

A League of His Own: Harmonizing Disparate Penal Outcomes in NFL, NBA, and MLB Collective Bargaining Agreements

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INTRODUCTION

“I’ve never assaulted any woman. I’ve never disrespected any woman.”¹ Deshaun Watson leaned into the microphone intently, hands gesticulating with the articulation of each point.² Flanked by Cleveland Browns General Manager Andrew Berry and Head Coach Kevin Stefanski, Watson defended his position relentlessly all throughout the thirty-eight minute press conference in March of 2022 introducing him as the organization’s starting quarterback.³ The announcement was just the beginning of Watson’s tumultuous journey with the Browns.⁴

Athlete misconduct occupies a complex and unique space in the United States. Sports are highly profitable and commercialized; owners, coaches, and general managers are motivated to win, even if doing so requires the use of individuals who engage in misconduct.⁵ Of course, all athletes, like anyone else, remain bound by civil and criminal laws. But professional athletes are concurrently constrained by collective bargaining agreements (CBAs), which act as another check upon behavior both on and off the field.⁶ CBAs provide independent disciplinary processes, with different investigative, adjudicative and punitive procedures than the criminal justice system itself.⁷ So, as CBAs and the criminal justice system interact, the outcomes for professional athletes become unpredictable.⁸ Further, given that each professional sports league is governed

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¹ Cleveland Browns, *Deshaun Watson Introductory Press Conference*, YOUTUBE (Mar. 25, 2022), <https://www.youtube.com/watch?v=gjOe0tgLCIE>.

² *Id.*

³ *Id.*

⁴ See Terry Pluto, *Deshaun Watson Trade Impact. About Baker Mayfield & Jim Schwartz – Terry Pluto’s Cleveland Browns Scribbles*, CLEVELAND.COM (Mar. 7, 2023), <https://www.cleveland.com/browns/2023/01/impact-of-deshaun-watson-trade-baker-mayfield-jim-schwartz-terry-plutos-cleveland-browns-scribbles.html> (“From the moment the Browns made the shocking trade for Deshaun Watson, they were in big trouble for the 2022 season. A team with a strong culture and coaching staff possibly could have overcome it. At least, they could have delivered something like a 9-8 record instead of 7-10. . . . Coach Kevin Stefanski seemed emotionally drained at times, especially dealing with questions about Watson’s off-field problems.”).

⁵ See Ellen Geyer, *Brown’s Signing of Hunt is Out of Line*, OBSERVER (Feb. 12, 2019), https://issuu.com/the-observer/docs/observer_2-12-19.

⁶ Cym H. Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 LAW & CONTEMP. PROBS. 3–4, (1973).

⁷ Janine Young Kim & Matthew J. Parlow, *Off-court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573–74 (2009).

⁸ See *id.*

by its own bargained-for CBA, the same behavior may receive different treatment—and punishment—based solely on the sport an individual plays.⁹

This Article presents a critical, comparative analysis of the collective bargaining agreements governing the three major sports leagues—the National Football League (NFL), the National Basketball Association (NBA), and Major League Baseball (MLB)—to demonstrate the disparate penal outcomes players experience based on the sport in which they participate. It proposes the creation of a CBA penal structure which (1) aligns with traditional judicial principles and (2) governs all three major leagues to create an adjudicative system in professional sport that mirrors public expectations of fair punishment and voids the outcome-determinative role a player’s sport has in punishment. Part I compares the CBAs governing each league to one another and discusses the disciplinary processes of each of the three leagues. Part II presents a case study, analyzing how Deshaun Watson was or would have been punished under each of the three CBAs, to demonstrate the outcome-determinative role sport can play. Part III discusses the considerations of criminal penal theory and traditional civil litigation, describing how these realities impact leagues’ adjudicative processes. Part IV proposes an optimal CBA penal structure to be implemented across all leagues and applies it to Watson’s situation to demonstrate its practicality. Part V briefly concludes.

I. COLLECTIVE BARGAINING IN SPORT

A. *Bargaining Between Professional Leagues and Players Associations*

Modern collective bargaining agreements exist in three of the United States’ primary professional sports leagues: the National Football League (NFL), the National Basketball Association (NBA), and Major League Baseball (MLB). These agreements are negotiated by select players, counsel, and league representatives on behalf of the organization concerned, then ratified with a majority vote from both the covered league and players.¹⁰ CBAs are valid and binding for an agreed-upon period of time, and renegotiation occurs upon expiration.¹¹

A critical piece of each CBA is its provisions surrounding the investigation

⁹ *Id.* at 575–79; Lowell, *supra* note 6, at 3.

¹⁰ See *The 5 Stages of Collective Bargaining*, NAT’L EDUCC. ASS’N (June 2022), <https://www.nea.org/resource-library/5-stages-collective-bargaining>.

¹¹ See, e.g., Grant Gordon, *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL (Mar. 16, 2020), <https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246>. CBAs may contain provisions allowing for termination prior to the date specified, but unless such provisions are triggered, the agreements remain valid until the agreed-upon expiration date. See, e.g., NATIONAL BASKETBALL ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, art. XXXIX (2023) [hereinafter NBA CBA], <https://imgix.cosmicjs.com/25da5eb0-15eb-11ee-b5b3-fbd321202bdf-Final-2023-NBA-Collective-Bargaining-Agreement-6-28-23.pdf> (giving the 2023 agreement effect until 2030, but also providing mutual early termination rights upon written notice or the occurrence of particular triggering circumstances).

and adjudication of athlete misconduct occurring off the field, court, or diamond. Because these provisions are bargained-for, each league takes a different approach.¹² The NFL CBA contains a general “Personal Conduct Policy,” while the NBA and MLB each have specific procedures to address sexual assault, domestic violence, and child abuse. These differences represent the independent negotiation procedures each league undertakes.

B. The NFL’s “Personal Conduct Policy” and “Conduct Detrimental”

The NFL’s CBA was ratified in 2020, and is currently binding through the 2030 season.¹³ The agreement deals with player punishment in several different ways, addressing off-field misconduct in particular in Articles 42 and 46.¹⁴ These provisions allow players to be punished by two different bodies: their particular club and/or the League commissioner.¹⁵

To truly understand the authority each of these bodies has under the CBA, it is critical to read them alongside the NFL’s Player Conduct Policy (“The Policy”).¹⁶ The Policy is an independent document authored by the commissioner pursuant to the NFL Constitution, Bylaws, and player contracts.¹⁷ It is incorporated into the CBA by reference, but not in full text.¹⁸ Therefore, the Policy may be unilaterally revised by the commissioner at any point, effectively circumventing the collective bargaining process.¹⁹ As a result, players may be bound by new rules upon the authorship of a new policy without their express consent to the new terms articulated within it.

The Policy concerns “conduct detrimental to the integrity of professional football.”²⁰ It allows the commissioner to prohibit, investigate, and where he or she deems appropriate, punish, any behavior by players falling within this definition.²¹ The concept of “conduct detrimental” is not expressly defined anywhere in the Policy or the CBA, though a non-exhaustive list of behavior falling within its purview is provided in the Policy.²²

¹² *The 5 Stages*, *supra* note 10.

¹³ NATIONAL FOOTBALL LEAGUE, 2020 COLLECTIVE BARGAINING AGREEMENT (2021) [hereinafter NFL CBA], <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>.

¹⁴ *Id.* art. 42, 46.

¹⁵ *Id.*

¹⁶ *Id.*; NATIONAL FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY (2023) [hereinafter PERSONAL CONDUCT POLICY], <https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2022-NFL-Personal-Conduct-Policy.pdf>.

¹⁷ PERSONAL CONDUCT POLICY, *supra* note 16, at 1.

¹⁸ NFL CBA, *supra* note 13, art. 46, § 1 (e)(ii).

¹⁹ See PERSONAL CONDUCT POLICY, *supra* note 16, at 1; NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. VIII, §§ 13(A)–(B), 15 (2016) [hereinafter NFL CONSTITUTION]; NFL CBA, *supra* note 13, appx. A, ¶ 18.

²⁰ PERSONAL CONDUCT POLICY, *supra* note 16, at 1.

²¹ *Id.*

²² See *id.* at 1–2; see also NFL CBA, *supra* note 13 (analogizing to the NFL’s Collective Bargaining Agreement that similarly does not define this language).

A check on this expansive authority is provided in the procedure followed in the penal process of player investigations, whether conducted by teams themselves (Article 42) or undertaken by the league commissioner (Article 46).

Per Article 42 on club discipline, teams are required to provide players with notice of potentially punishable behavior, punish uniformly for the same offenses, and hold players to the standards set out by the league in the Policy.²³ The Article also creates a penal schedule, requiring clubs to enforce progressive punishment for repeated offenses, and sets general guidelines on disciplinary issues likely to arise in each organization's daily business: player tardiness, injury reporting, damage to club equipment, and loss of playbooks.²⁴

Article 46 on commissioner discipline sets the general parameters of authority, reserving the right to punish "conduct detrimental to the integrity of, or public confidence in, the game of professional football" just as the Policy does.²⁵ The Policy thus serves as a more in-depth, substantive explanation of "conduct detrimental" to give players and clubs notice regarding the behavior the commissioner may punish under this Article.²⁶ Further, Article 46 places the burden of proof on the NFL, requiring it to support any punishment imposed with a preponderance of the evidence that the conduct of the player in question was a violation of the CBA and, by extension, Policy.²⁷

Articles 42 and 46 attempt to counterbalance the commissioner's unilateral Policy revision power by requiring the League and its teams to give players notice of actionable off-field misconduct.²⁸ Moreover, given that these provisions are contained in the CBA, players theoretically retain authority to renegotiate or more clearly define them. But at the same time, it remains unclear just how much bargaining power the players actually have—the commissioner's unilateral revision authority is protected by the Constitution, making the accessibility of the vague "conduct detrimental" concept less clear.²⁹

Player power progressed some with the 2020 CBA negotiation round, which created a new third-party disciplinarian to be consulted in player misconduct

²³ NFL CBA, *supra* note 13, art. 42, §§ 1(a)(xvii), 2(a)–(b), 3(a).

²⁴ *Id.* art. 42, § 1(b).

²⁵ *Id.* art. 46, § 1(a); PERSONAL CONDUCT POLICY, *supra* note 16, at 1.

²⁶ PERSONAL CONDUCT POLICY, *supra* note 16, at 1.

²⁷ NFL CBA, *supra* note 13, art. 46, § 1(e)(iv).

²⁸ *Id.* art. 42, § 2(a), art. 46, § 1(a).

²⁹ NFL CONSTITUTION, *supra* note 19, art. VIII, §§ 13(A)–(B), 14. For more on the balance between Commissioner authority and notice requirements, see SUE L. ROBINSON, DECISION, IN RE: MATTER OF DESHAUN WATSON 3 (Aug. 1, 2022), <https://www.documentcloud.org/documents/22124209-deshawn-watson-suspension-ruling?responsive=1&title=1> (discussing the NFL's authority to define what constitutes "(1) sexual assault; (2) conduct that poses a genuine danger to the safety and well-being of another person; and (3) conduct that undermines or puts at risk the integrity of the NFL" in violation of the Personal Conduct Policy, but noting, too, that the vague language of both the CBA and the Personal Conduct Policy prevents disciplinary officers from creating or enforcing punishments that are so strict or harsh they would be considered unforeseeable by players or disproportionate to the misconduct alleged).

investigations.³⁰ The independent, jointly-selected disciplinary officer investigates alleged Policy violations, conducts hearings, makes findings of fact, and offers rulings on the appropriate level of discipline.³¹ This officer's determination regarding whether a Policy violation occurred is binding, but any involved party may appeal the ruling *to the commissioner*.³² And, where Policy violations are found, the commissioner retains final authority over a player's "sentence."³³

Thus, despite the involvement of an independent officer, the NFL's commissioner retains broad and ultimate authority to define "conduct detrimental" and make final, binding disciplinary decisions under it.

