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## Throwing a Flag on Roger Goodell's Heavy Hand: A Comparison of NFL and FIFA Discipline and Dispute Resolution Mechanisms

Sean W. Pie

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**THROWING A FLAG ON ROGER  
GOODELL'S HEAVY HAND: A  
COMPARISON OF NFL AND FIFA  
DISCIPLINE AND DISPUTE  
RESOLUTION MECHANISMS**

*Sean W. Pié\**

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## INTRODUCTION

As the world becomes a more and more contentious place, people need outlets to get away from reality. In 2012, 61 percent of Americans turned to sports as their outlet.<sup>1</sup> While the National Football League (NFL) is king in America, with over \$13 billion of revenue from 2016-2017,<sup>2</sup> the public's fascination and obsession with sports is not limited to the United States. The international community has an even greater appetite for the world's most popular sport, soccer; 3.2 billion people tuned into the 2014 FIFA World Cup, including 1 billion watching Germany defeat Argentina in the final.<sup>3</sup>

As sports become more and more popular, the business behind it continues to grow. In 2016, the average NFL franchise value climbed to \$2.34 billion,<sup>4</sup> with the Los Angeles Rams' value doubling to \$2.9 billion after their relocation from St. Louis.<sup>5</sup> NFL teams are not the only franchises flush with cash, though. Following a television contract extension with ESPN and TNT,<sup>6</sup> the NBA brought in \$5.289 billion in basketball related income in 2016.<sup>7</sup> The sports industry is a business, and just like any other business the key to staying in business is to

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<sup>1</sup> Allen Hershkowitz, *The Greening of Professional Sports*, N.Y. TIMES (July 17, 2012), <http://www.nytimes.com/2012/07/18/opinion/the-greening-of-professional-sports.html>.

<sup>2</sup> Jason Belzer, *Thanks To Roger Goodell, NFL Revenues Projected to Surpass \$13 Billion In 2016*, FORBES (Feb. 29, 2016, 11:00 AM), <https://www.forbes.com/sites/jasonbelzer/2016/02/29/thanks-to-roger-goodell-nfl-revenues-projected-to-surpass-13-billion-in-2016/#5ef0a341cb79>.

<sup>3</sup> *2014 FIFA World Cup™ reached 3.2 billion viewers, one billion watched final*, FIFA (Dec. 16, 2015), <http://www.fifa.com/worldcup/news/y=2015/m=12/news=2014-fifa-world-cuptm-reached-3-2-billion-viewers-one-billion-watched--2745519.html>.

<sup>4</sup> Mike Ozanian, *The NFL's Most Valuable Teams 2016*, FORBES (Sept. 14, 2016, 9:45 AM), <https://www.forbes.com/sites/mikeozanian/2016/09/14/the-nfls-most-valuable-teams-2016/#2f6ba4b23068>.

<sup>5</sup> *Id.*

<sup>6</sup> *NBA extends television deals*, ESPN (Feb. 14, 2016), [http://www.espn.com/nba/story/\\_/id/11652297/nba-extends-television-deals-espn-tnt](http://www.espn.com/nba/story/_/id/11652297/nba-extends-television-deals-espn-tnt).

<sup>7</sup> Dan Feldman, *Report: NBA revenue projected to reach \$8 billion next season*, NBC SPORTS (Sept. 16, 2016, 10:05 AM), <http://nba.nbcsports.com/2016/09/16/report-nba-revenue-projected-to-reach-8-billion-next-season/>.

maintain good relations between management, labor and the customer. In sports, this means players and owners work together to put out the best product, and, in turn, hopefully most money. However, as in any other business, players and owners do not always get along.

Strikes and lockouts in American professional sports are not uncommon.<sup>8</sup> As recently as 2011, the NFL owners locked out players for 132 days amidst contentious collective bargaining agreement negotiations.<sup>9</sup> A labor strike or owner lockout is the biggest threat to the NFL's dominant run in American culture, and the current climate suggests there is potential for labor issues down the road. In August of 2017, DeMaurice Smith, executive director of the NFL Players Association, said a work stoppage after the current collective bargaining agreement expires in 2021 is a "virtual certainty."<sup>10</sup> 2021 is relatively far off in the future, and there is certainly time to mend the relationship between the NFL leadership and its players. This relationship is certainly in need of mending at the moment in light of the 2017 season's Ezekiel Elliott saga, which began with a six-game suspension handed down by the NFL on August 11, 2017,<sup>11</sup> and escalated into a full-blown legal battle in a United State District Court.<sup>12</sup> The purpose of this Comment is to compare the dispute resolution mechanisms of European soccer and American football.

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<sup>8</sup> Lockouts are a labor negotiations tactic employed by management or ownership of a business by which the employees are coerced into succumbing to management's wishes by excluding the employees from their workplace until certain terms are agreed upon. See *Lockout*, DICTIONARY.COM, <http://www.dictionary.com/browse/lockout> (last visited Mar. 28, 2019).

<sup>9</sup> *Topics: NFL Lockout*, ESPN (Dec. 5, 2012, 4:08 PM), [http://www.espn.com/nfl/topics/\\_/page/nfl-labor-negotiations](http://www.espn.com/nfl/topics/_/page/nfl-labor-negotiations).

<sup>10</sup> A.J. Perez, *DeMaurice Smith: NFL Lockout or Strike in 2021 is 'virtual certainty'*, USA TODAY (Aug. 17, 2017, 9:29 PM), <https://www.usatoday.com/story/sports/nfl/2017/08/17/demaurice-smith-nfl-lockout-strike-2021-virtual-certainty/578518001/>.

<sup>11</sup> Todd Archer, *Cowboys' Ezekiel Elliott Suspended Six Games for Conduct*, ESPN (Aug. 11, 2017), [http://www.espn.com/nfl/story/\\_/id/20302469/ezekiel-elliott-dallas-cowboys-suspended-six-games](http://www.espn.com/nfl/story/_/id/20302469/ezekiel-elliott-dallas-cowboys-suspended-six-games).

<sup>12</sup> A.J. Perez, *NFL Seeks Dismissal of Ezekiel Elliot's Federal Court Case*, USA TODAY (Sept. 4, 2017, 1:54 AM), <https://www.usatoday.com/story/sports/nfl/cowboys/2017/09/04/ezekiel-elliott-suspension-lawsuit-nfl-seeks-dismissal/631939001/>.

In Europe, athletes are also not immune to disputes with their management. Recently, superstar soccer player Neymar Jr. was bought out of his contract with the Spanish club FC Barcelona by French powerhouse Paris Saint-Germain (PSG) for a record-breaking \$263 million.<sup>13</sup> The move shocked the world, and, more importantly, shocked FC Barcelona; so much so, in fact, that the club filed suit against the twenty-five year-old Brazilian for breach of contract.<sup>14</sup>

Currently, European soccer and the NFL are structured very differently when it comes to handling issues between players and management. European soccer is governed under the leadership of two regulatory bodies, the Fédération Internationale de Football Association (FIFA)<sup>15</sup> and the Union of European Football Associations (UEFA).<sup>16</sup> The NFL, on the other hand is a completely independent entity; it has its own rules, and is not subject to any oversight apart from the thirty-two individuals who own the teams.<sup>17</sup>

This Comment will compare the structures utilized by the NFL and European soccer to settle disputes between athletes and their management. Section I of this comment provides background information on European soccer, specifically Neymar's legal situation. Sections I.A., I.B., and I.C., proceed to outline the current systems in place for European soccer disputes: the FIFA Dispute Resolution Chamber, the Court of Arbitration for Sport, and the FIFA Disciplinary Committee, respectively. Section II of this comment provides background information on the NFL and the issues it is

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<sup>13</sup> Jonathan Wilson, *Neymar's Transfer from Barcelona to PSG Defies Belief on All Levels*, SPORTS ILLUSTRATED (Aug. 3, 2017), <https://www.si.com/soccer/2017/08/03/neymar-transfer-psg-barcelona-world-record-fee>.

<sup>14</sup> Matt Bonesteel, *Barcelona says Neymar Breached his Contract, Demands he Repay Millions in Bonus Money*, WASH. POST (Aug. 22, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/08/22/barcelona-says-neymar-breached-his-contract-demands-he-repay-millions-in-bonus-money/>.

<sup>15</sup> *Governance*, FIFA, <https://www.fifa.com/governance/how-fifa-works/index.html> (last visited Mar. 30, 2019).

<sup>16</sup> *What UEFA Does*, UEFA, <https://www.uefa.com/insideuefa/about-uefa/what-uefa-does/> (last visited Mar. 30, 2019).

<sup>17</sup> *Teams*, NFL, <https://www.nfl.com/teams> (last visited Feb. 7, 2018); insert additional citations

currently facing. Section II.A. explores the procedures in place under the NFL Collective Bargaining Agreement that deal with grievances and punishment. Section II.B. describes the two latest major and most well-known disputes between NFL players and the NFL: “Deflategate” and the Ezekiel Elliott case. Finally, Section III challenges the proposed solution of another comment while also offering another, manageable solution the NFL should undertake.

While the systems in Europe and the NFL are very different and both have their flaws, they have adapted to the unique needs of the sports they govern. Despite fears that the NFL will cease to exist if DeMaurice Smith’s comments come to fruition, the NFL, with some minor tweaking, is in great shape to continue its dominant run in America. This Comment will demonstrate this point, articulate why major reform in American sports aiming to replicate the European model is not needed, and demonstrate that both European soccer and the NFL will only continue to succeed.

## I. EUROPEAN SOCCER BACKGROUND

The transfer window is among the most exciting times for soccer fans. The transfer of players within the transfer window is a system of player movement that is similar to free agency in American sports, but operates in a manner that is unique to international soccer.<sup>18</sup> Like the salary cap that is found in most major American sports,<sup>19</sup> the transfer system was first implemented in the late nineteenth century as a means to prevent the wealthy clubs from using their financial clout to attract all the top players without compensating the former club.<sup>20</sup> The transfer window is the common term for what FIFA defines as a

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<sup>18</sup> See Andi Thomas, *The European Soccer Transfer Market, Explained* (July 28, 2014), <https://www.sbnation.com/soccer/2014/7/28/5923187/transfer-window-soccer-europe-explained>.

<sup>19</sup> Three of the four “major” sports leagues, which include the National Football League, National Basketball League, National Hockey League, and Major League Baseball, employ a salary cap in order to curb spending on free agents and allow teams in smaller markets to compete with wealthier teams. Only Major League Baseball does not employ a salary cap.

<sup>20</sup> See generally James G. Irving, *Red Card: The Battle Over European Football’s Transfer System*, 56 U. MIAMI L. REV. 667 (2002).

registration period.<sup>21</sup> Each year there are two transfer windows, which serve as the exclusive periods for which players may be registered with new clubs.<sup>22</sup> The first transfer window begins sometime after one season ends and closes before the next season begins.<sup>23</sup> This window is not to last more than twelve weeks.<sup>24</sup> The second window occurs during the middle of the season and cannot “exceed four weeks.”<sup>25</sup> This mid-season period is mainly used for technical and tactical adjustments as well as to allow teams to replace injured players.<sup>26</sup>

During the first 2017 window, which lasted from June 1 to September 1, 7,590 transfers across the globe occurred at a combined expense of \$4.71 billion.<sup>27</sup> This was a record-breaking figure that almost amounted to what teams spent in transfer fees in all of 2016.<sup>28</sup> It is this free-wheeling system that led to a dispute between Neymar Jr. and FC Barcelona; the controversial transfer was a consequence of the Spanish club’s assertion that “Neymar was not for sale.”<sup>29</sup> However, Neymar’s contract contained a buy-out clause, enabling him to unilaterally terminate the contract for €222 million (\$263,347,500), a

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<sup>21</sup> See FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS, art. 6 § 1 (2007) [hereinafter FIFA REGULATIONS].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> FIFA COMMENTARY ON THE REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS 22 (2006), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjyq\\_94KrhAhUiVt8KHTsmBKwQFjAAegQIARAC&url=http%3A%2F%2Fwww.thefa.com%2F-%2Fmedia%2Ffiles%2Fthefaportal%2Fgovernance-docs%2Fregistrations%2Fdecember-2015-updates%2Fcommentary-on-the-regulations-for-the-status-and-transfer-of-players.ashx&usq=AOvVaw0dGntpuM0pNcN2A1BuIV4N](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjyq_94KrhAhUiVt8KHTsmBKwQFjAAegQIARAC&url=http%3A%2F%2Fwww.thefa.com%2F-%2Fmedia%2Ffiles%2Fthefaportal%2Fgovernance-docs%2Fregistrations%2Fdecember-2015-updates%2Fcommentary-on-the-regulations-for-the-status-and-transfer-of-players.ashx&usq=AOvVaw0dGntpuM0pNcN2A1BuIV4N) [hereinafter FIFA COMMENTARY].

