

Making the Right Call: Why Fairness Requires Independent Appeals in U.S. Professional Sports Leagues

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MAKING THE RIGHT CALL: WHY FAIRNESS REQUIRES INDEPENDENT APPEALS IN U.S. PROFESSIONAL SPORTS LEAGUES

Historically, the commissioners of the U.S. professional sports league have had a duty to preserve the integrity of the leagues. Developing from this concept through collective bargaining between the leagues and players' associations, the disciplinary systems of the leagues are designed to keep conflicts out of the U.S. courts. Recently, these systems have come under considerable public scrutiny questioning their fairness and effectiveness and, in some cases, the integrity of the commissioners and sports. Specifically, there have been issues with conflict of interest of the commissioners and arbitrary decision-making in disciplining players. This Comment explores the disciplinary systems of the four major U.S. professional sports leagues to determine whether they currently preserve justice. It then examines some of the most successful international sports disputes systems as a comparison. To preserve the public's faith in the integrity of sport, this Comment proposes a new independent arbitral body, the American Sports Arbitral Tribunal (ASAT), which would hear the disciplinary appeals from these U.S. professional sports leagues, at least removing the potential conflict of interest within the current systems. Finally, this Comment concludes that the leagues and players' associations would have to help create and incorporate this ASAT, but likely will not because nearly all of the collective bargaining negotiations involve mainly monetary distribution. Unfortunately, this may lead to the public losing faith in these sports leagues.

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I. INTRODUCTION

Fairness, consistency, and flexibility: these traits are often associated with the United States' legal system,¹ but are somehow missing from the disciplinary systems of American professional sports leagues.² Numerous examples from the four major professional sports leagues³ in the United States demonstrate the lack of these traits, and many of them will be discussed in this Comment. While examples from the National Football League (NFL), Major League Baseball (MLB), and National Basketball Association (NBA) will be discussed in Part II, the National Hockey League (NHL) provides several recent examples that will be discussed first as an illustration of some common problems with these disciplinary systems.⁴

The 2012 NHL playoffs were the most violent in recent years, partly due to the league office's inconsistency in doling out discipline.⁵ For

1. ARIC W. DUTELLE, *ETHICS FOR THE PUBLIC SERVICE PROFESSIONAL* 107 (2011); J. SCOTT HARR ET AL., *CONSTITUTIONAL LAW AND THE CRIMINAL JUSTICE SYSTEM* 51 (5th ed. 2012); ALBERT P. MELONE & ALLAN KARNES, *THE AMERICAN LEGAL SYSTEM: PERSPECTIVES, POLITICS, PROCESSES, AND POLICIES* 103 (2d ed. 2008); BETH WALSTON-DUNHAM, *INTRODUCTION TO LAW* 11, 17, 82 (5th ed. 2009).

2. Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 *TEX. REV. ENT. & SPORTS L.* 179, 202 (2010); David Sirotkin, Note, *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, 289–92 (2009).

3. National Football League (NFL), National Basketball Association (NBA), Major League Baseball (MLB), and National Hockey League (NHL).

4. At the time of this writing, the NHL season had been delayed by a collective bargaining dispute that finally ended well into the month of January, taking up nearly half the season. Ira Podell & Ronald Blum, *Drop the Puck: NHL, Players Settle Labor Dispute*, ASSOCIATED PRESS, Jan. 6, 2013, available at NEWSBANK, Rec. No. 95c2ee61e7864e6455367f9d43cab80d. In conducting its second lockout in a decade, the NHL has once again limited its fan base and market power, after what appeared to be an upswing in popularity stemming from the 2012 playoffs. See Jeff Laniado, *NHL Playoffs 2012: 3 Reasons Hockey Is Popular Again in the US*, BLEACHER REPORT (Apr. 19, 2012), <http://bleacherreport.com/articles/1152971-2012-nhl-stanley-cup-playoffshow-hockey-has-once-again-become-popular-in-the-us>; Steve Silverman, *8 NHL Teams Who Could Face Attendance Issues Due to the Lockout*, BLEACHER REPORT (Jan. 14, 2013), <http://bleacherreport.com/articles/1484307-8-nhl-teams-facing-a-big-attendance-issues-due-to-the-lockout>. The lockout may have once again hindered the NHL from achieving the same level of popularity and power as the NBA, MLB, and NFL. See Podell & Blum, *supra*; Kurt Badenhausen, *NHL Lockout Is Over, but Will the Fans Come Back?*, FORBES (Jan. 7, 2013, 10:55 AM), <http://www.forbes.com/sites/kurtbadenhausen/2013/01/07/nhl-lockout-is-over-but-will-the-fans-come-back/>. A brief view of the NHL's structural history will be discussed in Part II.D., *infra*.

5. Matt Brooks, *NHL Playoffs: Carl Hagelin, Matt Carkner Suspensions Continue*

example, in a first round game, Ottawa Senator Matt Carkner dropped his gloves and started punching New York Ranger Brian Boyle, who did not drop his gloves, making him an “unwilling combatant.”⁶ Boyle never threw a punch and was knocked to the ground, which typically signifies the end of a fight as the referees traditionally step in to separate the players, but Carkner kept punching and the referees did not get involved.⁷ Carkner’s actions subjected him to a minor penalty, a major penalty, and a game misconduct penalty.⁸ When the referees failed to get involved, fellow Ranger Brandon Dubinsky was the first of numerous players to intervene and separate the two.⁹ According to NHL Rule 46.16, referees have discretion to impose a game misconduct penalty on an intervening player; further, the game misconduct penalty is supposed to be imposed on every additional player involved in the same altercation during the same stoppage of play.¹⁰ However, the

League’s Inconsistent Rulings, WASH. POST (Apr. 16, 2012, 9:59 AM), http://www.washingtonpost.com/blogs/capitals-insider/post/nhl-playoffs-carl-hagelin-matt-carkner-suspensions-continue-leagues-inconsistent-rulings/2012/04/16/gIQAzmROLT_blog.html.

6. NATIONAL HOCKEY LEAGUE OFFICIAL RULES § 6, R. 46.2 (2012–2013) [hereinafter NHL OFFICIAL RULES], available at http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf; Brooks, *supra* note 5.

7. ROSS BERNSTEIN, *THE CODE: THE UNWRITTEN RULES OF FIGHTING AND RETALIATION IN THE NHL* 73 (2006); *Senators’ Matt Carkner Suspended One Game for Fighting*, SPORTING NEWS, Apr. 15, 2012, <http://www.sportingnews.com/nhl/story/2012-04-15/2012-stanley-cup-playoffs-matt-carkner-brian-boyle-fight-rangers-senators> (describing the fight). Carkner had not played earlier in the series and the Rangers had dominated the physical play to that point. See Dominik Jansky, *Rangers Vs. Senators, Game 1: Rangers Enjoy Spoils of Top Seed*, SBNATION.COM (Apr. 13, 2012, 10:03 AM), <http://www.sbnation.com/nhl/2012/4/13/2945491/new-york-rangers-ottawa-senators-game-1-nhl-playoffs-2012>; Ira Podell, *Rangers’ Carl Hagelin Suspended 3 Games, Senators’ Matt Carkner Penalized 1 Game*, NHL.COM, Apr. 15, 2012, <http://www.nhl.com/ice/news.htm?id=628081>. It appeared that the Senators’ coach may have turned Carkner loose as a weapon to take back momentum and try to win some games. See Podell, *supra*; Katie Strang, *There Will Be Blood . . . and Stitches: Rangers, Senators Understand that Game 2 Nastiness was Just the Beginning*, ESPNNEWYORK.COM (Apr. 15, 2012, 9:36 AM), http://espn.go.com/new-york/nhl/story/_/id/7815106/2012-stanley-cup-playoffs-new-york-rangers-ottawa-senators-ratchet-nastiness.

8. NHL OFFICIAL RULES, *supra* note 6, § 4; *NHL Suspends Hagelin, Carkner*, FACEOFF.COM, Apr. 15, 2012, <http://www.faceoff.com/suspends+Hagelin+Carkner/6463167/story.html> (listing the penalties Carkner received).

9. Arthur Staple, *Boyle, Dubinsky Move on from Game 2 Sideshow*, NEWSDAY (Apr. 15, 2012, 10:04 PM), <http://www.newsday.com/sports/hockey/rangers/boyle-dubinsky-move-on-from-game-2-sideshow-1.3662877>.

10. NHL OFFICIAL RULES, *supra* note 6, § 6, R. 46.16.

referees only gave Dubinsky and Carkner game misconduct penalties.¹¹ Following the game, NHL Vice President of Player Safety, Brendan Shanahan, suspended Carkner for one game, the same amount of time Dubinsky would miss from his game misconduct, despite the fact that Carkner was a repeat offender and Dubinsky was not, and despite the vast difference in their penalties.¹²

Later in the series, another Ranger, who had never been suspended before, was suspended for three games after being penalized for checking Senator's captain Daniel Alfredsson into the boards, resulting in a head injury that caused Alfredsson to leave the game.¹³ This came just days after Shea Weber, the Nashville Predators' captain, grabbed Detroit Red Wing Henrik Zetterberg by the back of the head and violently smashed his head into the boards near the end of the game; Weber was fined only \$2,500 and was not suspended.¹⁴

The only recourse players have when disciplined by the league office is an appeal to the NHL Commissioner, which most players find futile because of the extremely limited success rate of appeals.¹⁵ While these situations demonstrate the unfairness, inconsistency, and lack of

11. Steve Zipay, *Neil's OT Goal Give Sens Win Over Rangers*, NEWSDAY (Apr. 14, 2012, 11:48 PM), <http://www.newsday.com/sports/hockey/rangers/neil-s-ot-goal-give-sens-win-over-rangers-1.3661582>.

12. Alex Arthur, *Matter of Intent*, KING ARTHUR'S COURT (Apr. 19, 2012), <http://www.tuftsdaily.com/mobile/sports/alex-arthur-king-arthur-s-court-1.2732388>; Jon Rosen, *Dubinsky to Hear from NHL*, L.A. KINGS INSIDER (Feb. 6, 2013 7:26 AM), <http://lakingsinsider.com/2013/02/06/dubinsky-to-hear-from-nhl/>. Carkner maliciously attacked Boyle while Dubinsky stepped in to pull Carkner off of Boyle. Zipay, *supra* note 11. The NHL also claims that being a repeat offender is taken into consideration when determining a penalty. *See infra* Part III.D.

13. Damien Cox, *NHL Playoffs Veer Wildly out of Control*, THE STAR (Apr. 15, 2012), http://www.thestar.com/sports/hockey/2012/04/15/cox_nhl_playoffs_veer_wildly_out_of_control.html.

14. Robert MacLeod, *Suspensions Have Ruled the NHL Playoffs*, THE GLOBE AND MAIL (June 18, 2012, 10:24 AM), <http://www.theglobeandmail.com/sports/hockey/suspensions-have-ruled-the-nhl-playoffs/article4204229/>. Weber then signed a fourteen-year \$110 million contract over the off-season. Brian Stubits, *Predators Match Shea Weber Offer Sheet, Keep Captain in Nashville*, CBS SPORTS (July 24, 2012, 3:13 PM), <http://www.cbssports.com/nhl/blog/eye-on-hockey/19647711/predators-match-shea-weber-offer-sheet-keep-captain-in-nashville>. Doing the math, his annual salary is now \$7.85 million, which makes this fine about 0.03% of his annual salary and only 2.6% of his salary per game. Considering the aggressive nature of the act and the other punishments handed out for less egregious conduct, this fine is an example of why many do not take NHL discipline seriously.

15. *See* Matthew Heimlich, *Why the NHL Needs an Independent Disciplinary Appeals System*, SPORTS LAW 101 (Dec. 21, 2011, 1:19 PM), <http://www.sportslaw101.com/2011/12/21/why-the-nhl-needs-an-independent-disciplinary-appeals-system/>.

flexibility in the NHL disciplinary process, such circumstances are not confined merely to the NHL; they often occur in the other three major American professional sports leagues.¹⁶

It is because of this unfairness, inconsistency, and inflexibility that this Comment proposes the creation of an American Sports Arbitration Tribunal (ASAT), which would be responsible for arbitrating the appeals to disciplinary actions of the participating professional leagues.¹⁷ This independent tribunal would provide American professional sports leagues with a truly neutral body to hear disciplinary appeals. The ASAT would make the appeals procedure more fair and mitigate the problems of the current systems, such as having the commissioner act as the judge, jury, and executioner.¹⁸ Additionally, this Comment recommends that the American professional sports leagues provide a detailed outline of what conduct will result in suspension and utilize a system where punishments are based on precedent.¹⁹

Part II of this Comment will examine the history of the disciplinary process in American professional sports leagues and the role the commissioners have played in determining whether the commissioner system is fair. Part III will discuss the current disciplinary processes of the leagues under their governing documents to fully explore the opportunities for appeal and analyze their effectiveness. Part IV will look at other effective systems of sports discipline around the world, specifically the Court of Arbitration for Sport (CAS), the Basketball Arbitral Tribunal (BAT), and the National Rugby League's (NRL) system in Australia, to provide some examples of successful structures that do not use a commissioner as the ultimate authority and determine the applicable and inapplicable aspects of these systems to the American professional sports leagues. Part V will briefly analyze the United States legal system's judicial review to put the American legal standard in context. Part VI will introduce the ASAT and suggest how it could be incorporated into the American professional sports systems by incorporating different facets from the American leagues' CBAs and those of the global systems analyzed in Part IV. Part VII will conclude with additional recommendations to make professional sports discipline

16. *See infra* Part II.A–C.

17. *See infra* Part IV.

18. *See infra* Part III.

19. *See infra* Part IV.

more effective and consider the likelihood that the ASAT would be implemented.

II. ESTABLISHMENT OF COMMISSIONER POWER IN THE DISCIPLINARY PROCESS

Since the early twentieth century, American sports leagues have recognized the need for strong central leadership to enforce the rules, discipline the players, and maintain public interest and integrity of the game.²⁰ The team owners of the four major American professional sports leagues (NFL, MLB, NBA, and NHL) created this central authority in the position of the commissioner, giving the ultimate power of the entire league to one person.²¹ While commissioners have been instrumental in these leagues' success, they have not been perfect.²² By examining the history of the commissioner system in the four major American professional sports leagues, the need for an independent tribunal to settle disputes becomes apparent.

A. Beginnings of the Commissioner in the MLB

Various situations from the MLB's history provide examples of the flaws of the commissioner system.²³ As America's oldest sports league, the MLB has long experienced the inherent unfairness, inconsistency,

20. Parlow, *supra* note 2, at 181–83.

21. *Id.* at 185–87.

22. See Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1413–18 (1990) (describing several issues with the MLB Commissioner's "nearly unbridled power"); see also Sirotkin, *supra* note 2, at 306–09 (describing several disciplinary proceedings where there was a dispute regarding commissioner's power). The National Labor Relations Board (NLRB) pointed out in 1969 that the internal dispute system was flawed because the commissioner was appointed by the owners and would seemingly rule in their favor. Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190, 191 (1969). The NLRB stated, "The system appears to have been designed almost entirely by employers and owners, and the final arbiter of internal disputes does not appear to be a neutral third party freely chosen by both sides, but rather an individual appointed solely by the member club owners themselves." *Id.* (referring to Major League Baseball's arbitration system). However, this dispute occurred before the players association began collectively bargaining with the league, which removed the disputes from the NLRB's jurisdiction because disputes became governed by collective bargaining agreements. See MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 436 (2d ed. 2009).

23. See, e.g., Ken Belson, *Baseball Fires the Arbitrator Who Overturned Braun's 50-Game Suspension*, N.Y. TIMES, May 15, 2012, at B15.

and inflexibility that the commissioner structure creates.²⁴ Recent arbitration cases over the use of performance-enhancing drugs are prime examples of the flaws in the current commissioner system.