C. *The NBA and the Domestic Violence, Sexual Assault, and Child Abuse Policy*

The NBA's currently effective CBA was ratified in 2023, and like the NFL CBA, speaks specifically to off-court misconduct. But unlike its football counterpart, professional basketball's agreement has a disciplinary process specific to incidents of domestic violence, sexual assault, and child abuse.³⁴ The Domestic Violence, Sexual Assault, and Child Abuse Policy lies at the end of the CBA, separate from the provisions addressing other types of player misconduct.³⁵

The Domestic Violence, Sexual Assault, and Child Abuse Policy articulates the rights the league has in investigating alleged violations, and the procedures to be followed in doing so.³⁶ The NBA retains the right to use "third party resources including, but not limited to, outside legal counsel, outside investigators, or other individuals with relevant experience or expertise" in investigating player domestic abuse, sexual assault, or child abuse.³⁷ Generally, the league may refer players under investigation to the Policy Committee, which helps create a Treatment and Accountability Plan (TAP) for a player to follow during the disciplinary process.³⁸ The Committee, comprised of subject matter experts in each of the covered areas (Domestic Violence, Sexual Assault, and Child Abuse), oversees compliance with any TAPs in place, which may mandate counseling, psychological evaluation, or similar procedures deemed necessary or

³⁰ Pro Football Talk, *Understanding the NFL's New Process for Imposing Discipline under Personal Conduct Policy*, NBC SPORTS (May 5, 2022), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/understanding-the-nfls-new-process-for-imposing-discipline-under-personal-conduct-policy>.

³¹ NFL CBA, art. 46, § 1(e)(ii).

³² *Id.* art. 46, § 1(e)(v).

³³ *Id.*

³⁴ NBA CBA, *supra* note 11, exhibit F.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* exhibit F at 6.

³⁸ *See id.* exhibit F at 2–4.

potentially rehabilitative based on the Committee's own evaluation.³⁹

Players working with the Committee or otherwise under investigation are not automatically suspended; they may continue employment activities unless the commissioner him or herself decides to place that player on leave.⁴⁰ In fact, suspension during investigation is intended to be the exception, not the rule.⁴¹ And, even if the commissioner does place a player on leave, he or she may only do so for "a reasonable period of time" during which the player must continue to receive compensation, and may continue participating in non-public team events at his team's request, consent to which "shall not be unreasonably withheld."⁴²

The NBA commissioner retains "final authority" on all disciplinary action.⁴³ Upon a finding of "just cause," the commissioner may "fine, suspend, or dismiss and disqualify" any players who are found to be in violation of the policy, with no maximum or minimum penal constraints.⁴⁴ Players may challenge discipline through the NBA's Grievance Arbitration Process,⁴⁵ an appeals procedure which closely parallels normative litigation.⁴⁶ And though criminal and legal proceedings against a player inform commissioner punishment and Grievance Arbitration decisions, the proceedings are not dispositive of a player's disciplinary outcome.⁴⁷ If a player appeals through the Grievance Arbitration Process, the arbitrator's decision and award "constitute full, final, and complete disposition of the Grievance, and shall be binding upon the player(s) and Team(s) involved and the parties to the agreement."⁴⁸

But arbitrators who review commissioner decisions have limited authority.

³⁹ See *id.* exhibit F at 4.

⁴⁰ *Id.* exhibit F at 7. It is worth noting that it is the commissioner, not the Policy Committee or team organization, who retains the sole authority to place a player on leave during the investigative process. When considered in the context of other employment issues, this is an unusual result—the CEO of a large company typically would not retain authority over a human resources department or supervising manager to mete out punishment. See generally David Sirotkin, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 CARDOZO J. CONFLICT RESOL. 289 (2009).

⁴¹ See NBA CBA, *supra* note 11, exhibit F at 7 ("The parties agree that administrative leave is not intended to be routinely applied during the pendency of every player investigation under this Policy. Instead, administrative leave should be applied in only those cases in which a balancing of all relevant factors clearly establishes that it is reasonable to do so under the totality of the circumstances.").

⁴² *Id.* exhibit F at 7–8.

⁴³ *Id.* exhibit F at 9 ("[T]he Commissioner will determine all discipline under this Policy . . .").

⁴⁴ *Id.* exhibit F at 8.

⁴⁵ *Id.* exhibit F at 10.

⁴⁶ See Skyler Sands, *Mental Health and the NBA CBA: Making Sense of the Ben Simmons Arbitration*, BROOKLYN SPORTS & ENT. L. BLOG (Oct. 6, 2022), <https://sports-entertainment.brooklaw.edu/sports/mental-health-and-the-nba-cba-making-sense-of-the-ben-simmons-arbitration/> (describing how, during the grievance process, "parties initiate claims, engage in motion practice, attend hearings, and present witness testimony").

⁴⁷ See NBA CBA, *supra* note 11, exhibit F. The only exception to this rule is that the league, commissioner, or Policy Committee may not discipline a player who, after a criminal trial, has been acquitted. *Id.* exhibit F at 8.

⁴⁸ *Id.* art. XXXI, § 6(a).

If the misconduct appealed concerns conduct undermining the public confidence in or integrity of the game of basketball—assuming that violations of the NBA’s Domestic Violence, Sexual Assault, and Child Abuse Policy so qualify—and involves a financial penalty of \$50,000 or less, the Grievance arbitrators have no jurisdiction.⁴⁹ Instead, disputes are decided by the commissioner, and appeals are heard by the Player Discipline Arbitrator, who only has the authority to affirm or reduce the *financial* penalties imposed.⁵⁰ Similar misconduct involving a financial penalty which is greater than \$50,000 does follow the Grievance Arbitration procedure, but the Commissioner’s decision is reviewed only insofar as it is “arbitrary and capricious.”⁵¹

D. The MLB’s Domestic Violence, Sexual Assault, and Child Abuse Policy and “Just Cause.”

Like the NBA, the MLB has a separate disciplinary provision for misconduct involving domestic violence, sexual assault, and child abuse.⁵² And, like the NBA’s Policy Committee, the MLB has a Joint Policy Board which assesses and monitors a player’s conduct and progress after he has been confirmed or alleged to have engaged in misconduct pursuant to the domestic violence, sexual assault, and child abuse clause.⁵³

When a baseball player is implicated under the policy, the league has three choices: immediately place him on administrative leave, defer leave until he is charged with a crime, or defer leave until the commissioner receives credible, corroborating evidence of his violation(s).⁵⁴ A player on leave will continue to receive pay and may participate in certain non-public team events that the player’s club and the MLB Commissioner agree to.⁵⁵

The commissioner him or herself retains the authority to discipline players who engage in misconduct covered by the policy, so long as he or she has “just cause” to do so.⁵⁶ This burden is met where a player is criminally convicted or

⁴⁹ *Id.* art. XXXI, § 9(a).

⁵⁰ *Id.* art. XXXI, § 9(a)(5).

⁵¹ *Id.* art. XXXI, § 9(b). Here, the arbitrator has much less authority and discretion than in other disputes adjudicated under this article. *See generally id.* art. XXXI (suggesting that arbitrators have *de novo* investigative and adjudicative authority in resolving other types of disputes).

⁵² MAJOR LEAGUE BASEBALL, 2022–2026 BASIC AGREEMENT, attach. 52 (2022) [hereinafter MLB CBA], https://www.mlbplayers.com/_files/ugd/4d23dc_d6dfc2344d2042de973e37de62484da5.pdf; NBA CBA, *supra* note 11, exhibit F.

⁵³ MLB CBA, *supra* note 52, attach. 52, § IV; NBA CBA, *supra* note 35, exhibit F at 4.

⁵⁴ MLB CBA, *supra* note 52, attach. 52, § II. Players who are placed on leave may appeal the decision to the grievance arbitration panel, who will reinstate the player if it finds either that (1) allegations of misconduct leading to the leave “are not supported by credible information” or (2) “that allowing the Player to remain active during the Commissioner’s Office’s investigation is consistent with the safety of the victim(s) and will not cause significant disruption to the Player’s Club.” *Id.* attach. 52, § II(B)(1).

⁵⁵ *Id.* attach. 52, § II(B)(2).

⁵⁶ *Id.* attach. 52, § III(A).

enters a plea of guilty or *nolo contendere*—no contest—for conduct under the policy.⁵⁷ Otherwise, the concurrent adjudication of a matter in the judicial system is not binding on the commissioner’s process.⁵⁸ There are also no minimum or maximum penalties enumerated: the commissioner retains discretion to punish each instance of player misconduct to the degree he or she sees fit, subject to the arbitration panel appeals process.⁵⁹ When the MLB commissioner disciplines players, clubs may not also punish that policy violation, unless the commissioner has granted them the authority to do so.⁶⁰

Players may challenge discipline imposed by the commissioner through an arbitration panel review.⁶¹ And, like the NBA process, the MLB arbitration panel is similar to traditional litigation—parties are entitled to representation and may offer evidence; testimony is taken, records are kept, and written decisions are issued in the absence of settlement.⁶²

E. Dissonance in League Disciplinary Outcomes

CBAs are rightfully negotiated between the specific leagues and players whom they govern; however, these disparate negotiation processes—and disparate perspectives, personalities, and priorities—lead to agreements with different terms.⁶³

The NBA and MLB CBAs each include specific domestic violence, sexual assault, and child abuse policies.⁶⁴ The NFL adjudicates all misconduct under the more nebulous “personal conduct policy.”⁶⁵ Each league preserves players’ ability to appeal disciplinary decisions to an independent party, either an arbitrator or a disciplinary official.⁶⁶ In the appeals process, parties may present evidence, witnesses, and testimony as in normative litigation.⁶⁷ In all three

⁵⁷ *Id.* attach. 52, § III(D)(4)(a).

⁵⁸ *See id.* attach. 52, § III(D)(4).

⁵⁹ Dave Brown, *MLB Enacts Domestic Violence, Sexual Assault and Child Abuse Policy*, CBS SPORTS (Aug. 21, 2015) <https://www.cbssports.com/mlb/news/mlb-enacts-domestic-violence-sexual-assault-and-child-abuse-policy/> (discussing the commissioner’s “wide latitude” under the policy). MLB Commissioner Rob Manfred said that the “comprehensive policy . . . reflects the gravity and the sensitivities of these significant societal issues.” *Id.* MLBPA Executive Director Tony Clark stated, “Players are husbands, fathers, sons and boyfriends. And as such want to set an example that makes clear that there is no place for domestic abuse in our society. We are hopeful that this new comprehensive, collectively-bargained policy will deter future violence, promote victim safety, and serve as a step toward a better understanding of the causes and consequences of domestic violence, sexual assault, and child abuse.” *Id.*

⁶⁰ MLB CBA, *supra* note 52, attach. 52, § III(B)(1) (stating that a Club may not discipline a player for a violation of the Policy unless the Commissioner defers his disciplinary authority to the Club and that any such Club discipline may also be challenged through the arbitration process).

