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PLAYER DISCIPLINE IN THE NFL: ARBITRATION OR ARBITRARY?

*Adam J. Walker**

I. INTRODUCTION

Since the Houston Texans drafted him in 2017, Deshaun Watson has statistically been one of the best quarterbacks in the National Football League (“NFL”).¹ Watson led the Texans to the playoffs in both the 2018 and 2019 seasons before internal organizational issues led to Watson requesting a trade after the 2020 season.² By the end of March 2021, twenty-one women had filed civil lawsuits alleging Watson of sexual assault and sexual misconduct.³ Watson did not immediately face any discipline from the NFL, but the Texans made Watson inactive for every week of the 2021 season in light of the accusations and the rift between the organization and the quarterback.⁴ In June 2022, a twenty-fourth woman filed a lawsuit against Watson.⁵ By August 2022, Watson has settled twenty-three of the twenty-four lawsuits, and a Texas grand jury declined to criminally indict Watson.⁶

While these lawsuits were pending, the NFL also opened an investigation into the alleged sexual assaults in accordance with proper disciplinary procedures under the league’s Collective Bargaining Agreement (“CBA”) with the NFL Players Association (“NFLPA”).⁷ The investigation concluded in August 2022 with a disciplinary hearing under the CBA.⁸ The CBA is the chief governing document between NFL team owners and the NFLPA. It is arguably the most important document for the NFL because it establishes the rules governing the players’ labor. The first CBA was created in 1968, after team owners recognized the NFLPA,⁹ and those parties

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1. Greg Rajan, *Deshaun Watson’s NFL Timeline: From Texans Phenom to Suspended*, TEX. SPORTS NATION, <https://www.houstonchronicle.com/texas-sports-nation/texans/article/Deshaun-Watson-NFL-timeline-Texans-suspended-17342960.php#:~:text=April%2027%2C%202017%20%E2%80%94%20Three%20months,pick%20in%20the%20NFL%20draft> (Aug. 18, 2022) (since the Houston Texans drafted him in 2017, Deshaun Watson has statistically been one of the best quarterbacks in the National Football League (“NFL”)).

2. *Id.*

3. Aaron Reiss, *Deshaun Watson Timeline*, ATHLETIC (Oct. 18, 2022), <https://theathletic.com/2496073/2022/10/18/deshaun-watson-sexual-assault/>.

4. *Id.*

5. *Id.*

6. *Id.*

7. See Collective Bargaining Agreement, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION (2020), art. 46, § 2(B), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFLPA_CBA_March_5_2020.pdf.

8. Reiss, *supra* note 3.

9. *NFL labor history since 1968*, ESPN (Mar. 3, 2011), https://www.espn.com/nfl/news/story?page=nfl_labor_history.

agreed to the most recent iteration in March 2020.¹⁰ In 1968, players and team owners had different motivations to adopt the first CBA. The CBA secured better pay and benefits for the players and benefitted team owners by preventing work stoppages.¹¹ Today, the CBA serves those functions and many more, such as: to create parity among the teams through a salary cap and salary floor, address operational matters and safety concerns, implement mechanisms for players to bring injury grievances, draft and agree on player free-agency language, and negotiate other terms like season length and active roster limitations.¹² Players agree to CBAs to secure these benefits in order to protect their interests and physical well-being, while the owners agree to CBAs to protect against labor stoppages and to maximize profits.

Separate from the CBA, the NFL imposes a Personal Conduct Policy (“Policy”), which permits the league to discipline players for any conduct “found to be detrimental to the league and professional football” whether or not the conduct results in a criminal conviction.¹³ In Watson’s case, the NFL alleged Watson “violated three provisions of the Policy by engaging in: (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.”¹⁴

To resolve alleged violations of the league’s Policy, the current CBA provides that the case will initially go before a disciplinary officer jointly appointed by the parties.¹⁵ This is a significant change to Policy violation resolution, and one players advocated for, compared with prior CBA procedures which vested initial and appellate disciplinary determinations solely with the NFL commissioner.¹⁶ The current procedure states that the officer’s ruling will be final and binding but subject to each party’s right to appeal to the NFL commissioner, or the commissioner’s designee.¹⁷ Thus, the commissioner, or a person of the commissioner’s choosing, still has final appellate authority under current procedures as under past CBAs. In Watson’s case, the NFL and NFLPA appointed former U.S. District Judge Sue L. Robinson as the disciplinary officer, and she conducted the initial disciplinary hearing.¹⁸ In Judge Robinson’s decision, she concluded: first, that Watson’s conduct violated all three provisions of the Policy which the NFL alleged and second, that a six-game suspension without pay was the proper discipline, based on NFL precedent.¹⁹

10. See Dan Graziano, *NFL CBA approved*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work.

11. Ray Kennedy, *An Abbreviated History of the Collective Bargaining Agreement*, BUCS REP. (Feb. 28, 2020), <https://bucsreport.com/2020/02/28/an-abbreviated-history-of-the-collective-bargaining-agreement/>.

12. J. R. Carroll & Chris Turnage, *The National Football League’s Most Recent Collective Bargaining Agreement: Some Ins and Outs*, 53 ARK. LAW. 26, 27 (Fall 2020).

13. Sue L. Robinson, *Decision: In re: Matter of Deshaun Watson*, ESPN (Aug. 1, 2022), <https://www.espn.com/pdf/2022/0801/watson.pdf>.

14. *Id.* at 3.

15. Collective Bargaining Agreement (2020), *supra* note 7, at art. 46, § 1(e)(i).

16. Compare Collective Bargaining Agreement (2020), *supra* note 7, at art. 46, § 1(e)(i), with Collective Bargaining Agreement (2020), *supra* note 7, at art. 46 § 1(a) & 2(a).

17. Collective Bargaining Agreement (2020), *supra* note 7, at art. 46, § 1(e)(v).

18. Rajan, *supra* note 1.

19. Robinson, *supra* note 13, at 11–15.

The NFL appealed this decision to commissioner Roger Goodell, who then designated a former New Jersey prosecutor to hear the appeal.²⁰ Before the designee issued a ruling on the appeal, the parties reached a settlement that imposed an eleven-game suspension without pay, a five million dollar fine, and mandatory counseling for Watson.²¹ In October 2022, a new woman filed another lawsuit against Watson with similar allegations as prior suits.²² Since this arose after Watson's discipline hearing in August, it did not impact Watson's eleven-game suspension from that disciplinary action.²³ NFL spokesperson Brian McCarthy said, however, that Watson could face another league disciplinary action if the NFL believes Watson has further violated the Policy.²⁴

The CBA sets forth this process under the article titled "Commissioner Discipline," but sports media commonly refer to the process as arbitration. This paper will explore the NFL's disciplinary power under the CBA, whether the utilized procedure is arbitration, as it is commonly known as, and the arbitrariness of that procedure. To be clear, this paper offers a critique of the NFL's disciplinary *process* rather than critiquing the NFL for *taking action* to hold players accountable for their actions. To accomplish this, Section II will provide a brief introduction to the CBA and Policy before discussing different disciplinary procedures between the current and former CBAs. Section III will examine how the CBA disciplinary procedure worked as applied in Watson's case. This will include a thorough presentation of the facts of the case including the accusations, the major events, what the NFL investigation found, the NFL's charge against Watson, and the disciplinary procedure in action. Section IV will analyze the case, why it matters to the CBA procedure, implications it may have, whether the process was truly arbitration or an arbitrary form of dispute resolution, and potential solutions to remove arbitrariness from the process to ensure consistent outcomes and that egregious offenders like Watson receive harsher punishments. Section V will summarize the paper and reiterate its conclusion that the current player discipline process is more arbitrary than arbitration.

