

Peterson, Brady, and Elliot: Analyzing “the Trilogy” in Light of the NFL Commissioner’s Discipline Authority

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This research paper analyzes how the cases of National Football League (NFL) players Adrian Peterson, Tom Brady, and Ezekiel Elliot have affected the role of the NFL commissioner and the commissioner’s disciplinary authority in the NFL. The *Peterson*, *Brady*, and *Elliot* (hereinafter known as the *Trilogy*) cases each helped shape how the role of the commissioner and the commissioner’s disciplinary authority in the NFL are being amplified in light of the language used in the current collective bargaining agreement (CBA) negotiated by the NFL and the NFL Players Association (NFLPA) in 2011, legal precedent that limits a court’s ability to review an arbitrator’s decision, the law of the shop, and the CBA’s missing due process protections traditionally found in the courtroom. The findings and implications learned from the *Trilogy* show that players were unable to secure by lawsuit what they failed to achieve through collective bargaining, and that the holdings in each case highlight the need for the NFLPA to focus on collective bargaining as opposed to litigation in order to secure gains. This is important because the outcome of the *Trilogy* was not an aberration; it brings professional football in lockstep with the legal standard within labor relations, signaling a need for the NFLPA to change strategy. The *Trilogy* illustrates the commissioner’s vast authority and conveys the importance of improving the parties’ collective bargaining relationship to negotiate player discipline rules. The *Trilogy* provides a framework for understanding the commissioner’s vast powers under a broad CBA and an opportunity for both the NFL and the NFLPA to cooperatively revise the player discipline process to curb a consistent stream of high-profile and public challenges of commissioner discipline, possibly encouraging the sides to move away from an adversarial relationship toward more of a partnership for mutually beneficial gain.

Keywords: National Football League, NFLPA, collective bargaining, player discipline, due process

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Introduction

The position of commissioner was created as a necessity to foster the public's confidence in the integrity of professional sports (Parlow, 2010; Reinsdorf, 1996). League commissioners are empowered to impose a wide range of player discipline and, historically speaking, this power is well settled (Kim & Parlow, 2009). This entrenched power of the commissioner has led to multiple episodes between the National Football League (the NFL or NFLMC) and the National Football League Players Association (the NFLPA), over time forging an adversarial and contentious relationship between the two sides that continues today (Levine & Maravent, 2010). The current NFL Commissioner is Roger Goodell (Commissioner Goodell, Goodell, or the Commissioner). One of the hallmarks of Goodell's tenure is player discipline. Goodell's disciplinary power is grounded in the collective bargaining agreement (CBA) between the league and union. However, Goodell has faced criticism for levying arbitrary and heavy-handed penalties against players who violated league rules pursuant to the CBA, the league's standard player contract (SPC), and what is known as the Personal Conduct Policy (PCP) (Howard, 2014; Langley, 2014; Meyer, 2014). In addition to public criticism over player discipline, the league has faced numerous challenges related to player concussions, declining television ratings, and growing controversies related to increased political activism (Chinni & Bronston, 2018).

Three separate high-profile cases involving three players—Adrian Peterson, Tom Brady, and Ezekiel Elliott (hereinafter the *Trilogy*)—took place during a three-year period from 2014 to 2017. Each case challenged the Commissioner's discipline on different grounds: former NFL MVP running back Peterson was suspended for all but the first game of the 2014-15 NFL season after being arrested and charged with a crime resulting from him disciplining his child with a “switch” (*NFLPA v. NFLMC*, 2015; Pelissero, 2014); marquee quarterback Brady was suspended four games after an “independent” investigation determined that it was “more probable than not” that Brady was “generally aware” that team personnel deflated footballs prior to an NFL playoff game (*NFLPA v. NFLMC*, 2015, p. 9); and all-pro running back Elliott, after leading the league in rushing his rookie season, was suspended for six games after an investigation determined that “credible evidence” showed Elliott had used physical force against his ex-girlfriend, resulting in injuries (*NFLPA v. NFL*, 2017, p. 619). Each case focused on the Commissioner's role in the disciplinary process, playing out in public fashion. The NFL prevailed in each case, as each deciding court reaffirmed that judges are to respect the powers afforded to an arbitrator, with limited exceptions. This is important because the *Trilogy* brought professional football in lockstep with the legal standard within labor relations, signaling that the union needs to change its strategy.

This research paper will explore whether the outcome of the *Trilogy* has reshaped the power of the commissioner in the NFL, and how this power fits into the larger collective bargaining relationship between the league and players. Part I provides a brief overview of commissioner authority in professional sports, including its origin, where such power is derived, how courts traditionally responded to a challenge of a commissioner's disciplinary power, and the current sources and recent history of the NFL Commissioner's disciplinary power. Part



II, after explaining the legal framework governing how courts are to respond to legal challenges stemming from labor disputes, addresses the *Trilogy* in detail, analyzing each case and providing the basis for the fact finder's decision. Part III will provide several important takeaways from the cases and recommendations for how the players and league may use the lessons learned from the *Trilogy* to improve their relationship and change the future of player discipline.

Part I. Commissioner Authority in Professional Sports

The first professional sports league to establish the Office of the Commissioner was Major League Baseball (MLB) due, in large part, to a crisis of public confidence (Daniels & Brooks, 2008). Allegations emerged that players were bribed to throw the World Series (Parlow, 2010; Reinsdorf, 1996). To restore public confidence in baseball, team owners turned to federal judge Kennesaw Mountain Landis. Landis, a baseball fan himself, accepted the job on the condition that he be given absolute authority over decision-making (Reinsdorf, 1996). Owners granted Landis the authority under the MLB Constitution to “be the final arbiter of disputes between leagues and clubs and disputes involving players and to impose punishment and pursue legal remedies for any conduct that he determined to be detrimental to the best interests of the game” (Pachman, 1990, p. 1415). This marked the birth of expansive commissioner authority in sports, as eventually other professional sports leagues adopted a similar model of appointing one person as a chief executive officer with vast disciplinary powers (Pacifi, 2014).

Eventually, disputes involving the commissioner's best interest authority found their way into the court system. Several cases helped establish precedent governing the role of the commissioner. In *Charles O. Finley & Company v. Kuhn et al.* (1978), the Seventh Circuit Court of Appeals ruled in favor of the commissioner's disciplinary power, stating that the commissioner possessed “the authority to determine whether any act, transaction or practice is not in the best interest of baseball” and, once determining the issue, was empowered to “take whatever preventive or remedial action he deems appropriate ...” (*Charles O. Finley & Company v. Kuhn et al.*, 1978, p. 539). However in a later case, *Chicago National League Ball Club v. Vincent* (1992), a court stated that a commissioner's authority is limited by existing governing documents, such as a league constitution. Thus, the commissioner's authority is only a set of enumerated powers (Chass, 1992; *Chicago National League Ball Club v. Vincent*, 1992; Sathy, 1994).

Both the *Kuhn* and *Vincent* cases illustrate the premise that deference to commissioner authority is based on whether the commissioner acted according to the scope of authority, as written in league governing documents. This guideline also applies to NFL commissioner authority disputes. Case law recognizes that the NFL commissioner's disciplinary power is important to the integrity of the league, and this person plays a central role in player discipline (Tagliabue, 2012). However, understanding that limits to commissioner authority exist, precedent demonstrates that commissioner discipline is more likely to be upheld if the commissioner follows an established policy that stems from a collective bargaining relationship (Leibovitz, 2013; Tagliabue, 2012; *Williams v. NFL et al.*, 2009). Thus, any form of punishment must be commensurate with the offense



committed and the surrounding facts, and discipline must be meted out pursuant to established policies, operations, and practices (Parlow, 2010; Tagliabue, 2012).