⁶¹ *Id.* attach. 52, § III(D).

⁶² *Id.* art. XI, § B, appx. B.

⁶³ Compare NFL CBA, *supra* note 13, with MLB CBA, *supra* note 52, and NBA CBA, *supra* note 11; *see also infra* Part II.

⁶⁴ MLB CBA, *supra* note 52, attach. 52; NBA CBA, *supra* note 11, exhibit F.

⁶⁵ PERSONAL CONDUCT POLICY, *supra* note 16, at 1; NFL CBA, *supra* note 13, app. J, ¶ 9.

⁶⁶ *Infra* Part I.B–D.

⁶⁷ *Id.*

leagues, outside legal proceedings generally do not impact the authority of the commissioner to bring a disciplinary action.⁶⁸ And, in all three leagues, commissioners retain the ability to suspend players for cause during the investigative process. Moreover, the leagues themselves bear the burdens of proof: a preponderance of the evidence in the NFL,⁶⁹ and just cause in the NBA and MLB.⁷⁰ The disparate burdens of proof and adjudicative procedures within leagues, however, lead to disparate player outcomes.

II. CASE STUDY: DESHAUN WATSON

The NFL recently adjudicated the matters of Deshaun Watson under its CBA's disciplinary provisions and Player Conduct Policy. Watson was accused of at least 26 counts of sexual assault. To understand the outcome-determinative role a player's sport has more practically on punishment, Watson's case will be analyzed. First, his actual outcome under the NFL CBA, an eleven-game suspension, fine, and mandatory counseling, will be explained and assessed. Next, Watson's misconduct will be discussed through the lens of both the NBA and MLB CBAs to demonstrate how these leagues would have handled his misconduct differently. Using the exact language of these policies and prior decisions by their respective commissioners as guidance, such analysis shows that Watson likely would have been suspended for no time at all or a full season were he a basketball player, and for at least nine seasons but more likely for life were he a baseball player.

A. *Watson in the NFL: Twenty-Four Sexual Assault Allegations and an Eleven-Game Suspension*

Deshaun Watson is a twenty-eight-year-old quarterback who has played seven seasons in the NFL.⁷¹ Considered one of the most promising quarterbacks of his age, Watson is a three-time Pro Bowl selection, having thrown 118 touchdowns across sixty-six professional games.⁷² Watson's career began with promise; in the spring of 2021, it turned to peril.⁷³

⁶⁸ *Id.*

⁶⁹ NFL CBA, *supra* note 13, art. 46, § 1(e)(iv); *see* ROBINSON, *supra* note 29, at 2.

⁷⁰ NBA CBA, *supra* note 11, art. XXXI, § 15(c); MLB CBA, *supra* note 52, art. XII, § A.

⁷¹ *Deshaun Watson*, NFL, <https://www.nfl.com/players/deshaun-watson/> (last visited Apr. 4, 2024).

⁷² Cody Benjamin, *Deshaun Watson Traded to Browns: Texans Sending Star QB to Cleveland in Blockbuster Deal*, CBS (Mar. 21, 2022), <https://www.cbssports.com/nfl/news/deshaun-watson-traded-to-browns-texans-sending-star-qb-to-cleveland-in-blockbuster-deal/>; *2017 NFL Draft*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2017/draft.htm> (last visited Apr. 4, 2024); *Deshaun Watson Career Statistics*, NFL, <https://www.nfl.com/players/deshaun-watson/stats/career> (last visited Apr. 4, 2024).

⁷³ Madeline Coleman & Daniela Perez, *Deshaun Watson Timeline: What Has Happened Since First Lawsuit Filed*, SPORTS ILLUSTRATED (Aug. 18, 2022), <https://www.si.com/nfl/2022/03/11/deshaun-watson-timeline-what-has-occurred-first-lawsuit-filed>.

On March 16, The Buzbee Law Firm brought a sexual assault lawsuit against Watson on behalf of a massage therapist unnamed in the complaint.⁷⁴ The filing described Watson's alleged misconduct in March of 2020 in detail.⁷⁵ On March 17, two more suits were filed; the day after that, four more. This prompted the NFL to open an investigation into Watson, and the Houston Texans, his team at the time, to release a statement vowing to cooperate and take the allegations seriously.⁷⁶ By the end of April 2021, twenty-two civil lawsuits had been filed, and by October, ten criminal complaints accused Watson of sexual assault or misconduct, too.⁷⁷

Despite the ongoing investigations by the NFL and Houston Police Department, Watson remained a member of the Texans' squad.⁷⁸ And, after a grand jury in Harris County declined to indict him, interest in a trade for Watson spiked, with some half-dozen teams engaging in serious discussions with Houston about a deal to bring him to their respective organizations.⁷⁹ In March of 2022, the Cleveland Browns gave Watson the largest guaranteed contract in NFL history—five years, \$230 million—which he accepted, waiving his no-trade clause with the Texans.⁸⁰

In Watson's introductory press conference, Browns General Manager Andrew Berry described the “five-month Odyssey” Cleveland undertook to

⁷⁴ *Id.*; Madeline Coleman, *Graphic Details Shared in Sexual Assault Lawsuit Filed Against Deshaun Watson*, SPORTS ILLUSTRATED (Mar. 17, 2021), <https://www.si.com/nfl/2021/03/17/deshaun-watson-sexual-assault-lawsuit-graphic-details-massage-therapist>.

⁷⁵ Plaintiff's Complaint, *Jane Doe v. Deshaun Watson*, No. 2021-15324 (Dist. Ct. Harris Cnty. Mar. 16, 2021). The complaint details the specifics of the incident, including the plaintiff's understanding that “Watson wanted a massage for only one reason—sex.” *Id.* at 3. The plaintiff asserted that she rebuffed several of Watson's advances, but he was undeterred. *Id.* at 3–4. After touching her inappropriately, she asked him to leave and began crying. *Id.* at 4. The plaintiff then claimed that Watson stated, “I know you have a career and a reputation, and I know you would hate for someone to mess with yours, just like I don't want anyone messing with mine.” *Id.*

⁷⁶ Coleman & Perez, *supra* note 73; James Palmer (@JamesPalmerTV), TWITTER (Mar. 18, 2022, 5:55 PM), <https://twitter.com/JamesPalmerTV/status/1372668029000056832/photo/1>.

⁷⁷ Coleman & Perez, *supra* note 73; Madeline Coleman, *Goodell Says They Don't Have the Necessary Info to Put Watson on Exempt List*, SPORTS ILLUSTRATED (Oct. 26, 2021), <https://www.si.com/nfl/2021/10/27/nfl-commissioner-roger-goodell-comments-on-deshaun-watson-cases>.

⁷⁸ Coleman & Perez, *supra* note 73.

⁷⁹ Daniel Chavkin, *The Teams Who Could Make a Move for Deshaun Watson*, SPORTS ILLUSTRATED (Mar. 11, 2022), <https://www.si.com/nfl/2022/03/12/deshaun-watson-teams-trade-interest-grand-jury-decision> (“With Texans quarterback Deshaun Watson no longer facing criminal charges, NFL insiders expect trade interest in him to pick up this week.”); Madeline Coleman, *Grand Jury Returns ‘No’ Bills on Nine Criminal Complaints Against Deshaun Watson*, SPORTS ILLUSTRATED (Mar. 11, 2022), <https://www.si.com/nfl/2022/03/11/deshaun-watson-will-not-face-criminal-charges-grand-jury>.

⁸⁰ Coleman & Perez, *supra* note 73; Jacob Camenker, *The NFL's Highest-paid Quarterbacks in 2023 Salary, Guaranteed Money, and Total Contract Value*, THE SPORTING NEWS (July 27, 2023), <https://www.sportingnews.com/us/amp/nfl/news/nfl-highest-paid-quarterbacks-2023-salary/zqrureirykzx3z7hyq713qov>. Watson's contract puts him over the likes of two-time Super Bowl winner and MVP Patrick Mahomes, as well as franchise quarterbacks Joe Burrow (Cincinnati Bengals) and Josh Allen (Buffalo Bills). *Id.*

understand their new quarterback and the allegations against him.⁸¹ However, Berry admitted that, at the advice of the organization's legal counsel, neither he nor the investigative team had spoken with or reached out to any of the plaintiffs.⁸² Head Coach Kevin Stefanski spoke briefly in support of Berry and the move, emphasizing his faith in the Browns' internal research processes and his excitement to work with Watson.⁸³ Watson echoed the sentiments of both Berry and Stefanski, defended himself ardently, and insisted that he was looking forward to becoming an active member of the local Cleveland community once the investigation concluded.⁸⁴

The NFL investigation continued during and after the trade as the League compared Watson's conduct to the standards enumerated in the Player Conduct Policy.⁸⁵ At the conclusion of the investigation, the league was poised to suspend Watson for an entire year. However, the NFL Players Association (NFLPA) stepped in on the quarterback's behalf to argue against the severity of the punishment, emphasizing its stark contrast to the discipline given to owners Dan Snyder, Robert Kraft, and Jerry Jones.⁸⁶ The disparity between the NFL and

⁸¹ Cleveland Browns, *Deshaun Watson Introductory Press Conference*, YOUTUBE (Mar. 25, 2022), <https://www.youtube.com/watch?v=gjOe0tgLCIE>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ After Cleveland and Watson's blockbuster deal, NFL spokesman Brian McCarthy clarified that "any transaction would have no effect on the NFL's ongoing and comprehensive investigation of the serious allegations against Deshaun Watson. Nor would it affect his status under the Collective Bargaining Agreement and the Personal Conduct Policy. If the league's investigation determines that Watson violated the Personal Conduct Policy, discipline may be imposed pursuant to the policy and the CBA." Tom Pelissero (@TomPelissero), TWITTER (Mar. 18, 2022, 5:05 PM), <https://twitter.com/TomPelissero/status/1504927012711976965/photo/1>; see PERSONAL CONDUCT POLICY, *supra* note 16.