Deshaun Watson was not the first player the NFL has disciplined under the Policy after the 2020 CBA took effect, but Watson's case is significant because it was the first case to use the 2020 CBA's new discipline process.²⁵ Thus, Watson's case will be precedential for the NFL's new alternative dispute resolution process.

II. EXAMINING THE CBA'S LEAGUE DISCIPLINE PROCEDURES

In March 2011, the NFL and NFLPA failed to agree to a new CBA following initial negotiations, leading NFL owners to lock out the players for months, which

20. Reiss, *supra* note 3.

21. *Id.*

22. Jake Trotter, *Deshaun Watson facing new lawsuit*, ESPN (Oct. 13, 2022), https://www.espn.com/nfl/story/_/id/34792136/deshaun-watson-sued-allegedly-pressured-woman-oral-sex-massage.

23. *Id.*

24. *Id.*

25. Jenny Vrentas & Ken Belson, *NFL Appeals Deshaun Watson's Six-Game Suspension*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/08/03/sports/football/nfl-appeals-deshaun-watsons-suspension.html>.

put the start of the 2011 in jeopardy.²⁶ The start of the season was not delayed, however, after the NFL and NFLPA agreed to the 2011 CBA with only weeks to spare before kickoff.²⁷ The final deal mostly centered around revenue sharing, salary cap spending, and player safety.²⁸ Because the 2011 CBA focused on financial aspects of the deal, it did not significantly change the commissioner's authority over discipline for Policy violations as it stood in the 2006 CBA.²⁹ The current 2020 CBA made significant changes to the commissioner's disciplinary powers, an important issue for players, among other significant changes.³⁰ Most notably, these other changes include adding one more regular season game, giving players a higher share of total league revenue, and removing power over initial disciplinary decisions from the commissioner.³¹ The disciplinary decision-making power shift is a significant change from the 2011 CBA, which essentially allowed the commissioner to be "judge, jury, and executioner" in that the commissioner imposed discipline and heard any and all appeals.³² The commissioner had such substantial powers as league arbiter under the 2011 CBA that the Missouri Supreme Court found that those disciplinary powers were unconscionable and thus unenforceable.³³ However, that decision was not binding on the league.³⁴

All three CBAs—2006, 2011, and 2020—authorize the NFL to discipline players "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."³⁵ In light of this power, the NFL instituted the Policy.³⁶ The Policy contains a non-exhaustive list of prohibited conduct including specific violent, drug, and weapon offenses, but also contains broader, non-specific conduct prohibitions.³⁷ Those non-specific prohibitions include "'conduct that poses a genuine danger to the safety and well-being of another person;' and 'conduct that

26. Brian McIntyre, *NFL Lockout and How We Got Here*, SBNATION (July 25, 2011), <https://www.sbnation.com/nfl/2011/7/25/2292223/nfl-lockout-labor-cba>.

27. *Id.*

28. Patrick Rishe, *Who Won the 2011 NFL Lockout*, FORBES (July 21, 2011, 10:44 PM), <https://www.forbes.com/sites/sportsmoney/2011/07/21/who-won-the-2011-nfl-lockout/?sh=5c2032ac7071>.

29. *Compare* Collective Bargaining Agreement, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION (2006), art. XI at § 1(a), *with* Collective Bargaining Agreement, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION (2011), art. 46 at § 1(a).

30. Graziano, *supra* note 10.

31. *Id.*

32. *Id.*

33. *Hewitt v. Kerr*, 461 S.W.3d 798, 813 (Mo. 2015).

34. *Id.* at 813. This case began as an age discrimination suit filed by a former employee against the St. Louis Rams, *id.* The circuit court granted the Ram's motion to compel arbitration under the CBA and the employee petitioned for a writ of mandamus to prevent compelled arbitration, *id.* The sole issue before the Missouri Supreme Court was whether a writ of mandamus is the appropriate mechanism to review whether the trial court erred in sustaining a motion to compel arbitration; it held it was, *id.* The court's subsequent holding that the terms appointing the commissioner as the sole arbiter was dictum and not binding on the NFL as it was not a party in the appeal of the circuit court's decision, *id.* The circuit court judge was the respondent.), *id.* See also Kyle Yager, *Roger That: Calling an Audible on the NFL Commissioner's Final Authority over Player Disciplinary Matters As the 2020 Cba Re-Negotiation Looms*, 12 PENN. ST. ARB. L. REV. 239 (2020). See generally Theresa Mullineaux, *The Latest NFL Fumble: Using Its Commissioner as the Sole Arbitrator*, 2016 J. DISP. RESOL. 229 (2016).

35. See Collective Bargaining Agreement (2020), *supra* note 7, at art. 46 at § 1(a); Collective Bargaining Agreement (2011), *supra* note 29, at art. 46 at § 1(a); Collective Bargaining Agreement (2006), *supra* note 29, at art. XI at § 1(a).

36. Robinson, *supra* note 13.

37. *Id.* at 1–2.

undermines or puts at risk the integrity of the NFL.”³⁸ For conduct prohibited in the Policy that does not involve a crime defined by state or federal law, the NFL is left to define prohibited conduct on an ad-hoc basis.³⁹ With this understanding, this paper will examine the significant changes to the league discipline provision in the CBAs and notable uses of that disciplinary power in conjunction with violations of the Policy.

A. 2006 & 2011 NFL CBAs

The 2006 and 2011 CBAs both provide that in all actions taken by the commissioner against a player “for conduct detrimental to the integrity of, or public confidence in, the game of professional football,” the commissioner will give the player and the NFLPA written notice of the commissioner’s decision, typically a fine or suspension, and the player or NFLPA may appeal to the commissioner.⁴⁰ The only difference between the CBAs is the time in which an appeal must be filed with the commissioner after the commissioner’s decision: under the 2006 CBA, it must come within twenty days, while under the 2011 CBA it must come within three business days.⁴¹ Notably under these discipline schemes, the commissioner determines the initial outcome and decides any subsequent appeal.⁴²

In April 2010, Commissioner Goodell exercised his power under the 2006 CBA and the Policy by suspending then Pittsburgh Steelers’ quarterback Ben Roethlisberger.⁴³ Roethlisberger was suspended after accusations of rape in a civil lawsuit in Utah in 2009⁴⁴ and sexual assault of a college student stemming from an encounter at a bar in Georgia in early 2010.⁴⁵ This case is significant not only because the alleged violation is similar in nature to Watson’s but also because of its precedential value. This was the first time a player was suspended under the Policy despite never having been convicted or even charged with a crime.⁴⁶ The commissioner initially imposed a six-game suspension without pay and a comprehensive behavior evaluation; the commissioner justified this decision by stating that NFL players are held to a higher standard and their conduct must be consistent with the values of the league and the expectations of the fans.⁴⁷ Though Roethlisberger did not file an appeal, the commissioner later reduced the suspension to a four-game suspension without pay after meeting with Roethlisberger to evaluate his behavior.⁴⁸ This case exemplifies the commissioner’s unilateral power under the 2006 and 2011 CBAs

38. *Id.* at 2.

