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# **JUDGE, JURY, AND EXECUTIONER: ROGER GOODELL AND THE POWER TO PUNISH**

*Ursula Petersen\**

This Note examines the unbridled disciplinary powers granted to NFL Commissioner Roger Goodell. These powers, granted by the NFL's Collective Bargaining Agreement, allow Goodell to indiscriminately punish NFL players for violent, off-field behavior. The increased media coverage of domestic violence and sexual assault—perpetrated by NFL players—has damaged the NFL's public persona and resulted in loss of sponsorship. In response, Goodell has pledged to deter violent behavior and punish player indiscretions by crafting and implementing harsher Personal Conduct Policies.

This Note explores the history of NFL disciplinary policies and the legal challenges to Goodell's disciplinary powers. Additionally, this Note looks at how NFL players escape criminal punishment for violent conduct, the effect on their victims, and how the cycle of off-field player violence is continued. This Note concludes by proposing different and more proactive means by which Commissioner Goodell can exercise his power to more appropriately address, punish, and prevent violent player conduct.

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## I. INTRODUCTION

The National Football League (NFL) is widely regarded as a staple of American home life; watching football is about as American as apple pie. The 2015 Super Bowl was the most watched television event in U.S. history.<sup>1</sup> In recent years, however, the NFL has been scrutinized for a growing problem within the League: violent crime. Prior to 2014, NFL players were arrested, on average, more often than their National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB) counterparts.<sup>2</sup> With respect to domestic violence specifically, the arrest rate among NFL players was second only to that of the NBA.<sup>3</sup> Since 2014, 108 NFL players have been arrested, and twenty-nine of these arrests were for violent offenses such as rape, domestic violence, assault, and battery.<sup>4</sup> Yet, from 2006 to 2014, the League allowed 34 of the 57 reported domestic violence incidents to go unpunished.<sup>5</sup>

However, 2014 marked a year of change for the NFL's policies on personal conduct. In February 2014, Baltimore Ravens running back Ray Rice was arrested for domestic violence after a video was released showing Rice punching his then-fiancée, Janay Palmer, and knocking her unconscious.<sup>6</sup> Shortly after Rice's arrest, Vikings running back Adrian Peterson was arrested for child abuse after beating his young son with a tree

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1. Catherine Taibi, *Super Bowl XLIX Was Most-Watched Show in U.S. Television History*, HUFFINGTON POST (Feb. 2, 2015, 4:56 PM), [http://www.huffingtonpost.com/2015/02/02/super-bowl-tv-ratings-2015-patriots-seahawks\\_n\\_6595690.html](http://www.huffingtonpost.com/2015/02/02/super-bowl-tv-ratings-2015-patriots-seahawks_n_6595690.html) [https://perma.cc/FF9M-QUFZ].

2. Abigail Tracy, *NFL, NBA Lead Arrest Rates Across Pro Sports*, VOCATIV (Sept. 15, 2014, 11:31 AM), <http://www.vocativ.com/culture/sport/nfl-arrest-rates> [https://perma.cc/4ZZJ-9JER].

3. *Id.*

4. *NFL Player Arrests*, USA TODAY, <http://www.usatoday.com/sports/nfl/arrests/2014/all/all/> [https://perma.cc/H7AH-HRMBJ].

5. Meghan Keneally, *How the NFL Has Punished Players Arrested for Domestic Violence*, ABC NEWS (Sept. 19, 2014, 2:14 PM), <http://abcnews.go.com/US/nfl-punished-players-arrested-domestic-violence-goodell-era/story?id=25534452> [https://perma.cc/N6NJ-WGFB].

6. Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBNATION (Nov. 28, 2014, 2:08 PM), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens> [https://perma.cc/XE9M-7XNS].

branch.<sup>7</sup> In the face of these high-profile domestic violence cases, major sponsors such as Procter & Gamble, PepsiCo, and Anheuser-Busch expressed concern over the NFL's handling of these allegations.<sup>8</sup>

Consequently, NFL Commissioner Roger Goodell began taking affirmative steps towards reshaping the NFL's image. In an attempt to regain public favor and protect the League's brand, the NFL hired PR guru and former sex-crimes prosecutor Lisa Friel as an image consultant.<sup>9</sup> The League also hired domestic violence experts Jane Randel and Rita Smith as senior advisors to "help lead and shape the NFL's policies and programs relating to domestic violence and sexual assault."<sup>10</sup> Goodell stepped forward to apologize for the League's handling of domestic violence, and pledged to "get it right."<sup>11</sup> He then announced the implementation of new personal conduct policies and noted the importance of the U.S. legal system, saying, "[w]e do not have a clear and consistent policy that allows us to deal with the issues that are arising . . . . Our country has a legal system that everyone needs to respect."<sup>12</sup> In August 2014, the NFL issued a statement announcing the implementation of new additions to the Personal Conduct Policy (PCP).<sup>13</sup> Commissioner Goodell's pledge not only addressed the public's immediate concerns; it also altered the landscape of the NFL's disciplinary system.<sup>14</sup>

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7. Steve DiMatteo, *A Timeline of the Adrian Peterson Child Abuse Case*, SBNATION (Sept. 17, 2014, 12:22 PM), <http://www.sbnation.com/2014/9/17/6334793/adrian-peterson-child-abuse-statement-vikings-timeline> [https://perma.cc/LU2T-6NK8].

8. Aaron Pero, *NFL Loses Big Sponsor over Domestic Violence Problems*, KRON4 (Sept. 19, 2014, 12:07 PM), <http://kron4.com/2014/09/19/nfl-loses-big-sponsor-over-domestic-violence-problems/> [https://perma.cc/BT9H-QUMM].

9. Jane McManus, *Domestic Violence and the NFL: What Impact Has the League Made?*, ESPN (Jan. 28, 2015), <http://www.espn.com/espnw/news-commentary/article/12235694/impact-league-made> [https://perma.cc/J5DQ-K4YG].

10. *Roger Goodell Breaks Silence on Domestic Abuse: "I Will Get It Right"*, CBS NEWS (Sept. 19, 2014, 3:19 PM), <https://www.cbsnews.com/news/roger-goodell-breaks-silence-on-domestic-abuse-i-will-get-it-right/> [https://perma.cc/MWV2-C9ZF].

11. *Id.*

12. *Id.*

13. *The NFL's Response to Domestic Violence and Sexual Assault*, NFL.COM (Dec. 5, 2014, 10:57 PM), <https://www.nfl.com/news/story/0ap3000000439286/article/the-nfls-response-to-domestic-violence-and-sexual-assault> [https://perma.cc/W389-MBAQ].

14. *Id.*

From then forward, Goodell was in the position to oversee every single personal conduct case with the power to decide guilt and penalties.<sup>15</sup>

The issue now facing the League is that Commissioner Goodell is able to mandate player punishments in a seemingly arbitrary and unchecked exercise of power.<sup>16</sup> In this capacity, “the employed Commissioner represents an almost autonomous authority within the internal structure of the [L]eague, uncontrolled by its principal owners.”<sup>17</sup> Given the public response to cases such as Rice’s, Goodell faces pressure to dole out longer suspensions and heavier fines.<sup>18</sup> This note contends that Goodell’s power to punish, though broad, is both a necessary means to protect the NFL’s brand and a channel of alternative justice that operates outside of the U.S. legal system. Part II of this Article will outline the history of the NFL’s PCP. Part III will analyze judicial decisions that have affected the League, including arbitration decisions that confirm and uphold the Commissioner’s power to create and implement player punishments. Finally, Part IV proposes alternative ways in which Goodell can use his powers to rectify the violence plaguing the League and its players.

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15. *Id.*

16. See Joshua S.E. Lee & Jaimie K. McFarlin, *Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL & NBA*, 23 JEFFERY S. MOORAD SPORTS L.J. 69, 102 (2016).

17. *Id.* (quoting Gregor Lentze, Comment, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 72 (1995)).

18. See Greg A. Bedard, *The Right Thing—Finally*, SPORTS ILLUSTRATED (Sept. 8, 2014), <https://mmqb.si.com/2014/09/08/ray-rice-video-cut-by-ravens-suspended-by-nfl> [https://perma.cc/EG3S-8SRS].

## II. THE HISTORY OF PERSONAL CONDUCT POLICIES AND DISCIPLINE IN THE NFL

### A. *The Formation of the Violent Crime Policy*

The NFL was founded on September 17, 1920, in Canton, Ohio.<sup>19</sup> At the time of its creation, the NFL did not construct a PCP for its players.<sup>20</sup> In fact, the League did not institute a PCP until 1997, seventy-seven years after its founding.<sup>21</sup> The League generally ignored the issue of player conduct off the field, and issues involving violent crime, such as rape, murder, assault, and domestic violence, largely went unpublicized. Players' personal conduct issues continued to be mostly unnoticed by the public until 1994, when the murders of Nicole Brown, the ex-wife of former professional player O.J. Simpson, and Ron Goldman, Brown's then-boyfriend, became a catalyst.<sup>22</sup>

Within weeks of the infamous Brown-Goldman murders,<sup>23</sup> the NFL sent counselors to twenty-eight team training camps to discuss domestic violence with players for the first time in the League's history.<sup>24</sup> Though the NFL had not previously acknowledged a growing violence problem amongst players, League employees and former players noted that the issue had long been present.<sup>25</sup> The then-head of the NFL Employee Assistance Program, Lem Burnham, said that the lectures had not been prompted by the murders, but that the issue had been on his "laundry list of things to cover . . . because [he] was aware long before the Simpson case of what an insidious problem

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19. *NFL Founded in Canton*, PRO FOOTBALL HALL OF FAME (Jan. 1, 2005), <https://www.profootballhof.com/news/nfl-founded-in-canton/> [<https://perma.cc/3GNY-BADP>].

20. See Karisa Maxwell, *A Beginner's Guide to Understanding the NFL Personal Conduct Policy*, BROADLY. (Dec. 8, 2015, 8:00 AM), [https://broadly.vice.com/en\\_us/article/a-beginners-guide-to-understanding-the-nfl-personal-conduct-policy](https://broadly.vice.com/en_us/article/a-beginners-guide-to-understanding-the-nfl-personal-conduct-policy) [<http://archive.is/L633t>].