<sup>27</sup> *Big 5 Report: New Record High in Transfer Fees this Summer*, FIFA (Sept. 13, 2017), <http://www.fifa.com/governance/news/y=2017/m=9/news=big-5-report-new-record-high-in-transfer-fees-this-summer-2907752.html>.

<sup>28</sup> *Id.*

<sup>29</sup> Andy Hunter, Julien Laurens, and Sid Lowe, *Neymar Set to seal World-record Move to PSG Worth £450 in Fees and Wages*, THE GUARDIAN (Aug. 2, 2017, 3:44 PM), <https://www.theguardian.com/football/2017/aug/02/neymar-psg-barcelona-tells-team-mates-leave>.

fee which PSG paid.<sup>30</sup> Neymar has not publicly revealed his reasons for wanting to leave FC Barcelona, a club FiveThirtyEight.com ranks near the top of its “Global Club Soccer Rankings,”<sup>31</sup> although there has been speculation that Neymar wanted an “opportunity to lead the pack.”<sup>32</sup> This was not possible at FC Barcelona due to the presence of Lionel Messi, who signed a new contract in the summer of 2017<sup>33</sup> and is considered one of the top two players in the world.<sup>34</sup>

Buy-out clauses are common in many types of contracts, both in America and abroad, and are especially crucial to the soccer transfer system. As previously discussed, the transfer system was originally implemented to protect smaller clubs.<sup>35</sup> Buy-out clauses add an additional layer of protection. Without contractual buy-outs, teams, especially wealthy teams, would not be able to exert the level of financial influence that is seen during the transfer windows and at the frequency with which they do. This is because, like free agency in American sports, after a player’s contract expires, another team can sign them without paying a transfer fee. The hybrid nature of the European system is a result of the 1995 ruling of the European Court of Justice in a case brought by Dutch player Jean-Marc Bosman.<sup>36</sup> The European Court of Justice held that the transfer system for “out-of-contract” players infringed upon players’ freedom of movement, and “was to immediately cease.”<sup>37</sup>

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<sup>30</sup> Squire Patton Boggs, *The Neymar Transfer: An Analysis of Buy-Out Clauses – Part 1*, SQUIRE PATTON BOGGS (Aug. 3, 2017), <http://www.sports.legal/2017/08/the-neymar-transfer-an-analysis-of-buy-out-clauses-part-1/>.

<sup>31</sup> Jay Boice & Julia Wolfe, *Global Club Soccer Rankings*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/global-club-soccer-rankings/> (last updated Mar. 30, 2019, 5:39 PM).

<sup>32</sup> Tim Vickery, *Neymar: What would Motivate Brazil Forward to Leave Barcelona?*, BBC SPORT (Aug. 2, 2017), [www.bbc.com/sport/football/40767713](http://www.bbc.com/sport/football/40767713).

<sup>33</sup> *Id.*

<sup>34</sup> There is a heated debate amongst soccer fans over whether Messi or Portuguese and Real Madrid star, Cristiano Ronaldo deserves the title of best in the world. *See Messi v. Ronaldo – Goals, Stats for Messi & Cristiano Ronaldo*, MESSIVSRONALDO, [messivsronaldo.net](http://messivsronaldo.net) (last updated Mar. 30, 2019).

<sup>35</sup> *See generally*, Irving, *supra* note 20.

<sup>36</sup> *See id.* at 684–85.

<sup>37</sup> *Id.*



In Spain, buy-out clauses are permissible under Spanish law, as well as under the FIFA Regulations on the Status and Transfer of Players.<sup>38</sup> According to FIFA's "Commentary on the Regulations for the Status and Transfer of Players" (FIFA Commentary), breaches of contract, which Neymar's move would likely amount to, "give rise to compensation."<sup>39</sup> However the team and player contract for the amount a player must pay to unilaterally terminate the contract "without a valid reason."<sup>40</sup> The FIFA Commentary also notes that in certain countries, including Spain, buy-out clauses are mandatory pursuant to sports legislation.<sup>41</sup>

The validity of buy-out clauses in soccer contracts was confirmed by the Court of Arbitration for Sport in *Al Gharafa S.C. & M. Bresciano v. Al Nasr S.C. & FIFA*.<sup>42</sup> The *Al Gharafa* case involved a situation similar to Neymar's.<sup>43</sup> Mark Bresciano was an Australian player who played for Al Nasr S.C. of the United Emirates.<sup>44</sup> Bresciano unilaterally transferred to the Qatari club Al Gharafa S.C. after contract re-negotiations with Al Nasr failed.<sup>45</sup> The year prior, Bresciano had signed a three-year contract with Al Nasr and was in contact with the team's coach regarding training.<sup>46</sup> He nonetheless terminated the contract, prompting action by Al Nasr.<sup>47</sup> The matter was initially decided against Bresciano by FIFA's Dispute Resolution Chamber<sup>48</sup> causing Bresciano to appeal to the Court of Arbitration for Sport (CAS).<sup>49</sup> The CAS acknowledged the FIFA Commentary, and reasoned that the parties (ordinarily, the club) accept in advance that

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<sup>38</sup> FIFA COMMENTARY, *supra* note 26, at 47 n. 76.

<sup>39</sup> *See id.* at 46.

<sup>40</sup> *Id.* at 47.

<sup>41</sup> *Id.* n. 76; Real Decreto 1006/1985 of 26 June (For the Regulation of the Employment of Professional Sportspeople).

<sup>42</sup> *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA)*, Arbitration CAS 2013/A/3411 at 7 [hereinafter *Al Gharafa S.C.*].

<sup>43</sup> *See generally Id.*

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 4–5.

<sup>47</sup> *Id.*

<sup>48</sup> *See infra* Part I.A.

<sup>49</sup> *Id.* at 13.

the contract may be terminated.<sup>50</sup> Thus, such termination can be deemed to be based on the parties' prior consent.<sup>51</sup> The court noted, however, that a buy-out is not created when a term sets out the "consequences 'if' the contract is terminated, or if it refers to 'damages' caused by the player's "cancellation of the contract."<sup>52</sup> In *Al Gharafa S.C.*, unlike in the Neymar situation, Bresciano lost and had to pay damages because the contract spoke of damages in the event that the contract was terminated.<sup>53</sup>

The legality of the buy-out clause Neymar and PSG took advantage of is not the issue, however. In a statement on the club's website, FC Barcelona made public their demand that Neymar return the prepaid consideration for his contract renewal, €8.5 million in damages, and "an additional 10% because of delayed payment."<sup>54</sup> Barcelona also requested the PSG indemnify Neymar should he be unable to pay the demanded fees.<sup>55</sup> A key element of the impending legal battle is the payment of a loyalty bonus to Neymar; in Neymar's countersuit, he is claiming that he is owed a €26 million loyalty bonus stemming from his October 2016 contract.<sup>56</sup> The contract reportedly entitled Neymar to a bonus after July 31, 2017, or "one year into his contract."<sup>57</sup> "[A]lthough the release clause was triggered" on August 3, 2017, Barcelona "claim[s] that he had made the decision to leave before the end of July."<sup>58</sup> The suit will likely depend on the specific language

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<sup>50</sup> *Id.* at 26–27.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1.

<sup>53</sup> *Id.* at 27–28.

<sup>54</sup> *FC Barcelona Statement*, FC BARCELONA (Aug. 22, 2017, 2:58 PM), <https://www.fcbarcelona.com/club/news/2017-2018/fc-barcelona-statement-22-08-2017>.

<sup>55</sup> *Id.*

<sup>56</sup> Lloyd P. Thomas & Simon Grossobel, *The Neymar Transfer Saga Continues*, SQUIRE PATTON BOGGS (Aug. 28, 2017), <https://www.lexology.com/library/detail.aspx?g=a3da9c9d-65f4-44c2-8df9-e071b69881cd> ("It is noteworthy that Barcelona have brought their claim before the Jutjat Social, the Catalanian Labour Tribunal, although the club have passed the claim onto the Spanish Football Federation for referral to FIFA and the French Football Federation.").

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

of the contract and any evidence that Neymar actually decided to end his time with Barcelona before the date the bonus was due.<sup>59</sup>

FC Barcelona brought their claim before the Jutjat Social, a Catalonian Labour Tribunal, despite the fact that the team referred the issue to FIFA.<sup>60</sup> This is unlike the situation in *Al Gharafa*, where Al Nasr brought the claim before FIFA before the case was ultimately decided by the CAS.<sup>61</sup> Usually, disputes arising out of transfers that cross international borders, like the Bresciano and Neymar transfers, are heard by FIFA.<sup>62</sup> The decision to file with the Jutjat Social was a most likely part of the club's litigation strategy, and the policies and procedures of the Jutjat Social are outside the scope of this article. The objective of outlining Neymar's situation is to provide a current example of the types of issues the FIFA system attempts to resolve, rather than analyze the merits of the case.

While the Neymar saga may not end with a ruling from the FIFA Dispute Resolution Chamber or the CAS, the international attention garnered and the timing of the dispute conveniently juxtaposed the legal battle that took place in the United States between the NFL and Ezekiel Elliott.<sup>63</sup> The NFL has deservedly received criticism over how it resolves disputes involving players, especially after the "Deflategate"<sup>64</sup> scandal and the Elliott case. Such criticism has led some to suggest that the NFL should look into adopting

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<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See generally Al Gharafa S.C., supra* note 42.

<sup>62</sup> *See id.*

<sup>63</sup> *See* Around the NFL staff, *Cowboys RB Ezekiel Elliott Suspension Case Timeline*, NFL (Sept. 11, 2017, 9:47 AM), [www.nfl.com/news/story/0ap3000000841151/article/cowboys-rb-ezekiel-elliott-suspension-case-timeline](http://www.nfl.com/news/story/0ap3000000841151/article/cowboys-rb-ezekiel-elliott-suspension-case-timeline).

<sup>64</sup> The legal saga between New England Patriots quarterback Tom Brady and the NFL was dubbed "Deflategate" due to the claim that Brady had intentionally deflated footballs during a playoff game. *See* discussion *infra* Section II.B; *Deflategate Timeline: After 544 Days, Tom Brady Gives in*, ESPN (July 15, 2016), [http://www.espn.com/blog/new-england-patriots/post/\\_/id/4782561/timeline-of-events-for-deflategate-tom-brady](http://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady) [hereinafter *Deflategate Timeline*].

procedures similar to those found in European soccer.<sup>65</sup> Before turning to this argument, outlining how European soccer resolves disputes is important.

#### A. FIFA Dispute Resolution

In 2015, a lengthy investigation by the United States Department of Justice uncovered numerous instances of bribery within FIFA.<sup>66</sup> The investigation primarily focused on the 2010 awarding of the 2018 and 2022 World Cups to Russia and Qatar, respectively, and led to the resignation of FIFA President Sepp Blatter.<sup>67</sup> Despite FIFA's recent reputation, the governing body for international soccer's system for dispute resolution remains credible. Independent of the countries whose teams are members, FIFA makes it its "duty to provide the most stable and sustainable foundations for the game."<sup>68</sup> FIFA was founded in 1904 under Swiss law and is currently located in Zurich, Switzerland.<sup>69</sup> FIFA is run primarily through its Congress.<sup>70</sup> The Congress meets once a year to pass new statutes and to elect FIFA's President and various committee members.<sup>71</sup> Such committees include the Disciplinary Committee and the Appeals Committee. The Disciplinary Committee, in accordance with the FIFA Disciplinary Code can impose sanctions on most parties

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<sup>65</sup> See Trevor E. Brice, *Labor Pains on the Playing Field: Why Taking a Page from Europe's Playbook Could Help the United States*, 20 UCLA ENT. L. REV. 49, 49–54 (2013) (advocating a "two-tiered approach to solving American professional sports' culture of frequent work stoppages" involving the adoption of regulatory boards akin to FIFA and UEFA and legislation modeled after the Railway Labor Act).

<sup>66</sup> See Austin Knoblauch & Barry Stavro, *A Timeline of the FIFA Scandal*, LOS ANGELES TIMES (June 2, 2015, 4:40 PM), <http://www.latimes.com/sports/soccer/la-sp-fifa-scandal-timeline-20150603-story.html>.

<sup>67</sup> See *id.*

<sup>68</sup> *The Reform Process*, FIFA, <http://www.fifa.com/governance/how-fifa-works/the-reform-process.html> (last visited Oct. 12, 2017).

<sup>69</sup> *History of FIFA - Foundation*, FIFA, <https://www.fifa.com/about-fifa/who-we-are/history/index.html> (last visited April 7, 2019).

<sup>70</sup> FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES; STANDING ORDERS OF THE CONGRESS [hereinafter FIFA STATUTES] art. 25 § 2.