39. *Id.*

40. Collective Bargaining Agreement (2006), *supra* note 29, at art. XI at § 1 (a); Collective Bargaining Agreement (2011), *supra* note 29, at art. 46 at §1 (a).

41. Compare Collective Bargaining Agreement (2006), *supra* note 29, at art. XI §1 (a), with Collective Bargaining Agreement (2011), *supra* note 29, at art. 46 at §1 (a).

42. See Collective Bargaining Agreement (2006), *supra* note 29, at art. XI § 1 (a) & (c); Collective Bargaining Agreement (2011), *supra* note 29, at art. 46 at §1 (a) & §2 (a).

43. Judy Battista, *Roethlisberger Suspended for 6 Games*, N.Y. TIMES (Apr. 21, 2010), <https://www.nytimes.com/2010/04/22/sports/football/22roethlisberger.html>.

44. Jenny Vrentas, *Time is Ben Roethlisberger’s Harsh Critic*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/sports/ben-roethlisberger-steelers-retire.html>.

45. Battista, *supra* note 43.

46. *Id.*

47. *Id.*

48. *Ben Roethlisberger’s ban at 4 games*, ESPN (Sept. 3, 2010), <https://www.espn.com/nfl/news/story?id=5527564>.

where the commissioner handled initial hearings and appeals, or cases where the player does not even appeal.

The case of Jameis Winston, then quarterback of the Tampa Bay Buccaneers, is another notable discipline case under the old CBA scheme. In June 2018, Commissioner Goodell suspended Winston after a female Uber driver alleged that Winston touched her in an inappropriate and sexual manner without her consent.⁴⁹ The commissioner suspended Watson for the first three games of the 2018 season and, similar to Roethlisberger, required Winston to receive a clinical evaluation and comply with any recommended therapy program.⁵⁰ Importantly in this case, Commissioner Goodell noted that if Winston violated the Policy again it would result in more serious discipline, potentially a complete ban from the NFL.⁵¹ Goodell said this, however, without instituting any new formal discipline regime for sexual assault violations.

The NFL did in fact implement a new policy following its heavily criticized handling of Ray Rice's disciplinary action.⁵² Rice, a former running back for the Baltimore Ravens, is the subject of one of the most infamous NFL discipline cases. In July 2014, Commissioner Goodell suspended Rice for just two games for violating the Policy after Rice was arrested for a physical altercation with his then-fiancée.⁵³ Two months later, TMZ released more graphic footage of the physical altercation inside an elevator, after which Goodell and NFL reevaluated the decision and imposed an indefinite suspension and the Baltimore Ravens released Rice.⁵⁴ Initially, this may appear to be a harsh punishment, but there is a caveat. Commissioner Goodell lifted the indefinite suspension and reinstated Rice after the first twelve weeks of the season, thus, it was essentially a twelve-game suspension, though no team ever signed Rice to a contract again.⁵⁵

As mentioned, the NFL revised the Policy after the Rice case. This revision instituted a presumptive six-game suspension for certain violent offenders, including felonious assault or battery, domestic, dating, or family violence, and sexual assault by force or against someone who cannot give consent.⁵⁶ A second offense of this nature would result in an automatic minimum one-year ban.⁵⁷ This revision of the policy served to give NFL players and the public fair notice of what consequences to expect for certain types of conduct, specifically violent conduct.⁵⁸ Though this case is factually dissimilar from the Watson case, this sweeping change

49. Jenna Laine, *Buccaneers' Jameis Winston suspended first 3 games of 2018*, ESPN (June 28, 2018), https://www.espn.com/nfl/story/_/id/23936785/tampa-bay-buccaneers-quarterback-jameis-winston-suspended.

50. *Id.*

51. *Id.*

52. Gregg Rosenthal, *Ray Rice released by Ravens, indefinitely suspended*, AROUND NFL (Sept. 8, 2014, 7:21 AM), <https://www.nfl.com/news/ray-rice-released-by-ravens-indefinitely-suspended-0ap3000000391538>.

53. *Ray Rice suspended 2 games*, ESPN (July 24, 2014), https://www.espn.com/nfl/story/_/id/11257692/ray-rice-baltimore-ravens-suspended-2-games.

54. Rosenthal, *supra* note 52.

55. Kris Rhim & Ken Belson, *Here Are the Longest NFL Player Suspensions*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/article/nfl-suspensions.html>.

56. Robinson, *supra* note 13, at 12–13; *see also* Natl. Football League Players Assn. *ex rel.* Peterson v. Natl. Football League, 831 F.3d 985, 990 (8th Cir. 2016) (in August 2014, Commissioner Goodell sent a memo NFL owners and personnel explaining the shift to the presumptive six-game suspension for those certain offenders).

57. Rosenthal, *supra* note 52.

58. Robinson, *supra* note 13, at 13.

to the Policy is important because it affected Judge Robinson's disciplinary decision in Watson's case as the NFL made no revision to its "non-violent sexual assault" consequences, which in turn did not serve to give players fair notice of the NFL's intent to punish that conduct more severely.⁵⁹ While the NFL has not yet instituted this type of change to the Policy, there has been a significant change in the latest CBA to the discipline procedure, which removes some of the commissioner's unilateral power.

B. 2020 NFL CBA

The 2020 CBA provides that "fines or suspensions imposed upon players for violating the League's Personal Conduct Policy, as well as whether a violation of the Personal Conduct

Policy has been proven by the NFL, will be initially determined by a Disciplinary Officer

jointly selected and appointed by the parties."⁶⁰ Additionally, it provides the method of choosing and discharging the disciplinary officer, the length of the officer's term, the officer's responsibilities at a hearing, that the NFL bears the burden of proof for alleged violations, and that the officer's determination will be final and binding on the parties.⁶¹

Finality and bindingness are typical characteristics of arbitration, but the 2020 CBA undermines these characteristics by subjecting the initial decision to "the right of either party to appeal to the commissioner."⁶² The CBA clarifies that it may be the commissioner "or his designee" that will issue the final and complete binding decision.⁶³ This means that the NFL commissioner, head of one of the parties in discipline disputes, or someone he or she alone appoints, still retains the power over final appeals just as the commissioner did under the 2006 and 2011 CBAs.

It is also important to note that while the 2020 CBA gives the commissioner the power to "overturn, reduce, modify or increase" the penalty imposed by the disciplinary officer, the commissioner cannot impose punishment if the initial hearing officer does not impose punishment.⁶⁴ Thus, there are two ways for a case to end without it going to the commissioner: if the disciplinary officer determines there is no Policy violation and thus there is no sanction, or if neither party exercises their right to appeal.