21. *Id.*

22. See Bill Brubaker, *Violence in Football Extends Off Field*, WASH. POST (Nov. 13, 1994), <https://www.washingtonpost.com/archive/politics/1994/11/13/violence-in-football-extends-off-field/8247f13e-54aa-4285-8918-d7f7856690cf/> [<https://perma.cc/PN8P-N662>].

23. Simpson was acquitted of the murders. See *O.J. Simpson Acquitted*, HISTORY, <https://www.history.com/this-day-in-history/o-j-simpson-acquitted> [<https://perma.cc/9T54-M49D>].

24. Brubaker, *supra* note 22.

25. See *id.*

this is.”<sup>26</sup> Burnham may have been alluding to a domestic violence charge filed against Simpson five years before the Brown-Goldman murders. In early 1989, Simpson was involved in a disturbing domestic incident with Brown, where Simpson punched, kicked, and slapped Brown, pulled her hair, and threatened to kill her.<sup>27</sup> Simpson slapped Brown with such force that he left a visible handprint on her neck.<sup>28</sup> Neighbors found Brown hiding in bushes, bruised, crying, and repeating that Simpson would kill her, and Brown apparently told officers: “[y]ou never do anything about him. You talk to him and leave.”<sup>29</sup> Simpson did not receive jail time and instead was allowed to receive counseling over the phone from a psychiatrist of his choosing.<sup>30</sup>

Though Burnham made reference to the “insidious national problem” of domestic violence, he then added that domestic violence in the NFL was not as bad as the public believed and was overblown by the “media circus.”<sup>31</sup> Burnham said he believed that domestic violence was a societal issue that should be governed by the courts.<sup>32</sup> He announced that “gambling and drug [disciplinary] policies were instituted because they have a direct and detrimental effect on the game itself . . . . But this domestic violence thing is different. It’s a society thing and there are laws that govern it.”<sup>33</sup>

Three years after the murders of Brown and Goldman, the NFL adopted the first PCP under then-Commissioner Paul Tagliabue, known as the Violent Crime Policy (VCP).<sup>34</sup> Until the VCP was adopted, murder was the

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26. *Id.*

27. Josh Meyer, *Police Records Detail 1989 Beating That Led to Charge*, L.A. TIMES (June 17, 1994), [http://articles.latimes.com/1994-06-17/news/mn-5290\\_1\\_jail-time](http://articles.latimes.com/1994-06-17/news/mn-5290_1_jail-time) [<https://perma.cc/SN8D-22K3>].

28. *Id.*

29. *Id.*

30. *Id.*

31. Brubaker, *supra* note 22.

32. *Id.*

33. *Id.*

34. Maleaha L. Brown, Comment, *When Pros Become Cons: Ending the NFL’s History of Domestic Violence Leniency*, 50 FAM. L.Q. 193, 197 (2016).

only offense that barred a player from playing.<sup>35</sup> The VCP allowed the Commissioner to either suspend or fine any player who had been charged with a “crime of violence.”<sup>36</sup> The VCP also allowed the Commissioner to mandate clinical evaluations and counseling for players charged with any such crime.<sup>37</sup> However, a Commissioner’s action was limited under the VCP: the Commissioner could not impose any punishment until the criminal justice system had done so first.<sup>38</sup> This meant that players could go unpunished for violent crimes. Although the VCP was the NFL’s first step towards a proactive anti-violence policy, player punishments were still lacking.<sup>39</sup> Commissioner Tagliabue did not suspend a player for a domestic violence charge until 2000, three years after the League enacted the VCP.<sup>40</sup>

*B. Roger Goodell’s Election and the 2007 Personal Conduct Policy*

In August 2006, Roger Goodell was elected to succeed Commissioner Tagliabue.<sup>41</sup> Goodell had been working as the Chief Operating Officer of the NFL at the time of his election and had spent twenty-four years working with the League.<sup>42</sup> Goodell was elected unanimously by the League’s thirty-two team owners.<sup>43</sup>

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35. *Id.*

36. Suzanne Janusz, Comment, *The NFL’s Strict Enforcement of Its Personal Conduct Policy for Crimes Against Women: A Useful Tool for Combatting Violence or an Attempt to Punish Morality?*, 22 SETON HALL J. SPORTS & ENT. L. 93, 119 (2012).

37. *Id.*

38. Brown, *supra* note 34, at 197.

39. *Id.*

40. *Id.*

41. Mark Maske, *Owners Pick Goodell as NFL Commissioner*, WASH. POST (Aug. 9, 2006), <http://www.washingtonpost.com/wpdyn/content/article/2006/08/08/AR2006080801043.html> [<https://perma.cc/9ZP7-4MTW>].

42. *Id.*

43. *Id.*



The year Goodell became Commissioner, arrest rates of NFL players soared.<sup>44</sup> Between March 2006 and March 2007, sixty-three NFL players were arrested, amounting to a sixty-six percent increase in arrests from the previous year.<sup>45</sup> In response to the dramatic increase in arrests, Goodell announced that the NFL would be implementing a new, strengthened PCP.<sup>46</sup> The 2007 PCP prohibited players under contract from engaging in certain conduct.<sup>47</sup> The text provided, “[i]t will be considered conduct detrimental for Covered Persons to engage in . . . violent and/or criminal activity.”<sup>48</sup> While the text did not explicitly define “violent and/or criminal activity,” the policy provided illustrative examples, such as sex offenses, crimes involving actual or threatened physical violence, and domestic violence.<sup>49</sup> Those who engaged in such detrimental conduct would be subject to fines or suspensions at the discretion of the Commissioner.<sup>50</sup> The 2007 PCP thereby amended and expanded the power of the Commissioner to establish punishments because it no longer called for criminal prosecution as a prerequisite to disciplinary action.<sup>51</sup>

The range of Commissioner Goodell’s disciplinary power under the 2007 PCP derived from the 2006 Collective Bargaining Agreement (CBA).<sup>52</sup> In 2006, the National Football League Management Council, as the sole representative of the NFL, entered into the agreement with the National Football League Players Association (NFLPA), which is the sole

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44. Janusz, *supra* note 36, at 108.

45. *Id.*

46. David C. Weiss, Comment, *How Terrell Owens, Collective Bargaining, and Forfeiture Restrictions Created a Moral Hazard that Caused the NFL Crime Wave and What It Meant for Michael Vick*, 15 SPORTS LAW. J. 279, 281 (2008).

47. *NFL Personal Conduct Policy*, ESPN (Mar. 13, 2007), <http://www.espn.com/nfl/news/story?id=2798214> [<https://perma.cc/U9GD-WSP2>].

48. *Id.*

49. *Id.*

50. *Id.*

51. Brown, *supra* note 34, at 197.

52. Joshua S.E. Lee & Jaimie K. McFarlin, *Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL & NBA*, 23 JEFFERY S. MOORAD SPORTS L.J. 69, 81 (2016).

representative of present and future employee-players.<sup>53</sup> Article XI of the CBA established that the Commissioner had the right to determine the punishment for off-field conduct “detrimental to the integrity of, or public confidence in, the game of professional football.”<sup>54</sup> However, such punishments could not exceed the scope of the “Club Discipline” outlined in article VIII of the CBA, which limited suspensions to four weeks and fines to \$14,000.<sup>55</sup>

NFL players openly opposed the 2007 PCP.<sup>56</sup> Atlanta Falcons wide receiver Roddy White called Goodell’s exercise of power a “dictatorship.”<sup>57</sup> However, despite the expansion of Commissioner Goodell’s power to discipline players, some evidence shows that the 2007 PCP was ineffective. Arrests actually increased after the policy was put into place.<sup>58</sup> From January 1, 2000 to April 10, 2007, 324 players were arrested, but from April 10, 2007 to July 2, 2013, with the new PCP in place, 340 players were arrested.<sup>59</sup> On average, approximately ten more arrests were made per year since the 2007 PCP was put in place.<sup>60</sup> From the time of Goodell’s election in 2006 through 2014, NFL players were involved in 57 reported cases of alleged domestic violence.<sup>61</sup>

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53. *NFL Collective Bargaining Agreement* pmb1. (Mar. 8, 2006), <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf> [https://perma.cc/4RD6-YTUT] [hereinafter 2006 CBA].

54. *Id.* at art. XI, § 1(a).

55. *Id.* at art. VIII, § 1(a).

56. Christopher Hansen, *Is Roger Goodell’s Personal Conduct Policy Working?*, BLEACHER REPORT (July 2, 2013), <http://bleacherreport.com/articles/1691244-is-roger-goodells-personal-conduct-policy-working> [https://perma.cc/9MDB-WDJR].

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Meghan Keneally, *How the NFL Has Punished Players Arrested for Domestic Violence*, ABC NEWS (Sept. 19, 2014, 2:14 PM), <http://abcnews.go.com/US/nfl-punished-players-arrested-domestic-violence-goodell-era/story?id=25534452> [https://perma.cc/N6NJ-WGFB].

In addition to increased arrest rates, there was evidence that Goodell actively avoided exercising his disciplinary power and enforcing the PCP.<sup>62</sup> For instance, he suspended Pittsburgh Steelers Quarterback Ben Roethlisberger for six games after being accused of sexual assault, but the penalty was subsequently reduced to only four games.<sup>63</sup> Furthermore, Goodell was quiet on the issue of punishment in June 2013 when Cincinnati Bengals cornerback Adam Jones assaulted a bar patron despite the fact that Jones already had multiple offenses.<sup>64</sup> Goodell also gave first time offenders free passes, allowing them to continue playing unless the available facts indicated “egregious circumstances, significant bodily harm, or risk to others.”<sup>65</sup> On the surface, the 2007 PCP may have appeared to be an attempt to correct the growing problem of off-field violent conduct in the NFL. However, the CBA’s limitations on Goodell’s power, coupled with his leniency in enforcing player punishments, rendered the 2007 PCP an ineffective deterrent against violent behavior.