⁸⁶ Zach Koons, *Deshaun Watson's NFL Hearing to Continue Wednesday, per Report*, SPORTS ILLUSTRATED (June 29, 2022), <https://www.si.com/nfl/2022/06/29/deshaun-watson-nfl-hearing-continue-wednesday>. Dan Snyder, owner of the Washington Commanders, was fined \$10 million after an NFL investigation discovered the "toxic" and "highly unprofessional" culture of sexual assault and harassment within the Commanders organization. *NFL Fines Washington Football Team \$10 Million After Investigation into Workplace Culture*, ESPN, (July 1, 2021), https://www.espn.com/nfl/story/_/id/31745729/nfl-fines-washington-football-team-10m-culture-investigation. Robert Kraft, owner of the New England Patriots, was implicated in a prostitution ring, but was not punished by the NFL at all. Albert Breer, *Why Robert Kraft Has a Good Chance at Avoiding Suspension from the NFL*, SPORTS ILLUSTRATED (May 23, 2019), <https://www.si.com/nfl/2019/05/23/robert-kraft-patriots-nfl-spring-meeting-playoff-schedule-draft-combine>; Jared Mueller, *NFLPA Likely to Use Robert Kraft as Example of NFL's Double Standard*, BROWNS WIRE, USA TODAY (June 28, 2022), <https://brownswire.usatoday.com/2022/06/28/deshaun-watson-robert-kraft-nflpa-nfl-conduct-policy/>; Danny McDonald, *Here's What We Now Know About the Robert Kraft Case*, BOSTON GLOBE (Feb. 25, 2019), <https://www.bostonglobe.com/metro/2019/02/25/here-what-know-about-new-details-robert-kraft-case/19V375xc2AMYqq3rYgz6VM/story.html>. Jerry Jones, owner of the Dallas Cowboys, was accused of having a part in a voyeurism scandal involving team cheerleaders, but the league did not even conduct an investigation. Madeline Coleman, *NFLPA's Deshaun Watson Defense Will Target Three Prominent Owners, Per Report*, SPORTS ILLUSTRATED (June 16, 2022), <https://www.si.com/nfl/2022/06/16/nflpas-deshaun-watson-defense-will-target-three-prominent-owners-per-report>; Madeline Coleman, *Report: Cowboys Paid Millions to Settle Voyeurism*

NFLPA's positions left them unable to reach a settlement agreement, putting the case in the hands of Judge Sue Robinson, formerly of the U.S. District Court for the District of Delaware.⁸⁷ As previously discussed, the current NFL CBA allows for the joint appointment of a disciplinary officer with the authority to issue "binding findings of fact" and prescribe the appropriate player discipline.⁸⁸ Robinson served in this role, taking arguments from Watson, the NFL, and the NFLPA during an evidentiary hearing conducted in compliance with Article 46.⁸⁹ Robinson also spoke with several women involved in the suits.⁹⁰ On August 1, she released a sixteen-page ruling.⁹¹

In her ruling, Robinson found that Watson's troubling "pattern of conduct"⁹² violated the league's Personal Conduct Policy in three distinct ways, each of which was proven by the NFL by a preponderance of the evidence.⁹³ First, Watson sexually assaulted at least four individuals.⁹⁴ Second, Watson's conduct posed a "genuine danger to the safety and well-being" of others.⁹⁵ Third, Watson's "predatory conduct" undermined the NFL's integrity and reputation, as well as the public's confidence in the organization.⁹⁶ Robinson concluded that "Mr. Watson's pattern of conduct is more egregious than any before reviewed by the NFL."⁹⁷

Based on these factual findings, Robinson recommended Watson be suspended for six games without pay, the most severe suspension ever recommended for a player engaged in non-violent sexual misconduct.⁹⁸ Further, she asserted that Watson could only use team-approved massage therapists moving forward, and suggested that further Policy violations or adverse interactions with law enforcement could merit an increase in the disciplinary determination.⁹⁹

As to the severity of the punishment, Robinson explained that the terms of the NFL CBA tied her hands: the agreement mandated a six-game minimum suspension for *violent* sexual misconduct, a category into which Watson's behavior indisputably did not fall.¹⁰⁰ And, critically, non-violent sexual

Allegations Against Senior Executive, SPORTS ILLUSTRATED (Feb. 16, 2022), <https://www.si.com/nfl/2022/02/16/cowboys-paid-millions-to-settle-voyeurism-allegations>. Note that Snyder, Kraft, and Jones are all wealthy, white men.

⁸⁷ *Id.*; *Judge Sue L. Robinson*, U.S. DIST. COURT DIST. CT. OF DEL., <https://www.ded.uscourts.gov/judge/judge-sue-l-robinson> (last visited Apr. 4, 2024).

⁸⁸ NFL CBA, *supra* note 13, art. 46, § 1(e)(i)-(ii); ROBINSON, *supra* note 29.

⁸⁹ ROBINSON, *supra* note 29, at 3.

⁹⁰ Koons, *supra* note 86.

⁹¹ ROBINSON, *supra* note 29, at 16.

⁹² *Id.* at 8.

⁹³ *Id.* at 7–11.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.*

⁹⁶ *Id.* at 10–11.

⁹⁷ *Id.* at 15.

⁹⁸ *Id.* at 11–15.

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 13.

misconduct had never before been punished with a suspension longer than three games.¹⁰¹ Therefore, Robinson concluded that a six-game suspension was the maximum punishment she could levy while respecting Watson's rights of notice and the NFL's requirement to discipline "similarly situated players" with "fairness and consistency."¹⁰²

After Robinson's decision, the NFL exercised its right to appeal under the CBA,¹⁰³ seeking an indefinite suspension.¹⁰⁴ Commissioner Goodell, characterizing Watson's behavior as both "egregious" and "predatory," appointed Peter C. Harvey, former New Jersey Attorney General, to hear the appeal.¹⁰⁵ Before Harvey issued a binding decision, the NFL, NFLPA, and Watson settled, agreeing to an eleven-game suspension, a \$5 million fine, and counseling.¹⁰⁶ Having complied with the conditions, Watson made his first career start for the Browns on December 4, 2022.¹⁰⁷

Outside of the NFL and in the civil and criminal context, Watson has yet to face a verdict. Twenty-three of the twenty-six civil suits against him have been settled and dismissed, and the two grand juries that heard the criminal cases against him have declined to indict him.¹⁰⁸

Largely in response to the limitations Robinson faced in her punishment of Watson, the NFL changed the Player Conduct Policy in 2023 to include non-violent sexual assault involving "threats or coercion" in the category of acts eligible for the six-game mandatory minimum.¹⁰⁹ Further, the revisions allow disciplinary officers (Robinson or her equivalent) to prescribe more severe player

¹⁰¹ *Id.*

¹⁰² *Id.* at 13–14.

¹⁰³ Madeline Coleman, *NFL Appealing Deshaun Watson's Six-game Suspension*, SPORTS ILLUSTRATED (Aug. 3, 2022), <https://www.si.com/nfl/2022/08/03/nfl-appealing-deshaun-watson-six-game-suspension>.

¹⁰⁴ Coleman & Perez, *supra* note 73.

¹⁰⁵ Goodell had original authority to hear the appeal but exercised his right under the CBA to assign this authority to a representative of his choosing. See NFL CBA *supra* note 13, art. 46, § (2)(a); Daniela Perez, *Goodell: Deshaun Watson's Behavior was 'Egregious' and 'Predatory,'* SPORTS ILLUSTRATED (Aug. 9, 2022), <https://www.si.com/nfl/2022/08/09/roger-goodell-calls-deshaun-watson-behavior-egregious-predatory-nfl-appeals-six-game-suspension>. Goodell chose to appoint Harvey based on his "deep expertise in criminal law, including domestic violence and sexual assault." Around the NFL Staff, *NFL Commissioner Roger Goodell Designates Former NJ Attorney General Peter C. Harvey to Hear Appeal of Deshaun Watson's Six-game Suspension*, NFL (Aug. 4, 2022), <https://www.nfl.com/news/nfl-commissioner-roger-goodell-designates-former-nj-attorney-general-peter-c-ha>.

¹⁰⁶ Thomas Neumann, *Browns QB Deshaun Watson Suspended 11 Games*, SPORTS ILLUSTRATED (Aug. 18, 2022), <https://www.si.com/nfl/2022/08/18/deshaun-watson-cleveland-browns-suspension-appeals-ruling>.

¹⁰⁷ Coleman & Perez, *supra* note 73.

¹⁰⁸ Ben Shpigel & Jenny Vrentas, *Deshaun Watson Is Returning to Play Football: Here's What to Know*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/article/deshaun-watson-sexual-assault-lawsuit.html>.

¹⁰⁹ Jenny Vrentas, *N.F.L. Increases Penalties for Sexual Misconduct in Light of Deshaun Watson Case*, N.Y. TIMES (July. 31, 2023), <https://www.nytimes.com/2023/07/31/sports/football/nfl-conduct-policy-deshaun-watson.html>; PERSONAL CONDUCT POLICY, *supra* note 16, at 1–5.

punishment—including indefinite suspension.¹¹⁰

B. Watson in the NBA: Suspended a Full Season, Two Games, or Not at All

If Watson played basketball rather than football, he would be bound by the disciplinary process enumerated in the NBA's CBA, which could have resulted in a full-season suspension, a two-game suspension, or no suspension at all.

Unlike the NFL, NBA commissioners, under the league's agreement, retain expansive authority over sexual assault and domestic violence allegations. So, if Watson played in the NBA, the league likely would have opened an investigation. If Roger Goodell was the NBA's commissioner, he could have ended this investigation by issuing a full-season suspension—a result he so ardently requested during the duration of the NFL's investigation.¹¹¹ Using the past actions and proclamations of the commissioners as guidance in determining their course of action in the face of such expansive authority, as compared to Goodell, the result under NBA Commissioner Adam Silver is less clear.

Commissioner Silver was appointed in 2014 and has thus overseen all investigations under the new sexual assault and domestic violence policy.¹¹² In that time, several cases have arisen, with two notable investigations being opened into players Terence Davis and Miles Bridges following allegations of domestic abuse.¹¹³

Given that the Davis and Bridges investigations involved domestic violence rather than sexual assault, it is difficult to use their cases to reason by example. Davis, despite high levels of media attention at the time of his misconduct and the NBA's assertion that an investigation had begun, remains unpunished. The New York District Attorney's Office dropped his charges in February of 2021, and, since then, the league has never announced an end to the inquiry, a report of its results, or a punishment.¹¹⁴

¹¹⁰ *Id.*

¹¹¹ See Brad Senkiw, "NFL Commissioner Says Evidence Calls for Full-Year Suspension in Deshaun Watson Case," *SPORTS ILLUSTRATED* (Aug. 9, 2022), <https://www.si.com/college/clemson/tigers-in-the-nfl/nfl-commissioner-says-evidence-calls-for-full-year-suspension-in-deshaun-watson-case>.

¹¹² See Adam Silver, *NBA* (Aug. 2023) <https://cdn.phenompeople.com/CareerConnectResources/NBANBAUS/documents/Adamsilver-1704386799515.pdf>.

¹¹³ Davis, a then-rookie for the Toronto Raptors, was arrested in October 2020 for assault and criminal mischief in New York City. *Raptors Rookie Terence Davis Charged with Assaulting Woman in NYC*, *NBA* (Oct. 28, 2020), <https://www.nba.com/news/raptors-terence-davis-charged-assault-in-nyc>. Bridges, a power forward for the Charlotte Hornets, pled no contest in November 2022 to felony domestic violence charges. Baxter Holmes, "Miles Bridges Pleads No Contest to Felony Domestic Violence Charge," *ESPN* (Nov. 3, 2022), https://www.espn.com/nba/story/_/id/34941255/miles-bridges-pleads-no-contest-felony-domestic-violence.

¹¹⁴ *Report: Charges Dropped Against Terence Davis*, *SPORTS ILLUSTRATED* (Feb. 19, 2021), <https://www.si.com/nba/raptors/news/toronto-raptors-terence-davis-assault-charges-dropped>; see also John Gaudes, *Domestic Assault Charges Against Raptors' Terence Davis Dropped*, *SB*

Bridges, who was placed on paid administrative leave during his investigation, received a thirty-game suspension in April, twenty games of which were credited against his absence during the 2022-2023 season.¹¹⁵ Given that an NBA season is eighty-two games long, Bridges's punishment for domestic violence—to which he pled no contest—was only 12 percent of his season.

