



Personal Foul: Conduct Detrimental to the Team. Penalty Declined?

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ABSTRACT

This article discusses a recent bullying case in the National Football League (NFL) between Richie Incognito (Incognito) and Jonathan Martin (Martin). The incident raises questions regarding the fairness of the “conduct detrimental to the league” and “conduct detrimental to the team” clauses (detrimental conduct clauses) of the new Collective Bargaining Agreement (CBA).¹ Specifically, this article explores whether these detrimental conduct clauses are overly broad and considers whether the appeals process sufficiently protects the rights of NFL players.

Part I discusses what is currently known about the Incognito incident. Part II, in order to explore some legal implications of the incident, provides a brief history of the laws surrounding freedom of speech in the workplace. Part III delves into the NFL’s most recent CBA and is divided into four

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¹ Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2011–2020, art. 42, §1(a)(xv) (2011), *available at* <http://perma.cc/S9RU-R886> [hereinafter NFL CBA].

subsections, which discuss how the detrimental conduct clause is used in the NFL, what detrimental conduct is, how NFL players have been disciplined for detrimental conduct, and the appeal process that is available for players. Part IV discusses how similar clauses are utilized in the NBA and in television contracts. Part V proposes several arguments for and against having such broad and ill-defined clauses. Finally, Part VI discusses the litany of possible outcomes in the Incognito case under the detrimental conduct clause of the NFL CBA.

TABLE OF CONTENTS

I. THE INCOGNITO INCIDENT	216
II. FREEDOM OF SPEECH IN THE WORKPLACE	220
III. THE NFL CBA & THE DETRIMENTAL CONDUCT CLAUSE	221
A. <i>Introduction to the NFL CBA</i>	221
B. <i>Navigating the Detrimental Conduct Clause</i>	223
C. <i>What is Detrimental Conduct?</i>	225
D. <i>Past Examples of Conduct Detrimental to the Team</i>	227
i. Rashard Mendenhall	227
ii. Larry Johnson	228
iii. Kellen Winslow	229
iv. Riley Cooper	229
E. <i>The Appeal Process</i>	231
IV. DETRIMENTAL CONDUCT IN TELEVISION & THE NBA	232
A. <i>Morals Clauses in Television</i>	232
B. <i>Detrimental Conduct in the NBA</i>	234
V. PROS & CONS TO A BROAD DETRIMENTAL CONDUCT CLAUSE	236
VI. PREDICTING THE OUTCOME OF THE INCOGNITO INCIDENT	240
VII. EPILOGUE: THE TED WELLS REPORT	242

I. THE INCOGNITO INCIDENT

The precise facts of the incident between Incognito and Martin are in dispute, but certain details have been confirmed. In October 2013, second year offensive lineman for the Miami Dolphins, Jonathan Martin, left the team after wrestling with emotional issues.² In the days that followed it was

² *Timeline of Dolphins' Alleged Bullying Saga Between Richie Incognito and Jonathan Martin*, USA TODAY (December 17, 2013, 12:34 PM), <http://perma.cc/N8TE-QBX9>.

discovered that Martin had accused ninth year offensive lineman Richie Incognito of harassment.³ As additional evidence emerged connecting Incognito to the harassment charges, the Dolphins suspended Incognito based on what the organization considered to be conduct detrimental to the team.⁴ The incriminating evidence included several text messages containing racial slurs sent from Incognito (who is white), to Martin (who is half African-American).⁵ The most incriminating piece of evidence is an extremely vulgar voicemail, which Incognito admitted to leaving on Martin's phone.⁶ The message said:

“Hey wassup you half-n***** piece of (expletive). I saw you on Twitter, you been training ten weeks. Want to (expletive) in your (expletive) mouth. I'm going to slap your (expletive) mouth. Going to slap your real mother across the face. (laughter). You're still a rookie. I'll kill you.”⁷

Interestingly, the inciting incident that allegedly caused Martin to leave the team was not directly related to the messages delivered by Incognito. Instead, it was a cafeteria prank where several teammates, including Incognito, got up from the dining table when Martin sat down.⁸ Several Dolphins' players said the prank was a running joke, which had been played on many other teammates over the years.⁹ After the cafeteria prank, Martin told Incognito his departure had nothing to do with him.¹⁰ However, Martin later revealed he feared for himself and his family because of Incognito's bullying, which ultimately led to Incognito's suspension.¹¹

³ *Id.*

⁴ NFL CBA, *supra* note 1, art. 42, §1(a)(xv).

⁵ Jason La Canfora, *Dolphins Harassment Case: Text from Incognito to Martin Used Racial Slur*, CBS SPORTS (Nov. 4, 2013, 11:35 AM), <http://perma.cc/W2GJ-WFBY> (describing one text message where Incognito called Martin a half-n***** and another where Incognito threatened to kill Martin's entire family).

⁶ Jay Glazer, *Richie Incognito: I Am Not a Racist*, FOX SPORTS (Nov. 11, 2013, 8:44 PM), <http://perma.cc/7JSV-GA3Z>.

⁷ *Id.*

⁸ Anwar S. Richardson, *Former Dolphins Lineman Lydon Murtha Explains Jonathan Martin Events, Defends Richie Incognito*, YAHOO SPORTS (Nov. 7, 2013, 11:51 AM), <http://perma.cc/ET2L-FZMQ>.

⁹ Lydon Murtha, *Incognito and Martin: An Insider's Story*, SPORTS ILLUSTRATED (Nov. 7, 2013), <http://perma.cc/GC66-L6QB> (The joke was played on players who were suffering from an injury or illness. The crux of the joke was that other players did not want to catch “the bug” from the injured or sick player. In this case, it is rumored that Martin was feeling under the weather).

¹⁰ *Id.*

¹¹ Stephen Mansfield, *Men and Mission: A Lesson from the Incognito Affair*, HUFFINGTON POST (Dec. 30, 2013, 3:39 PM), <http://perma.cc/66N7-G4FR>.

The amount of media attention surrounding the incident may be surprising; however, there are real world implications at stake. The 30-year-old Incognito lost \$252,941 for each game he was suspended.¹² The maximum Incognito (or any other NFL player) can be suspended under the conduct detrimental to the team clause is four games, which is equivalent to about \$1,000,000 of his annual salary.¹³ Incognito and the team ultimately reached a deal where he would only forfeit two games' pay, approximately \$500,000, on the condition that he would agree to sit the remainder of the 2013-2014 season.¹⁴ Per the agreement, Incognito must wait for the NFL to finish its investigation before he can begin the appeal process.¹⁵

As of January 2014, it was still unclear whether Incognito's behavior should be deemed malicious bullying worthy of the massive fine or a mere overreaction from an overly sensitive teammate. In order to put the incident in perspective it is helpful to consider Incognito's checkered history. In 2002, as a freshman at the University of Nebraska, Incognito bullied his teammate Jack Limbaugh to the point where he stormed off the field.¹⁶ During the same season Incognito was suspended one game for an on-the-field fight against a Penn State player, and he was suspended again in the spring for unspecified reasons.¹⁷

In 2004, Incognito was convicted of misdemeanor assault stemming from a fight at a party.¹⁸ As a result of the fight, Nebraska again suspended Incognito. In response, Incognito transferred to Oregon where he was kicked off the team for violating team conditions.¹⁹ In 2005, Incognito declared for the NFL Draft and was selected by the St. Louis Rams, despite the obvious concerns surrounding his character.²⁰ Incognito ultimately enjoyed success

¹² Tom Pelissero, *NFL Players Association Will Support 'All Players' in Dolphins Mess*, USA TODAY (Nov. 5, 2013, 11:19 AM), <http://perma.cc/5WMY-7UFG/>.

¹³ NFL CBA, *supra* note 1, at art. 42, §1(a)(xv) (stating that the maximum fine is an amount equal to one week's salary and/or suspension without pay for a period not to exceed four (4) weeks).

¹⁴ Tom Pelissero, *Richie Incognito Back on Dolphins' Payroll*, USA TODAY (Nov. 29, 2013, 6:59 PM), <http://perma.cc/3E5T-JEC6>.

¹⁵ *Id.* (the appeal process for players punished under the detrimental conduct clause will be discussed in detail later in this article).