Case law involving commissioner authority also established other best practices for dealing with player discipline issues. These recommended practices include certain due process protections such as a neutral decision-maker, the ability to conduct discovery, present evidence, and to appeal (Parlow, 2010). Conversely, failure to provide due process, or decisions that are arbitrary or in violation of the commissioner's own league rules, traditionally are less likely to be supported under judicial scrutiny (*Chicago National League Ball Club v. Vincent*, 1992; Henderson, 2010; Leibovitz, 2013; Lockwood, 2008; *Rose v. Giamatti*, 1989). Since most NFL players have short careers and thus a limited period to make money playing football, it is in their best interest to push the NFLPA to limit the commissioner's broad disciplinary authority, but thus far disciplinary issues have not been the NFLPA's priority at the CBA negotiating table.

The PCP was most recently revamped and strengthened in the fall of 2016 (NFL Personal Conduct Policy, 2016) and lists 14 different categories that enable the commissioner based on his "authority under the Constitution and Bylaws to address and sanction conduct detrimental to the league and professional football" (NFL Personal Conduct Policy, 2016, p. 1). The extensive PCP also provides detailed notice of the league's expectations for and consequences of player conduct, including specific expectations under policies pertaining to the investigatory process, being placed on leave with pay during the process, the disciplinary process, how appeals take place, and mandatory reporting for clubs who learn of actionable conduct.

In addition to the PCP, the NFL commissioner's disciplinary authority is further codified by Article 46 of the CBA, which outlines the process by which player discipline matters are to proceed if player discipline is appealed (NFL-NFLPA Collective Bargaining Agreement, 2011). Such an appeal is heard by either the commissioner or one of his designees to serve as a hearing officer, in which a player may be accompanied by an attorney of his choice. During the appeal, both the NFLPA and NFL have the right to attend all hearings under Article 46, and can present testimony or any evidence relevant to the hearing. Limited discovery is allowed under Article 46. Once a decision occurs, federal labor law allows the parties to appeal to a federal court to review the soundness of the ruling from a legal perspective (*NFLPA v. NFLMC*, 2015). While courts afford substantial deference to an arbitrator's decision and thus generally do not review the case's underlying facts (*Associated Electrical Cooperative v. International Brotherhood of Electrical Workers, Local No. 53*, 2014; Tagliabue, 2012), a court will examine whether the arbitrator correctly interpreted the CBA and acted within the scope of his authority (*United Paperworkers International Union v. Misco*, 1987). Further, a court may vacate an arbitrator's decision if fundamental fairness was violated (*NFLMC v. NFLPA*, 2016). However, a court will not sit in place of an arbitrator and review the merits of the decision. Rather, a court will overturn an award where the arbitrator engaged in misconduct such as exhibiting partiality or corruption, exceeding his or her powers, or refusing to allow evidence that was material to the dispute (*NFLMC v. NFLPA*, 2016 [citing the Federal Arbitration Act]).



Commissioner Tagliabue versus Commissioner Goodell

Goodell's election as commissioner, and his use of an adversarial approach that starkly differed from his predecessor Paul Tagliabue, increased acrimony between the union and league (see Gagnon, 2016; Montgomery, 2015). Tagliabue took a more nuanced approach to player discipline, seemingly balancing the interests of both parties when it came to player discipline. The original NFL PCP implemented in 2000 under Tagliabue was used to punish Ray Lewis for lying to police about his role in the stabbing deaths of several individuals after the Super Bowl (Freeman, 2000). Although the policy gave Tagliabue the power to suspend players after criminal convictions or admissions of wrongdoing, Tagliabue never issued any major player suspensions under the policy (see Edelman, 2009). He also expanded procedural due process. For example, in 2002, Tagliabue hired an independent appeals officer, former NFL player and coach Art Shell, to hear players' appeals of on-field discipline (Associated Press, 2002). Both the league and union were satisfied with Shell's appointment, given his previous playing and coaching experience (Associated Press, 2002). Before Shell's appointment, appeals for on-field discipline were heard by Tagliabue himself or by his designee. By hiring Shell and not issuing significant punishments without providing due process, Tagliabue struck a more conciliatory approach.

After stewardship passed from Tagliabue to Goodell, NFL owners increased commissioner power to "protect the Shield" (see Hsu, 2007) by approving a revised PCP that enhanced the commissioner's power. This 2007 expanded PCP allowed for longer suspensions and the ability to suspend players for misconduct even without a criminal conviction. With this new authority in hand, Goodell began to markedly distinguish himself from his predecessor in player discipline cases. Within a year after instituting the new PCP, Goodell had released a number of perceived heavy-handed punishments in quick succession: he suspended cornerback Adam "Pacman" Jones for an entire season after a series of high-profile arrests, wide receiver Chris Henry for half a season after several arrests, defensive tackle Terry "Tank" Johnson for half a season after a weapons conviction, and quarterback Michael Vick for two years after his involvement in a dog fighting operation (Maske, 2007). Goodell's rapid-fire discipline helped establish his reputation as "protector of the Shield" (Hsu, 2007).¹

Notable Player Discipline Incidents

Bountygate. Perhaps the broadest exercise of Goodell's disciplinary power came during the Bountygate scandal that rocked the New Orleans Saints franchise (see Pacifici, 2014). In 2012, the NFL claimed that the Saints had a "bounty" program

¹ In 2010, Goodell continued exerting his disciplinary authority as commissioner by suspending quarterback Ben Roethlisberger for six games under the PCP for sexual assault allegations, despite Roethlisberger's denial of any wrongdoing and the district attorney's decision to not bring any charges for the incident (Battista, 2010). Roethlisberger's suspension would contribute to the Pittsburgh Steelers' decision to vote against ratifying the 2011 CBA amid concerns that the agreement failed to address Goodell's broader disciplinary powers and more severe punishments (Wilson, 2011).



that would provide cash payments to players based on their performance in games (Holder, 2013). Goodell suspended Saints defensive coordinator Gregg Williams indefinitely, head coach Sean Payton for an entire season, general manager Mickey Loomis for eight games, assistant head coach Joe Vitt for six games, linebacker Jonathan Vilma for an entire season, defensive tackle Anthony Hargrove for eight games, defensive end Will Smith for four games, and linebacker Scott Fujita for three games (Holder, 2013). This set up a legal battle between the union and league challenging the fairness of the penalties and Goodell's authority to penalize the players for their alleged roles (Pacifi, 2014).

During the ensuing legal fight over player suspensions, Goodell delegated his appeal authority to Tagliabue, the former commissioner. Although Tagliabue did not review Goodell's factual findings, he vacated all player suspensions, finding that the Saints coaches were more responsible for any misconduct (Tagliabue, 2012). Significantly, Tagliabue also found that Goodell had ignored past league precedent of only issuing minor fines to teams that had bonus incentives for in-game performance. Suspending players for an offense typically punished by a fine against a club, for Tagliabue, raised "significant issues regarding inconsistent treatment between players and teams" (Tagliabue, 2012, p. 18).

In his decision, Tagliabue also highlighted former NFL Commissioner Pete Rozelle's approach to discipline for implementing a new set of policies as a successful league model. The lesson appeared to be a message intended for Goodell: "[Rozelle] understood that sometimes it is necessary to clarify the rules – make sure everyone understands; postpone discipline for a while, not forever, but maybe for a season; and then enforce the rules with strict discipline" (Tagliabue, 2012, p. 8). Tagliabue's *vacatur* of the Saints players' suspensions and endorsement of Rozelle's disciplinary approach amounted to a rebuke of Goodell's handling of Bountygate. It also served as a lesson for the NFL to provide clear rules in advance, allow time for players and teams to learn and adapt to rules, and then strictly enforce clear rules in line with past precedent.

Goodell seemed to reject Tagliabue's suggestion of looking to Rozelle as an example on handling player discipline. After his Bountygate decision, Tagliabue stated that Goodell told him "I was surprised where you came out," referring to the former commissioner's decision to vacate the player discipline (Sherman, 2015, para. 51). However, Tagliabue felt Goodell's combative stance contributed to the two sides' feud over commissioner authority and an increasingly volatile relationship. "There's a huge intangible value in peace. There's a huge intangible value in having allies," Tagliabue said, referring to Goodell's approach (Sherman, 2015, para. 57). Instead of striking a conciliatory approach, Bountygate served as a harbinger of coming bitter disputes between the league and union litigating the commissioner's role, authority, and procedure related to player discipline. The following skirmishes helped set the stage for the *Trilogy*.