While Watson's case is the first to utilize the "arbitration" process under the 2020 CBA,⁶⁵ other players have been suspended for violations of the Policy since the 2020 CBA took effect. Former superstar wide receiver Antonio Brown was suspended for the first eight games of the 2020 season as he faced criminal charges of felony burglary and assault, as well as allegedly sending threatening texts to a

59. *Id.* at 13–14 (the language distinguishing violent/forceful and non-violent sexual assault is the exact language used in Judge Robinson's decision on pages 13–15; it was a crucial distinction to Judge Robinson in reaching her decision, but it does not reflect the opinion of the author).

60. Collective Bargaining Agreement (2020), *supra* note 7, at art. 46 at § 1(e)(i).

61. *Id.* at § 1(e)(i)-(v).

62. Collective Bargaining Agreement (2020), *supra* note 7, at art. 46 at § 1(e)(v).

63. *Id.*

64. Mike Florio, *Understanding the NFL's New Process for Imposing Discipline*, NBC SPORTS (May 5, 2022, 10:34 AM), <https://profootballtalk.nbcsports.com/2022/05/05/understanding-the-nfls-new-process-for-imposing-discipline-under-personal-conduct-policy/>.

65. Vrentas & Belson, *supra* note 25.

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woman who accused him of sexual misconduct.⁶⁶ Former Washington running back Derrius Guice was suspended for six games following accusations and criminal charges of battery, assault, and domestic violence, along with separate accusations of sexual assault.⁶⁷ The Brown and Guice cases did not go through a disciplinary officer because they were the sort of violent conduct subject to an automatic minimum suspension under the commissioner's revisions to Policy following the Ray Rice case.

III. APPLICATION TO THE WATSON CASE

This section will first set forth the facts of Deshaun Watson's case in detail to properly acknowledge the magnitude of the case. Next, this paper will examine the CBA disciplinary procedure as applied in Watson's case. As a content warning this section will discuss acts of sexual misconduct and assault in more detail than prior sections. Again, this case is significant not only because of the magnitude of its size and scope, but also because it was the NFL players' and the public's first glimpse into how discipline under the new 2020 CBA works for serious, "non-violent" offenses.⁶⁸

A. *Background and Facts of the Watson Case*

In 2017, the Houston Texans traded up in the NFL draft to select the star Clemson quarterback, Deshaun Watson.⁶⁹ Over his first four seasons, Watson became the darling of the league with his play, setting NFL records, leading the Texans to the playoffs twice, and ultimately receiving a contract extension that made him the second-highest paid quarterback in the NFL at the time.⁷⁰ In addition to these on-field accomplishments, he also maintained a pristine community appearance, donating both his time and money to the Houston area.⁷¹ Cracks began to form in Watson's relationship with the Texans, however, and Watson grew unhappy with the organization for two main reasons.⁷² First, the Texans traded away All-Pro wide receiver Deandre Hopkins, and second, the Texans hired a new general manager without Watson's input after stating Watson's input would be a factor in the hiring.⁷³ This

66. Ken Belson, *Antonio Brown Suspended Eight Games by the N.F.L.*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2020/07/31/sports/football/antonio-brown-suspension-nfl.html#:~:text=The%20N.F.L.%20on%20Friday%20suspended,and%20received%20two%20years%20probation>.

67. Henry Huber, *Why Hasn't the NFL Investigated All Accusations Against Derrius Guice?*, LSU REVEILLE (Aug. 24, 2021), https://www.lsureveille.com/sports/column-why-hasnt-the-nfl-investigated-all-accusations-against-derrius-guice/article_07d4c278-005f-11ec-ad55-238983615c86.html.

68. Robinson, *supra* note 13, at 13.

69. Rajan, *supra* note 1.

70. *Id.*

71. J.P. Priester, *Deshaun Watson Continues to Give Back to Those in Need*, SPORTS ILLUSTRATED (Oct. 29, 2020, 10:57 AM), <https://www.si.com/college/clemson/football/texans-quarterback-deshaun-watson-keeping-bust-during-bye-week>.

72. See Sarah Barshop, *Why Deshaun Watson is unhappy with Texans, and what comes next*, ESPN (Jan. 12, 2021), https://www.espn.com/blog/houston-texans/post/_id/25497/why-deshaun-watson-is-unhappy-with-texans-and-what-comes-next.

73. *Id.*

culminated in Watson officially requesting a trade from the organization in January 2021.⁷⁴ Unfortunately, circumstances would only grow worse.

Beginning in March 2021, female massage therapists began to file civil lawsuits against Watson, alleging sexual assault and misconduct during private therapy sessions.⁷⁵ The Texans provided therapy resources as part of its organization; however, Watson chose to book private therapy sessions.⁷⁶ From 2019 to 2022, Watson made private appointments with more than sixty different women.⁷⁷ Watson typically reached out to the women via Instagram, presenting himself as an ally to black businesswomen, and used his status as an NFL player to his advantage to seek same-day massages.⁷⁸ Watson was not concerned with whether they were experienced or even licensed massage therapists but stressed that these massages be in a private setting,⁷⁹ even going as far as taking non-disclosure agreements (“NDA”) to the sessions for the women to sign.⁸⁰

At the sessions, Watson would have the therapists focus on his lower back, glutes, abdomen, and groin area, which are legitimate focus areas for professional athletes.⁸¹ Watson supplied his own towels, rather than the traditional sheet, to cover himself, though these were no larger than a “Gatorade” towel athletes use on sidelines.⁸² The core allegation is that during the therapy session Watson insisted that the therapists target those focus areas with only the small towel covering him and, when he turned over onto his back, he would expose his erect penis and purposefully contact the therapists’ hands and arms multiple times with his penis.⁸³ It is even alleged that he sometimes ejaculated on the therapists’ arms.⁸⁴

Following the initial filing of lawsuits against Watson in March 2021, the NFL launched an investigation into Watson. While the investigation was ongoing, Watson did not waiver from his desire and request to be traded from the Texans and categorically denied the accusations.⁸⁵ Numerous teams contacted the Texans during the 2021 NFL season about trading for Watson, though no deal happened before the trade deadline due to the ongoing investigations.⁸⁶ Following the season, however, Watson was traded to the Cleveland Browns in exchange for a huge haul of draft picks.⁸⁷

74. Athletic Staff, *Deshaun Watson officially requests trade from Texans: Source*, ATHLETIC (Jan. 28, 2021, 8:59 AM), <https://theathletic.com/news/deshaun-watson-trade-texans/WvPmavyoA708/>.

75. See Reiss, *supra* note 3.

76. See 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>.

77. See *id.*

78. See *id.*

79. Robinson, *supra* note 13, at 4.

80. See Vrentas, *supra* note 76.

81. Robinson, *supra* note 13, at 7.

82. *Id.* at 5.

83. *Id.*

84. *Id.*

85. Reiss, *supra* note 3.

86. *Id.*

87. See *id.* (the Houston Texans received a 2022 first-round pick, 2023 first- and third- round picks, and 2024 first- and fourth-round picks while the Cleveland Browns received Deshaun Watson and a 2024 fifth-round draft pick).