¹⁶ Eric Edholm, *Richie Incognito's Troubled Timeline Dates Back to Early College Days*, YAHOO SPORTS (Nov. 5, 2013, 5:46 PM), <http://perma.cc/47TP-XYGS>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

on the field as an offensive lineman²¹, but his character issues continued to trouble him. During his four seasons with the Rams, Incognito was fined \$85,000 by the league for several on-the-field incidents ranging from striking another player to making inappropriate comments to a referee.²²

In comparison, Martin has no blemishes on his record. A graduate of Stanford University, Martin is described by teammates as an introvert.²³ There is no evidence that Martin has ever been accused of being a troublemaker. Based on Incognito's checkered history, it is fair to assume that the incident was just another example of his disruptive behavior. However, the most important fact in dispute is whether Miami Dolphins coaches may have known about or even coerced Incognito into bullying Martin in order to "toughen him up."²⁴

A few weeks after his suspension, Incognito said he did not realize his actions were hurting Martin; although he also acknowledged that what he considered commonplace teasing may have gone too far.²⁵ Perhaps Incognito believed his blatantly over-the-top and vulgar comments were commonplace, because that sort of behavior is condoned in most NFL locker rooms.²⁶ Lydon Murtha, a Miami Dolphin's offensive lineman from 2009 to 2012, wrote an article describing how rampant bullying is in the NFL.²⁷ He said, "[t]he coaches know who's [*sic*] getting picked on and in many cases call for that player to be singled out. Any type of denial on that side is ridiculous."²⁸

²¹ Peter Berkes, *2013 Pro Bowl: Richie Incognito Earns 1st Appearance*, SB NATION (Jan. 21, 2013, 8:22 AM), <http://perma.cc/GZ7J-HSR4> (describing how Incognito was considered a hot-head early in his career, but did not receive any personal foul penalties in 2012, while starting in all 16 games for the Miami Dolphins).

²² Tim Kephart, *Incognito Has Troubled History In Football*, CBS MIAMI (Nov. 4, 2013, 3:27 PM), <http://perma.cc/EPA4-LF4R>.

²³ Chris Perkins, *Dolphins Players Like Martin, but Love Incognito*, SUN SENTINEL (Nov. 5, 2013), <http://perma.cc/QGP4-HPVS> (stating that Incognito is "the resident funny guy, the cut-up, the class clown, the crazy one who keeps everyone laughing," while "Martin is reserved, quiet, and much more of an introvert").

²⁴ Omar Kelly, *Sources: Dolphins Coaches Asked Incognito to Toughen up Martin*, SUN SENTINEL (Nov. 5, 2013), <http://perma.cc/T36J-UHHU> (stating that Miami Dolphins coaches asked player Richie Incognito, who was the offensive line's undisputed leader, to toughen up teammate Jonathan Martin after he missed a voluntary workout last spring).

²⁵ Jay Glazer, *Richie Incognito: I Am Not a Racist*, FOX SPORTS (Nov. 11, 2013, 8:44 PM), <http://perma.cc/49TS-HXEN>.

²⁶ Lydon Murtha, *Incognito and Martin: An Insider's Story*, SPORTS ILLUSTRATED (Nov. 7, 2013), <http://perma.cc/DQ7J-BFM4>.

²⁷ *Id.*

²⁸ *Id.*

The Incognito incident raises questions regarding how NFL teams and current NFL Commissioner Roger Goodell discipline players for off-the-field comments by utilizing the detrimental conduct clause. This article will explore how the NFL and other organizations, including the National Basketball Association (NBA) and television networks, punish employees for comments made outside the workplace. Additionally, this article discusses possible changes to the NFL's detrimental conduct clause to make it more conducive to players' rights, while concurrently providing NFL management power to control its employees. Finally, this article will discuss the potential ramifications faced by Incognito depending on the various possible outcomes of the NFL's investigation (still pending in January 2014). Because the focal point of this article is misconduct involving a player's off-the-field comments, it is important to understand some of the underlying concepts of how freedom of speech can be limited in the workplace.

II. FREEDOM OF SPEECH IN THE WORKPLACE

Some commentators have argued that Richie Incognito should not be punished by the NFL because his comments were protectable free speech under the First Amendment.²⁹ There are several problems with this argument, the first being that free speech is not an absolute right. Free speech can be limited in several ways; for example, child pornography is not protected,³⁰ true threats are not protected,³¹ and most importantly for Incognito, not all comments in the workplace are protected.³² Workplace harassment law has become one of the broadest speech restrictions and has been used to suppress political statements, sexual jokes, and even religious comments.³³ More importantly, First Amendment free speech protection does not extend to private entities.³⁴ Thus, private employers, such as NFL-affiliated organizations, are allowed to terminate their employees based on

²⁹ Jay Busbee, *Shutdown Corner Mailbag: Richie Incognito, bullying, and free speech*, Yahoo Sports, (Nov. 7, 2013), <http://perma.cc/K3NX-RMF5>.

³⁰ See *New York v. Ferber*, 458 U.S. 747 (1982).

³¹ See *Virginia v. Black*, 538 U.S. 343 (2003).

³² Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 Ohio St. L.J. 341, 341(1994) (stating how a private-sector employer in the United States may fire an employee for the employee's political views).

³³ Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law — A Growing Conflict*, U.C.L.A. Law School, <http://perma.cc/KT72-MVZV> (last visited April 17, 2014).

³⁴ *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (First Amendment applies only to government speech restrictions).

speech they deem harmful to their business.³⁵ As a result, there is nothing unconstitutional about the NFL using the detrimental conduct clause as a tool to suppress comments made by NFL players.

In some respects, the NFL handles detrimental conduct by its employees in a more lenient fashion than most private businesses. In many occupations an employee would be immediately terminated for the sort of workplace harassment that allegedly occurred as part of the Incognito incident. However, the NFL workplace is different from most occupations. Unlike most workplace environment, the NFL is well-known as a raucous environment where uncouth comments are made on a daily basis.³⁶

Another difference between NFL teams and most employers is that if a player is terminated by an NFL organization there is nowhere else the player can be paid a comparable salary to play football. The Canadian Football League (“CFL”), which is a common second choice for players who cannot make it in the NFL, has an average player salary of \$80,000 per year compared to the NFL’s average salary of \$1.9 million per year.³⁷ The NFL has a veritable monopoly on the sport of football. However, the NFL (like any workplace) is allowed to implement policies to restrict some behavior and speech. Regardless of the legality or constitutionality of the NFL’s conduct policy, with so much money on the line it is important to determine if there are better alternatives to the current system. The next section will explain the intricacies of the current conduct policy system.

III. THE NFL CBA & THE DETRIMENTAL CONDUCT CLAUSE

A. *Introduction to the NFL CBA*

The NFL CBA is the most influential agreement in the NFL; however, it is just one agreement made between the National Football League Players Association (NFLPA³⁸) and NFL Management Council.³⁹ There are several

³⁵ *Id.*

³⁶ See Michael David Smith, *Richard Sherman calls NFL banning the N-word “an atrocious idea”*, NBCSports, (Mar. 3, 2014). <http://perma.cc/Y59N-HKGV> (explaining how the N-word is used frequently on the field by NFL players).

³⁷ Adriana Valente, *Average CFL Player Makes Only \$80,000 Per Year*, The Richest (Nov. 25, 2013) <http://perma.cc/RF5W-4HSP>.

³⁸ See NFL Players Association Constitution, Article 1.03 (March 2007) (describing how the National Football Players Association was established in part to protect the player’s interests and provide formal representation during collective bargaining agreement negotiations), available at <http://perma.cc/WZJ4-D5LN> (last visited April 17, 2014).

other contracts that dictate the power between players and management such as Uniform Player Contracts (UPC) and the NFL Constitution and Bylaws.⁴⁰ What makes the CBA so influential is it contains a supremacy clause stating that it supersedes the UPC and NFL Constitution and Bylaws.⁴¹ In 2011 there was a lockout by the owners of the players due to a dispute over the terms of a contemplated new NFL CBA, which had players, owners, and fans pleading for the NFL Management Council and the NFLPA to come to an agreement. Before the 2011 lockout, the NFL was operating under the provisions of a CBA that was last amended in 2006.⁴² When the 2011 CBA was ratified it contained much of the same language regarding detrimental conduct as the 2006 CBA did.⁴³ In August 2011, the lockout ended and the NFL and the NFLPA entered into the new CBA.⁴⁴ One of the most contentious issues was whether Commissioner Goodell would retain his disciplinary power, which empowers the Commissioner to make judgment calls on what off-the-field incidents should be considered conduct detrimental to the league, regardless of the legality of the conduct.⁴⁵

Under the new CBA there are two types of detrimental conduct: (1) conduct that is detrimental to the team; and (2) conduct detrimental to the league.⁴⁶ Each of the thirty-two NFL teams may have their own definition of conduct detrimental to the team because there is no exact definition in the CBA.⁴⁷ In comparison, conduct detrimental to the league is decided by the Commissioner.⁴⁸ Any punishment the commissioner imposes upon a player for conduct detrimental to the league precludes or supersedes team punishment for such conduct.⁴⁹

³⁹ Benjamin Leibovitz, *Unnecessary Roughness? A Review of the NFL Commissioner's On-The-Field Disciplinary Powers*, 20 Sports Law. J. 187, 191 (2013).