### C. *The 2014 Personal Conduct Policy Communications*

The NFL unveiled its most recent update to the PCP in August 2014.<sup>66</sup> Following the public outcry and widespread media coverage of the Ray Rice and Adrian Peterson cases, Commissioner Goodell sent a letter to NFL team owners outlining new, stiffer penalties than those in the 2007 PCP.<sup>67</sup> In his letter to NFL owners, Goodell stressed the effect domestic violence would have on the League, writing:

Although the NFL is celebrated for what happens on the field, we must be equally vigilant in what we do off the field. At times,

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62. See generally Ben Roethlisberger, *Quarterback, Twice Accused of Sexual Assault*, BROADLY. (Dec. 8, 2015, 8:00 PM), [https://broadly.vice.com/en\\_us/article/ben-roethlisberger-quarterback-twice-accused-of-sexual-assault](https://broadly.vice.com/en_us/article/ben-roethlisberger-quarterback-twice-accused-of-sexual-assault) [<http://archive.is/IGIW2>].

63. *Id.*

64. Hansen, *supra* note 56.

65. *Id.*

66. Katie Sharp, *NFL Announces New Domestic Violence Policy*, SBINATION (Aug. 28, 2014, 4:06 PM), <https://www.sbnation.com/nfl/2014/8/28/6079465/nfl-announces-new-domestic-violence-policy> [<https://perma.cc/4UU3-ZQM8>].

67. *Id.*

however, and despite our best efforts, we fall short of our goals. We clearly did so in response to a recent incident of domestic violence. . . . My disciplinary decision led the public to question our sincerity . . . . Simply put, we have to do better. And we will. The public response reinforced my belief that the NFL is held to a higher standard, and properly so.<sup>68</sup>

The 2014 PCP subjects players to heightened punishments compared to those included in the 2007 PCP.<sup>69</sup> Any player who violates the PCP by committing assault, battery, domestic violence, or sexual assault will be suspended for six games, without pay, if the violation is a first offense.<sup>70</sup> A more severe punishment may be imposed if the circumstances surrounding the violation are aggravated, such as the “presence or use of a weapon . . . or when the act is committed against a pregnant woman or in the presence of a child.”<sup>71</sup> A second offense of this nature results in indefinite suspension from the NFL, and while a player can petition for reinstatement to the League after a period of one year, there is no guarantee the petition will be granted.<sup>72</sup> Consistent with the 2007 construction of the PCP, the 2014 additions provide that decisions on punishment and discipline are pursuant to a delegation of the Commissioner’s power.<sup>73</sup>

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Personal Conduct Policy*, NFL (2016), <http://static.nfl.com/static/content/public/photo/2017/08/11/0ap3000000828506.pdf> [<https://perma.cc/C3FJ-4MK9>].

### III. GOODELL'S POWER IN PRACTICE

#### A. *Limitations of the CBA*

Across all professional sports leagues, most player-commissioner legal disputes arise from issues with the league's respective CBA.<sup>74</sup> The CBA is recognized as the "supreme governing authority concerning employment in the professional sports league" and is controlled by the National Labor Relations Act (NLRA).<sup>75</sup> *Major League Umpires Association v. American League of Professional Baseball Clubs* was the seminal case establishing the role of CBAs in professional sports.<sup>76</sup> The case, brought by a unit of MLB umpires who sought to unionize,<sup>77</sup> established the domain of the National Labor Relations Board (NLRB) over legal issues in professional sports leagues.<sup>78</sup> In part, the umpires sought unionization following labor disputes regulated by MLB rules, which provided for final resolution of disputes through arbitration by the Commissioner.<sup>79</sup> The umpires alleged a violation of section 9(c) of the NLRA,<sup>80</sup> which provided that "whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy."<sup>81</sup> Therefore, because the umpires alleged a violation of the NLRA, the dispute was subject to the jurisdiction

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74. See Joshua S.E. Lee & Jaimie K. McFarlin, *Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL and NBA*, 23 JEFFERY S. MOORAD SPORTS L.J. 69, 77–78 (2016).

75. *Id.* at 78.

76. Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. OF ENT. & SPORTS L. 179, 197 (2010).

77. Gregory Boucher, *Baseball, Antitrust and the Rise of the Players' Association*, 4 U. DENV. SPORTS & ENT. L.J. 121, 127 (2008).

78. *Id.*

79. Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969), <https://app.vlex.com/vid/43747677> [<https://perma.cc/8CRZ-ZPEN>].

80. *Id.*

81. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449, 453 (1935).

of the NLRB.<sup>82</sup> The NLRB found that the purpose and actions of MLB constituted interstate commerce since sports involved: (1) the exchange of money between teams located within different states; (2) team travel across state lines; and (3) Supreme Court precedent establishing football as a sport engaged in interstate commerce.<sup>83</sup> As such, the NLRB was given statutory power to hear the dispute upon the conclusive finding that MLB engaged in interstate commerce.<sup>84</sup>

Upon establishing jurisdiction over MLB, the NLRB found that the NLRA could legitimately apply to professional sports.<sup>85</sup> The NLRB found that MLB's construction of its employment system relied heavily on the Commissioner to self-regulate disputes within the League.<sup>86</sup> However, because the NLRA was found to apply to MLB, the NLRB held that the umpires were allowed to unionize and that their union had the authority to negotiate a variety of employment-related subjects for umpires through the Collective Bargaining Process.<sup>87</sup> While this case involved the structure of MLB, the consequences were far-reaching: the NLRB's decision meant that the NLRA could be applied to all professional sports leagues.<sup>88</sup>

Under *American League*, collective bargaining processes must comply with both fair employment practices and each sport's respective CBA, which mandates requirements for hours, wages, and working conditions.<sup>89</sup> For example, the current NFL CBA requires that the League and the players'

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82. See *Eighty Years of Workplace Democracy*, NLRB (2015), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf> [https://perma.cc/K82X-AFXG].

83. Boucher, *supra* note 77, at 127.

84. *Id.* at 127–28.

85. Parlow, *supra* note 76, at 197.

86. Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. at 190.

87. Parlow, *supra* note 76, at 197.

88. *Id.*

89. *Id.*

unions act in good faith.<sup>90</sup> It prohibits player strikes, stipulates the rules of player drafting, and determines players' salaries according to contract length.<sup>91</sup> Once a players' association and league representatives have engaged in arms-length negotiations and reached an agreement, negotiations will typically result in a finalized CBA that is effective for a specified number of years.<sup>92</sup> Though *American League* established that CBAs and collective bargaining processes are subject to fair employment practices, legal disputes inevitably arise when CBAs affect player discipline.<sup>93</sup>

### B. *The Legal Treatment of Commissioner Power*

Commissioner Goodell derives the power to punish players from two primary sources: the NFL CBA and the NFL PCP.<sup>94</sup> Additionally, article VIII of the NFL Constitution gives the Commissioner the "full, complete, and final jurisdiction and authority to arbitrate [disputes]."<sup>95</sup> Section 8.6 of article VIII gives the Commissioner further authorization to take appropriate legal action, or other steps, against players who engage in detrimental conduct.<sup>96</sup> The NFL's CBA defines this power in article 46, section 1(a), noting that all disputes arising from the Commissioner's actions against a player are subject to the agreed-upon CBA processes.<sup>97</sup> Finally, the NFL's 2014 PCP derives its authority from the League's CBA but expands and defines the Commissioner's power to discipline athletes for detrimental

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90. See NFL COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [https://perma.cc/A9JU-ZT7W] [hereinafter 2011 CBA].

91. *Id.*

92. Parlow, *supra* note 76, at 198.

93. Lee & McFarlin, *supra* note 74, at 80.

94. *Id.* at 81.

95. NFL, *Constitution and Bylaws of the National Football League* art. VIII, § 8.3 (2006), [http://static.nfl.com/static/content/public/static/html/careers/pdf/co\\_.pdf](http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf) [https://perma.cc/6BAS-8FCQ].

96. *Id.* at Art. VIII, § 8.6.

97. 2011 CBA, *supra* note 90, at art. 46, § 1(a).

conduct.<sup>98</sup> Though the Commissioner's power remains broadly established by these three documents, Goodell's power as the "ultimate adjudicator and arbitrator of punishment" has been put to the test in four major cases over the past four years.<sup>99</sup>

### 1. Ray Rice: Dealing a Blow to Goodell's Power

In February 2014, a domestic violence incident involving Ray Rice and his then-fiancée, Janay Palmer, occurred.<sup>100</sup> After the release of video footage showing Rice dragging Palmer's limp body from an elevator, Rice was "indicted for felony assault under circumstances evidencing indifference to the value of human life."<sup>101</sup> However, the court effectively dismissed the charges against Rice when it ordered a pre-trial intervention and determined that if Rice satisfactorily "completed an anger management course, attended counseling, and committed no further crimes," the charges would be dropped within one year.<sup>102</sup>

Rice met with Commissioner Goodell on June 16, 2014, for a disciplinary meeting.<sup>103</sup> The NFL was aware of the indictment, had seen the video of Rice dragging Palmer's body out of the elevator, and believed additional video footage existed of Rice assaulting Palmer earlier that evening.<sup>104</sup> However, the NFL never requested the presumed additional footage, and Goodell only issued a two-game suspension and a fine of one week's salary.<sup>105</sup> Goodell responded to public backlash by implementing a revised PCP dictating a six-game suspension for first-time domestic violence offenders but told Rice that the new, harsher policy would not affect his

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98. Lee & McFarlin, *supra* note 74, at 82.

99. *Id.* at 84.

100. Ray Rice, 1, 1 (NFL Nov. 28, 2014) (Jones, Arb.), <http://static.nfl.com/static/content/public/photo/2014/11/28/0ap3000000435652.pdf> [<https://perma.cc/BK9G-5QS7>].