The Browns promptly signed Watson to a record-setting five-year, fully-guaranteed, \$230 million extension.⁸⁸ This is unprecedented both in terms of money and being fully guaranteed, which is an extremely uncommon feature in NFL contracts.⁸⁹ The acquisition itself and subsequent extension sparked great criticism and anger among the NFL community.⁹⁰ First, merely acquiring a player with such allegations against him drew criticism.⁹¹ Second, the extension's structure appeared to presuppose a 2022 suspension because it minimized the amount of salary Watson would lose due to a suspension by making his 2022 salary a relatively small figure and dramatically increasing the salary in the contract's later years.⁹²

After more than a year of NFL investigation after the accusations became known and the NFL investigation concluded and the league initiated disciplinary action, alleging that Watson violated the Policy by engaging in: (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.⁹³

B. *NFL Disciplinary Action Results*

Following the new process outlined in the 2020 CBA, the NFL and NFLPA jointly selected Sue L. Robinson, a former federal district court judge,⁹⁴ to be the initial discipline officer.⁹⁵ Following the discipline hearing, Judge Robinson issued her decision, finding that Watson's conduct did violate the Policy because it constituted (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.

First, Judge Robinson found that Watson's conduct qualified as sexual assault (as defined by the NFL).⁹⁶ Neither the CBA nor the Policy define that prohibited conduct.⁹⁷ The CBA or Policy defines some prohibited conduct by state or federal law such that there is no need to include a definition, but when the conduct is not defined by law, the NFL must provide its own definition of the conduct.⁹⁸ This aspect of the NFL's discipline dispute resolution process is a weakness; its lack of guidance to NFL investigators when the broad, undefined prohibited conduct provisions are at issue may lead to arbitrariness in the process. At the hearing, an NFL investigator defined "sexual assault" as the "unwanted sexual contact with another

88. See Dan Graziano, *Deshaun Watson's NFL suspension will cost him \$5.69 million*, 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.

89. Carroll & Turnage, *supra* note 12, at 28–29.

90. Graziano, *supra* note 88.

91. See *id.*

92. *Id.*

93. Robinson, *supra* note 13, at 3.

94. *Judge Sue L. Robinson*, U. S. DIST. CT. DIST. DEL., <https://www.ded.uscourts.gov/judge/judge-sue-l-robinson>

(last visited Apr. 17, 2022) (Judge Robinson served on the U.S. District Court for the District of Delaware from 1991-2017 and was Chief Judge of that court from 2000-2007).

95. Andrew Brandt, *NFL Had Precedent for a Longer Deshaun Watson Suspension, Even With New Disciplinary Process*, SPORTS ILLUSTRATED (Aug. 1, 2022), <https://www.si.com/nfl/2022/08/01/deshaun-watson-suspension-process-precedent>.

96. Robinson, *supra* note 13, at 9.

97. *Id.* at 2.

98. *Id.*

person.”⁹⁹ Judge Robinson accepted that definition, stating that the NFL can choose how to impose its own policy, and applied it to the case.¹⁰⁰

Judge Robinson notes that much of the conduct itself, like using Instagram to engage in business, having specific focus areas, and even male clients getting an erection during a massage or the therapist making inadvertent contact with it, is not wrongful nor uncommon.¹⁰¹ Judge Robinson ultimately found, however, that Watson’s pattern of disregard the women’s professional qualifications, using small towels, and insisting on focus areas that commonly trigger erections was sufficient to infer that Watson probably was aware this contact would occur and he had a sexual purpose.¹⁰² Finally, Judge Robinson found that the sexual contact with the therapists was unwanted because none of the women would accept additional therapy sessions with Watson, and testimony from victims indicated several of the women expressed their discomfort during their therapy session with Watson.¹⁰³

Second, Judge Robinson found that Watson’s conduct posed a genuine danger to the safety and well-being of another person.¹⁰⁴ The Policy also leaves this prohibited conduct undefined, and here, the NFL did not offer a definition; rather, the NFL based its proof solely in the “emotional responses” of four therapists Watson engaged with.¹⁰⁵ The women testified that they sought counseling after their interaction with Watson, they are struggling to continue to work and questioning whether to continue in the massage therapy profession, and they have dealt with depression and sleeplessness due to their encounter with Watson.¹⁰⁶ Judge Robinson found that, by alleging a violation of this provision, the NFL sought to broadly define its concepts of “genuine danger,” “safety,” and “well-being.”¹⁰⁷ Judge Robinson again emphasized that, because it is the NFL’s Policy, the NFL can set the rules of play under it.¹⁰⁸ Judge Robinson then concluded that a sexualized workplace in which the therapists felt unsafe and the emotional distress they suffered due to their sessions with Watson constituted conduct which posed a genuine danger to the safety and well-being of another person.¹⁰⁹

Finally, Judge Robinson found that Watson’s conduct undermined, or put at risk, the integrity of the NFL.¹¹⁰ The NFL has typically applied this provision of the Policy to in-game matters, like Tom Brady’s “Deflategate” or the New Orleans Saints “Pay-for-Performance” scandal.¹¹¹ The NFL has argued, both in this case and prior case, that conduct “detrimental to the integrity of the NFL” changes depending on developments outside the league as well as within.¹¹² Judge Robinson accepted this and found that it is within the NFL’s power to expand the scope of this provision’s supervision to players’ personal lives when they invoke their status as an

99. *Id.* at 6.

100. *Id.*

101. *Id.* at 6.

102. Robinson, *supra* note 13, at 7–8.

103. *Id.* at 8.

104. *Id.* at 9–10.

105. *Id.* at 9 (this language classifying Watson’s female victims as emotional is the exact language used in Judge Robinson’s decision and can be found on page 9 of her opinion).

106. *Id.*

107. *Id.* at 9–10.

108. Robinson, *supra* note 13, at 10.

109. *Id.*

110. *Id.* at 11.

111. *Id.* at 10.

112. *Id.*

NFL player.¹¹³ That is precisely what Watson did when seeking out therapy sessions: he identified himself as a professional football player and used that status to reinforce his request for both the session and the focus on those particular areas of his body.¹¹⁴ Additionally, Watson’s conduct sparked criticism and public discourse for an extended period, which consequently subjected the NFL to tremendous public scrutiny and criticism.¹¹⁵ The combination of these facts was sufficient for Judge Robinson to find that Watson’s “predatory conduct” undermined the integrity and public confidence of the NFL.¹¹⁶

The NFL asked for an indefinite suspension of at least one full year; an unprecedented sentence for unprecedented conduct.¹¹⁷ Ultimately, Judge Robinson imposed only a six-game suspension without pay, restricted Watson to team-directed and team-approved massage therapists for his entire career, and requiring that Watson have no further violations of the Policy as conditions for his reinstatement after the suspension.¹¹⁸ Judge Robinson rooted her decision in the fact that, following Ray Rice’s revised suspension, the league created a controlling distinction between violent and “non-violent” offenses and gave fair notice to the players of the new, increased consequences for violent offenses.¹¹⁹

Judge Robinson found that, since then, the most common sentence for domestic violence and violent sexual acts has been a six-game suspension.¹²⁰ She further emphasizes that while Watson’s conduct may have been predatory, it was not “violent,” and the most severe sentence for a “non-violent sexual assault” was a three-game suspension.¹²¹ The NFL argued that consistency with precedent is not possible because no case has been similar in magnitude.¹²² Judge Robinson countered this by admitting that more severe discipline may be appropriate for “non-violent sexual assault,” but it is not appropriate without notice to players of the change in the league’s position on this matter.¹²³ She finds precedent controls here because of the NFL’s lack of notice for seeking harsher punishments for such conduct is unfair.¹²⁴ Further, Judge Robinson found that while Watson has not been particularly remorseful, he is a first time offender, has an excellent prior community standing, and was cooperative in the investigation.¹²⁵

In anticipation of Judge Robinson handing down her decision, the NFLPA and Watson released a joint statement stating they would stand by her decision, no matter the ruling.¹²⁶ In the statement the parties directly implicated the credibility of the disciplinary process, stating, “[e]very player, owner, business partner and stakeholder deserves to know that our process is legitimate and will not be tarnished

113. *Id.* at 10–11.