⁴⁰ *Id.*

⁴¹ *Id.* at 191–92. See also NFL CBA *supra* note 1 at art. 2, §1.

⁴² Leibovitz, *supra* note 39, at 200.

⁴³ See Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, art. 8 (2006), available at <http://perma.cc/MUN7-RBBE>.

⁴⁴ Howard Fendrich, *NFL Lockout Over: Owners, Players, Agree to a Deal*, HUFFINGTON POST (July 25, 2011, 10:20 PM), <http://perma.cc/3SVP-7KE3>.

⁴⁵ Louis Bien, *CBA Hung up on Roger Goodell's Control of Personal Conduct Policy*, SB NATION (Aug. 3, 2011, 8:14 PM), <http://perma.cc/4M2K-43F2>.

⁴⁶ NFL CBA, *supra* note 1.

⁴⁷ *Id.*

⁴⁸ *Id.* at art. 46, §1.

⁴⁹ *Id.* at art. 42, §3(b).

Many players feel the Commissioner acts as judge, jury, and executioner in all cases concerning off-the-field incidents.⁵⁰ It is unclear whether players are motivated by a desire for greater separation of powers, a personal vendetta against Commissioner Goodell for past fines, or have another reason to oppose the Commissioner's power. Regardless of the players' concerns, Goodell retained his power.⁵¹ The next section discusses how to navigate the complicated detrimental conduct clauses.

B. *Navigating the Detrimental Conduct Clause*

The detrimental conduct clause appears in several sections of the 2011 NFL CBA, including two sample contracts attached as appendices. The first contract in Appendix A is a sample NFL player contract, which is a template for contracts the players sign.⁵² The clause located under the subheading "integrity of the game" states:

"When a player is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract."⁵³

This exact language also appears in Appendix J, which is a sample contract for a player on a team's practice squad.⁵⁴

Similar language also appears in Article 46 of the CBA, which addresses how fines and suspensions may be levied against players by the commissioner, "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."⁵⁵ This broad language could apply to a litany of harmless acts where a player hypothetically is fined millions of

⁵⁰ Josh Alper, *Ryan Clark Toning Down his Comments Toward the League*, NBC SPORTS (Aug. 21, 2011, 10:59 AM), <http://perma.cc/8SQU-9QDV> (discussing Ryan Clark, a defensive back and the NFLPA representative for the Pittsburgh Steelers, and his involvement in the decision to vote against the new CBA because it handed Goodell the power to play judge, jury, and executioner when it comes to player discipline).

⁵¹ Joel Thorman, *NFL Lockout: Roger Goodell Retains Power to Discipline in New CBA*, SB NATION (Aug. 4, 2011, 10:11 AM), <http://perma.cc/EH7B-W5K7>.

⁵² NFL CBA, *supra* note 1, at app. A.

⁵³ *Id.*

⁵⁴ *Id.* at app. J.

⁵⁵ *Id.* at art. 46 (excluding from the definition of conduct detrimental to the league unnecessary roughness and unsportsmanlike penalties that occur in games,

dollars for making controversial comments regarding sexual orientation, politics, or the game of football itself.⁵⁶ Under this broad definition there is virtually no limit as to what the Commissioner may consider as conduct detrimental to the league.

Additionally, there exists similarly broad language in Article 42 of the CBA referring to conduct detrimental to the team or club.⁵⁷ This broad leeway essentially means NFL teams have their own personal conduct policies, which apply to all players on those teams.⁵⁸ The Incognito case is an example of a club, the Miami Dolphins, utilizing this power.⁵⁹ As stated above, a player cannot be penalized by both his team and the Commissioner; however, if the Commissioner decides to penalize a player the Commissioner's disciplinary action will supersede any action taken by the club.⁶⁰

There are limitations on how severely a player can be punished by his team. Article 42 of the CBA describes the penalties that may be enforced upon a player who is found to have been involved in conduct detrimental to the club.⁶¹ The key provision says:

“Conduct detrimental to Club—maximum fine of an amount equal to one week's salary and/or suspension without pay for a period not to exceed four (4) weeks. This maximum applies without limitation to any deactivation of a player in response to player conduct (other than a deactivation in response to a player's on-field playing ability), and any such deactivation, even with pay, shall be considered discipline subject to the limits set forth in this section. The Non-Injury Grievance Arbitrator's decision in *Terrell Owens* (Nov. 23, 2005) is thus expressly overruled as to any Club decision to deactivate a player in response to the player's conduct.”⁶²

which are punishable by someone appointed by the league commissioner, as opposed to by Roger Goodell himself).

⁵⁶ Several examples of players being fined and suspended by teams for just these reasons will be described in the section “Past Examples of Conduct Detrimental to the Team.”

⁵⁷ NFL CBA *supra* note 1, at art. 42, §1(a)(i)–(xv).

⁵⁸ *Id.* at art. 42, §2(a).

⁵⁹ *Id.*

⁶⁰ *Id.* at art. 42, §3(b).

⁶¹ *Id.* at art. 42, §1(a)–(xv).

⁶² *Id.* at art. 42, §1(xv). (The Terrell Owens case, which was expressly overruled in the 2011 CBA held the Philadelphia Eagles could suspend Owens for the maximum four games, as well as not permit him to play or practice after those four games, due to the nature of his conduct and its destructive and continuing threat to the team. Under the new CBA the Eagles would have had to release Owens or allow him to play after the four week suspension. Thus, the maximum penalty is a four-game suspension without pay, there can be no further penalties such as not allowing

An NFL season consists of seventeen weeks and NFL players are paid 1/17th of their salary each week.⁶³ Thus, there is a lot of money at stake⁶⁴ when up to roughly twenty-five percent of that salary can be deducted for conduct detrimental to the club.

In comparison, there does not appear to be the same limitation on the Commissioner's power to punish a player in excess of a four-week pay deduction. As stated above, NFL player contracts state that the Commissioner has the power to fine players a reasonable amount; to suspend a player for a certain period or indefinitely; and/or to terminate their contract. Thus, the Commissioner could hypothetically suspend players without pay for an entire year or even ban a player from the league, potentially costing the player millions of dollars.

Incognito was suspended by the Dolphins for conduct detrimental to the club and had the potential to lose a maximum four game checks, which totaled approximately \$1,000,000 based on his guaranteed salary before he took the deal forfeiting \$500,000 and agreeing to sit the rest of the season. However, as the investigation continued, the Commissioner had the power to impose a different, harsher penalty, which under the CBA would supersede the penalty levied by the Miami Dolphins. If the Commissioner decided to suspend Incognito for the entire year he would have essentially fined Incognito the remainder of his \$4,000,000 guaranteed contract. This leads to the difficult question of what exactly is detrimental conduct.

C. *What is Detrimental Conduct?*

The CBA states that a team can fine and suspend players for conduct detrimental to the club; however, detrimental conduct is not appropriately defined.⁶⁵ To determine what the CBA considers detrimental conduct, it is helpful to understand what conduct the CBA does not include under the detrimental conduct umbrella. The CBA specifies the maximum penalties for players who are overweight, absent or late from meetings, lose their playbook, get ejected from a game, throw a football into the stands, and

the player to practice or play after the four-games, instead the player must be released or allowed back on the team).

⁶³ Rob Demovsky, *Players Get Paid in Playoffs, Too*, ESPN: NFL NATION (Jan. 1, 2014, 11:30 AM) <http://perma.cc/4RTA-TNR3>.

⁶⁴ Monte Burke, *Average Player Salaries in the Four Major American Sports Leagues*, FORBES, (Dec. 07, 2012 15:29 EST), <http://perma.cc/SU4B-MLWJ>.

⁶⁵ See NFL CBA, *supra* note 1; see also Darren Heitner, *Should Richie Incognito Appeal His Suspension By The Miami Dolphins*, FORBES (Nov. 13, 2013), <http://perma.cc/3G26-WKGL>.

several other infractions.⁶⁶ Thus, these acts are not detrimental conduct because they are listed separately from conduct detrimental to the club clause.