<sup>71</sup> *Id.*

involved with international soccer.<sup>72</sup> These parties include teams, players, officials, and agents.<sup>73</sup> However, the Congress and FIFA Council reserve the disciplinary power in the case of the suspension or exclusion of any member.<sup>74</sup> The Disciplinary Committee, per the FIFA Statutes, may pass decisions “only when at least three members are present,” but “[i]n certain cases, the chairperson may rule alone.”<sup>75</sup> When disputes arise between players and their clubs, the dispute is heard by the Dispute Resolution Chamber (DRC).<sup>76</sup> The DRC “provides arbitration and dispute resolution on the basis of equal representation of players and clubs and an independent chairman.”<sup>77</sup> The DRC handles issues such as labor disputes, claims for training compensation, and overdue payables.<sup>78</sup>

The DRC is FIFA’s main dispute resolution body.<sup>79</sup> As such, its decisions are enforceable only through FIFA’s statutes,<sup>80</sup> and are very important in the international soccer community. The members of FIFA must fully comply with DRC decisions.<sup>81</sup> According to the FIFA Regulations on the Status and Transfer of Players (FIFA Regulations), the DRC adjudicates only “in the presence of at least three members,” which includes the DRC chairman or deputy

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<sup>72</sup> *Id.* art. 53 § 2.

<sup>73</sup> *Id.*

<sup>74</sup> *Disciplinary Committee*, FIFA, <http://www.fifa.com/about-fifa/committees/committee=1882042/index.html> (last visited Oct. 12, 2017).

<sup>75</sup> FIFA STATUTES, *supra* note 70, art. 53 § 1.

<sup>76</sup> *Players’ Status and Transfers: Dispute Resolution Chamber*, FIFA, <http://www.fifa.com/governance/dispute-resolution-system/index.html> (last visited Jan. 10, 2018).

<sup>77</sup> *Id.*

<sup>78</sup> *Decisions of Dispute Resolution Chamber*, FIFA, <https://www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html> (last visited Mar. 31, 2019).

<sup>79</sup> *See Players’ Status and Transfers: Dispute Resolution Chamber*, FIFA, <http://www.fifa.com/governance/dispute-resolution-system/index.html> (last visited April 9, 2019).

<sup>80</sup> *See generally*, FIFA STATUTES, *supra* note 70, art. 53.

<sup>81</sup> FIFA STATUTES, *supra* note 70, art. 14, § 1(a). *See* Ian Blackshaw, *ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center*, 24 MARQ. SPORTS L. REV. 1, 34 (2013) (outlining alternative dispute resolution in sports, including the FIFA Dispute Resolution Chamber and Court of Arbitration for Sport).

chairman.<sup>82</sup> The DRC consists of twenty-six members, equally representing the players and the clubs.<sup>83</sup> Player representatives are nominated by FIFPro, the international players union, and the club representatives are nominated by the various member leagues via the member clubs.<sup>84</sup> In a certain cases,<sup>85</sup> however, a DRC judge, designated by the members of the DRC, may settle the case because the disputes are clear-cut with unquestionable facts.<sup>86</sup> Any cases which concern “fundamental issues” are to be referred to the chamber.<sup>87</sup> Conveniently, the FIFA Commentary outlines what qualifies as a fundamental issue that must be submitted to the DRC panel; fundamental issues include situations “not covered by existing jurisprudence and for which discussions within the chamber are essential,” situations “in which existing jurisprudence needs to be extended or amended,” and situations “that have a major impact on the daily application and interpretation of the Regulations.”<sup>88</sup> Procedurally, the DRC is governed by the FIFA Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (Procedural Rules).<sup>89</sup>

Importantly, the Procedural Rules state that members of the DRC may not participate in the adjudication of cases in which they have a personal interest.<sup>90</sup> This provision is especially important in light of FIFA’s recent reputation and serves to add legitimacy into DRC proceedings. If a member’s impartiality is called into “legitimate doubt” by a party, the party can challenge and submit evidence of

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<sup>82</sup> FIFA REGULATIONS, *supra* note 21, art. 24 § 2.

<sup>83</sup> FIFA, RULES GOVERNING THE PROCEDURES OF THE PLAYERS’ STATUS COMMITTEE AND THE DISPUTE RESOLUTION CHAMBER art. 4 (2014) [hereinafter PROCEDURAL RULES].

<sup>84</sup> FIFA COMMENTARY, *supra* note 26, at 71–73.

<sup>85</sup> Article 24 of the FIFA Regulations lists three scenarios in which the DRC judge may adjudicate: 1) “all disputes up to a litigious value of CHF 100,000” (Swiss Francs); 2) disputes relating to the calculation of “training compensation”; and 3) disputes relating to the calculation of “solidarity contributions.” FIFA REGULATIONS, *supra* note 21, art. 24, § 2.

<sup>86</sup> *Id.* See FIFA COMMENTARY, *supra* note 26, at 73.

<sup>87</sup> FIFA COMMENTARY, *supra* note 26, at 73.

<sup>88</sup> *Id.*

<sup>89</sup> *See generally*, PROCEDURAL RULES, *supra* note 83.

<sup>90</sup> *See id.*, art. 7 § 1.

impartiality within five days.<sup>91</sup> The DRC will first determine whether it is the proper body to hear the case, and will then determine which of the FIFA statutes apply.<sup>92</sup> In a recent DRC decision, the Committee resolved a contract dispute regarding the unilateral termination in favor of the claimant player.<sup>93</sup> A reading of a DRC decision will reveal that the body operates very transparently, including making note of which of its Procedural Rules it relied on at each stage of its determination.<sup>94</sup> Rulings are required within thirty days if made by the DRC judge, or within sixty days if made by the chamber.<sup>95</sup>

## B. CAS Arbitration

The CAS, just like FIFA, is headquartered in Switzerland.<sup>96</sup> The CAS is recognized by the FIFA Statutes as the body to which parties may appeal final decisions passed by FIFA's legal bodies.<sup>97</sup> However, these appeals may only take place "after all other internal channels have been exhausted"<sup>98</sup> and only in certain cases.<sup>99</sup> Further, in order to ensure a consistent body of precedent, FIFA generally denies parties the ability to seek recourse in ordinary courts of law.<sup>100</sup> The CAS was originally created to handle international sports disputes

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<sup>91</sup> *See id.* art. 7 § 2.

<sup>92</sup> *Decision of the Dispute Resolution Chamber*, FIFA 4 (May 18, 2017), <http://resources.fifa.com/mm/document/affederation/administration/02/90/72/72/05170017-e.pdf>.

<sup>93</sup> *See generally id.*

<sup>94</sup> *See generally id.*

<sup>95</sup> FIFA REGULATIONS, *supra* note 21, art. 25 § 1.

<sup>96</sup> *See Addresses and contacts*, COURT OF ARBITRATION FOR SPORT, [www.tas-cas.org/en/general-information/addresses-and-contacts.html](http://www.tas-cas.org/en/general-information/addresses-and-contacts.html) (last visited Jan. 10, 2018).

<sup>97</sup> FIFA STATUTES, *supra* note 70, art. 58 § 2.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* art. 58 § 3 (barring appeals to the CAS in cases arising under the following situations: 1) "violations of the Laws of the Game"; 2) suspensions of up to four matches or up to three months (with the exception of doping decisions); 3) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an association or confederation may be made").

<sup>100</sup> *See id.* art. 59 § 2.

in a “specialized forum,” allowing for efficient adjudication of disputes.<sup>101</sup>

The CAS is governed by its Code of Sports-Related Arbitration, which outlines four separate procedures, including Ordinary Arbitration, Appeal Arbitration, the Ad hoc Division, and Mediation.<sup>102</sup> The Appeal Arbitration division of the CAS is most relevant to European soccer, as it is the place where parties may appeal DRC rulings.<sup>103</sup> Appeals from bodies like the DRC account for around 90% of the CAS caseload, 45% of which come specifically from some body of FIFA.<sup>104</sup> All appeals are heard by a panel of one or three arbitrators.<sup>105</sup> The CAS has become the prominent international sports tribunal, and has even been credited with developing *lex sportiva*, the principles of international law.<sup>106</sup> However, as a court of arbitration, the CAS is not bound by preceding decisions.<sup>107</sup> Instead, the CAS applies *lex sportiva* to each case before it.<sup>108</sup>

CAS panels, like the DRC, features either one or three arbitrators selected from a “geographically representative” list of 264 CAS members.<sup>109</sup> The number of arbitrators can be decided via an arbitration agreement between the parties, or, absent prior agreement, by the President of the Appeal Arbitration Division, “taking into

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<sup>101</sup> See Louise Reilly, Symposium, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 63 (2012).

<sup>102</sup> *Id.* at 64.

<sup>103</sup> See FIFA STATUTES, *supra* note 70, art. 57.

<sup>104</sup> Reilly, *supra* note 101, at 65, 69.

<sup>105</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION, art. R40.1, [http://www.tas-cas.org/fileadmin/user\\_upload/Code\\_2017\\_FINAL\\_en\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL_en_.pdf) (last visited Oct. 13, 2017) [hereinafter CAS CODE].

<sup>106</sup> See Jennifer Bondulich, *Rescuing the “Supreme Court” of Sports: Reforming the Court of Arbitration for Sport Arbitration Member Selection Procedures*, 42 BROOKLYN J. INT’L L. 275, 279 (2016) (exploring the objectivity of the CAS and arguing that CAS awards should be given precedential value in arbitration decisions so as to compel arbitrators to rule more consistently and fairly).

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See* Reilly, *supra* note 101, at 65.



account the circumstances of the case.”<sup>110</sup> The DRC members are appointed based on the nomination of the clubs and players.<sup>111</sup> In contrast, “CAS members are required to have full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.”<sup>112</sup> Like DRC panelists, CAS arbitrators are to “remain impartial and independent” and must “disclose any circumstances which may affect her/his” ability to fairly hear a case.<sup>113</sup> It is also significant that the parties have the ability to agree on the arbitrators who will hear the case.<sup>114</sup> Per the CAS Code of Sports-Related Arbitration (CAS Code), if one arbitrator is to hear the case, the parties have fifteen days to agree to a selection, otherwise the President of the Division goes through with the appointment.<sup>115</sup> If the panel is to consist of three arbitrators, each party selects an arbitrator, and together, those two individuals select the third panelist, the President of the Panel.<sup>116</sup>

Much like how the DRC applies a consistent set of “law” to its proceedings, regardless of where the actual dispute is heard, the CAS proceedings are governed by the law agreed upon by the parties.<sup>117</sup> In the absence of a choice of law by the parties, Chapter 12 of the Swiss Act on Private International Law Act applies to the proceedings.<sup>118</sup> However, this is only the case if one of the parties was not domiciled, nor had a “habitual residence in Switzerland.”<sup>119</sup> When it comes to the merits of the case, a CAS panel “has full power to review the facts and the law” and “may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous

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<sup>110</sup> CAS CODE, *supra* note 105, art. R40.1.

<sup>111</sup> The FIFA Statutes, FIFA Commentary, and FIFA Regulations do not provide clarity on the requirements of proposed members. *See* FIFA STATUTES, *supra* note 70; FIFA COMMENTARY, *supra* note 26; FIFA REGULATIONS, *supra* note 21.

<sup>112</sup> Reilly, *supra* note 101, at 65; Reilly, *supra* note 101, at 65 n. 13 (“The CAS working languages are English and French.”).

<sup>113</sup> CAS CODE, *supra* note 105, art. R33.

<sup>114</sup> *Id.* art. R40.2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* art. R45.

<sup>118</sup> *See* Reilly, *supra* note 101, at 68.

<sup>119</sup> *Id.*

instance.”<sup>120</sup> The main sources of law used by CAS panels are the rules and regulations of the sporting body from which the challenge came.<sup>121</sup> This feature of the CAS is important because it requires that CAS arbitrators stay current with the rules and regulations of the various governing bodies from which appeals come. Since 1998, the FIFA Congress has met every year to shape international soccer through the FIFA Statutes, the goals being “to improve the game of football constantly. . . .”<sup>122</sup> The CAS reviews any dispute either directly or indirectly related to sport, including those of a commercial or disciplinary nature, and “[a]ny individual or legal entity with capacity to act may have recourse to the services of the CAS.”<sup>123</sup> Therefore, CAS arbitrators, have to remain knowledgeable of the issues and changes occurring in an array of sports, organizations, and industries. Additionally, it allows for consistent and predictable rulings, both key for any judicial body’s image.