114. Robinson, *supra* note 13, at 11.

115. *Id.*

116. *Id.*

117. *Id.* at 12.

118. *Id.* at 15.

119. *Id.* at 12–13.

120. Robinson, *supra* note 13, at 13.

121. *Id.*

122. *Id.* at 13–14.

123. *Id.*

124. *Id.* at 14.

125. *Id.*

126. @NFLPA, TWITTER (July 31, 2022, 6:45 PM), <https://twitter.com/NFLPA/status/1553889675282112513>.

based on the whims of the League office.”¹²⁷ This statement pressured the NFL not to exercise its appeal right by placing the credibility of the process at issue.¹²⁸ The joint statement was an effort to avoid bad precedent for the players that would allow the commissioner to upend the ruling of the independent disciplinary officer.¹²⁹ If successful, the NFLPA would have created precedent under the 2020 CBA to keep the commissioner out of the disciplinary process. Ultimately, the NFL exercised its right under the CBA to appeal this decision to the commissioner but, before he or his designee could hear the appeal, the parties settled on an eleven-game suspension, the same conditions for reinstatement, and a \$5 million fine.¹³⁰

IV. ANALYSIS

In the first case to employ the disciplinary officer, Judge Robinson explicitly takes steps to reign in the unilateral power the NFL commissioner exercised prior to 2020. In the decision, she states it is inherently unfair to deem conduct as prohibited after its occurrence and unjust to alter the punishment for such conduct after the fact.¹³¹ The bar against imposing liability or increasing punishment *ex post facto* is a hallmark of the American judicial system,¹³² and this consideration helps make sense of Judge Robinson’s rationale. NFL player disciplinary hearings, however, are extrajudicial dispute resolution proceedings agreed to by contract. This does not mean all principles and hallmarks of the judicial system disappear, but it does create a more flexible system with more potential outcomes possible. With that in mind, this section will consider several issues, including whether Judge Robinson reached an appropriate outcome; whether this process resembles traditional notions of arbitration, or whether it is its own unique, arbitrary dispute resolution process; and ways in which the NFL could further alter this process to move it from arbitrary to arbitration.

A. *Was This an Appropriate Outcome?*

Whether Judge Robinson’s decision was appropriate under these circumstances is a matter of perspective and opinion. On the one hand, the formalist view values adherence to procedure and neutral decision makers’ independence from societal interests.¹³³ On the other hand, the realist view values public policy, societal interests, and context in making decisions.¹³⁴ Judge Robinson’s decision appears to align more with a formalist view. These are two classic schools of legal thought that were most prominent in the late nineteenth and early twentieth centuries.¹³⁵ These theories were typically applied to a broad range of substantive issues such as

127. *Id.*

128. Ely Allen, *NFLPA Pledges Not to Appeal Watson Decision*, PRO FOOTBALL RUMORS (July 31, 2022, 8:59 PM), <https://www.profootballrumors.com/2022/07/nflpa-pledges-not-to-appeal-watson-decision-pleads-for-nfl-to-join>.

129. *Id.*

130. Reiss, *supra* note 4.

131. Robinson, *supra* note 13, at 14.

132. See U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

133. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 201–04 (2009).

134. *Id.* at 207–10.

135. *Id.* at 199–200.

jurisprudence, interpretation, and constitutional questions.¹³⁶ Applying these theories to a labor arbitration decision is a novel approach for analyzing the outcome of such a proceeding but is nonetheless relevant here. Applying these theories helps an attempt to reconcile such egregious behavior and such a light punishment.

In this case the formalist view appears to have prevailed. Throughout her decision, Judge Robinson indicated numerous times that Watson's conduct was "predatory," "egregious," and fit for more severe punishment.¹³⁷ Judge Robinson exercised restraint and focused on the facts and evidence presented, precedents under the Policy, and the notice, or lack thereof, players had regarding increased punishments for "non-violent sexual assault," rather than focusing on society's increased awareness and condemnation of predatory sexual conduct.

Judge Robinson's formalist approach did not come without heavy public criticism and the desire that she would have actually imposed a harsher sentence rather than just talk about it.¹³⁸ The critics admit the process functioned as designed in the CBA; however, they wanted Judge Robinson to go further.¹³⁹ The critics would shift the NFL to a proactive disciplinary approach rather than the retroactive approach it has used for more than a decade.¹⁴⁰ Juan Carlos Areán, a director of an organization supporting victimized women, was especially disappointed in the decision because he did not believe it would deter other players because of the "non-violent" distinction.¹⁴¹

The "non-violent" distinction was critical to Judge Robinson's outcome, yet she glaringly failed to say what made Watson's conduct "non-violent"; surely many, including a number of the victims, would argue that his conduct was violent.¹⁴² Areán said that violence against women can come in many different forms, and it is important to look at other factors besides the presence of physical force, such as emotional abuse, to determine whether conduct is violent especially in sexual assault cases.¹⁴³ Helen Drew, a sports law professor at the University of Buffalo, said Judge Robinson, as she interpreted the NFL's policy definitions, should have found Watson's conduct violent.¹⁴⁴ By not including the grounds for finding Watson's conduct "non-violent," Judge Robinson an avenue left wide open for the NFL to appeal to the commissioner for a more severe punishment. Had the realist view succeeded in this case, it certainly would have favored a harsher punishment given the sheer magnitude of this case and society's interests following the movement.

That the formalism view prevailed is significant, in an antithetical way, for both players and the NFL as an entity. It is significant for players because it protects them from shifting societal views on different conduct and the NFL commissioner altering the level of punishment for conduct based on society's feelings. Additionally, the ruling is significant for the NFL because it illustrated how the NFL can

136. *Id.* at 197.

137. Robinson, *supra* note 13, at 14.

138. Ken Belson & Jenny Vrentas, *An Arbitrator Left Deshaun Watson's Fate to the NFL Commissioner*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/sports/football/deshaun-watson-nfl-discipline.html>.

139. *Id.*

140. *Id.*

141. *Id.*

142. Brandt, *supra* note 95.

143. Belson & Vrentas, *supra* note 138.

144. *Id.*

alter Policy violation punishments at will simply by giving notice to players.¹⁴⁵ What sort of notice is sufficient, however, remains an unanswered question. While the formalist approach may produce unsatisfactory results, it ensures that parties get the process they bargained for and a predictable outcome, which is what happened as applied here. Whether the process the NFL and NFLPA bargained for in the 2020 CBA is arbitrary or arbitration is the next point of discussion.