Another area rife with potential for misconduct that is explicitly excluded from the detrimental conduct definition is on-the-field conduct. Article 46 states:

“All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows:”⁶⁷

Subsection (b) refers to the process for determining whether players should be fined for unnecessary roughness and unsportsmanlike conduct on the playing field.⁶⁸ Article 46 carves out three separate offenses: unnecessary roughness and unsportsmanlike conduct, other conduct on the playing field, and conduct detrimental to the integrity of, or public confidence in, the game of professional football (conduct detrimental to the league). This distinction demonstrates conduct that occurs on the playing field should also be considered separately from detrimental conduct. One example of misconduct provided in the CBA is associating with gamblers or gambling activity, regardless of whether the gambling is related to the NFL.⁶⁹ Additionally, the NFL player contract in the CBA prohibits using or providing stimulants or other drugs used to enhance on-the-field performance.⁷⁰ Then the player contract broadly defines detrimental conduct as, “any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League.” This broad statement opens up Pandora’s Box as to what may be considered detrimental conduct.

⁶⁶ NFL CBA, *supra* note 1, at art. 42, §1(a)(i)–(xv).

⁶⁷ *Id.* at art. 46, §1(a).

⁶⁸ *Id.* at art. 46, §1(a)-(c). (describing how fines for unnecessary roughness and unsportsmanlike conduct shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such notification, the player, or the NFLPA with his approval, may appeal in writing to the Commissioner. Additionally, the Commissioner or person appointed by the Commissioner must consult with the Executive Director of the NFLPA when fining players for \$50,000 or more).

⁶⁹ NFL CBA, *supra* note 1, at app. A. §15.

⁷⁰ *Id.*

The one definition of detrimental conduct explicitly provided in Article 42 says any curfew violation the night before a club's game can be considered conduct detrimental to the club.⁷¹ In sum, conduct detrimental to the club encompasses any off-the-field conduct not listed in other areas of the CBA, as well as curfew violations. In comparison, conduct detrimental to the league appears to encompass the same conduct, except curfew violations, which is explicitly left for team discipline. This roundabout way of defining detrimental conduct is a result of the lack of an overt definition within the CBA.

What type of off-the-field conduct is considered detrimental? Interestingly, many off-the-field criminal acts such as domestic violence have largely been ignored by the NFL and are rarely considered detrimental conduct.⁷² In an effort to specify the type of off-the-field conduct that is considered detrimental it is helpful to look at past examples where players have been fined for violating the detrimental conduct clause. The problem that arises is that teams have inconsistently determined what conduct necessitates the hefty fines associated with violating the clause, particularly in the realm of free speech. Players have been fined (or not fined) for comments that are political, derogatory, or even references to a player's treatment by his team. Below are a few examples of how teams have reacted to player comments.

D. *Past Examples of Conduct Detrimental to the Team*

i. Rashard Mendenhall

In response to Osama Bin Laden's death and the subsequent celebratory acts in the United States, Pittsburgh Steelers running back Rashard Mendenhall took to Twitter and posted several controversial tweets.⁷³ One tweet said, "[w]hat kind of person celebrates death? It's amazing how people can HATE a man they have never even heard speak. We've only heard one side."⁷⁴ The more scandalous tweet stated, "[w]e'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style."⁷⁵ The latter tweet refers to the preposterous con-

⁷¹ *Id.* at art. 42, §1(a)(xiv).

⁷² Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 146 (2010).

⁷³ *Steeler Questions Accounts of 9/11*, FOX SPORTS (May 3, 2011), <http://perma.cc/364F-BCQ5>.

⁷⁴ *Id.*

⁷⁵ *Id.*

spiracy theory that the September 11th attacks were the result of an inside job by the United States government.

In response to the tweets, the Steelers president issued a statement regarding the Steelers' support for the troops.⁷⁶ At no time did the NFL overtly threaten or imply that Mendenhall's controversial comments amounted to conduct detrimental to the league. This is one example where a team and the league were willing to let controversial comments fly under the radar.

ii. Larry Johnson

In comparison to the Mendenhall case, former Kansas City Chiefs running back Larry Johnson faced a public firestorm after making controversial comments via Twitter.⁷⁷ His comments included the use of a three-letter homophobic slur, the belittling of a fan for making less money than him, and mocking his coach Todd Haley's lack of playing experience.⁷⁸ Unlike Mendenhall, Johnson was severely reprimanded under the conduct detrimental to the team clause. Johnson's two week suspension cost him approximately \$600,000 in lost wages.⁷⁹

Despite the litany of comments made by Johnson, the real catalyst in his suspension appears to be his use of homosexual slurs.⁸⁰ The offensive commentary by Mendenhall and Johnson both brought a barrage of criticism from fans and the media. Another similarity is that both players' tweets can be construed as controversial political or religious opinions. Mendenhall's tweet showed support for the highly divisive 9/11 "truth" group, which often cites Muslim discrimination and the Bush Administration to support their conspiracy theory that the September 11th attacks were an inside job.⁸¹ In comparison, Johnson's homophobic remarks may have been based on a religious or political opinion that opposes homosexuality. The biggest difference in the two cases is that Johnson personally attacked a fan while Mendenhall was making more general political statements. In the end, Mendenhall was not reprimanded while Johnson was fined approximately

⁷⁶ *Id.*

⁷⁷ Judy Battista, *As Johnson's Suspension Ends, So Does His Time With the Chiefs*, NEW YORK TIMES (Nov. 9, 2009), available at <http://perma.cc/3C59-862P>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Johnson Suspended Until Nov. 9*, ASSOCIATED PRESS (Oct. 29, 2009), <http://perma.cc/X9Y9-TA6F>.

⁸¹ See 911TRUTH.ORG, <http://www.911truth.org/> (last visited Apr. 11, 2014).

\$600,000. When teams fine players for controversial comments it raises speculation about why teams punish some players but not others.

iii. Kellen Winslow

Another player fined significant amounts of money for mere comments was Cleveland Browns tight end Kellen Winslow.⁸² Winslow contracted a dangerous staph infection from the Browns locker room, which led to his hospitalization.⁸³ After being treated, Winslow was outspoken regarding his unhappiness with how the Browns organization was handling a virtual outbreak of staph among players.⁸⁴

As a result, Winslow was suspended for one game costing him \$235,294 under the conduct detrimental to the team clause. This case is particularly troubling because it shows a team fining a player for trying to protect the health of himself and his teammates. Winslow utilized the expedited appeal process and the Browns eventually dropped the suspension.⁸⁵ The CBA's appeal process allows players to appeal charges of detrimental conduct to a board of neutral arbitrators.⁸⁶ This incident shows how even if the detrimental conduct clause is overly broad the appeals process can protect player's rights in some situations.

iv. Riley Cooper

A 2013 incident involving Philadelphia Eagles wide receiver Riley Cooper sheds more light on what type of conduct an NFL organization may consider detrimental to the team.⁸⁷ At a Kenny Chesney concert a fellow concertgoer captured video of Cooper stating he would "fight any n***** here."⁸⁸ This prompted a media and fan frenzy demanding that Cooper be

⁸² James Walker, *Browns Suspend Winslow One Game Over Critical Comments*, ESPN (Oct. 22, 2008), <http://perma.cc/JNE5-F432>.

⁸³ *Id.*

⁸⁴ James Walker, *Winslow Reveals Reason for Hospital Stay, Upset with Browns GM Savage* ESPN (Oct. 20, 2008), <http://perma.cc/3CNH-78XC> (explaining Winslow's staph infection was the sixth known infection in the Brown's organization in the past few seasons).

⁸⁵ ESPN, *Browns TE Winslow: Both Sides Know Where Each Was Coming From*, ESPN (Oct. 27, 2008), <http://perma.cc/935J-YZDS>.

⁸⁶ NFL CBA, *supra* note 1 at art. 43, §4. (The appeal process will be discussed in detail later in this article).

⁸⁷ Dan Hanzus, *Eagles Fine Riley Cooper for Insensitive Comment*, NFL.COM (July 31, 2013), <http://perma.cc/J8X8-FT4Z>.

⁸⁸ *Id.*

punished.⁸⁹ Cooper was not suspended, but was fined an undisclosed amount, which he referred to as “a good amount of money.”⁹⁰ Commissioner Goodell said he would not punish Cooper further because he felt the Eagles had acted swiftly and to his satisfaction.⁹¹

Cooper realized the heinous nature of his comments and wisely chose to apologize for his conduct, as opposed to seeking an appeal or any other form of redress. The Incognito incident is another case involving a white person uttering racial slurs. Hypothetically, had Incognito not used a racial slur it is likely that his comments would still be considered harassment or bullying. However, had Incognito not used a racial slur, would he be punished to the same extent? Incognito has, for the most part, stated that he has not done anything wrong; however, the one thing he has apologized for is the use of the N-word.⁹²

Based on the cases above, teams appear to be willing to use the detrimental conduct clause to punish players for racist or homophobic comments. However, racist and homophobic comments are frequently made by players without accompanying punishment. Regarding the N-word, Seattle Seahawk’s cornerback Richard Sherman stated, “It’s in the locker room and on the field at all times.”⁹³ This general atmosphere in which such comments are not punished may be why some players describe the Incognito incident as merely a case of a player making offensive comments,⁹⁴ as opposed to a bullying incident worthy of a \$500,000 fine.

