-lovie-smith-wants-deshaun-watsons-future-with-texans-resolved-as-soon-as-possible> [<https://perma.cc/3PDL-33SR>] (discussing the circumstances of Watson's place on the Texans going into the offseason).

94. Coleman & Perez, *supra* note 81; see also Daniel Chavkin, *The Teams Who Could Make a Move for Deshaun Watson*, SPORTS ILLUSTRATED (Mar. 11, 2022), <https://www.si.com/nfl/2022/03/12/deshaun-watson-teams-trade-interest-grand-jury-decision> [<https://perma.cc/5SUW-9EHS>] (identifying multiple franchises who expressed some form of interest in Watson).

95. Coleman & Perez, *supra* note 81; Madeline Coleman, *Source: Deshaun Watson Plans to Waive No-Trade Clause for Browns*, SPORTS ILLUSTRATED (Mar. 18, 2022), <https://www.si.com/nfl/2022/03/18/deshaun-watson-trade-browns-texans-quarterback-waives-no-trade-clause> [<https://perma.cc/N6FJ-4FXZ>].

Watson.⁹⁶ This led people to believe that Watson would eventually return to play.⁹⁷ Still, Watson's eligibility remained uncertain.

To complicate matters, the Browns signed Watson to an unprecedented contract.⁹⁸ The parties agreed to a five-year deal with \$230 million fully guaranteed.⁹⁹ The contract accounted for the uncertainty surrounding Watson and the \$230 million with another contractual provision; Watson would only receive a \$1 million salary during the 2022 season.¹⁰⁰ Consequently, if the NFL suspended Watson for the entire 2022 season, he would only forgo 0.4% of his contract. A fully guaranteed contract of this magnitude had never been seen in the NFL and it sent shock waves around the league.¹⁰¹

With Watson on a new team and with a new contract, all that was left was for the NFL to act. Because the new CBA gave judgment authority to an independent third-party Disciplinary Officer (Officer), rather than the Commissioner, the Watson proceedings would be unlike any other.¹⁰² Pursuant to the CBA, both the NFL and NFLPA agreed on the Officer¹⁰³—former United States District Court Judge for the District of Delaware, Sue Robinson.¹⁰⁴

96. AROUND THE NFL STAFF, *Browns Announce Trade for Texans Quarterback*, NFL (Mar. 20, 2022), <https://www.nfl.com/news/deshaun-watson-browns-trade-texans-quarterback-haslam-berry-stefanski> [<https://perma.cc/GS43-YCXX>].

97. *See id.* (detailing high-level Cleveland Browns' personnel and their confidence in Watson moving forward).

98. What makes Watson's contract so unique is that the \$230 million was 100% guaranteed. In 2022, the next-highest guaranteed amount was \$124 million (51.12%). This combination of value and guaranteed money was unheard of. *NFL Salary Rankings: 2022 Guaranteed Rankings*, SPOTRAC, <https://www.spotrac.com/nfl/rankings/2022/guaranteed> [<https://perma.cc/B57T-TV35>]; Rob Maaddi, *Analysis: Giving Deshaun Watson \$230 Million Guaranteed Has Become a Disaster for the Browns*, ASSOCIATED PRESS (Nov. 15, 2023), <https://apnews.com/article/deshaun-watson-contract-browns-andrew-berry-2f4c8e0ede9a15a884d1b5d6d1bab754> [<https://perma.cc/5278-X7P2>] (“Watson's unprecedented deal raised the contract demands for other quarterbacks, though nobody has since received more guaranteed money.”).

99. Dan Graziano, *Deshaun Watson's NFL Suspension Will Cost Him \$5.69 Million: Details of How It Affects the Cleveland Browns Quarterback's \$230 Million Contract*, ESPN (Aug. 19, 2022), https://www.espn.com/nfl/story/_/id/34419191/deshaun-watson-nfl-suspension-cost-569-million-details-how-affects-cleveland-browns-quarterback-230-million-contract [<https://perma.cc/2SNG-RVYS>].

100. *Id.*; Madeline Coleman, *Source: Browns Adjust Deshaun Watson Contract for Possible Suspension*, SPORTS ILLUSTRATED (Mar. 18, 2022), <https://www.si.com/nfl/2022/03/18/deshaun-watson-trade-browns-adjust-contract-for-possible-suspension> [<https://perma.cc/8FNQ-FXTB>].

101. Maaddi, *supra* note 98 (stating that the contract the Cleveland Browns gave Watson “ticked off other owners”); Jason La Canfora, *NFL Insider Notes: Deshaun Watson's Game-Changing Deal and Its Ramifications Hottest Topic at Owners Meetings*, CBS (Mar. 28, 2022), <https://www.cbssports.com/nfl/news/nfl-insider-notes-deshaun-watson-game-changing-deal-and-its-ramifications-hottest-topic-at-owners-meetings> [<https://perma.cc/6QDX-QWN5>].

102. Madeline Coleman, *Report: Goodell Isn't the One Who Determines Whether Deshaun Watson Violated NFL Policy*, SPORTS ILLUSTRATED (Mar. 30, 2022), <https://www.si.com/nfl/2022/03/30/roger-goodell-deshaun-watson-nfl-personal-conduct-policy-arbitrator> [<https://perma.cc/JU5U-7GL2>].

103. *Id.*

104. Gidget Alikpala, *Who Is Sue Robinson, the Arbitrator in Deshaun Watson's NFL Disciplinary Hearing?*, DIARIO AS (June 27, 2022), <https://en.as.com/nfl/who-is-sue-robinson-the-arbitrator-in-deshaun-watson-nfl-disciplinary-hearing-n> [<https://perma.cc/3BKE-DFLF>]; *see also* Sue Robinson, BALLOTEDIA, https://ballotpedia.org/Sue_Robinson [<https://perma.cc/3ZS8-T5BF>].

On August 1, 2022, Judge Robinson issued her opinion.¹⁰⁵ She found that Watson had violated the NFL's Personal Conduct Policy.¹⁰⁶ Judge Robinson mandated that Watson be suspended six games during the 2022–23 season, and that he only receive massages from team therapists.¹⁰⁷ However, Judge Robinson's decision was short-lived because the NFL appealed two days later.¹⁰⁸ In its appeal, the NFL sought to increase the suspension from six games to indefinite.¹⁰⁹ Goodell recused himself from ruling on the appeal and appointed the former New Jersey Attorney General Peter C. Harvey to act in his stead.¹¹⁰ On August 18, less than two weeks later, the NFL and NFLPA finalized a settlement agreement regarding Watson's punishment.¹¹¹

This settlement reflected a significant deviation from Judge Robinson's initial ruling. Under the settlement, Watson was to serve an 11 game suspension, pay a five million dollar fine, and attend mental health counseling.¹¹² Throughout everything, Watson had denied any wrongdoing.¹¹³ But on the same day the settlement announced, Watson released a statement.¹¹⁴ In that statement, Watson finally apologized for “pain this situation has caused,” and claimed to take “accountability for the decisions [he] made.”¹¹⁵

III. ANALYSIS

This Part analyzes Judge Robinson's opinion and its aftermath. This Part aims to answer three questions: (1) how Watson's conduct violated the NFL's Personal Conduct Policy; (2) why Judge Robinson only recommended that Watson serve a six-game suspension; and (3) why Watson settled for a far more severe punishment. Each answer reveals a core flaw in the NFL's disciplinary process.

105. Coleman & Perez, *supra* note 81; *see also* SUE L. ROBINSON, DECISION: *IN RE: MATTER OF DESHAUN WATSON*, ESPN (Aug. 1, 2022), <https://www.espn.com/pdf/2022/0801/watson.pdf> [<https://perma.cc/TJJ3-KXRE>].

106. ROBINSON, *supra* note 105, at 11–12.

107. *Id.* at 15.

108. Coleman & Perez, *supra* note 81.

109. *Id.*; Madeline Coleman, *NFL Appealing Deshaun Watson's Six-Game Suspension*, SPORTS ILLUSTRATED (Aug. 3, 2022), <https://www.si.com/nfl/2022/08/03/nfl-appealing-deshaun-watson-six-game-suspension> [<https://perma.cc/GPV6-FG6E>].

110. Coleman & Perez, *supra* note 81; Michael Shapiro, *Roger Goodell Won't Handle Deshaun Watson Appeal Process*, SPORTS ILLUSTRATED (Aug. 4, 2022), <https://www.si.com/nfl/2022/08/04/roger-goodell-wont-handle-deshaun-watson-appeal-process> [<https://perma.cc/Q9N3-WBAZ>].