The CAS also recognizes the importance of sports disputes being resolved swiftly. As will be discussed, much of the criticism lobbed at the NFL recently has been related to the almost obscene amount of time the “Deflategate” saga took up. Contrary to time issues that have beleaguered the NFL’s public image, the CAS attempts to receive and resolve cases in a timely manner. The CAS will only accept a decision if the disputed ruling’s comes from a federation whose statutes allow for CAS arbitration and if the appellant has exhausted all possible remedies within its federation.<sup>124</sup> Where no time limit is set by the statutes of the concerned federation, the CAS imposes an appeal time limit of “twenty-one-days from the receipt” of the challenged decision.<sup>125</sup> The appellant has just an additional ten days to file a brief outlining the facts, arguments, witnesses to be called and any evidence

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<sup>120</sup> CAS CODE, *supra* note 105, art. R57.

<sup>121</sup> *Reilly*, *supra* note 101, at 68; CAS CODE, *supra* note 105, art. R58.

<sup>122</sup> *About FIFA: FIFA Congress*, FIFA, <http://www.fifa.com/about-fifa/fifa-congress/all-you-need-to-know/index.html> (last visited Oct. 15, 2017).

<sup>123</sup> *Frequently Asked Questions*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Nov. 10, 2017).

<sup>124</sup> CAS CODE, *supra* note 105, art. R47.

<sup>125</sup> *Id.* art. R49.

for the CAS to consider.<sup>126</sup> After this, the respondent has twenty days to file its answer which must include a statement of defense, including any affirmative defenses, evidence, and witnesses to be called along with their expected testimony.<sup>127</sup> Failure to answer within the twenty day period will result in the CAS proceeding with the arbitration and delivering an award without considering the respondent's defense.<sup>128</sup> While ordinary CAS procedures last between six and twelve months, an award on an appeal must be announced within three months.<sup>129</sup> Importantly, upon agreement of the parties, the CAS will expedite its process and set guidelines in accordance with the parties' circumstances.<sup>130</sup> This is especially important in an athletic context, as it may allow a winning athlete to compete sooner than he or she normally would. The CAS has even conducted proceedings via video-conference in order to speed up of the process even more.<sup>131</sup>

The CAS could also "grant provisional and conservatory measures."<sup>132</sup> Such measures are particularly important when an athlete has an upcoming competition and wants a stay of the suspension in order to participate.<sup>133</sup> Those who followed the Ezekiel Elliot situation would recognize this mechanism, as it is similar to the requests he made to the Second Circuit Court of Appeals in New York in October and November of 2017 in hopes of playing while his appeal was heard

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<sup>126</sup> *Id.* art. R51.

<sup>127</sup> *Id.* art. R55.

<sup>128</sup> *Id.*

<sup>129</sup> *Frequently Asked Questions*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Nov. 10, 2017).

<sup>130</sup> CAS CODE, *supra* note 105, art. R52.

<sup>131</sup> *See* Reilly, *supra* note 101, at 72. In August of 2010, Australian swimmer Ryan Napoleon was sanctioned with a three-month suspension for an anti-doping violation. *Id.* In September, he appealed to the CAS. *Id.* His appeal included a request for an urgent decision in order to compete at the Commonwealth Games in India in early October. *Id.* After the international swimming federation (FINA) agreed to the expedited procedure, the CAS conducted its hearing with the President of the Panel in London and two other panelists in Lausanne, Switzerland and Sydney, Australia via video-conferencing. *Id.* The panel delivered its decision just eleven days after the appeal and Napoleon was able to compete. *Id.*

<sup>132</sup> *Id.*; CAS CODE, *supra* note 105, art. R37.

<sup>133</sup> *See* Reilly, *supra* note 101, at 72.

(discussed *infra*).<sup>134</sup> When deciding whether to preliminarily grant relief, the President of the Appellate Division or the CAS Panel (depending on what stage relief is sought) considers “whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the” party seeking relief “outweigh” the opposing party’s interests.<sup>135</sup> Any preliminary relief granted, however, will be annulled if the party seeking relief fails to file a “related request for arbitration within [ten] days” after requesting the provisional measure.<sup>136</sup>

Like the CAS’s demands on its arbitrators to stay current with any relevant sports law, the ability of parties seeking relief to expedite the process and obtain preliminary stays contributes to the legitimacy of CAS proceedings and awards. CAS awards are rendered based on a majority decision of the three-arbitrator panel.<sup>137</sup> Additionally, CAS awards state a brief reasoning for the panel’s decision.<sup>138</sup> Should the losing party wish to challenge a CAS decision, they must file such challenge with the Swiss Federal Tribunal.<sup>139</sup> Challenges of CAS decisions have increased to the point that a large portion of the Swiss Federal Tribunal’s case load dealing with international arbitration comes from the CAS.<sup>140</sup> However, this does not mean that parties around the world do not respect the legitimacy of the CAS rather, the large number of challenged CAS awards can be attributed to the number of cases the CAS receives.<sup>141</sup> Moreover, unlike other arbitral bodies, CAS awards may only be appealed to the Swiss Federal Tribunal.<sup>142</sup> FIFA, unlike some federations, explicitly requires

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<sup>134</sup> Jared Dubin, *Ezekiel Elliot asks Court for Administrative Stay that Would Allow Him to Play Sunday*, CBS SPORTS (Nov. 2, 2017), <https://www.cbssports.com/nfl/news/ezekiel-elliott-asks-court-for-administrative-stay-that-would-allow-him-to-play-sunday/>.

<sup>135</sup> See CAS CODE, *supra* note 105, art. R37.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* art. R50, R59.

<sup>138</sup> *Id.* art. 59.

<sup>139</sup> Reilly, *supra* note 101, at 75.

<sup>140</sup> *See id.*

<sup>141</sup> *See id.* at 76 (pointing out that the number of cases received by the CAS has grown at a similar rate as CAS-related judgments rendered by the Swiss Federal Tribunal).

<sup>142</sup> See CAS CODE, *supra* note 105, art. R59

compliance with CAS awards.<sup>143</sup> The FIFA Statutes require that members comply not only with FIFA regulations, but also with decisions of the CAS passed on the basis of an appeal from a FIFA body.<sup>144</sup> Further, the Statutes require that member associations and confederations place a provision in their own statutes recognizing the jurisdiction and authority of the CAS and giving “priority to arbitration as a means of dispute resolution.”<sup>145</sup> Failure to adhere to a CAS award subjects the violator to sanctions.<sup>146</sup> These sanctions can include fines, transfer bans, and in serious cases, expulsion from FIFA.<sup>147</sup>

FIFA’s insistence of the recognition of the CAS as a legitimate and final stage for all disputes has the effect of making sports-related disputes in Europe matter-of-fact occurrences. Players and teams (and attorneys) know what the standards are, how the relevant procedures are carried out, and who they must win over. Unlike some high-profile NFL legal battles, there is no debating over which Federal Court an appeal should be heard in, or whether a certain judge is more likely to rule one way or the other. Most importantly, time-consuming mechanisms can irritate fans. The fans largely control the economics of sport; they buy the tickets, merchandise and watch on television. The DRC and CAS’s policies and procedures work toward keeping fans focused on the action on the field rather than in the courtroom.

Despite its prominence in the international sports community, the CAS, like the NFL, has been subjected to criticism; critics initially pointed to the CAS’s “close ties” to the International Olympic Committee, and athletes claimed that this closeness illegitimized CAS

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(“The award . . . shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law. . . . It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in the particular at the outset of the arbitration.”).

<sup>143</sup> FIFA STATUTES, *supra* note 70, art. 14 § 1(a).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* art. 15 § f.; *Id.* art. 23 § f.

<sup>146</sup> *See id.* art. 61.

<sup>147</sup> FIFA DISCIPLINARY CODE, art. 64 §§ 1a-d) (2017) [hereinafter FIFA DISCIPLINARY CODE].

proceedings.<sup>148</sup> The CAS has since taken steps to improve its image, like founding the International Council of Arbitration for Sport to operate the CAS instead of the IOC.<sup>149</sup> While some have called for even greater reform of the CAS,<sup>150</sup> such measures are steps in the right direction. As will be discussed *infra*, the NFL would be smart to take similar measures to instill confidence in its players and fans.

### C. FIFA Disciplinary Committee

As previously mentioned, the FIFA Statutes grant the power of disciplining players, clubs, associations, officials, and other FIFA related parties to the Disciplinary Committee, except in the case of the suspension or expulsion of member associations.<sup>151</sup> The Disciplinary Committee is governed by the FIFA Disciplinary Code, which governs infringements of the rules in “every match and competition organised by FIFA.”<sup>152</sup> The Disciplinary Code bans acts such as “[i]nciting hatred and violence,”<sup>153</sup> brawling during a game,<sup>154</sup> “[p]rovoking the general public,”<sup>155</sup> as well as other acts that can be classified as unsportsmanlike.<sup>156</sup> Significantly, the only specific conduct by an individual occurring outside of a match that is mentioned in the seventy-four pages of rules is a ban on doping.<sup>157</sup> In very general language, Article 70 of the Disciplinary Code states that “[t]he judicial bodies of FIFA reserve the right to sanction serious infringements of the statutory objectives of FIFA . . . if associations, confederations and other sports organisations fail to prosecute serious infringements or fail to prosecute in compliance with the fundamental principles of law.”<sup>158</sup> While the scope of the Disciplinary Code is conduct during

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<sup>148</sup> See Bondulich, *supra* note 106, at 280.

<sup>149</sup> *Id.*; *History of the CAS*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Oct. 12, 2017).

<sup>150</sup> See Bondulich, *supra* note 106, at 327–28.

<sup>151</sup> See FIFA STATUTES, *supra* note 70, art. 53.

<sup>152</sup> FIFA DISCIPLINARY CODE, *supra* note 147, art. 2.

<sup>153</sup> *Id.* art. 53.

<sup>154</sup> *Id.* art. 50.

<sup>155</sup> *Id.* art. 54.

<sup>156</sup> See generally *id.*

<sup>157</sup> *Id.* art. 63.

<sup>158</sup> *Id.* art. 70 § 2.

FIFA sanctioned competition, this article appears to grant FIFA broad power to sanction any conduct that cuts against its “statutory objectives.”<sup>159</sup> This view is strengthened when Article 70 is read in conjunction with what the FIFA Statutes declare to be FIFA’s objectives; FIFA’s objectives include the promotion of soccer “globally in the light of its unifying, educational, cultural and humanitarian values”<sup>160</sup> and the promotion of “integrity, ethics and . . . all methods or practices . . . which might jeopardise the integrity of matches, competitions, players, officials and member associations. . . .”<sup>161</sup> FIFA itself determines what is contrary to its objectives; however, the Disciplinary Code implicitly places the burden of handling issues that fall outside the field of play on the various teams and leagues. In fact, the word “criminal” appears just once in the Disciplinary Code.<sup>162</sup> Associations are obligated to remove people who are “under prosecution for action unworthy of such a position (especially doping, corruption, forgery)” or dishonest crimes, or “who has been convicted of a criminal offence in the past five years.”<sup>163</sup> Thus, it appears as though it is incumbent on the individual associations and clubs within FIFA to discipline players who run into conflicts with the law. However, the extent of such discipline is not clear.

The English Premier League is the top soccer league in England, boasting powerful teams like Chelsea F.C. and Manchester United. The Premier League is governed by the Football Association (FA), which governs all of English soccer.<sup>164</sup> Among the Football Association’s published policies are rules on betting and integrity, registration of players, and financial regulation;<sup>165</sup> policies similar to those put in place by FIFA.

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<sup>159</sup> *Id.* art. 2.

<sup>160</sup> FIFA STATUTES, *supra* note 70, art. 2 § a.

<sup>161</sup> *Id.* art. 2 § g.

<sup>162</sup> FIFA DISCIPLINARY CODE, *supra* note 147, art. 68.

<sup>163</sup> FIFA DISCIPLINARY CODE, *supra* note 147, art. 68 § b).

<sup>164</sup> *Premier League Safeguarding*, PREMIER LEAGUE, <https://www.premierleague.com/safeguarding> (last visited Jan. 11, 2017).

<sup>165</sup> *Policies*, THE FA, [www.thefa.com/football-rules-governance/policies](http://www.thefa.com/football-rules-governance/policies) (last visited Jan. 11, 2017).