B. Is the NFL's Discipline Process Arbitration or Arbitrary?

All versions of the CBA noted in this paper avoided officially labeling the disciplinary process as “arbitration,” but the media has persistently referred to it as such. Whether the 2020 CBA discipline process is truly arbitration or arbitrary in nature first requires defining those terms. While there is no commonly used definition of arbitration, three essential elements of true arbitration have emerged over the past century: (1) that the parties voluntarily consent, (2) the arbiter’s decision is final and binding, and (3) it is done by a neutral party.¹⁴⁶ While the final and binding nature arbitration distinguishes it from other forms of alternative dispute resolution, disposition by a neutral party is just as essential to its legitimacy.¹⁴⁷ A proper arbitration decision binds the parties to that final disposition regardless of whether the parties accept it.¹⁴⁸ Conversely, “arbitrary” means a decision which depends on individual discretion rather than fixed rules; it is typically founded on prejudice or a preference other than reason and fact and has a capricious nature.¹⁴⁹ Further, just because parties agree to certain terms does not mean that those terms are “sacrosanct or that it is not arbitrary or capricious.”¹⁵⁰ The NFL and NFLPA’s agreed process possesses features of both these definitions, but its arbitrary features outweigh those of true arbitration.

First, the parties did consent to the “arbitration.” A party can only arbitrate issues it specifically agreed to submit to arbitration; this means that parties cannot be forced to arbitrate a dispute absent an affirmative contractual basis for concluding that the party agreed to do so.¹⁵¹ A CBA is a contract and the parties specifically bargained for its terms, including those governing disciplinary procedures, and consented to them when each party chose to ratify the 2020 CBA.¹⁵² That the parties consented to the “arbitration” indicates it may properly be arbitration, and it is a crucial element to a successful arbitration. However, voluntariness is not disputed here, so this element does not weigh heavily on the analysis.

Next, the 2020 CBA disciplinary procedure is not final and binding; in fact, the document expressly subjects the disciplinary officer’s decision to either party’s right to appeal to the commissioner.¹⁵³ As mentioned previously, the only decision

145. Robinson, *supra* note 13, at 14.

146. Niall Mackay Roberts, *Definitional Avoidance: Arbitration’s Common-Law Meaning and the Federal Arbitration Act*, 49 U. CAL. DAVIS L. REV. 1547, 1560–62 (2016).

147. *Id.*

148. *Id.* at 1561.

149. *Arbitrary*, BLACK’S LAW DICTIONARY (7th ed. 1999).

150. *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E. 2d 203, 215 (2009).

151. *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct 1906, 1923 (June 15, 2022), *reh’g denied*, 20-1573, 2022 WL 3580311 (U.S. Aug. 22, 2022).

152. *See Nat’l Football League Players Ass’n ex rel. Peterson v. Nat’l Football League*, 831 F.3d 985, 989 (8th Cir. 2016).

153. *Collective Bargaining Agreement (2020)*, *supra* note 7, at art. 46 at § 1(e)(v).

that cannot be appealed under the 2020 CBA discipline process is the decision not to impose any punishment. The finality element, however, requires absolute finality as to all decisions of the arbiter, not just select ones. This bears on the point that arbitration is intended to serve as a final adjudication of the dispute justified by neutral resolution on its merits, not as a mere subjective compromise between the parties.¹⁵⁴ The lack of finality and a binding nature in the initial disciplinary officer's decision indicates that the 2020 CBA process is something other than true arbitration. Yet this does not necessarily indicate arbitrariness, as there are other alternative dispute resolution methods that are not final and binding and are also not arbitrary as defined here.

The scale tips decidedly to arbitrary when the lack of finality is considered with the fact that the appeal goes to the NFL commissioner. The CBA's disciplinary procedure is initially heard by a neutral officer whom the parties jointly appoint,¹⁵⁵ which is an indicator that this process is a true arbitration. The appeals process is problematic, however, since the NFL commissioner or his appointee, a party with great stake in the outcome, can make the final decision.¹⁵⁶ An "arbitrator is not free to merely dispense his own brand of industrial justice,"¹⁵⁷ yet that is exactly what is possible when a party appeals the initial hearing officer's decision. The NFL commissioner may rely on his individual discretion rather than fixed rules. As the head of an involved party his final decision is almost certainly founded on a preference for what he believes is best for the NFL and its public appearance.

Further, the Missouri Supreme Court found that, under the 2011 CBA, designating the NFL commissioner as the sole arbiter was unconscionable because he is "an individual in a position of bias as the arbitrator," though this was not a binding holding on the NFL.¹⁵⁸ Under the 2020 CBA, the commissioner is no longer the sole arbiter, but there are still similarities to the 2011 CBA that could make the commissioner's involvement unconscionable. The similarities include the fact that the commissioner is still "an individual in a position of bias as the arbiter" and that the commissioner still makes the final decision.¹⁵⁹ This meets the definitional standard of arbitrary in that such a decision is based on the commissioner's individual discretion and the commissioner will inherently give preference to the NFL since the commissioner is head of the NFL and beholden to team owners rather than the NFLPA. This explicitly negates the neutrality element required for a true arbitration. Because a neutral arbiter is not guaranteed for the entire process, the NFL's disciplinary procedure is arbitrary rather than a true arbitration.

154. Roberts, *supra* note 146, at 1561.

155. Collective Bargaining Agreement (2020), *supra* note 9, at art. 46 at § 1(e)(i).

156. *Id.* at § (e)(v).

157. Saint Mary Home, Inc. v. Serv. Emps. Int'l Union, Dist. 1199, 116 F.3d 41, 44 (2d Cir. 1997).

158. State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798, 813 (Mo. 2015) (see corresponding parenthetical *supra* note 34); see Collective Bargaining Agreement (2020), *supra* note 7, at art. 46 at § 1(a); Collective Bargaining Agreement (2011), *supra* note 29, at art. 46 at § 1(a); Collective Bargaining Agreement (2006), *supra* note 29, at art. XI at § 1 (a).

159. State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798, 813 (Mo. 2015); see Collective Bargaining Agreement (2020), *supra* note 7, at art. 46 at § 1(a); Collective Bargaining Agreement (2011), *supra* note 29, at art. 46 at § 1(a); Collective Bargaining Agreement (2006), *supra* note 29, at art. XI at § 1 (a).

C. *Ways to Make the Process Less Arbitrary*

The 2020 CBA runs through the 2030 NFL season, so it is unlikely that this discipline process will be revised until then. When the time comes, however, there are several ways to make this process less arbitrary in a way that benefits both the NFL and the players.

One option to limit arbitrariness in this disciplinary process and ensure that egregious offenders receive sufficiently harsh punishments even if the current process remains unchanged in the next CBA, is to require more specificity from the NFL. The NFL must clarify more precisely what conduct is prohibited under the Policy and state the standard punishment for each type of prohibited conduct. Additionally, the NFL should include aggravating and mitigating circumstances for conduct violations in the Policy to allow for deviation from the standard punishment. Currently, the NFL relies on criminal law definitions for some of its prohibited conduct but leaves much of the prohibited conduct undefined. If the NFL provided definitions, elements, or examples for conduct that constitutes a violation of conduct policy, there would be more consistent case outcomes. This would benefit the players by providing them with clearer notice of what conduct is prohibited and more certainty about what punishment they will face if they engage in such conduct. At the same time, this would benefit the NFL by addressing the criticism about inconsistent outcomes of disciplinary cases.¹⁶⁰ Including aggravating and mitigating circumstances would still provide the NFL and discipline officer with flexibility in imposing punishment and ensure that the most egregious offenders are punished accordingly.