Additionally, it appears the Commissioner is content letting teams discipline their own players when the problematic conduct amounts to offensive comments. Once a penalty is imposed, the next step for a penalized player is the appeal process, which will be briefly considered in the next section.

⁸⁹ Mike Greger, *Riley Cooper: The Fallout*, METRO (Aug 1, 2013), <http://perma.cc/69D9-VTWR>.

⁹⁰ Hanzus, *supra* note 87, at 17.

⁹¹ *Id.*

⁹² Michael David Smith, *Richie Incognito: I'm Not a Racist, Don't Judge Me By That Word*, NBC SPORTS (Nov. 10, 2013), <http://perma.cc/ZZ4Y-MLPM>.

⁹³ Michael David Smith, *Richard Sherman Calls NFL Banning The N-word “An Atrocious Idea”*, NBCSPORTS, (Mar. 3, 2014), <http://perma.cc/QXS6-BYDH> (explaining a new rule the NFL proposed, which would make use of the N-word on the field subject to a 15-yard penalty).

⁹⁴ *Dolphins' Incognito Breaks Silence on Martin in First Interview Since Bullying Allegations Surfaced*, FOX NEWS (Nov. 11, 2013), <http://perma.cc/7R4P-24V7> (describing Incognito’s opinion that his words stemmed from a culture of locker room “brotherhood” rather than bullying).

E. *The Appeal Process*

An Article 43 non-injury grievance is the exclusive procedure for resolving disputes regarding compliance with the terms and conditions of employment of NFL players.⁹⁵ A non-injury grievance can either be ordinary or expedited.⁹⁶ An ordinary non-injury grievance must be filed within fifty days from the date of the incident upon which the grievance is based.⁹⁷ When the non-injury grievance involves a suspension, the player will have the option to have a hearing expedited, which means a hearing with an arbitrator must be held within seven days.⁹⁸ Incognito used the expedited appeal option; however, Incognito later agreed to postpone the expedited appeal until the NFL completed its investigation.⁹⁹

In comparison, Article 46 of the NFL CBA describes the appeal process for players penalized for conduct detrimental to the league, meaning the penalty was handed down by the Commissioner as opposed to the team.¹⁰⁰ Commissioner Goodell wields vast leverage in this appeal process, which makes it one of the more controversial aspects of the CBA.¹⁰¹ On appeal the Commissioner appoints the hearing officers and can appoint himself, although he must consult with the Executive Director of the NFLPA.¹⁰² Even after said consultation the Commissioner still has the discretion to serve as hearing officer.¹⁰³

The Commissioner's power is limited in part by due process rights described in the CBA such as a player's right to counsel of his choice, right to notice of the detrimental conduct, and a right to appeal.¹⁰⁴ However, there is almost no limit as to what type of off-the-field conduct constitutes detrimental conduct, because detrimental conduct is poorly defined. This

⁹⁵ NFL CBA, *supra* note 1, at art. 43.

⁹⁶ *Id.*

⁹⁷ *Id.* at art. 43, §2.

⁹⁸ *Id.* at art. 43, §4.

⁹⁹ Adam H. Beasley, *Richie Incognito Postpones Grievance Hearing Against Miami Dolphins, Wants to Return to Team*, MIAMI HERALD (Nov. 21, 2013), available at <http://perma.cc/4AVA-YU3H> (discussing how an independent arbitrator will be chosen under the CBA).

¹⁰⁰ *Id.* at art. 46.

¹⁰¹ See *Saints Bounties: Jonathan Vilma Leaves Appeals Hearing with Roger Goodell, Calls it a Sham*, CBS NEWS (June 18, 2012), <http://perma.cc/BY4X-HZPK>.

¹⁰² NFL CBA, *supra* note 1, at art. 46, §2(a) (There is no mention of whether the Executive Director of the NFLPA has any power to remove a hearing officer appointed by the Commissioner. It only says the Commissioner must consult with the Executive Director).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at art. 46, §§1-2.

makes the appeal process a key protection for a player facing discipline for detrimental conduct. The appeal process appears to be relatively neutral when a player is accused of conduct detrimental to the team, but not when a player is accused of conduct detrimental to the league. Before proposing some amendments to the NFL's detrimental conduct clause, it is helpful to discover how similar clauses are used in other sports and industries, when employees make controversial comments or harass other employees.

IV. DETRIMENTAL CONDUCT IN TELEVISION & THE NBA

A. *Morals Clauses in Television*

Morals clauses "generally allow companies employing talent to terminate an agreement when the talent's conduct is detrimental to the company's interests or otherwise devalues the performance due."¹⁰⁵ The detrimental conduct clause in the NFL CBA is an example of a morals clause. Morals clauses are commonly used by advertisers, movie studios, and television networks.¹⁰⁶ These companies are almost always looking to include a broad morals clause in contracts because that allows them to terminate talent for any potentially damaging conduct.¹⁰⁷

A sample morals clause used in television reads as follows:

"Network will have the right to terminate this Agreement for cause, which includes, without limitation . . . insubordination, dishonesty, intoxication, resignation . . . failure to conduct Talent's self with due regard to social conventions or public morals or decency, participation in any "adult" media (as determined by Network in its sole discretion) or commission of any act (in the past or present) which degrades Talent, Program, or Network or Producer or brings Talent, Network, Producer or the Program into public disrepute, contempt, scandal or ridicule (provided that Network shall so terminate this Agreement within a reasonable period of time of such information becoming public or coming to Network's attention) Network's use of Artist's services after termination of this Agreement shall not be deemed a reinstatement or renewal of this Agreement without the written agreement of the parties hereto."¹⁰⁸

¹⁰⁵ Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005).

¹⁰⁶ *Id.* at 239.

¹⁰⁷ Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares about Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 370 (2009).

¹⁰⁸ Kressler, *supra* note 105, at 252 (drafting of the sample clause was based on contracts negotiated by or in participation with Noah B. Kressler).

The sample clause above is exceptionally broad. NFL teams are limited to suspending a player (the talent) for up to four games before deciding whether to release the player. In the clause above, the television network can terminate the talent's contract outright as soon as the detrimental conduct is discovered. Additionally, the clause above does not include an appeal process for talent that may feel they have been wrongfully terminated.

As seen in the Incognito incident, the media attention can be relentless when a well-known individual is terminated for controversial comments. A few months after the Incognito incident, Phil Robertson, star of the A&E show *Duck Dynasty*, was suspended from the show for making comments deemed homophobic and racist.¹⁰⁹ The controversy stemmed from remarks Robertson made in an interview with GQ magazine, where he compared homosexuality to bestiality and suggested that African-Americans were happier before the civil rights movement.¹¹⁰ In response, A&E suspended Robertson.¹¹¹

It is safe to assume (and some evidence suggests) that Robertson was suspended under a morals clause found within his contract with A&E.¹¹² Petitions sprang up on social media both in favor and against Robertson's suspension. From one side there was an outcry over his freedom of speech and constitutional right to voice his faith and beliefs; on the other side, gay and civil rights groups cheered the suspension.¹¹³ One petition garnered over 260,000 signatures opposing Robertson's suspension.¹¹⁴

"In the end, A&E chose profits over African-American and gay people," according to gay rights group GLAAD, by reinstating Robertson to the show.¹¹⁵ *Duck Dynasty* is one of the most popular shows on cable televi-

¹⁰⁹ Scott Collins, '*Duck Dynasty*': A&E warned Phil Robertson about speaking out too much, LA TIMES (Dec. 20, 2013, 4:55 PM), <http://perma.cc/4LQJ-PHNN>.

¹¹⁰ *Id.*

¹¹¹ Ethan Sacks, Don Kaplan, et al., '*Duck Dynasty*' star Phil Robertson anti-gay video emerges as A&E beefs up security amid threats, NY DAILY NEWS (Dec. 21, 2013, 3:11 AM), <http://perma.cc/7XPD-CLE8>.

¹¹² Hollie McKay, '*Duck Dynasty*' Family Members Contractually Bound to A&E, *Source Says*, FOX NEWS (Dec. 23, 2013), <http://perma.cc/Y4CM-KFJE>.