The MLB was the first professional sports league to create a “Commissioner” office.²⁵ In 1919, the baseball world was rocked by a massive scandal when the infamous Chicago “Black Sox” supposedly accepted bribes to fix the World Series.²⁶ Worried about fans’ perception, the owners sought to create a position that would protect the integrity of the game and nominated United States District Judge Kenesaw Mountain Landis for the position.²⁷ Landis took the position on the condition that he was granted broad authority to discipline players in “the best interest of the game.”²⁸ After letting the legal process play out, Landis suspended the eight implicated players for life even though they were found not guilty.²⁹ This decision established the MLB’s right to discipline its athletes independent of the legal system and serves as precedent for enhanced commissioner’s authority under the best interests clauses in later Collective Bargaining Agreements (CBAs).³⁰

Commissioner Landis used his broad power to punish anyone he believed deserved it.³¹ For example, a player was arrested for stealing a car and receiving stolen cars in 1920 and instead of waiting for the criminal trial to finish, Landis suspended the player during the case.³² After the player was acquitted he applied for reinstatement, but Landis

24. The current disciplinary system is laid out in the 2012–2016 CBA agreement between the players association and the owners that is discussed *infra* Part III.A.

25. Parlow, *supra* note 2, at 183.

26. Mark T. Gould, *In Whose “Best Interests”?: The Narrowing Role of Baseball’s Commissioner*, ENT. & SPORTS LAW., Spring 1994, at 1, 19.

27. *Id.*

28. Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS SPORT 5, 12 (2011). Even the selection of Landis as commissioner can be viewed skeptically because he was the judge that ruled in favor of Major League Baseball (then Organized Baseball) when it was sued in an antitrust case by Federal Baseball. Jason M. Pollack, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1650 (1999).

29. Pollack, *supra* note 28, at 1652. Landis likely chose this course of action to counter the seemingly unfair trial where the players’ confessions “mysteriously disappeared” and the jurors carried the players out of the courtroom on their shoulders in celebration. *Id.*

30. *Id.* at 1653–54.

31. *See id.* at 1653–56 (noting Commissioner Landis’s use of broad authority during the 1920s).

32. *Id.* at 1654.

determined the player should have been found guilty and suspended the player for life.³³ In the only case to challenge his unfettered authority, an Illinois district court affirmed the Commissioner's power when it held that Landis's decisions were absolute and binding because the owners intended to give him such power.³⁴ As the first commissioner, Landis shaped the nature of the position and established a precedent for his future successors to do nearly anything they would want.³⁵

The next major event that changed the scope of disciplinary authority occurred in 1970 when the head of the MLB Players Association (MLBPA) successfully bargained for an independent arbitrator to handle labor disputes and conflicts arising from the CBA.³⁶ Then-Commissioner Bowie Kuhn maintained the authority to handle issues that only involved the integrity of the game or the public's faith in baseball.³⁷ The independent arbitrator was first utilized during the 1970 season when the California Angels attempted to suspend an outfielder for "lackadaisical play."³⁸ The arbitrator overturned the suspension after finding that the player was "emotionally ill and belonged on the disabled list."³⁹

In 1989, Commissioner A. Bartlett Giamatti regained some of the position's power when he banned Pete Rose from baseball for life for betting on baseball games in which he was the manager of one of the

33. *Id.* at 1654–55. Then in 1921, Landis suspended Babe Ruth and any New York Yankee that "barnstormed" after winning the World Series. *Id.* at 1655–56. Barnstorming involves players touring the country and playing pick-up games against non-professional teams for money. *See id.* at 1655 n.76; *History of Barnstorming*, BARNSTORMERSBASEBALL.COM, http://www.barnstormersbaseball.com/index.php?option=com_content&view=article&id=636&Itemid=191 (last visited Oct. 15, 2013).

34. *See Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298, 302 (N.D. Ill. 1931) (holding that "it was the intent of the parties to make the commissioner an arbiter, whose decisions made in good faith, upon evidence, upon all questions relating to the purpose of the organization and all conduct detrimental thereto, should be absolutely binding").

35. *See Pollack, supra* note 28, at 1658.

36. *Id.* at 1662–63.

37. *Id.* at 1662.

38. *Id.* at 1663.

39. *Id.* Commissioner Kuhn's power took another big hit when he attempted to suspend Texas Ranger player Ferguson Jenkins after Jenkins was arrested in an airport for possession of two ounces of marijuana, two grams of hashish, and four grams of cocaine. *Id.* at 1668. When the union filed a grievance, the arbitrator found that the suspension was the result of "mere surmise," and Jenkins escaped suspension, despite the fact he was convicted. *Id.* at 1668–69. Then in 1984, a pitcher was arrested in the Dominican Republic for possession of cocaine; after the Commissioner suspended him the MLBPA filed a grievance, but the arbitrator overturned the suspension. *Id.* at 1669.

teams.⁴⁰ One reason for the intensity of the suspension was because Rose did not admit to gambling; in fact, he fought the accusation for fourteen years before finally coming clean.⁴¹ Initially, Rose challenged Commissioner Giamatti's conduct in investigating Rose's illegal gambling activities, but the Ohio district court held that Commissioner Giamatti was well within the authority granted to him by the CBA.⁴² While this was a move towards more deference to the commissioner's discretion, Rose was disciplined as a manager, not as a player; thus, he did not have the benefit of the MLBPA or a CBA to fight the suspension.⁴³

After the recreational drug issues in the 1980s,⁴⁴ the next major issue to shape the commissioner's ability to discipline players arose at the turn of the twenty-first century in the midst of what is now referred to as "the Steroid Era."⁴⁵ The MLB instituted a drug testing policy in 2005 and created a five-strike suspension test that started at ten days for the first offense.⁴⁶ When evidence came out that the steroid problem was bigger than he thought, Commissioner Bud Selig created a new disciplinary system for performance-enhancing drugs: fifty games for the first positive test, one hundred games for the second, and a lifetime ban for the third.⁴⁷ This policy imposes a strict liability standard using zero tolerance that does not take into account any circumstances of particular situations.⁴⁸

40. Matthew A. Foote, *Three Strikes and You're (Not Necessarily) Out: How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 13 (2009).

41. *Id.* at 14.

42. *Rose v. Giamatti*, 721 F. Supp. 906, 918–19 (S.D. Ohio 1989).

43. *See* Foote, *supra* note 40, at 15.

44. *See id.* at 17–25. *See generally* Ed Magnuson, *Baseball's Drug Scandal*, TIME, Sept. 16, 1985, at 26 (discussing drug abuse by MLB players in the 1980s).

45. *See* Foote, *supra* note 40, at 25–29.

46. *Steroid Suspensions*, BASEBALL ALMANAC, http://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited Oct. 15, 2013).

47. Jonathan Bass, *Bud Selig's Tenure as MLB Commissioner Takes Path Similar to Recovering Addict*, GAMEDAYR (Aug. 21, 2013, 2:54 PM), <http://gamedayr.com/sports/bud-selig-mlb-commissioner-tenure-recovering-addict/>; *Steroid Suspensions*, *supra* note 46. This disciplinary system for performance-enhancing drugs remains in use.

48. Foote, *supra* note 40, at 31–32. This is going to be even more applicable if the MLB decides to create harsher penalties for violating the Joint Drug Agreement because of the extent of the Biogenesis scandal. *See* Richard Justice, *Majority of Players Want Tougher PED Penalties*, MLB.COM (Feb. 26, 2013, 12:05 PM), http://mlb.mlb.com/news/article.jsp?ymd=20130226&content_id=42006512&vkey=news_mlb&c_id=mlb (noting that players are

The unfairness of such a standard was well illustrated when former Philadelphia Phillies pitcher J.C. Romero was suspended for testing positive for a performance-enhancing drug before a World Series game.⁴⁹ The positive test resulted from a banned ingredient found in a supplement he had purchased from a local General Nutrition Store (GNC) that was mislabeled to show that it did not include the banned ingredient.⁵⁰ Romero took the supplement after the MLBPA had circulated a memo that said any supplements purchasable at GNC were approved.⁵¹ Moreover, the League suspended Romero despite the fact he had checked with two nutritionists and his strength and conditioning coach to confirm the supplement was approved.⁵² Romero served a fifty game suspension after he refused the MLB's offer of a twenty-five game suspension if he would admit guilt.⁵³

One of the least fair aspects of the appeal system in the MLB is the fact that the league can fire an "independent" arbitrator at any time, without cause, and has recently done so with an arbitrator that ruled against it.⁵⁴ In February 2012, Ryan Braun became the first player to successfully appeal a performance-enhancing drug related suspension in arbitration against the league.⁵⁵ Braun was able to win the appeal despite not challenging the science of the test or proving tampering, but simply by arguing a procedural error.⁵⁶ While the hearing was held

pushing for harsher penalties in light of the Biogenesis scandal); Ron Matejko, *Bud Selig: Stricter Drug Penalties*, ESPNDALLAS.COM (Mar. 2, 2013, 7:23 PM), http://espn.go.com/mlb/spring2013/story/_id/9008032/bud-selig-calls-tougher-drug-penalties-violations (explaining that Commissioner Selig is pushing for harsher penalties); *MLB Suspends 13, Including A-Rod*, ESPN.COM (Aug. 6, 2013, 12:06 PM), http://espn.go.com/mlb/story/_id/9540755/mlb-bans-13-including-alex-rodriguez-new-york-yankees-2014 (detailing the extent of the Biogenesis scandal).

49. Foote, *supra* note 40, at 31.

50. *Id.* at 31–32. Romero did not name the particular supplement he used from GNC. Peter Gammons, *Suspended Romero 'Didn't Cheat'*, ESPN.COM (Jan. 6, 2009, 1:36 PM), <http://sports.espn.go.com/mlb/news/story?id=3812334>.

51. Foote, *supra* note 40, at 31.

52. *Id.*

53. Gammons, *supra* note 50. Luckily, the appeal took place during the World Series and Romero was permitted to pitch. *Id.*

54. 30 MAJOR LEAGUE CLUBS & MAJOR LEAGUE BASEBALL PLAYERS ASS'N., 2012–2016 BASIC AGREEMENT art. XI, § A(9) (2011) [hereinafter MLB CBA], available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf; Belson, *supra* note 23.

55. Ken Belson & Michael S. Schmidt, *Star Player First to Win Appeal on a Drug Test*, N.Y. TIMES, Feb. 24, 2012, at A1.

56. *Id.*; see also Jeré Longman, *A Flawed Policy for Drug Testing*, N.Y. TIMES, Feb. 26, 2012, at SP9. Braun's representatives publicly denigrated the man who collected Braun's

before an “independent” arbitration tribunal,⁵⁷ the lead arbitrator, who had served as the independent arbitrator for longer than any of his predecessors, was fired by MLB three months after he ruled against the league.⁵⁸ This situation shows that the appeals process may not actually be impartial.⁵⁹

Not only can either party fire an arbitrator, but each party can select an arbitrator, who is not required to be impartial, to sit on the panel with a single impartial arbitrator responsible for making the decision.⁶⁰

sample, calling his actions “inappropriate.” Ronald Blum, *David Cornwell, Ryan Braun’s Lawyer, Criticizes Drug Collector Dino Laurenzi Jr.*, HUFFINGTON POST (Mar. 1, 2012, 6:56 PM), http://www.huffingtonpost.com/2012/03/01/david-cornwell-ryan-braun-dino-laurenzi_n_1315064.html. Braun would later agree to a sixty-five-game suspension for violation of the Joint Drug Agreement and publicly “apologize.” Erik Brady, *Brewers’ Ryan Braun Suspended for Rest of Season*, USA TODAY (July 22, 2013, 11:51 PM), <http://www.usatoday.com/story/sports/mlb/brewers/2013/07/22/ryan-braun-suspended-milwaukee-season/2576215/>. He finally admitted to using performance-enhancing drugs in a scripted statement he and his representatives sent out to the media in late August 2013. *Ryan Braun’s Full Statement*, ESPN.COM (Aug. 22, 2013, 8:01 PM), http://espn.go.com/mlb/story/_/id/9592973/ryan-braun-full-statement-admitting-ped-use.

57. Belson, *supra* note 23. The MLB uses a three-person arbitration panel for these disputes; composed of two-party arbitrators, one chosen by the league and one by the players’ association, and one independent arbitrator appointed by the agreement of both. MLB CBA, *supra* note 54, at art. XI, § A(9).

58. Belson, *supra* note 23. The arbitrator had served for thirteen years arbitrating cases between the union and the league. *Id.* His ruling provided precedent for other players in similar situations to escape suspension based on procedural errors, though the league and union are revising the language of the policy to eliminate any ambiguity and make the system stricter and more difficult to appeal. *Id.*

59. According to the CBA, either the league or the players association can terminate any arbitrator for any reason, as long as that arbitrator is not currently hearing a case. MLB CBA, *supra* note 54, at art. XI, § A(9). The American Arbitration Association (AAA) submits a list of arbitrators to serve as MLB arbitrators, and when the Players Association and League cannot agree on the impartial arbitrator for a case, they narrow the list by striking names until only one remains and he or she is the arbitrator for that hearing. *Id.*

60. See Longman, *supra* note 56; see also MLB CBA, *supra* note 54, at art. XI, § A(9); Belson & Schmidt, *supra* note 55. This system will be tested soon when Alex Rodriguez and his legal team bring their appeal to his 211-game suspension, the largest suspension ever. Ted Keith, *A-Rod Suspended Through 2014, Will Appeal; 12 Others Given Lesser Bans*, MLBSI.COM (Aug. 5, 2013), <http://mlb.si.com/2013/08/05/a-rod-suspended-through-2014-will-appeal-12-others-given-lesser-bans/>; Travis Waldron, *The List of Baseball Players Suspended in the Biogenesis Scandal*, THINKPROGRESS (Aug. 5, 2013, 1:45 PM), <http://thinkprogress.org/sports/2013/08/05/2414251/the-list-of-baseball-players-suspended-in-the-biogenesis-scandal/>. Rodriguez was one of fourteen players suspended, but was the only one to file a formal appeal and will likely argue that he is being treated arbitrarily. Barry Petchesky, *The Full List of Suspended Biogenesis Clients*, DEADSPIN (Aug. 5, 2013, 12:46 PM), <http://deadspin.com/the-full-list-of-suspended-biogenesis-clients-1029648603/>; Tom Van Riper, *Baseball Dishes Out Biogenesis Suspensions—Don’t Expect Much Damage*, FORBES

While the “independent” arbitrator ruled in this case, the fact that he was fired shows that the ultimate authority may still lie with the commissioner.⁶¹

The initial authority granted to the MLB Commissioner gave him so much power that he could discipline a player who was found not guilty of charges.⁶² This is unfair because the disciplinary system, much like U.S. societal and legal norms, is supposed to presume the innocence of the accused until proven guilty.⁶³ Though the commissioner’s power has undergone changes based on independent arbitration, the League now has the ability to fire arbitrators, which gives an arbitrator an incentive to rule in favor of the League in order to retain employment.⁶⁴ The League has also shown inflexibility in its handling of drug violations, leaving the players completely responsible for league, team, and manufacturer negligence.⁶⁵ These are among the issues that illustrate the need for a new appeal system in the MLB.

(Aug. 5, 2013, 3:06 PM), <http://www.forbes.com/sites/tomvanriper/2013/08/05/baseball-dishes-out-biogenesis-suspensions-I-expect-much-damage/>.

61. Since the League is more frequently involved in arbitration than the association (because the player can elect union representation but is not required to use it), the “impartial” arbitrators have an incentive to not make a decision against the League office. See HON. MING W. CHIN ET AL., CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION 18:665 (2012); MLB CBA, *supra* note 54, at art. XI, § A(9). The system explained in the CBA prevents an arbitrator from making an obvious arbitrary or capricious decision, which is already generally prohibited by the laws regarding arbitration. MLB CBA, *supra* note 54, at art. XI, § A(9); CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 462 (2d ed. 2011) (citing Federal Arbitration Act, 9 U.S.C. § 10(a) (1925)). The MLB’s arbitration procedure provides no additional protection of impartiality, and in fact gives reason to believe the arbitrators would not be impartial. See *supra* notes 54–60 and accompanying text.

62. Pollack, *supra* note 28, at 1654–55.

63. See *Coffin v. U.S.*, 156 U.S. 432, 458–60 (1895); PATRICK K. THORNTON ET AL., SPORTS ETHICS FOR SPORTS MANAGEMENT PROFESSIONALS 433 (2012); Parlow, *supra* note 2, at 201.

64. Belson, *supra* note 23. This pressure on the arbitrator to rule for the League illustrates the unfairness of the arbitration system.