Greg Hardy Appeal – Player Conduct Policy. Despite Tagliabue's attempt to send a message to Goodell, the commissioner continued to discipline players using a heavy-handed, inconsistent approach. In 2015, Goodell suspended defensive end Greg Hardy for 10 games through the NFL's PCP after he was convicted of two counts of domestic violence (Archer, 2015). Hardy exercised his right to appeal per CBA Article 46. NFL executive Harold Henderson served as



arbitrator. Although he affirmed Goodell's power to discipline Hardy per the PCP, he reduced the suspension. Henderson, like Tagliabue, noted the impropriety of Goodell's decision to change disciplinary precedent without notice:

10 games is simply too much, in my view, of an increase over prior cases without notice such as was done last year, when the 'baseline' for discipline in domestic violence or sexual assault cases was announced as a six-game suspension. Therefore, the discipline of Mr. Hardy hereby is modified to a suspension of four games; all other terms of the discipline letter remain in place. (Reyes, 2015, para. 10)

In the Matter of Ray Rice. The case of Ray Rice also tested the limits of Goodell's expansive use of authority pre-*Trilogy*. Rice, at the time a running back for the Baltimore Ravens, challenged an indefinite suspension stemming from a 2014 domestic abuse incident inside a casino hotel elevator. Rice had been arguing with his fiancée, now his wife, when he struck her. The blow knocked Mrs. Rice into an elevator rail, rendering her unconscious (Jones, 2014). A video of the incident's aftermath was released showing Rice carrying Mrs. Rice out of the elevator. Although Rice was indicted on one count of aggravated assault, he avoided criminal prosecution by agreeing to enter into a pre-trial intervention program (Jones, 2014). Goodell suspended Rice for two games and fined him one game check, the strongest NFL penalty for domestic violence cases at the time (Jones, 2014; Maske, 2014; Wise, 2014). However, Goodell later suspended Rice indefinitely after a more violent video of the altercation was released to the public (Boren, 2014; Jones, 2014).

Rice appealed his indefinite suspension per the CBA. Based on the evidence presented during the hearing, the arbitrator vacated Rice's indefinite suspension because he was punished twice for the same incident (Jones, 2014). If Goodell had initially suspended Rice indefinitely, the arbitrator would have sided with the NFL because the incident fell within the commissioner's role as league disciplinarian pursuant to his "conduct detrimental" authority (Jones, 2014). However, the graphic video's release did not change the factual basis that Goodell relied on for Rice's first discipline. Goodell's double discipline was arbitrary and exceeded his authority. Therefore, the arbitrator vacated the indefinite suspension as an abuse of discretion. The NFL did not appeal.

These notable cases all ended with Goodell's original discipline being vacated or reduced by the arbitrator. The union likely was encouraged by these results, as each case helped to illustrate the limits of commissioner power. However, this streak would not last. Once disputes over player discipline spilled beyond the mechanisms included in the CBA and into the courts, the parties would experience a reversal of fortunes as each court in the *Trilogy* grappled with the commissioner's broad power and undefined procedures set forth in Article 46.

Part II. The Trilogy

The *Trilogy* encompasses three episodes involving Peterson, Brady, and Elliot that produced three different appellate court decisions within 18 months. The Peterson and Elliot incidents involved allegations of domestic violence,



thus triggering the NFL's PCP, while the Brady episode allegedly triggered the commissioner's Article 46 disciplinary authority under the CBA due to purported violations of the NFL's competition rules and general wrongdoing. In total, the cases led to three very public legal cases that called into the question the fairness of the NFL's disciplinary system and the commissioner's direct role in the process. The following analyzes each case within the *Trilogy*, and provides legal context.

A Primer on Labor Law and CBA Disputes

To comprehend and contextualize the *Trilogy's* rationale, it is first necessary to provide a quick primer on the underlying legal reasoning governing CBA disputes. A congressional policy exists favoring resolving labor disputes through collective bargaining and arbitration rather than through the traditional legal system, as this philosophy helps promote industrial labor peace (*United Steelworkers of America v. Warrior & Gulf Navigation Company*, 1960; see also Hale, 1994). Since labor disputes often involve specialized knowledge that a judge may lack, the parties themselves are in the best position to fashion a suitable remedy or mutually agree upon a decision-maker with the ability help resolve the issue. Further, a traditional lawsuit may drag on for years, clogging up a court's docket and expending judicial resources. Grievance arbitration designates a more knowledgeable factfinder and may be a more expedient method of resolving labor disputes while also being less likely to undermine the collective bargaining relationship.

Challenges to CBAs are traditionally considered in light of this backdrop. The Labor Management Relations Act (LMRA) of 1947 gives a union the right to sue under federal law to enforce a CBA if it is violated. Specifically, section 301(a) of the LMRA provides the right for aggrieved parties to enforce CBAs in federal courts. Parties to a CBA are bound to its terms; often a CBA's language includes a requirement that both sides resolve any dispute stemming from the agreement through grievance arbitration. Consistent with the aforementioned congressional policy, courts are to honor this process of peacefully settling contractual disputes through grievance arbitration by not intervening in or interfering with what the sides agreed to through arm's length bargaining (*United Steelworkers of America v. Warrior & Gulf Navigation Company*, 1960). Rather than looking at this as a voluntary process, pursuant to commercial arbitration as codified in the Federal Arbitration Act (1926), grievance arbitration is part of the congressionally preferred labor process necessary to achieve industrial peace (LMRA, 1947). By not running to the courts in the event of a dispute, the parties can take advantage of their various collective bargaining rights and continue working to resolve the matter.

The *Steelworkers Trilogy*. In 1960, the United States Supreme Court decided a series of cases called the *Steelworkers Trilogy* that reinforced the congressional policy of non-interference by the courts in CBA disputes. These cases all involved lawsuits brought by the United Steelworkers of America pertaining to grievance arbitration. In total, the *Steelworkers Trilogy* reinforced the importance of courts respecting arbitrating grievances that pertained to a CBA "as an important breakthrough in securing a speedy, efficient, conclusive, and privately negotiated system for the resolution of union-management grievance disputes" (LeRoy &



Feuille, 1991, p. 79; Stephens, 1996). The *Steelworkers* Trilogy clarified that grievance arbitration was the preferred method for resolving CBA disputes brought under the LRMA; it was the fact finder that the sides had bargained for during the process. This conclusion dovetailed with the national policy favoring resolution of disputes through collective bargaining.

In *United Steelworkers of America v. American Manufacturing Company* (*American Manufacturing*, 1960), the union sought to compel arbitration of a member's CBA-based grievance related to his workers compensation claim. The CBA contained a detailed grievance procedure that included arbitration as the standard form of dispute resolution; however, the district and appeals court denied an order to arbitrate the claim, calling it "frivolous" (*American Manufacturing*, 1960, p. 566). The Supreme Court reversed the lower courts' rulings, reaffirming the policy stated in the LMRA that courts are to respect grievance arbitration as the way to settle disputes pursuant to a CBA. Courts had "no business weighing the merits of the grievance," as its function is limited when both sides have agreed to submit CBA issues to an arbitrator for interpretation (*American Manufacturing*, 1960, p. 558). Instead, a court is to defer to the arbitrator if the grievance is, on its face, governed by the CBA. Since a grievance may include aspects that are unfamiliar to a judge, the Court pointed out that "special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve" (*American Manufacturing*, 1960, p. 567). In this instance, since the sides had agreed to grievance arbitration, the factual issue at hand was to be solved by the arbitrator.