¹¹³ *Groups Start Petitions Demanding A&E Reinstate Phil Robertson on 'Duck Dynasty'*, FOX NEWS (Dec. 19, 2013), <http://perma.cc/HG7Y-KCUB> (discussing how the gay rights group GLAAD and many others have praised A&E for its quick action in indefinitely suspending Robertson for his remarks).

¹¹⁴ Liz Raftery, *Petition Creators Claim Credit for Phil Robertson's Return to Duck Dynasty, Challenge A&E*, TV GUIDE (Dec. 29, 2013, 11:11 AM), <http://perma.cc/YQP6-MG67>.

¹¹⁵ Michael Rothman & Gillian Mohny, *GLAAD Slams A+E for Returning Phil Robertson to 'Duck Dynasty'*, ABC NEWS (Dec. 28, 2013), <http://perma.cc/4DYZ-65QS>.

sion and sells an estimated \$400 million of product tie-ins, including duck calls and hunting rifles.¹¹⁶ Suspending Robertson risked alienating the show's gigantic fan-base.

The Miami Dolphins, like the A&E show *Duck Dynasty*, is a major business earning millions of dollars in profits.¹¹⁷ Interestingly, there were no petitions or similar support from the general public when Incognito was suspended. One possible reason for the difference in public support is that Robertson's comments arose in-part from his religious views, while Incognito's had no tie to religion or politics. Additionally, Robertson's comments were directed at a class of individuals, while Incognito's were directed at one specific individual. Another potential reason is Robertson was the face of *Duck Dynasty*, while Incognito performs in one of the most underappreciated positions in sport. Had Incognito been the Miami Dolphins' quarterback the public outcry may have been much stronger. Whatever the reason, both Incognito and Robertson experienced the power of broad morals clauses in their contracts.

B. Detrimental Conduct in the NBA

In the wake of the Incognito incident, the NBA disseminated a memorandum reminding players that bullying and hazing in any form will not be tolerated.¹¹⁸ However, the NBA and NFL have different locker room cultures that disparately affect the amount of bullying that occurs within. One major distinction between NFL and NBA locker rooms is that NFL players experience a wait-your-turn, earn-your-stripes sort of mentality; while, in the NBA coaches are more invested in their players making an immediate impact.¹¹⁹ Thus, the young players in the NBA often enjoy some of the larger contracts and more playing time, moving them up in the pecking order.¹²⁰ However, bullying and controversial off-the-court comments remain issues that NBA teams and the NBA Commissioner have the power to discipline.

¹¹⁶ Clare O'Connor, *Duck Dynasty Family's New Gun Line Is A Warning Shot To A&E*, FORBES (Jan. 3, 2014, 6:27 AM), <http://perma.cc/F59Y-ZGKD>.

¹¹⁷ *Miami Dolphins*, FORBES (Aug. 2013), <http://perma.cc/M33T-LCAC> (calculating the August 2013 value of the Miami Dolphins based on their current stadium deal, without deduction for debt other than stadium debt, at over \$1 billion).

¹¹⁸ Ric Bucher, *Bullying in the NBA? Don't Hold Your Breath Waiting for That Scandal*, BLEACHER REPORT (Nov. 12, 2013), <http://perma.cc/3EWR-XXLT>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

NBA organizations, like NFL teams, have the power to punish players for conduct detrimental to the team.¹²¹ Similarly, the NBA Commissioner has the power to discipline players for detrimental conduct, and the Commissioner's disciplinary action will preclude or supersede disciplinary action by any NBA team for the same act or conduct.¹²² The detrimental conduct clause in the NBA CBA regarding the Commissioner's power to discipline off-the-court conducts states:

“. . . action taken by the Commissioner (or his designee) concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and resulting in a financial impact on the player of \$50,000 or less, shall not give rise to a Grievance, shall not be subject to a hearing before, or resolution by, the Grievance Arbitrator, and shall not be determined by arbitration.”¹²³

There is an appeal process, but the appeal must be filed by the National Basketball Players Association (NBPA) and the outcome of the appeal is still determined by the Commissioner. The process is the same when a player is fined more than \$50,000, except the Grievance Arbitrator applies an even more stringent, arbitrary and capricious standard of review.¹²⁴ Similarly, the NFL's conduct detrimental to the league clause states the NFL Commissioner must consult with the NFLPA Executive Director before levying a fine over \$50,000; however, the NFL Commissioner still has full discretion to impose the fine.¹²⁵

To see how the detrimental conduct clause functions in the NBA it is helpful to look at a few examples. Former Cleveland Cavaliers center Andrew Bynum was suspended for conduct detrimental to the team following an incident at the team's practice.¹²⁶ The suspension cost Bynum one game check of \$111,000.¹²⁷ In another scenario, New York Knicks player J.R. Smith was fined \$25,000 for tweeting that he would send his “street homies [*sic*]” after NBA player Brandon Jennings.¹²⁸ The NBPA did not appeal the

¹²¹ Collective Bargaining Agreement Between the NBA and the NBA Players Association December 8, 2011, *available at* <http://perma.cc/CZ2L-UHRX> [hereinafter NBA CBA].

¹²² *Id.* at art. 6, §10.

¹²³ *Id.* at art. 31, §9(a).

¹²⁴ *Id.* at art. 31, §9(b).

¹²⁵ NFL CBA *supra* note 1 at art. 46, §(1)(c).

¹²⁶ Brian Windhorst, *Cavs' Andrew Bynum on 'Paid Leave'*, ESPN (Dec. 29, 2013, 2:51 PM), <http://perma.cc/U82Q-QVAK>.

¹²⁷ *Id.*

¹²⁸ Roger Groves, *Athlete Tweetability: The NBA Ruling Against J.R. Smith and Its Implications*, FORBES (Nov. 16, 2013, 12:11 AM), <http://perma.cc/5P5H-CTXX>

Commissioner's decision to fine J.R. Smith, leaving him out of options under the CBA.

In sum, the NBA and NFL CBAs both provide broad provisions that allow punishments and sanctions for inappropriate actions or detrimental conduct to the league, club, or the reputation of the professional athletes themselves. To determine whether such broad clauses are assailable, drafters must balance the problems of articulating all possible misconduct with the benefit of providing clarity in the CBA. The next two sections debate what, if any, changes should be made to the broad detrimental conduct clause utilized in the NFL.

V. PROS & CONS TO A BROAD DETRIMENTAL CONDUCT CLAUSE

One argument supporting a broad detrimental conduct clause is NFL teams and the Commissioner should have the power to promote lawful, ethical, and responsible conduct among players.¹²⁹ Having this power serves the interests of the NFL, the players, and the fans by protecting everyone involved.¹³⁰ Bullying, such as what allegedly occurred in the Incognito incident, can be dangerous and deterring that sort of claimed behavior is arguably for the betterment of society.¹³¹ Thus, if bullying were not punished it would send the wrong message to impressionable fans that idolize many professional athletes as role models, and could even lead a player to commit suicide.¹³²

Another argument in favor of a broad detrimental conduct clause is the great difficulty in defining every form of conduct the NFL desires to deter. For example, it is very difficult to define bullying, which is evident in the

(stating that J.R. Smith's tweet was a retaliation to Brandon Jennings tweeting about how Smith's brother should not be in playing in the NBA).

¹²⁹ 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 (2010).

¹³⁰ *Id.*

¹³¹ Amy Dardashtian, *Jonathan Martin's Polite, Suicide-Free Society*, HUFFINGTON POST (Nov. 18, 2013, 5:42 PM), <http://perma.cc/JS9-MFLX> (discussing the massive amounts of publicity in recent years of teens committing suicide as a result of bullying).

¹³² Young Shin Kim & Bennett Leventhal, *Bullying and Suicide: A Review*, 20 INT'L J. ADOLESC. MED. & HEALTH 133 (2008) (showing how almost all of the studies found connections between being bullied and suicidal thoughts among children).

numerous attempts to create bullying statutes.¹³³ The most specific bullying statutes define bullying based upon the “intent of the perpetrator, the reasonableness of his actions, or the effect that it has on another student.”¹³⁴ If the NFL were to adopt a definition of detrimental conduct that relies on determining the *mens rea* of the player, the reasonableness of the player’s actions, or the effect on the victim, the investigation process would become significantly more burdensome in order to prove any or all of those elements.