65. See Christian Red, *J.C. Romero, Former Phillies Reliever Suspended for Performance Enhancing Drugs, Settles Lawsuit, Says ‘Justice Is Served’ After Supplement is Tainted*, N.Y. DAILY NEWS (Jan. 10, 2012, 3:24 AM), <http://www.nydailynews.com/sports/i-team/romero-phillies-reliever-suspended-performance-enhancing-drugs-settles-lawsuit-justice-served-supplement-tainted-article-1.1003730> (explaining that J.C. Romero was suspended for fifty games after an over-the-counter supplement he was taking was later found to contain banned substances). No system of strict liability should exist in the sports world. See *infra* Part V. At the very least, players like Romero should be rewarded with the benefit of the doubt when they go through the effort to double-check with their teams or the League to make sure a substance is legal and are clearly not at fault. See *infra* Part V. The lack of any room for

B. History and Issues with the NFL's Commissioner

While the current system of NFL discipline and appeals is likely the most flexible of the major American professional sports leagues, it is still fraught with unfairness and inconsistency. The current commissioner, Roger Goodell, has imposed a nearly dictatorial rule: he has the right to both hand out discipline, directly or indirectly, and rule on the appeal thereof.⁶⁶ As the League has evolved, so has the commissioner's power; it has grown to such a level that problems are becoming more evident and there is a dire need to alter the system.⁶⁷

The owners first granted significant authority to Commissioner Pete Rozelle, the third man to hold the position, partially because he was able to bring financial solvency to the League.⁶⁸ NFL owners granted Rozelle similar authority to MLB Commissioner Landis, but unlike the MLB, the NFL did not have an arbitration procedure in the CBA for discipline.⁶⁹ Rozelle attempted to institute a drug-testing policy in the NFL but the NFL Players Association (NFLPA) would not agree to it, and an arbitrator ruled that instituting the testing policy was beyond the commissioner's power under the CBA.⁷⁰ In 2000, Commissioner Paul Tagliabue was empowered to suspend players for off-the-field conduct under the League's first Personal Conduct Policy (PCP).⁷¹ While Tagliabue gradually increased the power and authority of his position, his power is dwarfed in comparison to his successor, Roger Goodell.⁷²

error by anyone involved and only disciplining the player shows the flaws with the current system. See *supra* notes 48–53 and accompanying text.

66. Joshua A. Reece, Note, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 VAL. U. L. REV. 359, 360 (2010).

67. See, e.g., Jarrett Bell, *Bounty Ruling Proves Goodell Was Sloppy*, USA TODAY (Dec. 12, 2012, 3:52 PM), <http://www.usatoday.com/story/sports/nfl/2012/12/11/chicago-bell-paul-tagliabue-roger-goodell-bounty-scandal-was-just-a-witch-hunt/1762007/>.

68. Parlow, *supra* note 2, at 187.

69. *Id.*; Robert I. Lockwood, Comment, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 146–47 (2008).

70. Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 32 (2008).

71. Marc Edelman, *Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 636–37 (2009).

72. *Id.* Under the most recent CBA, the commissioner has the authority to name the officer to hear a discipline appeal and can elect to hear it himself at his discretion. NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N., COLLECTIVE

In August 2006, the owners elected Roger Goodell to serve as commissioner.⁷³ Soon after accepting this position, Goodell strengthened the PCP by making it stricter and applying it to a broader range of conduct.⁷⁴ The PCP is not part of the CBA, so any discipline that arises from it is not subject to the CBA's arbitration provision.⁷⁵ Instead, under the CBA, the commissioner, through himself or an appointee, is the appellate body for all player discipline grievances.⁷⁶ Goodell has used his authority under the PCP to suspend numerous athletes without giving them an opportunity to seek an appeal from an independent arbitrator.⁷⁷ While the PCP contains a limited list of conduct that may lead to discipline, the list is vague and can be interpreted as broadly as the commissioner wishes.⁷⁸ Moreover, it does not contain an outline of potential disciplinary sanctions, but instead states that discipline will be handed down "as warranted."⁷⁹ This clause creates suspicion of potential arbitrariness of discipline under the PCP because it makes the commissioner "the judge, jury and executioner."⁸⁰ This power demonstrates the unfairness in the system because the commissioner has no check on his authority and the governing

BARGAINING AGREEMENT art. 46, § 2(a) (2011) [hereinafter NFL CBA], available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf.

73. Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1087 (2008).

74. Edelman, *supra* note 71, at 637.

75. *Id.* at 638.

76. NFL CBA, *supra* note 72, at art. 46; 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, 170–71 (2010); Sirotkin, *supra* note 2, at 300.

77. Sirotkin, *supra* note 2, at 301 (providing several examples of Commissioner Goodell handing out discipline).

78. Logan O'Shaughnessy, *After Review: An Open Letter to NFL Commissioner Roger Goodell Suggesting That Limiting the League's Disciplinary Power Under the Personal Conduct Policy May Be in the League's Best Interests*, 88 U. DET. MERCY L. REV. 527, 534–35 (2011) (citing NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY (2008), available at <https://web.archive.org/web/20101228103442/http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFL%20Personal%20Conduct%20Policy%202008.pdf> (accessed by entering URL in the Internet Archive index)); see also NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY (2012) [hereinafter NFL PCP], available at <http://nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf>.

79. O'Shaughnessy, *supra* note 78, at 535–36.

80. *Id.* at 536; Michael McCann, *Overturing of Bounty Suspensions Backs Goodell into a Corner*, SPORTS ILLUSTRATED (Sept. 7, 2012, 6:46 PM), http://sportsillustrated.cnn.com/2012/writers/michael_mccann/09/07/saints-suspensions-overturned/index.html.

documents do not provide specific guidelines for conduct that may be disciplined, or the punishments to be imposed.⁸¹

Questions of subjective arbitrariness also arise regarding the player discipline system because similar situations have not been treated consistently.⁸² For instance, a player was arrested for DUI after he hit a parked car and then failed a breathalyzer test; the League fined him under the Substance Abuse Policy.⁸³ One year earlier, the League suspended another player for three games under the PCP after he was arrested on suspicion of drunk driving, but did not get in an accident.⁸⁴

Another example that creates questions about the objectivity and consistency of the commissioner is the suspension of New Orleans Saints' head coach, Sean Payton.⁸⁵ Goodell suspended Payton for a year for not stopping a "cash-for-hits" pool that the Saints operated—where players received monetary payments for big hits, injuring opposing players, and making impactful plays—dubbed "Bounty-Gate."⁸⁶

81. See generally *infra* Part III.B (discussing the governing NFL documents).

82. O'Shaughnessy, *supra* note 78, at 537.

83. *Id.* at 537–39. Cincinnati Bengals' linebacker Rey Mauluga registered a 0.157 blood alcohol content when police issued the breathalyzer. *Id.* at 537–38; Ray Slover, *Bengals' Rey Mauluga Fined; Suspension Revoked*, SPORTINGNEWS NFL (Aug. 17, 2010, 10:39 PM), <http://www.sportingnews.com/nfl/story/2010-08-17/bengals-rey-mauluga-fined-suspension-revoked>. He received a suspended-seven day jail sentence, his license was suspended for ninety days, and he did not help the circumstances by having an underage girl in the car. *Id.*

84. O'Shaughnessy, *supra* note 78, at 539. During the 2013 summer, Goodell did not punish Eagles' wide receiver Riley Cooper for publicly using a racial slur in a video-taped rant at a concert. Sam Farmer, *Roger Goodell: Team Punishment of Riley Cooper Is Enough*, L.A. TIMES (Aug. 1, 2013), <http://www.latimes.com/sports/sportsnow/la-sp-sn-cooper-goodell-20130801,0,3229785.story#axzz2cdh18U7E>. Goodell cited the CBA policy that the League does not punish a player for the same incident if he has already been punished by his team. *Id.* He also deflected a comparison of the slur Cooper used to the name Redskins, which has come under criticism of no longer being acceptable. *Id.* The League has also come under much public disparagement for its seemingly arbitrary policing of fineable hits. See Jeff Dickerson, *Jon Bostic Fined \$21K for Hit*, ESPNCHICAGO.COM (Aug. 21, 2013, 4:20 PM), http://espn.go.com/chicago/nfl/story/_/id/9587983/jon-bostic-chicago-bears-fined-21000-hit-mike-willie-san-diego-chargers.

85. See Chris Smith, *Roger Goodell Is Not Serious About Player Safety, and It's Because of Money*, FORBES (Mar. 22, 2012, 11:41 AM), <http://www.forbes.com/sites/chris-smith/2012/03/22/roger-goodell-nfl-are-not-serious-about-player-safety-and-its-because-of-money/>.

86. *Appeal Seeks Roger Goodell Recusal*, ESPN.COM (Oct. 12, 2012, 8:03 PM), http://espn.go.com/nfl/story/_/id/8493998/bounty-scandal-jonathan-vilma-others-appeal-seeks-roger-goodell-recusal-sources-say; *What Does Bounty-Gate Mean?*, SPORTINGCHARTS.COM, <http://www.sportingcharts.com/dictionary/nfl/bounty-gate.aspx> (last visited Oct. 15, 2013). The last person to receive a full-year suspension was Donte Stallworth, who killed a person in a drunk-driving accident. Smith, *supra* note 85.

Commissioner Goodell also fined the Saints organization a half-million dollars and usurped the organization's second-round draft pick for the next two NFL Drafts.⁸⁷ This was the most significant scandal since the New England Patriots and coach Bill Belichick were found to have videotaped opposing teams' practices.⁸⁸ In response to the Patriots' actions, Goodell fined the Patriots a quarter-million dollars, seized one first-round draft pick, and fined Belichick a half-million dollars, but did not suspend him.⁸⁹ The League also claimed it destroyed the videotape evidence and originally refused to release the number of tapes or what they contained.⁹⁰

While Belichick explicitly broke an NFL rule and Payton condoned a system that nearly every team around the League operates to some extent,⁹¹ Belichick merely received a fine, which equates to about twelve percent of his 2007 salary, and Payton was suspended without pay for a year, equivalent to the nearly seven million dollars he would have made, and lost the opportunity to coach a team that had been a perennial championship contender.⁹² This marked an unprecedented increase in punishment and illustrates the inconsistency of Commissioner Goodell's punishments. If the NFL had a more detailed governing document explaining the illegal conduct, players and coaches would know what conduct to avoid. There would be fewer appeals if this document had explicit punishments for these actions. Further, if the appeals that

87. *Id.* Additionally, the defensive coordinator said to have run the system was suspended indefinitely, the general manager was suspended for half of the season, and an assistant coach was suspended for six games. *Roundup: All Bountygate Penalties Against Saints*, ST. LOUIS POST-DISPATCH, May 2, 2012, http://www.stltoday.com/roundup-all-bountygate-penalties-against-saints/article_ab7bd2c6-948b-11e1-89ce-0019bb30f31a.html.

88. Judy Battista, *Patriots Were Questioned on Videotaping Claims*, N.Y. TIMES, Apr. 2, 2008, at D2.

89. *Id.*; Greg Bishop, *Questions Linger About Why N.F.L. Destroyed Patriots' Tapes*, N.Y. TIMES, Dec. 16, 2007, at SP1; *Belichick Draws \$500,000 Fine, but Avoids Suspension*, ESPN.COM (Sep. 14, 2007, 10:16 AM), <http://sports.espn.go.com/nfl/news/story?id=3018338>.

90. Battista, *supra* note 88; Bishop, *supra* note 89. In response to Senator Arlen Specter's public demand, it has come out that the League received eight tapes, recording play-calling from five teams in six games. *Timeline of Events Surrounding Patriots' Videotaping Scandal*, NFL.COM (July 26, 2012, 8:21 PM), <http://www.nfl.com/news/story/09000d5d8084899e/article/timeline-of-events-surrounding-patriots-videotaping-scandal>.

91. Smith, *supra* note 85.

92. Kristi Dosh, *Bill Belichick Highest-Paid Coach—Again*, ESPN.COM (May 16, 2012, 5:28 PM), http://espn.go.com/blog/playbook/dollars/post/_/id/719/bill-belichick-highest-paid-coach-again; Smith, *supra* note 85; *Belichick Draws \$500,000 Fine, but Avoids Suspension*, *supra* note 89.

resulted from disciplinary action were heard by an independent tribunal, then it could use a system of precedent and make sure the punishments are consistent. Such a system may have prevented the debacle that occurred from the suspensions of players involved in the scandal.

In addition to the discipline against the Saints organization and the coaches for Bounty-Gate, Commissioner Goodell suspended four Saints players accused of being the ring leaders of, and participating in, the bounty pool.⁹³ The players filed a grievance under the CBA claiming that Goodell had abused his power in suspending them.⁹⁴ Under the CBA, this type of grievance is heard by a three-member panel of arbitrators.⁹⁵ Not only did the players appeal the suspensions, but one also sued Goodell for defamation.⁹⁶ An independent arbitration panel overturned the suspensions and mandated that Goodell could only reissue the suspensions if he found “there was intent to injure beyond creating incentives for performance.”⁹⁷ Goodell promptly reissued two of the suspensions and adjusted the remaining two.⁹⁸ When the players appealed that decision, Goodell announced that his predecessor as Commissioner, Paul Tagliabue, a lawyer, would hear the appeals instead of Goodell.⁹⁹

Tagliabue then issued a decision that vacated the players’ suspensions but defended Commissioner Goodell’s findings.¹⁰⁰ He

93. *Appeal Seeks Roger Goodell Recusal*, *supra* note 86. Defensive lineman Anthony Hargrove was originally suspended for eight games; outside linebacker Scott Fujita was suspended for three games; defensive end Will Smith was suspended for four games; and middle linebacker Jonathan Vilma was suspended for an entire season. *Roundup: All Bountygate Penalties Against Saints*, *supra* note 87.

94. See McCann, *supra* note 80; *Appeal Seeks Roger Goodell Recusal*, *supra* note 86.

95. McCann, *supra* note 80; *Appeal Seeks Roger Goodell Recusal*, *supra* note 86.

96. *Appeal Seeks Roger Goodell Recusal*, *supra* note 86; see also Vilma v. Goodell, 917 F. Supp. 2d 591 (E.D. La. 2013). A judge dismissed the suit according to a rule that prevents players from suing the commissioner for discipline resulting from a collective bargaining agreement’s arbitration proceeding. *Id.* at 595–96; Jonathan Stempel, *Judge Throws Out Defamation Case Against NFL Commissioner*, REUTERS (Jan. 17, 2013, 7:40 PM), <http://www.reuters.com/article/2013/01/18/us-nfl-vilma-lawsuit-idUSBRE90H00W20130118>.

97. McCann, *supra* note 80.

98. *Appeal Seeks Roger Goodell Recusal*, *supra* note 86.

99. Judy Battista, *Tagliabue to Hear Appeals in Bounty Case*, N.Y. TIMES, Oct. 20, 2012, at D6. By doing so, the Commissioner implicitly acknowledged that a conflict of interest existed and the system is inherently unfair.

100. Will Brinson, *Paul Tagliabue ‘Vacates All Player Discipline’ in Saints Bounty Case*, CBSSPORTS.COM (Dec. 11, 2012, 1:20 PM), <http://www.cbssports.com/nfl/blog/eye-on-football/21362069/paul-tagliabue-vacates-all-player-discipline-in-saints-bounty-case>.

believed that the process of acquiring facts and enforcing discipline should have taken weeks, but the league office was misled by members of the Saints organization, which caused it to take more than three years.¹⁰¹ Tagliabue also determined that the players' suspensions were unwarranted because they were grossly disproportionate to the precedential punishment for similar actions.¹⁰² While the ex-Commissioner found that the players' conduct was detrimental to the game, he vacated the punishments because of a lack of necessary evidence and conflicting reports from team officials.¹⁰³ This decision implicitly stated that in suspending the players, Commissioner Goodell had been overly harsh, which ultimately diminished his power as commissioner to determine punishments and revealed that the penalties were unfair and inconsistent.¹⁰⁴ Tagliabue demonstrated the flexibility that only an independent arbitrator can truly have, and that the commissioner certainly lacks, in this type of situation. If these disputes were designed to be heard by an independent tribunal, like the ASAT, these procedural ills would be eliminated.