The second case, *United Steelworkers of America v. Warrior and Gulf Navigation Company* (*Warrior and Gulf*, 1960), involved a grievance relating to the employer's decision to contract out maintenance work. The union sought to arbitrate the grievance but the employer refused, claiming the CBA was silent on this topic. The Supreme Court reversed lower court findings that the CBA did not vest the arbitrator authority to review the disputed employer conduct, highlighted arbitrating disputes as being integral to national policy favoring resolving labor disputes through collective bargaining remedies, not judicial intervention (*Warrior and Gulf*, 1960). Cases involving substantive provisions of a CBA often involve specialized functions not normally performed by court (*Warrior and Gulf*, 1960). The two sides voluntarily submitted to an arbitrator since the person "is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment" (*Warrior and Gulf*, 1960, p. 582). The goal is sustained labor peace through the CBA and the grievance arbitrator, through grievance arbitration process helps, to contextualize the CBA. Thus, since this was a question for the arbitrator and not the courts, the Court reversed.

The final *Steelworkers* Trilogy case is *United Steelworkers of America v. Enterprise Wheel and Car Corporation* (*Enterprise*, 1960), which involved the discharge of several employees who had protested the firing of another employee. The discharged employees filed a grievance, and the arbitrator reinstated the employees with back pay and reduced their penalty to a 10-day suspension; however, the employer refused to follow the ruling because it occurred after the CBA had expired. The Supreme Court ruled in favor of the employees, reiterating once



again that it is not the province of the court to view the merits of an arbitration award properly awarded under a CBA (*Enterprise*, 1960). Doing so would undermine the national policy of settling labor disputes through arbitration and usurp the function arbitrators play by providing specialized knowledge regarding “the custom and practices of a particular factory or of a particular industry as reflected in particular agreements” (*Enterprise*, 1960, p. 596).

Beyond the *Steelworkers* Trilogy, several other cases further articulated the Supreme Court’s continued preference for courts to play a limited role in grievance arbitration. In *United Paperworkers International Union, AFL-CIO v. Misco* (*Misco*, 1987), an employee filed a grievance after being discharged pursuant to the employer’s drug policy. The arbitrator ruled in favor of the employee, and the employer filed suit with the district court to overturn the award. The district and appellate court sided with the employer on factual grounds. However, the Supreme Court reversed, pointing to the *Steelworkers* Trilogy and the policy that courts are not to reconsider the merits of an arbitrator’s award pursuant to the federal policy of settling labor disputes through grievance arbitration. The Court reiterated that because the sides bargained for the arbitrator’s specialized interpretation of the CBA, a court plays a limited role in grievance arbitration—to respect the award if it drew its essence from the CBA. “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,” a court cannot overturn the award even if it believes he or she made a serious error (*Misco*, 1987, p. 38). This language connotes significant deference to the grievance arbitrator.

Finally, the case of *Major League Baseball Players Association v. Garvey* (*Garvey*, 2001) further reinforced the notion of arbitrator deference and that courts are not authorized to review arbitrators’ decisions on the merits so long as they draw their essence from the CBA. Former professional baseball player Steve Garvey entered into arbitration with his union after the organization rejected his collusion claim against other MLB clubs. The arbitrator sided with the union, questioning the credibility of Garvey’s allegations. Garvey challenged the ruling, and the dispute eventually made its way to the Supreme Court. The Court restated its conclusions from the *Steelworkers* Trilogy, including that judges are not to decide the merits of a grievance because this action usurps the arbitrator’s judgement bargained for by the parties. If there is a rare occurrence requiring reversal, the court is to merely vacate the award and allow further proceedings to continue (*Garvey*, 2001). Therefore, the Court vacated the appellate ruling on the merits, continuing the message that judges are not to inappropriately second guess arbitrators (see LeRoy & Feuille, 1991).

The *Steelworkers* Trilogy, *Misco*, and *Garvey* work together to reinforce the federal policy that labor disputes should be resolved through their own legal framework between the parties, and that the sides should be held to their bargained for agreement. This federal policy provides the foundation from which we explore the *Trilogy*.

NFLPA v. NFLMC (*Peterson*)

On September 11, 2014, former Minnesota Vikings’ all-pro running back Adrian Peterson was indicted by a Texas grand jury for felony reckless or negligent injury



of a child. On November 4, 2014, Peterson pled no contest to a reduced charge of misdemeanor reckless assault (Bieler, 2014). The indictment stemmed from Peterson's May 2014 decision to use a "switch," or a long stick, to discipline his son. Once Peterson's legal proceedings concluded, in a letter dated November 18, NFL commissioner Roger Goodell suspended "Peterson without pay for 'at least the remainder of the 2014,' fined him six weeks' pay," and ordered him into counseling (*NFLPA v. NFLMC*, 2015, p. 1088). Goodell mentioned that his power to discipline Peterson was pursuant to the PCP, which had been strengthened and announced to the public on August 28, 2014, in the aftermath of the Ray Rice case, two weeks before Peterson's indictment occurred. Goodell noted that Peterson's conduct was detrimental to the league and, under the PCP, carried "a baseline discipline of a suspension without pay for six games or certain offenses, including ... domestic violence" (*NFLPA v. NFLMC*, 2015, p. 1088). The results of Peterson's counseling would determine whether he was allowed back into the league.

Peterson's appeal of Goodell's discipline was heard by Henderson, a former NFL executive. Peterson's attorneys principally argued that (a) Peterson should have been penalized under the former (and more lenient pre-August 28, 2014) PCP because the corporal punishment incident occurred in May 2014, and (b) Peterson had never received notice that the enhanced PCP applied to his May 2014 conduct (*NFLPA v. NFLMC*, 2015). Henderson was not persuaded by either argument. Instead, he concluded that Goodell possessed "considerable discretion in assessing discipline" (Henderson, 2014, p. 4). Henderson opined if Goodell "should determine that the current level of discipline imposed for certain types of conduct has not been effective in deterring such conduct, it is within his authority to increase discipline in such cases. He is not forever bound to historical precedent ... He should not be handcuffed by prior cases" (Henderson, 2014, p. 4).

Without going into details, or providing much further discussion, Henderson ruled that Goodell had "broad discretion" pursuant to the PCP and that Peterson would have been subject to the same level of discipline under either policy (Henderson, 2014, p. 4). Therefore, it did not matter which PCP applied to Peterson. Henderson said Goodell was "not forever bound to historical precedent" (Henderson, 2014, p. 4), and upheld the commissioner's discipline.

Peterson petitioned for the *vacatur* of Henderson's arbitration award under Section 301 of the LMRA and Section 10 of the Federal Arbitration Act. The appeal was heard by an old NFLPA ally, Judge David Doty, of the United States District Court of Minnesota (Koplowitz, 2015; Pelissero, 2015; Sandomir, 2011). Although a preference exists to have labor disputes settled privately, as arbitrators are given substantial deference, an arbitrator's decision must draw its essence from the CBA (*Bureau of Engraving, Inc. v. Graphic Communications International Union, Local 1B*, 1999). If the award did not draw its essence from the agreement, the arbitrator imposed "his own brand of industrial justice" and the award must be vacated (*NFLPA v. NFLMC*, 2015, p. 1089). Thus, the issue was whether Henderson went outside the CBA to render his decision.

Judge Doty ruled for Peterson after finding that Henderson failed to make an award that drew "its essence from the collective bargaining agreement" (*NFLPA v. NFLMC*, 2015, p. 1091). The decision to overturn the award was not based on an explicit CBA section, but instead on the court's finding that Henderson failed to draw from the "industrial common law [that] includes 'past practices of



the industry and shop,’ and ‘the parties’ negotiating history and other extrinsic evidence of intent” (*NFLPA v. NFLMC*, 2015, p. 1090). This “law of the shop” is a term of art that also includes prior arbitration awards (*NFLPA v. NFLMC*, 2015; *Warrior and Gulf*, 1960). The district court reasoned that Henderson did not provide a basis for distinguishing between the Rice case, which was now part of the law of the shop (e.g., part of the negotiating history between the parties) and that did not allow for retroactive discipline under the new PCP, and why such backdated discipline applied to Peterson. Judge Doty was dissatisfied with Henderson’s reasoning that the commissioner had broad discretion under the CBA and that either version of the PCP would have allowed for the punishment Peterson received. The district court concluded that Henderson’s disregard of the law of the shop meant he failed to draw from the essence of the CBA, thus creating a basis to vacate the award (*NFLPA v. NFLMC*, 2015).

