

# Deflategate’s Labor Legacy: The Centrality of Grievance Procedures in Collective Bargaining Negotiations

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## I. INTRODUCTION

Five weeks into the 2016-17 National Football League (“NFL” or “the League”) season and for the first time in nine months, New England Patriots (“the Patriots”) celebrity quarterback Tom Brady (Brady) roared onto the football field. For the first four weeks of the season, he served a suspension originally issued by NFL Commissioner Roger Goodell (“Goodell” or “the Commissioner”) in May 2015.

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Goodell suspended Brady because Brady's "conduct"—being generally aware that members of the Patriots staff were intentionally deflating footballs below League-required inflation, which may give a quarterback an advantage—was "detrimental" to the "integrity" of the game of football.<sup>1</sup> Soon after receiving Goodell's letter pronouncing his discipline, Brady and the National Football League Players Association ("the union" or "NFLPA") on his behalf, requested an appeals hearing, governed by Article 46 (the "grievance procedure"<sup>2</sup>) of the NFL/NFLPA collective bargaining agreement ("CBA"), to challenge the discipline.<sup>3</sup>

After the appeals hearing,<sup>4</sup> in which Goodell served as the overseer and designer of the process, as well as ultimate decision-maker therein, Goodell issued a decision confirming his original disciplinary action.<sup>5</sup> Brady and the NFLPA requested a federal court review the

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1. Troy Vincent's Letter to Tom Brady, ESPN (May 12, 2015), [http://www.espn.com/nfl/story/\\_id/12873455/troy-vincent-letter-tom-brady](http://www.espn.com/nfl/story/_id/12873455/troy-vincent-letter-tom-brady).

2. It is important to note a particular challenge in writing about this procedure. The NFL has no single disciplinary policy; multiple policies exist in multiple forms, only some of which are incorporated into the CBA. See, e.g., National Football League & National Football League Players Association, Collective Bargaining Agreement 2011-2020, Aug. 4, 2011, (at Art. 42(6) (drug policies), available at <https://nfl-labor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [hereinafter CBA]; *id.* Art. 4(9) (team-negotiated forfeiture behavior). Article 46 is confusingly titled "Commissioner Discipline," though it does not outline any discipline or behavior worthy of discipline. Section 1(a) of Article 46, entitled "League Discipline," states both that the Commissioner will notify a player promptly of any discipline and that the player may appeal in writing within three days. Article 46(1)(a)–(2) then describe a process for appealing such discipline. So, simplistically, if a player receives a notice of discipline, the player may initiate an Article 46 grievance proceeding. Because the entity that gives notice of discipline and the entity to whom the player grieves is one and the same, media outlets, courts, and even the parties themselves regularly conflate the disciplinary process and the grievance procedure. See Jim Trotter, "Talks Over Roger Goodell's Disciplinary Role Take Massive Step Backward," ESPN, Mar. 24, 2016, [http://www.espn.com/nfl/story/\\_id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down](http://www.espn.com/nfl/story/_id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down). Of particular note, the process Goodell and the NFLPA frequently call the "discipline process" is actually the appeal or grievance procedure, and we will refer to it as such. *Id.* Though the discipline process, too, could benefit from renegotiation, we will focus here exclusively on the grievance procedure.

3. See NFLPA, "NFLPA Moves to Recuse Roger Goodell as Arbitrator in Tom Brady Appeal," NAT'L FOOTBALL LEAGUE PLAYERS ASS'N' (May 19, 2015), <https://www.nflpa.com/news/all-news/nflpa-formally-requests-commission-recuse-self-as-arbitrator-in-brady-appeal>.

4. See *In the Matter of: Thomas Brady: Appeal Hearing Transcript*, NAT'L FOOTBALL LEAGUE (June 23, 2015) [hereinafter Hearing Transcript].

5. See Roger Goodell, *Final Decision on Article 46 Appeal of Tom Brady*, NAT'L FOOTBALL LEAGUE (July 28, 2015) [hereinafter Final Decision], at 5.

arbitration<sup>6</sup> decision.<sup>7</sup> The NFL, led by the owners' representative Management Council ("Management Council"), also filed in federal court, seeking to confirm the arbitration award.<sup>8</sup> The U.S. District Court vacated the suspension in September 2015, allowing Brady to start the 2015-2016 season.<sup>9</sup> The court found that Goodell's decision was premised on "several significant legal deficiencies" and that the arbitration itself was "fundamentally unfair."<sup>10</sup> The NFL appealed to the Second Circuit and won; the three-judge panel voted 2-1 to reinstate Brady's suspension because Goodell had acted within his vast discretion.<sup>11</sup> Brady's request for a rehearing in the Second Circuit<sup>12</sup> was denied in August 2016.<sup>13</sup>

In confirming Goodell's arbitration decision, the Second Circuit declared that Goodell, as arbitrator, "properly exercised his broad

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6. Though an argument could be made that this process is not arbitration, we accept *arguendo* this definition and refer to the hearing as "the hearing" or "the arbitration" interchangeably. By calling it arbitration, the parties trigger a few pertinent laws, particularly the Federal Arbitration Act, which the U.S. District Court cites in this case, and the Labor Management Relations Act, which the Second Circuit cites in this case. These laws and subsequent court precedent give great deference to the arbitrator—here, the Commissioner—to make decisions as he sees fit. As long as the decisions can be drawn reasonably from the CBA and are fundamentally fair, even if a decision is factually erroneous, courts must affirm the arbitration decision. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683–84 (2010).

7. See Unredacted Petition to Vacate Arbitration Award for Petitioner at 2, Nat'l Football Players Ass'n on its own behalf and on behalf of Tom Brady v. Nat'l Football League and Nat'l Football League Mgmt. Council (D. Minn. July 29, 2015) (Civ. No. 15-3168).

8. See Brief for Plaintiff at 2, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n (S.D.N.Y. July 28, 2015) (Civ. No. 15-05916). Based on the first-to-file principle, the District of Minnesota transferred the NFLPA's case to the Southern District of New York, which then consolidated the cases. See Nat'l Football League Players Ass'n on its own behalf and on behalf of Tom Brady v. Nat'l Football League and Nat'l Football League Mgmt. Council, Civ. No. 15-3168, at \*2 (D. Minn. July 30, 2015) (order transferring case to the Southern District of New York).

9. See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 453, 474 (S.D.N.Y. 2015).

10. *Id.* at 463, 470–71, 473.

11. See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 542 (2d Cir. 2016).

12. See generally Petition for Panel Rehearing or Rehearing En Banc of Appellees Nat'l Football League Players Association and Tom Brady, Nat'l Football League Mgmt. Council and Nat'l Football League v. Nat'l Football League Players Ass'n on its own behalf and on behalf of Tom Brady, (2d Cir. filed May 23, 2016) (No. 15-2801) [hereinafter Petition for Panel Rehearing].

13. See Nat'l Football League Mgmt. Council and Nat'l Football League v. Nat'l Football League Players Ass'n on its own behalf and on behalf of Tom Brady, 647 F.App'x. 32 (2d Cir. 2016) (denying rehearing and rehearing en banc).

discretion under the collective bargaining agreement.”<sup>14</sup> The 2-1 decision described the disciplinary procedure as “unorthodox,” but stated somewhat unconvincingly that the court “presumed” the procedure was “bargained for” and “mutually decided” upon “years ago.”<sup>15</sup> This assumption that the procedure was the result of intentional, mutual decision sparked our curiosity, and this article.

Though the District Court and the Second Circuit came to different conclusions, both decisions highlighted that the Brady case, which the media termed “Deflategate,”<sup>16</sup> was neither about flat footballs nor a bombastic Commissioner. Rather, Deflategate exposed a paltry grievance procedure that results in procedural unfairness in the players’ disciplinary process.<sup>17</sup> It holds implications for business relationships and grievance procedures beyond the Deflategate case and the NFL. Specifically, Deflategate offers warnings about,<sup>18</sup> and insight into, how future collective bargaining negotiations about grievance procedures ought to occur.

While we take no position on whether Deflategate was rightly or wrongly decided based on arbitration case law, we do assert in Part I that the Article 46 grievance procedure itself is an unwise agreement *for both parties*. In Part II, we analyze why the procedure remained unchanged during the CBA negotiations from 1960 to the present. We suggest that this was no oversight—the NFL and NFLPA deliberately left the procedure untouched. In Part III, we offer recommendations for changing the disincentives to renegotiate. We also suggest contract design and drafting principles that ought to underlie how

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14. 820 F.3d at 532.

15. *Id.*

16. Susanna Kim & Aaron Katersky, *Deflategate: NFL Probing Whether New England Patriots Used Deflated Balls*, ABCNEWS (Jan. 19, 2015), <http://abcnews.go.com/Sports/deflategate-nfl-investigating-england-patriots-deflated-balls/story?id=28322679> (the first use of the term “Deflategate” by mainstream media).

17. See, e.g., Andrew Storm, *The Brady Decision is Good for Unions*, ONLABOR (Apr. 26, 2016) <https://onlabor.org/2016/04/26/the-brady-decision-is-good-for-unions/>. Though not extending the argument as far as Storm or us, Michael McCann, sports law scholar at University of New Hampshire School of Law, suggests that Deflategate is primarily about whether management is treating a union member unlawfully in a disciplinary matter. See *New Amicus Briefs Try to Show Tom Brady Case is Relevant Beyond NFL*, SPORTS ILLUSTRATED (June 1, 2016), <http://www.si.com/nfl/2016/05/31/deflategate-tom-brady-roger-goodell-amicus-briefs-labor-unions>.

18. Multiple interested parties—from the parties themselves to external arbitration experts—warn of the “harm” Deflategate could inflict on “all unionized workers” and management who have “bargained for appeal rights [i.e., a grievance procedure] as a *protection*.” *E.g.*, Petition for Panel Rehearing, *supra* note 12, at 3.

the NFL Management Council and NFLPA—and other union/management relationships—structure future grievance procedure bargaining processes.

## II. THE GRIEVANCE PROCEDURE

The appeals hearing highlighted above is a substantial component of the overall grievance procedure outlined in Article 46 of the NFL and NFLPA's Collective Bargaining Agreement (CBA).<sup>19</sup> Article 46 permits the Commissioner to discipline player behavior he believes is "detrimental to the integrity of, or public confidence in, the game of professional football."<sup>20</sup> The Commissioner must name the behavior that violated the policy and notify the player in writing of the punishment.<sup>21</sup> Conduct considered "detrimental" can include behavior both on and off the football field.<sup>22</sup> If the player disagrees with the disciplinary decision, the player and the NFLPA may appeal the decision to the Commissioner and request a hearing.<sup>23</sup>

The appeals hearing is overseen by a hearing officer, who can be either the Commissioner or someone he appoints.<sup>24</sup> The hearing is scheduled within ten days of the Commissioner receiving notice of the appeal.<sup>25</sup> The parties must exchange documents at least three days in advance of the hearing.<sup>26</sup> Both parties may bring representation to the hearing.<sup>27</sup> The hearing is transcribed, unless otherwise agreed to beforehand.<sup>28</sup> Though not articulated in Article 46, the Commissioner decides the procedures for the hearing.<sup>29</sup> Post hearing briefs are not allowed, unless the Commissioner requests them.<sup>30</sup> As soon as is "practicable," the hearing officer issues a decision that is the "full, final and complete disposition of the dispute and will be binding."<sup>31</sup> Visually, the entire process may be depicted like this:

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19. See CBA, *supra* note 2.

