

---

## Speech: A Different Look at Compliance in Professional Sports: Why the NFL Personal Conduct Policy Might Be More Illegal than the Very Conduct It Seeks to Regulate

Marc Edelman

Follow this and additional works at: <https://via.library.depaul.edu/jslcp>

---

### Recommended Citation

Marc Edelman, *Speech: A Different Look at Compliance in Professional Sports: Why the NFL Personal Conduct Policy Might Be More Illegal than the Very Conduct It Seeks to Regulate*, 7 DePaul J. Sports L. & Contemp. Probs. 89 (2011)

Available at: <https://via.library.depaul.edu/jslcp/vol7/iss2/2>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Sports Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

**SPEECH: A DIFFERENT LOOK AT COMPLIANCE IN  
PROFESSIONAL SPORTS: WHY THE NFL  
PERSONAL CONDUCT POLICY MIGHT BE  
MORE ILLEGAL THAN THE VERY  
CONDUCT IT SEEKS TO REGULATE**

*Marc Edelman\**

*Editors' Note:* Marc Edelman is a member of the faculty at Barry University's Dwayne O. Andreas School of Law in Orlando, FL, where he teaches in the areas of Antitrust, Contracts, Property and Sports Law. He also teaches Law and Professional Sports during the summers at Fordham Law School in New York, NY.

*Professor Edelman has written numerous articles applying federal anti-trust laws to the professional sports industry. In 2009, Professor Edelman published the provocative article, "Are Commissioner Suspensions Any Different from Illegal Group Boycotts?"<sup>1</sup> This article was among the first to suggest that the NFL's Personal Conduct Policy might violate Section 1 of the Sherman Act.*

*Professor Edelman was the final speaker at the DePaul Journal of Sports Law & Contemporary Problems March 4, 2011 symposium, entitled "A Rule is a Rule: Compliance in the World of Sports." With his permission, it is our privilege to publish an edited transcript of his speech. The Journal wishes to thank Professor Marc Edelman for extending us this opportunity to share his lecture with you.*

INTRODUCTION

Thus far today, many of our panelists have discussed the problem of collegiate and professional athletes not complying with league rules. In this context, we have been speaking in a discourse that places a duty of "compliance" on athletes to follow rules that are decided upon

---

\* Marc Edelman is a member of the faculty at Barry University's Dwayne O. Andreas School of Law in Orlando, Florida (Marc@MarcEdelman.com). Professor Edelman earned his B.S. in economics from the Wharton School (University of Pennsylvania) and both his J.D. and M.A. from the University of Michigan. He teaches sports law during the summers at Fordham Law School in New York, NY. Professor Edelman retains full copyright to this article.

1. See Marc Edelman, *Are Commissioner Suspensions Really any Different from Illegal Group Boycotts? Analyzing the Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATHOLIC UNIVERSITY LAW REVIEW 631 (2009).

by either the leaders of the NCAA or professional sports leagues. These rules, to the extent enforceable, come from contracts negotiated between colleges or member-clubs in professional sports leagues. These rules are not derived through collective bargaining. Thus, players do not have any say in the rules.

Today, I am going to speak almost exclusively about the NFL Personal Conduct Policy, and why the NFL Personal Conduct Policy, in itself, might be illegal, much like some of the behavior it seeks to regulate. We will begin today with a discussion of the NFL Personal Conduct Policy. We will then turn to the underlying economic harms caused by the policy. Finally, we will finish up with a brief discussion of Section 1 of the Sherman Act and why, by enforcing the NFL Personal Conduct Policy, the NFL team-owners themselves might be out of compliance with U.S. federal law.

#### THE NFL PERSONAL CONDUCT POLICY

There is a lot of confusion about the NFL Personal Conduct Policy, and how this policy came into place. To try to avoid this confusion, let me first explain that the NFL Personal Conduct Policy was never a product of arms-length collective bargaining between the NFL teams and their players union, nor was it ever ratified, in writing, by the players union. Rather, the early forms of the NFL Personal Conduct Policy were unilaterally implemented by NFL team-owners to give the league commissioner power to suspend players, on a limited basis, for actual criminal wrongdoing. This makes the NFL Personal Conduct Policy, in a legal sense, different from the NFL's substance abuse policy, which was collectively bargained and appears directly in the league's CBA ("collective bargaining agreement").<sup>2</sup>

Also, to turn back many years to when the NFL teams first implemented their personal conduct policy, the NFL Personal Conduct Policy was, at the time, really no big deal. This was because the last commissioner of the NFL, Paul Tagliabue—a lawyer and a former partner at the law firm of Covington and Burling—used the policy and its suspension power only to suspend players for the most serious of conduct, and only for one game or two games at a time, at most.

