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BENDING THE RULES TO CHANGE THE RULE? WAS THE NATIONAL FOOTBALL LEAGUE'S DOMESTIC VIOLENCE POLICY COLLECTIVELY BARGAINED FOR?

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I. INTRODUCTION

On August 28, 2014, in response to a wide range of criticisms of the National Football League's (NFL or the League) handling of Ray Rice's domestic violence incident, Commissioner Roger Goodell sent a letter to the owners of all thirty-two NFL teams.¹ The letter detailed the implementation of a new league-wide domestic violence policy.² The implementation of this new policy raises questions regarding Commissioner Goodell's authority to unilaterally amend the League's Personal Conduct Policy. This Comment will first lay out the background of Rice's story and the NFL's implementation of the new Domestic Violence Policy. Using Rice's story as an application to the collective bargaining framework, this Comment will argue that disciplinary policies, like the NFL's Domestic Violence Policy, are permissive subjects of collective bargaining and not mandatory subjects. Therefore, as a permissive subject of collective bargaining, the NFL and Commissioner Goodell were not obligated to collectively bargain for its implementation in amending the Personal Conduct Policy. Additionally, this Comment will address how the NFL, as a private association, mistreated Rice in its retroactive application of

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1. *Roger Goodell Letter to NFL Owners*, ESPN (Aug. 29, 2014), http://espn.go.com/nfl/story/_/id/11425532/roger-goodell-letter-nfl-teams-domestic-violence-policy [hereinafter *Goodell Letter*].

2. *Id.*

the new Domestic Violence Policy.

II. FACTUAL BACKGROUND TO RAY RICE'S SITUATION AND THE IMPLEMENTATION OF THE NEW DOMESTIC VIOLENCE POLICY

On February 15, 2014, Ray Rice was arrested on simple assault charges for his role in an altercation with his then-fiancée Janay Palmer at an Atlantic City casino.³ Four days later, video evidence of Rice dragging an unconscious Janay out of a hotel elevator surfaced on the Internet.⁴ Rice was indicted on aggravated assault charges on March 27, 2014, despite Janay's desire to not prosecute her fiancé.⁵ The next day, Rice and Janay were officially married.⁶ Rice applied for, and was accepted into, a pretrial intervention program that could remove the charges from Rice's record if he adhered to certain conditions.⁷ Under the conditions of the program, Rice had to complete a twelve-month program and stay out of trouble during that period.⁸ On June 16, 2014, Rice had his discipline hearing with the NFL, where Rice and Commissioner Goodell were joined by the Baltimore Ravens' General Manager Ozzie Newsome, the Ravens' Team President Dick Cass, the NFL's General Counsel, the NFL's Vice President for Labor Relations, and Janay Rice.⁹ On July 24, 2014, Rice received written notice that the NFL had suspended him for two games in the upcoming 2014 season.¹⁰

In the weeks following the announcement of Rice's suspension, there was a great deal of public outcry over the perceived lightness of the NFL's punishment and the League's perceived domestic violence problem.¹¹ These wide-ranging criticisms likely played a major role in Commissioner Goodell's decision to formulate the new Domestic Violence Policy. In his letter to the

3. Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBNATION (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens#>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* It is worth noting that less than one percent of domestic violence cases in New Jersey from 2010–2013 received this deal. John Barr & Don Van Natta Jr., *Program Ray Rice in Is Rarely Granted*, ESPN (Sept. 12, 2014), http://espn.go.com/espn/otl/story/_/id/11514871/judicial-figures-show-ray-rice-deal-offered-rarely.

8. Bien, *supra* note 3.

9. *Id.*

10. *Id.*

11. See, e.g., Travis Waldron, *100,000 People Ask Roger Goodell to Change NFL Policy After 'Meager' Ray Rice Punishment*, THINKPROGRESS (Aug. 1, 2014), <http://thinkprogress.org/sports/2014/08/01/3466615/100000-sign-petition-calling-on-nfl-commissioner-to-address-domestic-violence/>.

club owners, Goodell acknowledged that Rice's suspension "led the public to question [the League's] sincerity, [the League's] commitment, and whether [the League] understood the toll that domestic violence inflicts."¹² Goodell further admitted that he "didn't [sic] get it right" with regard to Rice's punishment.¹³ Goodell then attached a memorandum to all NFL personnel that outlined the new Domestic Violence Policy, making it effective immediately.¹⁴