Goodell reinstated Peterson after Judge Doty’s decision, but the NFL also appealed the district court’s holding. The Eighth Circuit Court of Appeals took a very limited approach to reviewing Henderson’s decision, unlike the district court, citing the national policy favoring resolving disputes through collective bargaining as the basis of its decision, as articulated in the *Steelworkers* Trilogy and supporting Supreme Court cases (*American Manufacturing*, 1960; *Enterprise*, 1960; *Misco*, 1987; *Warrior and Gulf*, 1960). The court of appeals reasoned that it should not apply judicial scrutiny concerning whether Goodell’s discipline of Peterson was appropriate or whether Henderson made the right choice in reviewing the discipline. Since the parties had agreed to be bound by the grievance arbitrator’s construction of the CBA and relevant agreements, labor law precedent bound the court to side with the arbitrator so long as Henderson was “even arguably construing or applying the contract and acting within the scope of his authority,” including the law of the shop (*NFLPA v. NFL*, 2016, p. 993). Even if the court disagreed with the arbitrator’s construction or application of the CBA, “as long as the arbitrator is arguably construing or applying arbitral precedents, a court’s disagreement with the arbitrator’s application of precedent is not sufficient grounds to vacate an arbitration decision (*NFLPA v. NFL*, 2016, p. 994; citing *American National Can Company v. United Steelworkers of America*, 1997). Thus, the issue on appeal was whether Henderson at least arguably construed or applied the CBA and related policies used by Goodell to penalize Peterson, including the law of the shop.

The court of appeals noted that the CBA and PCP endowed the commissioner with discretion to fine and suspend individuals under his conduct detrimental power. It also observed that the arbitrator consulted the law of the shop by relying on a 2010 arbitration decision involving a Miami Dolphins player to conclude that the commissioner was not bound to historical precedent involving player discipline. Thus, Henderson believed that the CBA and dispositive documents, as well as the law of the shop, provided Goodell with the ability to suspend Peterson for six games along with other penalties if he believed a lesser punishment would have been insufficient. As the court noted, Henderson’s “decision on this point was grounded in a construction and application of the terms of the Agreement and a specific arbitral precedent. It is therefore not subject to second-guessing by the courts” (*NFLPA v. NFL*, 2016, p. 995). The PA’s final argument on appeal related to Peterson’s arbitration being fundamentally unfair. However, the court



held that it could not vacate an arbitration under the LMRA due to fundamental unfairness, as it related to attacking Henderson’s factual decision, which undermined the policy of arbitrator deference.

The court of appeals provided a suggestion to the PA. In response to Peterson’s argument that Henderson was not impartial and that the arbitration was unfair, the court pointed out that both parties had consented to Henderson through collective bargaining. “The parties bargained for this procedure, and the [Players] Association consented to it ... When parties to a contract elect to resolve disputes through arbitration, a grievant ‘can ask no more impartiality than inheres in the method they have chosen ...’” (*NFLPA v. NFL*, 2016, p. 548). In other words, the court cannot correct a defect that was baked into the CBA. That was for the parties to collectively bargain. The Eighth Circuit Court of Appeals’ decision illustrated that judicial intervention, per the *Steelworkers* Trilogy, was solely limited to a review of an arbitrator’s decision and not a legal review of the underlying facts as they related to the CBA and associated documents. The court is not to second guess an arbitrator’s decision. Because the court refused to examine the merits of the actual dispute, this holding did not disturb the commissioner’s immense scope of disciplinary authority, given the language in the CBA bargained for by the parties.

NFLMC v. NFLPA (Brady)

This case is commonly referred to as “Deflategate.” The Deflategate saga principally involved a four-game suspension levied against New England Patriots’ quarterback Tom Brady stemming from the team’s use of allegedly underinflated footballs during the 2014 AFC Championship game against the Indianapolis Colts (Mather, 2016). After the NFL was informed of irregularities involving the Patriots’ game balls, which could be argued was a possible benefit to New England’s offense, the league retained attorney Ted Wells and his law firm to launch a probe into this matter. Wells and his law firm began an “independent” investigation co-headed by Wells and NFL Vice President/General Counsel Jeff Pash, pursuant to the NFL’s Policy on Integrity of the Game and Enforcement of Competitive Rules. The resulting 139-page report (the Wells Report) was intended to “represent the independent opinions of Mr. Wells and his colleagues” regarding Deflategate (Wells, Karp, & Reisner, 2015, p. 5).

The Wells Report made several conclusions concerning who was responsible for the underinflated footballs used by the Patriots during the 2014 AFC Championship game. Because of its investigation, the Wells Report concluded that “it is more probable than not that New England Patriots personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules” (Wells et al., 2015, p. 122). The Wells Report further concluded that “it is more probable than not that Brady was at least generally aware of the inappropriate activities of [two Patriots’ equipment room employees] involving the release of air from Patriots game balls” and that “it is unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady’s knowledge and approval” (Wells et al., 2015, p. 128). Although Brady denied any knowledge or wrongdoing, he was still disciplined.



On May 11, 2015, Brady received a letter from NFL Executive Vice President Troy Vincent detailing the penalty for his alleged role in Deflategate. The NFL commissioner, pursuant to his Article 46 power under the CBA, had suspended Brady for the first four games of the 2015 regular season due to the Wells Report's finding that he was generally aware of the deflation of footballs, which allegedly would not have taken place without his knowledge (*NFLMC v. NFLPA*, 2015). Vincent went on to write that Brady's "failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant evidence ... clearly constitute[d] conduct detrimental to the integrity of and public confidence in the game of professional football" (*NFLMC v. NFLPA*, 2015, p. 457). Brady appealed his suspension and Goodell exercised his right under Article 46 to designate himself as the appeals hearing officer.

Prior to the arbitration hearing, Brady requested that the league provide all documents "created, obtained, or reviewed by NFL investigators" including those from the authors of the Wells Report and NFL security related to the Deflategate investigation (*NFLMC v. NFLPA*, 2015, p. 458). Goodell balked at the document request, citing that Article 46 merely required the parties to "exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing" and that the CBA calls for "tightly circumscribed discovery," not the complete production of all documents (*NFLMC v. NFLPA*, 2015, p. 459). Brady had also moved that Pash and Wells be compelled to testify during the arbitration hearing since they were the co-lead investigators of the Wells Report (*NFLMC v. NFLPA*, 2015). However, Goodell also denied this request, reasoning that because Article 46 was silent on the permitted scope of witness testimony at appeals hearings, it was up to his discretion to determine the scope of what is presented "for a hearing to be fair" (*NFLMC v. NFLPA*, 2015, p. 460). Goodell stated that Pash lacked any "first-hand knowledge of the events at issue" and did not play a substantive role in the Deflategate investigation" (*NFLMC v. NFLPA*, 2015, p. 460). Therefore, Goodell only granted the motion to compel Wells's testimony.

At the arbitration hearing, Brady's principal argument centered on a lack of notice. The NFLPA argued Brady had been disciplined under a policy that he had never been made aware of and applied only to "Chief Executives, Club Presidents, General Managers, and Head Coaches," not players (*NFLMC v. NFLPA*, 2015, p. 460). Brady was never provided with this policy and under the league policies for players, which he had been made aware of, equipment violations are subject to a \$5,512 fine for the first offense, not a suspension. Goodell was not persuaded by the NFLPA's argument. Goodell upheld his original penalty, stating that the appropriate level of discipline for Brady's conduct was akin to the collectively bargained penalty for a first-time violation of the policy governing performance enhancing drugs, which carried a four-game suspension (*NFLMC v. NFLPA*, 2015). With Goodell affirming his own decision based on his "conduct detrimental" power, the stage was set for an appeal to federal court.