Then, in 2007, the NFL teams hired a new commissioner, Roger Goodell, and with the NFL teams' approval, Goodell announced a far more extensive version of the Personal Conduct Policy. The new policy was drastically broader than the old policy. In it, each of the individual NFL teams granted the commissioner power to suspend players

---

2. See NFL Collective Bargaining Agreement 2006-2012, Art. XLIV, § 6 (Substance Abuse).

for a wide range of conduct, including even conduct where there had been no finding of criminal wrongdoing. In addition, the new Personal Conduct Policy empowered the NFL commissioner to suspend a player for an indefinite period of time, which in essence could mean their termination from the league for life. Perhaps because Goodell, unlike Tagliabue, had no formal legal training, he missed the point of how thirty-two independent teams granting one man the power to keep a player from practicing his profession might be deemed to be an illegal group boycott under Section 1 of the Sherman Act. To the extent the NFL's lawyers noticed the problem, they never made their concerns public.

As [Marquette Law] Professor [Matthew] Parlow alluded to earlier on this panel, the NFL Personal Conduct Policy was not a complete blindside to the union. Before announcing changes to the policy, Commissioner Goodell discussed these changes with the former head of the National Football League Players Association, the late Gene Upshaw, as well with a panel of anywhere from five to ten players—the exact amount has been disputed in the media. But the NFL players union never agreed in writing to inserting this policy into the CBA, and the CBA, at the time, specifically had a clause that says no changes to the CBA are permissible, unless in a signed writing.<sup>3</sup>

So, in essence, the NFL Personal Conduct Policy was put in place by the teams—maybe with the union's tacit approval, certainly with a few players' approval—but not in the scope of collective bargaining. Thus, the policy is not by any stretch exempt from antitrust scrutiny.

#### ECONOMIC HARMS OF THE NFL CONDUCT POLICY

Now, some of you may be saying “so what's the big deal?” Employers generally govern the conduct of their employees, and the NFL Personal Conduct Policy is no different than any other form of workplace oversight. Many of you might also appreciate the policy because you think it enforces good public values. Dog-fighting, late night philandering and carrying guns without a license are all wrongful acts. Shouldn't we applaud the NFL from keeping negative role models off television?

However, to try to make the point about why the NFL Personal Conduct Policy is different from a traditional employer implementing a code of decorum for its employees, let's try something.

Raise your hand if you would have a problem if your home law school, DePaul Law School, implemented a policy that said if profes-

---

3. See NFL Collective Bargaining Agreement 2006-2012, Art. LV, § 19 (Parol Evidence).

sors were found to engage in dog-fighting, they would be terminated. Would anyone here have a problem with that? No hands.

What about my home law school? What if Barry University put in place a rule that said if a professor engaged in dog-fighting they would be fired? Does anybody have a problem with that? Again, there are no hands.

Now, let me add a twist. What about if every law school in the country, through the American Bar Association, agreed not to hire any law professor that ever engaged in dog-fighting? Thus, under this hypothetical, any professor who ever engaged in dog-fighting would be prohibited from teaching law—even after he served time, paid off his debt to society, and is rehabilitated?

Now, finally, I see some hands.

I think you get the point.

Here's why the NFL Personal Conduct Policy is different from traditional workplace rules. The NFL is not a single employer. Rather, it is a collection of thirty-two separate businesses. If you do not believe me, just read the Supreme Court's recent 9-0 opinion in *American Needle*, which says just that.<sup>4</sup> So, when the NFL bans a worker, it is not like DePaul Law School banning a worker or Barry Law School banning a worker, but more like all the law schools in the country together banning a worker.

Making matters even worse, in the United States, the NFL's thirty-two teams are the only collection of businesses that play premier professional football. Of course, there is the recently formed UFL, but that is on a much lower level and far lower pay scale. So UFL notwithstanding, if you are a premier professional football player in the United States, the only places where you could go work is for one of the thirty-two NFL teams. Thus, if the thirty-two NFL teams all got together and passed a rule that said we're going to exclude a particular player, then that particular player is no longer able to practice his profession in a meaningful way anywhere in the U.S., or perhaps even anywhere in the world.