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1–2.



penalty.<sup>106</sup> However, when the additional video footage showing Rice punching Palmer in the face was released, Commissioner Goodell suspended Rice indefinitely.<sup>107</sup> The NFL said the video presented “a starkly different sequence of events” that contradicted what Rice said at his June 16 disciplinary meeting.<sup>108</sup> Under article 43 of the NFL CBA, which provides for non-injury grievances, Rice appealed his punishment to an arbitrator.<sup>109</sup>

Ultimately, Rice won his appeal.<sup>110</sup> Former Judge Barbara Jones heard the appeal, during which the NFL claimed that the Commissioner Goodell’s expansion of Rice’s punishment was warranted after Rice “misled” him during the disciplinary meeting.<sup>111</sup> Jones explored the first instance of discipline, noting that when Goodell decided upon the two-game punishment, he weighed Rice’s testimony, the decisions of the pre-trial intervention, and Rice’s acceptance of responsibility.<sup>112</sup> However, Jones then cited to the arbitration proceedings where Goodell testified that in the face of public criticism, he felt Rice’s discipline was viewed as insufficient.<sup>113</sup> Jones also noted Goodell’s testimony regarding his reaction to the footage of Rice punching Palmer.<sup>114</sup> Goodell testified that he was shocked at the footage, calling it “violent” and “disturbing,” and claimed that it depicted a different series of events than those Rice described at the disciplinary meeting.<sup>115</sup>

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106. *Id.* at 2.

107. *Id.*

108. *Id.*

109. *See* 2011 CBA, *supra* note 90, at art. 43.

110. Dan Hanzus, *Ray Rice Wins Appeal, Immediately Eligible to Return*, NFL (Nov. 28, 2014, 3:03 PM), <http://www.nfl.com/news/story/0ap3000000435623/article/ray-rice-wins-appeal-immediately-eligible-to-return> [<https://perma.cc/SR4J-LH24>].

111. Ray Rice, *supra* note 100, at 2.

112. *Id.* at 5.

113. *Id.* at 6.

114. *Id.* at 7.

115. *Id.*

Jones ultimately set aside the NFL's argument that Rice's punishment was valid under article 46 of the CBA.<sup>116</sup> During the proceedings, NFL counsel argued that article 46 of the CBA contained an implicit "just cause" provision that gave Commissioner Goodell the power to retroactively expand Rice's punishment.<sup>117</sup> Jones examined the text of article 43 of the CBA and determined that because article 43 contained an explicit "just cause" provision, the parties were aware of how to bargain for such a provision when forming the CBA.<sup>118</sup> This, according to Jones, worked to "bolster[] the conclusion that it should not be read into [a]rticle 46."<sup>119</sup>

For Jones, the question then became whether Goodell abused his discretion in punishing Rice.<sup>120</sup> Because there was no just cause provision in [a]rticle 46, the burden fell upon the NFLPA to prove that the imposition of the indefinite suspension was arbitrary.<sup>121</sup> Jones found that there was sufficient evidence that Goodell and the League were aware of the domestic violence between Rice and Palmer prior to June 16, 2014.<sup>122</sup> At the disciplinary meeting, Rice not only told Goodell that he struck Palmer but also physically demonstrated with his left arm how he hit her.<sup>123</sup> Jones concluded that while viewing the actual footage of Rice striking Palmer may have "evoked horror" in Commissioner Goodell, Rice was truthful throughout his disciplinary meeting, rendering the indefinite suspension arbitrary and invalid.<sup>124</sup>

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116. *Id.* at 17.

117. *Id.* at 8.

118. *Id.*

119. *Id.*

120. *Id.* ("For me, this means that the discipline determinations under [a]rticle 46 should be reviewed to determine whether the Commissioner abused his discretion, that is, whether his determination was arbitrary or capricious. Where the imposition of discipline is not fair or consistent, an abuse of discretion has occurred.").

121. *Id.*

122. *Id.* at 9.

123. *Id.* at 10.

124. *Id.* at 15.

The Rice decision dealt a significant blow to Goodell's power. The decision established that Goodell could not use article 46 of the CBA to retroactively impose harsher punishments pursuant to the 2014 additions to the PCP.<sup>125</sup> But this decision would be overturned and contrasted against the following two cases: "Deflategate" and Adrian Peterson's arbitration appeal.

## 2. Deflategate: Inflating Goodell's Disciplinary Power

On January 18, 2015, the New England Patriots played the Indianapolis Colts for the American Football Conference title.<sup>126</sup> After the Patriots defeated the Colts, the Colts grew suspicious and questioned the replacement of twelve footballs after the second-half kickoff.<sup>127</sup> Colts linebacker D'Qwell Jackson noticed something unusual with one of the balls and gave it to a member of the Colts' equipment staff, who noticed the ball seemed to be underinflated.<sup>128</sup> The League began an investigation after it was reported that eleven of the twelve balls used in the first half of the game were underinflated.<sup>129</sup> Patriots Quarterback Tom Brady made a public appearance on January 23, 2015, stating, "I didn't alter the ball in any way."<sup>130</sup> However, after three months of investigation, League Investigator Ted Wells found that the Patriots intentionally used the underinflated balls to their advantage and that Brady was "at least generally aware" of the scheme.<sup>131</sup> In the

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125. Caroline A. Carmer, Article, *NFL Management Council v. NFL Players Ass'n: District Court Deflates the NFL Commissioner's Authority*, 23 SPORTS LAW. J. 201, 206 (2016).

126. *Patriots QB Tom Brady Has Deflategate Appeal Denied by 2nd U.S. Circuit Court*, ESPN (July 13, 2016), [https://www.espn.com/nfl/story/\\_/id/17045257/new-england-patriots-qb-tom-brady-deflategate-appeal-denied-2nd-us-circuit-court](https://www.espn.com/nfl/story/_/id/17045257/new-england-patriots-qb-tom-brady-deflategate-appeal-denied-2nd-us-circuit-court) [<https://perma.cc/7CCQ-D43M>].

127. *Deflategate Timeline: After 544 Days, Tom Brady Gives In*, ESPN (July 15, 2016), [https://www.espn.com/blog/new-england-patriots/post/\\_/id/4782561/timeline-of-events-for-deflategate-tom-brady](https://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady) [<https://perma.cc/6JVL-H6DR>] ("[A]fter the second-half kickoff, game officials replaced the 12 balls that were used in the first half with 12 backup balls that had been approved before game time, which drew questions." Two days later, ESPN reported "that 11 of the 12 balls used in the first half of the game were significantly underinflated.").

128. *Id.*

129. *Id.*

130. *Id.*

131. *Patriots QB Tom Brady Has Deflategate Appeal Denied by 2nd U.S. Circuit Court*, *supra* note 126.

investigative report released by the League, text messages between the equipment assistant and the locker room manager were presented as evidence implicating Brady.<sup>132</sup> Wells also reported that Brady refused to release records of his emails, texts, or phone records, which hindered the investigation.<sup>133</sup> After these findings were released, Commissioner Goodell decided to suspend Brady for four games without pay, explaining that “there was ‘substantial and credible evidence’” showing Brady’s knowledge of the underinflated balls and that Brady “failed to cooperate ‘fully and candidly with the investigation.’”<sup>134</sup>

The NFLPA and Brady appealed Goodell’s decision in arbitration.<sup>135</sup> Goodell exercised his power under CBA article 46, section 2, to oversee the hearing as arbitrator, and subsequently published an arbitration award affirming Brady’s suspension.<sup>136</sup> Goodell published a 20-page opinion, stating that under article 46 “the hearing officer gives appropriate deference to the findings of the disciplinary decision under review; that is so even when the Commissioner serves as hearing officer.”<sup>137</sup> Goodell defended Brady’s four-game suspension as a punishment consistent with similar collectively-bargained discipline contained within the CBA, such as conduct punishable under the Steroid Use Policy.<sup>138</sup>

Brady and the NFLPA moved in federal district court to vacate Goodell’s arbitration award.<sup>139</sup> Brady argued that both Goodell’s punishment and subsequent arbitration award were invalid under the Federal Arbitration Act because Goodell exceeded his power as an arbitrator in

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132. *Deflategate Timeline: After 544 Days, Tom Brady Gives In*, *supra* note 127.

133. *Id.*

134. Carmer, *supra* note 125, at 202 (citing *NFL Mgmt. Council v. NFL Players Ass’n*, 125 F. Supp. 3d 449, 457, 467 (S.D.N.Y. 2015)).

135. Cole Renicker, *A Comparative Analysis of the NFL’s Disciplinary Structure: The Commissioner’s Power and Player’s Rights*, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1051, 1058–59 (2016).

136. *Id.*

137. *NFL Mgmt. Council*, 125 F. Supp. 3d at 460–61 (emphasis omitted).

138. Carmer, *supra* note 125, at 210.

139. *NFL Mgmt. Council*, 125 F. Supp. 3d at 452.

violation of 9 U.S.C. § 10(4).<sup>140</sup> The court analyzed Brady's claim under the umbrella of precedent concerning legitimate and illegitimate arbitration awards and examined whether the arbitrator's award stemmed from the CBA since the arbitrator cannot issue awards simply based on his or her idea of what constitutes justice.<sup>141</sup> The court found in favor of Brady and vacated the award, and the NFL appealed.<sup>142</sup>

On appeal, the Second Circuit overturned the decision to vacate the arbitration, thereby rendering a verdict in favor of Goodell and the NFL.<sup>143</sup> The court reasoned that Goodell's power was broad enough to authorize punishment for detrimental conduct and that his authority was legitimately bargained for and agreed upon by the parties involved.<sup>144</sup> In its holding, the court awarded Goodell substantial power to determine player punishments, finding that Goodell was entitled to analogize Brady's conduct to the CBA's Steroid Use Policy in determining a parallel punishment.<sup>145</sup> The court explained that nothing in the CBA or precedent demanded that Goodell find a more "persuasive" means of formulating Brady's punishment, and thus Goodell's determination was permissible.<sup>146</sup> This decision affirmed Goodell's broad discretionary authority to create player punishments. The court further affirmed Goodell's power by legitimizing Goodell's decision to punish Brady under article 46 of the CBA.<sup>147</sup>

### 3. Adrian Peterson: Reaffirming Goodell's Power

Commissioner Goodell's authority and the validity of disciplinary action under the 2014 enhancements to the PCP have been challenged in court. When Adrian Peterson was indicted on child abuse charges, the NFL

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140. *Id.* at 462.

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

142. *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 531–32 (2d Cir. 2016).

143. *Id.* at 532.

144. *Id.*

145. *Id.* at 540.