An NBA investigation into Watson's behavior may have opened and, like Davis's, quietly faded into the background after the settlement of civil suits and the dropping of criminal charges.¹¹⁶ Like Davis, Watson did not face criminal charges, but unlike Bridges, Watson did not enter a plea. However, given that the Davis and Bridges investigations involved domestic violence rather than sexual assault, it is difficult to use their cases as parallels.¹¹⁷

If Commissioner Silver had punished Watson for "just cause," Watson would have retained the authority to appeal.¹¹⁸ Arbitrators who review just cause determinations are typically guided by a seven-step test, where answering no to any of the seven questions demonstrates an absence of just cause:¹¹⁹

One: Did the company give the employee forewarning or foreknowledge of the possible or probably [sic] disciplinary consequences of the employee's conduct?¹²⁰ Yes, the joint policy on domestic violence and sexual assault in the NBA CBA binds all league participants, meaning Watson would have agreed to its terms as part of his contract; this policy reserves for the NBA the right to punish any attempted or actual non-consensual sexual assault that uses or threatens the use of force.¹²¹

Two: Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?¹²² Yes, any punishment of Watson would be meted to create a safe environment for both the team and staff, and not engaging in sexual assault is a proper expectation for any employee, even more so for Watson due to his consent to the CBA.

NATION (Feb. 19, 2021), <https://www.raptorshq.com/2021/2/19/22291256/nba-news-terence-davis-domestic-assault-charges-dropped>.

¹¹⁵ Larry Lage, *Miles Bridges Says 'I May Be Back in March' After June 2022 Arrest*, NBC WASHINGTON (Feb. 22, 2023), <https://www.nbcwashington.com/news/sports/miles-bridges-says-i-might-be-back-by-march-after-june-2022-arrest/3284692/>. During the investigation, Bridges has been on paid administrative leave. *Id.*; Shauntel Lowe, *N.B.A. Commissioner Adam Silver Defends Bridges Suspension*, N.Y. TIMES (Apr. 25, 2023), <https://www.nytimes.com/2023/04/25/sports/basketball/adam-silver-miles-bridges-suspension.html>.

¹¹⁶ *Supra* notes 106–108. Recall that a grand jury declined to bring charges indicting Watson. Chavkin, *supra* note 79.

¹¹⁷ See *supra* notes 115–16 and accompanying text.

¹¹⁸ NBA CBA, *supra* note 11, art. XXXI, § 9(a).

¹¹⁹ David A. Dilts & Clarence R. Deitsch, *The Tests of Just Cause: What Price Predictability in Arbitral Decision Making?*, 5 EMP. RESP. & RTS. J. 13, 15 (1992).

¹²⁰ *Id.*

¹²¹ *Id.*; NBA CBA, *supra* note 11, exhibit F at 1.

¹²² Dilts & Deitsch, *supra* note 119, at 15.

Three: Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?¹²³ Yes, the NBA CBA requires that any incidents be investigated, and players receive notice when such investigations are opened; in practice, Judge Robinson acted in this role.¹²⁴

Four: Was the company's investigation conducted fairly and objectively?¹²⁵ Yes, Judge Robinson was a jointly-appointed, neutral, third-party evaluator; the NBA CBA requires the appointment of a grievance arbitrator with similar characteristics.¹²⁶

Five: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?¹²⁷ Yes, Judge Robinson found Watson guilty by a preponderance of the evidence.¹²⁸

Six: Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?¹²⁹ Yes, several NFL athletes have been suspended pursuant to violations of their CBA's off-field conduct provisions, as have NBA players.¹³⁰

Seven: Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?¹³¹ Maybe.

With respect to (a), difficulties could arise based on what qualifies as "proven." If "proven" requires a conviction, the answer to this question is no, meaning Silver and the NBA would not have met a "just cause" burden in theoretically punishing Watson. If "proven" is satisfied by Judge Robinson's preponderance-of-the-evidence finding, the answer to (a) is yes, and (b) may be considered.

With respect to (b), a "yes" answer would be supported by the fact that the Houston Texans traded Watson away due to the severity of his misconduct

¹²³ *Id.*

¹²⁴ NBA CBA, *supra* note 11, exhibit F at 6; *see supra* note 87 and accompanying text.

¹²⁵ Dilts & Deitsch, *supra* note 119, at 15.

¹²⁶ *See* NBA CBA, *supra* note 11, art. XXXI, § 7(a), exhibit F at 10.

¹²⁷ Dilts & Deitsch, *supra* note 119, at 15.

¹²⁸ *Id.*; Robinson *supra* note 29, at 9–11.

¹²⁹ Dilts & Deitsch, *supra* note 119, at 15.

¹³⁰ *See* Cody Benjamin, *Deshaun Watson Suspended Eleven Games: How Brown's QB Ban Compares to Other Major NFL Discipline in the Last Fifteen Years*, CBS (Aug. 18, 2022), <https://www.cbssports.com/nfl/news/deshaun-watson-suspended-11-games-how-browns-qbs-ban-compares-to-other-major-nfl-discipline-in-last-15-years/>. Similar misconduct allegations have resulted in similar suspensions—Ezekiel Elliott of the Dallas Cowboys was suspended six games for alleged assault and domestic violence; Jarran Reed of the Seattle Seahawks was suspended six games for alleged assault; Kareem Hunt of the Cleveland Browns was suspended eight games for an assault incident which was caught on video. *Id.*; *see also* Mike Chiari, *Browns' Kareem Hunt Suspended Eight Games for Violating NFL's Personal Conduct Policy*, BLEACHER REPORT (Mar. 15, 2019), <https://bleacherreport.com/articles/2825870-browns-kareem-hunt-suspended-8-games-for-violating-nfl-personal-conduct-policy>. *See also supra* notes 106–108.

¹³¹ Dilts & Deitsch, *supra* note 119, at 15.

allegations. However, a “no” answer might be reached if the record of service is only “reasonably related” if it contains prior incidents. This interpretation seems unlikely, though, as it would prevent the league from punishing any first-time offenders, no matter how egregious their alleged misconduct. In total, given the severity of the allegations against Watson, Judge Robinson’s findings, and the Texans’ decision, the answer to this question should be yes.

Because all seven questions can likely be answered in the affirmative, Watson’s appeal for just cause would likely be defeated were he a player in the NBA. Accordingly, he would be bound by the penal decision of the commissioner. Under Commissioner Silver’s standards, Watson likely would have faced a suspension of six games or less, all but two of which probably would have been suspended.¹³² Were Rodger Goodell the NBA commissioner with authority to levy punishment, Watson likely would have been suspended for an entire season without recourse.¹³³

C. *Watson in the MLB: From Nine Seasons to a Lifetime*

Were Watson a professional baseball player, he would face yet a different punishment under the governing CBA—he likely would have faced a suspension of between nine and sixteen seasons, if not released from the league altogether. The adjudicative process in the MLB is procedurally similar to that of the NBA, but Watson’s outcome under the former can be predicted with more certainty than the latter. This is due to the similarities between Watson’s case and that of Trevor Bauer, a pitcher suspended in 2021 under the MLB’s player conduct policy on domestic violence. Watson’s likely penal outcome under the MLB CBA can be predicted by way of comparison.

Bauer, a member of the Los Angeles Dodgers, was an outstanding player, winning the Cy Young award in 2020 for excellence in pitching.¹³⁴ When a woman accused Bauer of beating and sexually abusing her,¹³⁵ the MLB swiftly

¹³² This conclusion is reached by comparison to Miles Bridges. Bridges was suspended for thirty games of an eighty-two-game long NBA season, roughly 36.6 percent. All but ten games of that suspension were excused because Bridges was not permitted to play during the investigation, a fact that Silver believed was relevant in determining the actual suspension length. Bridges’s true penalty, then, was 12 percent of the season. With a seventeen-game long NFL season, Watson’s prescribed punishment, by comparison, would have been about six games, all but two of which would be similarly excused as Watson did not play between his release from the Texans and procurement by the Browns. See *supra* Part II.A–B.

¹³³ Coleman & Perez, *supra* note 73. To the extent that commissioners retain broad authority, disparate penal outcomes may be attributable to the whims of these individuals just as much as to the CBAs themselves. However, the focus of this paper remains with the structures in place in the CBAs themselves and the effect of these structures as driven by tendencies of those individuals charged with enforcing them, attempting to isolate the agreements while recognizing that they move in tandem with subjective beliefs of their enforcers.

¹³⁴ *Cy Young*, MLB, <https://www.mlb.com/awards/cy-young>.

¹³⁵ Associated Press, *Pitcher Trevor Bauer’s Suspension for Sexual Abuse is Ended by an MLB Arbitrator*, NPR (Dec. 23, 2022) <https://www.npr.org/2022/12/23/1145186495/trevor-bauer-suspension-arbitrator-dodgers-pitcher-sexual-assault>.

conducted an investigation, suspending Bauer at the outset and lengthening the suspension thirteen times as the league moved through the adjudicative process.¹³⁶ Bauer staunchly denied any misconduct, and authorities did not pursue prosecution for want of evidence sufficient to support the requisite beyond-a-reasonable-doubt standard.¹³⁷ During the league investigation, two more women accused Bauer of similar misconduct.¹³⁸

Despite the absence of criminal action, MLB Commissioner Rob Manfred exercised his authority as commissioner to punish Bauer.¹³⁹ Manfred meted out an unprecedented two-season, 324-game suspension without pay, costing Bauer roughly \$60 million of his \$102 million contract.¹⁴⁰

The MLB did not disclose the details of its investigation, but it bore the burden of proof and Manfred was entitled to punish the pitcher for “just cause.”¹⁴¹ Bauer appealed the punishment to an independent arbitrator, who, in December of 2022, reduced the sentence to 194 games pursuant to the same “just cause” standard.¹⁴² This suspension, even in reduced form, was the league’s longest-ever for sexual assault or domestic violence.¹⁴³ In January of 2023, less than a month after the arbitrator’s decision, the Dodgers released Bauer.¹⁴⁴

¹³⁶ David Brand, *Dodger’s Bauer Suspended Two Seasons over Alleged Sex Assault*, ASSOCIATED PRESS (Apr. 29, 2022), <https://apnews.com/article/mlb-sports-violence-los-angeles-baseball-8575d58d306ba34f8a62bd030cd7f454>.

¹³⁷ See Alden Gonzalez & Jeff Passan, *Everything You Need to Know About Trevor Bauer’s Reduced Suspension*, ESPN (Dec. 22, 2022), https://www.espn.com/mlb/story/_/id/35307636/trevor-bauer-mlb-suspension-reduction-dodgers; Bauer Grievance Hearing Begins on Attempt to Overturn Ban, ASSOCIATED PRESS (May 23, 2022), <https://apnews.com/article/mlb-sports-rob-manfred-los-angeles-dodgers-baseball-7c5e9d15c6d4a8a2c435827549c79725>.