Judge Richard Berman, of the United States District Court for the Southern District of New York, heard Brady's appeal. Similar to the *Peterson* trial court, the major issue was "whether the arbitrator's award dr[ew] its essence from the collective bargaining agreement, since the arbitrator [was] not free to



merely dispense his own brand of industrial justice” (*187 Concourse Associates v. Fishman*, 2005; *NFLMC v. NFLPA*, 2015, p. 462). The “industrial common law of the shop” again became a central issue at the trial court level (*NFLMC v. NFLPA*, 2015, p. 462; *United States v. International Brotherhood of Teamsters*, 1992). Judge Berman evaluated the legal foundation of Deflategate based on the applicable law of the shop, specific to notice of prohibited conduct and penalties, and vacated Brady’s discipline based on deficiencies in the NFL appeal process (*NFLMC v. NFLPA*, 2015).

Judge Berman’s law of the shop inquiry centered on Brady’s lack of notice regarding his alleged role and punishment in Deflategate. The district court further found it was law of the shop “to provide professional football players with advance notice of prohibited conduct and potential discipline” (*NFLMC v. NFLPA*, 2015, p. 462). Brady was never advised prior to or during the Wells Report investigation that he could receive a four-game suspension for general awareness of ball deflation by others or participation in any scheme to deflate footballs and non-cooperation with the ensuing investigation. Judge Berman was also not persuaded Brady had received adequate notice that his penalty would be based on the CBA’s steroids policy (that Goodell had cited as a basis for the punishment), which was collectively bargained specifically for performance enhancing drugs and not deflating footballs or obstructing an investigation (*NFLMC v. NFLPA*, 2015). The district court concluded that it was the law of the shop to provide players with advance notice of prohibited conduct and the associated penalties. Because Goodell had failed to abide by the law of the shop by not providing notice that Brady could have been suspended for an equipment violation, Judge Berman concluded that the commissioner “may be said to have ‘dispense[d] his own brand of industrial justice’” (*NFLMC v. NFLPA*, 2015, p. 466). This conclusion created the basis to vacate the award.

Judge Berman also declined to defer to the commissioner’s general power as the league disciplinarian. He said Goodell’s “reliance on notice of [the] broad CBA ‘conduct detrimental’ policy – as opposed to specific Player Policies regarding equipment violations – to impose discipline upon Brady is legally misplaced” (*NFLMC v. NFLPA*, 2015, p. 470). Instead, the district court pointed to the Rice arbitration and *Peterson* district court decision (which at that time had yet to be overturned by the Eighth Circuit) as examples where players were disciplined under specific policies, “because an applicable specific provision within ... [p] layer [p]olicies [are] better calculated to provide notice to a player than a general concept such as ‘conduct detrimental’” (*NFLMC v. NFLPA*, 2015, p. 470). In other words, it appeared Judge Berman was not willing to acquiesce to the commissioner’s judgment and instead required discipline be made pursuant to an established policy that, as part of the law of the shop, provided greater notice of the penalty instead of a vague concept such as “conduct detrimental.” Judge Berman also ruled that it was fundamentally unfair and prejudicial to prevent Pash from testifying for his role in the Deflategate saga and deny access to the original materials that were used for the Wells Report.

The NFL appealed to the Second Circuit Court of Appeals, which limited its scrutiny to reviewing whether Goodell acted within the scope of his authority pursuant to the CBA (*NFLMC v. NFLPA*, 2016). In a 2-1 split decision, the three-member panel ruled that the commissioner’s disciplinary decision was



vested in his broad authority to punish conduct that he believed undermined the “integrity of the game,” pursuant to Article 46 of the CBA. Since the sides agreed that the commissioner had the wide-ranging power to investigate and sanction those who engage in conduct detrimental to the integrity of the game with limited procedural process, it was not for the court to second guess the arrangement. Instead, the Second Circuit concluded that Goodell had properly exercised his broad power to penalize Brady pursuant to the CBA.

After reviewing the case’s facts, the court reaffirmed the national preference to resolve labor disputes without government intervention (*International Brotherhood of Electrical Workers v. Niagara Mohawk Power Corporation*, 1998; *Warrior and Gulf*, 1960). Parties are bound by their mutually negotiated CBA, and arbitrators chosen to resolve a dispute are trusted for their judgement to “interpret and apply [the] agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties” (*Alexander v. Gardner–Denver Company*, 1974, p. 53). Like the Eighth Circuit’s inquiry in *Peterson*, the Second Circuit examined whether Goodell’s decision drew its essence from the CBA, and was not merely his own brand of industrial justice. Judicial scrutiny is highly deferential; “even arguably construing or applying the contract and acting within the scope of his authority” and not “ignor[ing] the plain language of the contract” was sufficient to affirm an arbitrator’s decision (*NFLMC v. NFLPA*, 2016, p. 537).

The court of appeals began its analysis by reviewing Article 46, noting that although it provided broad power to discipline those who have engaged in conduct detrimental to the game, the section failed to provide rules of procedure for the hearing other than exchanging exhibits no later than three days prior to the hearing. Further, the language of Article 46 was so vast that the court felt Brady could have received notice that his discipline was “plausibly grounded in the parties’ agreement, [the CBA], which [was] all the law require[ed]” (*NFLMC v. NFLPA*, 2016, p. 539). As for Brady’s other procedural claims related to notice, the majority found that the judicial scrutiny required to affirm Goodell’s ruling was low enough that even a barely colorable interpretation was enough to pass muster. The CBA gave Goodell wide latitude to interpret conduct detrimental and the court found that Goodell was within his discretion to conclude that Brady’s conduct as stated in the Wells Report and his failure to cooperate in the investigation provided a basis for discipline pursuant to Article 46.

In terms of the due process claims, the court of appeals held that an arbitrator possessed the authority to decide questions related to procedure such as witnesses and evidence. Since a court cannot second guess an arbitrator unless the arbitrator violated fundamental fairness (*Tempo Shain Corporation v. Bertek, Inc.*, 1997), the Second Circuit turned its analysis to examining whether Goodell violated fundamental fairness. The majority looked to the CBA’s text to determine this issue. After reviewing Article 46, the court of appeals determined that Goodell had acted reasonably in construing the clause, specifically the language related to discovery since Brady had challenged the arbitration based on his denial of a more extensive discovery and access to evidence/witnesses. Further, the parties had bargained for and agreed to the language in Article 46, and Goodell was under no obligation to deviate from the investigative and disciplinary powers



delegated to him in the agreement. Had the parties desired a more expansive discovery process, they should have memorialized it into Article 46. In other words, a court cannot provide more benefits than afforded to the parties through the bargaining process.

In his dissent, Chief Judge Katzmann believed Goodell undermined Brady's ability to receive fair notice and his opportunity to confront the case against him by penalizing him for a more serious charge than what was found in the Wells Report. The dissent also questioned why Goodell did not explain the severity of the punishment. The chief justice felt that the commissioner's decision to discipline Brady without notice or reasonable explanation was made outside of the CBA and thus his "own brand of industrial justice" (*NFLMC v. NFLPA*, 2016, p. 554). Chief Judge Katzmann concluded by viewing the Article 46 appeals process as a check on commissioner authority that was bargained for by NFLPA that has been abused by the league against the players. This line of reasoning suggests that Chief Justice Katzmann viewed the court's role as effectuating the intent of the clause to ensure that the commissioner used his power in a fair manner. A group of labor law scholars, in their amicus brief challenging the majority's holding, also criticized the panel's decision because it "empowers arbitrators to ignore the parties' arguments and CBA-imposed limitations on their power, and denies recourse to parties that have suffered even the most egregious violations of industrial due process" (Amicus Curiae Brief, Scholars for Labor Law and Industrial Relations, 2016, p. 6). Both these criticisms suggest the majority's holding undermines the grievance arbitration process and collective bargaining relationship between the parties.