The circular nature of the NFL's disciplinary process was evidenced by Bounty-Gate.¹⁰⁵ The ASAT would provide an independent tribunal that would significantly reduce the time of an appeals process, and come to a fair and consistent decision based on the totality of the circumstances. Thus, the NFL should take serious consideration of an independent arbitral tribunal that would make the process faster, more fair, and more consistent.

101. NEW ORLEANS SAINTS PAY-FOR-PERFORMANCE/"BOUNTY," 8 NFL (2012) (Tagliabue, Arb.), available at http://sports.cbsimg.net/images/blogs/FinalDecision_Saints_Appeal.pdf.

102. *Id.* at 13. Tagliabue noted that previously players had been fined, but not suspended for similar conduct. *Id.*

103. *Id.* at 22.

104. *See id.* at 13, 22.

105. Jesse Reed, *Reviewing the Complete Timeline of NFL, Saints Bountygate Scandal*, BLEACHER REPORT (Dec. 11, 2012), <http://bleacherreport.com/articles/1441646-reviewing-the-complete-timeline-of-nfl-saints-bountygate-scandal>. The NFL initially suspended the players; the players then filed grievances and appeals and one filed a defamation lawsuit; the Commissioner rejected the players' appeals; the players filed another grievance; the grievance arbitration panel found for the players and ordered Commissioner Goodell to look at the case again; Goodell recused himself and appointed former-NFL Commissioner Paul Tagliabue to hear the case; and finally, Tagliabue vacated the suspensions (and ended the nightmare). *Id.*

C. The Basketball Czar: The NBA Commissioner

The majority of issues in the NBA's disciplinary process have stemmed from the current commissioner, David Stern.¹⁰⁶ During his tenure as commissioner, Stern has instituted a dress code, suspended players for off-court conduct, and fined one organization a quarter-million dollars for resting its star players for one game during a stretch of away games.¹⁰⁷ These examples, among others, demonstrate that the NBA's policy for disciplining players and teams is unfair, inconsistent, and inflexible.

The NBA got off to a much slower start than the MLB and NFL, as it did not appoint its first commissioner until 1967, and did not give him broad authority until 1971.¹⁰⁸ Prior to 1971, the League President was responsible for player discipline, though he only did so in limited circumstances.¹⁰⁹ One such situation was in 1953 when the NBA President suspended a player indefinitely for gambling.¹¹⁰ In 1967, then-President Walter Kennedy's title was changed to Commissioner.¹¹¹ Seeing the success of this system in the MLB, in 1971 the owners granted the commissioner expansive authority to discipline players in the League's best interests.¹¹² It was under Kennedy that the players unionized and negotiated a CBA.¹¹³ In 1975, Lawrence O'Brien was appointed NBA Commissioner.¹¹⁴ O'Brien contributed to the NBA's merger with the American Basketball Association, but his period as

106. Sam Amick, *NBA Global Games are Proud Accomplishment for Stern*, USA TODAY, Oct. 2, 2013, at C1 (stating that Stern will be stepping down as NBA Commissioner on Feb. 1, 2014). See generally Lockwood, *supra* note 69, at 150–69 (discussing the changes to the NBA Commissioner's authority while David Stern has held the position).

107. Lockwood, *supra* note 69, at 150–52; Sam Borden, *Basketball Players' Night Off Makes a Stand for Sitting Out*, N.Y. TIMES, Dec. 1, 2012, at A1. The players that were rested include Tim Duncan, Manu Ginobili, and Tony Parker, who have all played more than ten seasons in the NBA, and all with their current team, the San Antonio Spurs. *Id.* The Spurs only lost the game by five points despite not playing their three stars and facing the defending champion Miami Heat in Miami. *Id.*

108. Lockwood, *supra* note 69, at 149.

109. See *id.* at 147–48.

110. *Id.*

111. Parlow, *supra* note 2, at 186; Lockwood, *supra* note 69, at 149.

112. See Lockwood, *supra* note 69, at 149; see also Parlow, *supra* note 2, at 186.

113. Lockwood, *supra* note 69, at 149.

114. *Id.* at 150.

commissioner was mainly notable for economic disputes rather than player discipline.¹¹⁵

David Stern has held the position of NBA Commissioner since his appointment in 1984.¹¹⁶ During his tenure, Stern has used the “best interest clause” to expand the power of the commissioner much farther than his predecessors.¹¹⁷ Stern regulated both on- and off-court conduct, including an off-court dress code and an on-court dress code that limited accessories players can wear on-court.¹¹⁸ On the court, Stern prohibited players from wearing Band-Aids on their faces during games, unless medically necessary, to limit self-promotion.¹¹⁹ Additionally, the off-court dress code requires players to “wear Business Casual attire whenever they are engaged in team or league business.”¹²⁰ Stern has used his authority to unilaterally create new rules and occasionally issue unprecedented punishments.¹²¹ Through the best interest power, Stern has also regulated comments that could be viewed as offensive to, or critical of, the referees or the League.¹²² It was under the former reasoning that Stern fined Dennis Rodman \$50,000, the largest fine of an NBA player at that point, for a comment insulting Mormons after a

115. *Id.* This merger would secure the NBA as the dominant basketball league by absorbing the top four teams of the American Basketball Association, which included such prominent players as Julius “Dr. J” Erving. *Id.* at 149–50; *Encyclopedia Playoff Edition*, Biography of *Julius Erving*, NBA.COM, http://www.nba.com/history/players/erving_bio.html (last visited Oct. 15, 2013).

116. Brent D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 209 (2007). Recently, Stern announced he will step down as commissioner in February 2014, his thirtieth year holding the position. Jason Gay, *Stern Gets Ready for the Buzzer*, WALL ST. J., Oct. 26, 2012, at D10; *David Stern to Step Down Feb. ‘14, Announces Silver as Successor for NBA Commissioner*, SPORTS BUSINESS DAILY (Oct. 26, 2012), <http://www.sportsbusinessdaily.com/Daily/Issues/2012/10/26/Leagues-and-Governing-Bodies/Stern-retires.aspx>. Despite naming a successor, Stern’s replacement will need to be approved by the owners. *Id.*

117. See Parlow, *supra* note 2, at 186–87; Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 57–60 (2010).

118. Showalter, *supra* note 116, at 210.

119. Wilson, *supra* note 117, at 57–58.

120. *Id.* at 55–56 (quoting *NBA Player Dress Code*, NBA.COM (Oct. 20, 2005, 6:42 PM), http://www.nba.com/news/player_dress_code_051017.html). Stern was trying to diminish the NBA’s “hip-hop” reputation that he feared was damaging the public’s view of the game. Showalter, *supra* note 116, at 210.

121. See Wilson, *supra* note 117, at 57–59.

122. *Id.* at 59–60.

game in Utah.¹²³ Under the latter reasoning, Stern has repeatedly fined Dallas Mavericks owner Mark Cuban for disparaging the referees through various media outlets.¹²⁴

Commissioner Stern has also been criticized for his inflexible approach to discipline under the rule that requires players to stay in “the immediate vicinity of their bench” during a fight on the court.¹²⁵ One example of this inflexible approach occurred following the 2007 Western Conference Semifinals, where in game four San Antonio Spurs forward Robert Horry flagrantly fouled Steve Nash, the star guard of the Phoenix Suns and two-time League MVP.¹²⁶ Two Suns players, including star forward Amare Stoudemire, immediately jumped up from the bench following the incident.¹²⁷ While they merely stepped onto the court, they were both suspended for one game.¹²⁸ Meanwhile, Tim Duncan, the San Antonio superstar forward, also stepped onto the court, but because the altercation occurred closer to the Suns’ bench, he was not suspended.¹²⁹ This situation demonstrates the inconsistency and inflexibility of Commissioner Stern’s punishments. Additionally, under the CBA, players may only appeal to the commissioner, who made the decision to suspend them.¹³⁰ Like the NFL and MLB commissioners, Commissioner Stern would be in a conflict of interest hearing an appeal

123. Christopher J. McKinny, Comment, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 248–49 (2003). Rodman was punished for saying Mormons were “asshole[s].” ELLIS CASHMORE, SPORTS CULTURE: AN A–Z GUIDE 202 (2000); McKinny, *supra*, at 248–49.

124. Wilson, *supra* note 117, at 59–60.

125. *Three Players Suspended Following Spurs-Suns Incident*, NBA.COM (May 15, 2007, 7:02 PM), http://www.nba.com/news/spurssunssuspension_070515.html (quoting BASKETBALL OPERATIONS DEPT., OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION 2006–2007, § VII.c (2006), available at http://www.nba.com/media/rule_book_2006-07.pdf); see also Jeffrey A. Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts*, 35 VAL. U. L. REV. 449, 452 (2001).

126. *Three Players Suspended Following Spurs-Suns Incident*, *supra* note 125.

127. *Id.*

128. *Id.*

129. Marc Stein, *NBA Suspends Stoudemire, Diaw for Leaving Bench*, ESPN.COM (May 16, 2007, 8:36 PM), <http://sports.espn.go.com/nba/playoffs2007/news/story?id=2871615>.

130. See Mishkin, *supra* note 125, at 452. If the player feels the commissioner abused his power in making the decision, then the player can file a grievance against the League, which an independent arbitrator would hear. See Lockwood, *supra* note 69 at 154. The League’s collective bargaining agreement is discussed *infra* notes 192–201 and accompanying text.

to a decision in which he participated.¹³¹ This example is another illustration of a situation that the ASAT would improve.

Two other events have shaped the perception of the NBA Commissioner and his ultimate authority. The first was the suspension of Latrell Sprewell in the winter of 1997.¹³² Sprewell was asked to leave a practice by his coach, but instead of leaving, Sprewell wrestled the coach to the ground and choked him.¹³³ Once separated, Sprewell continued to destroy team property and attacked the coach again, grazing him with one punch.¹³⁴ After performing an investigation of the incident, Commissioner Stern suspended Sprewell for one full year.¹³⁵ However, Sprewell filed a grievance, and the arbitrator selected by the NBA and National Basketball Players Association (NBPA) reduced the suspension to the remainder of the current season, or from eighty-two to only sixty-eight games.¹³⁶ This situation is an example of how an independent arbitration can be effective, but also of the arbitrator's likelihood to find a middle ground of punishment that will leave both parties unhappy.¹³⁷ This problem is likely caused by the fact that either side can fire an arbitrator for any reason, and would be solved by the proposed ASAT because the tribunal would be independent from both parties and require reasons for firing arbitrators.¹³⁸

The second event involved a situation similar to the Sprewell arbitration. In 2004 a brawl broke out at a Detroit Pistons game against the Indiana Pacers.¹³⁹ Three Pacers players were suspended for violence against fans because the NBA determined that since the conduct

131. Mark Kriegel, *In His Twilight, Stern Coming up Small*, FOX SPORTS (Dec. 13, 2011, 11:49 AM), <http://msn.foxsports.com/nba/story/nba-david-stern-running-new-orleans-hornets-rejecting-trades-has-become-incredible-shrinking-commissioner-121211>.

132. See Lockwood, *supra* note 69, at 152.

133. *Id.* at 152–53.

134. *Id.* at 153.

135. *Id.*

136. *Id.* at 154; Parlow, *supra* note 2, at 195.

137. In this case the fact that Sprewell's suspension was reduced is unfathomable; had the coach decided to press charges, Sprewell could have easily been arrested for assault and battery of his employer. See Cal. Penal Code §§ 240, 242 (West 2008). The arbitrator seemed to not want to side with either party for fear of a vengeance firing from the other side. See *infra* note 193 and accompanying text. See generally Belson, *supra* note 23 (discussing the firing of an experienced arbitrator after an unpopular decision). If the Sprewell situation was not worthy of a full-year suspension, then presumably nothing will be under the current system.

138. See discussion *infra* Parts III.C, VI.

139. Lockwood, *supra* note 69, at 156.

occurred during an NBA game, it was necessarily on-court conduct.¹⁴⁰ The NBPA filed a grievance and appealed the suspensions to the grievance arbitrator, but the NBA refused to participate because it believed the suspensions were not subject to arbitration.¹⁴¹ When the arbitrator reduced the players' suspensions, the NBA sued the NBPA, arguing that because the conduct was on-court the arbitrator had no jurisdiction.¹⁴² However, a New York district court held that because the specific conduct did not typically occur during the course of the game, it was not on-court conduct and was thus subject to appeal to the grievance arbitrator.¹⁴³ The arbitrator found that Commissioner Stern did not have "just cause" to suspend at least one of the players, so the suspensions were reduced.¹⁴⁴ This fight is yet another example of how the current arbitration system in the NBA leaves both parties with disappointing results.¹⁴⁵

While the Pacers and the Sprewell situations give the impression that the independent arbitration provision in the NBA's CBA is effective, both processes took longer than necessary and produced results that were unsatisfactory to both parties involved.¹⁴⁶ These examples exemplify that players have little protection from inconsistent rulings under the current disciplinary structure. Commissioner Stern has also demonstrated remarkable inflexibility in determining discipline.¹⁴⁷ This system could be improved by allowing an independent tribunal to hear a greater number of disciplinary inquiries, which would increase the fairness, consistency, and flexibility of the process.

140. Sirotkin, *supra* note 2, at 306–07.

141. *Id.*

142. Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528(GBD), 2005 WL 22869, at *3 (S.D.N.Y. 2005).

143. *Id.* at *11.

144. Lockwood, *supra* note 69, at 157–58.

145. *See id.* This incident was a severe black-eye on the NBA and clearly a situation where the commissioner should have been able to suspend players under the best interest clause. *See Artest, Jackson Charge Palace Stands*, ESPN.COM (Nov. 21, 2004, 2:57 AM), <http://sports.espn.go.com/nba/news/story?id=1927380>.

146. *See* Lockwood, *supra* note 69, at 155–56.

147. *See supra* notes 118–29 and accompanying text.

D. The Most Recent Development: The NHL Commissioner

Until 1992, the most powerful position in the NHL League office was the President.¹⁴⁸ In order to lure Gary Bettman, then the General Counsel of the NBA, away from the NBA the owners offered him a new position: NHL Commissioner.¹⁴⁹ This position expanded the authority of the President to include a similar power to the commissioners of other professional sports leagues.¹⁵⁰ Over the course of his tenure, the NHL has endured three lockouts and, in an attempt to increase public interest in the game, instituted various rule changes.¹⁵¹ In addition to recent inconsistent discipline,¹⁵² Bettman has also resorted to an exceptional suspension in multiple cases involving extreme on-ice misconduct, punishing four players for “the rest of the season.”¹⁵³ These four incidents involved: one player sucker-punching another in the back of the head; one player striking another player in the face with his stick; one player using his stick to strike another player in the side of the head; and one player elbowing another in the head.¹⁵⁴ By disciplining all four players for “the rest of the season,” Commissioner Bettman avoided setting a precedent for similar conduct. Additionally, despite the fact that the commissioner has the authority to discipline for off-ice conduct, he chose not to discipline Dany Heatley when Heatley was arrested for reckless driving and charged with vehicular homicide for driving over

148. Thomas J. Arkell, *National Hockey League Jurisprudence: Past, Present and Future*, 8 SETON HALL J. SPORTS L. 135, 136 (1998).

149. *Id.*

150. *Id.*

151. Gary Bettman, SPORTS E-CYCLOPEDIA (Feb. 12, 2013, 11:30 PM), <http://www.sportsecyclopedia.com/nhl/comish/bettman.html>. These rule changes included an impromptu rule interpretation change during the 1999 Stanley Cup finals in which during the third overtime Dallas Stars forward Brett Hull scored a goal with a skate in the crease, which had previously been characterized as a situation where a goal would be disallowed, but the referees allowed the goal and the Stars won the Stanley Cup over the Buffalo Sabres. *Controversy Continues*, CNNSI.COM (June 22, 1999, 8:11 PM), http://sportsillustrated.cnn.com/hockey/nhl/1999/playoffs/news/1999/06/20/sabres_bitter/. After the game, NHL officials upheld the goal despite a goal crease rule that had been enforced under a no-tolerance policy throughout the season. *Id.* The Sabres have never returned to the Stanley Cup finals. *Stanley Cup Champions and Finalists*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=25426> (last visited Dec. 31, 2013).