¹³⁸ Stephanie Apstein, *Trevor Bauer Is Eligible to Pitch in 2023 After Arbitrator Reduces His Suspension*, SPORTS ILLUSTRATED (Dec. 22, 2022), <https://www.si.com/mlb/2022/12/23/trevor-bauer-suspension-reduced-reinstated>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*; Brand, *supra* note 136.

¹⁴¹ Brand, *supra* note 136.

¹⁴² *Id.* This reduced sentence represents suspension for a season-and-a-half. (The typical MLB season lasts 162 games). Bauer also received a suspension for the first fifty games of the following season, 2023. Mark Bailey, *How Many Baseball Games in a Season?*, BASEBALL BIBLE (Feb. 7, 2023), <https://www.baseballbible.net/how-many-baseball-games-in-a-season/>.

¹⁴³ Matthew Moreno, *Dodger News: Trevor Bauer Reinstated and Suspension Reduced*, DODGER BLUE (Dec. 22, 2022), <https://dodgerblue.com/dodgers-news-trevor-bauer-suspension-appeal-reduced-reinstated/2022/12/22/>.

¹⁴⁴ The Dodgers released a statement:

The Dodgers organization believes that allegations of sexual assault or domestic violence should be thoroughly investigated, with due process given to the accused. . . . Two extensive reviews of all the available evidence in this case -- one by commissioner Manfred and another by a neutral arbitrator -- concluded that Mr. Bauer’s actions warranted the longest ever active player suspension in our sport for violations of this policy. Now that this process has been completed, and after careful consideration, we have decided that he will no longer be part of our organization.

Mike Axisa, *Trevor Bauer DFA: Dodgers Release Pitcher After Lengthy Suspension*, CBS (Jan. 13, 2023), <https://www.cbssports.com/mlb/news/trevor-bauer-dfa-dodgers-release-pitcher-after-lengthy->

During the free agency period, no other MLB team signed him.¹⁴⁵ Unemployed, Bauer opted for a one-year, \$3 million contract with a professional league in Japan—roughly 9 percent of the value of his contract with the Dodgers prior to release.¹⁴⁶

Were Watson to face the same penal process as Bauer under the MLB CBA, his outcome would have been vastly different than it was under the NFL CBA.

Bauer was an award-winning player prior to his suspension; however, this did not impact the league's willingness to suspend him.¹⁴⁷ Watson is an excellent athlete too, but this would likely not bear on his adjudication. When reports of his alleged misconduct surfaced, Watson likely would have been placed on immediate leave, which would have been extended, as Bauer's was, until the league investigative process was complete.¹⁴⁸ Like Bauer, Watson vehemently denied misconduct; as the Los Angeles prosecutor declined to bring criminal action against Bauer, so too did a Houston Grand Jury decline to indict Watson.¹⁴⁹ As was true with Bauer, the absence of criminal proceedings would not impede Manfred's willingness to punish Watson.¹⁵⁰

Manfred's punishment of Bauer was severe—a two-season suspension was unheard of.¹⁵¹ Bauer faced accusations from three individuals.¹⁵² By comparison, Watson faced allegations from at least twenty-four.¹⁵³ Taking Bauer's 324 game suspension and dividing it by three, he was suspended roughly 108 games per allegation. A typical MLB season is 162 games, meaning each allegation cost Bauer 66 percent of his season.¹⁵⁴ A typical NFL season is seventeen games,¹⁵⁵ and 66 percent of seventeen is roughly 11.33 games. Applying the same penal structure to Watson, then, 11.33 football games per allegation times twenty-four allegations is 272 games total.

That's sixteen seasons.

suspension/#:~:text=The%20Los%20Angeles%20Dodgers%20have,%2C%20release%2C%20or%20waive%20him.

¹⁴⁵ R.J. Anderson, *Trevor Bauer Signs with Yokohama DeNA BayStars in Japan After Going Unsigned in MLB Free Agency*, CBS (Mar. 13, 2023) <https://www.cbssports.com/mlb/news/trevor-bauer-set-to-play-in-japan-after-going-unsigned-in-mlb-free-agency-per-report/>.

¹⁴⁶ *Id.*; Brand, *supra* note 136.

¹⁴⁷ *See* Brand, *supra* note 136.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; Chavkin, *supra* note 79.

¹⁵⁰ *See* Brand, *supra* note 136; Chavkin, *supra* note 79.

¹⁵¹ *See* Brand, *supra* note 136.

¹⁵² Two women from Columbus, Ohio, later came forward to support the initial plaintiff's allegations against Bauer; they did not pursue civil action, but rather disclosed Bauer's alleged misconduct to a journalist from the Washington Post. *Bauer Grievance Hearing*, *supra* note 137.

¹⁵³ *Browns QB Deshaun Watson Settles 20 of 24 Lawsuits Alleging Sexual Misconduct*, NFL (June 21, 2022), <https://www.nfl.com/news/browns-qb-deshaun-watson-settles-20-of-24-lawsuits-alleging-sexual-misconduct>.

¹⁵⁴ *See* Bailey, *supra* note 142.

¹⁵⁵ *See* NFL Communications, *NFL Season to Feature Seventeen Regular-season Games per Team*, NFL (Mar. 30, 2021), <https://nflcommunications.com/Pages/NFL-Season-To-Feature-17-Regular-Season-Games-Per-Team.aspx>.

And even if Watson made a just cause appeal to the independent arbitrator, and the arbitrator reduced the suspension in exact proportion to Bauer's, Watson would still be facing a suspension of roughly nine-and-a-half seasons.¹⁵⁶

Further, in the MLB, Watson likely would not be receiving the largest guaranteed contract in league history—he'd be pushed out of it. So, were Watson a baseball player, he would be in a far worse position than he is as a football player—facing a 256-game suspension instead of an eleven-game one.

III. THE EFFICACY OF CIVIL LITIGATION AND CRIMINAL JUSTICE IN INFORMING LEAGUE OUTCOMES

The civil litigation process and criminal trial procedure can help shape expectations of Watson's punishment and inform perceptions of what "just" punishment may look like for similarly accused offenders. The different legal and societal goals of private and public laws, as well as the ways in which private and public laws interact, creates uncertainty and unpredictability around Watson's situation.

A. Employment Law Considerations

In light of the principals of our judicial system and considering Judge Robinson's findings on Watson's conduct, it is troubling that Watson remains employed, respected, and well-paid. The civil system seeks to make plaintiffs whole; it also seeks to deter bad behavior. To that end, this goal might have been achieved because the women who suffered at the hands of Watson's conduct received monetary compensation. And, typically, a wrongdoer is deterred when he or she is forced to pay a significant settlement because it creates a meaningful financial burden.¹⁵⁷

However, when dealing with a professional athlete like Watson—especially considering his new \$230 million contract—paying out settlements does not have the same deterrent effect. Further, Watson remains employed. Even if settlement payments place a meaningful burden on his financial situation now, this burden will be assuaged over the next five guaranteed years of his contract. The civil system recognizes that monetary compensation is not always sufficient to make plaintiffs whole—this is evidenced by the existence of injunctive relief.¹⁵⁸ Yet settlements are bargained for, and basic economic principles suggest that bargaining leads to efficient outcomes.¹⁵⁹ As a result, the extent to which Watson's return to the league conflicts with traditional conceptions of civil fairness is unclear.

Moreover, though the NFL is the governing body of the individual teams

¹⁵⁶ See Moreno, *supra* note 143.

¹⁵⁷ See *Damages*, LEGAL INFO. INST., CORNELL L. SCH., <https://www.law.cornell.edu/wex/damages> (last visited Apr. 4, 2024).

¹⁵⁸ See, e.g., *id.* (discussing of specific performance, another form of non-monetary relief).

¹⁵⁹ See Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 475 n.11 (1993).

within it, player contracts are private agreements between players and organizations: employees and their employers. Thus, there is a limit to the league's authority, even within its own system—such was the entire goal of creating player associations to begin with.¹⁶⁰ Although the NFL can prescribe certain disciplinary procedures and processes, it cannot exercise control over private parties freely contracting with one another in a competitive market. Therefore, despite the NFL's findings about Watson's wrongful conduct, the Browns are a private employer at liberty to write, sign, and enforce a contract with a private employee. Watson, as an employee, retains the right to contract his services to the highest-paying employer, exploiting his particular skill set to reach the most ideal employment opportunity. Accordingly, the civil principles that protect the integrity of private contract law protect the settlement of Watson's claims, as well as his continued employment within the league.

B. *Criminal Law and Penal Theory Considerations*

Evaluating Watson's actions from a criminal justice perspective also helps inform how his punishment was determined and why certain aspects of it may be suboptimal. Different penal theories—utilitarian, retributivist, and rehabilitative—lead to different conclusions about whether Watson's agreed-upon punishment is consistent with the criminal system's goals.

1. *The "Utility" of Watson's Punishment*

A utilitarian approach to criminal justice focuses on using punishment as a tool—a forward-looking means to provide future societal good, rather than a backward-looking means to levy proportionate harm upon a perpetrator.¹⁶¹ Punishment should have "utility," imposed to convey some benefit to a larger society, decreasing the incidence of social harm by deterring, reforming, or incapacitating past and/or prospective perpetrators.¹⁶² The focus of this approach is protecting modern social goals and order, rather than ensuring that the wrongdoer him or herself meets a particular fate.¹⁶³

The utilitarian, then, would look to the social benefit conferred by the discipline Watson received, focusing on if his punishment provides forward-facing good, rather than whether it penalizes him appropriately based on his character or guilt. Requiring Watson to attend counseling and only use team-

¹⁶⁰ See *Collective Bargaining Agreements in Sports Leagues*, JUSTIA (July 2023), <https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/>; *History*, MAJOR LEAGUE BASEBALL PLAYERS, <https://www.mlbplayers.com/history> (discussing the rise of unions to protect players' rights and to protect players from exploitation by league officials).

¹⁶¹ See Joshua Dressler, *The Wisdom and Morality of Present-day Criminal Sentencing*, 38 AKRON L. REV. 853, 853–54 (2005) (“[U]tilitarians believe that the infliction of pain in the form of punishment is justifiable if, but only if, it is expected to result in a net reduction of pain of crime that otherwise would occur.”).

¹⁶² *Id.* at 853–55.

¹⁶³ *Id.* at 853–54.

certified massage therapists likely confers such future good. Counseling may cause him to reflect and reconsider his actions, making him less of a threat to society. Masseur restrictions prohibit Watson from seeking out unsuspecting individuals who may be more susceptible to coercion, particularly as they work in an unofficial, unregulated, unprotected environment. So, such punishments confer some “good” insofar as they would curb Watson’s access to vulnerable individuals or otherwise generate within him some personal reform.¹⁶⁴

On the other hand, Watson’s employment status, particularly in light of Judge Robinson’s findings, is troubling to the utilitarian.¹⁶⁵ By a preponderance of the evidence, Watson sexually assaulted at least four individuals, endangered several more, and undermined public confidence in the integrity of his employer.¹⁶⁶ Most individuals do not remain employed after such conduct. Nor do they make \$230 million.¹⁶⁷ Watson’s discipline thus does not deter—it does quite the opposite.

2. *Punishment as Victim Retribution*

A retributivist approach to criminal justice focuses on punishment proportional to moral desert—blameworthiness or culpability—even if such punishment is not the most efficient course of action.¹⁶⁸ It is important to remember that, in the criminal system, a defendant is innocent until proven guilty.