Despite this dissent, the Second Circuit majority's holding fits with the Eighth Circuit's decision of applying limited judicial scrutiny to arbitrator decisions and construing Article 46 as granting immense power to the commissioner without significant requirements when it came to appeals. The Second Circuit's ruling in *Brady* conforms with the *Steelworkers* Trilogy and national policy favoring dispute resolution through the CBA's machinery contained in the grievance arbitration provisions. This is the schema the parties bargained for. If the arbitrator acted within the bounds of his authority according to the plain meaning of the CBA, a party on the losing end of the decision should revise the document that delegated such authority to the arbitrator as opposed to filing suit. Any revisions to the commissioner's authority or appeals process should occur through collective bargaining, not judicial review. Doing so, as espoused in the *Steelworkers* Trilogy, would be likely to subvert the labor relationship. Once again, the union was unable to overturn the results of its collective bargaining in court.

NFLPA v. NFL (*Elliott*)

The final case in the *Trilogy* stemmed from several incidents involving former Ohio State standout and current Dallas Cowboy running back Ezekiel Elliott. In 2016, Elliott was allegedly involved in multiple instances of physical violence with an intimate partner, Tiffany Thompson (Bonesteel, 2016). Although police investigated the matter, no arrests were made and the Columbus (Ohio) City Attorney chose not to prosecute Elliott. During a separate incident at a St. Patrick's Day parade in 2017, Elliott allegedly engaged in lewd conduct with a



different female (Reyes, 2017). Although this incident was captured and posted on social media, Elliott did not face criminal or civil legal consequences.

Even though Elliott avoided prosecution, the NFL opened its own investigation as to whether he violated the NFL's PCP. The investigation took over a year and included interviewing more than a dozen witnesses and examining, per the league, "all available evidence including photographic and digital evidence, thousands of text messages and other records of electronic communications" between Elliott and Thompson as well as the police reports from both incidents (Jones, 2017, p. 2). On August 11, 2017, Goodell, relying on the NFL investigation's findings that Elliott used physical force against his intimate partner on three separate occasions, suspended Elliott for six games pursuant to the current NFL PCP. Goodell also instructed Elliott to consult with a qualified professional for clinical evaluation.

The NFLPA appealed Goodell's decision pursuant to Article 46 and requested that the league produce documents related to the investigation, including the investigators' notes, and to make several witnesses available, including Thompson, and both league investigators—Lisa Friel and Kia Roberts—as well as several medical experts used in the investigation. The NFL refused to grant these requests. Henderson, once again appointed arbitrator by the league, denied the NFLPA's request for production of documents or to compel Elliott's ex-girlfriend to testify. However, Henderson ordered both principal league investigators to appear to testify at the hearing. The NFLPA learned during the hearing that Roberts, the investigator who interviewed Elliott's ex-girlfriend multiple times, found that Thompson lacked credibility (*NFLPA v. NFL and NFLMC*, 2017). The NFLPA also discovered during the arbitration hearing that Roberts was kept from a meeting between Goodell, a panel of outside advisors, and the other investigator (*NFLPA v. NFL and NFLMC*, 2017). The NFLPA reasoned that Roberts was kept away because the league did not want Goodell to decide against disciplining Elliott.

Henderson was tasked with deciding whether Goodell's discipline was arbitrary and capricious, meaning it was made on unreasonable grounds, whether Elliott had adequate notice of the charges, and whether his appeal rights were fair and consistent with league policies. After the three-day arbitration, the arbitrator ruled in favor of the league. He found that "the record contain[ed] sufficient credible evidence to support the Commissioner's determinations" and that the "process for imposing discipline outlined in the [PCP]" was "followed closely, step by step" (Henderson, 2017, p. 8). Henderson reaffirmed that his job was to determine whether Elliott was "afforded adequate notice of his alleged violation, the right to representation, opportunity to present evidence, and a decision which is fair and consistent" (Henderson, 2017, p. 7). Henderson was not re-examining the evidence presented in the Elliott case or second guessing Goodell's decision; rather, the commissioner was "entitled to deference on those judgements absent irregularities [that were] not present here" (Henderson, 2017, p. 8). Goodell made his decision after reading the report, which contained all "statements and inconsistencies" accumulated by the investigators (Henderson, 2017, p. 7). Neither investigator's recommendation was required per the PCP.

The NFLPA did not wait for Henderson's decision before filing suit with the United States District Court for the Eastern District of Texas to vacate his



decision. The case was assigned to Judge Mazzant. Henderson did not rule until five days after the NFLPA filed its complaint. The NFLPA's central argument was that Elliot had been denied fundamental fairness to properly defend himself in the hearing because they could not access the investigators' notes, cross-examine Thompson, and question Goodell (*NFLPA v. NFL and NFLMC*, 2017). The league maintained that the district court did not possess jurisdiction to hear the case because, by refusing to wait for the arbitrator's ruling, Elliot had failed to exhaust his remedies agreed to in the CBA. However, the district court found that exhaustion was unnecessary and intervention was appropriate because the league repudiated its procedural obligation by failing to provide Elliot with fundamental fairness during the arbitration.

The district court distinguished Elliot's case from the *Brady* Second Circuit decision, which found that denial of evidence was immaterial to the case, by concluding that the denied evidence was material in this case (*NFLMC v. NFLPA*, 2016; *NFLPA v. NFL and NFLMC*, 2017). Roberts's questions about a witness's credibility and opinion concerning whether to punish Elliot, each material items, were both left out of the league's report and possibly not communicated to Goodell. Because it was not in the Elliot report, and the NFLPA was unable to review the investigators' notes, the court reasoned that the NFLPA did not know about Roberts's beliefs (*NFLPA v. NFL and NFLMC*, 2017). It was only after Roberts testified on the second day of arbitration that this information came to light, post-commissioner discipline. The court also found that Henderson breached the CBA by barring access to "certain procedural requirements, which were necessary to be able to present all relevant evidence at the hearing" (*NFLPA v. NFL and NFLMC*, 2017, p. 948). Judge Mazzant concluded fundamental unfairness existed from the beginning of the league's decision-making process to punish Elliot and lasted through the arbitration, as Henderson's decision to deny key witnesses and documents was a serious misconduct:

The NFLPA was not given the opportunity to discharge its burden to show that Goodell's decision was arbitrary and capricious. At every turn, Elliott and the NFLPA were denied the evidence or witnesses needed to meet their burden. Fundamental unfairness infected this case from the beginning, eventually killing any possibility that justice would be served. (*NFLPA v. NFL and NFLMC*, 2017, p. 954)

The district court, having found it could intervene due to a lack of fundamental fairness throughout the process, ruled for Elliot, and granted his request for a temporary restraining order (TRO) enjoining the player's suspension from taking effect.

Although the TRO was in place, meaning Elliot could keep playing for the Cowboys, the league petitioned the Fifth Circuit Court of Appeals to stay the lower court's injunction. The NFL again argued that the district court lacked subject matter jurisdiction since Elliot filed his lawsuit prior to the arbitrator's decision and therefore did not exhaust his contractual remedies (*NFLPA v. NFL and NFLMC*, 2017). The appellate court reviewed the issue *de novo*. In a 2-1 decision, the majority cited the preference of settling CBA disputes via contractually agreed methods and held that Elliot's lawsuit was premature. Elliot had



not exhausted his remedies agreed to in the CBA. Further, the majority found that judicial intervention was inappropriate in this instant because the league's conduct did not amount to a repudiation of the procedures specified in the CBA. Even though the NFLPA objected to the outcome and fairness of the arbitration process, an arbitration hearing as stated in Article 46 indeed occurred. The repudiation exception would have only applied if the NFL had refused Elliot's arbitration request despite both sides agreeing to it in the CBA (*NFLPA v. NFL and NFLMC*, 2017). Since Elliot failed to exhaust his procedural remedies and no basis for subject matter jurisdiction existed, the Fifth Circuit majority vacated the district court's ruling and TRO.

Like the district court's decision, the dissent found the fundamental unfairness of the process violated the CBA. Since an alleged violation of a labor contract and issues related to fundamental fairness in arbitrations were enough to grant a court subject matter jurisdiction (*Houston Refining, L.P. v. United Steel, Paper & Forestry, Rubber Manufacturing*, 2014; *Ramirez-Lebron v. International Shipping Agency, Incorporated*, 2010), the dissent believed full judicial review was appropriate. The dissent concluded that the NFLPA and Elliot were arguably denied access to material evidence prior to the hearing as well as the right to present relevant evidence at the hearing. This impinged on the integrity of the arbitration process, and thus was the basis for repudiation of the CBA.