111. Coleman & Perez, *supra* note 81.

112. *Id.*; *see also* Thomas Neumann, *Browns QB Deshaun Watson Suspended 11 Games*, SPORTS ILLUSTRATED (Aug. 18, 2022), <https://www.si.com/nfl/2022/08/18/deshaun-watson-cleveland-browns-suspension-appeals-ruling> [<https://perma.cc/S3Z4-A6RB>]; Luis Guillermo Vázquez & Gidget Alikpala, *Deshaun Watson Suspension: All the Details of the Settlement with the NFL*, DIARIO AS (Aug. 18, 2022), <https://en.as.com/nfl/deshaun-watson-suspension-all-the-details-of-the-settlement-with-the-nfl-n> [<https://perma.cc/RU2R-STFV>].

113. Coleman & Perez, *supra* note 81; *see also* Madeline Coleman, *Deshaun Watson Denies Assaulting Any Woman*, SPORTS ILLUSTRATED (Mar. 25, 2022), <https://www.si.com/nfl/2022/03/25/deshaun-watson-denies-assaulting-disrespecting-any-woman> [<https://perma.cc/HN9T-DP37>].

114. Coleman & Perez, *supra* note 81.

115. *Id.*

A. What Does “Prohibitive Conduct” Mean

Judge Robinson opened her opinion by detailing the Commissioner’s authority in subjecting NFL players to discipline under the CBA. More specifically, she stated that the Commissioner has the authority to discipline players “for conduct detrimental to the integrity of, or public confidence in, the game of professional football.”¹¹⁶ Judge Robinson then outlined the substance of the Policy and its non-exhaustive list of violative conduct.¹¹⁷

Judge Robinson also elaborated on the NFL’s disciplinary process and how she came to serve as the ruling Officer in this case.¹¹⁸ Furthermore, she explained that the Officer is presented with the allegations and the evidence, and it is her job to determine if such amounts to a Policy violation.¹¹⁹

Additionally, Judge Robinson stated that the CBA rendered the Officer’s decision on guilt “final and binding.”¹²⁰ Her recommended punishment, however, was subject “to the right of either party to appeal to the Commissioner.”¹²¹ Regarding a burden of proof, the NFL bore the burden to prove, by the preponderance of the evidence, that the accused player engaged in conduct prohibited by the Policy. In satisfying their burden, “the NFL must rely on ‘credible evidence’ found in the record.”¹²²

Watson was accused of engaging in three classes of prohibited conduct. Those being: (1) sexual assault; (2) conduct that poses a genuine danger to the safety and well-being of another person; and (3) conduct that undermines or puts at risk the integrity of the NFL.¹²³ The opinion addressed each of the alleged offenses separately.¹²⁴

First, the opinion analyzed whether Watson’s conduct qualified as sexual assault.¹²⁵ As previously stated, Watson was accused of touching paid masseuses in a sexual manner and coercing masseuses to touch him sexually.¹²⁶ For Judge Robinson’s decision, the most important fact was that Watson was not alleged to have exerted force on his victims.¹²⁷ No portion of the Policy contained a definition for “sexual assault.” Thus, the NFL was allowed to put forth its own definition at the hearing. The NFL defined “sexual assault” as “unwanted sexual conduct with another person.”¹²⁸ Because it was “the NFL’s prerogative

116. See ROBINSON, *supra* note 105, at 1 (quoting NFL, NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT, art. 46, § 1(a) (2020)).

117. *Id.* at 1–2.

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. ROBINSON, *supra* note 105, at 2 (quoting NAT’L FOOTBALL LEAGUE, NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT, art. 46, § 1(e)(v) (2020)).

122. *Id.* at 3 (quoting NAT’L FOOTBALL LEAGUE, NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT, art. 46, § 1(e)(iv) (2020)).

123. *Id.* at 3. It is important to note that the Personal Conduct Policy does not contain any definitions of the three alleged violations.

124. *Id.* at 6–11.

125. ROBINSON, *supra* note 105, at 6.

126. *Infra* Part II.C.

127. ROBINSON, *supra* note 105, at 5.

128. *Id.* at 6.

to impose the Policy on its players, [Judge Robinson was] bound to accept the NFL's definition."¹²⁹

Using the NFL's definition, Judge Robinson found that Watson's conduct was "sexual assault."¹³⁰ According to the opinion, Watson's conduct clearly fell within the NFL's definition of "sexual assault" because he intentionally caused unwanted, sexual contact with his victims.¹³¹ Under the definition, force was irrelevant. Therefore, a lack of force was not detrimental to the NFL's position., and the opinion found that Watson's conduct violated the Policy.¹³²

Second, the opinion analyzed whether Watson's conduct was "conduct that pose[d] a genuine danger to the safety and well-being of another person."¹³³ Judge Robinson lacked a definition to steer her analysis because, again, the Policy contained no definition. The NFL also failed to provide a definition at the evidentiary hearing.¹³⁴ Instead, the NFL argued that Watson's conduct was violative if the victims were "'fearful' of Mr. Watson's ability to 'use his status . . . to damage [the victims'] professional careers."¹³⁵

In the analysis, the opinion stated that when comparing the facts at hand "against the other examples of violent conduct prohibited by the Policy, it [was] apparent that the NFL ha[d] . . . broadly define[d] the concepts of 'genuine danger,' 'safety,' and 'well-being.'"¹³⁶ Moreover, because she was interpreting the NFL's Policy, Judge Robinson deferred to the NFL's interpretation. As her opinion stated, the NFL created the Policy so "it can set the rules."¹³⁷ This meant that the NFL could satisfy its burden by showing that victims feared Watson's ability to use his status to damage their professional careers.¹³⁸ The opinion found that the NFL did satisfy its burden, and again, Watson violated the Policy.¹³⁹

Finally, the opinion analyzed whether Watson engaged in "conduct that undermine[d], or put[] at risk, the integrity of the NFL."¹⁴⁰ This time, Judge Robinson had a definition to assist in her decision. This definition was not contained in the Policy, but it was used in prior disciplinary proceedings. The NFL, in explaining its failure to provide an updated definition, stated that:

[t]he matters that can affect such integrity and public confidence [in the game of professional football] evolve and change over time depending on developments within and external to the League, and the parties to the

129. *Id.* ("As it is the NFL's prerogative to impose the Policy on its players, I am bound to accept the NFL's definition of sexual assault.").

130. *Id.* at 9.

131. *Id.* 6–9.

132. ROBINSON, *supra* note 105, at 9 ("Mr. Watson violated the Policy in this regard.").

133. *Id.*

134. *Id.* at 9.

135. *Id.* at 9.

136. *Id.* at 9–10.

137. ROBINSON, *supra* note 105, at 10.

138. *Id.*

139. *Id.* ("Based on the NFL's broad interpretation of this prohibited conduct as reflected in the evidence it chose to present, I find that the NFL has carried its burden to prove, by a preponderance of the evidence, that Mr. Watson's conduct posed a genuine danger to the safety and well-being of another person.").

140. *Id.*

CBA's have agreed not to operate with a static or frozen definition of conduct detrimental.¹⁴¹

The definition was only mildly informative because that precedent had little relevance to the facts at hand.¹⁴² The two prior occasions identified by the opinion were: (1) the proceedings related to Tom Brady deflating balls in an AFC Championship game; and (2) the proceedings related to the New Orleans Saints' "Pay-For-Performance" scheme.¹⁴³ Thus, precedent indicated that, traditionally, only on-field conduct fell into this category of conduct.¹⁴⁴

Nevertheless, Judge Robinson implemented a broader interpretation. Her opinion found that Watson's conduct would be violative if he had used his status as an NFL player when engaging in other prohibited conduct.¹⁴⁵ The opinion found this because Watson using his status would "cast a negative light on the [NFL]" and would publicly (and negatively) affect the NFL's integrity and public confidence.¹⁴⁶ Therefore, such conduct would be violative. Ultimately, the opinion concluded that Watson used his NFL-player status when he engaged in prohibited conduct.¹⁴⁷ Thus, he had engaged in "conduct that undermine[d] or put at risk, the integrity of the NFL."¹⁴⁸

Judge Robinson's opinion contains several problems. The problem, however, is not that the opinion found that Watson violated the Policy. Instead, the problem is *how* Judge Robinson came to her decision. Specifically, Judge Robinson used the NFL's arguments and definitions to guide her analysis and, consequently, was too deferential to the NFL. Though the NFL failed to define categories of prohibited conduct in its Policy, the NFL was nevertheless able to promulgate definitions during the proceedings, and Judge Robinson automatically accepted these new definitions. Such a reward is inequitable, prejudices the opposing party, and violates the doctrine of *contra proferentem*.