Under the new policy, "violations of the Personal Conduct Policy regarding assault, battery, domestic violence or sexual assault that involve physical force will" result in a six-game suspension without pay for a first offense.¹⁵ The NFL will take into consideration any mitigating factors and may levy longer, or shorter, suspensions where it deems appropriate.¹⁶ Circumstances that may lead to a more severe punishment include: prior incidents before entering the NFL; the presence of a weapon; or evidence of choking, repeated striking, or committing the act against a pregnant woman.¹⁷ A second offense of the Domestic Violence Policy will now result in banishment from the NFL, which may be appealed after one year.¹⁸

On September 8, 2014, just days after the announcement of this new policy, a new video of Rice actually striking Janay in the elevator surfaced.¹⁹ That same day, as a result of this new video evidence, the Ravens released Rice, and the NFL announced it would be suspending Rice indefinitely.²⁰ The NFL announced that the new, longer suspension was based on the fact that the new video presented the League with additional evidence not present at the time of the original suspension.²¹ Rice appealed his indefinite suspension a week later and requested that Commissioner Goodell not preside over the hearing based on his involvement in the investigation.²² Goodell, however, testified at Rice's appeal in early November.²³

12. *Goodell Letter*, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Bien*, *supra* note 3.

20. *Id.*

21. Tom Pelissero & Gary Mihoces, *Ray Rice Cut by Ravens, Suspended by NFL Indefinitely*, USA TODAY (Sept. 8, 2014), <http://www.usatoday.com/story/sports/nfl/ravens/2014/09/08/baltimore-ravens-cut-ray-rice/15291729/>.

22. *Bien*, *supra* note 3.

23. *Id.*

III. COLLECTIVE BARGAINING FRAMEWORK

The obligation to collectively bargain is laid out in the National Labor Relations Act (NLRA).²⁴ This duty of collective bargaining is a “mutual obligation of the employer and the [representative] of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”²⁵ Further, the NLRA precludes both parties from terminating or modifying a collective bargaining agreement²⁶ unless certain conditions designed to maintain the collective bargaining process are present.²⁷

The scope of the duty to collectively bargain was originally difficult to define, specifically what was required within the duty to collectively bargain over “other terms and conditions of employment.”²⁸ The Supreme Court first discussed the issue of mandatory subjects in the 1958 case of *NLRB v. Wooster Division of Borg-Warner Corp.*²⁹ The Court held that a party’s duty to bargain in good faith extended only to mandatory subjects of collective bargaining.³⁰ However, parties are free to propose and bargain over other subjects, but neither party is required to bargain over permissive subjects of collective bargaining.³¹ The Court further held that neither party may insist on the resolution of a permissive subject of collective bargaining, as doing so would violate the duty to bargain in good faith.³²

The Supreme Court expanded upon *Borg-Warner* to clarify that an employer cannot unilaterally modify a mandatory subject to an agreement under the duty to bargain in good faith.³³ In *First National Maintenance Corp. v. NLRB*, the Supreme Court identified three categories of management decisions and determined their classification as mandatory or permissive subjects of collective bargaining.³⁴ These categories are as follows: (1) those that have an indirect and attenuated impact on the employer–employee relationship; (2) those that “are almost exclusively ‘an aspect of the relationship’ between

24. 29 U.S.C. § 158(d) (2013).

25. *Id.*

26. *Id.*

27. § 158(d)(1)–(4).

28. *See* § 158(d).

29. 356 U.S. 342 (1958).

30. *Id.* at 349.

31. *Id.*

32. *Id.*

33. *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

34. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981).

employer and employee;” and (3) those that have a direct impact on employment.³⁵ Decisions with an indirect impact were deemed to be permissive subjects of collective bargaining and thus not subject to the duty to collectively bargain.³⁶ Management decisions that are exclusively an aspect of the employer–employee relationship are considered mandatory subjects of collective bargaining and thus must be collectively bargained for in good faith.³⁷ The last category requires a balancing test; the issue becomes a mandatory subject of collective bargaining “only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”³⁸ The language of section 8(d) of the NLRA does not provide a definitive list of mandatory subjects of collective bargaining; however, these mandatory subjects of collective bargaining only cover issues that settle an aspect of the employer–employee relationship.³⁹

Additionally, courts’ holdings regarding what constitutes a mandatory subject of collective bargaining versus a permissive subject of collective bargaining vary by state.⁴⁰ Further, not every non-mandatory subject of collective bargaining is a permissive subject of collective bargaining.⁴¹ State statutes may render certain practices unfair labor practices.⁴² A permissive, but lawful, subject of bargaining that is agreed to by the parties may be presented by either party, leaving the other party free to accept or reject the proposal.⁴³ Unions serve as the exclusive representatives of employees in the collective bargaining process with regards to pay, wages, and other conditions of employment.⁴⁴

35. *Id.* (quoting *Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 178 (1971)).