20. *Id.* at Art. 46(1)(a).

21. See *id.*

22. See *Personal Conduct Policy*, NAT'L FOOTBALL LEAGUE (Dec. 2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf> [hereinafter PCP].

23. CBA, *supra* note 2, at Art. 46(1)(a).

24. *Id.* at (2)(a).

25. *Id.* at (2)(f)(i).

26. *Id.* at (2)(f)(ii).

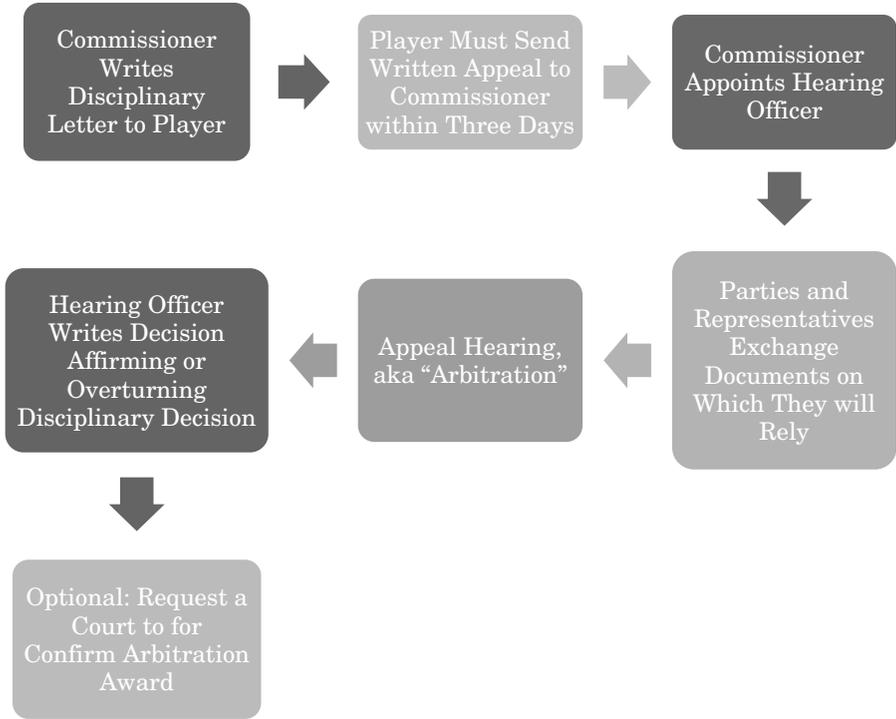
27. *Id.* at (2)(b).

28. *Id.* at (2)(f)(iii).

29. See Hearing Transcript, *supra* note 4 at 6:15–25.

30. CBA, *supra* note 2, at Art. 46(2)(f)(iv).

31. *Id.* at (2)(d).



### A. *An Unwise Agreement*

While many aspects of this procedure are abnormal, we assess whether the procedure was a wise agreement to which both parties should have mutually committed. Harvard Negotiation Project scholars Roger Fisher, William Ury, and Bruce Patton propose a definition of a wise negotiated agreement<sup>32</sup>: such an agreement meets the “legitimate interests of each side to the extent possible”<sup>33</sup>; it “resolves

32. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 4 (1991) [hereinafter Fisher & Ury].

33. *Id.*

conflicting interests fairly”<sup>34,35</sup>; is durable, and “takes community interests [beyond those of the bargaining parties] into account.”<sup>36</sup> Below, we offer a few reasons why Article 46 does not meet these criteria for a wise agreement.

### **The Grievance Procedure Does Not Resolve Conflicts Fairly Because It Offers No Guidance on What Conduct is Subject to Discipline**

The League publicly states that “most rules and fines”<sup>37</sup> are the result of collective bargaining, and are not “handed down from on high.”<sup>38</sup> According to the League, players receive “clear instruction” on what constitutes a violation and have the opportunity to provide feedback each year on the impact of rules.<sup>39</sup> Clear instructions provide a fair basis for evaluating behavior and, ideally, deter future undesired behavior.

But nowhere does the bargained-for Article 46 articulate what activities erode “integrity of the game” or “public confidence.” The NFL does have policies—namely, the “Integrity of the Game Policy” and the “Personal Conduct Policy” (“PCP”)—that outline some on-field and off-field behavioral expectations, but the NFL wields these in peculiar ways. Most importantly, neither the Integrity of the Game Policy nor the PCP is incorporated explicitly into the CBA, which

34. *Id.*

35. Here, we consider procedural fairness, that is, whether the Article 46 procedure resolves conflicts in a respectful, unbiased way that ensures all essential participants' voices are heard and that all participants understand why a certain outcome was reached. *See generally* E. LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL FAIRNESS* (1988) (outlining that these factors contribute more than any others to an individual's willingness to cooperate with an organization's rules and procedures). An evaluation based on substantive fairness of the procedure as applied may or may not reach the same conclusion. *See, e.g.,* Gail A. Ball, Linda Klebe Trevino & Henry P. Sims Jr., *Just and Unjust Punishment: Influences on Subordinate Performance and Citizenship*, 37 *ACAD. MANAGE. J.* 299, 301–02 (1994) (describing various decision points in an employee disciplinary process as subject to evaluation for procedural fairness) [hereinafter *Just and Unjust*].

36. Fisher & Ury, *supra* note 32, at 4.

37. Further exploration reveals that “most” means only the on-field rules, not those included in the personal conduct policy. NFL, *Fines and Appeals*, <http://operations.nfl.com/football-ops/fines-appeals/> (last visited Oct. 16, 2016).

38. NFL, *NFL Rules Enforcement*, <http://operations.nfl.com/football-ops/nfl-rules-enforcement/> (last visited Oct. 16, 2016).

39. *Id.*

means players can be disciplined under policies not bargained for collectively.<sup>40</sup> The Integrity of the Game Policy is cited in the Brady discipline letter, but the players had not even been given this policy by the time Brady was disciplined.<sup>41</sup> And the PCP employs the term “conduct detrimental,” implying that the PCP covers conduct that is “detrimental,”<sup>42</sup> but it adds disciplinary steps to conduct detrimental procedures absent from Article 46 and have not been negotiated or incorporated into the CBA.<sup>43</sup> The bargainers knew how to incorporate conduct clauses into the CBA; they did so with a 32-page policy outlining what constitutes drug misconduct. So since neither the Integrity of the Game Policy nor the PCP are incorporated into the CBA, we believe that the negotiators chose not to articulate or incorporate a definition of “conduct detrimental.”<sup>44</sup>

To summarize: Article 46 does not articulate a definition of “conduct detrimental.” The Integrity of the Game Policy is not distributed to players, the PCP adds disciplinary procedures absent from Article 46, and neither is bargained for collectively. It’s no wonder why most stakeholders do not know constitutes an Article 46 violation.

Instead, Article 46 allocates to the Commissioner sole responsibility for determining what constitutes “conduct detrimental” and how it should be disciplined.<sup>45</sup> Some arbitration experts consider this outside the bounds of what the NFL can do without first bargaining with the union.<sup>46</sup> Still, the Commissioner has indicated that the NFLPA waived any rights it might have had to bargain about what constitutes such behavior or what the discipline should be.<sup>47</sup>

Setting aside the legal question about whether unincorporated disciplinary terms or un-negotiated procedural terms are permitted

40. Alison McCann, *The NFL's Uneven History of Punishing Domestic Violence*, FIVETHIRTYEIGHT, (Aug. 28, 2014, 8:13 PM), <http://fivethirtyeight.com/features/nfl-domestic-violence-policy-suspensions/>.

41. *NFL Releases Statement on Patriots' Violation*, NFL, <http://www.nfl.com/news/story/0ap3000000492190/article/nfl-releases-statement-on-patriots-violations> (May 11, 2015). This policy had been given to Chief Executives, Club Presidents, General Managers, and Head Coaches on February 11, 2014, but had not been given to players.

42. PCP, *supra* note 22, at 1.

43. *Id.* at 5–6.

44. *Id.*

45. CBA, *supra* note 2, at Art. 46(1)(a).

46. Brief of Kenneth Feinberg as amicus curiae in support of Appellee’s Petition for Panel Rehearing or Rehearing En Banc, in Case 15-2801 (2nd Cir. May 31, 2016), at 5 [hereinafter Feinberg Amicus Brief].

47. Anna L. Jefferson, *The NFL and Domestic Violence: The Commissioner’s Power to Punish Domestic Abusers*, 7 SETON HALL J. SPORT L. 353, 364 (1997).

in the union-management disciplinary process, employees who cannot anticipate what will happen to them lose a sense of process control and, in turn, decrease their performance of desired behaviors.<sup>48</sup> If one of the employer's interests is to deter undesired behavior, it is unclear how this procedure does so.

### **The Grievance Procedure is Not Durable Because It Is Dependent on a Personality, Not a System**

Article 46 relies on the Commissioner to decide the conduct to be disciplined, whether to discipline, how to discipline, who will decide any appeal, and what procedural rules will apply in an appeal.<sup>49</sup> The Commissioner is not simply judge, jury, and executioner—he plays nearly every available role in the grievance process. This is unsustainable because it relies on an individual making de novo judgments with each particular instance of discipline. This requires a substantial amount of time and resources that could be used more wisely.

Importantly, because Commissioner may overturn his own award, the procedure violates the arbitration convention of “*functus officio*,” which means that once an arbitrator has issued the arbitrator's final award, the arbitrator himself may not revise it.<sup>50</sup> Goodell could have recused himself from assessing his own disciplinary decision as he had in other cases,<sup>51</sup> but did not, asserting to the NFLPA in a pre-hearing letter that he would not “abrogate his authority” or “rewrite the CBA,” which gives him discretion to hear the appeal.<sup>52</sup> Indeed, Goodell utilized that authority to both hear the appeal and “directly assess[ ]” Tom Brady's disciplined conduct.<sup>53</sup>

48. See Just and Unjust, *supra* note 35, at 316.

49. “[W]hen the subject matter of a dispute is arbitrable,” as here, “procedural” questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.” *Misco*, 484 U.S. at 40, cited in NFL Appellate Brief to the 2nd Circuit, Feb. 5, 2016.