One argument that can work in favor or against a broad detrimental conduct clause revolves around whether the clause is lawful. Under labor law, it is permissible for employers to implement employee conduct rules to protect their business interests.¹³⁵ However, there are limits as to how vague an employer’s conduct policy can be. In May 2012, the National Labor Relations Board (NLRB) released a memorandum discussing ways employers may legally regulate social media and other aspects of free speech.¹³⁶

In the report, the NLRB cites a case where it found that portions of the employer’s policy were overly broad.¹³⁷ The NLRB determined that the first section of the policy, restricting employees from publicly posting information about the company, was an unlawful restriction of freedom of speech.¹³⁸

¹³³ Susan Hanley Kosse & Robert H. Wright, *How Best To Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?* 12 DUKE J. GENDER L. & POL’Y 53, 62 (2005).

¹³⁴ *Id.* at 62–63.

¹³⁵ 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, 1089 (2008).

¹³⁶ OFFICE OF THE GENERAL COUNSEL, NLRB, MEMO. OM 12-59, REPORT FROM ACTING GENERAL COUNSEL CONCERNING RECENT SOCIAL MEDIA CASES (2012), available at <http://perma.cc/U7HU-AYNA/>.

¹³⁷ *Id.* at 12–13 (quoting the clause, which said “Employees are prohibited from posting information regarding [Employer] on any social networking sites (including, but not limited to, Yahoo finance, Google finance, Facebook, Twitter, LinkedIn, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, ‘Personal Electronic Communications’), that could be deemed material nonpublic information or any information that is considered confidential or proprietary. Such information includes, but is not limited to, company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules. Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers”).

¹³⁸ *Id.*

This is similar to the Kellen Winslow case where the Cleveland Browns suspended Winslow under the detrimental conduct clause for being outspoken regarding the team's staph infection outbreak.¹³⁹ The NLRB would likely find the NFL's detrimental conduct clause overly broad for being used against Winslow in such fashion. However, this is a moot point because the fine against Winslow was reversed on appeal.¹⁴⁰

In comparison, the NLRB determined the second portion of the employer's policy prohibiting online bullying and harassment was lawful.¹⁴¹ Here, the NLRB cited *Tradesman International*, which held a rule prohibiting slanderous or detrimental statements about the company, sexual harassment, or racial statements were lawful.¹⁴² The Incognito incident is arguably not online bullying because it involved cellphones, voicemails, and face-to-face confrontations. However, it involved potentially slanderous statements and racial harassment,¹⁴³ which the NLRB has determined as activity that can lawfully be prohibited by employers. Thus, the NLRB would likely support the broad detrimental conduct clause as applied in the Incognito incident.

Additionally, it is important to note that labor laws protect the rights of employees by allowing employee unions, such as the NFLPA, to collectively bargain with sports leagues, such as the NFL, to reach agreements that govern terms of employment.¹⁴⁴ Thus, the current detrimental conduct clause in the CBA, as negotiated by the NFL and the NFLPA, would most likely be upheld under current law.

However, there are still several arguments against a broad detrimental conduct clause. For example, further defining what constitutes detrimental conduct would provide clarity to NFL players. Additionally, players ought to know when they are breaking the rules if they are threatened with potentially facing severe penalties upwards of \$1,000,000 in some cases.¹⁴⁵ A *mens rea* and reasonableness requirement would help clarify what is meant by bullying. One way to define and enforce bullying in the NFL could be, when a player intentionally and unreasonably harasses another NFL employee with his comments or actions he will be subject to a fine of "X". Another opportunity to provide clarity to players would be to explicitly state that racist

¹³⁹ See *supra* Part III(D)(iii).

¹⁴⁰ *Id.*

¹⁴¹ OFFICE OF THE GENERAL COUNSEL, NLRB, *supra* note 136, at 13–14.

¹⁴² *Tradesmen Int'l*, 338 N.L.R.B. 460, 462.

¹⁴³ Glazer, *supra* note 6 (describing how Incognito left a voicemail on Martin's phone referring to Martin as a half-n*****).

¹⁴⁴ NLRA 29 U.S.C. §§ 151-169.

¹⁴⁵ Pelissero, *supra* note 12 (discussing how if Incognito is suspended the full four games his maximum loss would be \$1,176,470).

and/or homophobic comments are punishable if made in a public forum like Twitter.

Another way to amend the detrimental conduct clause in the CBA would be to set maximum fine limits for all NFL players. Such fines have proven to be successful for players who are overweight.¹⁴⁶ There is also a maximum fine of \$25,000 for players ejected from football games.¹⁴⁷ In comparison, NFL players who are disciplined for conduct detrimental to the team lose up to four game checks, which can total millions of dollars. Perhaps it would be better to set a ceiling of \$50,000 for detrimental conduct penalties.¹⁴⁸ Penalties could be scaled to increase in increments of \$25,000 for repeat offenders.

Opponents of such a theoretical policy may argue \$50,000 is not a large enough fine to deter players such as Incognito who make millions of dollars per year. However, \$50,000 is still a considerable amount of money, even for NFL players. Additionally, many affluent NFL players end up bankrupt after retirement,¹⁴⁹ demonstrating that some athletes may not be able to afford the exorbitant fines currently accompanying detrimental conduct suspensions. The financial problems many NFL players face also show players may be deterred by a potential \$50,000 fine.¹⁵⁰

Another argument against the current system applies to cases where a player violates the conduct detrimental to the league clause. As stated above,¹⁵¹ the appeal process for conduct detrimental to the league is basically controlled by the NFL Commissioner, while players appealing conduct detrimental to the team face a more neutral process.¹⁵² Thus, players have been more outspoken regarding the appeal process when a player's conduct is considered detrimental to the league.

¹⁴⁶ NFL CBA, *supra* note 1, at art. 42, §1(a)(i).

¹⁴⁷ *Id.* at art. 42, §1(a)(xiii).

¹⁴⁸ *Id.* at art. 46, §1(c) (discussing how the maximum fine the commissioner can levy without consulting the NFLPA is \$50,000).

¹⁴⁹ Pablo S. Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated (Mar. 23, 2009). (discussing how by the time they have been retired for two years, 78% of former NFL players have gone bankrupt or are under financial stress because of joblessness or divorce).

¹⁵⁰ See generally Jack Behta, *Ten Reasons Why NFL Players Go Broke*, NATIONAL FOOTBALL POST (May 30, 2012, 4:00 PM), <http://perma.cc/3DR5-SR9V> (citing careers shortened by injury, poor financial counseling, and bad investments as some of the top reasons NFL players end up in financial straits despite their large contracts on paper).

¹⁵¹ Part III(E).

¹⁵² Part III(D).

In the New Orleans Saints bounty gate scandal Commissioner Goodell punished Saints linebacker Jonathan Vilma for conduct detrimental to the league for allegedly accepting money as consideration for attempting to injure on opposing players during games.¹⁵³ The Commissioner imposed the initial penalties and presided over the appeal hearing. In response, Vilma left the hearing, which he felt was unfair because the Commissioner was acting as, “judge, jury, and executioner”.¹⁵⁴ A possible fix to the unfairness of the appeal process is to implement the appeal process used for conduct detrimental to the team for all detrimental conduct cases in the NFL. Now that the arguments for and against amending the detrimental conduct clause and its related processes have been presented, this article will focus on the potential ramifications facing Richie Incognito.

VI. PREDICTING THE OUTCOME OF THE INCOGNITO INCIDENT

There are several ways the outcome of the Incognito incident may turn depending on the facts that are revealed in the ongoing investigation. The evidence may reveal that Miami Dolphins coaches actually encouraged Incognito’s behavior in an attempt to toughen up the younger Martin. If coaches were involved, it is possible they would be disciplined under the NFL’s Personal Conduct Policy, which is separate from the NFL CBA and applies to coaches as well as players who commit conduct detrimental to the integrity and public confidence of the NFL.¹⁵⁵ In the New Orleans Saints bounty gate scandal, the Commissioner punished Saints coach Sean Payton for awarding money to players for making vicious and dangerous hits on opposing players during games, under the NFL’s Personal Conduct Policy.¹⁵⁶ While not completely on par, a coach paying players to hit opponents is similar to a coach encouraging a player to verbally assault teammates.

Another way the Incognito case could turn is if the investigation turns up no evidence of encouragement from coaches. Incognito will then have the choice of putting this incident behind him or appealing the penalty. The appeal process for conduct detrimental to the team, which Incognito was

¹⁵³ CBS News, *supra* note 101.

¹⁵⁴ *Id.*

¹⁵⁵ NFL Personal Conduct Policy, (2013) (applying the policy to players, coaches, other team employees, owners, game officials and all others privileged to work in the National Football League).

¹⁵⁶ CBS News, *supra* note 101.

disciplined for violating, is undoubtedly fairer than the appeal process for conduct detrimental to the league charges.¹⁵⁷

The Commissioner could still punish Incognito more than the Miami Dolphins already have for conduct detrimental to the league, although if no coaches were involved then a league action seems unlikely considering Goodell's track record of letting teams discipline their own players for conduct amounting to inappropriate comments. On the other hand, the Incognito incident has bullying aspects, which differentiates it from the cases discussed previously where players were mostly punished for inappropriate comments.