146. *Id.*

147. *Id.* at 539.

put him on an exempt list, meaning that Peterson would continue to be paid, but was prohibited from playing until the case was resolved.<sup>148</sup> At the time, Peterson expected to be reinstated and allowed to play following his no contest plea.<sup>149</sup> Instead, however, Goodell found that Peterson violated the PCP by engaging in “conduct detrimental to the game of professional football,”<sup>150</sup> suspended him for six games and ordered him to pay six games’ worth of fines.<sup>151</sup> As allowed under the PCP and CBA, Peterson appealed his discipline to a League-appointed arbitrator.<sup>152</sup> The NFLPA, representing Peterson, argued that Goodell acted improperly in issuing the six-game suspension.<sup>153</sup> The NFLPA further posited that Peterson’s punishment should have been limited to a two-game suspension under the PCP and that the League was “making up the process and punishment as it goes.”<sup>154</sup> The arbitrator concluded that Peterson’s punishment was “fair and consistent,” noting that Goodell had the requisite discretion under article 46 of the PCP and that the August 2014 communications to the team owners reflected “current thinking on domestic violence.”<sup>155</sup>

Peterson then appealed the arbitrator’s decision to the U.S. District Court for the District of Minnesota, seeking to vacate the arbitration award.<sup>156</sup> The court found in favor of Peterson and the NFLPA, ruling that the 2014 communications created an entirely new PCP and that punishing Peterson under these communications was prohibited by the CBA.<sup>157</sup> After

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148. Ken Belson, *Appeals Court Upholds N.F.L.’s Suspension of Adrian Peterson*, N.Y. TIMES (Aug. 4, 2016), <http://www.nytimes.com/2016/08/05/sports/football/adrian-peterson-appeals-court-upholds-nfl-suspension.html> [<http://archive.is/yoD1c>].

149. *Id.*

150. *NFL Players Ass’n v. NFL*, 831 F.3d 985, 989 (8th Cir. 2016).

151. Belson, *supra* note 148.

152. *NFL Players Ass’n*, 831 F.3d at 989.

153. *Id.* at 990–91.

154. *Id.* at 991.

155. *Id.*

156. *Id.* at 992.

157. *Id.*

the district court handed down its decision, Goodell reinstated Peterson to play.<sup>158</sup> Nonetheless, the League appealed the district court's order to the Eighth Circuit.<sup>159</sup>

The Eighth Circuit overturned the district court's decision.<sup>160</sup> This particular decision reinforced the notion that the Commissioner is not strictly bound to historical precedent in formulating punishments if the PCP does not provide sufficient deterrence against detrimental conduct.<sup>161</sup> Further, the court disagreed with the NFLPA's claim that the arbitration award was "fundamentally unfair," a decision that affirmed the legitimacy of Goodell's authority under article 46.<sup>162</sup> The Eighth Circuit stressed that an arbitration decision that draws its essence from the CBA may not be vacated on the grounds it is unfair simply because the losing party is dissatisfied with the result.<sup>163</sup>

The Eighth Circuit's Adrian Peterson decision affirmed Goodell's power to issue player punishments. This decision, which interpreted article 46 to give Goodell broad authority to punish players, gave Goodell the latitude to begin shaping the League's response to issues of violent, off-field conduct.

#### 4. Ezekiel Elliott's Punishment: Solidifying Goodell's Power

On July 22, 2016, Tiffany Thompson called 9-1-1.<sup>164</sup> In a remarkably calm voice, Thompson stated she was calling to follow up on a previously reported domestic violence issue, and then requested an officer be dispatched

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158. *Id.* at 993.

159. *Id.*

160. *Id.* at 999.

161. *Id.* at 995.

162. *Id.* at 998.

163. *Id.* at 999; *see also* Hoffman v. Cargill, Inc., 236 F.3d 458, 463 (8th Cir. 2001) (holding fundamental unfairness vacates an arbitration award only to "arbitration schemes so deeply flawed as to preclude the possibility of a fair outcome").

164. Diana Moskovitz, *Here Are the Ezekiel Elliott Police Reports and 911 Call*, DEADSPIN (July 22, 2016, 2:06 PM), <https://deadspin.com/here-are-the-ezekiel-elliott-police-reports-and-911-cal-1784138626> [<https://perma.cc/67BA-JZT8>].

to her address.<sup>165</sup> When asked who was involved, Thompson responded: “My boyfriend. And he’s been doing it for the past five days.”<sup>166</sup>

Thompson’s boyfriend was Ezekiel Elliott, the starting running back for the Dallas Cowboys.<sup>167</sup> Prior to Thompson’s July 22 phone call, Thompson called the police on February 12, 2016, to report that her boyfriend had shoved her against a wall and injured her shoulder.<sup>168</sup> Elliott allegedly perpetrated other acts of violence against Thompson.<sup>169</sup> In the fall of 2015 he allegedly injured Thompson’s jaw when he pushed her up against a wall,<sup>170</sup> and on a different day, he pushed her into a bathtub with such force that Thompson sustained a concussion.<sup>171</sup>

The July 2016 incident between Elliott and Thompson differed from those in 2015. Beginning on July 16, Elliott came to stay with Thompson in Columbus, Ohio.<sup>172</sup> That evening, their interactions became violent when Elliott twice attempted to have sexual intercourse with Thompson and she protested.<sup>173</sup> After the second time Thompson refused to have intercourse with Elliott, he threw her against a door and choked her.<sup>174</sup> Thompson texted her aunt that week, calling Elliott “abusive” and claiming to have bruises “all

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165. *Id.*

166. *Id.*

167. *Id.*

168. Sarah Hardy, *A Comprehensive Timeline of Ezekiel Elliott’s Domestic Violence Case*, SBNATION, <https://www.sbnation.com/2017/8/29/16151642/ezekiel-elliott-timeline-domestic-violence-police-report-nfl-suspension-appeal> (last updated Nov. 30, 2017, 5:03 PM) [<https://perma.cc/38H3-UMAR>].

169. Exhibit A-NFLPA-44 at 13, NFL Players Ass’n v. NFL, No. 4:17-cv-00615 (E.D. Tex. Aug. 31, 2017), [https://www.scribd.com/document/357775484/Ezekiel-Elliott-suit?secret\\_password=346bmr6DodAJQPAFQtb&irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad\\_group=66960X1516590X5c0fe12fa44d50757b69c7956ccc718c&keyword=ft750noi&source=impactradius&medium=affiliate#from\\_embed](https://www.scribd.com/document/357775484/Ezekiel-Elliott-suit?secret_password=346bmr6DodAJQPAFQtb&irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad_group=66960X1516590X5c0fe12fa44d50757b69c7956ccc718c&keyword=ft750noi&source=impactradius&medium=affiliate#from_embed) [<https://perma.cc/LJ2Z-JLFQ>].

170. *Id.*

171. *Id.* at 15.

172. *Id.* at 27.

173. *Id.*

174. *Id.*



over [her] body.”<sup>175</sup> Thompson also sent her aunt seven pictures of the bruises on her body.<sup>176</sup> Thompson later told police that on July 18 she and Elliott got into an argument during which he choked her.<sup>177</sup> She also alleged that on the following day, Elliott threw her against a wall in her apartment, told her she was lucky “he has not killed her yet,” and slapped her across the face.<sup>178</sup> Thompson further alleged that on July 21, the night before she called 9-1-1, Elliott yet again turned violent.<sup>179</sup> She claimed he threw her against a wall, grabbed her around the throat, yanked her by the wrist, and dragged her across the floor.<sup>180</sup> The next day, on her twenty-first birthday, Thompson called the police to report the five incidents of domestic violence.<sup>181</sup>

Despite Thompson’s forwarding of a total of twenty photographs of her injuries and bruises to authorities,<sup>182</sup> the Columbus Prosecutor’s office decided not to pursue charges against Elliott.<sup>183</sup> The Columbus City Attorney explained in a press release that charges would not be filed against Elliott due to a lack of sufficient evidence, citing conflicting witness reports and affidavits.<sup>184</sup> But before the Office of the Prosecutor announced an investigation—before they had pictures of Thompson’s injuries or took witness affidavits—the NFL announced that it would conduct an independent investigation into the allegations.<sup>185</sup>

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175. *Id.* at 28.

176. *Id.*

177. *Id.* at 29.

178. Hardy, *supra* note 168.

179. Exhibit A-NFLPA-44, *supra* note 169, at 49.

180. *Id.*

181. *Id.* at 61.

182. Hardy, *supra* note 168.

183. Richard C. Pfeiffer, Jr., *Official Press Release, COLUMBUS OHIO CITY ATTORNEY’S OFFICE* (Sept. 6, 2016), [http://www.columbuscityattorney.org/pdf/press/EZEKIEL% 20ELLIOTT %20PRESS%20RELEASE%209-6-16.pdf](http://www.columbuscityattorney.org/pdf/press/EZEKIEL%20ELLIOTT%20PRESS%20RELEASE%209-6-16.pdf) [<https://perma.cc/9XD4-MUXN>].

184. *Id.*

185. Hardy, *supra* note 168.

The course of the NFL's investigation was rocky. The NFL's investigatory team put together a comprehensive report that compiled witness statements, pictures of injuries, phone records, text records, and doctors' opinions.<sup>186</sup> However, this did not detract from key facts that would call Thompson's story into question. Investigators and doctors found that in some of the photographs, Thompson actually had no discernable bruising and that in others, bruising was consistent with being hit with a "hard object" rather than a fist.<sup>187</sup> There was also an issue with Thompson's testimony since on numerous occasions, Thompson told police and prosecutors conflicting versions of events.<sup>188</sup> Perhaps one of the more damning pieces of evidence to come to light during the NFL investigation was the testimony of one of Thompson's friends who claimed that Elliott did not assault Thompson on July 22 and that Thompson asked her to lie to the police.<sup>189</sup>

Other holes were poked in Thompson's credibility. Three witnesses signed affidavits stating that Thompson claimed she was going to "ruin" Elliott's career.<sup>190</sup> Thompson's own phone records revealed that she and a friend exchanged text messages discussing the possibility of blackmailing Elliott using sex tapes of the couple.<sup>191</sup> Despite the evidence of bruising and abuse that Thompson provided to authorities, the issue remained that her story and credibility were severely damaged throughout the course of the NFL investigation. The NFL read the very evidence—or lack thereof—that caused prosecutors to refrain from filing charges against Elliott in a starkly different light.