Contra proferentem is a doctrine of contract interpretation stating that ambiguous terms are interpreted *against* the drafter.¹⁴⁹ The NFL drafted the Policy. Therefore, *contra proferentem* would suggest that, when there are ambiguous terms in the Policy, the NFL (as the drafter) should have the Policy interpreted against them. Nevertheless, the opinion did the opposite: though the NFL initially drafted the Policy, Judge Robinson still deferred to the NFL when interpreting ambiguous terms. Judge Robinson specifically deferred to the NFL *because* the NFL drafted the Policy.

This form of contract interpretation provides the NFL with improper incentives. The NFL is disincentivized from including clear and unambiguous definitions in its Policy or elsewhere. This unfairly disadvantages players and even team owners. Instead of knowing

141. *Id.* (alterations in original).

142. *See* ROBINSON, *supra* note 105, at 10–11 (making clear that the examples where the League invoked this language "were focused on the game of football itself").

143. *Id.* at 10 (quoting *Brady*, NFLPA Ex. 8 at 17 n.18.). The saga of Tom Brady will prove to be relevant when discussing the power of the Commissioner on appeal.

144. *Id.* at 10 (citing only to the disciplinary proceedings involving the deflation of game balls and a "pay-for-performance" scheme).

145. *Id.* at 10–11.

146. ROBINSON, *supra* note 105, at 11 (internal quotation marks omitted).

147. *Id.*

148. *Id.*

149. *Contra Proferentem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

what conduct is prohibited, players must wonder unknowingly in hope that they do not engage in what the NFL may later deem as misconduct. The NFL can also craft new policy definitions at CBA proceedings that more specifically fit the accused conduct.

Because the NFL drafts vague and ambiguous rules for its players, the NFL uses broad definitions to guide the disciplinary process when it decides to punish a player for their actions. At the hearing, then, the NFL provides the Disciplinary Officer with a new, clearer, more NFL-favorable definition. The Officer accepts these new definitions even though the definition was also unavailable to the player until their hearing. Therefore, it is no coincidence that the conduct at issue fell within the NFL's definition of misconduct.

Punishing under vague and ambiguous categories of misconduct allows the NFL to essentially engage in *ex post facto* punishment. *Ex post facto* punishment generally occurs in the criminal setting when a statute "criminalizes an action and simultaneously provides for punishment of those who took the action before it had legally become a crime."¹⁵⁰ Such punishment is contradictory to the American sense of justice.¹⁵¹ While not all punishment under the Policy is *ex post facto*, the structure of the process makes such occurrences likely.

The Policy's vagueness and ambiguity may make it difficult for players to ascertain the boundaries for prohibited conduct. In some cases, a reasonable interpretation of a category of prohibited conduct may not include the conduct at issue. Nevertheless, because of the NFL's ability to generate controlling definitions, the conduct could still be punishable.

For example, the Watson opinion found that Watson's conduct violated the Policy because it was "conduct that pose[d] a genuine danger to the safety and well-being of another person" and "conduct that undermine[d] or put[] at risk, the integrity of the NFL."¹⁵² There can be multiple interpretations of the former category. For example, one may interpret it as requiring infliction of physical pain, while another may interpret the language as encompassing all pain—both physical and emotional. Watson's conduct did not involve force and there was no real risk of physical pain.¹⁵³ Though there was certainly emotional pain, that interpretation is not necessarily the only reasonable interpretation. Thus, Watson's conduct may not have been violative but for the NFL's *ex post facto*, broad interpretation. The same analysis applies to the latter category of conduct. Watson's misconduct occurred off the playing field.¹⁵⁴ And aside from Watson's job as an NFL player, there was no connection between Watson's conduct and the NFL.¹⁵⁵ Thus, one reasonable interpretation would demand the conclusion that the conduct was not violative. Nevertheless, the Officer came to the opposite conclusion.¹⁵⁶ She reached that conclusion because of the forced compliance with the NFL's definitions.

150. *Ex Post Facto Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

151. *See* U.S. CONST., art. 1, § 9, cl. 3 (federal laws cannot be *ex post facto*); *see also* U.S. CONST., art. 1, § 10 (state laws cannot be *ex post facto*).

152. ROBINSON, *supra* note 105, at 10–11.

153. *Id.* at 13 ("It is undisputed that Mr. Watson's conduct does not fall into the category of violent conduct that would require the minimum 6-game suspension.").

154. *Id.* at 4–5.

155. *Id.* at 11 ("Mr. Watson identified himself as a player for the NFL to initiate contact with the therapists, and used his ties to the Texans to reinforce his requests for massages focused on his lower back, glutes, abs, and groin area.").

156. *Id.*

In order to find that Watson violated the Policy, the Officer needed the NFL to introduce its own definition.¹⁵⁷ In doing so, the NFL prohibited Watson's conduct for the first time, and the Officer subsequently concluded that Watson should be punished for his violation.¹⁵⁸ Therefore, the NFL enabled and assisted in the enforcement of *ex post facto* punishment.¹⁵⁹

What is puzzling is that Watson's conduct could, should, and would, fit under a plain understanding of "sexual assault."¹⁶⁰ Meaning, it was unnecessary for the NFL to stretch other categories of misconduct to fit the facts. Thus, *ex post facto* punishment could have been avoided. Nevertheless, the lack of a definition for "sexual assault" poses another problem that must also be resolved.

The definition of "sexual assault" that was proposed and accepted was not necessarily incorrect. Such an interpretation of "sexual assault" is reasonable. In fact, the definition is in use around the United States.¹⁶¹ More specifically, the adopted definition closely mirrors the definition provided by the Department of Justice's Office of Violence Against Women.¹⁶² However, Watson's conduct would not have qualified as sexual assault under the Texas penal code where the conduct occurred.¹⁶³ This divergence demonstrates that there is a split amongst acceptable definitions of sexual assault. That is not to say that Watson should be punished for what he did, but that the *ex post facto* punishment is unnecessary.

Another flaw is that the lack of a uniformly stated standard makes it difficult for players to predict the applicable definition in their proceedings. In the Watson proceedings, the NFL waited until Watson's evidentiary hearing to discover what definition would be used.¹⁶⁴ Consequently, the NFL did not specifically define vague Policy terms until it knew the facts it would present, and the NFL almost certainly knew the Officer would have to apply this definition. Thus, the NFL could have, and likely did, model the definition to ensure that it covered Watson's conduct. The delay also ensured that Watson had minimal time to prepare his defense. Regardless of guilt, this process is antithetical to justice.

The NFL's power to produce definitions at the hearing, and the fact those definitions must be accepted, also renders its burden of proof meaningless. This is not to say that the preponderance standard itself is without weight. Instead, the *ad hoc* definition curation

157. ROBINSON, *supra* note 105, at 10 (showing the NFL definition of "conduct that undermines, or puts at risk, the integrity of the NFL").

158. *Id.* at 10–12. The opinion discusses the battle between the NFL and NFLPA as to Watson's punishment.

159. The NFL argued that if the punishment is unprecedented, it is because the conduct is unprecedented. In that argument lies the heart of the issue. The NFL has punished a player without support other than their own whims. While this time such punishment may be noble, the fear is that the next time it will not be. *Id.* at 12–13.

160. *Id.* at 6 (defining "sexual assault" as "unwanted sexual contact with another person").

161. *E.g.*, KY. REV. STAT. ANN. § 510.130 (West 2008) ("A person is guilty of sexual abuse . . . when he or she subjects another person to sexual contact without the latter's consent."); WIS. STAT. § 940.225(3m) (2023) ("[W]hoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor."); *see also* *Sexual Assault*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Offensive sexual contact with another person, exclusive of rape.").

162. *Sexual Assault*, U.S. DEP'T OF JUST.: OFF. OF VIOLENCE AGAINST WOMEN, <https://www.justice.gov/ovw/sexual-assault> [https://perma.cc/3EX8-CB3D] (defining "sexual assault" as "any nonconsensual sexual act proscribed by . . . law").

163. *See* TEX. PENAL CODE ANN. § 22.011 (West 2021) (defining "sexual assault" as penetration of a person's body amongst other things).

164. ROBINSON, *supra* note 105, at 9–10.

allows the NFL to bend definitions to the evidence. So, instead of presenting evidence that the conduct was prohibited, the NFL presents a definition that retroactively encompasses the conduct. Thus, the NFL is the one that actually determines guilt, and the Officer is merely a pawn.