The FA also promulgates a handbook for each season; the FA Handbook governs the conduct of all participants within the FA.<sup>166</sup> Section E of the Handbook states that the FA may act against any participant “in respect of any Misconduct.”<sup>167</sup> Misconduct is defined as a breach of the “[l]aws of the [g]ame,” the rules described in the FA Handbook, the statute and regulations of FIFA and UEFA, the rules of any other affiliated association or competition, and any order or direction of the FA.<sup>168</sup> The misconduct section goes on to require adherence to many rules similar to FIFA, including bans against discrimination,<sup>169</sup> betting,<sup>170</sup> and a mandate to maintain the integrity of matches and competitions.<sup>171</sup> Unlike FIFA, however, the FA Handbook has a specific section regarding criminal offenses committed by participants.<sup>172</sup> The FA has the power to suspend anyone who has been convicted of a criminal offense because the convicted participants continued participation constitutes a “risk of physical harm” to other participants.<sup>173</sup> In addition, the FA has the power to suspend participants based on allegations of criminal offenses that may involve breaches of the Handbook’s betting and integrity policies.<sup>174</sup> Such allegations include criminal gambling rings or accepting bribes.<sup>175</sup> The significance of these two policies, when read in conjunction, is that the FA, based on its Handbook, does not have the power to suspend participants for alleged criminal offenses unrelated to the integrity of the game. Based on the FA Handbook and the FIFA Statutes and Regulations, the policy in international soccer appears to be one where the governing bodies largely allow law enforcement to handle criminal behavior by players, coaches, and others. The governing bodies only become involved when the legal system has run its course. As will be shown, this is very different from

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<sup>166</sup> THE FA, THE FA HANDBOOK art. E §1 (2018/2019).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* art. E § 4.

<sup>170</sup> *Id.* art. E § 8.

<sup>171</sup> *Id.* art. E § 5.

<sup>172</sup> *Id.* art. E § 26.

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* art. E § 16 para. a.

<sup>175</sup> *Id.*



the NFL's current policies. Specifically, it is very different from the NFL's Personal Conduct Policy.

## II. NFL BACKGROUND

Over the course of the 2017–2018 season, the NFL encountered many off-the-field stories. The season began with players across the league kneeling during the National Anthem in protest of the current political climate related to police brutality.<sup>176</sup> The protests garnered so much attention that President Donald Trump responded, calling the players “sons of bitches” and the NFL “weak and out of control.”<sup>177</sup> The league has also endured constant criticism of its handling of concussions; numerous players have taken enormous hits and then returned to play very quickly, causing many to question the validity of the NFL's concussion protocol, with some calling the policy “a fraud.”<sup>178</sup> A recent criticism stems from how the Carolina Panthers handled quarterback Cam Newton during the Wild Card Round of the 2017-2018 Playoffs.<sup>179</sup> Newton sustained a hit and remained on the ground, but only missed one play after the team determined that he had just been poked in the eye.<sup>180</sup> What constitutes big news in the NFL is more a product of reaction than what the inherent issues are with the league and its structure. Twenty-four-hour coverage by the likes of ESPN and the NFL Network ensure that once a new story pops up, previous stories begin to die in the public's mind. This is what

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<sup>176</sup> Josh Hafner, *Anthem Kneeling isn't Aimed at Veterans, and other NFL Protest Misconceptions*, USA TODAY (Sept. 25, 2017, 4:32 PM), <https://www.usatoday.com/story/news/nation-now/2017/09/25/anthem-kneeling-isnt-aimed-veterans-and-other-nfl-protest-misconceptions/701409001/>.

<sup>177</sup> Scooby Axson, *Trump: NFL 'Weak and Out of Control' for Allowing Protests*, SPORTS ILLUSTRATED (Nov. 28, 2017), <https://www.si.com/nfl/2017/11/28/donald-trump-nfl-protest-anthem>.

<sup>178</sup> Tom Schad, *Concussion Expert Calls NFL Protocol 'fraud' after Colts QB Jacoby Brissett Returns*, USA TODAY SPORTS (Nov. 12, 2017, 5:40 PM), <https://www.usatoday.com/story/sports/nfl/colts/2017/11/12/expert-calls-nfl-concussion-protocol-fraud-colts-qb-jacoby-brissett-returns/856853001/>.

<sup>179</sup> Kevin Skiver, *Timeline: Cam Newton Flap the Latest Blow to NFL's Scrutinized Concussion Protocol*, CBS SPORTS (Jan. 8, 2018, 9:33 PM), <https://www.cbssports.com/nfl/news/timeline-cam-newton-flap-the-latest-blow-to-nfls-scrutinized-concussion-protocol/>.

<sup>180</sup> *Id.*

happened regarding the Ezekiel Elliott story. Once Elliott decided to withdraw his appeal, accepting his six-game suspension, news outlets turned to other sources for news. Despite this, the NFL's structure is still questionable, and it begins with the Collective Bargaining Agreement.

In July of 2011, the NFL owners voted 31–0, with the Oakland Raiders abstaining, to approve a new ten-year collective bargaining agreement between themselves and the players.<sup>181</sup> Then, once the players also voted in favor, the 130-day lockout officially ended, and fans' fear that there would be no football in 2011 was assuaged.<sup>182</sup> One of the main issues was revenue sharing.<sup>183</sup> Under the owners' plan, revenue would be split only after \$1 billion was portioned out for the owners.<sup>184</sup> The ultimate resolution of this was a 52/48 split of the revenue between the owners and the players, which represented a lower share for the players than the previous deal.<sup>185</sup> However, teams would now have to reach a floor of 89% of the salary cap, meaning more money in salary for veteran players.<sup>186</sup> This rise in veteran salary, in addition to the new cap floor, stemmed from the institution of a rookie wage scale.<sup>187</sup>

Under the 2006 collective bargaining agreement, rookies negotiated the terms of their contracts, oftentimes leading to the early picks holding out for the best contract they could get.<sup>188</sup> Under the current agreement, rookie salaries are scaled according to draft slot, obviating the need to holdout over salary negotiations.<sup>189</sup> In fact, since

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<sup>181</sup> Adam Schefter, *Sources: Deal to end Lockout Reached*, ESPN (July 25, 2011), [www.espn.com/nfl/story/\\_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say](http://www.espn.com/nfl/story/_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say).

<sup>182</sup> *Id.*

<sup>183</sup> See Brice, *supra* note 65, at 61.

<sup>184</sup> *See id.*

<sup>185</sup> Patrick Rische, *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/#239c18207071>.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Andrew Brandt, *Rookies Sacrificed in New CBA*, ESPN (May 15, 2012), [http://www.espn.com/nfl/story/\\_/id/7929748/nfl-bad-time-rookie](http://www.espn.com/nfl/story/_/id/7929748/nfl-bad-time-rookie).

<sup>189</sup> Rische, *supra* note 185.

the new collective bargaining agreement in 2011, the only notable rookie to holdout was Joey Bosa in 2016.<sup>190</sup> Although Bosa's salary was predetermined, he wanted certain offset language regarding his signing bonus removed, causing him to holdout for most of the team's preseason training camp.<sup>191</sup> Other "wins" for the players included a reduction in the number of "Organized Team Activity" sessions and a 10% increase in minimum salaries in the first year, with continual increases thereafter.<sup>192</sup> According to reports, once the owners approved the agreement, there was a high level of confidence that the players would follow suit due to the "working relationship between [DeMaurice] Smith and . . . Roger Goodell. . ."<sup>193</sup> The two had reportedly worked together very closely to ensure that any "remaining issues were resolved."<sup>194</sup> Times certainly have changed. Before discussing specific instances of the NFL's flaws playing out in court and what changes should be made, a review of the NFL Collective Bargaining Agreement is necessary.

#### A. NFL Collective Bargaining Agreement

Governed by, construed, and interpreted under New York law,<sup>195</sup> the NFL Collective Bargaining Agreement (NFL CBA) is the product of "bona fide, arm's length collective bargaining" and "the sole and exclusive bargaining representative of present and future employee players in the NFL."<sup>196</sup> The agreement covers a bargaining unit that consists of all current NFL players, all veteran free agents,<sup>197</sup> drafted rookies, and rookie free agents.<sup>198</sup> The NFL CBA, spanning

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<sup>190</sup> Nate Davis, *Joey Bosa Ends Holdout, Signs Contract with Chargers*, USA TODAY SPORTS (Aug. 29, 2016, 6:57 PM), <https://www.usatoday.com/story/sports/nfl/chargers/2016/08/29/joey-bosa-contract-san-diego-chargers/89549298/>.

<sup>191</sup> *Id.*

<sup>192</sup> Rishe, *supra* note 185.

<sup>193</sup> Schefter, *supra* note 181.

<sup>194</sup> *Id.*

<sup>195</sup> NFL COLLECTIVE BARGAINING AGREEMENT, art. 70 § 1 (2011) [hereinafter NFL CBA].

<sup>196</sup> *Id.* "Preamble."

<sup>197</sup> Players who were once on an NFL team, but are currently not on a roster or practice squad.

<sup>198</sup> NFL CBA, *supra* note 195, at "Preamble."

300 pages and 70 articles, covers topics including contracts,<sup>199</sup> the college draft,<sup>200</sup> collusion between teams,<sup>201</sup> and the “Pro Bowl” all-star game.<sup>202</sup> Interestingly, article 3 section 1 of the NFL CBA provides that neither the NFL Players Association, “nor any of its members will engage in any strike, work stoppage or other concerted action” that interferes with the operation of the NFL or any team.<sup>203</sup> However, the potential 2021 lockout, like the 2011 lockout, will almost surely come after the NFL CBA expires. Thus article 3 section 1 would not apply.

In terms of dispute resolution, the NFL CBA dedicates two articles to “grievances” and two articles to team and commissioner discipline.<sup>204</sup> Article 42 describes the NFL’s policy regarding discipline handed down by teams.<sup>205</sup> The NFL CBA sets maximum fines teams may levy on players for events like reporting to training camp overweight, unexcused lateness, and even throwing a football into the stands during a game.<sup>206</sup> Teams are required to inform players of all disciplinary actions that may be taken against them at the beginning of training camp, and in event of a violation, provide the offending player written notice at any address the team reasonably expects the player to be located.<sup>207</sup> Article 43 governs “non-injury grievance[s],” which is defined as

[a]ny dispute . . . arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any application provision of the NFL Constitution and Bylaws or NFL Rules

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<sup>199</sup> *Id.* art. 4.

<sup>200</sup> *Id.* art. 6.

<sup>201</sup> *Id.* art. 17.

<sup>202</sup> *Id.* art. 38.

<sup>203</sup> *Id.* art. 3 § 1.

<sup>204</sup> *See id.* art. 42, 43.

<sup>205</sup> *See id.* art. 42.

<sup>206</sup> *Id.* § 1(a).

<sup>207</sup> NFL CBA, *supra* note 195, § 2.

pertaining to the terms and conditions of employment of NFL players. . . .<sup>208</sup>

Any and all grievances are to be resolved exclusively based on the procedure the NFL CBA sets forth.<sup>209</sup> Grievances may be initiated by players, teams, the NFL Management Council, or the NFLPA and must be filed within fifty days of the occurrence or nonoccurrence on which the grievance is based, or within fifty days from the date which the party filing the grievance “became known or reasonably should have . . . known” of the “facts of the matter . . . whichever is later.”<sup>210</sup> Once a grievance is filed, the party to whom it is presented must answer within ten days setting forth admission or denials of the facts related to the grievance, with any denial including the specific grounds for denial.<sup>211</sup> If the grievance is not resolved after filing and answer, it moves on to the appeal stage. Any appeal, whether by a player, a team, the NFLPA, or the NFL Management Council, is to be made to the Notice Arbitrator.<sup>212</sup> In the event of a grievance involving a suspension, the suspended player will have the option to appeal immediately without having to file the grievance with their team or the league.<sup>213</sup> In such an event, an expedited hearing is to be held by an arbitrator designated by the Notice Arbitrator within seven days and the NFL and NFLPA are to engage in “good faith efforts” to schedule the grievance hearing before the player’s next game.<sup>214</sup> In addition to grievances involving suspensions, both the NFLPA and the NFL Management Council can immediately appeal up to four grievances per year, which allows for an expedited hearing within seven days.<sup>215</sup> In such a case, the arbitrators are to issue their decision within five days after completion of the hearing.<sup>216</sup>

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<sup>208</sup> *Id.* art. 43 § 1.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* art. 43 § 2.

<sup>211</sup> *Id.* § 3.

<sup>212</sup> *Id.* § 4.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> NFL CBA, *supra* note 195, § 4.