On August 11, 2017, the NFL publicly announced that Elliott would receive a six-game suspension<sup>192</sup>—the maximum punishment allocated by

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186. Exhibit A-NFLPA-44, *supra* note 169, at 7.

187. *Id.* at 64.

188. See Jeanna Thomas, *Ezekiel Elliott's Suspension and Appeal, Explained*, SB NATION, <https://www.sbnation.com/2017/8/18/16141526/ezekiel-elliott-suspension-appeal-explained-nfl-domestic-violence> (last updated Dec. 24, 2017, 4:36 PM) [<https://perma.cc/F9CC-YAX3>].

189. *Id.*

190. Hardy, *supra* note 168.

191. *Id.*

192. Thomas, *supra* note 188.

the PCP—as punishment for his conduct.<sup>193</sup> NFL counsel B. Todd Jones sent Elliott a letter detailing the reasoning behind his suspension.<sup>194</sup> According to the letter, Goodell made the decision to suspend Elliott for six games, acting under his authority granted in article 46 of the NFL CBA.<sup>195</sup> Based on the investigatory report collected by the NFL, as well as discussions with independent advisors and the Columbus City prosecutors, Goodell determined that Elliott had abused Thompson during the week of July 16, 2016.<sup>196</sup>

However, though Goodell’s decision to enforce punishment for domestic violence seemed to be in response to a long-unheeded call to action, Goodell’s decision has been shrouded in controversy. Following Elliott’s suspension from the field, the NFLPA filed a suit on his behalf against the NFL.<sup>197</sup> The NFLPA claimed that Elliott’s suspension was unwarranted because Elliott did not receive a “fundamentally fair” arbitration hearing during the investigation.<sup>198</sup> Specifically, the NFLPA claimed that Goodell’s decision to punish Elliott was illegal, because “discipline is only warranted when ‘credible evidence establishes that [the player] engaged in conduct prohibited by the [PCP].’”<sup>199</sup> According to the NFLPA, Goodell did not have sufficient credible evidence to support a finding that Elliott abused Thompson.<sup>200</sup> During the appeal, testimony from Lisa Friel revealed that the

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193. Katie Sharp, *NFL Announces New Domestic Violence Policy*, SBNATION (Aug 28, 2014, 4:06 PM), <http://www.sbnation.com/nfl/2014/8/28/6079465/nfl-announces-new-domestic-violence-policy> [<https://perma.cc/4UU3-ZQM8>].

194. Chris Chavez, *Ezekiel Elliott’s Suspension Letter from the NFL*, SPORTS ILLUSTRATED (Aug. 11, 2017), <https://www.si.com/nfl/2017/08/11/ezekiel-elliott-suspension-letter-nfl> [<http://archive.is/zJBIM>].

195. *Id.*

196. *Id.*

197. *NFL Players Ass’n v. NFL*, No. 4:17-CV-00615, 2017 WL 3940545, at \*2 (E.D. Tex. Sept. 8, 2017).

198. *Id.* at \*1.

199. *Id.*

200. Tom Ley, *Roger Goodell Was Told Lead Investigator Didn’t Think Evidence Was Sufficient to Suspend Ezekiel Elliott*, DEADSPIN (Sept. 1, 2017, 11:48 AM), <https://deadspin.com/roger-goodell-was-told-lead-investigator-didnt-think-ev-1798702514> [<https://perma.cc/8ADD-GEVK>].

NFL's lead investigator, Kia Roberts, did not think that there was enough evidence to prove Elliott abused Thompson and that Goodell was aware of her opinion before choosing to suspend Elliott.<sup>201</sup>

Ultimately, the legal issues were resolved in Goodell's favor. The NFLPA, on Elliott's behalf, filed two preliminary injunctions against the NFL with the intent of blocking Elliott's suspension.<sup>202</sup> Initially, a Texas federal court granted the NFLPA's request for an injunction, but the decision was overruled following the NFL's filing of a motion to stay in New Orleans.<sup>203</sup> The federal appellate court found the Texas court did not have proper jurisdiction to issue an injunction because the NFLPA's filing was premature.<sup>204</sup> On October 16 Elliott filed a motion for a temporary restraining order (TRO) in the Southern District of New York.<sup>205</sup> On November 9 the Second Circuit denied Elliott's motion for a TRO, and Elliott's six-game suspension was officially reinstated, rendering Elliott ineligible to play.<sup>206</sup> Though Elliott had planned to appeal the decision in December 2017, he ultimately dropped the appeal in November 2017 and sat out five games.<sup>207</sup> In announcing his decision to drop the appeals process,

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201. *Id.*

202. See Todd Archer, *Cowboys RB Ezekiel Elliott Suspension Upheld Again After Court Denies Motion*, ESPN (Nov. 9, 2017), [http://www.espn.com/nfl/story/\\_/id/21354070/dallas-cowboys-rb-ezekiel-elliott-suspended-upheld-again-court-denies-motion](http://www.espn.com/nfl/story/_/id/21354070/dallas-cowboys-rb-ezekiel-elliott-suspended-upheld-again-court-denies-motion) [https://perma.cc/C8CX-UTT5].

203. Mark Maske, *Ezekiel Elliott Loses Latest Court Battle, Clearing Way for NFL to Enforce Suspension*, WASH. POST (Oct. 30, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/10/30/ezekiel-elliott-loses-latest-court-battle-clearing-way-for-nfl-to-enforce-suspension/?utm\\_term=.ddc9f5621a23](https://www.washingtonpost.com/news/sports/wp/2017/10/30/ezekiel-elliott-loses-latest-court-battle-clearing-way-for-nfl-to-enforce-suspension/?utm_term=.ddc9f5621a23) [http://archive.is/LbTZz].

204. *Id.* (“[T]he Court concludes that, on this record, the NFLPA has failed to demonstrate a substantial question warranting the extraordinary remedy of injunctive relief or a balance of hardships that decidedly weighs in its favor.”).

205. Kate Hairopoulos, *Ezekiel Elliott Timeline: The Suspension, the Appeal and the Cowboys Running Back's Return*, SPORTSDAY, <https://sportsday.dallasnews.com/dallas-cowboys/cowboys/2017/11/09/ezekiel-elliott-timeline-suspension-appeal-cowboys-rb-stands-now> (last updated Dec. 30, 2017) [https://perma.cc/3FFH-QFA3].

206. Archer, *supra* note 202.

207. *Ezekiel Elliott Drops Appeal, Accepting Six-Game Suspension*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/sports/football/ezekiel-elliott-suspended.html> [http://archive.is/nnURb].

his agents noted that Elliott's decision was "in no way an admission of wrongdoing."<sup>208</sup>

The ultimate decision to uphold Elliott's punishment—as well as Elliott's decision not to appeal—reaffirmed Goodell's power, the matter highlighted Goodell's high-handed approach. Allegations persist that if Goodell had not willfully ignored the dearth of evidence, his conclusion would have been different.<sup>209</sup> Goodell, while taking a more progressive approach to the NFL's issue with domestic violence, dealt a potential blow to the League, players, and victims of domestic violence with his decision to suspend Elliott. Goodell sentenced Elliott to a maximum punishment for an incident about which there was no confession, as in the Adrian Peterson case, and no evidence that Elliott was actually the person who hit Thompson, such as the videotapes that showed Ray Rice assaulting Palmer.

The League's handling of Elliott's case shows that Goodell may not have provided a fair hearing and may have ignored pertinent concerns relating to Elliott's alleged innocence. Responding to public outcry over the way the NFL handled past domestic violence issues, Goodell may have acted in an overzealous fashion. Goodell likely alienated Elliott, his sympathizers, and Dallas Cowboys' owner, Jerry Jones.<sup>210</sup> By cutting corners in the NFL's justice system, Goodell risks similarly alienating players and management alike.

Perhaps more troubling is the fact that future victims of domestic violence committed by NFL players may bear the ultimate burden of Goodell's rush to judgment. If Thompson lied about being abused by Elliott and if Elliott was punished on the basis of such false evidence, Goodell would undoubtedly face intense public backlash. Would a woman's word ever be viewed as truthful again? Would all women who accuse NFL players of domestic violence be perceived as doing it to exploit a player? Would players be able to use Elliott's erroneous punishment as a shield to deflect punishments for their own behavior? If Goodell denied Elliott a fair hearing on the disputed issues, and it was revealed that Thompson's stories were falsified and that Elliott was punished as a result, Elliott would be the victim.

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208. *Id.*

209. *See Ley, supra* note 200.

210. *NFL Players' Union Sues Over Ezekiel Elliot's 6-Game Suspension in Domestic Violence Case*, FOX NEWS (Sept. 1, 2017), <http://www.foxnews.com/sports/2017/09/01/nfl-players-union-sues-over-ezekiel-elliotts-6-game-suspension-in-domestic-violence-case.html> [<http://archive.is/vMuxB>].

Goodell would be viewed as the arbiter of guilt upon an innocent player rather than a champion for domestic abuse victims and survivors. Fortunately, there are progressive, legal, and comprehensive solutions to the NFL's domestic violence problem that Roger Goodell and the League can begin to implement. These are discussed in the next Part.