152. See *supra* notes 5–15 and accompanying text.

153. Jamie Fitzpatrick, *The Longest NHL Suspensions*, ABOUT, http://pricetheockey.about.com/cs/history/a/nhl_suspensions.htm (last visited Sept. 1, 2013). The longest was for twenty-five games and the shortest for ten games. *Id.*

154. *Id.*

eighty miles-per-hour in a thirty-five miles-per-hour zone and crashing his Ferrari, which resulted in the death of his teammate and friend.¹⁵⁵ This same conduct would likely have been suspension-worthy in any of the other three leagues.¹⁵⁶

While the advent of the commissioner has undoubtedly helped the four major American professional sports leagues develop and thrive in the last century,¹⁵⁷ the disciplinary structure outlined by each league's CBA has left much to be desired for both leagues and players.¹⁵⁸ In each league, the commissioner has seemingly unbeatable power to distribute discipline at his discretion without regard to any system of precedence or an explicitly defined code.¹⁵⁹ He is limited only by vague provisions in the league's CBA or league constitution.¹⁶⁰ The commissioner system has been so economically successful that it would make little sense to completely abolish it, but establishing an independent arbitral tribunal to hear appeals would make the system more fair and consistent.¹⁶¹ This new structure would alleviate the commissioners of appeal responsibilities while retaining the commissioners' power to discipline. Instead, this new body would establish a system of precedent to increase the integrity of the leagues and remove much of the public criticism of commissioners that arises when commissioners hear appeals to their own disciplinary decisions.¹⁶² The ASAT would thus achieve the best of

155. Ray Glier, *Heatley Sentenced to 3 Years' Probation*, N.Y. TIMES, Feb. 5, 2005, at D5.

156. See, e.g., Benjamin Hochman, *Nuggets' Smith Suspended 7 Games*, DENVER POST (Aug. 28, 2009, 2:53 PM), http://www.denverpost.com/nuggets/ci_13223490#ixzz0ejFsIIvU (noting that the NBA suspended J.R. Smith for a reckless driving accident resulting in the death of his friend); *Ex-O's Hurler Ponson Gets Five Days for DWI*, ESPN.COM, Dec. 12, 2005, <http://sports.espn.go.com/mlb/news/story?id=2256427> (explaining that MLB's Sidney Ponson's contract was terminated by the team one week after Ponson was convicted of driving while impaired); *Little Charged with Felony DUI, Speeding*, ESPN.COM, Apr. 27, 2004, <http://sports.espn.go.com/nfl/news/story?id=1790240> (noting that the NFL suspended Leonard Little for the first half of the 1999 season without pay after he pled guilty to involuntary manslaughter for a traffic accident).

157. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 67 (1995).

158. See Sirotkin, *supra* note 2, at 304–09; Belson, *supra* note 23; Heimlich, *supra* note 15.

159. See Sirotkin, *supra* note 2, at 291, 299–302.

160. *Id.* at 292–98.

161. See Lentze, *supra* note 157, at 67.

162. See, e.g., Mishkin, *supra* note 125, at 452; Reece, *supra* note 66, at 361; Sirotkin, *supra* note 2, at 291, 300–01.

both worlds by maintaining the power of the commissioner to act in the best interests of the league while curtailing negative publicity and increasing public trust in the system and the sport.

III. CURRENT GOVERNING DOCUMENTS

Each of the professional American sports leagues are governed by various documents, including constitutions, league bylaws, and most importantly, CBAs.¹⁶³ The CBA for each league establishes the procedures and scope of the disciplinary system.¹⁶⁴ This Part will explore the arbitration provisions in the governing documents of the MLB, NFL, NBA, and NHL. It will also assess what aspects are effective and can be incorporated into the ASAT, as well as those that are ineffective and how they should be changed by the ASAT.

A. The MLB's Governing Documents

The MLB has three different systems of arbitration: one for salary disputes, one for on-field discipline, and one for all other grievances.¹⁶⁵ Salary arbitration will not be discussed in this Comment because it is a completely separate system that does not involve player discipline.¹⁶⁶ For appeals of discipline stemming from on-field conduct or “conduct that is materially detrimental or materially prejudicial to the best interest of Baseball,” players participate in a hearing in front of the Executive Vice President, Administration, or the MLB Commissioner.¹⁶⁷

163. ROGER I. ABRAMS, *SPORTS JUSTICE: THE LAW & THE BUSINESS OF SPORTS* 90 (2010); MATTHEW J. MITTEN, *SPORTS LAW IN THE UNITED STATES* 49 (Roger Blanpain et al. eds., Wolters Kluwer 2011).

164. Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 168 (1995), reprinted in *SPORTS LAW & REGULATION* 129, 131 (Joseph Gordon Hylton & Paul M. Anderson eds., 1999).

165. MLB CBA, *supra* note 54, at art. VI, § E, arts. XI, XII.

166. *See generally id.* at art. VI, § E (providing the procedures and rules regarding salary arbitration of MLB players).

167. *Id.* at art. XII, § A–B, art. XI, § C(1)(a)–(b). These hearings usually arise from suspensions due to a fight on the field, touching an umpire, or a pitcher intentionally hitting a batter. *See* MAJOR LEAGUE BASEBALL, 2012 EDITION OFFICIAL BASEBALL RULES R. 9.05 (2012), available at http://mlb.mlb.com/mlb/downloads/y2012/Official_Baseball_Rules.pdf; e.g., Matt Snyder, *Devin Mesoraco Likely Faces Suspension After Making Contact with Umpire*, CBSSPORTS.COM (July 30, 2012, 8:55 PM), <http://www.cbssports.com/mlb/blog/eye-on-baseball/19691226/devin-mesoraco-likely-faces-suspension-after-making-contact-with-umpire>; Todd Zolecki, *Hamels Suspended 5 Games for Hitting Harper*, MLB.COM (May 8, 2012, 4:27 PM), http://mlb.mlb.com/news/article.jsp?ymd=20120507&content_id=30648282&vkey=news_mlb&c_id=mlb; *Suspensions Doled Out for MLB Brawl*, USA TODAY, June 19,

In these cases, players are given the right to all evidence the League uses in an investigation regarding that player's discipline and can challenge the just cause for their punishment.¹⁶⁸ Additionally, the best interests clause can be found in the MLB Constitution, establishing that the commissioner may investigate and punish anything he believes is "not in the best interests of the national game of Baseball."¹⁶⁹ The ASAT would not alter the first step in these punishments; the League CBA would still govern player discipline and allow the commissioner, or a representative of the commissioner's office, to impose penalties on players for on- and off-field conduct. The ASAT would incorporate the MLB's approach to appealing discipline by providing all evidence the league used in the investigation, but the challenge hearing would be conducted by ASAT instead of by the League.¹⁷⁰

The arbitration system for all other grievances under the CBA takes much more time to resolve because they are conducted by the arbitration panel,¹⁷¹ which is composed of two-party arbitrators (one appointed by the League and one by the Players' Association) and one "impartial" arbitrator.¹⁷² This impartial arbitrator must be agreed upon by the League and the Association, otherwise the American Arbitration Association (AAA) submits a list of potential arbitrators that the League and Association must narrow down to one.¹⁷³ These impartial arbitrators can be fired at any time, for any reason, by either the League or the Association, so long as they are not currently handling a case.¹⁷⁴ Decisions by the panels may not create precedent and are final and binding.¹⁷⁵ None of these policies would be incorporated into the ASAT; in fact, the ASAT would use essentially the opposite of these provisions.¹⁷⁶

2007, http://usatoday30.usatoday.com/sports/baseball/2007-06-18-brawl-suspensions_N.htm.

168. MLB CBA, *supra* note 54, at art. XII, § D.

169. MAJOR LEAGUE CONST. art. II, §§ 2-3 (2008), *available at* <http://bizofbaseball.com/docs/MLConstitutionJune2005Update.pdf>.

170. MLB CBA, *supra* note 54, at art. XII, § D.

171. *Id.* at art. XI, § B. These grievances include suspensions under the drug policy as well as all other non-disciplinary grievances allowable in the CBA. *Id.* at art. XI, § A(1).

172. *Id.* at art. XI, § A(9).

173. *Id.*

174. *Id.*

175. *Id.* at art. XI, § B.

176. Further discussion of the ASAT specific policies and proposed provisions can be found *infra* Part V.

B. The NFL's Governing Documents

The NFL employs three types of arbitrators that each rule on different conflicts: an impartial arbitrator, a notice arbitrator, and a system arbitrator.¹⁷⁷ However, player discipline doled out by the NFL Commissioner is not included in any of the provisions that fall under any of these arbitrators' jurisdiction.¹⁷⁸ Instead, the commissioner assigns a League officer representative to hear a player's appeal.¹⁷⁹ His power to hear these appeals is found in the NFL Constitution.¹⁸⁰ Additionally, his disciplinary powers include the power to punish any "conduct detrimental to the best interests of the League or professional football."¹⁸¹ These appeals are heard between eight to thirteen days from the player's filing for appeal of punishment.¹⁸² The CBA provides for a minimum fine for each year and, before the beginning of the season, the league and the NFLPA agree on a schedule of fines.¹⁸³ Still, the league may increase fines or suspensions "[w]here circumstances warrant," including where infractions were "flagrant and gratuitous."¹⁸⁴

177. NFL CBA, *supra* note 72, at arts. 15, 16, 43. The impartial arbitrator has authority to rule over decisions involving free agency, rookie compensation, the draft, some salary cap concerns, and most non-injury issues. *Id.* at arts. 6, 8–10, 13, 21, 23, 26. The system arbitrator is responsible for all other issues. *Id.* at arts. 1, 4, 6–19, 26–28, 31, 68–70. The league and the players association agreed on a notice arbitrator, who is responsible for selecting the four non-injury grievance or impartial arbitrators. *Id.* at art. 43, § 6. The most senior non-injury grievance arbitrator is next in line for the position of notice arbitrator. *Id.* These arbitrators can also be fired by either side for any reason, but only during a ten-day window in July. *Id.*

178. *Id.* at art. 46.

179. *Id.* at art 46, § 2(a). The commissioner can elect to hear the appeal himself at his discretion. *Id.* Since the league office has handed down the punishment, this in essence allows the same party to be the police, prosecution, judge, and jury.

180. CONST. AND BYLAWS OF THE NAT'L FOOTBALL LEAGUE art. VIII, § 8.3 (2006), available at http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

181. *Id.* at art. VIII, § 8.3(E).

182. NFL CBA, *supra* note 72, at art 46, § 2(i).

183. *Id.* at art. 46, § 1(d).

184. *Id.* Unfortunately, the CBA does not articulate what these terms mean. *See id.* Various players believe the league is "out to get them" and for some it is with good reason. Ashley Dunkak, *Carolina Safety Mike Mitchell Takes Thinly Veiled Shot at Ndamukong Suh*, CBS DETROIT (Oct. 28, 2013, 5:04 PM), <http://detroit.cbslocal.com/2013/10/28/carolina-safety-mike-mitchell-takes-thinly-veiled-shot-at-ndamukong-suh/>; Michael David Smith, *Merton Hanks: I Fined Ndamukong Suh to Get His Attention*, NBC SPORTS (Oct. 19, 2013, 7:40 AM), <http://profootballtalk.nbcsports.com/2013/10/19/merton-hanks-i-fined-ndamukong-suh-to-get-his-attention/>. The league does not help its cause by keeping the CBA terms vague because questions of subjectivity are inevitable. Additionally, many, including Redskins Head Coach Mike Shanahan, would like to see the procedure change so that the appeals are conducted in a more timely manner and players would miss less time while the League makes

Additionally, players can be punished by the league for violating the PCP, which outlines the types of behavior the commissioner finds detrimental to the league.¹⁸⁵ On the other hand, the league can only reduce a fine “if it exceeds 25 percent of one week of a player’s salary for a first offense, and 50 percent of one week of a player’s salary for a second offense,” or if the player argues that the circumstances do not warrant the scheduled fine.¹⁸⁶ These fines do not contribute to the League workers’ salary, instead half of the fines go to the players’ assistance trust and the remaining half are donated to a charity on which the NFL and NFLPA agree.¹⁸⁷

While the appeals from player discipline are not currently delegated to an arbitrator under the NFL’s CBA, these appeals would be handled by the ASAT.¹⁸⁸ The NFL does a commendable job of attempting expeditious hearings, and a similar provision would be in place in the ASAT to ensure players would not miss unnecessary time or play when they should be suspended.¹⁸⁹ If the athlete receiving discipline decides to appeal, the League would also have to provide any evidence used and give reasoning for the fine or suspension if it differed from punishments set forth in the CBA. One aspect of the NFL CBA that would most certainly be imitated is the distribution of player fines, which would go to one of a list of charities.¹⁹⁰ Also, while the NFL provides a policy for increasing fines according to a particular schedule, it should provide more detail as to what conduct is “flagrant and gratuitous,” as it would have to prove the extent of such conduct to the ASAT panel.¹⁹¹

C. The NBA’s Governing Documents

Unlike the NFL and MLB, the NBA uses only two arbitrators: a grievance arbitrator and a system arbitrator.¹⁹² The grievance arbitrator

its decision. John Keim, *Coach: Appeal Process Needs Change*, ESPN (Oct. 25, 2013, 2:54 PM), http://espn.go.com/nfl/story/_id/9877119/mike-shanahan-coach-washington-redskins-thinks-appeal-process-change.

185. NFL PCP, *supra* note 78.

186. NFL CBA, *supra* note 72, at art. 46, § 1(d).

187. *Id.* at art. 46, § 5(c).

188. *Id.* at art. 46, § 2(a).

189. *Id.* at art. 46, § 2(i).

190. *Id.*

191. *Id.* at art. 46, § 1(d).

192. NAT’L BASKETBALL ASS’N & NAT’L BASKETBALL PLAYERS ASS’N., NBA COLLECTIVE BARGAINING AGREEMENT arts. XXXI & XXXII (2011) [hereinafter NBA CBA], available at <http://www.nbpa.org/cba/2011>. The system arbitrator handles mostly

is scheduled to serve for the length of the CBA, but can be terminated by either party during a six-day window each summer.¹⁹³ The grievance arbitrator is responsible for handling disciplinary disputes, but only those disputes arising from a fine of at least fifty-thousand dollars or a suspension of at least twelve games, anything less can only be appealed to the commissioner.¹⁹⁴ For these smaller appeals, the commissioner has the authority to affirm or reduce the fine or suspension, but cannot increase it.¹⁹⁵ For the larger appeals, the grievance arbitrator must use an “arbitrary and capricious” standard of review of the commissioner’s decision.¹⁹⁶ Like the NFL, the NBA has a list of some of the off-court conduct that will result in punishment and a schedule of fines, but it is not very specific.¹⁹⁷ Additionally, hearings cannot take place immediately, or even quickly, because each side is guaranteed thirty days’ notice.¹⁹⁸ In preparation for the hearings, the parties must submit a joint statement of the issue and are required to present all relevant evidence to the other side at least a week in advance of the hearing.¹⁹⁹ The arbitrator is granted broad authority to make decisions related to smaller issues, such as procedural matters and jurisdiction, and his or her decision is final and binding.²⁰⁰

The NBA uses a structure that only allows for an arbitrator to rule on the most serious penalties while handling smaller penalties in-house,²⁰¹ a system the ASAT would alter.²⁰² Further, while the NBA provides a schedule for fines and suspensions,²⁰³ it would have to be more fully developed to include more specific conduct so the arbitrators could avoid having to interpret ambiguous CBA provisions. The schedule for hearings would also be changed to be more efficient, while

monetary disputes, including those related to free agency. *Id.* at art. XXXII, § 1.

193. *Id.* at art. XXXI, § 7(a). If the arbitrator is fired and the league and the players association cannot agree on the next arbitrator, the International Institute for Conflict Prevention and Resolution submits a list of eleven lawyers that the parties can choose from to be the next grievance arbitrator. *Id.* at art. XXXI, § 7(b).

194. *Id.* at art. XXXI, § 9(a).

195. *Id.* at art. XXXI, § 9(a)(4).

196. *Id.* at art. XXXI, § 9(b).

197. *See id.* at art. VI.

198. *Id.* at art. XXXI, § 4(a).

199. *Id.* at art. XXXI, § 5(a)–(b).

200. *Id.* at art. XXXI, § 6.

201. *Id.* at art. XXXI, § 9(a).