This system of *ad hoc* definition curation is not only unfair, but it could create illogical results. For example, say Cameron is an NFL superstar accused of violating the Policy by committing “assault.”¹⁶⁵ The facts are as follows: Cameron was at a bar with his friend, Emma, when he decided to pull a prank on her. When Emma has her back turned, Cameron taps on her shoulder, and as soon as she turns, he says “BOO!” Emma is apprehensive and she jumps in her seat before realizing it was merely a prank. Emma did not suffer any physical or mental harm. In fact, she thought it was quite funny. Nevertheless, the NFL chooses to punish Cameron.

Because Cameron’s prank involved scaring Emma, it hypothetically could have resulted in her suffering a heart attack. The NFL alleges that Cameron has committed “assault.” Under an ordinary understanding of “assault,” Cameron’s conduct is not prohibited, and the conduct would not be prohibited under criminal or civil definitions of assault either.¹⁶⁶ Thus, Cameron’s conduct would seemingly be permissible under the Policy.

The NFL could punish Cameron for “assault” nonetheless. The NFL could fashion its own definition of “assault,” encompassing the fact pattern. The NFL could define “assault” as any act meant to cause apprehension that results in apprehension. Then the NFL could wait for the evidentiary hearing to offer its definition of “assault.”

Of course, Cameron intended to cause apprehension, and Emma was apprehensive. As a result, the NFL has a fitting definition with accompanying evidence to support the finding of a violation. The Officer, bound to accept the definition, would find a Policy violation for “assault.”¹⁶⁷ In this, the NFL has avoided its burden of proof, and instead, placed an immense burden on the player to prepare a defense without adequate foresight.

There was no chance that Cameron would have anticipated his prank would result in him being found to commit violent assault under the Policy. Yet, because the Policy contains no definitions of violent assault, the NFL could do whatever it wanted. This goes to show that while the NFL does put players on notice that certain conduct is prohibited, the *ad hoc* definitions render that notice pointless.

The same issue is evident in the opinion’s analysis of whether Watson engaged in “conduct that pose[d] a genuine danger to the safety and well-being of another person.”¹⁶⁸ The NFL had generally used this category when punishing violent conduct that endangered a person’s physical well-being.¹⁶⁹ Yet, the opinion concluded that putting at risk a person’s mental well-being was also prohibited.¹⁷⁰ More specifically, conduct was violative if it

165. NFL CONDUCT POLICY, *supra* note 46, at 1.

166. KY. REV. STAT. ANN. § 508.030 (West 2023); IOWA CODE § 708.1 (2021); *Assault*, BLACK’S LAW DICTIONARY (11th ed. 2019).

167. NFL CONDUCT POLICY, *supra* note 46, at 1.

168. ROBINSON, *supra* note 105, at 9.

169. *Id.* at 9–10.

170. *Id.*

caused the victim to be “fearful of [the player’s] ability to use his status . . . to damage [the victim’s] professional careers.”¹⁷¹

It seems reasonable to conclude that “well-being” could encapsulate mental, emotional, and physical well-being. Watson did not pose a danger to his victim’s physical well-being, but he clearly posed a genuine danger to his victim’s mental/emotional well-being.¹⁷² So, under a plain reading, Watson may have violated the Policy. Nevertheless, the NFL took a more nuanced approach. The NFL argued that conduct would be violative if the victim feared that the player could damage their career.¹⁷³ This nuanced approach provided no benefit to the League because, again, Watson’s conduct would have been violative under a much broader reading. In fact, the NFL’s definition-stretching actually hurts players because it is unlikely that any player would have anticipated the definition the NFL applied.¹⁷⁴ So, the NFL curated a nuanced definition at the detriment of its players without providing a benefit to itself.

The NFL’s definition does not seem like a logical outgrowth of the Policy. Had the NFL placed a definition in the Policy beforehand, it is unlikely this would have been the definition it chose. However, because the definition had to be accepted, the NFL ensured Watson’s punishment. The next time this provision of the Policy is allegedly violated, the definition may change. Then the definition will likely be tailored to meet different conduct.

Another issue with the disciplinary process is inconsistency. This is apparent when observing the opinion’s analysis of whether Watson engaged in “conduct that undermine[d] or put[] at risk, the integrity of the NFL.”¹⁷⁵ In the opinion’s analysis of this issue, the guiding definition was whether Watson’s conduct “can affect [the] integrity and public confidence [in the game of professional football].”¹⁷⁶ Looking at the cases cited to by Judge Robinson in combination with a textual analysis, Watson’s conduct did not violate the Policy.

Nevertheless, the NFL put forth the winning theory. The NFL believed that when Watson held himself out as an NFL player, he used the League’s image.¹⁷⁷ He negatively affected that image by engaging in misconduct. As a result, Watson’s conduct “undermine[d] or put[] at risk, the integrity of the NFL.”¹⁷⁸ Had the question been whether or not Watson had undermined or risked the integrity of the NFL, the answer would likely be yes. However, that does not mean that Watson’s conduct “affect[ed] [the] integrity and public confidence [in the game of professional football].”¹⁷⁹

First, the textual analysis. How does one affect the integrity and public confidence in the *game* of professional football? First you need to know what “game” means. A “game”

171. *Id.* at 9 (internal quotations omitted).

172. *See id.* (discussing the psychological affect Watson had on his victims).

173. ROBINSON, *supra* note 105, at 9.

174. Remember the earlier hypothetical of Cameron and Emma. Imagine that Emma is now a bartender and Cameron is a patron. This time when Cameron acts like he is throwing water on Emma he records the event. Emma is in fear that Cameron will post the video and it will go viral because he is an NFL player. Cameron has made Emma fearful that he will “use his status as an NFL player to damage her professional careers.” *See* ROBINSON, *supra* note 105, at 9.

175. *Id.*

176. *Id.* at 10–11 (second alteration in original).

177. *Id.* at 11.

178. *Id.* at 10–11.

179. *See* ROBINSON, *supra* note 105, at 9.

is defined as “a physical or mental *competition* conducted according to rules with the participants in direct opposition to each other.”¹⁸⁰ To “affect” is “to act on and cause a *change* in (someone or something).”¹⁸¹ So, the question is whether conduct causes a *change* in the *competition* of professional football. Watson’s conduct had nothing to do with competition aside from his eventual suspension. As a result, Watson’s conduct did not affect the game of professional football.

It may be argued that the “game of professional football” is referring to “a type of activity or business.”¹⁸² Even so, Watson’s conduct would not be violative of the business of professional football. A “business” is “[a] commercial enterprise carried on for profit”¹⁸³ “Integrity” is the “firm adherence to a code of especially moral or artistic values.”¹⁸⁴ Finally, “confidence” is the “faith or belief that one will act in a right, proper, or effective way.”¹⁸⁵ Nothing Watson did affected the integrity or confidence in the business of professional football. The NFL, only one part of professional football, discovered misconduct and punished the responsible party. Watson’s actions may have negatively affected the NFL, but not the game of professional football.

Though the NFL may have taken longer than necessary to punish Watson, this is not Watson’s fault. The NFL cannot control all of the actions of all of its players, and no business can. This idea is the backbone of the doctrine of *respondeat superior*, which only holds employers liable for employee conduct in the course of business.¹⁸⁶ The requisite level of supervision for business-related *and* non-business-related conduct is unrealistic.

So, because the NFL could not preemptively control Watson’s off-field conduct, it did the next best thing and held him responsible after the fact. In holding Watson responsible, the NFL showed adherence to its values against sexual misconduct. The same cannot be said for Watson, but the issue is not whether Watson’s actions affected the integrity or public confidence in himself.

Second, the opinion. The inconsistency is multiplied when comparing Judge Robinson’s analysis to previous instances of violative conduct under that same category. Her opinion cites two examples. Both had a direct on-field effect.¹⁸⁷ The first example was the time Tom Brady was accused of deflating footballs that he used in a game.¹⁸⁸ The second was when the New Orleans Saints were accused of using a “Pay-for-Performance”

180. *Game*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/game> [<https://perma.cc/NL6Z-4AV5>] (emphasis added).

181. *Affect*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/affect> [<https://perma.cc/45M2-5C5Q>] (emphasis added).

182. *Game*, OXFORD LEARNER’S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/game_1 [<https://perma.cc/EQ3U-PT7E>].

183. *Business*, BLACK’S LAW DICTIONARY (11th ed. 2019).

184. *Integrity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/integrity> (on file with the *Journal of Corporation Law*).

185. *Confidence*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/confidence> [<https://perma.cc/Y786-94GF>].

186. *Respondeat Superior*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the doctrine as holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency).