#### IV. GOODELL'S POWER: A CHANNEL OF JUSTICE OUTSIDE THE CRIMINAL LAW SYSTEM

##### A. *NFL Players and Privilege: The Failures of the Criminal Justice System*

Based on the varying legal precedent explained above, Commissioner Goodell has established his power to create player punishments for violations of the PCP. As discussed, following the 2014 additions to the PCP, Goodell has taken a strong stance against domestic violence and other violent crimes committed by NFL players.<sup>211</sup> Although Goodell's popularity among players may have decreased as a result of his increased power and harsher punishments, this newfound power can serve as a means of penalizing players who might otherwise avoid punishment under the criminal justice system.<sup>212</sup>

Some research suggests that the problem of violent crime amongst NFL players may not change, but a stricter enforcement of the PCP may result in more player punishments.<sup>213</sup> A 2015 study published in the *Journal of Criminal Justice* found that since 2000, NFL players were often arrested for violent crimes at rates well above the national average.<sup>214</sup> The study, which defined violent crime as murder, manslaughter, aggravated assault, rape, battery, domestic violence, and child abuse, found that the total measure of NFL players arrested for violent crime between 2000 and 2013 was higher

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211. Sean Wagner-McGough, *Ryan Clark: Players 'Develop a Hate' for Roger Goodell, NFL Execs*, CBS SPORTS (Mar. 21, 2016), <http://www.cbssports.com/nfl/news/ryan-clark-players-develop-a-hate-for-roger-goodell-nfl-execs/> [<http://archive.is/MbCcu>].

212. *Id.*

213. Maxwell Strachan, *Why Aren't We Talking About What This Study Discovered About NFL Violence?*, HUFFINGTON POST (Sept. 1, 2015, 11:28 AM), [https://www.huffingtonpost.com/entry/nfl-violence-arrest-rate\\_us\\_55df5d9ee4b0e7117ba9336f](https://www.huffingtonpost.com/entry/nfl-violence-arrest-rate_us_55df5d9ee4b0e7117ba9336f) [<https://perma.cc/H5BH-58SZ>].

214. *Id.*

than the arrest rates for twenty- and thirty-something year old men as a whole in the entire twenty-first century.<sup>215</sup>

Some scholars have suggested that the NFL attracts those predisposed to violence because participation in contact sports fosters an environment of violence, attracting “hard-hitting” players who carry violence and aggression off the field.<sup>216</sup> Further studies supported the notion that NFL players engage in a cycle of repeat offenses.<sup>217</sup> However, overall, studies have been inconclusive as to whether the nature of the NFL, or football in general, encourages or makes it more likely that NFL players will perpetuate violence against women.<sup>218</sup>

Regardless, it remains undisputed that violent crime, including domestic violence, remains a prevalent issue for players. A particularly salient issue is whether status as an NFL player makes it less likely that players will be held accountable for their actions.<sup>219</sup> Players might escape accountability due to the “privileged athlete hypothesis,” which proposes that professional sports players are conditioned to think of themselves as special—adored by fans and the public.<sup>220</sup> This notion becomes distorted once players start to get into legal trouble during the course of their college careers since troubled players rely on coaches, athletic departments, and the police to help excuse their conduct.<sup>221</sup> Once the players reach the professional level, they have become “accustomed to getting away with behavior for which most people are held accountable.”<sup>222</sup>

Overall, professional athletes are less likely to be convicted of violent crimes than non-athletes.<sup>223</sup> For example, though Greg Hardy, “a star

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215. *Id.*

216. Jerri Kay-Phillips, *Unnecessary Roughness: The NFL's History of Domestic Violence and the Need for Immediate Change*, 5 BERKELEY J. ENT. & SPORTS L. 65, 78 (2016).

217. *Id.* at 79.

218. *Id.*

219. *Id.*

220. *Id.* at 80.

221. *Id.*

222. *Id.*

223. *Id.* at 81.

defensive end then with the NFL's Carolina Panthers," was arrested in 2015 for the assault of his former girlfriend, Nicole Holder, he never faced prosecution.<sup>224</sup> In 2014, Holder was stopped by police in Charlotte, North Carolina.<sup>225</sup> Holder explained to officers, through tears, that Hardy had thrown her against a bathtub wall, tossed her onto a sofa that was covered in assault rifles, and then proceeded to choke her to the point where she believed he would kill her.<sup>226</sup> Despite evidence supporting Holder's claims, including police reports, interview transcripts, and a dozen photographs of bruises that covered almost all of Holder's body, the charges against Hardy were dismissed and expunged.<sup>227</sup> Hardy went on to sign with the Dallas Cowboys, and the team's owner, Jerry Jones, called him a "real leader" who has the respect of all of his teammates.<sup>228</sup> Hardy's case is not unique: O.J. Simpson never served jail time for beating Nicole Brown,<sup>229</sup> Ray Rice escaped jail time for assaulting his fiancée,<sup>230</sup> and Adrian Peterson never served time for child abuse.<sup>231</sup>

The problem extends beyond a failure to prosecute, with evidence of deliberate police interference in investigations involving players.<sup>232</sup> In 2010,

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224. Diana Moskovitz, *This Is Why NFL Star Greg Hardy Was Arrested for Assaulting His Ex-Girlfriend*, DEADSPIN (Nov. 6, 2015, 12:57 PM), <http://deadspin.com/this-is-why-nfl-star-greg-hardy-was-arrested-for-assaul-1739117634> [<https://perma.cc/E9QX-LAFT>].

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. Josh Meyer, *Police Records Detail 1989 Beating That Led to Charge*, L.A. TIMES (June 17, 1994), [http://articles.latimes.com/1994-06-17/news/mn-5290\\_1\\_jail-time](http://articles.latimes.com/1994-06-17/news/mn-5290_1_jail-time) [<https://perma.cc/SN8D-22K3>].

230. *See generally* Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBNATION (Nov. 28, 2014, 2:08 PM), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens> [<https://perma.cc/XE9M-7XNS>] (indicating that a two-game suspension was the only punishment Rice received).

231. Eric Prisbell and Brent Schrottenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, USA TODAY (Nov. 4, 2014, 3:09 PM), <http://www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197/> [[perma.cc/G9NZ-YNL6](https://perma.cc/G9NZ-YNL6)].

232. *See* Andrew Sharp, *Ben Roethlisberger, Sexual Assault, and the Mixed Messages of Super Bowl XLV*, SBNATION (Feb. 4, 2011, 11:27 AM), <http://www.sbnation.com/2011-super->



a woman accused Pittsburgh Steelers Quarterback Ben Roethlisberger of raping her in a nightclub bathroom in Milledgeville, Georgia.<sup>233</sup> Allegedly, the officer who wrote the criminal report called the accuser “a drunken bitch,” and further stated “[t]his pisses me off, that women can do this.”<sup>234</sup> During the course of the police investigation, surveillance videos of the club that evening were taped over and lost after the local police viewed the footage.<sup>235</sup> Further, despite the presence of male DNA found when conducting a rape kit for Roethlisberger’s accuser, investigators withdrew their request for a sample of Roethlisberger’s DNA.<sup>236</sup> And while Roethlisberger had yet to be proven guilty in a criminal court, the 2010 rape allegation came on the heels of a 2009 civil suit filed by a woman who claimed Roethlisberger raped her in a hotel room in Nevada.<sup>237</sup> In 2010, in the same month Roethlisberger allegedly raped the woman in a club bathroom, another Milledgeville resident claimed Roethlisberger forcefully put his hand up her skirt.<sup>238</sup> The two incidents in Milledgeville were never prosecuted; the woman who accused Roethlisberger of rape refused to continue her case past the investigatory stage, with her lawyer saying the trial would be intrusive after the already “unnerving” media coverage.<sup>239</sup>

For women who are victims of violent crimes perpetrated by NFL players, prosecution and police investigations seemingly have failed to prove fruitful in the course of punishment. Wives and girlfriends of players have

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owl/2011/2/4/1974253/ben-roethlisberger-sexual-assault-superbowl-xlv  
AQB2-ESHE].

[<https://perma.cc/>

233. *Id.*

234. *Id.*

235. *Roethlisberger Video No Longer Exists*, ESPN (Mar. 25, 2010), <http://www.espn.com/nfl/news/story?id=5026596> [<https://perma.cc/2M6A-Z4EK>].

236. *Id.*

237. *Ben Roethlisberger, Quarterback, Twice Accused of Sexual Assault*, BROADLY. (Dec. 8, 2015, 8:00 PM), [https://broadly.vice.com/en\\_us/article/ben-roethlisberger-quarterback-twice-accused-of-sexual-assault](https://broadly.vice.com/en_us/article/ben-roethlisberger-quarterback-twice-accused-of-sexual-assault) [<http://archive.is/IGIW2>].

238. Sharp, *supra* note 232.

239. *Id.*

expressed, often indirectly, that the “privileged athlete hypothesis” is true.<sup>240</sup> Nicole Holder, when asked by police why she was crying, replied: “[i]t doesn’t matter. . . . Nothing is going to happen to him anyways.”<sup>241</sup> Holder’s sentiment echoed Nicole Brown’s sentiment in 1989, when she told police: “You never do anything about him. You talk to him and leave.”<sup>242</sup> Dewan Smith-Williams, who was previously married to a NFL player, has said that women eventually believe there is nothing that can fix the cycle of domestic violence, and instead begin to focus on how to live with it.<sup>243</sup> Female accusers also face widespread public criticism and victim-shaming for reporting issues of rape and domestic violence. Because the alleged perpetrators are NFL players, the platform on which to criticize accusers is larger and more public than it would be for offenses involving private citizens.<sup>244</sup> While the criminal justice system may fail to provide victims of violent crime with legal remedies, Goodell’s power may nonetheless serve as a channel to achieve justice.

*B. Proposal: Goodell Should Exercise Power Proactively but Fairly*

It has been approximately three years since the NFL introduced its latest PCP. Under the 2014 guidelines, Goodell increased the length of punishments for players as well as the fines they face for violent offenses. These changes are meaningful because they force players to face consequences: although they may escape punishment under the legal system, offenders in the League may lose their livelihood. Although Goodell instituted these measures to crack down on player misconduct, opportunities for Goodell to proactively, rather than reactively, address the NFL’s violence problems still exist. Goodell has the power to create deterrents to violence that can work to educate players, rather than punishing them. Goodell also has the power to reverse the culture of toxic masculinity within the League

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240. See Kay-Phillips, *supra* note 216, at 81.