36. *Id.* at 677–78.

37. *Id.*

38. *Id.* at 679.

39. *Pittsburgh Plate Glass Co.*, 404 U.S. at 178.

40. Davis M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 *YALE L.J.* 689, 705–06 (1990).

41. 20 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 55:32 (4th ed. 2001).

42. *Id.*

43. *Id.*

44. Frederick T. Golder & David R. Golder, *Appropriate Subjects for Collective Bargaining—Mandatory Subjects*, in *LABOR AND EMPLOYMENT LAW: COMPLIANCE AND LITIGATION* § 2:15 (3d ed.), Westlaw (database updated July 2015).

IV. APPLICATION OF THE DUTY TO COLLECTIVELY BARGAIN TO THE NFL AND RAY RICE

As the NFL Commissioner, Roger Goodell is granted the authority to discipline players through three distinct sources: (1) the NFL's Collective Bargaining Agreement (CBA);⁴⁵ (2) the NFL Constitution and Bylaws;⁴⁶ and (3) the NFL Player Contract.⁴⁷ Each of these sources grants Commissioner Goodell a broad array of authority in handling player discipline. Additionally, the Personal Conduct Policy provides a definitive set of guidelines to govern the on- and off-field conduct of players such as Rice.⁴⁸ Further, in assessing these sources, it can likely be concluded that disciplinary matters and their enforcement constitute a permissive subject of collective bargaining within the NFL context.

The CBA between the NFL and the National Football League Players Association (NFLPA) was most recently agreed to in 2011, following a widely covered lockout.⁴⁹ Article 46 of the CBA covers a commissioner's disciplinary powers and the requisite procedures for imposing disciplinary action.⁵⁰ Most significant is the integrity of the game clause, which grants a commissioner the authority to discipline "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."⁵¹ The Commissioner is required to promptly send written notice to a player and the NFLPA, and within three business days, a player or the NFLPA may appeal the commissioner's decision in writing.⁵²

Section 8.13 of the NFL Constitution further details the Commissioner's power.⁵³ Under this provision, the Commissioner has the authority to (1) either suspend a player, fine a player for up to \$500,000, or both;⁵⁴ (2) cancel any

45. NFL COLLECTIVE BARGAINING AGREEMENT art. 46 (2011) [hereinafter NFL CBA].

46. CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. 8.13 (2006) [hereinafter NFL CONSTITUTION].

47. NFL CBA, *supra* note 45, app. A.

48. *See generally* NFL, PERSONAL CONDUCT POLICY (2013), <https://nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf> [hereinafter PERSONAL CONDUCT POLICY].

49. *See* Nate Davis, *NFL, Players Announce New 10-Year Labor Agreement*, USA TODAY (July 25, 2011), http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1#.VP3XqYHF_Co.

50. NFL CBA, *supra* note 45.

51. *Id.* art. 46, sec. 1(a).

52. *Id.*

53. NFL CONSTITUTION, *supra* note 46, art. 8.13.

54. *Id.* art. 8.13(A)(1).

contract of a player with a member team;⁵⁵ (3) seek authorization from the Executive Committee for harsher disciplinary measures than prescribed by the Constitution;⁵⁶ (4) bar individuals from entry to any NFL or team stadium or facility;⁵⁷ and (5) change, modify, or reduce any suspension not requiring member club approval.⁵⁸

The integrity of the game clause is further built into the NFL Player Contract.⁵⁹ The language again is rather ambiguous and broad in noting “any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or [professional] football” is subject to the Commissioner’s disciplinary authority.⁶⁰ The NFL Player Contract further allows the Commissioner “to suspend [a p]layer for a period certain or indefinitely; and/or [sic] to terminate th[e] contract.”⁶¹

The determination as to whether disciplinary matters, such as the NFL’s Domestic Violence Policy, are mandatory or permissive subjects of collective bargaining will depend on certain characteristics. No single characteristic may be viewed as dispositive, but taken as a whole, these characteristics can lead to the determination that the NFL’s Domestic Violence Policy amounts to a permissive subject of collective bargaining.