187. ROBINSON, *supra* note 105, at 10–11.

188. *Id.* at 10; Joseph Stromberg, *Tom Brady’s Deflategate Scandal, Explained*, VOX (May 19, 2015), <https://www.vox.com/2015/1/21/7866121/deflated-football-patriots-cheating> [<https://perma.cc/UKX2-ZJ5H>].

scheme which rewarded players for their in-game play (injuring the opposing team's players).¹⁸⁹ This precedent demonstrates that affecting the integrity of the "game" historically meant conduct impacting the on-field play or sport, not the business.¹⁹⁰ Moreover, the precedent shows that this category of conduct has been interpreted to punish conduct that had a direct on-field effect. Therefore, the opinion's analysis in Watson is inconsistent with the precedent cited.

The lack of definitions in the Policy and the automatic acceptance of the NFL's definition at disciplinary hearings causes great concern. The current structure of the NFL's disciplinary process enables the league to engage in *ex post facto* punishment. The current structure also allows the NFL to gain an unfair advantage by shaping definitions to fit the evidence. This in turn allows the NFL to avoid its burden of proof and, by preventing appropriate notice of the applicable definition used against the player, increase the player's burden. Moreover, the current structure could lead to absurd results. The current process will continue to create inconsistencies in the Policy's application. Those problems are not only a concern for players, but for owners and even the NFL.

B. Judge Robinson's Opinion on Punishment and the Aftermath

The opinion and eventual settlement demonstrated that there are problems with the punishment portion of the NFL's disciplinary process. The opinion recommended punishment.¹⁹¹ But this recommendation was rendered moot as soon as the NFL appealed. The result of the appeal was a settlement that nearly doubled the suspension Watson was to serve. How did this happen? We begin with the opinion.

During the Watson proceedings, the NFL recommended a one-season suspension, which the opinion considered.¹⁹² However, Judge Robinson found that the season-long suspension was too far removed from precedent.¹⁹³ The opinion stated that the NFL was attempting to "impose a more dramatic shift in its culture without the benefit of fair notice to—and consistency of consequence for—those in the NFL subject to the Policy."¹⁹⁴ In other words, the NFL wanted to abandon precedent in favor of modern sensibilities.¹⁹⁵

Instead, the opinion recommended a six-game regular season suspension without pay. While not an entire season, the recommended suspension was "the most significant punishment ever imposed on an NFL player for allegations of non-violent sexual conduct."¹⁹⁶ In addition, Watson was to be limited to club-approved massage therapists for

189. ROBINSON, *supra* note 105, at 10; Judy Battista, *N.F.L. Inquiry Says Saints Set Bounty for Hits*, N.Y. TIMES (Mar. 2, 2012), <https://www.nytimes.com/2012/03/03/sports/football/nfl-says-saints-had-bounty-program-to-injure-opponents.html> (on file with the *Journal of Corporation Law*).

190. *Game*, *supra* note 182.

191. ROBINSON, *supra* note 105, at 15.

192. *Id.* at 12.

193. *Id.* at 11–14.

194. *Id.* at 15.

195. For a deeper look into precedent of NFL decisions, see Kris Rhim & Ken Belson, *Here Are the Longest N.F.L. Player Suspensions*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/article/nfl-suspensions.html> (on file with the *Journal of Corporation Law*).

196. ROBINSON, *supra* note 105, at 15.

club approved sessions.¹⁹⁷ In its recommended punishment the opinion complied with prior precedent but took a step toward escalation in line with modern sensibilities.

This is not to say that following precedent is necessarily good or bad. Precedent is the foundation of American law. Following precedent is the basis for one of the most quintessential legal doctrines: *stare decisis*.¹⁹⁸ Precedent provides continuity and helps to prevent disparity.¹⁹⁹ However, relying solely on precedent does not create a perfect system. In many instances, precedent limits changes to the law. This reliance can lead to archaic punishments or other unattractive results. Such a consequence occurred when Judge Robinson ordered punishment in the Watson decision.

The opinion concluded that Watson engaged in non-violent “sexual assault” in violation of the Policy based on the NFL’s proposed definition. Unfortunately, this violation is common in the NFL.²⁰⁰ However, Watson received the “most significant punishment ever imposed on an NFL player for allegations of non-violent sexual conduct.”²⁰¹ Nevertheless, this punishment was only six regular season games—roughly 35% of the regular season.²⁰² Such a punishment is mild given the modern climate.²⁰³ Even though this was the most severe punishment for the conduct at issue, many people (including Judge Robinson) believed it was insufficient.²⁰⁴

Some may argue that, because the punishment ordered was grounded in precedent, the decision was just. The NFL, however, took a different position and decided to appeal the decision, seeking a more severe punishment. This appeal multiplies the concern; not because Watson’s initial punishment was just but because the appeal makes the opinion pointless. Before the appeal, a neutral third-party based her decision on the Policy, evidence, and precedent. On appeal, however, the decision becomes solely that of the Commissioner.²⁰⁵ While the Commissioner is bound by the Policy and evidence, he is not bound by precedent.²⁰⁶ Furthermore, the Commissioner is biased in favor of the NFL. What was once an unbiased decision—notwithstanding other issues with the NFL’s disciplinary process—is now a decision based on the whim of one man.

197. *Id.* at 15.

198. See *Stare Decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”).

199. Sebastian Lewis, *Precedent and the Rule of Law*, 41 OXFORD J. LEGAL STUD. 873, 883 (2021).

200. ROBINSON, *supra* note 105, at 11–14.

201. *Id.* at 15.

202. *Id.* at 15; 2023 NFL Schedule Announced, NFL (May 12, 2023), <https://operations.nfl.com/updates/football-ops/2023-nfl-schedule-announced> [<https://perma.cc/7LW8-XQZY>].

203. See Wood et al., Research Note, *Climate Surveys: An Inventory of Understanding Sexual Assault and Other Crimes of Interpersonal Violence at Institutions of Higher Education*, 23 VIOLENCE AGAINST WOMEN 1249, 1249 (2017) (“Sexual assault, dating/domestic violence, sexual harassment, and stalking are complex crimes and have been a major focus of national attention at institutions of higher education.”); *Me Too Movement*, BRITANNICA, <https://www.britannica.com/topic/Me-Too-movement> [<https://perma.cc/X9WK-KY9K>] (discussing the rise and legacy of the “me too” movement); ROBINSON, *supra* note 105, at 15 (discussing the NFL’s response to “public outcr[ies]” based on “violent conduct” of its players).

204. ROBINSON, *supra* note 105, at 15.

205. *Id.* at 2.

206. NFL, NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT, art. 46, § 1(e)(v) (2020) (limiting the appeal only to “arguments why, based on the evidentiary record below, the amount of discipline, if any, should be modified”—not precedent).

Amplifying the concern is the lack of a standard of review for the Commission on appeal.²⁰⁷ The Commissioner has unfettered power in making his determination on appeal. He can accept the lower decision or change it. He could decide that no suspension is necessary or ban Watson entirely. The Commissioner need not find any error or abuse of discretion on the part of the Disciplinary Officer.²⁰⁸ He merely needs to disagree with the discipline recommended by the Disciplinary Officer.²⁰⁹

So, while Watson seemed to have won with the unbiased Disciplinary Officer, that was for naught. Because of the appeal, the Officer's decision meant nothing. This eventually led to the settlement, but why? Well, had Watson fought the appeal, the NFL would most likely have implemented a season-long suspension.²¹⁰ So, instead of sitting out an entire season, Watson "settled"—accepting a suspension almost double the one in the opinion with additional fines.²¹¹

While the neutral third-party decision maker seemed like an addition to the NFL's disciplinary process that would limit bias, the Officer was merely a hurdle to the inevitable. At the end of the day, her decision meant nothing. The player is still at the complete mercy of the NFL.

The concern with the power disparity between the Commissioner and players is increased by the permanency of the Commissioner's decision on appeal. Players can appeal the Commissioner's decision but must do so in federal court.²¹² There, players are almost guaranteed to be denied relief. The best case to demonstrate this is *NFL Management Council v. NFLPA*—also known as the "Deflate-Gate Case."²¹³

Prior to the 2020 CBA, New England Patriots Quarterback Tom Brady was found by the NFL to have deflated and used footballs in the 2015 AFC Championship Game.²¹⁴ After an investigation, Brady was suspended for four games.²¹⁵ Brady then requested and received an arbitration.²¹⁶ At the arbitration, the Commissioner acted as the arbitrator, and he affirmed the discipline.²¹⁷ The NFLPA then appealed to United States District Court for the District of Minnesota while the NFL brought an action the same day in the Southern

207. *Id.* (specifying no standard of review).