In Watson’s case, two grand juries declined to indict him.¹⁶⁹ However, Judge Robinson’s internal report is troublesome at best.¹⁷⁰ It suggests that there is at least some culpability on Watson’s behalf deserving some level of punishment—per her suggestion, six games without pay.¹⁷¹ But also consider how Judge Robinson was confined by the NFL adjudicative process itself. After all, she issued the most severe punishment for a player involved in non-violent sexual misconduct and characterized Watson’s actions as “egregious;” yet she herself acknowledged the limitations she faced because the behavior was non-violent.¹⁷²

Therefore, emphasizing moral culpability over technical, black-and-white commission of a crime, the retributivist would likely assert that Watson’s

¹⁶⁴ *See id.*

¹⁶⁵ ROBINSON, *supra* note 29, at 9–11.

¹⁶⁶ *Id.*

¹⁶⁷ *See Camenker, supra* note 80.

¹⁶⁸ *See* IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (1887). Kant discusses various penal theories at length but ultimately concludes that “the Right of Retaliation,” or in our terms, retributivism, “is the only Principle which . . . can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain . . .” *Id.* at 196. Kant emphasizes that an individual “must first be found guilty and *punishable*, before there can be any thought of drawing from his Punishment any benefit for himself or his fellow-citizens.” *Id.* at 195 (emphasis in original).

¹⁶⁹ Shpigel & Vrentas, *supra* note 108.

¹⁷⁰ *See infra* Part III.A.

¹⁷¹ ROBINSON, *supra* note 29, at 15.

¹⁷² *Id.*

punishment should be in line with his own *mens rea*—knowledge, intent, or premeditation in committing the offenses alleged.¹⁷³ Watson’s status as a professional athlete may, in the eyes of the retributivist, make his conduct more reprehensible:¹⁷⁴ there is some public perception that athletes are treated more favorably than laymen by the criminal justice system, and professional athletes are often role models for young people.¹⁷⁵ Therefore, the retributivist would likely find Watson’s punishment insufficient to the extent it was limited by the NFL’s internal guidelines, rather than allocated in accordance with his severe and “egregious” conduct.

3. *Punishment to Guide Rehabilitation*

Whereas the retributivist approach looks backwards—punishment is proportional to culpability at the time of and around the offense—the rehabilitative approach looks forward, using punishment as a means to promote future good, focusing particularly on the individual concerned rather than society as a whole.¹⁷⁶ Unlike utilitarianism, the rehabilitative approach uses punishment to reform the individual wrongdoer, rather than to set an example or confer good upon others.¹⁷⁷

¹⁷³ In fact, another conception of the retributivist theory would be a focus on *mens rea* rather than *actus reus*. The offender’s state of mind, not his actual role in the physical actions that make his behavior criminal, is the point of emphasis under this approach. This is Kant’s theory as seen in his focus on determining not just whether an individual is guilty, but whether he or she is actually punishable. See KANT, *supra* note 168, at 195. In considering Watson’s *mens rea* specifically, his lack of remorse may be meaningful. See Cleveland Browns, *supra* note 1.

¹⁷⁴ See Kim & Parlow, *supra* note 7, at 584; see Dressler, *supra* note 161, at 856 (“[T]he core of retribution . . . requires that we look not just at the harm caused, but also at the very individualized factors relating to the defendant’s moral culpability . . .”).

¹⁷⁵ See Kim & Parlow, *supra* note 7, at 584–85 (“Even if an athlete is punished by the public criminal justice system, fans may demand action by leagues because of the perception that athletes are favorably treated by the criminal justice system—by police, judges and juries—or that public punishment will fail to have the intended retributive . . . effect.”); see Michael M. O’Hear, *Blue-collar Crimes/White-collar Criminals: Sentencing Elite Athletes Who Commit Violent Crimes*, 12 MARQ. SPORTS L. REV. 427, 437–39 (2001) (positing that athletes may have “enhanced culpability” due to an athletes’ “putative responsibilities as a role model”). In fact, the NBA’s CBA lists these factors to be considered in the reinstatement of players suspended for violating the league’s drug policy: “the player’s conduct since his dismissal, including the extent to which the player has since comported himself as a suitable role model for youth; and whether the player is judged to possess the requisite qualities of good character and morality.” NBA CBA, *supra* note 11, art. XXXIII, § 13(a). Yet, professional athletes have themselves, over the years, pushed back against this notion—Charles Barkley, a Hall of Fame basketball player and two-time Olympic gold medalist, once famously asserted in a Nike commercial, “I am not a role model. I am not paid to be a role model. I am paid to wreak havoc on the basketball court. . . . Just because I dunk a basketball doesn’t mean I should raise your kids.” Killin’ Time Classics, *Nike Commercial - Role Model - Charles Barkley*, YOUTUBE (Sept. 8, 2021), <https://www.youtube.com/watch?v=K2DWuNmiWZA>.

¹⁷⁶ In this manner, the rehabilitative approach is a more targeted form of utilitarianism. Rehabilitation punishes because it believes accountability can “prevent future crime by reforming an individual, by providing her with employment skills, psychological aid, etc., so that she will not want or need to commit offenses in the future.” JOSHUA DRESSLER, BLACK LETTER OUTLINES: CRIMINAL LAW 4 (2d ed. 2010).

¹⁷⁷ *Id.*

In Watson's circumstance, a rehabilitative approach would emphasize punishment aimed at preventing future misconduct; here, likely mandatory counseling.¹⁷⁸ Forcing Watson to think critically about his actions and their impact on others might be the most effective approach in preventing future indiscretions. However, Watson has maintained his innocence throughout this entire process, which may undermine the efficacy of the rehabilitative approach—if Watson does not believe he has done anything wrong, he would likely not believe he has any reason to reflect or reform.¹⁷⁹

Further, despite the ongoing allegations of misconduct, the Browns gave Watson the largest guaranteed contract in NFL history.¹⁸⁰ When Watson joined the Browns, the Browns' front office emphasized its belief in Watson's character and its commitment to the adjudicative process.¹⁸¹ If rehabilitation is the Browns' goal, their internal investigation and prescription of mandatory counseling seem to help meet it. But despite the ongoing allegations of misconduct, the Browns gave Watson the largest guaranteed contract in NFL history.¹⁸² Can rehabilitation be truly effective if Watson not only keeps his job, but gets both a raise and a promotion?¹⁸³

¹⁷⁸ See Neumann, *supra* note 106. This is also a more impactful rehabilitative consequence than Watson's fine or suspension given the value of the fine when compared to his guaranteed contract or the length of his suspension compared to the Brown's commitment to continually employ him. *Supra* note 80 and accompanying text.

¹⁷⁹ See Francis T. Cullen, *Correctional Rehabilitation*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 235, (Erik Luna ed., 2017) (“[R]ehabilitation can be justified on moral grounds as a humane alternative to efforts to inflict pain on the convicted and for the investment it makes in offenders' lives (e.g., improves their citizenship, mental health, human capital). But treatment's legitimacy hinges most fully on its ability to fulfill its promise to make offenders less likely to recidivate.”). Can this goal of decreased recidivism rates be achieved where the alleged perpetrator does not believe he has committed a crime?

¹⁸⁰ Coleman & Perez, *supra* note 73.

¹⁸¹ Cleveland Browns, *supra* note 1. Browns General Manager Andrew Berry emphasized the team's commitment to the process of understanding Watson's situation at the March 2022 press conference introducing Watson as the new face of the franchise. *Id.* Berry said:

[It was] the weight of the anticipated reaction, and the nature of the allegations, that really pushed us to do as much work as possible both internally and externally in terms of understanding the cases and who Deshaun was as a person. It was through this really, five-month Odyssey, and the information that we were able to amass, and the reference work, and obviously working through due process and the legal process that got us comfortable pursuing a trade for Deshaun.

Id.

¹⁸² Coleman & Perez, *supra* note 73.

¹⁸³ Raise in the sense that Watson's contract with the Browns had a higher guaranteed value than the one he had with the Texans, *see id.*; promotion in the sense that Watson was benched by the Texans when news of his alleged misconduct started to surface, and the Browns promised to make Watson their starting quarterback (disposing of their prior starter, Baker Mayfield) when they brought him into the organization. See Andrew Brandt, *The Browns Have Two Quarterback Problems with Deshaun Watson and Baker Mayfield*, SPORTS ILLUSTRATED (June 23, 2022), <https://www.si.com/nfl/2022/06/23/cleveland-browns-two-quarterback-problems-watson-mayfield-business>.

4. *Using Penal Theory to Construct Effective CBAs*

Each approach—utilitarian, retributivist, and rehabilitative—is understood and implemented in traditional criminal justice proceedings, which are public fora of punishment.¹⁸⁴ In contrast, professional sports leagues are private organizations. This difference has both advantages and disadvantages in aligning the interests of both civil and criminal law.

The private nature of leagues brings with it the freedom of contract—it is each organization’s prerogative to contract with whomever it wants, for however long it wants, at any value it desires. In this manner, a team like the Browns retains complete authority to hire any player, including Watson, in spite of his alleged indiscretions. The divergence between public and private interests here creates conflict.¹⁸⁵

Yet simultaneously, the divide between public social interests and private contractual interests can also be helpful: “private regulation is necessary [in the sports context] because traditional public legal remedies . . . are typically inadequate. Depending on the nature of the violation, such remedies either are not available or afford a form of relief which does not provide sufficient protection of the group’s interest.”¹⁸⁶ The private punisher’s ability to regulate exactly in accordance with his or her needs represents a convergence of interests—to punish in a way that is directly proportional to what will best serve the group, whether that group is society (public) or a team (private).¹⁸⁷ Further, the structure of sports leagues may allow for the creation of private penal structures which resemble the public system in significant ways,¹⁸⁸ namely: “(1) the public nature of punishment, (2) the sense of direct accountability to fans, and (3) the assertion of independent *moral* authority to punish by sports leagues or commissioners.”¹⁸⁹ These three similarities between the private and public structure mean that any of the three penal theories may be appropriate and well-implemented in the professional sports context. Applying penal theory to the collective bargaining agreement structure, then, can allow for the adoption of an internal adjudicative process which preserves the integrity of private contracting, while also conforming with the expectations of the general public when it comes to crime and punishment.

IV. APPLYING PENAL THEORY TO THE COLLECTIVE BARGAINING

¹⁸⁴ See Kim & Parlow, *supra* note 7, at 593.

¹⁸⁵ The caveat being that some individuals, like those who condone a rehabilitative approach, might favor freedom of contract in the sense that a person’s future is not determined by the wrongdoings of his past.

¹⁸⁶ John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 709 (1977).

¹⁸⁷ See Dressler, *supra* note 161, at 854.

¹⁸⁸ Kim & Parlow, *supra* note 7, at 592.

¹⁸⁹ *Id.* (emphasis in original). With respect to the third prong, see prior analysis of athletes as role models, *supra* note 175 and accompanying text.