First, the NFL and NFLPA’s CBA is governed under the NLRA because the NLRA governs relations between an employer and an employee’s union representative.⁶² The fact that the NFL and the NFLPA, as the exclusive bargaining representative of the players, have a valid and enforceable CBA requires the two parties to bargain collectively in good faith over mandatory subjects of collective bargaining.⁶³ As Casinova Henderson recently argued, the NLRA favors the broad powers of the NFL Commissioner in labor relations.⁶⁴

In *Wood v. National Basketball Ass’n*, the Second Circuit noted that collective bargaining between athletes and their respective leagues raises a series of issues for a court, with little to no precedent in standard industry

55. *Id.* art. 8.13(A)(2).

56. *Id.* art. 8.13(B).

57. *Id.* art. 8.13(D).

58. *Id.* art. 8.13(E).

59. NFL CBA, *supra* note 45, app. A.

60. *Id.*

61. *Id.*

62. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937).

63. 29 U.S.C. § 158(d) (2013).

64. Casinova O. Henderson, *How Much Discretion Is Too Much for the NFL Commissioner to Have over the Players’ off-the-Field Conduct?*, 17 *SPORTS LAW. J.* 167, 180 (2010).

relations.⁶⁵ It is obvious that disciplinary matters are not matters affecting wages or hours. Therefore, to be deemed a mandatory subject of collective bargaining, disciplinary matters must fall under the category of other matters adversely affecting working conditions of employees. As discussed previously, there is no clearly defined list of mandatory subjects, and some conditions of employment may not be considered mandatory subjects of collective bargaining in certain jurisdictions.⁶⁶ Unilateral decisions that affect conditions of employment may not be considered mandatory subjects when they “inherently and fundamentally relate to the primary mission of the employer.”⁶⁷ In this instance, a court would have to weigh an employee’s interest against managerial prerogatives to determine policy.⁶⁸

In *Teaneck Board of Education v. Teaneck Teacher’s Ass’n*,⁶⁹ the New Jersey Supreme Court determined that hiring and firing decisions qualify as managerial prerogatives and thus are permissive subjects of collective bargaining.⁷⁰ The *Teaneck* court also cited to a series of cases that furthered the managerial prerogative to decisions about retaining, transferring, and promoting or hiring employees.⁷¹ Each of these conditions has been determined to fall under the scope of a managerial prerogative and is considered a permissive subject of collective bargaining.⁷²

In *Robertson v. National Basketball Ass’n*,⁷³ members of various teams in the National Basketball Association (NBA) and American Basketball Association sued under a variety of causes.⁷⁴ In the course of resolving the players’ dispute, the *Robertson* court noted that mandatory subjects of collective bargaining are not wholly immune from other areas of law just because they must be collectively bargained over.⁷⁵ Additionally, the *Robertson* court held that the NBA reserve clause, player draft, and non-merger clauses in the NBA’s CBA were not mandatory subjects of collective bargaining.⁷⁶ In doing so, the

65. 809 F.2d 954, 961 (2d Cir. 1987).

66. Rabban, *supra* note 40.

67. Henderson, *supra* note 64, at 182 (citing FRANCIS C. AMENDOLA ET AL., *Secondary Pressures*, in 51A C.J.S. LABOR RELATIONS § 487 (2008)).

68. *Id.*

69. 462 A.2d 137 (N.J. 1983).

70. *Id.* at 140.

71. *Id.*

72. *Id.*

73. 389 F. Supp. 867 (S.D.N.Y. 1975).

74. *Id.* at 872–73.

75. *Id.* at 888.

76. *Id.* at 890.

court noted “[t]erms and conditions of employment’ was not meant to reach every issue that might interest unions or employers.”⁷⁷ A parallel can potentially be drawn between the classifications of the above items with the NBA’s CBA and the NFL’s new Domestic Violence Policy. The issue of player discipline can likely fall into the category of issues decided in *Robertson* that interest a players union but do not necessitate a term and condition of employment sufficient to be a mandatory subject of collective bargaining.

Henderson noted in his 2010 Article that the implementation of the then-new Personal Conduct Policy by the Commissioner would seem to evidence a “managerial prerogative” that would not require collective bargaining.⁷⁸ In a similar fashion to his implementation of the NFL’s Domestic Violence Policy, Commissioner Goodell announced the policy after minimal discussion with the NFLPA.⁷⁹ Under the Personal Conduct Policy, the Commissioner went as far as to punish players for actions that occurred before the policy took effect.⁸⁰ However, Henderson noted that no determination has been made regarding the implementation of the Personal Conduct Policy.⁸¹ Commissioner Goodell’s decision to implement the new Domestic Violence Policy draws a parallel to Henderson’s statement regarding the Personal Conduct Policy. Goodell, on behalf of the NFL, made this unilateral decision in an effort to protect the primary mission of the NFL—maintaining the integrity of the game.⁸²