208. *Id.*

209. *Id.*

210. ROBINSON, *supra* note 105, at 12. The NFL, at Watson's initial hearing, requested a season-long suspension. Judge Robinson of course, denied this request. On appeal, the CBA does not require any abuse for Judge Robinson's decision to be overturned. The Commissioner's decision is then binding. It stands to reason that the Commissioner of the NFL would be aligned with the interests of the NFL. In that case it does not seem too far of a leap to assume that the Commissioner would adopt the NFL's recommended punishment. This is shown even more so with the fact that Watson "settled" for an 11 game suspension. Watson would only settle for a lesser suspension. Thus, the suspension ordered on appeal would most likely have been a full season.

211. Becky Sullivan, *Deshaun Watson Will Be Suspended for 11 Games After Allegations of Sexual Misconduct*, NPR: SPORTS (Aug. 18, 2022), <https://www.npr.org/2022/08/12/1117058302/deshaun-watson-controversy-suspension-nfl-preseason> [https://perma.cc/US34-KM7H].

212. *See NFL Mgmt. Council v. NFLPA*, 296 F. Supp. 3d 614, 615–16 (S.D.N.Y. 2017) (explaining the procedural history of a Policy violation).

213. *Id.*

214. *NFL Mgmt. Council v. NFLPA*, 820 F.3d 527, 531 (2d Cir. 2016).

215. *Id.* at 534.

216. *Id.* at 531.

217. *Id.*

District of New York.²¹⁸ The court vacated the decision, because “Brady lacked notice that his conduct was prohibited and punishable by suspension, and that the manner in which the proceedings were conducted deprived him of fundamental fairness.”²¹⁹ However, the NFL appealed the district court’s decision and the United States Court of Appeals for the Second Circuit reversed.²²⁰

The court said that it only had the power to “ensure that the arbitrator was ‘even arguably construing or applying the contract and acting within the scope of his authority.’”²²¹ The court continued, stating that it was to ensure the Commissioner “did not ‘ignore the plain language of the contract.’”²²² The Court further stated that the Commissioner’s decision must only draw its essence from the CBA to be confirmed.²²³ Moreover, the court found that:

[T]he CBA [specifically allowed] the Commissioner to sit as the arbitrator in all disputes . . . knowing full well that the Commissioner had the sole power of determining what constitutes [violative conduct], . . . knowing that the Commissioner would have a stake in both the underlying discipline and in every arbitration Had the parties wished to restrict the Commissioner’s authority, they could have fashioned a different agreement.²²⁴

The court then found that, in this instance, this low standard had been met.²²⁵ A standard of “arguably construing” or “acting within the scope of his authority” are both extremely low. If Watson did not settle and the Commissioner rendered a decision, that decision would almost certainly be insulated from review. Because the Commissioner’s authority under the Policy is so broad, it gives the Commissioner exorbitant discretion. Regardless of the Officer’s decision, the evidence presented, or the precedent cited, so long as the Commissioner arguably construed the Policy and acted within the scope of his authority, his decision stands permanent.

The current disciplinary process is fatally flawed. The system makes the “Neutral Third-Party Decision Maker” no more than a pawn to create an illusion of fairness. An appeal places unilateral authority in the Commissioner. His decision is then insulated from review. Clearly the system needs serious overhaul. Without an overhaul, the players and the stakeholders will lose.

IV. RECOMMENDATION

There are three modifications to the NFL’s disciplinary process that must be made: (1) adding definitions for conduct the Policy prohibits; (2) adding punishment guidelines for violating the Policy; and (3) amending the CBA to include a standard of review the Commissioner must abide by when reviewing lower disciplinary decisions. These modifications will provide clarity, consistency, and create a less biased system. In turn, this

218. *Id.* at 535. The action was eventually transferred to the Southern District of New York. *Id.*

219. *NFL Mgmt. Council*, 820 F.3d at 531–32.

220. *Id.* at 532.

221. *Id.* at 537.

222. *Id.* (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

223. *Id.* at 538.

224. *NFL Mgmt. Council*, 820 F.3d at 548.

225. *Id.* at 532.

will benefit the players, the stakeholders, and the league itself. In the end, the NFL is a business, and it must return value to its stakeholders. These changes will accomplish that goal.

A. Definitions

Some examples of conduct prohibited by the Policy are reflected in the legal system, but most are League-specific.²²⁶ Thus, the lack of applicable definitions creates clarity and uniformity issues. These issues have been discussed by comparative law scholars.²²⁷ The world is split between two legal systems, common law and civil law, but the number of languages spoken around the world is more numerous.²²⁸ Though differences between the common and civil legal systems are disappearing,²²⁹ language barriers present innumerable differences in legal terminology across the world.²³⁰ Resultingly, there is confusion as to what the law requires. As in comparative law, the problem with the NFL's disciplinary process is that those who are bound by the rules do not readily know what they mean. To fix this there must be more precise definitions available. The question, then, is what definitions should be in the Policy?

When considering prohibited conduct based in law, one might assume the NFL would mirror legal definitions. Nevertheless, the NFL has no guidance for how it must curate the definitions that will bind its players. This, of course, creates unjust results because, in the words of Judge Robinson, "as it is the NFL's prerogative to impose the Policy on its players, [she is] bound to accept the NFL's definition[s]."²³¹ This mandatory acceptance leads to situations where the players are punished using unreasonable definitions.

Instead of adding definitions to the Policy, one possible solution may be to require that all definitions offered by the NFL be reasonable. But only requiring reasonability leaves room for abuse because the players accused of violating the Policy would still be ignorant of the definition that will be applied until their hearing. Such notice is less than fair.²³² Indeed, this modification would still enable the NFL to engage in *ex post facto* punishment because the Policy's vagueness would still allow the NFL to curate "reasonable" evidence-based definitions. Thus, a reasonableness requirement is detrimental to the players and the owners.

For the players, the damage is obvious, but for the owners, it is more nuanced. As with all businesses, stakeholders want profit. One threat to that investment profit is volatility or unpredictable market.²³³ The NFL's current disciplinary process is the epitome

226. *Id.* at 531.

227. See generally William B. Stern, *Comparative Law: The History of the Language Problem and the Use of Generic Terms*, 55 L. LIBR. J. 300 (1962) (discussing how the use of generic terms in international law may help cure the language barriers).

228. *Id.* at 302–03.

229. *Id.* at 304.

230. *Id.* at 304.

231. ROBINSON, *supra* note 105, at 6.

232. *Fair Notice*, BLACK'S LAW DICTIONARY (11th ed. 2019). Fair notice requires apprising of the claim. *Id.* One cannot be informed as to the substance of a claim where there is no substance.

233. *What Causes Volatility in the Stock Market?*, AM. CENTURY INVS. (Sept. 14, 2023), <https://www.americancentury.com/insights/what-causes-market-volatility> [<https://perma.cc/M8TZ-6MZW>] ("A

of unpredictability. Owners are completely unaware of the standards that their players will be held. This lack of awareness significantly hinders the owners' ability to adequately prepare for the punishment their players receive. As a result, owners may end up making unnecessary moves. For example, an owner may cut a player who is innocent in relation to the conduct alleged.²³⁴ Unpredictability could also cause owners to do nothing. An owner could assume one of her players will receive a minor punishment and decide to retain the player. Then, when the NFL gives a player a season-long suspension, the owner has no recourse. The result of an owner's misstep (caused by unpredictability) could be fewer wins, poor ticket sales, poor merchandise sales, and more.

To prevent these harms, this Note recommends the NFL clearly define the conduct the Policy prohibits. Definitions would ensure players know what their conduct will be measured against. This would protect against potential *ex post facto* punishment, and it would create transparency. Definitions would also create predictability in the market and help protect the owners' investments. Moreover, definitions would allow the NFL to retain control over the process. The only thing the NFL would give up is its ability to impose new definitions during arbitration.

This Note further recommends that the NFL should be required to include only reasonable definitions in the Policy. This reasonable definition approach would require that definitions be *objectively* reasonable. This, in turn, requires that each definition be (1) comprehensible by laypersons and (2) related to a common interpretation. For example, the term "assault" requires a "person in reasonable apprehension of imminent harmful or offensive contact."²³⁵ Under the reasonable definition approach, the NFL could omit the words "harmful" and "offensive," and the definition would be reasonable. This is because the word "apprehension," on its own, requires some worry or fear that an unpleasant contact will occur.²³⁶ The use of "reasonable" before "apprehension" would require the worry or fear to be objectively reasonable regardless of whether the conduct was "harmful or offensive."