202. Further discussion of this system *infra* Part V.A.

203. NBA CBA, *supra* note 192, at art. XXXI, § 9.

maintaining effectiveness, and the arbitrators would have similar authority to rule on smaller issues, such as arbitrability and procedural issues. These arbitrators would also have similar security throughout the year, except that in order to be fired, a party must provide just cause for termination, as opposed to firing for any reason.²⁰⁴

D. The NHL's Governing Documents

Similar to the MLB and NFL, the NHL and the National Hockey League Players' Association (NHLPA) appoint an impartial arbitrator to serve for the duration of the CBA.²⁰⁵ Either party may dismiss this impartial arbitrator each year by giving the arbitrator written notice on or before September 1.²⁰⁶ The NHL CBA allows the commissioner to discipline players for both on-ice and off-ice conduct.²⁰⁷ For the on-ice discipline, the commissioner, or his designee, may impose a fine or suspension on a player for "the use of excessive and unnecessary force and reckless acts resulting in injury."²⁰⁸ By including "resulting in injury," the NHL distinguishes itself greatly from the NFL, NBA, and MLB.²⁰⁹ In determining the punishment, the League office considers the player's intent, the specific conduct, any resulting injuries, past offenses, and game situations.²¹⁰ For suspensions up to five games or fines over five-thousand dollars, the player has the right to a telephonic hearing with the League, which is held as soon as reasonably possible.²¹¹ If a player decides to appeal the League's disciplinary decision, the commissioner decides whether another hearing (either telephonic or in-

204. *See supra* note 193 and accompanying text.

205. NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYER'S ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION: SEPTEMBER 16, 2012–SEPTEMBER 15, 2022 art. 17, § 6 (2012) [hereinafter NHL CBA], available at http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf. The impartial arbitrator must be a member of the National Academy of Arbitrators. *Id.*

206. *Id.*

207. *Id.* at arts. 18, 18-A.

208. *Id.* at art. 18, §§ 1–2.

209. *Id.* at art. 18, § 2. This factor creates considerable confusion and the appearance of subjectivity in discipline because the league has given it great weight in decision-making, perhaps more so than the player's intent. *See supra* notes 5–15 and accompanying text.

210. NHL CBA, *supra* note 205, at art. 18, § 2. For instance, a particularly hard hit in a close game may not result in a suspension where it might if the game is lopsided. *Id.*

211. *Id.* at art. 18, §§ 4(b)(i), 8(a). The league is also required to give the NHLPA any evidence it plans to use prior to the hearing. *Id.* at art. 18, § 4(b)(ii).

person) is necessary.²¹² If the commissioner hears the appeal, he determines if the League's decision "was supported by clear and convincing evidence."²¹³ In these appeals, the commissioner's ultimate disciplinary decision is final and binding.²¹⁴ Like the other leagues, the NHL Constitution also grants the commissioner the authority to hear disputes and issue discipline.²¹⁵

For suspensions of six games or more, players have a right to an in-person hearing with a League representative.²¹⁶ If a player elects to appeal that decision, the commissioner must conduct an in-person hearing with the player using the same "clear and convincing" standard.²¹⁷ For these more serious suspensions, the player may appeal the commissioner's decision to a Neutral Discipline Arbitrator (NDA), who will conduct a third in-person hearing to determine whether the suspension was supported by "substantial evidence."²¹⁸ Like the impartial arbitrator, the NDA is appointed to serve for the duration of the term but may be discharged each year by either party upon notice on or before July 1.²¹⁹ If a hearing is necessary after dismissing one NDA but before replacing her, the impartial arbitrator conducts the hearing.²²⁰

The commissioner also has the power to discipline players for violation of off-ice League rules or conduct "that is detrimental to or against the welfare of the League or the game of hockey," similar to the other leagues' best interests clauses.²²¹ Under the CBA, the commissioner can suspend or expel a player, fine a player, or cancel a player's contract.²²² Under this provision, the commissioner must

212. *Id.* at art. 18, § 12.

213. *Id.*

214. *Id.*

215. CONST. OF THE NAT'L HOCKEY LEAGUE, art. VI, § 6.3(b), (j), *available at* <http://www.bizofhockey.com/docs/NHLConstitution.pdf>.

216. NHL CBA, *supra* note 205, at art. 18, § 9.

217. *Id.* at art. 18, § 12.

218. *Id.* at art. 18, § 13(c). The NDA's decision is final and binding. *Id.* During this entire process, the player is prevented from playing in a game, at least up to the length of the suspension. *Id.* at art. 18, § 13(b).

219. *Id.* at art. 18, § 14(a). The NDA is supposed to have "substantial experience as an arbitrator or judge," but no sports familiarity is required. *Id.* at art. 18, § 14(c). In fact, the other prerequisite is the ability to be in Toronto or New York for the potential hearings. *Id.*

220. *Id.* at art. 18, § 14(d).

221. *Id.* at art. 18-A, § 2.

222. *Id.* at art. 18-A, § 2(a)-(c). While cancelling a contract is very unlikely,

conduct a hearing, the result of which can be appealed to the impartial arbitrator.²²³ The impartial arbitrator considers the surrounding circumstances, the proportionality of the penalty to the offense, and the interests of both the League and player in determining whether the punishment is supported by substantial evidence and is not unreasonable.²²⁴

While certain provisions of the MLB, NFL, NBA, and NHL CBAs could be incorporated into an effective and efficient arbitral body, most provisions would run counter to the goal of the ASAT. The proposed arbitral tribunal would not alter the current immediate disciplinary provisions of the CBAs; it would only affect the appeals procedures, as will be discussed in Part VI. Thus, the leagues could still collectively bargain for disciplinary procedures, conduct that will result in punishment, and the types of penalties that can be imposed; the ASAT would make sure that the leagues abide by these agreements.²²⁵

IV. EFFECTIVE INTERNATIONAL SYSTEMS

Throughout the world numerous international sports courts and professional sports leagues have developed their own systems of discipline. Three that have been particularly successful and contain elements that could be successfully incorporated in American professional sports are the Court of Arbitration for Sport (CAS), the Basketball Arbitral Tribunal (BAT), and Australia's National Rugby League (NRL).²²⁶ These three systems do not use a commissioner

Commissioner Bettman cancelled a contract between Ilya Kovalchuk and the New Jersey Devils because he believed the parties were attempting to circumvent the League salary cap. Tarik El-Bashir, *NHL Fights Back in Contract Battle*, WASH. POST, July 22, 2010, at D6. The parties eventually restructured the deal, which the NHL accepted, but Kovalchuk unexpectedly retired in the summer 2013; leaving \$77 million of the total \$100 million on the table and returning to Russia to play in the Russian Hockey League instead. Kevin Allen, *Ilya Kovalchuk Says He's Retiring from NHL*, USA TODAY (July 12, 2013, 1:17 AM), <http://www.usatoday.com/story/sports/nhl/devils/2013/07/11/ilya-kovalchuk-announces-retirement-new-jersey-devils/2509857/>.

223. NHL CBA, *supra* note 205, at art. 18-A, §§ 3(d), 4.

224. *Id.* at art. 18-A, § 4.

225. See MLB CBA, *supra* note 54, at arts. XI–XII; NBA CBA, *supra* note 192, at arts. VI, XXXI; NFL CBA, *supra* note 72, at art. 46; NHL CBA, *supra* note 205, at arts. 17, 18, 18-A.

226. See MITTEN ET AL., *supra* note 22, at 321; Ian Dobinson & David Thorpe, *What's Wrong With the Commissioner? Some Lessons from Downunder*, 19 SETON HALL J. SPORTS & ENT. L. 105, 110–11 (2009); Dirk-Reiner Martens, *Basketball Arbitral Tribunal*, INNOVATING JUSTICE, <http://www.innovatingjustice.com/innovations/Basketball-Arbitral->

structure and have alternative arrangements that this Part will explore. Much like Part III, this Part will assess the effectiveness of each aspect of these systems and determine whether they can, and should, be incorporated into the proposed ASAT. By integrating the effective features from various different structures, the ASAT would balance the challenges faced by the individual systems and ultimately create what could be the most fair and consistent disciplinary structure in the world of sports.

A. The World's Largest International Sports Court: CAS

The CAS is located in Lausanne, Switzerland²²⁷ and resolves various international sport disputes, including disputes involving athletes in Olympic sports, international football, and any other sport disciplinary cases that involve athletes with a CAS arbitration provision in their contracts.²²⁸ The International Council of Arbitration for Sport (ICAS) is a group of twenty members that creates and amends the code that governs CAS.²²⁹ ICAS members are elected to renewable four-year periods by the International Sports Federations, National Olympic Committees, and the International Olympic Committee.²³⁰ The ICAS is responsible for appointing and removing CAS arbitrators and supervises the CAS Court Office.²³¹

The CAS maintains more than 150 arbitrators with legal training and sports backgrounds.²³² These arbitrators are listed publicly,²³³ and are expected to perform their duties objectively and independently.²³⁴ While CAS decisions are publicly available if all parties agree, the arbitrators are bound by a duty of confidentiality.²³⁵ The applicable division of CAS

Tribunal (last visited Feb. 11, 2013).

227. COURT OF ARBITRATION FOR SPORTS, *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, in TAS/CAS CODE § 1 (2013) [hereinafter CAS STATUTES], available at [http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20(en).pdf).

228. *History of the CAS: Types of Disputes Submitted to the CAS*, TAS/CAS, <http://www.tas-cas.org/en/infogenerales.asp/4-3-239-1011-4-1-1/5-0-1011-3-0-0/> (last visited Jan. 13, 2013).

229. CAS STATUTES, *supra* note 227, §§ 2, 4, 6.

230. *Id.* §§ 4–5.

231. *Id.* § 6.3, .7.

232. *Id.* §§ 13–14.

233. *Id.* § 15.

234. *Id.* § 18.

235. COURT OF ARBITRATION FOR SPORTS, *Procedural Rules*, in TAS/CAS CODE R. 43

for American sports leagues is the Appeals Arbitration Division, which resolves disputes between athletes and federations, associations, or other sports bodies.²³⁶ All arbitrators can be challenged within a week of the party finding grounds for a challenge, such as subjectivity or previous relationship between the arbitrator and the other party.²³⁷

The CAS arbitrators have the authority to determine if the case is within CAS jurisdiction, so no outside court assistance is necessary.²³⁸ A panel contains three arbitrators, unless otherwise determined by the organization's document containing the CAS arbitration provision.²³⁹ Usually, both the claimant and respondent select a single arbitrator, and those two arbitrators select the third; however, unlike the MLB system, all three arbitrators must be impartial.²⁴⁰ The panel has the authority to require either party to produce any documents or other evidence that it believes is likely to exist and is relevant.²⁴¹ The parties can either elect that the panel apply general principles of fairness and justice or request that the panel apply the laws of a particular jurisdiction.²⁴² When an organization disciplines an athlete, that athlete has three weeks to file an appeal, unless another time limit exists in the organization's governing documents.²⁴³ The CAS can affirm a Federation's decision, make a new decision that replaces it, or annul it and refer the case back to the Federation.²⁴⁴ Whatever the result, all CAS decisions are final and binding on the parties.²⁴⁵

(2013) [hereinafter CAS PROCEDURAL RULES], available at [http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20(en).pdf); CAS STATUTES, *supra* note 227, § 19.

236. CAS STATUTES, *supra* note 227, § 20.b.

237. *Id.* § 34.

238. CAS PROCEDURAL RULES, *supra* note 235, at R. 39. The claimant is required to pay 1,000 Swiss francs for the CAS to hear the case. *Id.* at R. 64.1. The panel would then determine an estimate cost of the proceeding that must be paid in advance. *Id.* at R. 64.2. It can also award reasonable attorney's fees. *Id.* at R. 64.1.

239. *Id.* at R. 50.

240. Compare *id.* at R. 40.2, with MLB CBA, *supra* note 54, at art. XI, § A(9).

241. CAS PROCEDURAL RULES, *supra* note 235, at R. 44.3.

242. *Id.* at R. 45, 58.

243. *Id.* at R. 49.

244. *Id.* at R. 57.

245. *Id.* at R. 46. The only recourse one can have from a CAS decision is an appeal to the Swiss Federal Tribunal (SFT) because the seat of CAS is in Lausanne, Switzerland. *Id.* at R. 47; Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 80 (2008). The SFT will only review cases on very limited grounds: erroneous jurisdiction; failure to rule on

While the ASAT would solely involve disputes involving leagues from North America, like the CAS it would involve athletes from across the globe who speak many different languages.²⁴⁶ As will be discussed in the next Part, the ASAT would likely incorporate many of the CAS's policies because it is to date the largest and most prominent arbitral tribunal specifically dedicated to sports-related issues, and, like the goal of ASAT, it only hears appeals.²⁴⁷

B. The Newest International Sports Court: BAT

The International Basketball Federation recently established an independent arbitral tribunal specifically for basketball.²⁴⁸ The BAT, like CAS, was established in Switzerland.²⁴⁹ BAT arbitrations are conducted before a single arbitrator, who is appointed by the BAT President on a rotational basis.²⁵⁰ The arbitrator has the authority to rule on jurisdiction issues as well as to stop the proceedings if he or she believes the arbitration rules are not the appropriate realm to resolve the dispute.²⁵¹ This arbitrator can be challenged if there are legitimate doubts about his or her independence; such a challenge must be brought "within seven days after the ground for the challenge" becomes known to the BAT President.²⁵²

claim; ruling on unclaimed issues; and irregular panel formation. *Id.* at 86.

246. See *History of the CAS: Origins*, TAS/CAS, <http://www.tas-cas.org/en/infogenerales.asp/4-3-234-1011-4-1-1/5-0-1011-3-0-0/> (last visited Dec. 31, 2013). The need for an internationally conscious system is apparent with the increase of foreign players in the North American leagues. See *Percentage of Foreign Players Rises*, ASSOCIATED PRESS, Apr. 5, 2012, available at NewsBank, Rec. No. D9TV1DV81; Joel Millman, *These Days, Everybody's All-American Just May Be a Haitian*, WALL ST. J. (Dec. 4, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB125987130978175269>; *NHL Nationality Breakdown from 1917-18 to 2013-14*, QUANTHOCKEY.COM, http://www.quant hockey.com/TS/TS_PlayerNationalities.php (last visited Feb. 7, 2013); *Record-Tying 84 International Players on Opening-Night Rosters*, NBA.COM (Oct. 31, 2012, 1:20 AM), <http://www.nba.com/2012/news/10/30/international-players-on-opening-night-rosters/index.html>.

247. See MITTEN ET AL., *supra* note 22, at 321.

248. INTERNATIONAL BASKETBALL FEDERATION, FIBA INTERNAL REGULATIONS, bk. 3, ch. VII, § 289 (2010).

249. CAS STATUTES, *supra* note 227, § 1; INTERNATIONAL BASKETBALL FEDERATION, *supra* note 248, at bk. 3, ch. VII, § 295.

250. BASKETBALL ARBITRAL TRIBUNAL, ARBITRATION RULES, R. 8.1 (2012) [hereinafter BAT RULES], available at http://www.fiba.com/downloads/v3_expe/bat/BATArbitrationRules1May2012.PDF.

251. *Id.* at R. 1.2-1.3.

252. *Id.* at R. 8.3.

To start a proceeding, a party must submit a complaint that contains “[a]ll written evidence on which the Claimant intends to rely.”²⁵³ The defendant is required to answer, but any additional filings will be ignored unless the arbitrator requests them.²⁵⁴ Each hearing requires a nominal fee depending on the value of the case that is no less than 1,500 euro, but no more than 7,000 euro.²⁵⁵ The arbitration can proceed only if both parties agree in writing to arbitrate the dispute, typically through an arbitration clause in the player’s contract.²⁵⁶ A quirk to this system is that arbitrators can promote a settlement between the parties instead of the typical arbitration ruling.²⁵⁷ Arbitrators are not required to follow any particular set of governing documents, but instead make rulings on the general principles of fairness and justice, unless otherwise stipulated in the contract between the two parties.²⁵⁸ Within six weeks of the hearing, the arbitrator must file an award, which is public unless otherwise mandated by the arbitrator or the BAT President.²⁵⁹ The result of this award determines what party is responsible for paying arbitration costs and the proportions of those costs.²⁶⁰

This system was established to provide an effective, efficient, and simple method of resolving disputes in the world of international professional basketball.²⁶¹ While some aspects of this structure are unrealistic to bring to the U.S., like the single arbitrator and the lack of a code, there are other aspects that would make sense for American professional sports leagues, such as, having the arbitrators selected by an independent body and having them determine issues of jurisdiction, evidence, and procedure.²⁶² These aspects could help to make the system of discipline in American professional sports faster, more fair, and more consistent.