The argument for classifying the Domestic Violence Policy as a permissive subject is made stronger in light of ongoing discussions taking place between Commissioner Goodell and the NFLPA. In the recent weeks after implementing the policy, Commissioner Goodell and the League’s owners met regarding the Domestic Violence Policy.⁸³ Goodell and the owners met to discuss potential revisions to the policy he instituted in August 2014.⁸⁴ The Commissioner had even stated that he would like to institute a revised version

77. *Id.* (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220–21, 223–24 (1964); *Westinghouse Elec. Corp. v. NLRB*, 387 F.2d 542, 545–48 (4th Cir. 1967)).

78. Henderson, *supra* note 64, at 183.

79. *Id.* at 172.

80. *Id.*

81. *Id.* at 183.

82. See PERSONAL CONDUCT POLICY, *supra* note 48.

83. Erik Brady, *NFL’s Domestic Violence Policy Could Undergo Numerous Changes*, USA TODAY (Oct. 9, 2014), <http://www.usatoday.com/story/sports/nfl/2014/10/08/domestic-violence-policy-changes/16950271/>.

84. *Id.*

of the Domestic Violence Policy before the Super Bowl in February of 2015.⁸⁵ The League and the NFLPA have also been collaborating with former sex crimes prosecutor Lisa Friel in their efforts to revamp the Domestic Violence Policy.⁸⁶ On December 10, 2014, the NFL team owners unanimously endorsed a revised version of the Personal Conduct Policy.⁸⁷ This new policy was the product of a series of meetings with various groups and touched on new policies for handling domestic violence and similar types of violations.⁸⁸

These efforts by Commissioner Goodell strengthened the notion that his implementation of the Domestic Violence Policy was a permissive subject of collective bargaining. As previously noted, an employer may voluntarily choose to negotiate over a permissive subject of collective bargaining. This is precisely what Goodell chose to do with the NFLPA. Goodell's initial unilateral decision was permissible in his effort to further protect the integrity of the NFL. In doing so, Goodell made a decision that affected terms and conditions of employment but related to the primary mission of the NFL. However, Goodell and the NFLPA later attempted to bargain over such a permissive subject in good faith. If such efforts failed, the NFLPA could not insist on any proposed changes as a condition to an agreement.⁸⁹ Rather, Commissioner Goodell would be able to either keep the current Domestic Violence Policy or unilaterally make further alterations to the policy without violating a duty to collectively bargain in good faith under the NLRA.

Opponents to Commissioner Goodell's unilateral implementation of the NFL's Domestic Violence Policy could make a variety of contentions that the policy constitutes a mandatory subject of collective bargaining. An initial argument could look to the NFL CBA, Article 70, Section 9.⁹⁰ Section 9 states "[t]his Agreement may not be changed, altered, or amended other than by a written agreement signed by authorized representatives of the parties."⁹¹ Commissioner Goodell's unilateral implementation of the Domestic Violence

85. *Id.*

86. Thomas Tracy, *Revamp of NFL's Domestic Violence Policy Could Take Months, Says Ex-Sex Crimes Prosecutor Hired by League*, N.Y. DAILY NEWS, <http://www.nydailynews.com/sports/football/revamp-nfl-domestic-violence-policy-months-experts-article-1.1982990> (last updated Oct. 22, 2014).

87. *NFL Owners Endorse New Personal Conduct Policy*, NFL (Dec. 10, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>.

88. *Id.*

89. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

90. NFL CBA, *supra* note 45, art. 70, sec. 9.

91. *Id.*

Policy portrays the exact type of amendment the parties collectively bargained to prohibit. The Domestic Violence Policy was implemented without a written agreement signed by both parties and was done swiftly, without discussion with the NFLPA over its provisions. An additional argument could be made that the parallels between the NFL's Personal Conduct Policy and Domestic Violence Policy indicate a history of unlawful unilateral changes to mandatory subjects of collective bargaining. As Henderson noted in his article, no challenge was ever made to the Personal Conduct Policy's implementation, so it remains unclear whether its implementation was lawful under the NLRA's duty to collectively bargain.⁹²

The National Labor Relations Board (NLRB) arbitration decision in *Golden Stevedoring Co. & International Longshoremen's Ass'n*⁹³ draws a similar parallel to any potential claim regarding the Domestic Violence Policy. At issue in the *Golden* case was an alleged unilateral change to the company's disciplinary policies.⁹⁴ The NLRB's Division of Judges (Judges) noted that the duty to collectively bargain, with relation to working conditions, applied only where the change was "material, substantial, and . . . significant."⁹⁵ The Judges also noted that in a prior decision, the Board found that an employer had made an unlawful unilateral change when it adopted a new discipline form without bargaining with the employees' representative.⁹⁶ Thus, one could conceivably argue that Commissioner Goodell's unilateral implementation of the Domestic Violence Policy, as a change in the disciplinary policy, was material, substantial, and significant to the working conditions of NFL players. Such a finding would render the implementation of the Domestic Violence Policy as an unlawful unilateral change to a mandatory subject of collective bargaining.