This approach affords flexibility while retaining transparency. Flexibility is built into a reasonable standard, so it can apply to many facets of law.²³⁷ As the example above shows, the definition can still be open-ended to ensure coverage of some unprecedented conduct. Additionally, the definition's open-ended nature does not prevent a layperson

turbulent—or volatile—market can be concerning as an investor, especially if your investments lose value."); *How Traders Can Take Advantage of Volatile Markets*, CHARLES SCHWAB (July 23, 2019), <https://international.schwab.com/investing-education/how-traders-can-take-advantage-volatile-markets> [<https://perma.cc/6FR4-AJZP>] ("The bad news is that higher volatility also means higher risk. When volatility spikes, you have the opportunity to generate an above-average profit, but you also run the risk of losing a great deal of capital in a relatively short period of time.").

234. Jordan Dajani, *Prosecutors Say Ex-Bills Punter Matt Araiza Was Not Present During Alleged Gang Rape, Per Report*, CBS (May 9, 2023), <https://www.cbssports.com/nfl/news/prosecutors-say-ex-bills-punter-matt-araiza-was-not-present-during-alleged-gang-rape-per-report> [<https://perma.cc/C3SX-GUAT>].

235. *Assault*, *supra* note 167.

236. *Apprehension*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/apprehension> [<https://perma.cc/SJE9-7VGM>].

237. *Reasonable*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("It is extremely difficult to state what lawyers mean when they speak of 'reasonableness.' In part the expression refers to ordinary ideas of natural law or natural justice, in part to logical thought, working upon the basis of the rules of law." (quoting JOHN WILLIAM SALMOND, JURISPRUDENCE 183 (Glanville L. Williams ed., 10th ed. 1947))).

from understanding it. Almost all laypersons would understand what it means to be apprehensive of contact and, if one does not, the definition is easily accessible. Resultingly, the player has a reasonable expectation of what conduct is prohibited.

The reasonability requirement may lead to the adoption of definitions not accepted in American law, but this is not concerning. Instead, the NFL would serve as a place to create legal developments. The United States constantly undergoes legal reformation and change.²³⁸ There are Uniform Codes, Restatements, and academic journals all aimed at progressing American law.²³⁹ Indeed, the law itself is dynamic and ever changing.²⁴⁰ Therefore, change in law is actually consistent with the American legal ideology. The NFL could experiment with definitions that conform to modern sensibilities. The application of new definitions would serve as an example for other jurisdictions. At the same time, the NFL retains rulemaking flexibility.

Moreover, the structure of the Policy favors a reasonability requirement. The Policy prohibits conduct that occurs both on and off the field. If the NFL were required to adopt definitions with legal precedent, it would be unable to prohibit a substantial amount of conduct found to violate the Policy. Therefore, a reasonability requirement is a proper means of guiding the NFL's definition curation.

Furthermore, the reasonability requirement does not preclude the use of most definitions. The NFL could still choose to adopt a definition that is based in law but would not be required to do so. Again, this is consistent with the flexibility that the NFL has maintained in its disciplinary process.

There are many benefits in reasonable definitions of prohibited conduct in the NFL's Policy. Reasonableness ensures that players are aware of what conduct is prohibited. Reasonableness also mitigates bias and gives players a fair opportunity to defend themselves on equal terms with the NFL. It also dissipates *ex post facto* punishment. As for the owners, reasonableness creates market predictability. Predictability allows owners to adequately prepare for the future to continue maximizing profit. In addition, the NFL's image improves. It would no longer be seen as an entity ruled by a sovereign

238. *Criminal Law Reform*, ACLU, <https://www.aclu.org/issues/criminal-law-reform> [<https://perma.cc/DES8-BPXU>].

239. See e.g., U.C.C. (AM. L. INST. & UNIF. L. COMM'N 2022) (an example of a restatement); see generally *Restatements of the Law Guide*, WASHBURN UNIV. SCH. OF L., <https://www.washburnlaw.edu/library/research/guides/restatements.html> [<https://perma.cc/F8S5-ZLZS>] (giving guidance on how and where to use restatements); *Journals and Periodicals*, HEINONLINE, <https://home.heinonline.org/content/journals-and-periodicals> [<https://perma.cc/CL4P-72SD>] (collecting scholarly periodicals).

240. JOSÉ JUAN MORESO, LEGAL DYNAMICS, LEGAL INDETERMINACY AND CONSTITUTIONAL INTERPRETATION, 101 (1998).

Commissioner. Instead, it would be seen as a league that respects its players—much like the NBA in recent years.²⁴¹ This generates profits for all.²⁴²

B. Punishment Guidelines

Another major issue with the Watson proceedings was punishment. The opinion initially handed down a six-game suspension, but Watson settled for an 11 game suspension after the NFL appealed.²⁴³ While the opinion’s punishment was based on precedent, the settlement was based on public sentiment.²⁴⁴ Alone, neither can result in justice. Instead, there must be a blend of precedent and public sentiment. To do so, the NFL should implement a punishment guideline in the Policy.

This guideline should not merely be numbers based on conduct. Instead, it should list relevant factors the Officer must take into consideration. For example, the Officer would need to consider precedent, the NFL’s recommendation, aggravating factors, cultural considerations, and mitigating or aggravating factors. There may be some punishments based on categories of conduct that are easily defined, like Watson’s sexual assault. Other categories—like conduct “detrimental to the integrity of, or public confidence in, the game of professional football”²⁴⁵—make a numerical system inappropriate. Therefore, a host of considerations and a delineation of the Officer’s authority is more appropriate.

This guideline would allow the Officer to go beyond the bounds of precedent. We can look to federal criminal sentencing for guidance. The factors listed in 18 U.S.C. § 3553(a) guide judges when determining what sentence is “sufficient but not greater than necessary” in a given case.²⁴⁶ The NFL should adopt these factors. Rather than a numerical approach, the NFL should look at relevant factors to find a just sentence for the given case. More

241. *NBA, Players Finalize New Collective Bargaining Agreement*, SPECTRUM NEWS (Apr. 26, 2023), <https://ny1.com/nyc/all-boroughs/ap-top-news/2023/04/26/nba-players-finalize-new-collective-bargaining-agreement> [<https://perma.cc/4WAR-JBFA>] (discussing a new “player-friendly” rule); Jeff Zillgitt, *NBA Schedule More Player Friendly with Fewer Back-to-Back Games*, USA TODAY (Aug. 12, 2015), <https://eu.usatoday.com/story/sports/2015/08/12/nba-schedule-more-player-friendly-fewer-back-back-games/31564149> [<https://perma.cc/24PH-WSPR>]; Mike Wise, *Phil Jackson’s Departure Tells Us NBA Is a Player’s League*, ANDSCAPE (June 29, 2017), <https://andscape.com/features/phil-jackson-departure-tells-us-nba-is-a-players-league> [<https://perma.cc/AX27-8L7E>].

242. *See National Basketball Association Total League Revenue from 2001/02 to 2022/23*, STATISTA (Nov. 28, 2023), <https://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005> [<https://perma.cc/999H-S7N8>] (showing the NBA’s revenue growth in the last 12 years); *see also* Ted Kitterman, *5 Ways Workplace Culture Drives Business Profitability*, GREAT PLACE TO WORK (Feb. 13, 2023), <https://www.greatplacetowork.com/resources/blog/5-ways-workplace-culture-drives-business-profitability> [<https://perma.cc/SA6Y-5AFR>] (expressing that businesses with better culture derive more profit); Solomon Thimothy, *Why Brand Image Matters More Than You Think*, FORBES (Oct. 31, 2016), <https://www.forbes.com/sites/forbesagencycouncil/2016/10/31/why-brand-image-matters-more-than-you-think/?sh=288fedf010b8> (on file with the *Journal of Corporation Law*) (detailing the importance of a good brand image).

243. Coleman & Perez, *supra* note 81.

244. *See* Albert Breer, *How Both Sides Got What They Wanted in the Deshaun Watson Settlement*, SPORTS ILLUSTRATED (Aug. 18, 2022), <https://www.si.com/nfl/2022/08/18/deshaun-watson-nfl-settlement> [<https://perma.cc/4ZW9-XZ76>] (“In a post-Ray Rice world, the NFL is fully aware of how it’s perceived when it comes to situations involving transgressions against women.”); ROBINSON, *supra* note 105, at 15.