253. *Id.* at R. 9.1.

254. *Id.* at R. 11.2, 12.1.

255. *Id.* at R. 17.1.

256. *Id.* at R. 1.1.

257. *Id.* at R. 12.3.

258. *Id.* at R. 15.1.

259. *Id.* at R. 16.3–4.

260. *Id.* at R. 17.3.

261. *Id.* at R. 0.2–3.

262. *See id.* at R. 0.1, 1.2–3, 3.1, 8.1, 12.1–2, 15.1.

C. Another National Professional League: Australia's NRL

Australia's NRL is now governed by a system that includes a "Code of Conduct, Anti-Doping Rules, Anti-Vilification Code, Judiciary Code of Procedure and Appeals Committee Procedural Rules."²⁶³ Under these rules, the discipline for on-field violence²⁶⁴ is administered according to a set of specific violations that have specific punishments based on the grade of the offense.²⁶⁵ Further, each grade has an explicit number of demerit points, which also contribute to developing the punishment.²⁶⁶ Players are given written notice of a charge and have three options: plead guilty, plead guilty to the offense but not guilty to the grade, or plead not guilty to the offense.²⁶⁷ Moreover, players are rewarded with a lesser point value if they plead guilty and get increased points for repeat offenses.²⁶⁸

This system works quickly and effectively because the match review committee must submit the notice of offense the next business day after the match.²⁶⁹ The player then has one business day to respond either with a guilty plea or notice that he will fight the charge.²⁷⁰ If he fights it, the hearing is held the following day, with a potential for appeal for procedural infractions the day after the hearing.²⁷¹ In all, this process takes a maximum of four days to complete the entire process of discipline and appeal.²⁷²

263. AUSTRALIAN RUGBY LEAGUE COMM'N, NRL JUDICIARY CODE OF PROCEDURE: POLICY STATEMENT NO 1 OF 2012 (2012), available at http://media.dailytelegraph.com.au/multimedia/2012/07/NRL_Judiciary_Polic.pdf; NAT'L RUGBY LEAGUE, CODE OF CONDUCT (2007), available at http://www.rugbyleague.com.au/nrl/nrl_code_of_conduct.pdf; Dobinson & Thorpe, *supra* note 226, at 110; *NRL Judiciary Report*, NRL.COM, <http://www.nrl.com/nrlhq/referencecentre/judiciary/tabid/10435/default.aspx> (last visited Sept. 1, 2013).

264. Rugby is one of the most violent games in the world, but it is no more violent than American football. See Homa Khaleeli, *American Football or Rugby: Which is More Dangerous?*, SHORTCUTSBLOG (Jan. 28, 2013, 11:50 AM), <http://www.theguardian.com/sport/shortcuts/2013/jan/28/american-football-rugby-more-dangerous>. Thus, an analysis of the disciplinary system of violence in rugby should be just as easily administrated in football.

265. Dobinson & Thorpe, *supra* note 226, at 124.

266. *Id.*; *NRL Judiciary Report*, *supra* note 263.

267. Dobinson & Thorpe, *supra* note 226, at 124.

268. *Id.* at 124, 127.

269. *Id.* at 126–27.

270. *Id.* at 127.

271. *Id.*

272. *Id.* The NFL currently has a similar system for on-field conduct, as evidenced by Ed Reed's successful appeal. Jeff Zrebiec & Aaron Wilson, *Reed's Suspension Lifted: After Successful Appeal on Helmet Hit, He Defends Hard-Nosed Style*, BALTIMORE SUN, Nov. 21,

The NRL has a judiciary branch that includes a Chairman, a Judiciary Counsel, and an Adjudicating Panel, which consists of three members.²⁷³ The Chairman decides all questions of law, evidence, and procedure, but does not participate in the decision of the appeal.²⁷⁴ This Chairman must be serving, or have served, as a judge in either an Australian state or federal court because the system is similar to a criminal case where there is an emphasis on the fairness of the proceedings to secure just outcomes.²⁷⁵ The Judiciary Counsel is responsible for prosecuting players on the league's behalf.²⁷⁶ The Counsel is composed of former rugby league players who are also attorneys.²⁷⁷ This combination provides the legal formality to the proceedings and has a prosecutor who truly understands the position the players are in during the heat of competition.²⁷⁸ The ultimate decision of whether a charge should stand rests with the Adjudicating Panel, which, like the Counsel, is composed of former players.²⁷⁹ A group of three is selected from a pool of five, and acts as the jury in the case, responding to the cases presented by both sides and the burdens and standards explained by the Chairman.²⁸⁰

Video evidence is usually presented and all the evidence and the grading are recorded so the Panel can follow precedent.²⁸¹ The evidence of a particular case must be included in the notice of charge document that goes to the player so that he can develop a defense.²⁸² Like a defendant in a criminal trial, the charged player's previous suspensions and fines are excluded from the hearing unless the Panel determines the player is guilty, at which time the Panel needs to know the player's

2012, at D1. Ed Reed is a Pro-Bowl caliber safety who, while playing for the Baltimore Ravens, was suspended by the League for an illegal hit because the League believed he had a history of illegal hits. *Id.* On appeal, the League reduced the suspension to a fine because Reed was able to show that he did not have the history as a repeat offender that the League initially believed he had. *Id.*

273. Dobinson & Thorpe, *supra* note 226, at 131.

274. *Id.*

275. *Id.*

276. *Id.* at 133.

277. *Id.*

278. *See id.* at 133–34.

279. *Id.* at 134.

280. *Id.* at 134–35.

281. *Id.* at 135.

282. *Id.* at 138.

disciplinary past to decide the intensity of the punishment.²⁸³ If a player wishes to appeal, he has a week to ask for an appeal from the Chairman, who will grant it if there is a good likelihood of success.²⁸⁴

An appeal is heard by the Appeals Committee, which can affirm, quash, find the player guilty of a lesser offense, or increase the penalty imposed on the player.²⁸⁵ These decisions are final and binding on the parties and no new evidence may be entered.²⁸⁶ Players must pay a \$5,000 security fee before the appeal, which they get back only if they win, to avoid frivolous appeals.²⁸⁷ The Appeals Committee is a panel of three people: the President of the Appeals Committee, who must have served as a judge, and both the players association and the Chairman selecting one person each.²⁸⁸ This three-person panel has the final authority to determine whether the decision was reasonable and supported by evidence.²⁸⁹

While some aspects of this system may not work in the United States, the specificity of rules and punishments as well as former player involvement in the process would vastly improve the current structure of discipline in American sports leagues. While many of the leagues currently have quick appeals for on-field conduct, there are aspects of these three disciplinary systems that can make the American systems more fair, consistent, and efficient.²⁹⁰

283. *Id.*

284. *Id.* at 141–42.

285. *Id.* at 142.

286. *Id.* at 142–43.

287. *Id.* at 143. The NRL salary cap is \$5.15 million for the twenty-five highest paid athletes. *Salary Cap Breakdown: NRL Payments for the Top 25 2013 Cap*, NRL.COM, <http://www.nrl.com/nrlhq/referencecentre/salarycap/tabid/10434/default.aspx> (last visited Oct. 4, 2013). This equates to a maximum average salary of \$176,000 per player, or just over 5% of the average MLB player's salary, less than 3.5% of the average NBA player's salary, 7.3% of the average NHL player's salary, and only slightly higher than a typical NFL practice squad player. See Joe Dorish, *Average Salaries in the NBA, NFL, MLB, and NHL*, YAHOO SPORTS (Nov. 12, 2011), <http://sports.yahoo.com/nba/news?slug=ycn-10423863>; Brian McIntyre, *New England Patriots Have Top-Paid NFL Practice Squad*, NFL.COM (Sept. 7, 2012, 7:52 AM), <http://www.nfl.com/news/story/0ap1000000059339/article/new-england-patriots-have-toppaid-nfl-practice-squad>; *MLB Salaries*, CBSSPORTS.COM, <http://www.cbssports.com/mlb/salaries/avgsalaries> (last visited Oct. 4, 2013).

288. Dobinson & Thorpe, *supra* note 226, at 143.

289. *Id.* at 143–44.

290. See MLB CBA, *supra* note 54, at art. XI, § C; NFL CBA, *supra* note 72, at art. 46.

V. APPLICABLE ASPECTS OF JUDICIAL REVIEW IN THE UNITED STATES LEGAL SYSTEM

The structure of the U.S. court systems generally involves a lower court that initially hears cases and at least one appellate court in the jurisdiction that hears potential review.²⁹¹ Traditionally, lower court determinations of fact face a clearly erroneous standard of review by appellate courts, whereas the lower court's legal holdings are reviewed de novo.²⁹² Further, a lower court judge's discretionary decision is usually reviewed under an "abuse of discretion" standard.²⁹³ All appeals in this system are conducted by a completely separate court to reduce, and ideally eliminate, the potential for bias.²⁹⁴ The established appellate procedure not only serves to preserve justice, but also as a check on lower court judges.²⁹⁵ One of the biggest concerns about lower court judges is maintaining impartiality, or at least the perception of it.²⁹⁶

Congress understands the importance of this perception, which is why it codified the requirement that a judge disqualify herself if her impartiality "might reasonably be questioned."²⁹⁷ The judge is supposed to act sua sponte and recuse herself.²⁹⁸ However, if a judge does not recuse herself, either party may file a motion to remove the judge from the proceeding by filing an affidavit with the facts and reasons why the party believes the judge is biased.²⁹⁹ The goal is to eliminate bias and

291. See 1 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW: THE STRUCTURE OF GOVERNMENT 31 (8th ed. 2010); *Structure of Federal Courts*, USCOURTS.GOV, <http://www.uscourts.gov/educational-resources/get-informed/federal-court-basics/structure-federal-courts.aspx> (last visited Oct. 4, 2013).

292. Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 285–86 (2002); Chad M. Oldfather & Matthew M. Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 IND. L. REV. 45, 54 (2009).

293. Casey et al., *supra* note 292, at 286, 309–11; Oldfather & Fernholz, *supra* note 292, at 54.

294. Oldfather & Fernholz, *supra* note 292, at 64.

295. See *id.* at 66.

296. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 66–67 (2000). Other important features of the legal system include the right to be heard, notice of laws and charges, the right to cross-examine witnesses, and the right to receive a reasoned decision. RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 20–21 (2011).

297. 28 U.S.C. § 455 (2006).

298. Abramson, *supra* note 296, at 70.

299. 28 U.S.C. § 144 (2006); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1,

enhance public confidence in the justice system by employing an objective test of whether a disinterested observer would significantly doubt the judge's impartiality.³⁰⁰

To demonstrate the importance of public confidence further, the American Bar Association (ABA) published a model rule titled: "Promoting Confidence in the Judiciary."³⁰¹ The rule states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."³⁰² By including the appearance of impropriety, the ABA recognizes that public perception of the system is nearly as important, if not more so, than the justice of the system itself, and that the public will distrust a system that is not impartial.³⁰³ The language in that rule is very similar to the reasoning behind granting the commissioner a best interest power.³⁰⁴

VI. AMERICAN SPORTS ARBITRAL TRIBUNAL (ASAT)

The ASAT would incorporate some particularly effective components from each of the professional American sports CBAs as well as the international systems previously assessed in Part IV. However, various aspects of the ASAT would create new and unique processes for handling disciplinary appeals to make the system as fair, efficient, and effective as possible. This Part will explain the structure of

23–24 (1994).

300. CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.05 (5th ed. 2013); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1233 (2002). The Supreme Court recently reaffirmed the objective reasonable prudent person standard to determine the judge's ability to be impartial. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009). The Court found a judge must recuse himself if the case involved someone who had given him significant campaign contributions. *Id.* at 886–87.

301. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2011). A concept first articulated by James Madison, who recognized that men cannot completely control their biases and must be protected from themselves for the good of the public. THE FEDERALIST NO. 10, at 55 (James Madison) (Harvard University Press 2009). Ironically, it was such a crisis of confidence that led to the MLB making Judge Landis the first commissioner. *See supra* notes 25–27 and accompanying text.

302. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2011) (asterisks omitted).

303. *Id.* at R. 1.2 cmt. 3.

304. Compare MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2011) (requiring that a judge act to promote public confidence in the independence of the judiciary), with MAJOR LEAGUE CONST. art. II, §§ 2–3 (2008), available at <http://bizofbaseball.com/docs/MLConstitutionJune2005Update.pdf> (explaining the commissioner's responsibility to promote the best interests of baseball).

the ASAT, including how the procedures would work, and will explore the potential feasibility of the proposed ASAT.

A. The Creation and Maintenance of the ASAT

Like the CAS and BAT, the ASAT would be an independent body with its own governing documents and code, regardless of the sport involved in the dispute.³⁰⁵ The separate code would establish the structure of the proceedings and codify rules that arbitrators must abide by when making decisions. Similar to the CAS,³⁰⁶ the ASAT would be composed of a group of established arbitrators that have experience in one of the major North American arbitration associations,³⁰⁷ international sports arbitral tribunals,³⁰⁸ a similarly structured court around the world, or any independent arbitrator who can show sufficiently related experience and education.³⁰⁹ The tribunal would be composed of at least ten original arbitrators (the Board), who would have to apply and be appointed by the participating leagues and players' associations.³¹⁰ Like the NRL structure, former-athletes could apply for a position on the ASAT if they can prove in their applications that they have legal experience or training, or related skills that would enable them to effectively adjudicate these types of hearings.³¹¹ Using a similar election policy as the CAS, the Board would then select ten more; that group of twenty would then select ten more, and so on until at least fifty arbitrators had been appointed.³¹² By having the Board select these arbitrators, it is much less likely that an arbitrator would feel a responsibility to rule on behalf of one of the parties in the dispute.

305. See *supra* Part IV.A–B.

306. See *supra* note 232 and accompanying text.

307. For example, the International Institute for Conflict Prevention & Resolution, the AAA, and the Judicial Arbitration and Mediation Services.

308. For example, the CAS, the BAT, and the International Arbitration Association. Additionally, anyone who has served as a league arbitrator would have sufficient experience to be considered.

309. The decision regarding whether the independent arbitrator has sufficient experience and education would be at the discretion of the Board.

310. Ideally the NBA, NBPA, MLB, MLBPA, NFL, NFLPA, NHL, and NHLPA would all participate, but there would be no bar on what league could participate. The only requirement would be incorporating language into its governing documents giving the ASAT authority to function effectively.

311. See Dobinson & Thorpe, *supra* note 226, at 133. A fund would also be created from the fines to provide for athletes' post-career legal education to help prepare athletes for this position.

312. See *supra* note 231 and accompanying text.

Whenever an arbitrator retired or was discharged, the members of the ASAT would have the duty to select a replacement if there were fewer than fifty left; if there were more than fifty, the members would have discretion as to whether to add a replacement. Maintaining at least fifty qualified arbitrators is important to prevent any one arbitrator from dealing with a particular league too frequently.

As in most of the organizations discussed previously, the arbitrators would be expected to perform their duties objectively and independently³¹³ and would be subject to the standards of the code as well as the requirements of the Federal Arbitration Act (FAA).³¹⁴ Adapting the CAS and BAT policies,³¹⁵ either party would have the right to challenge the decision based on the FAA requirements for disclosure, impartiality, abuse of power, and misconduct.³¹⁶ This policy would provide a safeguard for players or leagues that do not get a fair hearing or decision. While the decisions of the panels would be public, all proceedings, documents, and statistics, including the identity of the arbitrators, would be confidential, and if any party were to reveal any confidential information, that party would be subject to a substantial fine, similar to CAS decisions.³¹⁷

All arbitrators could be fired by any league or association during a specified week in the summer each year, similar to the NBA CBA,³¹⁸ however, unlike the current structures for the American professional sports leagues, this request for dismissal must be accompanied by just cause for termination.³¹⁹ This requirement would protect arbitrators from retribution from one party simply because the arbitrator ruled against that party, and increase the public's view of the integrity of the system. These requests would be handled in a confidential manner so the arbitrator would be unaware of who requested the termination, but would know the reasoning for the request. The Board would review the request and determine whether to keep the arbitrator on staff. These

313. BAT RULES, *supra* note 250, at R. 8.3; CAS STATUTES, *supra* note 227, § 18; MLB CBA, *supra* note 54, at art. XI, § A(9).