All relevant documents are to be submitted not later than fourteen days before a grievance hearing.<sup>217</sup> Failure to do so results in the preclusion of submitting any documents for review by the arbitrators, with the caveat that the opposing party will still be able to review those documents.<sup>218</sup> In the event of an expedited hearing, any documentary evidence must be submitted two days before the hearing.<sup>219</sup> For all hearings, the arbitration panel consists of four arbitrators, “whose appointment must be accepted in writing by the NFLPA and the [NFL] Management Council,” even though only one arbitrator hears the grievance.<sup>220</sup> Either of those two parties “may discharge a member of the arbitration panel” in writing, but only between July 10 and July 20 each year.<sup>221</sup> If either party exercises this power, the other party has two days to discharge an arbitrator of its own choosing.<sup>222</sup> Both the NFLPA and NFL Management Council must agree on any new arbitrators.<sup>223</sup> If they cannot agree within thirty days, the Notice Arbitrator sends both sides a list of ten qualified arbitrators and fourteen days after that, the NFLPA and NFL Management Council strike names off the list back and forth until one name is remaining.<sup>224</sup> The party who makes the first strike is determined by a coin flip, with the parties alternating who strikes first for the duration of the NFL CBA.<sup>225</sup> If a party decides not to “cooperate in the striking process,” it waives its right to participate in the selection of the appointment at issue.<sup>226</sup>

Under the NFL CBA, hearings occur according to the arbitrator’s schedules; each arbitrator designates a “minimum of twelve . . . hearing dates per year . . . for use by the parties” to the NFL CBA.<sup>227</sup> After consulting with the Notice Arbitrator, each arbitrator will convey those dates to the NFLPA and the NFL Management

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<sup>217</sup> *Id.* § 5(b).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* § 6.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> NFL CBA, *supra* note 195, § 6.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* § 7(a).

Council.<sup>228</sup> This process repeats, as required, each year and for each new arbitrator that joins the panel.<sup>229</sup> Once the NFLPA and NFL Management Council know which dates are available, each party notifies each arbitrator thirty days in advance of which dates are going to be used the following month.<sup>230</sup>

At hearings, parties to the grievance, normally players or teams, and the NFLPA and NFL Management Council may present any relevant evidence, be it in the form of testimony, documents, or otherwise.<sup>231</sup> Should a party's witness be "unable to attend the hearing," the offering party must inform the opposing party of the witness's identity and unavailability.<sup>232</sup> The parties will then, either at the hearing or within fourteen days thereafter, agree on dates to take the testimony of unavailable witnesses, which must be "within forty-five . . . days of the parties' receipt of the hearing transcript."<sup>233</sup> Another alternative to combatting unavailable witnesses is the use of telephone conferencing, but only if both parties agree.<sup>234</sup>

In cases where the "material facts" are not in dispute, the arbitrator has the authority to decide the case "solely on the written submissions of the parties."<sup>235</sup> Further, if the amount claimed is less than \$25,000, the parties do not even have to meet face to face; the hearing can be held via telephone.<sup>236</sup> Parties may request the submission of post-hearing briefs for consideration by the arbitrator.<sup>237</sup> In such a case, and where the grievance does not involve a suspension and less than \$25,000 is at issue, the parties shall simultaneously submit post-hearing briefs.<sup>238</sup> In the case of a suspension-related hearing or

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* § 7(b).

<sup>233</sup> *Id.*

<sup>234</sup> NFL CBA, *supra* note 195, § 7(b).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

one where the claim is greater than \$25,000, only the arbitrator may request post-hearing briefs.<sup>239</sup>

Once a hearing has been held, the arbitrator has thirty days from the submission of post-hearing briefs to issue a written decision, except that the arbitrator cannot consider briefs filed “more than sixty . . . days after receipt of the last transcript, unless the parties agree otherwise.”<sup>240</sup> According to Article 43, the decision of the arbitrator constitutes the “full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to [the NFL CBA].”<sup>241</sup> However, as will be discussed<sup>242</sup>, in numerous instances players have challenged the decisions of NFL arbitrators, despite the agreed upon language in the NFL CBA.

While the arbitrator has the ultimate authority in any grievance hearing, the NFL CBA does place some limitations on such power; the arbitrator may not “add to, subtract from,” or change “in any way the provisions” in the NFL CBA, nor any supporting document.<sup>243</sup> The arbitrator also may not grant a remedy other than “a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order,” or an order of compliance with a specific term of the NFL CBA.<sup>244</sup> The one alternative to the grievance hearing process is the Grievance Settlement Committee; at the end of each regular season, a “committee consisting of representatives of the NFLPA and representatives of the Management Council” meet to “engage in good faith efforts to settle or bifurcate any pending grievances.”<sup>245</sup> In committee meetings, no evidence is taken, except the involved parties “may be contacted to obtain information about their dispute.”<sup>246</sup> If the committee resolves any grievances by mutual agreement, the resolution, like an arbitrator

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.* § 8.

<sup>241</sup> *Id.*

<sup>242</sup> *See infra* Part II.B.

<sup>243</sup> NFL CBA, *supra* note 195, § 8.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* § 13.

<sup>246</sup> *Id.*



ruling, constitutes the “full, final and complete disposition of the grievance. . . .”<sup>247</sup>

Injury grievances, claims that a player or practice squad member was released because of an injury sustained while performing the services required in their contract (i.e. injuries sustained in practices, games, or training with the team),<sup>248</sup> are handled largely the same as non-injury grievances. The biggest distinction between the two types of grievances is the role of physicians; players must be examined by a neutral physician within twenty days of filing an injury grievance.<sup>249</sup> The physician may not examine the player with the aid of supplemental medical information, either records submitted by the team or player, or communication with the team physician.<sup>250</sup> The NFLPA and NFL Management Council “maintain a jointly-approved list of neutral physicians, including at least two orthopedic physicians and two neuropsychologists in each city” hosting an NFL team.<sup>251</sup> The list is subject to modification only between February 1 and April 15 each year.<sup>252</sup> During this period, both the NFLPA and NFL Management Council “may eliminate any two neutral physicians from the list by written notice to the other party.”<sup>253</sup> Should any vacancies occur, either by the doing of a party, or otherwise, both the NFLPA and NFL Management Council submit a list of three replacements within thirty days.<sup>254</sup> If the parties are unable to agree on a choice

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* art. 44 § 1. Many NFL contracts contain clauses that void the contract should the player injure himself outside of team-sanctioned activities. Adam Kilgore, *Yes, there are some Things Pro Athletes aren't Allowed to Do*, WASH. POST (July 6, 2015), [https://www.washingtonpost.com/news/sports/wp/2015/07/06/yes-there-are-some-things-pro-athletes-arent-allowed-to-do/?utm\\_term=.d67a96861f7d](https://www.washingtonpost.com/news/sports/wp/2015/07/06/yes-there-are-some-things-pro-athletes-arent-allowed-to-do/?utm_term=.d67a96861f7d). Such restrictions are common in basketball. *See id.* For more on activity restrictions in professional athletes' contract, *see id.*

<sup>249</sup> NFL CBA, *supra* note 195, art. 44 § 4(a).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* § 5.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

within ten days, then they perform the odd coin-flipping, striking procedure outlined above.<sup>255</sup>

The NFL's policies governing grievances are very similar to those of FIFA, and these policies have not brought negative attention to the NFL. Article 46, however, is the source of much of the NFL's bad publicity.<sup>256</sup> Article 46 outlines the process by which all disputes involving a fine or suspension for on-field conduct, or action taken against a player by the Commissioner "conduct detrimental to the integrity of, or public confidence in, the game of professional football" are handled.<sup>257</sup> The term "conduct detrimental" is not defined in the NFL CBA.<sup>258</sup> In theory the term suggests that egregious acts that induce public shame on the league will be covered. In practice, however, the term has been used as Commissioner Roger Goodell's justification for imposing his own sense of morality under the guise of "protecting the [NFL] shield."<sup>259</sup> In cases where Goodell decides to take action for "conduct detrimental" he is to send written notice of such action to the player and the NFLPA.<sup>260</sup> The player, or the NFLPA, then has three business days to appeal in writing to Goodell.<sup>261</sup> For on-field offenses, any fines or suspensions are levied by "a person appointed by the Commissioner."<sup>262</sup> The appointment of said person occurs after consultation with the Executive Director of the NFLPA.<sup>263</sup> Like in "conduct detrimental" cases players have three business days to appeal in writing to the Commissioner.<sup>264</sup> In the case

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<sup>255</sup> *Id.*

<sup>256</sup> The Legal Blitz, NFLPA Continues to Ignore the Awful CBA it Agreed to, ABOVE THE LAW (Aug. 30, 2017, 12:38 PM), <https://abovethelaw.com/2017/08/nflpa-continues-to-ignore-the-awful-cba-it-agreed-to/>.

<sup>257</sup> *Id.* art. 46 § 1(a).

<sup>258</sup> *See generally, id.*

<sup>259</sup> Mike Lupica, *Roger Goodell and NFL are Protecting a 'Shield' that Fails to Protect its Own Players and Families*, NEW YORK DAILY NEWS (Sept. 14, 2014, 1:30 AM), [www.nydailynews.com/sports/football/lupica-shield-nfl-protecting-article-1.1938945](http://www.nydailynews.com/sports/football/lupica-shield-nfl-protecting-article-1.1938945).

<sup>260</sup> NFL CBA, *supra* note 195, art. 46 § 1(a).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* § 1(b).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

of a “conduct detrimental” appeal, the Commissioner appoints one or more designees to serve as hearing officers.<sup>265</sup>

In contrast, for on-field punishment appeals, the Commissioner and the Executive Director of the NFLPA, on a yearly basis, “jointly select two . . . or more designees to serve as hearing officers.”<sup>266</sup> Article 46 also provides for appeals in cases arising from “conduct detrimental.”<sup>267</sup> In such cases, “the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.”<sup>268</sup> This difference in the appeals process is essential to the criticism endured by Roger Goodell. Thus, what Article 46 boils down to is Goodell’s ability to serve as judge, jury, executioner, and court of appeals in cases involving “conduct detrimental” to the NFL. This enormous power vested in Goodell can also be illustrated simply by comparing the length of Article 46 with that of Articles 43 and 44: Article 46 spans less than three pages in the CBA, while Articles 43 and 44 combine for over twelve pages. While the rules governing normal disputes appear to be heavily bargained for, when it comes to Commissioner discipline, Roger Goodell seems to have applied the league’s massive leverage (discussed *infra*) directly against the players’ throats.

#### B. Tom Brady and Ezekiel Elliott

No two stories have generated more coverage and scrutiny of Roger Goodell’s powers than Tom Brady and “Deflategate” and the recent Ezekiel Elliott saga. “Deflategate” can be described as nothing short of a debacle, spanning 544 days and ultimately ending with Goodell coming out on top, as he always does.<sup>269</sup> The saga began after Indianapolis Colts linebacker D’Qwell Jackson intercepted one of Brady’s passes in the 2015 AFC Championship Game and handed “the ball to a member of the Colts’ equipment staff, who noticed the ball seemed underinflated and notified coach Chuck Pagano.”<sup>270</sup> After the

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<sup>265</sup> *Id.* § 2(a).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> See *Deflategate Timeline*, *supra* note 64.

<sup>270</sup> *Id.*

game, which the Patriots won handedly 45-7, ESPN's Chris Mortensen reported that eleven of the twelve "balls used in the first half of the game were significantly underinflated."<sup>271</sup> Three days later, the NFL announced that it was launching an investigation into the deflated footballs led by Jeff Pash and Ted Wells.<sup>272</sup> The Patriots then went on to defeat the Seattle Seahawks in Super Bowl XLIX 28-24.<sup>273</sup> On May 6, 2015, after almost five months and millions of dollars, the "Wells Report" is released, in which the NFL stated that it was "'more probable than not' that Patriots personnel deliberately deflated footballs . . . and that Brady was probably 'at least generally aware' of the rules violations."<sup>274</sup> Tom Brady was suspended for four games and the Patriots were fined \$1 million and forfeited two draft picks.<sup>275</sup>

When the NFLPA announced Brady was to appeal the suspension, it urged Goodell to appoint a neutral arbitrator; however, the NFL announced that Goodell would, in fact, preside over the appeal.<sup>276</sup> In a letter to the NFLPA Goodell officially informed the union that he would be presiding over the appeal, citing his responsibility under the NFL CBA to "'serve as hearing officer in any appeal involving conduct detrimental to the integrity of the game."<sup>277</sup> On June 23, 2015, Goodell heard Brady's appeal, and five days later, the NFL announced that the suspension would not be reduced.<sup>278</sup> Brady then filed a cause of action in the U.S. District Court for the Southern District of New York challenging Goodell's decision.<sup>279</sup> On September 3, 2015, Judge Richard Berman vacated the four-game suspension.<sup>280</sup> In so doing, Judge Berman criticized Roger Goodell for "'dispens[ing] his own brand of industrial justice."<sup>281</sup> In response to

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> See *Deflategate Timeline*, *supra* note 64.

<sup>278</sup> *Id.*

<sup>279</sup> See generally *NFL Mgmt. Council v. NFL Players Ass'n*, 125 F. Supp. 3d 449 (S.D.N.Y. 2015).

<sup>280</sup> *Id.* at 472-74.