Also, just to clarify, while we are saying that it is the commissioner who announces suspensions, a commissioner suspension is really no different than thirty-two teams collectively agreeing to a suspension. Think about who the NFL commissioner is. The NFL commissioner is not some independent actor. The NFL commissioner is hired by the

---

4. *American Needle Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2206-07 (May 24, 2010) (noting that "the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of [Section 1 of the Sherman Act]. The legality of that concerted action must be judged under the Rule of Reason.").

thirty-two separate NFL teams to act as a quasi-agent or perhaps a fiduciary on their behalf. So when the commissioner says someone is indefinitely suspended from the NFL, it in essence is as if the teams have all gotten together and reached an agreement to keep someone out of the league and restrain the person's right to practice the profession.

In addition, when Commissioner Goodell suspends a player, what he and the NFL teams are really doing is reducing consumers' ability to express a preference to see a brand of professional football that contains the players who are being boycotted under the policy.

Let me illustrate that last point a bit further. We're here in Chicago. How many Bears fans do we have in the room? (Many hands rise). That is a decent number of Bears fans.

During the past couple of years when the Bears were struggling, who would have been okay if Michael Vick became their quarterback? (Many hands rise again).

That is a lot of hands.

Now, in a free market, absent the restraint known as the NFL Personal Conduct Policy, if your hands translated into an increased willingness to pay for tickets for the Bears games if Vick were the quarterback, and not Rex Grossman, Bears ownership may have signed Michael Vick the moment that the Atlanta Falcons released him.

However, the NFL Personal Conduct Policy disregards the free market preferences of consumers by saying that no NFL team-owner may sign certain players—no matter how badly local fans are willing to pay for this event. Thus, the policy deprives consumers of the traditional means to exercise product preference.

#### WHY THE NFL PERSONAL CONDUCT POLICY MAY VIOLATE ANTITRUST LAW

For the past several minutes, I have been secretly interweaving anti-trust law into our discussion of public policy. But, for a moment, let's look at the black letter law and see how specifically the NFL Personal Policy might be illegal under Section 1 of the Sherman Act.

As some of you may know, Section 1 of the Sherman Act, in pertinent part, states that "[e]very contract, combination . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal."<sup>5</sup> This section of antitrust law, of course, does not literally mean that every business contract is illegal. However, Section 1 of the Sherman

---

5. 26 Stat. 209 (1890), codified as amended, 15 U.S.C. §§ 1-7 (2000).

Act outlaws many types of agreements to fix prices, fix wages, allocate markets, and boycott third parties.<sup>6</sup>

There is a three-step process for determining whether particular conduct violates Section 1 of the Sherman Act. First, the court will determine whether the arrangement constitutes an agreement among two or more parties that affects interstate commerce.<sup>7</sup> Then, the court will determine whether the arrangement, on balance, enhances or suppresses competition.<sup>8</sup> Finally, the court will determine whether any affirmative defense negates the finding of antitrust liability.<sup>9</sup>

Let's begin with the two threshold issues: interstate commerce and an agreement among parties. We all know that the NFL engages in interstate commerce: nobody is disputing that. Television is broadcast across state lines. Internet features are broadcast across state lines. The players move across state lines. The games take place across state lines.

In addition, the Supreme Court has now told us in its *American Needle* opinion that, in an antitrust sense, the NFL is composed of thirty-two separate parties and is not a single entity.<sup>10</sup> So that threshold issue, which we discussed briefly before, is also met.

As to the second part of the antitrust analysis—whether the NFL personal conduct policy is unreasonable under the antitrust meaning of that word—up until the late 1970s the rule of reason allowed courts to play the role of policy advocates. During that period, courts balanced what was economically harmful in a restraint with what it deemed to be the restraint's full range of economic and social justifications. Thus, this prong of rule of reason analysis was once as obscure as guessing what lies inside a black box.

Under the old set of rules, we saw this type of wide-open balancing test in a case that [Toledo Law School professor Geoffrey] Rapp ear-

6. See Marc Edelman & Brian Doyle, *Antitrust and 'Free Movement' Risks of Expanding Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 412-13 (2009).

7. See *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003) ("Section 1, like the tango, requires multiplicity. A company cannot conspire with itself."); see also *Denver Rockets*, 325 F. Supp. at 1049, 1062 (D.C. Cal. 1971) (citing 15 U.S.C. § 1); 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 (2009).

8. See 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, 640-41 (2009).

9. See 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, 640-41 (2009).

10. *American Needle Inc.*, 130 S.Ct. 2201, 2206-07.

lier referenced, *Molinas v. National Basketball Association*.<sup>11</sup> In that case from 1961, the Southern District of New York upheld an indefinite suspension of Jack Molinas for being engaged in gambling on basketball games, finding that, on balance, the moral harms of gambling outweighed the anti-competitive effect of the group boycott.