Another option to limit arbitrariness in the process would reverse the order of the hearing officers. This proposal would have the commissioner be the initial disciplinary officer and the independent arbiter would hear any appeal. This proposal is essentially how the National Hockey League (“NHL”) handles player discipline.¹⁶¹ This plan does not completely satisfy the neutrality and finality aspects of a true arbitration since the head of a disputing party would be involved, but it would make it less arbitrary and have substantial benefits for both parties. The NFL would be able to maintain a degree of control in the process in order to publicly establish its stance on a given case and create/maintain the public appearance it desires.¹⁶² The NFL would solidify the legitimacy of the player discipline process since a neutral party would make the final decision on an appeal.¹⁶³ Under this plan, the commissioner would make the final decision in a case if were not appealed, but no appeal would signal that the parties thought the resolution was fair and thus still solidify legitimacy. The NFLPA and player would benefit first by simply having a neutral party handle appeals rather than the head of an involved party.¹⁶⁴ Second, a

160. Ansh Bhadani & Aarya Srinivasan, *NFL: A History of Inconsistent Suspensions*, MONARCH (Oct. 18, 2022), <https://amhsnews.org/7252/sports/analyzing-the-nfls-inconsistentsuspensions/>; see also Tessa J. Kajdi, *Is There Something Arbitrary about the NFL's Arbitration Process?*, SYRACUSE L. REV. LEGAL PULSE (Nov. 2, 2017), <https://lawreview.syr.edu/nfl-arbitration-process/>.

161. See Yager, *supra* note 34, at 251.

162. *Id.* at 253.

163. See Mullineaux, *supra* note 34, at 241–44 (discussing that the other major North American sports leagues, the NBA, MLB, and NHL, have adopted discipline procedures which either use an initial neutral arbiter, greatly reduce the commissioner's authority, or make any appeal go to a neutral arbiter and none of those leagues face questions about the legitimacy of their discipline processes).

164. See Yager, *supra* note 34, at 253.

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neutral appeals arbiter would encourage the NFLPA or a player to appeal a decision since the chilling effect of a biased party handling appeals is gone.¹⁶⁵ Only time will tell what is next for the player discipline process for Policy violations in the next CBA but expect the NFLPA to push for further change than what it achieved in the 2020 CBA.¹⁶⁶

A third option to limit arbitrariness in the process would be to leave the appeal process in place but send the appeal to a panel of three arbiters. This option is modeled after Article 37(b)(2) of the International Centre for Settlement of Investment Disputes' regulations and rules.¹⁶⁷ Under this option, a single initial disciplinary officer would handle the initial arbitration. Then, on appeal, the NFL and NFLPA would each appoint one arbiter of their choosing and jointly select a third arbiter to be president of the tribunal. This approach would maintain the neutrality aspect of arbitration throughout the process while respecting the parties desire to have an appeals process. One downside to this approach is the increased costs the parties will face by having to potentially hire four qualified arbiters rather than just one, but there are benefits as well. This approach would have similar benefits for both parties as the approach discussed above but is similarly unlikely to occur since the NFL will want to maintain some control in the process.

The most dramatic option to limit arbitrariness is completely overhauling the process in the next CBA. The parties could make the process a true arbitration by keeping the neutral hearing officer, eliminating appeals to the commissioner, and completely removing commissioner involvement. Appeals to courts, however, must remain available in any circumstance if a party wishes to challenge the legality of the arbitrator's award. The United States Supreme Court has said that the parties bargained for the arbiter's construction of the contract, so courts have no place to overrule that interpretation solely because it differs from the court's.¹⁶⁸ The Court said an arbiter's award must stand if it even arguably draws its essence from the CBA, even if the arbiter construed or applied the CBA incorrectly.¹⁶⁹ A court may reverse an arbiter's award only if the award manifestly draws its essence from some other consideration, like external law or the arbiter's personal views, such that the arbiter dispenses "his own brand of industrial justice."¹⁷⁰ The Court's "draws its essence" standard gives great deference to arbitrators as a policy of favoring voluntary settlement of labor disputes,¹⁷¹ which makes court appeals of arbiter's awards difficult to win. Additionally, the Federal Arbitration Act provides four statutory grounds on which a court may vacate an arbitration award.¹⁷² This option would maintain the parties' current voluntary consent as it ensures that the process is neutral and the arbiter's decision is final and binding. This option would also have

165. Mullineaux, *supra* note 34, at 239–41.

166. @BenVolin, TWITTER (Aug. 1, 2022, 6:10AM), <https://twitter.com/BenVolin/status/1554062011306311681>.

167. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 37, Aug. 27, 1965, ICSID, https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf.

168. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598–99 (1960).

169. *Id.* at 597.

170. *Id.*

171. See *Bos. Celtics Ltd. P'ship v. Shaw*, 908 F.2d 1041, 1045 (1st Cir. 1990); *Nat'l Football League Players Ass'n ex rel. Peterson v. Nat'l Football League*, 831 F.3d 985, 993 (8th Cir. 2016) (illustrating how the "draws its essence" standard has been applied in the context of court appeals of sports arbitration arising under CBAs and that courts are very reluctant to overrule arbiter's awards).

172. See 9 U.S.C. § 10.

benefits for both parties. For the NFL, it would help solidify the legitimacy of the process and the Policy in the public's eye by removing itself from the judgment process. For the NFLPA and players, it would help ensure the fairness of the process and remove uncertainty surrounding punishment created by the appeals process. This option, however, is doubtful to actually occur. The NFL will likely be unwilling to relinquish power in the judgment process since it, like any business, wants to maintain control over the way the public perceives it. Further, both parties have continued to bargain for an appeal procedure in CBA's since at least 2006, so they clearly value it. Even if the NFLPA wanted to remove the NFL's involvement, it would likely have to give up more than it is willing to in future CBA negotiations.

V. CONCLUSION

What effect, if any, a less arbitrary method of player discipline would have had on Deshaun Watson's case is pure speculation. What is known, however, is that Watson's case progressed through the player discipline process as bargained for in the CBA. The NFL exercised its right to appeal in hopes of securing a more severe punishment it thought warranted for Watson's horrific conduct. Before the commissioner's designee heard the appeal, the parties reached a settlement, and Watson is serving the terms of his punishment.

The NFLPA and players progressed toward a fairer discipline process in the 2020 CBA compared to the 2006 and 2011 CBAs. The commissioner's absolute power has been reduced, but his remaining role continues to contaminate the player discipline process. Until a neutral party handles the whole process, it will remain more arbitrary and will not be true arbitration. There are numerous ways to reduce the arbitrariness of the current process in the next CBA, and enacting such a system or a true arbitration would have significant benefits for the NFL, the NFLPA, and fans of football.