ADJUDICATIVE PROCESS TO REACH FAIR, CONSISTENT, AND PREDICTABLE
OUTCOMES

The criminal justice system cannot be defined solely on the basis of utilitarian, retributivist, or rehabilitative justifications.¹⁹⁰ Similarly, effective CBAs cannot focus on just one of these theories—they must encompass the most important aspects of all three and harmonize their key principles with the private freedom of contract. Further, CBAs should create unity across leagues, not dissonance. A CBA penal structure which (1) aligns with traditional judicial principles and (2) governs all three major leagues will create an adjudicative system in professional sport which both mirrors public expectations of fair punishment and voids the outcome-determinative role a player’s sport currently has in the adjudicative process.¹⁹¹ Unifying the major leagues in this manner will allow for a convergence of both player and fan expectations.

A. Commissioner: Either/Or, Not Both/And

The commissioner should retain the authority to bring disciplinary proceedings against a player, but conflict arises from the fact that he or she is both the “prosecutor” and the employer. Throughout the adjudicative process, then, the two roles must be separated.

When the commissioner *brings* a disciplinary claim, his or her adjudicative authority must yield to employment considerations: he or she should release prosecutorial authority, considering only a player’s present or future employability. The concerns of the commissioner as an employer should only be relevant at the beginning and end of the adjudicative process because these are

¹⁹⁰ See, e.g., O’Hear, *supra* note 175, at 435–37 (discussing the different sentencing guidelines in various jurisdictions and the underlying disparate penological approaches that shape these decisions).

¹⁹¹ It is critical to note that ratifying the same penal provisions in all three of the NFL, NBA, and MLB CBAs faces several obstacles. First, CBAs are freely-negotiated contracts by private parties—leagues and players associations. Freedom of contract principles protect that autonomy. (This is not to say that players do not believe in accountability, but rather that they like consistency, predictability, and protection in the adjudicative process). Second, CBA negotiation is a give-and-take process; implementing more a severe penal structure (the player “give”) likely requires conferring a significant benefit (the player “take”). The players of each league may prefer different “takes”: for the NFL, it might be no more marijuana testing, Jackson Thompson, *NFL Players Can Smoke Marijuana for the First Time During the Offseason and the Window Opened on 4/20*, INSIDER (Apr. 20, 2021) <https://www.insider.com/nfl-players-can-smoke-marijuana-without-discipline-starting-420-2021-4>; for the NBA, it might be more load management protections, See Athletic NBA Staff, *NBA Load Management: Is It a Problem? How Do We Know It Works? Our Experts Discuss*, ATHLETIC (Mar 3, 2023), <https://theathletic.com/4272209/2023/03/03/load-management-nba-injuries/>; for the MLB, it might be a change in the playoff structure, see Zachary D. Rymer, *The Winners and Losers of MLB’s New CBA Agreement*, BLEACHER REPORT (Mar. 11, 2022), <https://bleacherreport.com/articles/2954242-the-winners-and-losers-of-mlbs-new-cba-agreement>). Although the internal difficulties in ratification and negotiation are considerable, when motivated properly by policy and public opinion, such as this proposed solution is, they are not insurmountable. By replacing only the CBA penal structure, not the entirety of the agreement, leagues maintain the majority of the provisions specific to and necessary for the effective functioning of their sport.

the times where such concerns are most salient.

Consider first the concerns at the beginning of the penal process. The NBA and MLB provisions allowing indefinite player suspension at the outset of disciplinary proceedings are appropriate. These clauses allow the commissioner to proactively address employability concerns by removing the player from the public eye: players may continue to practice and play internally but may not participate in games or other outward-facing events. But, by allowing a player to continue engaging with his team and receiving pay, the league preserves the presumption of innocence.¹⁹²

Also, the permissive—rather than mandatory—suspensions parallel the criminal bail structure. In bail proceedings, the court determines whether the allegations against an individual are so severe that they merit continued custody, despite the presumption of innocence. It is the court's role to make this preliminary determination based on the available information. Courts have wide discretion—bail may be nominal, or it may be denied all together. Either choice is available while preserving a presumption of innocence. Similarly, the commissioner can determine whether the alleged misconduct is significant enough to merit “custody”—an indefinite suspension—or “bail”—continued participation. And just as individuals may not be held in prison without “just cause,” a suspension cannot continue if it is no longer reasonable.¹⁹³

Once an initial suspension is decided, the commissioner must transition to and remain in the prosecutorial role for the remainder of the disciplinary procedures. This protects players from employment threats based on inaccurate or incomplete information. Consider traditional separation-of-powers concepts: the commissioner cannot serve as both the executive and the judiciary. Thus, he must, at times, abdicate one of these responsibilities for the sake of the other to prevent using one role for the benefit of the other.

Only after the adjudicative process has ended may a commissioner resume his role of employer. And any decisions he makes as an employer must be based squarely on the fact-findings of the independent committee that conducted the investigation. As the ultimate employer, the commissioner should retain the authority to remove players from the league following adjudication. This is the only way to protect a league's integrity, something the NFL hails in the Policy

¹⁹² Although the fairest way to preserve this innocence would be to allow the player to continue complete participation in his team events, in the employment context, the proposed hybrid model is the most effective way to respect the employer/prosecutor concerns of the commissioner. Consider, too, how this parallels the presumption of innocence in the criminal context. Yes, this presumption protects a defendant during the adjudicative process, but he or she must remain incarcerated before and throughout the trial. This protects the social interest in fair adjudication while also protecting the public from potentially harmful behavior. Similarly, a player is presumed innocent at the outset of the league adjudicative process but must face consequences by way of suspension (“jail time”) in order to preserve league reputation and ensure players allegedly engaging in violative conduct are held accountable (“protect the public”).

¹⁹³ See generally MLB CBA, *supra* note 52; NFL CBA, *supra* note 13; NBA CBA, *supra* note 11.

as all-important.

As the head of a league, the commissioner has the responsibility—and the authority—to preserve this integrity.¹⁹⁴ The commissioner may, based on the facts presented by the independent committee, dismiss a player from a league. This decision must be in writing and explicitly reference the committee findings in its rationale. Given its severity, the dismissal decision should be appealable to an independent, jointly-appointed panel, with deference to the commissioner's decision rather than *de novo* review. This deference would be based on the commissioner's authority as the head of a league, the factual support requirements of the dismissal decision, and the employer-employee relationship between the commissioner and the player at issue.¹⁹⁵

B. Jointly-Appointed, Independent, Three-Judge Tribunal Review

Between the commissioner's employment decisions, a three-judge panel should be jointly appointed to make findings of fact in the adjudication proceedings. This panel should take evidence, hear witnesses, and speak with relevant parties, paralleling the processes in the criminal system (and all three leagues' appeals process). By externalizing the adjudicative process in this way, players are protected from the self-serving decisions of both commissioners—who may be seeking a severe but unwarranted punishment to make a player an example—and teams—who may be willing to turn a blind eye to varying degrees of misconduct to have on-field or on-court success.

An independent tribunal also allows for a closer parallel between the CBA penal process and traditional judicial procedures. Following their findings, the panel would issue a written decision, just like a court. Unlike the current NFL structure, where the arbitrator concurrently issues a decision and a penal recommendation, the guilt and sentencing phases should be separate. In the guilt phase, both players and the commissioner would have the opportunity to present mitigating and aggravating evidence. In the sentencing phase, the player, but not the commissioner, should be allowed to present mitigating evidence.¹⁹⁶ Players should retain the right to appeal the panel's findings, subject to an arbitrary-and-

¹⁹⁴ Note the ways in which commissioners are appointed: players and leagues must agree on the appointee. *See, e.g.*, NFL CONSTITUTION, *supra* note 19, art. VIII, § 1. This democratic system allows for an executive who is fair, reasonable, and representative of both the players and the leagues.

¹⁹⁵ True, players are employed by their individual teams, not the league; but the relationship between teams and leagues more closely parallels one of principal and agent than one of employer and independent contractor.

¹⁹⁶ If a commissioner were allowed to present aggravating evidence or recommend a punishment at this phase, it would conflate the employer and prosecutor roles, implicating fairness concerns. The commissioner may make a final dismissal decision later, rendering the prior sentencing process moot, but this decision would be the exception, not the rule; would be grounded in the facts of the independent panel's findings; and would be appealable. This ultimate decision must be preserved to respect the employer-employee relationship between commissioner and player, something that the current systems do not do.

capricious review by a single independent officer, jointly appointed by the parties.

C. Preserving Employment Concerns and Player Due Process

The proposed approach would result in the same penal outcome for Watson, regardless of the sport played; each CBA would contain the same penal structure. First, Commissioner Goodell, the employer, would retain the authority to suspend Watson, the employee, indefinitely, which he would likely do at the outset of the investigation and through its completion. This would protect the integrity of the NFL. To preserve the presumption of innocence in light of the suspension, Watson would continue to receive pay. After a suspension decision, Goodell would participate in the investigation solely in a “prosecutorial” capacity.

The NFL and NFLPA would then jointly appoint a three-judge panel to investigate Watson’s misconduct. This investigation would involve collecting evidence and testimony, and speaking with relevant witnesses, including Watson himself and the women he allegedly assaulted. After this investigation and prior to a final sentencing, Watson would have the opportunity to present favorable mitigating evidence, but Goodell would not. The panel would issue a written decision, much as Judge Robinson did.

If both Goodell and Watson agreed with the panel’s decision, the punishment would be final and binding. If Watson disagreed, he could appeal to a jointly-appointed independent appeal officer, who would review the panel’s decision on an arbitrary-and-capricious standard. If Goodell disagreed, he could appeal under the same conditions, or he could issue a dismissal decision releasing Watson from the league entirely. It is important for Goodell to retain this dismissal authority to recognize his capacity as an employer. Watson could appeal a dismissal decision to an independent, jointly-appointed officer, and such an appeal would be deferential to the commissioner’s decision. Because Judge Robinson’s findings met the preponderance-of-the-evidence standard, Goodell’s decision to dismiss Watson based on the findings would likely be upheld upon appeal. So, if Goodell, an employer empowered to protect the integrity of the league, wanted to dismiss a player to protect the NFL’s reputation, he would have the authority to do so.

This solution preserves the employer-employee relationship, parallels expectations of the civil and criminal judicial processes, and preserves due process throughout the entire adjudication—it is satisfactory under any penal theory. It is utilitarian in that it preserves freedom-of-contract relations between leagues and players; it is retributivist in that it allows leagues to dismiss players for misconduct, punishing in proportion to the league’s conception of moral desert; and it is rehabilitative in that it seeks to maintain league integrity, which it may do by using punishment to encourage player compliance moving forward.

In the absence of such harmony, no league is protected from the perilous

penal proceedings or inevitable uncertainty so-called “conduct detrimental” creates.

CONCLUSION

The history, culture, and nuances of each professional sports league led to the creation of unique CBAs. These agreements govern both on- and off-field conduct and represent an equilibrium between players (employees) and leagues (employers). The use of collective bargaining is beneficial, but can frustrate traditional conceptions of justice, both in the civil and criminal context. Accordingly, a penal structure that is identical in the CBAs of all professional sports leagues, parallels traditional judicial processes, and preserves both criminal and employment concerns would create a predictable, consistent, and just adjudicative process for professional athletes who engage in misconduct. Otherwise, athletes are punished in disparate, unpredictable, and sometimes unjust ways; otherwise, athletes are left in a league of their own.