50. *Wash.-Balt. Newspaper Guild v. Wash. Post Co.*, 442 F.2d 1234, 1238 (D.C. Cir. 1971). The American Arbitration Association—the premiere third-party provider of arbitrators—follows this principle. Am. Arb. Ass'n Arbitration Commercial Arbitration Rule R-46 (2013); accord Am. Arb. Ass'n Labor Arbitration Rule 40 (2013); Am. Arb. Ass'n Employment Arbitration Rule 40 (2009).

51. In the Matter of Ray Rice (“Ray Rice”) and In the Matter of New Orleans Saints Pay-for-Performance (“Bounty-Gate”), both on file with author.

52. *Tom Brady Suspension Case Timeline*, NFL (July 15, 2016, 3:24 PM), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline>.

53. Final Decision, *supra* note 5, at 17–18.

This allocation of decision rights, though perhaps efficient<sup>54</sup>, invests in one person “invariably motivated by their own sets of personal and professional goals” the power to make nearly all possible decisions in a single system.<sup>55</sup> This can lead to opportunistic exploitation of the system itself.<sup>56</sup> For example, it is easy to imagine a situation where Goodell, knowing public perception impacts the profitability of the League and thus, the contentment of his bosses, would make a disciplinary choice because of the weight of public opinion. And he has actually done so. When Goodell suspended Ray Rice in 2014 for two games for beating Rice’s fiancée unconscious, the public outrage was so strong that Goodell revisited the decision, suspending Rice indefinitely. A judge disagreed with public opinion, and with Goodell, and reinstated Rice.<sup>57</sup> A full discussion of that case would merit a separate article.

In addition, the individual, and thus the entire disciplinary process, can be swayed by “nudges” from influential people, such as the owners who elect Goodell to his post as Commissioner.<sup>58</sup> Effective grievance procedures do not rely on the personality of the specific person in the role of reviewer, as the system needs to exist even if the reviewer changes. A durable grievance procedure operates effectively independent of who is in the role, and provides both flexibility and structure to adopt to new situations and people, while maintaining consistency in outcome.

**The Procedure Does Not Resolve Conflicts Fairly Because it Does Not Articulate a Clear Process. Therefore, the party that creates the procedure has a greater procedural advantage than another.**

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54. Query whether recreating the hearing’s procedural rules every time, which has been Goodell’s practice, captures the potential efficiency of a one-person decision rights system. See, e.g., Xosé H. Vázquez, *Allocating Decision Rights on the Shop Floor*, 15 ORG. SCIENCE 463, 464 (2004) (claiming that behavioral uncertainty in the labor context makes it more efficient to allocate most or all decision rights to a manager).

55. Peter Jacobs, *Decision Rights: Who Gives the Green Light?*, HBS WORKING KNOWLEDGE (Aug. 8, 2005), <http://hbswk.hbs.edu/item/decision-rights-who-gives-the-green-light>.

56. Nicholas Argyres & Kyle Mayer, *Contract Design as a Firm Capability: An Integration of Learning and Transaction Cost Perspectives*, 32 ACAD. MANAG. REV. 1060, 1065 (2007) (discussing contract design in company-consumer contract negotiations).

57. *Supra* note 51.

58. Mike Florio, “NFL Hopes Kraft Pushes for Neutral Arbitration,” NBCSPORTS (May 11, 2015, 10:52 AM) <http://profootballtalk.nbcsports.com/2015/05/11/nflpa-hopes-kraft-pushes-for-neutral-arbitration/>.

The NFL uses an Article 46 hearing to review and hear new facts, even though it is formally called an “Appeal.” The Deflategate arbitration explicitly included new evidence, a new punishment, and—most shocking of all—a new basis for discipline.<sup>59</sup> These elements are far from standard appellate features. Brady was originally punished for being “at least generally aware” of a scheme to deflate footballs and “fail[ing] to cooperate fully and candidly with the investigation” by not turning over his cell phone and other electronic evidence.<sup>60</sup> But after the “Appeal,” Goodell stated that he was punishing Brady because he “knew about, approved of, consented to, and provided inducements and rewards in support of” a scheme to deflate footballs, in addition to his lack of cooperation with the investigation.<sup>61</sup> This new basis for discipline turned the so-called appeal into a new fact-finding hearing, where the fact-finder and decider was the same party who imposed the initial discipline.

Even the Second Circuit majority notes the dual purpose of this “arbitration” process; the court calls it both a hearing to “establish a complete factual record” that includes expanding that record and possibly changing the basis for discipline,<sup>62</sup> and an appeal with limited discovery.<sup>63</sup> This discrepancy is, in fact, the basis for Chief Judge Katzmann’s dissent; Article 46 explicitly states that what the court and parties call “arbitration” is an appeals process, not a *de novo* hearing.<sup>64</sup>

Unfortunately, Article 46 articulates no procedural guidance—no standard of review, no evidentiary rules—to prime the parties to treat it like an evidentiary hearing. So, a party may be disadvantaged if it accepts Article 46 language naming the hearing as an appellate hearing—as sufficient to know how to operate within that procedure.

Even if parties understood the hearing to be an appeal, Article 46 offers little clarity on the procedural format the hearing follows. The Second Circuit, which deferred to Goodell’s authority, stated that Article 46 does not “articulate rules of procedure for the hearing” and therefore, Goodell is left to determine the structure and procedures for the hearing.<sup>65</sup> Not even the attorneys involved in the Deflategate

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59. Hearing Transcript, *supra* note 4, at 28:18–25, 29:1–5.

60. *Supra* note 1.

61. Final Decision, *supra* note 5.

62. 820 F.3d at 541.

63. *Id.* at 546.

64. *Id.* at 549.

65. 820 F.3d at 537. The absence of statutory provisions for discovery techniques does not alleviate the arbitrator from a duty to ensure relevant documentary evidence is shared timely and fully with both parties. 125 F. Supp. 3d at 472.

hearing could identify a procedure they were able to follow.<sup>66</sup> In fact, in order to set a procedure, the law firm representing the NFL sent out a “memo” outlining the procedure for *this particular Article 46 hearing* in advance of the hearing.<sup>67</sup> Without an understanding of what will happen at the hearing, whether evidence will be heard, what rules govern admission of evidence, and how evidence will be weighed, parties and their attorneys have a difficult time preparing for the hearing, potentially disadvantaging the party or parties who cannot adequately prepare.<sup>68</sup> Indeed, when these ad hoc procedures are enacted, even courts which generally defer to Goodell’s authority to design the procedures are “extremely disturbed by the fundamental lack of due process.”<sup>69</sup> Because the procedure is redesigned nearly each time it is implemented, and not clearly laid out anywhere, it does not resolve fairly the interests at least one, and perhaps both, parties have in preparation and consistency.

**The Grievance Procedure Cannot Adequately Meet Both Parties’—and Community—Interests in Detering Undesirable Behavior Because the Discipline and Subsequent Appeals Process are Inconsistent**

Both players and the NFL want to deter undesirable behavior, on and off the field, because it makes all stakeholders in the NFL look bad. Yet, Article 46 misses an opportunity to have a deterrent effect. Article 46 gives no standards for what disciplinary actions the Commissioner may take for “conduct detrimental.” The Personal Conduct Policy, which is not incorporated into the CBA, says punishment could range from fines to banishment, but it is all dependent on “the nature of the violation and the record of the employee.”<sup>70</sup> The Commissioner or his designee has the final say in the discipline and in what conduct warrants discipline.<sup>71</sup>

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66. It is evident from the first few minutes of the arbitration transcript that the attorneys, and Goodell himself, were confused about what procedural rules were in place. Hearing Transcript, *supra* note 4, at 1–4.

67. *Id.*

68. Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LABOR LAWYER 21, 30–32 (1997) (suggesting employers shape more specific arbitration clauses rather than rely on boilerplate language, in part to avoid a court interpreting the clause in a way unfavorable to one side).

69. See, e.g., *Vilma v. Goodell*, 917 F. Supp. 2d 591, 596 (E.D. La. 2013) (granting summary judgment for Goodell but expressing discomfort that Goodell did not allow disciplined players to know the identities of, or confront, their accusers).

70. PCP, *supra* note 22, at 6.

71. *Id.*

Without objective standards guiding decisions about conduct and discipline, the review in a grievance proceeding is arbitrary.<sup>72</sup> The NFL has successfully argued that the Commissioner has full discretion to issue punishments without considering as precedential previous punishments.<sup>73</sup> Some may argue that this randomness actually creates a more deterrent disciplinary system; players are more likely to be cautious of their behavior if they do not know if, and to what extent, they will be disciplined. But fairness concerns actually *increase* when uncertainty is present.<sup>74</sup> Research on employer-employee punishment indicates that performance of the desired behavior actually increases the more procedurally just the employee perceives the manner in which the punishment was issued to be.<sup>75</sup> Additionally, the employee's perception that the manner of punishment was unfair *increases* negative citizenship behaviors such as revenge-seeking and resistance to other authority figures.<sup>76</sup> Neither the NFL, the players, nor the public want to condone or ignore bad behavior in the NFL. A better agreement would consider how best to design a procedure that deters unwanted behavior.

**The Grievance Procedure Cannot Sufficiently Resolve  
Conflicting Interests Because Its Procedural Vagueness  
Encourages Litigation. This Indicates Article 46 is Not a  
Durable Agreement**

The procedural vagueness and concentrated authority make it more likely than not that parties will seek judicial review of an arbitration decision, making commitment to the original agreement—and to the organization that made it—less durable.<sup>77</sup> Indeed, almost every issue in the Deflategate trial touched on *procedural* questions

72. Fisher & Ury, *supra* note 32, at 81–82, 85.

73. National Football League Players Association on behalf of Adrian Peterson v. National Football League, 2016 WL 4136958 slip op. at 6 (8th Cir. Aug. 4, 2016).

74. Stefan Thau, *How Management Style Moderates the Relationship Between Abusive Supervision and Workplace Deviance: An Uncertainty Management Model*, 108 ORG. BEHAVIOR & HUMAN DECISION PROCESSES 79, 79 (2009).

75. *See Just and Unjust*, *supra* note 35, at 314–15.

76. *Id.* at 302–03.

77. Tom Tyler & Heather Smith, *Justice, Social Identity, and Group Processes*, in THE PSYCHOLOGY OF THE SOCIAL SELF 228 (Tom Tyler et al., eds. 1999) (feelings about whether a procedure is fair impact not only satisfaction with the outcome and process, but also commitment to an organization, positive behavior, and views of authority figures in the organization) [hereinafter Tyler & Smith].

stemming from the arbitration.<sup>78</sup> With so many seemingly unresolved or at least continuing procedural questions, Article 46 is not made to sustain scrutiny.