245. ROBINSON, *supra* note 105, at 1.

246. 18 U.S.C. § 3553(a).

power to implement the Officer's sound judgment further eliminates bias in the disciplinary process. Instead of the NFL dictating punishment, punishment will be in the hands of a neutral third-party who is basing her decision on already-enumerated factors. While this system is less predictable than a numerical chart, such a chart is less viable when dealing with unprecedented conduct.²⁴⁷

The key purpose of a punishment guideline is to "guide judicial discretion," not to mandate a certain punishment.²⁴⁸ By implementing guidelines, outcomes are easier to predict and so too are the costs of correction.²⁴⁹ This in turn benefits the owners. Owners can more accurately predict player punishment. This predictability allows the owner to act accordingly—e.g., obtain a replacement, trade, modify special events, etc.²⁵⁰

The guideline would also allow the NFL to remain flexible while limiting the opportunity for abuse. Due to the limited nature of their Policy—listing only 14 categories of prohibited conduct—the NFL must keep punishment somewhat open ended.²⁵¹ The world is ever changing, and the NFL needs to be adaptable. We saw this issue with Watson. His sexual misconduct did not involve force, and this resulted in a much lesser punishment than what possibly should have been ordered.²⁵² The League, however, wanted to reflect modern sensibilities, so it subjected Watson to an abuse of discretion and an abuse of process.

Guidelines would cure this problem. It would allow the Officer to extend or retract the appropriate punishment for unprecedented conduct. This allows punishment to be tailored to precedent and modern sensibilities. An example where a punishment may be tailored downward would be when a player has been arrested for possession of marijuana for personal consumption. In that case, public policy may indicate that the player should be punished less harshly than in the past. Therefore, the implementation of flexible guidelines would be beneficial.

Additionally, the guidelines would promote transparency. Being open with what conduct warrants what punishment allows players to make educated decisions, where they know the consequences of their actions. Some players may still commit "unprecedented" offenses, but this does not negate the need for a guideline.²⁵³ The discretionary nature of

247. The entire issue with Watson's punishment is that a lot of what happened was unprecedented. There is no way to put unprecedented conduct neatly into a chart. Instead, we must look at relevant factors beyond numerical calculations to determine what justice requires. See 18 U.S.C. § 3553(a).

248. ROBIN L. LUBITZ & THOMAS W. ROSS, U.S. DEP'T OF JUST., NCJ NO. 186480, SENTENCING GUIDELINES: REFLECTIONS ON THE FUTURE (2001).

249. *Id.*

250. Kevin Patra, *Jaguars Trade for Suspended Falcons WR Calvin Ridley*, NFL.COM (Nov. 1, 2022), <https://www.nfl.com/news/jaguars-trade-for-suspended-falcons-wr-calvin-ridley> [<https://perma.cc/5MUC-8M2K>].

251. ROBINSON, *supra* note 105, at 1–2.

252. *Id.*; Nora Princiotti, *The NFL Could Have Made a Statement with the Deshaun Watson Punishment; Instead, It Cut a Deal*, THE RINGER (Aug. 18, 2022), <https://www.theringer.com/nfl/2022/8/18/23312175/deshaun-watson-cleveland-browns-suspension-roger-goodell> [<https://perma.cc/LUT6-2HS6>].

253. Rob Maaddi, *NFL Suspends Miami Dolphins Owner for 'Unprecedented' Tampering with Tom Brady, Sean Payton*, PBS (Aug. 2, 2022), <https://www.pbs.org/newshour/nation/nfl-suspends-miami-dolphins-owner-for-unprecedented-tampering-with-tom-brady-sean-payton> [<https://perma.cc/26YD-DRBA>]; Mary Kay Cabot, *NFLPA Bracing for 'Unprecedented' Discipline of Deshaun Watson but Prepared to Vigorously Fight It, Per*

the guidelines would allow the Officer to render punishment fitting the overarching purpose of the Policy.

The guideline would ensure that prohibited conduct is justly punished. It would account for multiple offenses, stacking, concurrency, and more. The guidelines allow flexibility while promoting transparency. This benefits players, owners, and the NFL.

C. Standard of Review

The importance of an applicable standard of review cannot be understated. The standard of review is one of the first things that one considers when determining if they have a viable appeal.²⁵⁴ In fact, a standard of review can be determinative.²⁵⁵ In an analysis of the United States Court of Appeals for the Sixth Circuit, researchers found that “appeals that were decided ‘de novo’ were nearly 20% more likely to be reversed than those under the more deferential standards.”²⁵⁶ Suffice it to say, that a standard of review matters.

Resultingly, the NFL should implement a standard that the Commissioner must apply when reviewing the Officer’s decision. Such a modification should be made in the next CBA. This Note suggests that the applicable standard should be an “abuse of discretion” standard. If the Commissioner does not find such an abuse, the Officer’s decision stands. However, if the Commissioner finds that the Officer abused her discretion, then the Commissioner can modify the decision within reason. As a result, the Commissioner would need to consider the Policy and evidence when rendering a decision. This would include the applicable definitions and punishment guidelines.

The implementation of a standard of review ensures fairness in the disciplinary process. It is obvious that an organization’s disciplinary process may be biased where the head of the organization is charged with unilaterally resolving a dispute between an employee of that organization. Therefore, limiting the head’s discretion would serve to eliminate the opportunity for bias to infect the disciplinary process.

It appears as if the NFL is aware of this potential for abuse. The NFL took the first step to curb the Commissioner’s power by bringing in an independent third party to render initial decisions.²⁵⁷ Yet, this initial decision means nothing if there is no standard to govern the Commissioner’s review. The league can simply appeal the decision and implement

Report, CLEVELAND.COM (June 16, 2022), <https://www.cleveland.com/browns/2022/06/nflpa-bracing-for-unprecedented-discipline-of-deshawn-watson-but-prepared-to-vigorously-fight-it-per-report.html> [https://perma.cc/KP8X-8ETG].

254. Julia Rugg, *Identifying and Understanding Standards of Review*, WRITING CTR.: GEO. UNIV. L. CTR. (2019), (discussing the different standards of reviews that the appellate courts adopt to determine the outcomes of cases that come to them on appeal), <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf> [https://perma.cc/YDS8-V3N2].

255. *Id.*

256. Colter Paulson, *How Important Are Standards of Review?*, SIXTH CIR. APP. BLOG (May 15, 2012), <https://www.sixthcircuitappellateblog.com/news-and-analysis/how-important-are-standards-of-review> [https://perma.cc/D3DG-T3LB].

257. Alikpala, *supra* note 104.

their own punishment via the Commissioner or his selected agent.²⁵⁸ A standard on review will give the Officer's decision weight.

This provides obvious benefits to the players, but it also benefits the owners. For the owners, a standard of review limits market volatility. By limiting the Commissioner's discretion, it is far less likely for punishments to vary so largely from initial decision to the final decision. As it stands, an owner could decide based on a belief that their player will be suspended for six games. However, after an appeal, that suspension could almost double. This inconsistency could have prevented the owner from being adequately prepared. On the other hand, the owner could wait until a final decision before making a change. This too is harmful for the owner's investment. If the owner is not adequately altered and subsequently prepared to lose their star quarterback for an entire year, they could fail to modify their team to fit their new goals. Resultingly, a team that was originally a playoff contender could be stuck in the middle of the pack. Not only would the owner lose revenue from ticket sales and other merchandise, but they would also lose out on having a higher draft pick they might otherwise receive if they had the proper time to prepare a tank.²⁵⁹ Resultingly, the standard of review benefits the owners.

V. CONCLUSION

While the NFL has made progress in their efforts to manage player conduct, it still has a way to go. Watson's disciplinary proceeding has highlighted crucial flaws in the current disciplinary process. The current structure too heavily favors the NFL. Additionally, the Policy under which the conduct is measured is vague and ambiguous. The current system allows for the NFL to abuse its discretion and the process itself. The Officer serves a seemingly irrelevant role in the process as she merely rubber stamps whatever the NFL places before her. However, by implementing definitions, punishment guidelines, and a standard of review, these flaws can be corrected. In turn, players will receive a fairer shake. The owners will have predictability which will allow them to maximize profit. And the NFL will retain flexibility while creating an image of a player-friendly entity. This is how the NFL will remain king.

258. Jake Trotter, *NFL Appeals Ruling That Deshaun Watson of Cleveland Browns Should Be Suspended Six Games*, ESPN (Aug. 3, 2022), https://www.espn.com/nfl/story/_/id/34342566/nfl-appealing-dashaun-watson-six-game-suspension [https://perma.cc/6N9N-AVEP].

259. *The NFL's Current Draft System Clearly Incentivizes Tanking*, PRO FOOTBALL TALK (Feb. 2, 2022), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/the-nfls-current-draft-system-clearly-incentivizes-tanking> (on file with the *Journal of Corporation Law*); Donnie Druin, *Should Cardinals Tank for Caleb Williams?*, ALL CARDINALS (July 9, 2023), <https://www.si.com/nfl/cardinals/analysis/should-arizona-cardinals-tank-for-caleb-williams> [https://perma.cc/9JN8-M2B5] (discussing whether the Arizona Cardinals should tank because their star quarterback was injured).