314. Federal Arbitration Act, 9 U.S.C. § 10 (2012).

315. BAT RULES, *supra* note 250, at R. 8.3; CAS PROCEDURAL RULES, *supra* note 235, at R. 34.

316. 9 U.S.C. § 10.

317. CAS PROCEDURAL RULES, *supra* note 235, at R. 43; CAS STATUTES, *supra* note 227, § 19.

318. *See supra* Part III.C.

319. *See supra* Part III.

procedures would ensure that the accused arbitrators never learn the organization that accused them, so the arbitrators cannot develop a bias against the organization if the Board decides to keep the arbitrator on staff. This system would prevent dismissals and requests without merit and bring accountability to the leagues requesting dismissal.

Slightly altering the NBA system, which lets the commissioner decide on small fines and penalties,³²⁰ the ASAT would have at least three arbitrators on call for small issues that could be settled much more quickly than the large issues, which may require a full trial process. The determination of which disputes would be considered small and which would be considered large would be handled by the leagues in their CBAs and not codified by the ASAT.³²¹ Similar to BAT arbitrators, ASAT arbitrators would have the authority to broker an agreement between the parties, or make an independent decision.³²² This approach would allow the leagues to determine which discipline they believe must be determined quickly and efficiently to maintain justice, such as cases the facts would be relatively straightforward. Further, the leagues would define the issues and punishments that would require intensive fact-finding and a larger investigation, which would require a longer, more court-like trial. Removing the commissioner entirely from the appeals procedure would bring greater integrity to each sport because it would remove the chance of bias or partiality, or at least the public's perception of it.

B. The Small Dispute Process

The small issues would be handled by a single arbitrator, like BAT arbitrations.³²³ These small hearings would involve both parties and would be conducted via video or telephone conference to eliminate the costs and delay of travel. The complainant would be required to provide written notice to both the ASAT and the opposing party, who would be required to file an answer within two business days. The conference would take place at a time agreed upon by the parties, but no later than two business days after the ASAT received the answer and no more than five days after the filing of the complaint. This timetable would ensure the efficient resolution of these disputes and would get

320. *See supra* notes 195–96 and accompanying text.

321. *See supra* note 178 and accompanying text.

322. BAT RULES, *supra* note 250, at R. 12.3.

323. *Id.* at R. 8.1.

innocent players back playing as early as possible. Similar to the power of the NBA Commissioner, the arbitrator would have authority to affirm or reduce the league's decision, but not to increase it.³²⁴ The parties would make the entirety of their arguments during this hearing, and there would be no required brief or discovery process because of the limited facts involved. The parties would need to provide any evidence they believe necessary to convince the arbitrator with during this conference so the opposing party would have a chance to dispute it. Like the decisions of most of the leagues' arbitrators, these decisions would be final and binding.³²⁵ Due to the limited fact-finding required, these smaller disputes would likely be resolved quickly. All decisions would be documented to establish a system of precedent, so the disputes could be resolved fairly and referenced in future cases. This documentation would make sure the players know exactly what type of conduct would make them liable for specific suspensions and fines and would eliminate the ambiguity that currently exists under the CBAs.

C. The Large Dispute Process

Large disputes would be heard by a panel of three impartial arbitrators, similar to CAS proceedings.³²⁶ Differing from the CAS system, these arbitrators would be randomly selected and an algorithm would be created to prevent any individual arbitrator from hearing disputes predominantly from one sport.³²⁷ Like the power of the NBA Commissioner,³²⁸ the panel would have authority to affirm or reduce the league's decision, but not to increase it. Additionally, comparable to the NRL system, these decisions would be documented and would set precedent for each league that would be applicable in similar future

324. NBA CBA, *supra* note 192, at art. XXXI, § 9(a)(4).

325. BAT RULES, *supra* note 250, at R. 16.5; CAS PROCEDURAL RULES, *supra* note 235, at R. 46; MLB CBA, *supra* note 54, at art. XI, § B; NBA CBA, *supra* note 192, at art. XXXI, § 6; NFL CBA, *supra* note 72, at art. 46, § 2(d); Dobinson & Thorpe, *supra* note 226, at 142-43.

326. CAS PROCEDURAL RULES, *supra* note 235, at R. 50.

327. *Id.* at R. 40.2. This algorithm would prevent the arbitrators from becoming too familiar with any particular league or players association, which would avoid any previous biases from coming into play even subconsciously. The system benefits from the arbitrators' legal and analytical skills rather than their familiarity with any particular sport. Unfortunately, the author is not a mathematician and unable to present an example of said algorithm.

328. NBA CBA, *supra* note 192, at art. XXXI, § 9(a)(4).

situations per league.³²⁹ Moreover, the totality of the circumstances would come into play for each hearing to prevent a player who went through reasonable efforts to make sure he was not breaking the rules from being disciplined, like J.C. Romero.³³⁰ Thus, no punishments would be handed out with a strict liability standard, and all appellants would have the opportunity to truly clear their name.

The ASAT would not hand out discipline; it would still be up to the individual leagues to determine the rules and punishments and to initially enforce those rules. Instead, the tribunal would only be used when the punished player disputed the discipline and wished to appeal the decision. The arbitrators would analyze the league's decision based on the league's governing documents and a reasoned brief submitted by the league. This brief would provide the ASAT with any evidence, such as previous conduct or applicable precedent, that it would need to confirm the decision and so that the player could effectively make his or her defense, akin to the NRL system.³³¹ Additionally, if the CBAs still had ambiguous language, like the NFL's "flagrant and gratuitous" standard for increasing fines and suspensions,³³² then the brief would need to clarify the explicit type of conduct that would result in the increased penalty by giving examples of past suspensions or fines for similar conduct by players in similar situations. This brief would have to be submitted within five business days of the written notice of the player's appeal to keep the process efficient.

The hearing would take place between a week and ten days after the notice of appeal, and the parties would submit briefs to the ASAT panel at least two days in advance, similar to the NRL and NFL structures.³³³ Though not required, a player would have the right to be represented by an attorney or a union representative. The appellant player would have to prove that the league was being arbitrary and capricious, abusing its power, or not following its own rules in handing down the particular discipline. The player could use the totality of the circumstances, including on- and off-court conduct, other players' punishments, and

329. Dobinson & Thorpe, *supra* note 226, at 135.

330. *See supra* notes 49–53, 64 and accompanying text.

331. Dobinson & Thorpe, *supra* note 226, at 138.

332. NFL CBA, *supra* note 72, at art. 46, § 1(d).

333. *Id.* at art. 46, § 2(i); Dobinson & Thorpe, *supra* note 226, at 124–27. As opposed to the NBA system, which allows for a much greater timeframe. NBA CBA, *supra* note 192, at art. XXXI, § 4.

any other evidence that could show injustice. The league would also have the right to participate in the hearing, but would not be required to participate if the evidence submitted in the brief was sufficient.³³⁴ Like the CAS policy, discovery requests would be granted at the panel's discretion.³³⁵ Further, the player would be entitled to any evidence used in the investigation, much like the MLB system.³³⁶ The hearing would not have a particular time limit, but must allow for each party to present all of its evidence to ensure justice. Arbitrators would publish a reasoned decision for each case, which the league could then use as a basis for how to handle future situations. These publications would be anonymous, like the CAS decisions, unless the appellant waived his or her right to privacy. This documentation would hopefully prevent future disputes because players would better understand the likely penalties for their actions and the league would be able to look at precedential decisions to determine future discipline. Like the decisions of most of the leagues' arbitrators, these decisions would be final and binding.³³⁷

D. Funding the ASAT and Understanding the Fees

The Board and arbitrators would be paid using only the arbitration rates, for which there would be two base rates, one for small issues and one for large, and additional incremental increases as would be explained in the code.³³⁸ These rates would be determined by the average of the fair market rates of the major North American arbitration agencies. These fees would be shared equally by the union representing the player and the league, but would be refunded to the winning party by the opposing side. Any fines that the panel affirms would be payable to the league and the league would follow its own CBA to determine the use of those funds. Embracing an element of the

334. The league could be represented by any active member of the commissioner's office who participated in the original disciplinary decision.

335. CAS PROCEDURAL RULES, *supra* note 235, at R. 44.3.

336. MLB CBA, *supra* note 54, at art. XII, § D.

337. BAT RULES, *supra* note 250, at R. 16.5; CAS PROCEDURAL RULES, *supra* note 235, at R. 46; MLB CBA, *supra* note 54, at art. XI, § B; NBA CBA, *supra* note 192, at art. XXXI, § 6; NFL CBA, *supra* note 72, at art. 46, § 2(d); Dobinson & Thorpe, *supra* note 226, at 142-43.

338. The incremental expenses could be imposed for excessively long hearings, procedures to strike a particular arbitrator for a previous relationship with a party, or similar circumstances that would make that particular hearing longer and more difficult than the norm, similar to Rule 11 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 11.

NFL's CBA,³³⁹ any fine imposed by the arbitrators for conduct against the rules of the ASAT, such as disclosure of confidential information, unreasonable delay, or bad faith, would be directly paid to the ASAT, which would delegate the funds to one of five selected charities based on the recommendation of the opposing party.³⁴⁰ Like the BAT system, the arbitrator would determine what proportion of expenses each side would be required to pay, with the exception that parties would be responsible for their own witnesses.³⁴¹ Further, the panel could award attorney's fees if it found that one party acted in bad faith or filed a frivolous claim. These rules would make sure that no athlete would be unable to bring a case due to expense, and would guarantee that the arbitrators would be paid a fair rate, and that neither party would unduly delay the proceedings or act with malice because of the repercussions of fines.

E. The Potential Obstacles to Creating the ASAT

Historically, CBA negotiations have often focused around monetary issues.³⁴² The current state of the economy has only made these issues more important and made it more difficult to come to an agreement.³⁴³ These issues have included free agency, salary caps, wage restrictions, and revenue splits.³⁴⁴ In fact, during the most recent collective bargaining negotiations between the NFL and NFLPA, the most significant changes were in terms of the revenue split, the salary cap and minimum spending requirements, bonus forfeitures, rookie compensation, guaranteed contracts, and drug testing.³⁴⁵

While the NFL Commissioner's disciplinary power had been a popular topic of discussion and most players were not happy with it, the new CBA left the structure nearly unchanged.³⁴⁶ This phenomenon is

339. NFL CBA, *supra* note 72, at art. 46, § 5(c).

340. One of these would be an athlete education fund, which would grant scholarships to retired athletes looking to gain a legal education to eventually become an arbitrator.

341. BAT RULES, *supra* note 250, at R. 17.3.

342. See 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 4.9 (Gary A. Uberstine ed., 2012); Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 7 (2012).

343. Parlow, *supra* note 2, at 203.

344. Deubert et al., *supra* note 342, at 11–14.

345. *Id.* at 44–63, 65–66.

346. *Id.* at 63–65.

not unique to the NFL; the new NBA CBA also involved mostly changes to monetary issues, and did not address disciplinary provisions.³⁴⁷ Similarly, the new MLB Basic Agreement involved a variety of changes to monetary issues, but, other than a change to drug testing, no other mentions of disciplinary provisions.³⁴⁸ These most recent CBA negotiations suggest that disciplinary issues are not very important to the players or the players' unions.

Since it is highly unlikely that during the next round of CBA negotiations disciplinary appeals will suddenly become more important, it is probably up to the leagues to take the issue of fair appellate procedure up themselves. However, doing so would involve giving up a significant power that the leagues have over the players, which would likely be met by the leagues asking for the players to give up more money in exchange, which they are very unlikely to do. Therefore, it is unlikely that there will be any disciplinary changes in the major American sports leagues, let alone something as drastic as this Comment proposes; however, similar systems have been established in other nations and internationally, showing that it can be done.³⁴⁹ Unfortunately, this means that the players and the fans will likely have to deal with a system that is unfair, inconsistent, and inflexible.

VII. CONCLUSION

Whether the ASAT is a realistic concept that can effectively be incorporated into the American sports governance structure remains to be seen. One thing is certain, changes need to be made. The current disciplinary provisions in the CBAs of the four major American professional sports leagues are ambiguous, at best, as to what conduct will result in punishment, and the extent of the punishment that will be handed down.³⁵⁰ The NFL and NBA have attempted to create conduct policies, which work to varying degrees,³⁵¹ but that does not fully

347. Larry Coon, *Breaking Down Changes in New CBA*, ESPN.COM (Dec. 3, 2011, 9:01 PM), http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one.

348. See Anthony DiComo, *Key Points of Collective Bargaining Agreement*, MLB.COM (Nov. 22, 2011, 2:45 PM), http://mlb.mlb.com/news/article.jsp?ymd=20111122&content_id=26026776.

349. See DEBORAH HEALEY, *SPORT AND THE LAW* 177–81 (4th ed. 2009).

350. NFL CBA, *supra* note 72, at art. 46, § 1(a), (d); see also MLB CBA, *supra* note 54, at art. XII, § A–B, NBA CBA, *supra* note 192, at art. XXXI, § 9.

351. NBA CBA, *supra* note 192, at art. VI; NFL PCP, *supra* note 78; see also *supra* text accompanying note 185.

encompass the breadth of conduct for which they have doled out discipline. Too many of these decisions are arbitrary and without sufficient reasoning.³⁵²

Furthermore, the system of appeals that allows the commissioner's office to hear an appeal on discipline it handed out is a clear conflict of interest that must be removed from the system to give it more integrity.³⁵³ As was evidenced in Part II, a commissioner will rarely, if ever, overturn or reduce a punishment that he had a hand in creating.³⁵⁴ The current state of disciplinary systems in the American sports world is in disarray, as exemplified by the Bounty-Gate mess in the NFL,³⁵⁵ the Ryan Braun situation in the MLB,³⁵⁶ and the punishment of the San Antonio Spurs in the NBA,³⁵⁷ as well as many other situations. This problem will not likely be fixed by each league's next CBA unless it is explicitly brought up beforehand. CBA negotiations too often focus only on the money and leave the rest of the CBA alone.³⁵⁸ Thus, it is a burden on the leagues themselves to more explicitly lay out what conduct will be disciplined, and the specifics of the punishments, similar to the NRL governing documents.³⁵⁹ Unfortunately, leagues are unlikely to do so because it would require transparency in the disciplinary process and giving up discretionary power.

Therefore, although the proposed arbitral body would increase the fairness, consistency, and flexibility of the current systems, it will not likely be implemented and the disciplinary procedures of each league is

352. See *supra* notes 78–79, 86–90, 118–22 and accompanying text.

353. See *supra* note 162 and accompanying text.

354. See *supra* Part II.

355. See *supra* notes 85–95 and accompanying text.

356. See Belson, *supra* note 23.

357. See *supra* notes 126–29 and accompanying text.

358. As evidenced by the NHL's recent CBA negotiations that resulted in a lockout, as well as the recent NBA and NFL lockouts that produced little to no change in the disciplinary provisions of the CBA. See Howard Beck, *N.B.A. Reaches Tentative Deal to Save Season*, N.Y. TIMES, Nov. 27, 2011, at A1 (detailing changes in NBA CBA after lockout); Katie Carrera, *The NHL CBA: Analyzing What's New*, WASH. POST (Jan. 14, 2013), <http://www.washingtonpost.com/wp-srv/sports/capitals/2013/cba/index.html> (detailing the major changes to the NHL CBA after the lockout); Mike Garafolo, *NFL, Referees End Lockout After Reaching New Labor Deal*, USA TODAY (Sept. 27, 2012, 1:52 AM), <http://usatoday30.usatoday.com/sports/nfl/story/2012/09/27/nfl-referees-end-lockout-after-reaching-new-labor-deal/57846906/1> (detailing the major issues negotiated during the NFL referee's lockout).

359. Dobinson & Thorpe, *supra* note 226, at 110–11; see also *supra* notes 263–68 and accompanying text.

likely to remain unchanged until a tremendous scandal makes it necessary in order to preserve the integrity of the game.

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