Beyond judicial review of the arbitration decisions themselves, the vague procedures have led to other court filings. After the Bountygate decision, discussed *infra*, New Orleans Saints player Jonathan Vilma filed a defamation suit against Goodell, who had suspended Vilma for a full season for allegedly offering bounties for other players on the Saints to injure opponent players.<sup>79</sup> Though the U.S. District Court for the Eastern District of Louisiana dismissed the case on preemption grounds, “[t]he Court nonetheless believe[d] that had [the discipline and appeal] been handled in a less heavy handed way, with greater fairness toward the players and the pressures they face, this litigation and the related cases would not have been necessary.”<sup>80</sup>

One might question the use of court resources, including an expedited briefing schedule,<sup>81</sup> for a case that arguably had little urgency in the overall United States justice system.<sup>82</sup> Indeed, Judge Berman urged the NFL and NFLPA to negotiate a mutually agreeable settlement to the Deflategate case before he ruled because “[t]he earth is already sufficiently scorched.”<sup>83</sup> The unwise grievance procedure has not resolved conflicts fairly; if it had, parties would be less likely to seek review in federal courts. Instead, the procedure leads parties to seek resolution of differences in a less efficient manner, i.e., an expensive court proceeding, so that even if the outcome is not what each party desires, the parties at least feel they are fairly treated. Through the courts, they seek the procedural fairness they are not finding in the grievance procedure itself.

### III. WHY HAS ARTICLE 46 NOT BEEN RENEGOTIATED?

Despite Article 46 being an “unorthodox” grievance procedure, the Deflategate court decisions generally defer to the “bargained for”

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78. See, e.g., 125 F. Supp. 3d at 452–53, 463; 820 F.3d at 531–2, 536, 549–50.

79. 917 F. Supp. 2d at 591.

80. *Id.* at 597.

81. *Supra* note 52.

82. Mark Maske & Leonard Shapiro, *NFL Labor Negotiations Continue to Move Slowly*, WASH. POST (Nov. 17, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602208.html> [hereinafter Maske & Shapiro].

83. Rachel Axon, *Deflategate Judge Tells NFL, Union to ‘Tone Down’ the Talk*, USA TODAY (July 30, 2015, 9:23 PM), <https://perma.cc/K4Z8-X44H?type=image>.

and “mutually decided” upon agreement that includes such a provision.<sup>84</sup> Indeed, “the parties . . . could have fashioned a different agreement”<sup>85</sup> And chose not to do so. While Goodell may be correct that both sides “have had discussions about the disciplinary process for decades,”<sup>86</sup> the procedure has not actually changed much since 1968—the year the NFL and NFLPA drafted the original CBA.<sup>87</sup> Why was this provision, unwise at best and intentionally one-sided at worst, untouched in CBA negotiations?

Common wisdom might say the decision not to negotiate for a different provision was unintentional. Players and management likely focused a majority of CBA negotiations on more distributive issues like salary, leaving little time to focus on something procedural, like a disciplinary mechanism, especially when the procedure is unlikely to impact many players. Also, grievance arbitration—what both parties concede Article 46 is—has been a standard contract term for most labor-management collective bargaining agreements since the 1940s,<sup>88</sup> so boilerplate language may not have grabbed the attention of NFLPA representatives.

In addition to these substantive reasons for passively leaving Article 46 as is, the NFLPA may believe the current state of affairs affords it the weight of public opinion. As it stands, the NFLPA can claim it is the victim of a powerful Management Council that took advantage of the union's weak bargaining power for many years. Many commentators blame the NFLPA for agree to a poorly drafted CBA which “allows the NFL Commissioner such sweeping powers and not place a clear limitation on those powers.”<sup>89</sup> But in a battle between billionaire owners and millionaire players, the bargaining power narrative may make the players more sympathetic to a public

84. 820 F.3d at 532.

85. *Id.* at 541.

86. Jim Trotter, *Talks Over Roger Goodell's Disciplinary Role Take “Massive Step Backward,”* ESPN (Mar. 24, 2016), [http://www.espn.com/nfl/story/\\_/id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down](http://www.espn.com/nfl/story/_/id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down).

87. Mike Florio, “*Commissioner's Power has been Present Since First CBA,*” NBC-SPORTS, (May 17, 2015, 7:18 PM), <http://profootballtalk.nbcsports.com/2015/05/17/commissioners-power-under-article-46-has-been-present-since-the-first-cba/> [hereinafter *Commissioner's Power*].

88. See, e.g., Stephen Goldberg, *Grievance Mediation: Why Some Use it and Others Don't*, in *DISPUTE RESOLUTION IN THE WORKPLACE 2060–67* (Proceedings of the National Academy of Arbitrators 2009), <http://naarb.org/proceedings/pdfs/2009-205.PDF> [hereinafter *Grievance Mediation*].

89. Darren Heitner, *Ray Rice Discipline Brings To Light Poorly Drafted NFL Collective Bargaining Agreement* FORBES (Sept. 11, 2014, 7:52 AM), <http://www.forbes.com/sites/darrenheitner/2014/09/11/ray-rice-discipline-brings-to-light-poorly-drafted-nfl-collective-bargaining-agreement/#57c0f45d334b>.

that wants to root for the “little guy,” especially if that little guy has been treated unjustly.

We believe this narrative is incomplete. The NFL and NFLPA contract had many provisions with more elaborate processes, and the parties could have chosen to enumerate a grievance procedure for conduct detrimental discipline—quite easily, especially in the last ten years—had they desired. A deeper examination of the bargaining incentives reveals that both the NFL and NFLPA had substantial reasons not to renegotiate the original 1960s process. Thus, we assert that the NFLPA and NFL knew how to design a more specific grievance procedure, and chose not to do so.

### A. *Owner Disincentives to Negotiate a New Grievance Procedure*

Owners have little incentive to change the current procedure. The people with complaints are the disciplined players themselves, most of whom have behaved in a way that was inappropriate, sometimes illegal, and potentially detrimental to the League. The League has received bad publicity because of the behavior—see, e.g., coverage of the recent domestic violence cases<sup>90</sup>—so the League has a strong interest in dealing with such conduct quickly, flexibly, and strongly.

The owners have a strong interest in ensuring any procedural overseer understands the specific context of, and owners’ fiduciary interests in, professional football.<sup>91</sup> Grievance procedures could serve to regulate player behavior, but also to avoid public relations problems; these factors all contribute to the NFL’s bottom line. Allowing the appointment of an unaffiliated arbitrator cedes some control over those interests because the arbitrator would not then be answerable to the owners. On the other hand, the owners retain a great deal of control by permitting the Commissioner—their employee—to appoint himself to “arbitrate” a grievance. With Goodell responsible for overseeing discipline, and also representing the owners’ interests, the owners at least indirectly, if not directly, weigh in on disciplinary decisions.<sup>92</sup>

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90. See, e.g., Holly Yan, “NFL Fallout: Domestic Violence Cases Lead Some Fans to #BoycottNFL,” CNN, (Sept. 16, 2014, 9:15 AM), <http://www.cnn.com/2014/09/15/us/nfl-fallout/>.

91. Stephen B. Goldberg, *A Modest Proposal for Better Integrating Collective Bargaining and Interest Arbitration*, 19 LABOR LAWYER 97, 98 (2003) [hereinafter *A Modest Proposal*].

92. See, e.g., Mike Florio, “NFL Hopes Kraft Pushes for Neutral Arbitration,” NBCSPORTS (May 11, 2015, 10:52 AM), <http://profootballtalk.nbcsports.com/2015/05/11/nflpa-hopes-kraft-pushes-for-neutral-arbitration/> (describing how the owners

The owners also have an interest in engaging more effectively in financial negotiations than they have in the past. During the 2006 CBA negotiations, the owners felt pressured into an agreement, and felt they neglected some key financial issues, perhaps in the face of some non-financial issues.<sup>93</sup> By not discussing the grievance procedure in collective bargaining negotiations, the NFL exercises its belief that a grievance procedure is a permissive, not a mandatory, subject of collective bargaining negotiations.<sup>94</sup> From the NFL's perspective, any discussion of it is a generous move on the NFL's part. The NFL wants to focus on the profits.

Finally, by not forcing Goodell to jump through complicated procedural hoops, the owners free Goodell to focus on his primary responsibility—generating revenue for the NFL and the owners. Goodell has promised to increase revenues to \$25 billion by 2027; profits may cure other challenges, such as Goodell's handling of disciplinary matters, the Commissioner presents to the owners.<sup>95</sup>

#### B. *Player Disincentives to Negotiate a New Grievance Procedure*

For the NFLPA, it is easier for a union representative to blame a “bad” arbitrator than to spend negotiation capital on redesigning a process that may not entirely satisfy his union.<sup>96</sup> The union representative is under pressure to secure the best deal for the current roster of players. Since the average length of a playing career in the NFL is three years,<sup>97</sup> the union representative is never negotiating for the

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wanted Kraft to influence Goodell's appointment of an arbitrator in the Deflategate case).

93. Ron Borges, *Mike Vrabel: There's a Place for More Pay*, BOSTON HERALD, (Nov. 9, 2008), [http://www.bostonherald.com/sports/patriots\\_nfl/new\\_england\\_patriots/2008/11/mike\\_vrabel\\_there%E2%80%99s\\_place\\_more\\_pay](http://www.bostonherald.com/sports/patriots_nfl/new_england_patriots/2008/11/mike_vrabel_there%E2%80%99s_place_more_pay).

94. See Sean P. McCarthy, *Bending the Rules to Change the Rule? Was the NFL's Domestic Violence Policy Collectively Bargained For?*, 26 MARQUETTE SPORTS L. REV. 245, 255–56 (2015).

95. Daniel Kaplan, *Goodell Sets Revenue Goal of \$25B by 2027 for NFL*, SPORTS BUS. DAILY, (Apr. 5, 2010), [http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-\\$25B-By-2027-For-NFL.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-$25B-By-2027-For-NFL.aspx).

96. See, e.g., A Modest Proposal, *supra* note 91 at 101 (citing “internal political consequences” as a reason a union or management would accept undesirable terms rather than negotiate better terms); Grievance Mediation, *supra* note 88, at 207 (stating that a more hierarchical procedure allows blame to rest solely on the arbitrator, which poses “little risk to prestige or job security” of the union negotiator).