While it can conceivably be argued that the Domestic Violence Policy constitutes either a mandatory or permissive subject of collective bargaining, it is more likely that a court would determine the policy is a permissive subject. The NFLPA has not actively objected to its implementation or provisions, and has begun openly working with the Commissioner to solidify the policy going forward. Additionally, to prove the Domestic Violence Policy is a permissive subject of collective bargaining, Commissioner Goodell can point to his implementation of the Domestic Violence Policy to help promote the League's

92. Henderson, *supra* note 64, at 183.

93. *See generally* Golden Stevedoring Co., & Int'l Longshoremen's Ass'n, AFL-CIO, S. Atl. & Gulf Coast Dist., 15-CA-13334, 1998 WL 1985226 (N.L.R.B. July 28, 1998).

94. *Id.*

95. *Id.* (quoting Millard Processing Servs., Inc., 310 N.L.R.B. 421, 425 (1993)).

96. *Id.*

primary mission—maintaining the integrity of the NFL. These arguments would insulate the policy from potential collective bargaining violations under the NLRA.

V. THE RESOLUTION OF RAY RICE'S DOMESTIC VIOLENCE SUSPENSION

Any potential claims made against the NFL's Domestic Violence Policy under the NLRA would likely be made by the NFLPA as the players' official representative.⁹⁷ Such a claim would provide little recourse for the current situation of Ray Rice and his indefinite suspension. However, Rice has recently pursued successful claims against the NFL to get his suspension overturned through an arbitration proceeding; thus, a claim against the NFL framed under the law of private associations could be successful.⁹⁸

Commissioner Goodell possesses the power to suspend players through the NFL's Personal Conduct Policy.⁹⁹ Under this policy, a player is "required to avoid 'conduct detrimental to the integrity of and public confidence in the National Football League.'"¹⁰⁰ A player may be disciplined even if he is not found guilty of a crime.¹⁰¹ The League is able to initiate investigations into disciplinary issues involving players, and after concluding an investigation, the Commissioner has full authority to impose discipline.¹⁰² The policy states that discipline may be imposed under a variety of circumstances: (1) "[c]riminal offenses including, but not limited to, those involving: the . . . threat of violence; domestic violence and other forms of partner abuse . . . [and] disorderly conduct;" (2) "[v]iolent or threatening behavior among employees, whether inside or outside the workplace;" (3) "[c]onduct that imposes inherent danger to the safety and [well-being] of another person;" and (4) "[c]onduct that undermines . . . the integrity and reputation of the NFL."¹⁰³ Discipline is "based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges were filed), and other relevant factors."¹⁰⁴ A first offense generally does not result in discipline until a case is resolved in court, unless an offense posed an

97. NFL CBA, *supra* note 45, at xiv.

98. *See generally* In the Matter of Ray Rice (2014) (Jones, Arb.), http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf.

99. *See generally* PERSONAL CONDUCT POLICY, *supra* note 48.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

“immediate and substantial risk” to the NFL’s reputation.¹⁰⁵ The implementation of the new Domestic Violence Policy amounts to an amendment of the current policy; however, all of the above provisions still apply to the Personal Conduct Policy.

In an article published in 1995, Professor Jan Stiglitz discussed the powers that commissioners in the four major American sports leagues possessed in handling player discipline.¹⁰⁶ Stiglitz also categorized certain misconduct as integrity-related misconduct, which included “off the field conduct which might effect [sic] the public’s view of the player or the sport.”¹⁰⁷ Stiglitz notes that integrity-discipline is the most difficult to control because the leagues have an interest in protecting their public image, but players have a certain privacy issue with regulating off-field behavior.¹⁰⁸ Stiglitz’s article discusses the provision of the applicable NFL CBA in 1995, which provided for the commissioner’s power to fine or suspend a player for conduct deemed “detrimental to the League or professional football.”¹⁰⁹