However, the old anything-matters view of the Rule of Reason is long gone. In an important Supreme Court case from the late 1970s, *United States v. National Society of Professional Engineers*,<sup>12</sup> the Court made the broad line of reasoning in *Molinas* obsolete. According to the Supreme Court's decision in *Professional Engineers*, a proper assessment of conduct under the Rule of Reason must focus solely on balancing the competitive conditions of a restraint, both good and bad.<sup>13</sup> In fact, the Supreme Court in *Professional Engineers* said even important public policy concerns such as safety could not save a restraint that, in an economic sense, was not anticompetitive.

Now, my understanding of what *Professional Engineers* means is that today the NFL cannot defend its personal conduct policy on morality, and can only try to defend it by arguing that the policy is economically beneficial to consumers. So maybe a gambling case such as *Molinas* would come out the same way today if a court were able to show that a player gambling on his sport would lead consumers to lose trust for the sport, and thus the sport would cease to exist due to a loss of fans.

But if you take the *Professional Engineers* standard and apply it to the NFL personal conduct policy, I strongly doubt that one could earnestly come to the same conclusion. Although we may not like dog-fighters in the NFL because we think dog-fighters like Michael Vick are immoral and bad role models, those are not pro-competitive economic reasons for keeping dog-fighters out. They are simply public policy arguments.

Now, that doesn't mean any single team on its own could not reach the independent business conclusion and announce, "We are not signing Michael Vick." And if all thirty-two teams reach that same conclusion, independently based on their own business judgment, there is no antitrust violation at all. But when the commissioner steps in and reaches that decision on behalf of all thirty-two teams together, the commissioner takes the power away from the individual teams and the consumers, and that is exactly where the antitrust problem lies.

---

11. 190 F.Supp. 241 (S.D.N.Y. 1961).

12. 435 U.S. 679 (1978).

13. *Nat'l Soc'y of Prof'l Engineers*, 435 U.S. at 688.

WHAT CAN THE NFL DO LEGALLY TO STAMP OUT  
BAD BEHAVIOR?

Even for those concerned about the personal conduct of NFL players, there are, of course, other ways to protect decorum without enforcing a potentially illegal, personal conduct policy. First, as I mentioned earlier, any individual NFL team already may impose its own, independent code of conduct without running afoul of antitrust law. I would presume that certain conduct is so egregious that no NFL team would ever sign a player that engages in that conduct, even absent a league-wide policy.

In addition, if a player engages in grossly illegal conduct, that player will likely be incarcerated and thus unable to play football anyway. We do not really need to worry about a player that has committed a string of murders seeking to join the NFL. That player would be in jail, thanks to our publicly operated criminal justice system.

If the NFL Players decide not to maintain a union, perhaps the NFL teams could go to Congress and get permission to get an exemption from antitrust law subject to federal oversight.

Or, finally, to the extent the NFL Players decide to maintain a union, the NFL teams may attempt to collectively bargain over the NFL Personal Conduct Policy. Of course, if the teams and the players can reach an agreement in writing over the NFL Personal Conduct Policy, the entire argument that the policy violates antitrust law becomes moot, as many courts already have ruled that bona-fide collectively bargained agreements related to mandatory terms and conditions of bargaining are exempt from antitrust law<sup>14</sup> and challengeable only against the union under labor law.

## CONCLUSION

In closing, I wanted to remind all of you that overall I agree with most of the panelists on a number of points, including the importance of promoting positive football role models. Nevertheless, the method by which NFL club owners have sought to promote positive role models is improper.

The NFL Personal Conduct Policy harms the players that Commissioner Goodell suspends by concertedly taking away their right to practice their profession. In addition, the NFL Personal Conduct pol-

---

14. For example, the Supreme Court of the United States has crafted a "non-statutory" labor exemption to antitrust scrutiny where employer conduct relates to the collective bargaining process. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

icy harms consumers by robbing them of their ability to demand, on the free market, football games that include those excluded players.

I am not, by any means, condoning the egregious wrongs committed in recent years by Michael Vick, Ben Roethlisberger, and several other NFL players. However, for the NFL team-owners to use the egregious wrongful acts of a few NFL players as a *carte blanche* license to engage in a group boycott is a gross miscarriage of justice.

Two wrongs do not make a right.

Thus, if the NFL club owners truly want to encourage NFL players to act with greater decorum, they, like the players, must follow the black letter of the law. This begins with implementing a policy of personal conduct that itself complies with the law, and specifically Section 1 of the Sherman Act.