97. Rob Arthur, *The Shrinking Shelf Life of NFL Players*, WALL ST. J., (Feb. 29, 2016, 12:42 AM), <http://www.wsj.com/articles/the-shrinking-shelf-life-of-nfl-players-1456694959>.

exact same constituents from one cycle to the next. And current players are focused on short-term gains. If they influence the negotiations, the negotiations are likely to focus on immediate player issues like salary and on-field safety. This is a recipe for small, incremental change.<sup>98</sup> Given a series of potential issues to “put on the table,” players will not eagerly select an issue that many deem irrelevant, like a grievance procedure for disciplinary actions.<sup>99</sup>

Indeed, the vague grievance procedure actually *serves* short-term player interests. The majority of players will never seek to use the grievance procedure because most of them will not be disciplined for conduct detrimental. Thus, they may not care much if a few players are subject to an arbitrary disciplinary process. If the chance of a reputable player being unfairly punished is, let’s say, 1/3, and the chance of a disreputable player being fairly punished is 2/3, then the risk that a few “good” guys will be unfairly punished may seem like a reasonable price to pay to ensure that disreputable players are punished.<sup>100</sup> The League is exclusive; many players who do not engage in questionable conduct are equally qualified to play, and the players would rather have upstanding players than players whom the union is forced to defend.<sup>101</sup> So, the union may not want to spend too much negotiation capital on revising this procedure, at the cost of a smaller revenue percentage or other compromise.

Additionally, the owners choose whether the players play. There is no seniority system. So, if an owner does not like a player’s behavior, whether or not it rises to the level of conduct detrimental, a player could lose his job.<sup>102</sup> It is reasonable to believe the NFLPA

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98. “In working with organizational disputes, there is a great temptation for [disputants] to settle for small improvements in communication or relationships between the parties, rather than trying to revise the roles, structures, systems, cultures, and strategies that chronically produce the conflict stories.” KENNETH CLOKE AND JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT* 163 (2000).

99. STANFORD CENTER ON CONFLICT AND NEGOTIATION, *BARRIERS TO CONFLICT RESOLUTION* 51 (Kenneth Arrow et al., eds. 1995) [hereinafter *Barriers to Conflict Resolution*] (discussing the certainty effect).

100. Mike Florio, “*So Why Didn’t the NFLPA Reduce Goodell’s Power in 2011?*,” NBCSPORTS, (Nov. 20, 2014, 4:23 PM), <http://profootballtalk.nbcsports.com/2014/11/20/so-why-didnt-the-nflpa-reduce-goodells-power-in-2011/>.

101. Sam Farmer, *Character Will Count in the NFL Draft; With a Stricter Conduct Policy, Teams Will Be Cautious About Making the Right Decisions. Drug Use, Violence Are Issues Among Top Prospects*, L.A. TIMES, Apr. 26, 2007, at D3.

102. In a thorough review of the CBA, there was no mention of retaliation; an owner may release a player who is oppositional to the owner without consequence. For instance, in the ten months between the original discipline and the final arbitration decision in the Bountygate case, Anthony Hargrove was let go from the Green Bay Packers. NFL, *Paul Tagliabue Vacates Saints Player Bounty Suspensions*, NFL

weighed the costs of negotiating a new Article 46 against the small benefit—there have been only 53 disciplinary actions for personal conduct violations since 2002, four per year on average<sup>103</sup>—and thus far chose to keep Article 46 in its 1968 state.

#### IV. WHY NOW?: THE TURNING POINT FOR RENEGOTIATING THE GRIEVANCE PROCEDURE

Though the League disciplines hundreds<sup>104</sup> of players per year—assessing fines, suspending from game play, and ordering to counseling or drug treatment<sup>105</sup>—Brady's case drew particular attention to the NFL's disciplinary process, including the grievance procedure.

In the decade prior to Deflategate, the League and NFLPA had dealt with many prominent examples of how the vague “conduct detrimental” grievance procedure and opaque implementation of the procedure led parties to seek review, often in court. Some of Brady's notoriously detrimental predecessors were suspended under Article 46 for such off-field activities as hitting a four-year-old with a switch (Adrian Peterson)<sup>106</sup> and punching a woman unconscious (Ray Rice, mentioned briefly *supra*).<sup>107</sup> Though the behavior itself could be more easily categorized as “conduct detrimental” to the League and to humans in general, such cases were appealed to the federal courts, where the courts often disagreed with the procedure's outcomes.<sup>108</sup>

And one prominent example of “conduct detrimental” discipline did not even make it to federal court before being overturned. That case, called “Bountygate,” involved four New Orleans Saints players suspended for allegedly offering cash rewards to fellow players who

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(Dec. 11, 2012, 1:30 PM), <http://www.nfl.com/news/story/0ap1000000109646/article/paul-tagliabue-vacates-new-orleans-saints-bounty-suspensions> [hereinafter Bounty Suspensions].

103. Alison McCann, *The NFL's Uneven History of Punishing Domestic Violence*, FIVETHIRTYEIGHT (Aug. 28, 2014, 8:13 PM), <http://fivethirtyeight.com/features/nfl-domestic-violence-policy-suspensions/>.

104. Most are for on-field violations, a few dozen for criminal conduct, and a few for other “conduct detrimental.” John Gibeaut, *When Pros Turn Cons: Athletes Who Commit Crimes Are Giving Sports a Black Eye. But While the NFL Claims It's Tackling the Problem, Other Leagues Appear Content to Sit on the Sidelines*, 86 A.B.A.J. 38, 103 (2000); Paul Kuharsky, *NFL Says Player-Conduct Policy Working*, TENNESSEAN, Mar. 13, 2008.

105. See PCP, *supra* note 22, at 6.

106. NFLPA, 2016 WL 4136958.

107. *Id.* at slip op. 2.

108. Surprisingly to many, such appeals resulted in *reduced* discipline after federal court review Adrian Peterson, 88 F. Supp. 3d at 1089–91; Ray Rice, slip op. at 16.

injured opposing players during games.<sup>109</sup> Goodell appointed Tagliabue the arbitrator for the appeal hearing.<sup>110</sup> Tagliabue's decision vacated discipline of all four players, stating there was not enough evidence for Goodell to issue such harsh penalties.<sup>111</sup> Since 2012, Goodell's disciplinary decisions have been overturned five times.<sup>112</sup>

In parallel, the relationship between the players and the League has become more antagonistic. For nearly a decade after the CBA of 1993, a "long-standing peace" between labor and management reigned, in large part because of the good relationship between Commissioner Paul Tagliabue and NFLPA Executive Director and former player Gene Upshaw.<sup>113</sup> The CBA was extended, without much fuss, three times between 1993 and 2006.<sup>114</sup>

But the CBA negotiations begun in 2005 and extended into 2006 had a different tone, for a few reasons. First, the League saw a 13 percent increase in revenue in the last decade, a significant increase over the previous CBA negotiation cycles. Now, more money was at stake.<sup>115</sup> Second, the owners negotiated revenue sharing among themselves at the same time as they negotiated revenue sharing with the union.<sup>116</sup> They chose to uncouple the two issues and negotiate the revenue sharing agreements separately.<sup>117</sup> The result of the NFLPA negotiation? The NFLPA received a considerable 60 percent of the revenue, and the owners did not want to budge on other issues.<sup>118</sup>

Soon after, the owners then opted out of the CBA in 2007 and reopened the contract for negotiation. New Commissioner Goodell specifically named player discipline (especially the ability to recover

109. Bounty Suspensions, *supra* note 102.

110. *Id.*

111. *Id.* The discipline for each player was unique to that player's role in the bounty system.

112. Joe Nocera, *True Scandal of Deflategate Lies in NFL's Behavior*, N.Y. TIMES (Jan. 22, 2016) [http://www.nytimes.com/2016/01/23/sports/football/nfl-ignores-ball-deflation-science-at-new-england-patriots-expense.html?\\_r=0](http://www.nytimes.com/2016/01/23/sports/football/nfl-ignores-ball-deflation-science-at-new-england-patriots-expense.html?_r=0).

113. Maske & Shapiro, *supra* note 82.

114. *NFL Labor History Since 1968*, ESPN (Mar. 3, 2011), [http://www.espn.com/nfl/news/story?page=nfl\\_labor\\_history](http://www.espn.com/nfl/news/story?page=nfl_labor_history).

115. Jeffrey F. Levine & Bram A. Maravent, *Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 141 (2010).

116. Maske & Shapiro, *supra* note 82.

117. Ron Borges, *Tagliabue Agrees CBA Talks are Not Progressing*, BOSTON GLOBE (Feb. 4, 2006), [http://archive.boston.com/sports/football/articles/2006/02/04/tagliabue\\_agrees\\_cba\\_talks\\_not\\_progressing/?page=full](http://archive.boston.com/sports/football/articles/2006/02/04/tagliabue_agrees_cba_talks_not_progressing/?page=full).

118. *Supra* note 115, at 1421–22.

signing bonuses from disciplined players) as an issue that sparked the opt-out and renegotiation.<sup>119</sup>

Since then, negotiations between the NFL and the NFLPA of disciplinary issues have grown increasingly contentious. In 2007, the Commissioner, with support from the NFLPA and in consultation with Upshaw and a panel of players,<sup>120</sup> revised the Personal Conduct Policy to allow the Commissioner to regulate a wider scope of off-field behavior,<sup>121</sup> and to do so under the expired CBA's grievance procedures.<sup>122</sup> But before Upshaw could negotiate the new CBA, he died unexpectedly.<sup>123</sup> The NFLPA then hired DeMaurice Smith as the new NFLPA Executive Director. Soon after, the NFLPA began objecting to what it considered conflicts of interest in Goodell's discretionary decisions under Article 46.<sup>124</sup>

In 2014, the League examined the Personal Conduct Policy again and updated it to include specific minimal discipline for domestic violence conduct.<sup>125</sup> Unlike before, the League neither showed the policy to the players until it was released, nor asked the players for input when drafting the policy.<sup>126</sup> The League did not change the clause that said, "Appeals of any disciplinary procedures will be processed pursuant to Article 46. . ."<sup>127</sup> More than that, however, the League

119. Ron Borges, *Mike Vrabel: There's a Place for More Pay*, BOSTON HERALD (Nov. 9, 2008), [http://www.bostonherald.com/sports/patriots\\_nfl/new\\_england\\_patriots/2008/11/mike\\_vrabel\\_there%E2%80%99s\\_place\\_more\\_pay](http://www.bostonherald.com/sports/patriots_nfl/new_england_patriots/2008/11/mike_vrabel_there%E2%80%99s_place_more_pay).

120. See *Goodell Strengthens NFL Personal Conduct Policy*, USA TODAY (Apr. 11, 2007), [http://usatoday30.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy\\_N.htm](http://usatoday30.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm).

121. Robert Ambrose, *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, 1076 (2008); *NFL Owners Endorse New Personal Conduct Policy*, NFL Dec. 10, 2014, 1:40 PM, <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>.