In the twenty years since the publishing of Stiglitz’s article, the powers held by the NFL Commissioner have remained relatively the same, if not expanded further. The Commissioner’s disciplinary power is limited in that a player must be afforded due process, notice, and an opportunity to defend himself.¹¹⁰ This restriction can be similarly drawn to those of commissioners in the other three major sports leagues. For example in *Charles O. Finley & Co. v. Kuhn*, the Seventh Circuit addressed the best interests of the sport clause for Major League Baseball (MLB).¹¹¹ In *Finley*, MLB Commissioner Bowie Kuhn voided the assignment of three players’ contracts because the assignments were “inconsistent with the best interests of baseball.”¹¹² The court held that MLB was able to take whatever action it deemed appropriate, so long as it was not contrary to the governing state law, federal law, or MLB’s bylaws and provided rudimentary due process.¹¹³

The decision handed down in *Finley* was strengthened by the resulting arbitration decision of *National Basketball Players Ass’n on behalf of Player*

105. *Id.*

106. *See generally* Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L. J. 167 (1995).

107. *Id.* at 177.

108. *Id.* at 177–78.

109. *Id.* at 182–83 (quoting NFL CBA, *supra* note 45, app. A).

110. Henderson, *supra* note 64, at 177.

111. 569 F.2d 527, 530 (7th Cir. 1978).

112. *Id.* at 531.

113. *Id.* at 544.

*Latrell Sprewell & Warriors Basketball Club & National Basketball Ass'n.*¹¹⁴ The *Sprewell* decision centered on former Golden State Warrior player Latrell Sprewell's altercation with his coach P.J. Carlesimo, which involved Sprewell choking and throwing punches at Carlesimo.¹¹⁵ As a result of this dispute, the Warriors initially suspended Sprewell for a minimum of ten games.¹¹⁶ NBA Commissioner David Stern ultimately suspended Sprewell for an entire year, while the Warriors later terminated Sprewell's contract.¹¹⁷ John Feerick presided over the arbitration and ultimately determined that Sprewell should only be suspended for sixty-eight games (i.e., the remainder of the NBA season) and have his contract reinstated.¹¹⁸ In making his decision, Feerick noted that the arbitrary and capricious standard was applicable to Sprewell's case.¹¹⁹ Under the arbitrary and capricious standard, courts will choose to intervene when an association's decision is made arbitrarily or capriciously.¹²⁰ Feerick further noted that in an employment context, "once a penalty has been assessed and accepted, it cannot be increased without the discovery of new additional facts that were not readily available to an employer at time of the original punishment."¹²¹ Suspending Sprewell for sixty-eight games was still "many times the aggregate [suspensions] imposed on the other players for acts of physical violence" during the previous two seasons.¹²²

The broad disciplinary authority granted to the MLB Commissioner in *Finley* is applied in a similar fashion to Commissioner Goodell in the NFL. As discussed above, Commissioner Goodell derives his broad authority to impose discipline on NFL players from the CBA,¹²³ the NFL Constitution and Bylaws,¹²⁴ and the NFL Uniform Player Contract.¹²⁵ Further, Commissioner Goodell would be restricted in imposing discipline under the same requirements

114. See MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 575 (3d ed. 2013) (discussing Nat'l Basketball Players Ass'n on behalf of Player Latrell Sprewell & Warriors Basketball Club & Nat'l Basketball Ass'n, 591 PLI/Pat (Pub. L. Inst.) 469 (2000) (Feerick. Arb.)).

115. *Id.* at 575–76.

116. *Id.*

117. *Id.* at 577.

118. *Id.* at 581.

119. *Id.* at 578.

120. *Id.* at 388.

121. *Id.* at 579.

122. *Id.* at 581.

123. NFL CBA, *supra* note 45.

124. NFL CONSTITUTION, *supra* note 46.

125. NFL CBA, *supra* note 45, app. A.

laid out in *Sprewell*. So long as Commissioner Goodell did not apply the NFL's Bylaws arbitrarily or capriciously to Rice, did not act contrary to controlling law, and provided Rice with rudimentary due process, then the indefinite suspension of Rice was within Goodell's authority.