<sup>281</sup> *Id.* at 462 (quoting *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005)).

the ruling, the NFL appealed to the United States Court of Appeals for the Second Circuit in New York.<sup>282</sup> The appeal was heard on March 3, 2016, over a year after the Patriots' win over the Colts.<sup>283</sup> On April 25, 2016, the Second Circuit reversed the lower court's ruling, reinstating the suspension.<sup>284</sup> The court reasoned that Goodell properly exercised his broad discretion as arbitrator, discretion that was properly grounded in the NFL CBA and that did not deprive Brady of "fundamental [f]airness."<sup>285</sup> Specifically, the court noted that "the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a)" and that "[t]hey did so knowing full well that the Commissioner had the sole power of determining what constitutes 'conduct detrimental,' . . ."<sup>286</sup> After this ruling, Brady filed a motion for a second hearing, which was denied.<sup>287</sup> Brady ended up serving his four-game suspension at the beginning of the 2016 season, which ended with the Patriots defeating the Atlanta Falcons in Super Bowl LI.<sup>288</sup>

The Ezekiel Elliott saga, while not as prolonged as "Deflategate," followed a very similar path. On August 11, 2017, after a year-long investigation, the NFL announced that it was suspending Elliott for six games after finding that Elliott assaulted his former girlfriend, Tiffany Thompson.<sup>289</sup> Elliott was originally accused by Thompson in July of 2016, but after months of investigation, prosecutors announced in September 2016 that Elliott "would not be

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<sup>282</sup> See *Deflategate Timeline*, *supra* note 64.

<sup>283</sup> *Id.*

<sup>284</sup> See generally *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527 (2d Cir. 2016).

<sup>285</sup> *Id.* at 548.

<sup>286</sup> *Id.*

<sup>287</sup> See *Deflategate Timeline*, *supra* note 64.

<sup>288</sup> See Nate Davis, *Super Bowl LI Analysis: Patriots Beat Falcons 34-28 in first-ever Super Bowl OT*, USA TODAY SPORTS (Feb. 5, 2017, 11:57 PM), <https://www.usatoday.com/story/sports/nfl/2017/02/05/super-bowl-2017-51-li-patriots-falcons-analysis-tom-brady-matt-ryan/97529938/>.

<sup>289</sup> Around the NFL staff, *Cowboys RB Ezekiel Elliott Suspension Case Timeline*, NFL (Sept. 11, 2017, 9:47 AM), [www.nfl.com/news/story/0ap3000000841151/article/cowboys-rb-ezekiel-elliott-suspension-case-timeline](http://www.nfl.com/news/story/0ap3000000841151/article/cowboys-rb-ezekiel-elliott-suspension-case-timeline).

charged with domestic violence.”<sup>290</sup> Like Brady, Elliott appealed the suspension.<sup>291</sup> Unlike Brady, however, the appeal was heard by Harold Henderson, who was appointed by Goodell, pursuant to NFL CBA Article 46 § 2.<sup>292</sup> On September 1, 2017, before the final ruling on the suspension, the NFLPA, on behalf of Elliott, filed for a “temporary restraining order in Texas to block any suspension upheld by Henderson.”<sup>293</sup> Henderson upheld the suspension on September 5, 2017, less than a week before the start of the 2017 regular season.<sup>294</sup> However, because of the timing of the appeal decision, Elliott was allowed to play in Week 1.<sup>295</sup> Elliot then filed for a preliminary injunction against the NFL’s enforcement of the suspension in the United States District Court for the Eastern District of Texas, Sherman Division, which was granted by Judge Amos Mazzant on September 8, 2017.<sup>296</sup>

In his opinion, Judge Mazzant stated that the NFL and Harold Henderson breached the NFL CBA when Henderson denied Elliott “access to certain procedural requirements,” including access to “investigators notes,” the opportunity to cross examine Tiffany Thompson, and the chance to question Roger Goodell.<sup>297</sup> Based on the procedural denials, Judge Mazzant found that Elliott did not receive a fundamentally fair hearing before Henderson.<sup>298</sup> Like in Brady’s case, the NFL appealed Judge Mazzant’s ruling in the United States Court of Appeals for the Fifth Circuit.<sup>299</sup> Just like the Second Circuit’s ruling in the Brady case, the Fifth Circuit vacated the lower court’s ruling.<sup>300</sup> The court reasoned that Elliott’s lawsuit was premature, because Elliott had not exhausted all his “grievance

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* See NFL CBA, *supra* note 195, art. 46 § 2.

<sup>293</sup> Around the NFL staff, *supra* note 289.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See generally *NFL Players Ass’n v. NFL*, 270 F. Supp. 3d 939 (E.D. Tex. 2017).

<sup>297</sup> *Id.* at 948.

<sup>298</sup> *Id.* at 953.

<sup>299</sup> See generally *NFL Players Ass’n v. NFL*, 874 F.3d 222 (5th Cir. 2017).

<sup>300</sup> *Id.* at 229.

procedures” in the NFL CBA.<sup>301</sup> Thus, the District Court lacked subject matter jurisdiction over the case.<sup>302</sup> Further, Elliott’s failure to exhaust all remedies was not excused because the NFL abided by all the arbitration provisions in the NFL CBA.<sup>303</sup>

After the NFL sought affirmation of Henderson’s award in the Southern District of New York, Elliott filed another motion for a temporary restraining order and preliminary injunction barring the NFL’s enforcement of his six-game suspension.<sup>304</sup> The temporary restraining order was granted on October 17, 2017, which allowed Elliott to play until the legal process wound up.<sup>305</sup> A hearing for the preliminary injunction was scheduled for October 30, 2017.<sup>306</sup> Elliott’s primary argument at the preliminary injunction hearing was that he was denied “fundamental fairness” during his arbitration proceedings.<sup>307</sup> However, the court found that Elliott failed to establish that Henderson’s decision was fundamentally unfair.<sup>308</sup> The court reasoned that Henderson complied with all provisions of the NFL CBA, which did not require him to allow Elliott to confront Thompson or Goodell.<sup>309</sup> Like in Brady’s case, the court relied heavily on the fact that the players collectively bargained for the provisions in the CBA.<sup>310</sup> As long as the NFL complied with such provisions, which the court found it did, Elliott’s fundamental fairness argument could not prevail.<sup>311</sup> On November 15, 2017, Elliott dropped his appeal, and began serving his suspension.<sup>312</sup>

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<sup>301</sup> *Id.* at 227–28.

<sup>302</sup> *See id.*

<sup>303</sup> *See id.* at 229.

<sup>304</sup> *See generally NFL Mgmt. Council v. NFL Players Ass’n*, 296 F. Supp. 3d 614 (S.D.N.Y. 2017).

<sup>305</sup> *See NFL Mgmt. Council v. NFL Players Ass’n*, No. 17-cv-06761-KPF, 2017 U.S. Dist. LEXIS 171995 (S.D.N.Y. Oct. 17, 2017).

<sup>306</sup> *Id.*

<sup>307</sup> *NFL Mgmt. Council*, 296 F. Supp. 3d at 622.

<sup>308</sup> *Id.* at 623.

<sup>309</sup> *See id.* at 623–624.

<sup>310</sup> *See id.* at 621–23, 625–26.

<sup>311</sup> *See id.* at 623–24.

<sup>312</sup> AP, *Cowboys’ Elliott Drops Appeal, Will Serve Rest of 6-game Ban*, USA TODAY SPORTS (Nov. 15, 2017, 5:34 PM),

## III. WHAT THE NFL SHOULD DO

The Brady and Elliott cases are the most publicized and extreme examples of NFL players fighting back against Roger Goodell's enormous power. While to an outsider, Brady and Elliott may have had strong cases stemming from a fundamentally unfair process, the NFL will continue to point to the NFL CBA as its trump card. As long as the NFL CBA retains Article 46 as it currently is written, courts will continue to find in favor of the NFL. If the NFL and Roger Goodell are going to begin to revive their public image, they should start with Article 46 during the approaching NFL CBA negotiations; a step that does not require the drastic changes some have called for.

## A. Argument Against Trevor Brice's Solution

Trevor Brice begins his 2013 article, entitled "Labor Pains on the Playing Field: Why Taking a Page from Europe's Playbook Could Help the United States," with an overview of the history of work stoppages in American pro sports, as well as the current applicable law.<sup>313</sup> Currently, the National Labor Relations Act (NLRA) creates the collective bargaining rights of private American workers, including professional athletes.<sup>314</sup> The NLRA's purpose is to encourage collective bargaining in order to remove "substantial obstructions to the free flow of commerce."<sup>315</sup> Brice notes that "[t]he theme behind the NLRA is that private parties engaged in business should resolve disputes arising out of that business without government interference."<sup>316</sup> Thus, according to Brice, no one form of dispute resolution is favored over another, making work stoppages an option just as good as mediation or arbitration.<sup>317</sup> As a result, Brice argues that because of the incentivization of the use of "economic weapons" in

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<https://www.usatoday.com/story/sports/nfl/2017/11/15/cowboys-elliott-drops-appeal-will-serve-rest-of-6-game-ban/107724034/>.

<sup>313</sup> See Brice, *supra* note 65, at 54–64.

<sup>314</sup> *Id.* at 54–55.

<sup>315</sup> *Id.* at 55 (quoting 29 U.S.C. § 151).

<sup>316</sup> *Id.* at 56.

<sup>317</sup> *Id.*



sports labor negotiations, the NLRA is an “ineffective means of regulating [such] negotiations.”<sup>318</sup>

Brice goes on to outline the governing bodies of sport in Europe, including FIFA and UEFA.<sup>319</sup> Brice believes that “strong governing organization[s] with the power to intervene in disputes,” like FIFA, help to minimize the use of work stoppages and lockouts.<sup>320</sup> Because of this, Brice proposes that the United States should create a governmental body charged with overseeing all aspects of professional sports.<sup>321</sup> Brice’s key reasoning is that such a body would help take labor disputes “out of the hands of self-interested parties and put them into the hands of” an entity whose purpose is preserving sports.<sup>322</sup> Brice argues that the “new body should enforce its own statutes through its own dispute-resolution system,” like the structure in place with FIFA.<sup>323</sup>

As part of this, Brice proposes that the U.S. implement new legislation in the mold of the Railway Labor Act (RLA).<sup>324</sup> Enacted in 1926, the RLA’s purpose is the avoidance of “interruption of interstate commerce by providing for the prompt resolution of labor disputes while still protecting the right of employees to bargain collectively.”<sup>325</sup> To accomplish this goal, the statute imposes a duty on the parties “to undertake all reasonable efforts toward negotiating a settlement before allowing for the use of economic weapons.”<sup>326</sup> The RLA has several provisions which encourage mediation over work stoppages and lockouts.<sup>327</sup> Under the RLA, collective bargaining agreements don’t expire, but rather have dates at which they become amendable.<sup>328</sup> Additionally, strikes and lockouts cannot be employed for “minor”

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<sup>318</sup> *See id.* at 56.

<sup>319</sup> *See id.* at 64–65.

<sup>320</sup> *See id.* at 65.

<sup>321</sup> *See id.* at 64–65.

<sup>322</sup> *See Brice, supra* note 65, at 74.

<sup>323</sup> *Id.* at 75.

<sup>324</sup> *See id.*

<sup>325</sup> *Id.* at 76.

<sup>326</sup> *Id.* at 76–77.

<sup>327</sup> *See id.* at 77.

<sup>328</sup> *See id.*

disputes.<sup>329</sup> Brice believes that similar legislation, applied to sports, would require the parties to make more of a genuine effort before resorting to work stoppages or lockouts.<sup>330</sup>

Brice's argument hinges on the assumption that both athletes and leagues have "tremendous leverage" that is uncommon in most other labor dispute contexts.<sup>331</sup> However, this is simply not the case in the NFL. In July of 2017, Seattle Seahawks cornerback Richard Sherman, a member of the NFLPA Executive Committee, said, "[i]f we want to get anything done, players have to be willing to strike."<sup>332</sup> Sherman noted that in order to seek change, players are "going to have to miss games, [they're] going to have to lose some money" if they are to make a point.<sup>333</sup> This is easy for Sherman to say because he is one of the league's marquee players, with an average salary of around \$9 million.<sup>334</sup> Because of his status, he has a certain degree of leverage, but that makes him an exception in the NFL. The vast majority of NFL players have very little leverage compared to the billionaire owners that employ them. This is evidenced mainly by the fact the average NFL career is very short, and it is getting shorter.<sup>335</sup>

According to a *Wall Street Journal* analysis of data from 2008 to 2014, the average NFL career is 2.66 years, down from 4.99 years in 2008.<sup>336</sup> Most players do not have the bank account Sherman does, and need to cash in on what is likely to be a very short career. While Sherman is correct in saying the players have to strike, they simply do

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<sup>329</sup> *Id.* (citing *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 725–27 (1945)).

<sup>330</sup> *See* Brice, *supra* note 65, at 77.

<sup>331</sup> *See id.* at 55.