122. Mike Florio, *So Why Didn't the NFLPA Reduce Goodell's Power in 2011?*, NBCSPORTS (Nov. 20, 2014, 4:23 PM), <http://profootballtalk.nbcsports.com/2014/11/20/so-why-didnt-the-nflpa-reduce-goodells-power-in-2011/>.

123. Judy Battista, *Gene Upshaw, N.F.L. Union Chief, Dies at 63*, N.Y. TIMES (Aug. 21, 2008), <http://www.nytimes.com/2008/08/22/sports/football/22upshaw.html>.

124. For instance, though Harold Henderson, former vice president of labor relations for the League, had arbitrated many previous Article 46 hearings without objection, the League objected to his hearing the Adrian Peterson case in 2015 because he was "too close" the League. *NFLPA*, 2016 WL 4136958 at slip op. 3.

125. PCP, *supra* note 22.

126. *NFLPA: Not Consulted on Policy*, ESPN (Dec. 9, 2014), [http://www.espn.com/nfl/story/\\_id/12005607/nfl-players-association-says-not-consulted-league-revamped-personal-conduct-policy](http://www.espn.com/nfl/story/_id/12005607/nfl-players-association-says-not-consulted-league-revamped-personal-conduct-policy).

127. Mike Florio, *Commissioner Retains Final Say Over Personal Conduct Policy Discipline*, NBCSPORTS (Dec. 10, 2014, 2:24 PM), <http://profootballtalk.nbcsports.com/2014/12/10/commissioner-retains-final-say-over-personal-conduct-policy-discipline/>.

added a process to protect against future barriers to agreement. Now, the Player Conduct Policy can only be changed upon recommendation of the Conduct Committee, comprised of nine NFL owners and, notably, no players.<sup>128</sup> This process change—leaving out key stakeholders from decisions in which they have been involved for 40 years—combined with the Deflategate case sparked NFLPA calls for renegotiation.

At the 2016 NFL/NFLPA annual meeting, the NFLPA tried to engage the NFL in renegotiations of the procedure.<sup>129</sup> The union requested neutral arbitration for appeals of discipline. According to the NFLPA, the NFL said, “neutral arbitration is not part of this negotiation.”<sup>130</sup> Since the failed renegotiation, the Pittsburgh Steelers’ player representative to the union has urged the NFLPA to start saving money, saying that the union should be willing to wage a legal battle, or even strike if necessary, to change the grievance procedures during the 2018 negotiations.<sup>131</sup>

#### A. *Changing the Incentives*

When stakeholders have some control over a decision process, they are more likely to perceive both the process and the outcome as fair.<sup>132</sup> Thus, managers and employees, together with advising attorneys, are in the best position to design dispute resolution contract provisions, specifically, the determination of roles and responsibilities within a dispute resolution system.<sup>133</sup> But the stakeholders can only negotiate a procedurally fairer grievance process if the parties actually come to the bargaining table. So how might the NFL and NFLPA incentivize their own constituents to support negotiating a new grievance procedure? We offer nine measures that can help.

**i. Consider the expense of current checks on procedural discretion.** Certainly, negotiating a new system will take time and

128. PCP, *supra* note 22.

129. Jim Trotter, *Talks Over Roger Goodell’s Disciplinary Role Take “Massive Step Backward,”* ESPN (Mar. 24, 2016), [http://www.espn.com/nfl/story/\\_/id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down](http://www.espn.com/nfl/story/_/id/15053643/talks-nfl-nflpa-reduction-roger-goodell-role-break-down).

130. *Id.*

131. Jacob Klinger, *Pittsburgh Steelers Union Rep on 2020 CBA: “You Hit ‘Em in the Pocket,”* PENNLIVE (Aug. 22, 2016, 11:53 AM), [http://www.pennlive.com/steelers/index.ssf/2016/08/steelers\\_nflpa\\_union\\_rep\\_cba.html](http://www.pennlive.com/steelers/index.ssf/2016/08/steelers_nflpa_union_rep_cba.html) (anytime a player is disciplined, “it paints a black eye over everybody” and the process should be renegotiated).

132. LIND & TYLER, *supra* note 35.

133. Argyres & Mayer, *supra* note 56, at 1068 (advocating that managers and other employees be directly involved in negotiating roles and responsibilities in dispute resolution clauses).

some personal investment from both sides. But failing to negotiate a new system will continue the current pattern of discipline\_discretion\_decision\_litigation. The NFLPA can continue to use litigation to check the Commissioner whenever he wields substantial discretion.<sup>134</sup> But litigation is expensive, time-consuming, and public.<sup>135</sup> If one or both sides can break out the costs of the current procedure and overall conduct system—i.e., how much the vague grievance procedure cost each side in terms of time (almost two years and two seasons of football for Deflategate) and money (law firms like Gibson Dunn and Paul, Weiss do not come cheap), both before and during rights-based court proceedings—the parties may see the economic advantage of designing an efficient yet more effective internal interest-based system.<sup>136</sup>

**ii. Agree that willingness to come to the negotiation table is not a sign of weakness.** If both sides can at least agree that there may be a better way to have a conversation about the grievance procedure than through the courts, then they can come to the table without the stigma of “giving in” to the other side.<sup>137</sup> They can understand that listening is not agreeing, and talking is not conceding. Instead, they can frame renegotiations of the grievance procedure now as a time-saving measure for both sides,<sup>138</sup> so they can focus the 2020 CBA negotiations on issues that affect all parties rather than a few.

**iii. Talk less about trust, more about respect.** Though “trust” is a commonly-discussed trait of successful negotiations,<sup>139</sup> a

134. Commissioner's Powers, *supra* note 87.

135. Storm, *supra* note 17.

136. *See generally*, JEANNE BRETT, WILLIAM URY & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED (1988) (articulating the three types of dispute resolution systems: interest-based, rights-based, and power-based).

137. Barriers to Conflict Resolution, *supra* note 99, at 13. This will take a substantial shift from what NFLPA Executive Director DeMaurice Smith says the pattern in the last decade has been, “We have been asked to be partners when it is convenient and – more frequently – told what to do when it is not.” Gabriel Sherman, *The Season from Hell: Inside Roger Goodell's Ruthless Football Machine*, GQ (Jan. 19, 2015), <http://www.gq.com/story/roger-goodell-season-from-hell?printable=true> [hereinafter Sherman].

138. Stephen B. Goldberg, *Mediation in the Workplace: An Alternate Route to Attitudinal Structuring in the Labor-Management Relationship*, 31 NEGOT. J. 415, 417 (2015) [hereinafter Mediation].

139. *See, e.g.*, Roy J. Lewicki & Beth Polin, *The Role of Trust in Negotiation*, in HANDBOOK OF ADVANCES IN TRUST RESEARCH 29 (Reinhard Bachmann & Akbar Zaheer, eds. 2013).

party with substantial power may use a trust-based structure to pressure the lower power party into an agreement, i.e., “Don’t you trust me by now? I take good care of you.”<sup>140</sup> Also, it is unlikely that both sides of an agreement will always trust each other, especially in a repeated, long-term relationship like the NFL and NFLPA have. Yet, trust is not necessary to come to a wise agreement for both sides, especially if both sides agree to checks and balances within a negotiation process. Both publicly and privately, the NFLPA could easily and accurately express appreciation and respect for the owners who build successful teams. In turn, the Management Council could express respect for the players’ talent and willingness to work on issues outside of the game itself. This can replace the vitriolic comments and set the tone for respectful negotiations between people who share a group identity within the NFL.<sup>141</sup>

#### iv. Emphasize mutual interest:

**a. Keeping these disputes about internal procedures out of court.** Both sides would prefer to keep potentially controversial decisions, and their aftermath, out of the spotlight of court proceedings.<sup>142</sup> This confidentiality saves time and money, and allows the NFL and NFLPA to focus on their main purposes: playing football and increasing profits. Additionally, an increased sense of procedural justice is linked with an increased occurrence of positive citizenship

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140. See, e.g., Brian Campbell, *Enacting Trust: Contract, Law and Informal Economic Relationships in a Spanish Border Enclave in Morocco*, 3:2 J. COMP. RESEARCH IN ANTHRO. & SOCIO. 17 (2012). Roger Fisher, co-author of the seminal negotiation text *Getting to Yes*, believed that, “the less an agreement depends on trust, the more likely it is to be implemented.” BEYOND YES 124 (1991).

141. Rather than coming to the table merely to gain benefits or avoid costs, individuals often engage in group negotiations with identities that they seek (consciously or unconsciously) to affirm in the interaction. This appreciation behavior can meet the identity need, so parties become more inclined to engage with rules and policies created by the other side. See Tyler & Smith, *supra* note 77, at 237.

142. Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENTER. L., 145, 175, <http://harvardjssel.com/wp-content/uploads/2010/04/JSEL-Withers.pdf> [hereinafter Withers] (highlighting how players want to keep disciplinary cases out of the public eye). Similarly, owners want potentially controversial cases to be managed internally. *Lacy T. et al. v. Oakland Raiders et al.*, No. RG14710815, amended complaint filed (Cal. App. Dep’t Super. Ct., Alameda County Feb. 4, 2014) (the owners argued that an employment class action lawsuit filed by Oakland Raiders cheerleaders to receive backpay should be heard in arbitration, with NFL Commissioner Roger Goodell as arbiter, rather than heard in federal court, but the arbitration request was denied). Note that the cheerleaders did not bargain for the grievance procedure in their employment contract, whereas the NFLPA had the opportunity to do so and did not).

behaviors like altruism and courtesy.<sup>143</sup> If disputes are managed in a procedurally just way, both sides can expect a decrease in court cases *and* an increase in civil behavior.

**b. Maintaining public confidence in the NFL.** Though Goodell claims he does not “do things for public relations,”<sup>144</sup> the whole purpose of the “conduct detrimental” clause is to maintain public confidence in the integrity of the game.<sup>145</sup> So why not consider that public confidence when shaping a grievance policy visible to the public at large—many of whom are football fans? They likely will support a procedure they perceive as legitimate more than one they perceive as arbitrary.<sup>146</sup> Currently, the NFL asserts it offers “due process” to its players facing disciplinary decisions.<sup>147</sup> Though the public may not know the legal definition of due process, the public has a sense of what a fair process looks like.<sup>148</sup> Indeed, arbitration expert Kenneth Feinberg, who administered such processes as the September 11 Victim Compensation Fund and the One Fund Boston, filed a rare amicus curiae brief supporting Brady’s request for rehearing because of the “unfettered aggrandizement of arbitral powers” the Deflategate arbitration represented.<sup>149</sup> He claimed the ruling in this

143. See Just and Unjust, *supra* note 35, at 302.

144. Sean Gregory, *How Far Will Roger Goodell Go, To Protect The Game He Loves?*, TIME (Dec. 6, 2012), <http://keepingscore.blogs.time.com/2012/12/06/cover-story-how-far-will-roger-goodell-go-to-protect-the-game-he-loves/>.