On November 28, 2014, Rice received the final ruling from his appeal of the indefinite suspension, which declared that his suspension was overturned as a result of an abuse of discretion.¹²⁶ The Honorable Barbara S. Jones served as the arbitrator for Rice's appeal.¹²⁷ Jones determined that the applicable legal standard for league discipline under Article 46 of the CBA required discipline to be "fair and consistent."¹²⁸ If the imposition of discipline by the Commissioner was not fair and consistent, then an abuse of discretion occurred because the rules were applied arbitrarily or capriciously.¹²⁹ Jones additionally noted that the burden of proof lies on a player to show that a challenged discipline was arbitrary or capricious.¹³⁰

The determination regarding the fair and consistent imposition of punishment to Rice centered on what information was known to the NFL at the time of its June 16th meeting with Rice.¹³¹ Jones noted that during his arbitration hearing, Rice testified that he told the Commissioner on June 16th

I hit her, [when] she was coming back towards me. . . . and I hit her, and she went down and she hit her head, and then by the time the elevator got up, the elevator opened, a security guard was right there and he said, after I was dragging her out, 'you had assaulted her, get away from her.'¹³²

Rice further demonstrated with his arm how he hit Janay that night by "swinging it in an arc across his body with his hand open" and stated that he gave a similar demonstration to Commissioner Goodell during the June 16, 2014, meeting.¹³³ Given these facts, Jones concluded that the release of the September 8, 2014, video inside the elevator did not present any new evidence

126. In the Matter of Ray Rice, *supra* note 98, at 17.

127. *Id.*

128. *Id.* at 8.

129. *Id.*

130. *Id.*

131. *Id.* at 9.

132. *Id.* at 10 (alteration in original).

133. *Id.*

to the Commissioner, nor did Rice mislead the NFL during the initial meeting.¹³⁴

Jones further ruled that the broad disciplinary power granted to the Commissioner did not allow for him to retroactively apply the penalties of the Domestic Violence Policy to Rice.¹³⁵ On numerous occasions throughout their dealings, Goodell had assured Rice that his initial two-game suspension would not be changed.¹³⁶ Jones noted that any failure on the part of the NFL to understand the level of violence was not due to Rice's description of the events.¹³⁷ Jones's final ruling stated "[b]ecause Rice did not mislead the Commissioner and because there were no new facts on which the Commissioner could base his increased suspension, I find that the imposition of the indefinite suspension was arbitrary."¹³⁸ Accordingly, Rice's indefinite suspension was vacated, while the conditions of his first punishment remained in effect.¹³⁹

VI. CONCLUSION

Commissioner Goodell's handling of the Ray Rice situation and the resulting implementation of the NFL's Domestic Violence Policy resulted in a great deal of controversy. The unilateral implementation of the Domestic Violence Policy by Commissioner Goodell could draw a challenge under the duty to collectively bargain as laid out in the National Labor Relations Act. However, the success of such a claim would be reliant on a court's determination of whether changes to a disciplinary policy constitute a mandatory or permissive subject of collective bargaining. A court would most likely categorize the Domestic Violence Policy and its implementation as a lawful unilateral change to a permissive subject of collective bargaining. Commissioner Goodell's decision to implement the Domestic Violence Policy was made in an effort to protect the primary mission of the NFL, protecting the integrity of the game. Such a unilateral decision is considered a permissive subject of collective bargaining under *Wood*.¹⁴⁰ Additionally, the later discussions and negotiations between Commissioner Goodell and the NFLPA since the Domestic Violence Policy's initial implementation underscore its characterization as a permissive subject of collective bargaining.

Ray Rice's situation was ultimately resolved through a neutral

134. *Id.* at 2.

135. *Id.* at 16.

136. *Id.* at 2, 16.

137. *Id.* at 16.

138. *Id.* at 17.

139. *Id.*

140. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987).

arbitration, but the handling of the case has left Rice without a team.¹⁴¹ As a result of the public outcry to his incident in Atlantic City, Rice may never play in the NFL again.¹⁴² On January 15, 2015, Rice settled his grievance with the Ravens for \$3.52 million in back pay owed to him from his overturned indefinite suspension.¹⁴³ The NFL and the Commissioner should use the result of Rice's arbitration appeal as a cautionary lesson in their future disciplinary dealings with players. All parties will be better served if the Commissioner delays exercising his disciplinary authority until he is absolutely positive all relevant facts and evidence have been obtained. And once discipline has been imposed, the Commissioner cannot then lengthen the original punishment without the presentation of new, relevant evidence.

141. Eric Macramalla, *Ray Rice Settles Grievance Against Ravens, Likely Bringing His NFL Career to an End*, FORBES (Jan. 15, 2015), <http://www.forbes.com/sites/ericmacramalla/2015/01/15/ray-rice-settles-grievance-against-ravens-likely-bringing-his-nfl-career-to-an-end/>.

142. *Id.*

143. *Id.*