In the end, the NFL is setting a major precedent for how players should treat one another. Locker room culture from high school to the NFL consists of positive aspects like building camaraderie and negative aspects such as bullying. Hazing, particularly of young NFL players, is commonplace around the NFL and considered just another aspect of locker room culture.¹⁵⁸ Incognito has admitted that the way he and others communicate on the offensive line is vulgar.¹⁵⁹ Thus, the 24-year-old Martin has been accused by some NFL players of violating the code of the locker room for bringing grievances against Incognito. Miami Dolphins players have stepped up in defense of Incognito, exclaiming "this is the way of the locker room."¹⁶⁰

If acting in the manner that Incognito allegedly did towards Martin is as commonplace as many players seem to suggest, then there is a potential for many more incidents like the Incognito incident to arise in the future. Goodell has even mentioned that the Incognito incident could lead to new workplace rules.¹⁶¹ One idea would be for Goodell to define locker room bullying and make it apply to all NFL teams, so that there are not thirty-two different definitions of bullying in the NFL. Additionally, Goodell could impose a maximum fine for players who are disciplined for bullying, as opposed to basing the fine on how much the players make, to avoid excessive fines. With the amount of activity that can be construed as bullying in

¹⁵⁷ NFL CBA, *supra* note 1, at art. 43, §6 (discussing how appeal process involves the appointment of arbitrators.).

¹⁵⁸ Erik Brady, Jim Corbett & Lindsay H. Jones, *Blame the Victim? Some Players Criticize Jonathan Martin*, USA TODAY (Nov. 5, 2013, 11:52 PM), <http://perma.cc/8R22-J6Q4>.

¹⁵⁹ Glazer, *supra* note 6.

¹⁶⁰ Stephen Mansfield, *Incognito Scandal's Manly Men*, USA TODAY (Dec. 22, 2013, 4:39 PM), <http://perma.cc/738-ZFNX>.

¹⁶¹ Ken Belson, *Goodell Says Miami Case May Lead to New Workplace Rules*, NY TIMES (Dec. 11, 2013), <http://perma.cc/B3DX-5VQQ>.

locker room culture, a broad clause with harsh penalties like the detrimental conduct clause is not the best way to enforce bullying.

VII. EPILOGUE: THE TED WELLS REPORT

After a thorough investigation, the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP issued a final report on the Incognito incident on February 14, 2014.¹⁶² The Ted Wells Report (the “Report”), issued on Valentine’s Day, certainly did not conjure up thoughts of love, but hopefully it can act as a catalyst to generate a more caring and respectful workplace environment throughout the NFL.

The Report clarified and confirmed several key points regarding the Incognito incident. First, the entirety of the Report confirmed that Incognito’s behavior was, by most standards, unacceptable. While Martin also engaged in vulgar communications with Incognito, Martin’s comments were comparatively innocuous.¹⁶³ The Report also confirmed that the cafeteria prank was the breaking point that led to Martin’s departure from the team.¹⁶⁴ However, evidence demonstrated that Martin’s departure was also based on other incidents occurring on the same day, as well as a buildup of over a year of harassment by Incognito and other Miami Dolphins teammates.¹⁶⁵ The Report also made a pivotal clarification when it concluded Incognito’s behavior towards Martin was not expressly encouraged by Dolphins’ coaches.¹⁶⁶

The Report revealed a pattern of harassment including vulgar comments regarding Jonathan Martin’s sister, which seemed to cause Martin

¹⁶² Mike Chiari, *Jonathan Martin-Richie Incognito Investigation Report Released*, Bleacher Report (Feb. 14, 2014), <http://perma.cc/4QGV-U2M7>.

¹⁶³ Theodore V. Wells, Jr. et al., *Report to the National Football League Concerning Issues of Workplace Conduct at the Miami Dolphins* 25 (2014) (revealing a text message where Martin begins by saying to Incognito, “You F*** that b****?”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 24 (stating how earlier in the day and in the cafeteria, Incognito referred to Martin as a “stinky Pakistani” in front of several other players).

¹⁶⁶ *Id.* at 44-45 (discussing how Incognito claimed coach Jeff Ireland and General Manager Brian Gaine each took him aside and told him to take responsibility for making Martin physically tougher and stronger. Media reports speculated that the coaches may have told Incognito to toughen Martin up by treating him inappropriately, but Incognito denied this in the report. Regardless, both Gaine and Ireland were fired after the Incognito story broke, but before the Ted Wells Report was released).

considerable anguish.¹⁶⁷ However, arguably some of its most disturbing passages did not include the vulgar insults, but instead offered a glimpse into Martin's mental suffering, as revealed through private text messages with his parents.¹⁶⁸ In these messages Martin reveals he contemplated suicide.¹⁶⁹ The report compared his psychological state to that of a victim of domestic abuse who out of fear remains close with his tormentor.¹⁷⁰ Yet, throughout this period of torment, the Report found Martin did not adequately express to his teammates or coaches the pain and depression that the comments were causing him.¹⁷¹

In the wake of the Report many players and executives have been galvanized to make NFL locker rooms a more respectful and professional work environment.¹⁷² This sentiment for change is largely based on the scathing report, which revealed a level of taunting and bullying by Incognito and other players worse than many expected. Highly esteemed Philadelphia Eagles wide receiver Jason Avant told Commissioner Goodell in a recent meeting, “[w]e need you to set standards. We need you to make it black and white. We need standards, and if we don’t meet them, we shouldn’t be here.”¹⁷³ Goodell has been meeting with players and coaches to try and determine what those standards should be.¹⁷⁴

Additionally, Goodell still has the power under the CBA to levy harsher penalties on Incognito and other players and/or coaches named in the Report. Article 46 states, “[t]he Commissioner and a Club will not both discipline a player for the same act or conduct. The Commissioner’s disciplinary action will preclude or supersede disciplinary action by any Club for

¹⁶⁷ *Id.* at 10 (explaining how Martin was particularly offended by these crude comments about his sister and that his transparent discomfort only increased the frequency and intensity of the insults).

¹⁶⁸ *Id.* at 16 (referring to his reaction to the bullying Martin was enduring, Martin texted his mother, “I’m never gonna change. I got punked again today. Like a little bitch. And I never do anything about it. I was sobbing in a rented yacht bathroom earlier Whether or not Incognito, Jerry [offensive lineman John Jerry], and Pouncey [offensive lineman Mike Pouncey] fully appreciated the effect.”).

¹⁶⁹ *Id.* at 96.

¹⁷⁰ *Id.* at 93 (explaining that consulting expert Dr. Berman found Martin’s reaction to Incognito’s harassment as consistent with a person who is trapped in an abusive situation and that attempting to develop a close, friendly relationship with the abuser is a common coping mechanism).

¹⁷¹ *Id.* at 37.

¹⁷² Peter King, *The NFL’s Wake Up Calls*, MONDAY MORNING QUARTERBACK (Feb. 17, 2014), <http://perma.cc/UM9V-UWRK>.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (discussing how Goodell has met with 30 players in 60 days asking them how to make the locker room more tolerant).

the same act or conduct.”¹⁷⁵ The existence of this section means that while the Dolphins have already punished Incognito, Goodell has the power to render a decision which supersedes the disciplinary action taken by the Dolphins. Regardless of how Incognito or other players are punished, the most important decision Goodell will make is how to deter future bullying incidents.

Before the incident, Richie Incognito signed the Miami Dolphins’ workplace conduct policy which prohibited harassment including, “unwelcome contact; jokes, comments and antics, generalizations and put-downs.” This sort of workplace conduct policy would likely be supported if it applied to all NFL teams. The key would be incentivizing compliance with the policy. One way to do this would be to enforce strict fines on players who violate the policy.¹⁷⁶

Historically, the NFL has turned a blind eye to players verbally abusing one another and accepted it as a part of locker room culture. The NFL was blindsided by the egregious nature of the Incognito incident and, as a result, tolerance for this sort of behavior is dwindling. In order for the NFL to put this terrible incident in its rearview mirror, Goodell must use his immense power as Commissioner to create a healthier and more professional locker room culture. In order to remind players that behavior like that exhibited by Incognito will not be tolerated, new guidelines must be implemented that have a league wide affect.

¹⁷⁵ Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2011–2020, art. 46, §4 (2011), *available at* <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

¹⁷⁶ Wells Report, *supra* note 163, at 2.