145. In highlighting the importance of his 2007 off-field conduct disciplinary powers, Goodell stated: “We must protect the integrity of the NFL. The highest standards of conduct must be met by everyone in the NFL because it is a privilege to represent the NFL, not a right. These players, and all members of our league, have to make the right choices and decisions in their conduct on a consistent basis.” *Goodell Suspends Pacman, Henry for Multiple Arrests*, ESPN (May 17, 2007), <http://www.espn.com/nfl/news/story?id=2832015>.

146. *In the Matter of Ray Rice*, Decision 17 (Nov. 28, 2014) (Jones, Arb.), [http://www.espn.com/pdf/2014/1128/141128\\_rice-summary.pdf](http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf) (citing *Qi Xing Huang v. Bureau of Citizenship & Immigration Servs.*, 269 F. App’x 138, 139 (2nd Cir. 2008)).

147. *Paul Tagliabue Vacates Penalties*, ESPN (Dec. 12, 2016), [http://www.espn.com/nfl/story/\\_/id/8736662/paul-tagliabue-vacates-new-orleans-players-bounty-penalties](http://www.espn.com/nfl/story/_/id/8736662/paul-tagliabue-vacates-new-orleans-players-bounty-penalties).

148. See generally Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4 (2004) (outlining how perceptions of justice are present as early as first grade and advocating courts and other justice-based bodies take into account how the public perceives fairness, and not only what due process actually requires).

149. Feinberg Amicus Brief, *supra* note 46, at 5.

case could have “serious potential to affect public confidence in arbitral proceedings” to be “fair” and “legitimate,”<sup>150</sup> in substantial part because Goodell’s *procedural* decisions were beyond the parties’ grant of authority through the CBA.<sup>151</sup> Legitimacy to outside stakeholders can be an important marker of a “good” procedure.<sup>152</sup> No one wants to be accused of acting in an “arbitrary and capricious” manner, especially when hundreds of millions of U.S. citizens are watching.<sup>153</sup>

**c. Avoiding 32 different processes, one for each NFL team.** Under Article 46 and other grievance procedure articles in the CBA, teams may still discipline their own players; double jeopardy applies, and if a team disciplines, the League cannot. So, if teams and players do not believe players will be treated fairly in the Article 46 process, they are more likely to employ team-based discipline. No stakeholders—the League, owners, teams, or players—want 32 different disciplinary systems operating within the same League. If players can negotiate with even a few teams to agree to discipline players for conduct detrimental on their own, and if players agree to use the team-based grievance procedure, the threat of a thousand (or 32) flowers blooming may be sufficient to bring the League to the bargaining table.<sup>154</sup>

**v. Demonstrate that adherence to rules increases when those who will follow them are involved in creating them.**<sup>155</sup> Behavioral research indicates that employees who believe a disciplinary process to be procedurally fair are more likely to adhere to disciplinary guidelines.<sup>156</sup> A perception that a system is fair increases when a party is part of deciding what that system looks like. When players have some process control over decisions that may affect

150. Unopposed Motion of Kenneth R. Feinberg for Leave to File as Amicus Curiae in Support of Appellees’ Petition for Panel Rehearing or Rehearing En Banc at 5, in Case 15-2801 (2nd Circuit May 26, 2016).

151. Feinberg Amicus Brief, *supra* note 46.

152. For an analogous context, see, e.g., Jennifer L. Schulenberg et al., *An Application of Procedural Justice to Stakeholder Perspectives: Examining Police Legitimacy and Public Trust in Police Complaint Systems*, POLICING AND SOCIETY (2015).

153. 820 F.3d at 546.

154. Tyler & Smith, *supra* note 77, at 174.

155. *Id.* at 179.

156. See Just and Unjust, *supra* note 35, at 300 (explaining a laboratory study in which this finding was made).

them or one of their teammates, they are more likely to not only comply with the decisions, but also to defend the process by which the decisions were made.<sup>157</sup>

**vi. See multiple negotiation fronts as linked.** As the owners learned from the 2006 CBA, managing two negotiations at once—one with the union, and one among themselves—and considering them separate from one another can split focus and result in an agreement (or two) that is suboptimal, especially when those agreements are dependent on one another.<sup>158</sup> This, in turn, can lead to expensive renegotiations. Seeing the two negotiations as linked potentially can lead to greater value created for all parties.<sup>159</sup>

**vii. Change the players at the bargaining table.**<sup>160</sup> Some parties on both sides of the union/management divide attribute the recent litigious and uncivil relationship between union and management to the lack of continuity among representatives. Tagliabue and Upshaw had a close, productive long-term relationship.<sup>161</sup> But after Upshaw's untimely passing in 2006, both sides hired representatives more disposed to litigation than negotiation. One commentator identified Goodell as having a "smashmouth" negotiating style that comes out full force in issues involving his authority.<sup>162</sup> DeMaurice Smith, NFLPA Executive Director, regularly claims the League is fully of "bullies" and declares that the League and Players are at "war."<sup>163</sup> Since the current players have a history of incendiary remarks, and especially with the history of litigation around the grievance procedure itself, both parties would do well to bring new representatives to the bargaining table. Ideally, these representatives would be process-oriented, would be able to focus on the system rather than individual cases, and would be able to think about the long-term good of the

157. *Id.* at 315.

158. See generally JAMES SEBENIUS & DAVID LAX, 3D NEGOTIATIONS (2006) (discussing the third dimension of negotiations—set-up—and common mistakes made with selecting parties and sequencing negotiations with them).

159. *Id.*

160. ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW TULUMELLO, BEYOND WINNING 218–20 (2000).

161. "If that's what happens when you're too close, I recommend everybody be too close," said Robert K. Kraft, the owner of the New England Patriots." Judy Battista, *Gene Upshaw, N.F.L. Union Chief, Dies at 63*, N.Y. TIMES (Aug. 21, 2008), <http://www.nytimes.com/2008/08/22/sports/football/22upshaw.html>.

162. Sherman, *supra* note 137.

163. See, e.g., Sridhar Pappu, *Quarterback for a Team of 1,900*, N.Y. TIMES (Jan. 22, 2011), [http://www.nytimes.com/2011/01/23/business/23nfl.html?\\_r=0](http://www.nytimes.com/2011/01/23/business/23nfl.html?_r=0).

relationship between players and the NFL rather than simply solve for the immediate past problems with the grievance procedure.

**viii. Enlist allies.** As former NFL Commissioner Paul Tagliabue commented, “There’s a huge intangible value in allies” on the other side of the bargaining table.<sup>164</sup> The NFLPA may find some allies among teams and coaches. For instance, the Patriots filed an amicus brief supporting Tom Brady’s appeal of the Second Circuit’s decision upholding Goodell’s arbitration decision.<sup>165</sup> This action is notable for two reasons. First, a franchise—represented by its owner Robert Kraft, who has been called the “assistant commissioner” because of his close relationship with Goodell<sup>166</sup>—rarely sides with a player against the NFL Management Council. Second, not only did the Patriots side with Brady, but the franchise’s purpose for doing so was to “call the Court’s attention to the fundamental unfairness of the *entire* [disciplinary and subsequent grievance] *process* [emphasis ours],”<sup>167</sup> a process to which the franchise, by its owner as proxy, agreed during the CBA negotiations. As amicus curiae, the Patriots argued that the court’s decision to uphold Goodell’s procedure actually “threatens to undermine vital principles governing arbitration of collective bargaining agreements throughout the national economy.”<sup>168</sup> Having such an ally—and identifying others—can help the NFLPA leverage non-player stakeholders to encourage the NFL itself to renegotiate the procedure.<sup>169</sup>

**ix. Be willing to bring in unbiased third parties.** Truly unbiased third parties—such as a labor mediator from the Federal Mediation and Conciliation Service<sup>170</sup> or a private mediator familiar

164. Sherman, *supra* note 137.

165. Will Brinson, *The Patriots Just Took a Rarely Used Action in Deflategate to Defend Tom Brady*, CBS (May 25, 2016), <http://www.cbssports.com/nfl/news/the-patriots-just-took-a-rarely-used-legal-action-in-deflategate-to-defend-tom-brady/>.

166. Joe Nocera, *True Scandal of Deflategate Lies in NFL’s Behavior*, N.Y. TIMES (Jan. 22, 2016), [http://www.nytimes.com/2016/01/23/sports/football/nfl-ignores-ball-deflation-science-at-new-england-patriots-expense.html?\\_r=0](http://www.nytimes.com/2016/01/23/sports/football/nfl-ignores-ball-deflation-science-at-new-england-patriots-expense.html?_r=0).

167. Brief of New England Patriots as Amicus Curiae in Support of Appellee’s Petition for Panel Rehearing or Rehearing En Banc, in Case 15-2801 (2nd Cir. filed May 24, 2016) [hereinafter Patriots Amicus Brief],

168. *Id.*

169. RON SHAPIRO ET AL., *THE POWER OF NICE* 184 (2015).

170. Since 1947, labor and management negotiators from any union in the country may contact the Federal Mediation and Conciliation Service to request assistance in collective bargaining. FEDERAL MEDIATION AND CONCILIATION SERVICE, <https://www.fmcs.gov/> (last visited Oct. 17, 2016).

with dispute systems design—could identify and work with the parties to break through unhelpful communication patterns, at a much lower cost than a protracted negotiation leading to court.<sup>171</sup> A third-party neutral educated in dispute systems design could also facilitate a meeting in which the parties actually brainstorm and decide on elements of the system.<sup>172</sup> If direct assistance in negotiating a new system is not effective, the NFLPA and NFL could agree to mediatory interest arbitration, in which a panel of arbitrators—one selected by NFLPA, one by NFL, and one neutral—hears each party's concerns and decides a mutually beneficial solution that takes into account the primary interests of both parties.<sup>173</sup> Adding this outside, expert perspective could enhance the satisfaction of parties and result in an even better system.<sup>174</sup>

## B. *Formulating a Bargaining Process*

After overcoming some of the disincentives to come to the bargaining table around a new grievance procedure, the parties then need to determine some basic principles to fortify the renegotiation process. As labor scholar Stephen Goldberg argues, engaging in a mutually beneficial negotiation over a more narrow issue, like the grievance procedure, can “achieve relationship-wide attitudinal structuring” that can positively impact future negotiations,<sup>175</sup> such as the upcoming 2020 CBA renegotiation. For a better negotiation approach, the NFLPA and the NFL should engage in the following six process moves:

**i. Include all critical stakeholders to a system in the system design itself.**<sup>176</sup> Even if a stakeholder is not directly involved in the negotiations themselves, the dynamics of intra-group negotiations can impact the viability of inter-group agreements.<sup>177</sup> A collaborative problem-solving approach to labor-management negotiations is

171. See, e.g., Grievance Mediation, *supra* note 88, at 205 (describing findings that grievance mediation is more cost-effective than arbitration and is more likely to improve the longer-term communication between parties).