241. Moskovitz, *supra* note 224.

242. Meyer, *supra* note 229.

243. Kay-Phillips, *supra* note 216, at 81.

244. See A.J. Perez, *NFL, NFLPA Clash over Alleged Reports of Blaming Alleged Victim in Ezekiel Elliott Case*, USA TODAY (Aug. 16, 2017, 1:37 PM), <https://www.usatoday.com/story/sports/nfl/cowboys/2017/08/16/ezekiel-elliott-suspension-appeal-nflpa-dallas-cowboys/572969001/> [https://perma.cc/JH8T-NWUY].

that has fostered player privilege. There are three possible solutions Goodell can utilize to achieve this.

The first solution is simple: continue to enforce the player punishments and fines under the 2014 PCP. Though punishing a player's conduct may seem reactive rather than proactive, active penalization can serve as a deterrent for other players. Players may realize that they will be subject to suspensions or fines if they witness other players being punished for misconduct. Lisa Friel, "the NFL's special counsel for investigations," has spoken out about the construction of the 2014 PCP, noting the strength of the message it sends and its rehabilitative consequences.<sup>245</sup> Friel notes that though there is always the threat of a lifetime ban from the League, the possibility of an appeal after a one-year ban offers a "carrot" that can be used to encourage players to rehabilitate their behavior.<sup>246</sup>

The second solution is to create comprehensive, continual education programs. The NFL began a domestic violence training program in 2015 that required all League employees and players to attend a one-hour session.<sup>247</sup> However, players with scheduling conflicts were allowed to attend the session via webinar, indicating a laxity in the League's attendance policy.<sup>248</sup> The training program, created by the League's VP of Social Responsibility, combined the issues of domestic violence, child abuse, and sexual assault into one session.<sup>249</sup> In response to the training, players voiced their opinions that the program just did not work.<sup>250</sup> Players felt as if they were being treated as perpetrators prematurely, and one stated that he left the

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245. Justin Block, *Next Time Greg Hardy Abuses Women, He's Out of the NFL. Who Does That Help?*, HUFFINGTON POST (Oct. 10, 2015, 4:09 PM), [https://www.huffingtonpost.com/entry/lifetime-ban-domestic-violence-football\\_us\\_560dac7de4b0af3706e02f5c](https://www.huffingtonpost.com/entry/lifetime-ban-domestic-violence-football_us_560dac7de4b0af3706e02f5c) [https://perma.cc/3GYD-R88R].

246. *Id.*

247. Lindsay H. Jones, *NFL Begins New Phase of Domestic Violence Education as Training Camps Open*, USA TODAY (July 27, 2015, 5:20 PM), <https://www.usatoday.com/story/sports/nfl/2015/07/27/domestic-violence-training-education-drunk-driving-intervention/30752175/> [perma.cc/NX8F-5UTN].

248. Sarah Kogod, *Players Don't Think the NFL's Domestic Violence Training Is Working*, SBATION, <https://www.sbnation.com/nfl/2015/5/6/8209087/nfl-domestic-violence-training-presentation-nflpa> (last updated May 6, 2015, 12:11 PM) [https://perma.cc/X3FS-VDAE].

249. *Id.*

250. *Id.*

seminar feeling guilty, despite having done nothing wrong.<sup>251</sup> Consequently, treating innocent players as perpetrators from the start of educational training will serve only to alienate them, and will make them view the training as an annoyance rather than as a useful tool. Additionally, it seems unlikely that a single one-hour educational session that combines a variety of such volatile issues will foster a lasting effect on players' understanding of the issues.

Ideally, a re-tooled education program would include the following: (1) the division of domestic violence and sexual assault education training into two separate programs; (2) the education sessions would last longer than one hour; (3) in-person attendance would be compulsory; and (4) the training would take place both before training camps begin and at the end of the season. Additionally, the program's presentation should be reconfigured. The education program would be more effective if the League hired speakers the players could relate to, such as players who have admitted to suffering from "privileged athlete" syndrome and abusing their partners. For instance, the League could hire Vance Johnson, a former Denver Broncos player who admitted to abusing his ex-wife.<sup>252</sup> Since 1996, Johnson has spoken out about domestic violence prevention.<sup>253</sup> By hiring a former NFL player to educate players on domestic violence, players may find the program more effective because they can relate to the environment and mindset in which players like Johnson committed abusive acts.

The third and final possible solution would be to write punishment for violent crimes into the CBA and to consider delegating Goodell's power to oversee League disputes to an independent arbitrator. In his capacity as arbitrator, overseeing player disputes with the League, Goodell should endeavor to strike a balance between the competing interests at the center of arbitration proceedings—especially since his decisions as an arbitrator can be overturned upon judicial review. Though the interest in protecting victims is strong, Goodell should proactively defend arbitration decisions by giving players a fair hearing. Ezekiel Elliott and the NFLPA highlighted this in Elliott's 2017 case, claiming that Goodell did not allow Elliott access to testimony against him, which rendered him unable to deflect or counter

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251. *Id.*

252. OWN, *Vance Johnson Reflects on His Abusive Past*, YOUTUBE (Oct. 11, 2011), [https://www.youtube.com/watch?v=D-kei\\_tuDqs](https://www.youtube.com/watch?v=D-kei_tuDqs) [<http://archive.is/kwNKG>].

253. *Id.*

arguments and accusations.<sup>254</sup> Judge Crotty of the Southern District noted that Elliott was “deprived of opportunities to explore pertinent and material evidence.”<sup>255</sup> These issues, which seem to deprive players of fair investigations, hearings, and arbitration proceedings, render Goodell’s decisions vulnerable to legal contestation, since arbitration proceedings may be overturned where there is a “fundamental unfairness.”<sup>256</sup>

Though the NFL does not function as a civil or criminal court, the League’s actions arguably deprive players of due process, since punishments will deprive players of a property interest—their salaries—and their opportunity to be heard will be impinged upon by a deprivation of access to information and evidence. In these situations, players and the NFLPA could attempt to vacate arbitration proceedings on the grounds that the lack of due process provided by the League rendered the proceedings fundamentally unfair. Although the arbitration process and Goodell’s powers are determined through the collective bargaining process, arbitration decisions are still vulnerable to judicial intervention.<sup>257</sup> Due to the construction of article 46, courts have largely upheld Goodell’s decisions, but there could come a time when a judge does invalidate a decision due to fundamental unfairness; thus, posing a threat to Goodell’s decision to punish.

As such, the League could opt to write punishment for violent crimes into the CBA. Practically speaking, this step could not be accomplished until 2020 or 2021, when negotiations for the League’s new CBA will take place.<sup>258</sup> To create such a provision, the NFL and the NFLPA would first need to agree on what constitutes a violent crime—if domestic violence and sexual assault would fall under the same umbrella—and how these crimes should be punished. Writing punishments into the CBA could eliminate disputes over the PCP since the NFLPA would have a hand in deciding what

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254. See Sally Jenkins, *Ezekiel Elliott Case is a Legal Morass for One Reason: Roger Goodell*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/sports/ezekiel-elliott-case-is-a-legal-morass-for-one-reason-roger-goodell/2017/10/18/3733bdac-b447-11e7-be94-fabb0f1e9ffb\\_story.html?utm\\_term=.c951ab68701b](https://www.washingtonpost.com/sports/ezekiel-elliott-case-is-a-legal-morass-for-one-reason-roger-goodell/2017/10/18/3733bdac-b447-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.c951ab68701b) [<https://perma.cc/5ZNA-NJGA>].

255. *Id.*

256. *Id.*

257. *See id.*

258. Jane McManus, *How the NFL Can Tackle Domestic Violence*, ESPN (Aug. 6, 2014), <http://www.espn.com/espnw/news-commentary/article/11306949/how-why-domestic-violence-added-nfl-cba> [<https://perma.cc/9E22-HPTB>].

punishments are acceptable as well as how disputes should be handled or arbitrated. Allowing the players' union to represent players in negotiations may quell concerns that Goodell wields too much power and helps ensure that players are not alienated by NFL policies.

Conversely, players may not care about outlining punishments in the CBA or may actively oppose this solution, and this is where Goodell's power comes into play. Since Goodell wields so much power, he can use his power as a bargaining chip. As ESPN columnist Jane McManus notes, Goodell has a compelling reason to take a proactive stance on domestic violence issues since public opinion of both Goodell and the League plummeted in the wake of Ray Rice's suspension.<sup>259</sup> This could mean loss of viewers and sponsors. Acting proactively, Goodell could propose that in exchange for writing violent conduct policies into the CBA, he would appoint an independent arbitrator to oversee League disputes. Goodell could also use his leverage to act on issues the League considers important, such as Human Growth Hormone (HGH) testing.<sup>260</sup> Ideally, Goodell could insist for both HGH testing and the writing of violent crime policies into the CBA in exchange for forfeiting the ability to appoint League arbitrators.

However, the question would remain: what would players really get out of this? First, they would get a boost in public approval. But the main appeal for players would be that Goodell, in this scenario, would be delegating some of his own power. Considering that players regard Goodell as a "one man punishment gang," this proposed solution might actually be the most appealing to players since Goodell would no longer have the final say in deciding punishments.<sup>261</sup> As McManus writes, "removing him as the sole arbitrator of the justice league would be catnip to players."<sup>262</sup> The concern may linger that the NFLPA would take this opportunity to make punishments for domestic violence or sexual assault negligible, but in the face of public backlash and losing sponsors, the NFLPA needs as much positive PR as it can get.

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259. *See id.*

260. *Id.* (stating that Goodell "might be able to leverage something the league badly wants—testing for HGH—by packaging that with domestic violence.").

261. *Id.*

262. *Id.*

## V. CONCLUSION

Throughout his tenure as NFL Commissioner, Roger Goodell has established himself as a man to be feared. Players who act unfavorably off the field will still have to answer to Goodell, regardless of what happens to them in the criminal justice system. Goodell's power to punish players has expanded and been upheld by the courts. This Note examines the root of the domestic violence issue in the NFL as well as the history of commissioner power and the legal treatment thereof and concludes with a discussion of how Commissioner Goodell's power can be used to combat the problem of violence in the League. In the face of a criminal justice system that fails to hold players accountable, Roger Goodell may be the only source of justice for victims of violent crimes perpetrated by NFL players. If Goodell wants to protect the integrity of the League, the sport, and its players, he needs to begin taking proactive, affirmative action and come out strong on the issue of off-field violent crime.