<sup>332</sup> Mike Florio, *Richard Sherman: Players Need to be Willing to Strike*, PRO FOOTBALL TALK (July 12, 2017, 11:15 PM), [profootballtalk.nbcsports.com/2017/07/12/richard-sherman-player-need-to-be-willing-to-strike/](http://profootballtalk.nbcsports.com/2017/07/12/richard-sherman-player-need-to-be-willing-to-strike/).

<sup>333</sup> *Id.*

<sup>334</sup> *OTC Advanced: Richard Sherman, OVER THE CAP*, <https://overthecap.com/player/richard-sherman/1565/> (Last visited April 10, 2019).

<sup>335</sup> SI Wire, *WSJ Data Analysis Shows Average Length of NFL Careers Decreasing*, SPORTS ILLUSTRATED (Mar. 1, 2016), <https://www.si.com/nfl/2016/03/01/nfl-careers-shortened-two-years-data-analysis>.

<sup>336</sup> *Id.*

not have the leverage to do so on a league-wide scale. Even if the top players, who can afford to strike, do so, the lesser known players will see that as an opportunity to play more and the league will go on. The situation has presented itself in the past, most notably with the Washington Redskins; in 1987, the NFLPA went on strike, leaving teams like the Redskins to play with replacement players.<sup>337</sup> The league played its schedule with the “scabs” until the regular players broke their strike.<sup>338</sup> The striking players felt pressure to cross the picket line because the teams appeared un-phased by the use of the replacement players.<sup>339</sup> The Washington “Scabskins”<sup>340</sup> are a great example of the disparity in leverage between the owners and the players. Because of this disparity, the drastic measures Brice proposes are unnecessary. Not only would Brice’s proposal require lots of time working its way through Congress, but because NFL players are unlikely to effectively strike, new legislation could only potentially disrupt a very successful industry. There is a simpler solution.

#### B. Manageable Changes

The NFL CBA’s provisions regarding injury and non-injury grievances<sup>341</sup> are similar to those found in FIFA. They attempt to provide transparency and clear guidance to the grievance process, with input from both the NFLPA and the NFL Management Council. Thus, the roadmap is already in place for the NFL to improve its relations with players. The media and player criticism of the NFL and Roger Goodell has stemmed from instances like the Brady and Elliott suspensions. Both suspensions were handed down pursuant to Article 46, not Article 43.<sup>342</sup> The issue is very clearly the enormous grant of power bestowed upon Roger Goodell by Article 46 and his role as judge, jury and executioner. As such, rearticulating Article 46 to mirror

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<sup>337</sup> Rich Cohen, *The Scabs who Paved the Way for the Redskins’ 1987 Super Bowl title*, SPORTS ILLUSTRATED (Nov. 3, 2015), <https://www.si.com/nfl/2015/11/04/washington-redskins-scabs-super-bowl-xxii>.

<sup>338</sup> *Id.*

<sup>339</sup> *See id.*

<sup>340</sup> *Id.*

<sup>341</sup> *See supra* Part II.A.

<sup>342</sup> *See supra* Part II.B.

the procedures for injury and non-injury grievances would go a long way in improving the relationship between Goodell and the players.

One place the NFL could look to for guidance is the NBA Collective Bargaining Agreement (NBA CBA); since entering the role in 2014, NBA Commissioner Adam Silver has widely been viewed as a very player-friendly commissioner.<sup>343</sup> Part of the reputation has come from how Silver has dealt with players' social activism,<sup>344</sup> and a large part has come from the recent influx of money due to a new television deal.<sup>345</sup> The new deal with ESPN and TNT began at the beginning of the 2016–2017 season and is worth \$24 billion over nine years.<sup>346</sup> The deal is almost three times more than the previous deal.<sup>347</sup> When the deal was completed in 2014, many projected that it would increase the salary cap from \$63 million to above \$100 million by the 2017–2018 season.<sup>348</sup> The projections fell just short, with the NBA announcing in the summer of 2017 that the 2017–2018 cap would be set at \$99.093 million.<sup>349</sup> While not all players are paid equally, this averages out to \$8,257,750 for each of the twelve players on an active NBA roster. For comparison, the NFL's salary cap for the 2017–2018 season was \$177.2 million.<sup>350</sup> This averages out to \$3,343,396.23 for each of the

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<sup>343</sup> Gerald Imray, *Silver: NBA Relationship with Players 'best' in Sports*, NBA (July 30, 2015, 1:43 PM), [www.nba.com/2015/news/07/30/silver-on-nba-finances.ap/](http://www.nba.com/2015/news/07/30/silver-on-nba-finances.ap/).

<sup>344</sup> Aaron Mansfield, *Adam Silver Hopes NBA Players Will Do 'Appropriate Thing' and Stand for National Anthem*, COMPLEX (Oct. 21, 2016), <https://www.complex.com/sports/2016/10/adam-silver-nba-players-stand-national-anthem>.

<sup>345</sup> Mike Prada, *NBA to Announce 9-year, \$24 billion TV Deal with ESPN, Turner*, SB NATION (Oct. 5, 2014, 10:08 PM), <https://www.sbnation.com/2014/10/5/6916597/nba-new-tv-deal-espn-turner-24-billion>.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *NBA Salary Cap Reportedly Projected to Rise Past \$100M*, FOX SPORTS (Apr. 18, 2015, 7:45 AM), <https://www.foxsports.com/nba/story/salary-cap-projected-to-rise-past-100-million-by-2017-18-041815>.

<sup>349</sup> *NBA Salary Cap Set for 2017-18 Season at \$99.093 Million*, NBA (July 1, 2017, 12:18 AM), [www.nba.com/article/2017/07/01/nba-salary-cap-set-2017-18-season-99093-million/#/](http://www.nba.com/article/2017/07/01/nba-salary-cap-set-2017-18-season-99093-million/#/).

<sup>350</sup> Edward Lewis, *NFL Salary Cap For 2018 Season Set at \$177.2 Million*, NFL (Mar. 31, 2018, 7:01 AM),

fifty-three players on an active NFL roster. NBA players are very well paid, and, in turn, they are very happy.

Commissioner Silver does not differ from Goodell just on good will, however. The NBA CBA's policies regarding commissioner discipline are more player friendly than those found in the NFL. Article XXXI, section 9 (a) of the NBA CBA states that disputes involving action taken by the commissioner "concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball" and that results in a financial impact of less than or equal to \$50,000, are not handled as grievances and are not resolved by the Grievance Arbitrator.<sup>351</sup> Like the NFL, players disciplined under this commissioner power may appeal in writing to Silver.<sup>352</sup> Also like the NFL, Silver hears the appeal and issues a written decision that, absent subsequent appeal, constitutes the "full, final and complete disposition" of the case.<sup>353</sup> However, this is only for minor cases. Unlike the NFL, the NBA alters its commissioner discipline procedures for more serious offenses; in the event of a suspension under Silver's aforementioned powers that results in a financial impact of more than \$50,000, the process is handled "in the same manner as a Grievance."<sup>354</sup> The only difference in such a proceeding is that the Grievance Arbitrator must apply an "arbitrary and capricious" standard of review.<sup>355</sup> The Grievance Arbitrator has "exclusive jurisdiction" to determine all disputes which come before him/her.<sup>356</sup> The NBA procedures for handling grievances, in terms of initiating the grievance and the timing provisions, are similar to those of the NFL.<sup>357</sup> The Grievance Arbitrator is agreed upon by the NBA and the NBA Players' Association (NBAPA), and either party "may discharge the Grievance Arbitrator by serving written notice upon him/her" and the

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<http://www.nfl.com/news/story/0ap3000000919680/article/nfl-salary-cap-for-2018-season-set-at-1772-million>.

<sup>351</sup> 2017 NBA-NBPA COLLECTIVE BARGAINING AGREEMENT, art. XXXI § 9(a) (2017) [hereinafter NBA CBA].

<sup>352</sup> *Id.* § 9(a)(1).

<sup>353</sup> *Id.* § 9(a)(3).

<sup>354</sup> *Id.* § 9(b).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* § 1(a)(i).

<sup>357</sup> *See id.* §§ 2–6 (outlining the NBA grievance procedures).

other party during the period between July 27 and August 1 each year.<sup>358</sup>

The distinction made by the NBA CBA between serious and minor offenses, and their correlating procedures serves as a check on Commissioner Silver's power to deal out punishment under his reiteration of "conduct detrimental." The NFL would be smart to adopt a similar model. The NBA's policy allows for the commissioner to have a certain degree of latitude in wielding the power he rightly has, but also allows for independent review in serious cases where the player is even more likely to challenge the punishment. A twelve-game suspension in the NBA (~14% of regular season games) is roughly equivalent to a two-game suspension in the NFL (12.5% of regular season games). Were the NFL to adopt this distinction in procedure, suspensions like those challenged in "Deflategate" and Elliott's case would be reviewed by an independent party, possibly eliminating the need to take the case to Federal court. The NBA's model is just one route the NFL could take in the approaching CBA negotiations, however. Whatever the NFL does, it must consider how the policies will be viewed by a group of players who already do not trust Goodell. This one minor tweak could go a long way towards rebuilding that trust.

#### IV. CONCLUSION

While the NFL remains the top sports league in the United States, it is no secret that the NFL is in a different place than it used to be. While the league saw its television ratings increase this past season by 5%,<sup>359</sup> the NFL saw ratings drop 9.7% during the 2017-2018 season, a further decline from the 8% decrease during the 2016-2017 season.<sup>360</sup> The 2016 season's drop was been attributed to the unusual Presidential

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<sup>358</sup> *Id.* § 7(a).

<sup>359</sup> Tim Baysinger, *What Drove the NFL's TV Ratings Increase in 2018?*, The Wrap (Jan. 5, 2019, 12:30 PM), <https://www.thewrap.com/what-drove-the-nfls-tv-ratings-increase-in-2018/>.

<sup>360</sup> Greg Norman, *NFL TV Ratings Drop Nearly 10 Percent during Tumultuous Season*, FOX NEWS (Jan. 5, 2018), [www.foxnews.com/sports/2018/01/05/nfl-tv-ratings-drop-nearly-10-percent-during-tumultuous-season.html](http://www.foxnews.com/sports/2018/01/05/nfl-tv-ratings-drop-nearly-10-percent-during-tumultuous-season.html).

race,<sup>361</sup> while the more recent decline, according to one survey, was mainly due to players kneeling during the National Anthem.<sup>362</sup> The rise in ratings during the 2018 season has been attributed to higher offensive outputs that created exciting, close games.<sup>363</sup> It is also likely that fans tuned in more frequently because there was no overbearing controversy like the Tom Brady and Ezekiel Elliott situations. The NFL appears as though it is recovering from the slide it endured from 2016-2018; however, the league's image could still use some refreshing, and the first step is rebuilding trust with the players. While the NFL has survived lockouts before, there is a possibility that some Americans could find other ways to entertain themselves, or become fed up with the league, a lockout could not come at a worse time. The NFL's worst public relations nightmare would be DeMaurice Smith and the NFLPA allowing the league to slip into another lockout in 2021. The NFL, and Roger Goodell, must think hard about whether power is more important than a good relationship with the players, not only for their sake, but also for the millions of fans who live and die with their teams. Daniel Kraker and David Morris best summed up the place professional sports teams have in their communities:

This combination of emotion, history and entertainment make sports a business unlike any other. The people of Detroit don't congregate around the television to watch Ford or GM workers build cars; Seattle residents don't watch Microsoft employees design software. But rooting for the Tigers and the Supersonics and the Lions is a natural communal activity.<sup>364</sup>

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<sup>361</sup> *Id.*

<sup>362</sup> Valerie Richardson, *Survey: Main Reason for NFL's Ratings Slide was Player Take-a-knee Protests*, THE WASHINGTON TIMES (Feb. 6, 2018), <https://www.washingtontimes.com/news/2018/feb/6/nfl-ratings-down-due-anthem-protests-survey/>.

<sup>363</sup> See Baysinger, *supra* note 359.

<sup>364</sup> DANIEL KRAKER & DAVID MORRIS, ROOTS, ROOTS, ROOTS FOR THE HOME TEAM: COMMUNITY-OWNED PROFESSIONAL SPORTS, INST. LOCAL SELF-RELIANCE 1 (1998), <http://www.ilsr.org/wp-content/uploads/files/images/rootsroots.pdf>.

A fall without NFL football would crush so many people, and so many communities that depend on their team, in both economic and noneconomic ways. Despite the comments Smith has made, because of the disparity in leverage between the owners and the players, a lengthy lockout is unlikely. But this does not mean that Goodell cannot take a page out of Adam Silver's book and relinquish some power in order to build better relationships with the players, and, as a result, a better relationship with the fans. After all, without fan support the NFL would cease to exist.