172. M.P. Rowe, *The Ombudsman Role in a Dispute Resolution System*, 7 NEG. J. 353 (1991) (discussing how an ombuds might assist in designing the internal dispute resolution system for an organization).

173. See, e.g., A Modest Proposal, *supra* note 91, at 99.

174. See Barriers to Conflict Resolution, *supra* note 99, at 22–23.

175. Mediation, *supra* note 138, at 415.

176. Lisa B. Bingham, *Self-Determination in Dispute Systems Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2001-2002).

177. Joel Cutcher-Gershenfeld, *Intraorganizational Bargaining in Multi-Stakeholder Initiatives*, 31 NEGOT. J. 393, 399 (2015).

equally successful for profits and customer experience, and more successful for employee satisfaction and performance, compared to a negotiation model that emphasizes control and adversarial relations.<sup>178</sup> Thus, all critical stakeholders— including system users, implementers, decision-makers, and potential spoilers— should be involved in designing the system itself.<sup>179</sup> In the NFL/NFLPA context, then, the players, NFLPA representatives, owners, Commissioner and other League executives, arbitrators or hearing panelists, and perhaps a dispute systems design expert should be part of designing and improving a new procedure.

**ii. Establish clear goals for the procedure.** The goals should then dictate the design. Also, establishing specific goals at the outset will help parties monitor and evaluate whether the system is working, and what tweaks may need to be made later. Monitoring provides an immediate feedback loop based on individual experiences with the procedure. Evaluation employs the data gathered from monitoring to analyze how the procedure is meeting its goals overall.<sup>180</sup> If the feedback is truly received and considered by those overseeing the procedure, the data can help them adapt more rapidly and appropriately to the needs of the stakeholders, thus improving users' sense that the overall system is procedurally fair.<sup>181</sup>

**iii. Anticipate how to manage an ongoing flow of conflicts.** Grievance procedures need to be created proactively, not reactively; since policies will not prevent misconduct, both sides need to create a practical procedure knowing that it will be used. Focusing the design with only one or two types of potential grievances in mind, e.g., domestic violence discipline,<sup>182</sup> means the process likely will not be agile enough to address reasonably anticipatable grievances, let alone grievances that have not yet been imagined.<sup>183</sup>

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178. GREG J. BAMBER ET AL., *UP IN THE AIR: HOW AIRLINES CAN IMPROVE PERFORMANCE BY ENGAGING THEIR EMPLOYEES* (2009).

179. NANCY ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* ch. 4, 6 (2013).

180. Resolution Systems Institute, *Monitoring and Evaluation of ADR Programs*, <http://courtdadr.org/manual/monitor.php>.

181. This is particularly true when considering whether the role and actions of a decision-maker within a procedure are fair. See generally Richard A. Posthuma & James B. Dworkin, *A Behavioral Theory of Arbitrator Acceptability*, 11:3 INT'L J. CONFLICT MANAG. 249 (2000).

182. See discussion of domestic violence policy *supra* pp. 115–116.

183. John Aram & Paul Salipante, *An Evaluation of Organizational Due Process in the Resolution of Employee/Employer Conflict*, 6:2 ACAD. MANAGE. REV. 197 (1981).

**iv. Clearly outline each step of the procedure, so everyone can operationalize their role(s) and actions at each step.** One might argue that the CBA is not the place to articulate procedural guidance for parties. Certainly, too much detail can inhibit the flexibility needed to manage new situations.<sup>184</sup> Yet, other CBA provisions dealing with compensation or injury grievances include multiple pages of procedural guidance, including rules of discovery, for those grievance proceedings.<sup>185</sup> The parties conceived of grievance procedures as the kind of complex transactions that should require “more explicit description of the parties’ roles and responsibilities” and “more provision for communication procedures.”<sup>186</sup> As arbitration expert<sup>187</sup> Kenneth Feinberg reminds, “[T]he key to a successful arbitration begins with a clear understanding by the parties of the scope of the arbitration itself and the role the arbitrator plays in ensuring fairness.”<sup>188</sup> This helps the Commissioner not have to redesign the procedural wheel every time<sup>189</sup> and helps parties better prepare for the process.<sup>190</sup> If the stakeholders do not want to start from scratch, they might consider using an existing arbitration model rule, such as the American Arbitration Association’s (AAA) Commercial Arbitration Rules.<sup>191</sup>

**v. Be person-neutral.** The fairness of a system should not depend on the personality of a Commissioner to achieve its purposes. As the Bountygate case demonstrated, two Commissioners can hold very different opinions about how to interpret facts and disciplinary action. As with judges, differences can be illuminating. But judges also have minimum standards of conduct, clear roles, and precedent to

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184. Argyres & Mayer, *supra* note 56, at 1065 (“excessively detailed specifications of roles and responsibilities can lead to lengthy negotiations that can damage the relationship and can inhibit adaptation to new, unanticipated circumstances that may arise during the course of the contractual relationship”).

185. *See, e.g.*, CBA, *supra* note 2, at Art. 14–16, Art. 43.

186. Argyres & Mayer, *supra* note 56, at 1064 (asserting that the more complex a transaction is, the more all key stakeholders should be involved and roles and responsibilities for each step should be enumerated).

187. Unopposed Motion of Kenneth R. Feinberg for Leave to File as Amicus Curiae in Support of Appellees’ Petition for Panel Rehearing or Rehearing En Banc at 5, in Case 15-2801 (2d. Cir. May 26, 2016).

188. Feinberg Amicus Brief, *supra* note 46, at 2.

189. 820 F.3d at 545, n.12.

190. J.S. “Chris” Christie, Jr., *Preparing for and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 265 (2008) (naming “what procedural parts or steps to expect in arbitration” as one of the top four ways an attorney should prepare her client for success in arbitration).

191. *Id.* at 270–80 (describing the AAA rules as applied to an attorney’s preparation for arbitration).

guide them; this creates a more consistent system than a vague arbitration clause. The system should not rely solely on the judgment of one person.<sup>192</sup> Instead, it should have some structural checks to ensure parties can expect similar results, even from different Commissioners. For instance, a panel of three—a player, a coach, and an owner, perhaps—might review the conduct to determine whether the conduct violates NFL policy. Then, the Commissioner can hear an appeal based only on whether the three-person decision is inconsistent with previous decisions or the policies themselves. This structure allows for stakeholders—rather than one person—to evaluate what behavior complies with the policies and check one another. The check also requires each Commissioner to rely on what previous NFL professionals have decided, rather than treating appeals as *de novo* reviews.

**vi. Consider how to reduce exposure of both parties to publicity.** Keeping league discipline confidential is not unprecedented in professional sports. The PGA Tour not only keeps its disciplinary process out of the public eye, but the Tour does not even publicly disclose the *discipline* it imposes on its member golfers.<sup>193</sup> While we do not necessarily endorse the Tour's approach, we encourage the NFL to consider the principle of confidentiality to its collective bargaining negotiations, and the resulting disciplinary procedures. Nothing in the current grievance procedure requires parties to publish a transcript of the arbitration, yet the parties do so. Then, the process becomes a political stage and increases "procedural pain." This pain, in turn, increases humiliation and decreases the instructiveness of the process.<sup>194</sup> Maintaining the renegotiations, and the subsequent procedure, as a confidential process rather than publishing a transcript for public consumption would encourage more candor about each sides' interests.<sup>195</sup> Face-saving measures like confidential hearings or confidential referrals to special services (such as substance abuse counseling or mental health treatment) also may

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192. As one journalist put it, "When [Goodell] is reacting to PR crises and disciplining players, his judgment is poor. But when he's negotiating on behalf of his owner bosses, Goodell almost never loses." Sherman, *supra* note 137.

193. *Frequently Asked Questions*, PGA TOUR (July 28, 2015), <http://www.pgatour.com/company/pga-tour-faqs.html>.

194. See Just and Unjust, *supra* note 35, at 305 (explaining a laboratory study in which this finding was made).

195. *Cf.* Heather Scheiwe Kulp, *A Tightrope Over Both Your Houses: Ensuring Party Participation and Preserving Mediation's Core Values in Foreclosure Mediation*, 14 PEPPERDINE J. DISP. RES. 203, 212 (2014) (discussing candor as a significant purpose of confidentiality in dispute resolution proceedings).

help both parties generate better solutions to the problem in front of them, rather than worrying about the perception of how they manage it to the outside world.<sup>196</sup>

## V. CONCLUSION

The NFL spends countless hours every year revising its on-field rules.<sup>197</sup> Yet, discipline for off-field conduct and appeals of such discipline have occupied substantial time and cost for both the NFL and NFLPA in the last decade, with only minimal revisions. While both sides have some incentives for maintaining the current procedure, growing perceptions of the procedure as unfair will negatively impact not only public perceptions of the NFL, but also behavior of the players. These disincentives, coupled with additional disincentives framed *infra*, dictate that renegotiation of Article 46 is wise for both the NFL and the NFLPA. Among the structural considerations for renegotiations, both sides should consider whether to change negotiation representatives or bring in a third-party neutral to help them design a new process. If the NFL and the NFL Players Association truly agree that “making sure players and staff conduct themselves in a manner that honors the game and safeguards it for future generations is a priority,”<sup>198</sup> then the entities must negotiate both a disciplinary and a grievance procedure that honors the game by being procedurally fair and oriented towards dispute systems design best practices.

The authors wish to note a fitting epilogue to this article. At the end of the season in which he served his four-game suspension, Tom Brady won his fifth Super Bowl and received the Super Bowl MVP award for leading the Patriots to the most substantial comeback win in Super Bowl history.<sup>199</sup>

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196. R. WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 281–302 (1965), *cited in* A Modest Proposal, *supra* note 91, at 107.

197. *2016 Rules Changes and Points of Emphasis*, NFL, <http://operations.nfl.com/the-rules/2016-rules-changes-and-points-of-emphasis/> (last visited Oct. 16, 2016).

198. *NFL Rules Enforcement*, NFL <http://operations.nfl.com/football-ops/nfl-rules-enforcement/> (last visited Oct. 17, 2016).

199. Christopher L. Gasper, *Tom Brady Shows that Love Trumps Deflategate*, BOSTON GLOBE (Feb. 7, 2017), <https://www.bostonglobe.com/sports/patriots/2017/02/06/gasper/rynO2oJhUi3tHFBlSfEtM/story.html>.