The final significant ruling of the Elliot saga occurred in the United States District Court for the Southern District of New York. Having the *Brady* decision on its side, the league had filed in the Second Circuit after Henderson ruled in favor of the NFL. The league asked the court to enforce Henderson's award that affirmed Elliot's suspension. After the Fifth Circuit's reversal of the lower court decision for lack of subject matter jurisdiction, the NFLPA answered the league's complaint, counterclaimed to vacate Henderson's award, and asked the court to grant a TRO and preliminary injunction to stay Elliot's suspension. Bound by the *Brady* Second Circuit Court of Appeals standard, which instructed judges not to substitute their own viewpoint in place of an arbitrator's on the merits of a factual dispute (*NFLMC v. NFLPA*, 2016), Judge Failla's review of the *Elliot* case was limited. Judicial review focused on whether Henderson "was even arguably construing or applying the contract and acting within the scope of his authority and did not ignore the plain language of the contract" (*NFLMC v. NFLPA*, 2017, p. 621).

The New York district court noted that even an arbitrator's "failure to follow arbitral precedent" was not a valid reason to overturn the award (*NFLMC v. NFLPA*, 2017, p. 621). Instead, so long as the decision drew its essence from the collective bargaining agreement and was not merely the arbitrator's own brand of industrial justice, it was to be affirmed (*NFLMC v. NFLPA*, 2017). This time, the district court was not persuaded by the NFLPA's argument that arbitration awards that lacked fundamental fairness were to be overturned. Supreme Court precedent suggested that courts should defer to arbitrators as opposed to superimposing their definition of "fairness" beyond what the parties had bargained for through their CBA (*NFLMC v. NFLPA*, 2017, p. 623, citing *Misco*, 1960). Courts should not stand in judgment of the CBA, as this "enlarged scope of judicial review in LMRA cases would therefore have practical, injurious effects for parties to collective bargaining agreements engaged in arbitrations to resolve labor



dispute” (*NFLMC v. NFLPA*, 2017, p. 623). Therefore, the New York district court ruled that the fundamental fairness standard did not apply in this case.

Since appealing this ruling would have placed oral arguments four games into Elliot’s suspension (McCann, 2017), the NFLPA chose to end its litigation and accept the suspension (Florino, 2017). The *Elliot* case underscored the deference courts place on the terms negotiated into a CBA, “if the arbitrator acts within the scope of this authority, the remedy for a dissatisfied party is not judicial intervention, but for the parties to draft their agreement to reflect the scope of power they would like their arbitrator to exercise” (*NFLMC v. NFLPA*, 2017, pp. 621-622).

This deference to the LMRA and collective bargaining highlights the importance of negotiation and clear language in an agreement. The *Peterson* and *Brady* appeals cases both illustrated a court’s willingness to honor the specific language, and silence, of the mutually bargained for CBA. The *Elliot* case tested the Article 46 language and continued the trend of courts rejecting the fundamental fairness doctrine argument as a basis to re-construe the CBA or the arbitrator’s decision. Enhanced judicial review undermined the bargaining relationship between the parties as well as the policy favoring dispute resolution through private agreement.

Part III. *Trilogy* Takeaways and Implications for the Future

A review of all three cases *en toto* presents several informing takeaways regarding the legal, policy, and practical issues the NFL and NFLPA should consider involving player discipline/conduct and the commissioner’s authority. First, the judicial deference to the NFL commissioner’s authority under Article 46, although not universal, reaffirms the limited value of litigation as a realistic long-term solution. Second, the appellate courts’ neutralization of the law of the shop, including honoring the sides’ prior negotiation history, has vastly increased the scope of the commissioner’s power. Third, a lack of clear procedural safeguards in the CBA creates a barrier to the NFLPA’s effective representation of its members’ interests and highlights the question whether an agreement to arbitrate must include an agreement to a fair process. Finally, and perhaps most significant, the *Trilogy* illustrates that labor disputes between the league and the union do not exist in a vacuum. They are guided by the precedent set by the *Steelworkers Trilogy*.

The *Trilogy* raises concerns for both the NFLPA and the NFL, engendering the question of how each side will approach the future. The NFLPA’s paramount legal problem is whether it can curb the increasing power of the commissioner—now affirmed by three circuits—and, in light of the legal landscape, whether it can induce the league to change the disciplinary process to create fair and accessible procedures for players. The NFL’s problem is driven by a continuing crisis of public perception and may only be remedied by a policy shift that highlights the need for new policies to prevent inconsistent player discipline, while simultaneously improving its relationship with the players who are its natural partners. The NFLPA has several potential solutions, some of which involve



significant legal limitations and some of which will require a wholesale evolution of how the NFLPA approaches the next CBA negotiation. The NFL, similarly, may need to envision a more collaborative and less adversarial relationship with the players and the NFLPA.

The NFLPA's Strategy

The league's approach to commissioner discipline is unlikely to change without intervention. While the NFLPA can continue to pursue its position in the courts and hope to find sympathetic judges like Doty, Berman, and Mazzant who will continue to be skeptical of the casual due process methods in the current CBA, the NFL now has expansive, favorable precedent in three of the 12 regional appellate circuits. Future challenges are likely to be evaluated in line with the *Steelworkers* Trilogy precedent and related cases espousing the federal policy favoring maintaining industrial peace through collective bargaining remedies. All three of the decisions discussed in this paper have emphasized that the NFLPA bargained for this system. Despite the union's insistence that it expected disciplinary procedures to be in line with past precedents, the law of the shop, and fair due process, courts have refused to uphold the NFLPA's interpretation in the absence of any explicit rules or procedures corroborating that view in the CBA. Instead, the appellate courts deferred to the grievance arbitrator's interpretation, per the *Steelworkers* Trilogy. It is even less likely post-*Trilogy* that a future court will award to the NFLPA what it failed to win through collective bargaining. Therefore, a more fruitful approach may be for the NFLPA to continue fighting for greater constraints on commissioner authority at the collective bargaining table and in the court of public opinion.

Appealing to public opinion could be a useful tool as part of an overall strategy of pursuing the NFLPA's best option for addressing the issues demonstrated through the *Trilogy*: renegotiating the CBA. If the NFLPA wants to change the future path of commissioner discipline, it needs to prioritize bargaining for a CBA containing robust disciplinary due process. The NFLPA should draft a desired arbitration procedure, make it public, and call on the league to negotiate in good faith for a fair process. The goal would be to codify concrete procedures mandating that both sides engage in full discovery, allowing both sides to call relevant witnesses and otherwise present evidence. Another proposal could be making the complete rules of evidence applicable to disciplinary procedures, similar to a standard case in civil litigation. If the stakes are as high as the NFLPA contends—arguing that the players face irreversible damage in careers that can be cut short any day by injury—the union should seek maximum procedural protections in the CBA (*NFLPA v. NFL and NFLMC*, 2017).

Among other features, the NFLPA should propose separating the appeals process from the powers of the commissioner. This may be accomplished by electing an independent panel of three arbitrators to hear appeals in a more traditional setting. One recommendation is to have the NFL and NFLPA each select an arbitrator from a pre-approved list, and have both sides collaboratively settle on the third arbitrator. Removing the commissioner's direct authority from the appeals process to a neutral arbitrator using a well-reasoned and well-noticed policy is more likely to bolster due process. Arbitrations would then be assigned



to truly independent arbitrators, rather than former NFL executives such as in *Peterson* and *Elliott*. A qualified and neutral arbitrator may also benefit the parties by more routinely coming to well-reasoned decisions to create consistent precedent, consistent with the intent of the *Steelworkers* Trilogy.

Perhaps the NFLPA could persuade Goodell that these reforms are in the best interest of the NFL by appealing to his familiar mantra: “Protecting the Shield.” The NFLPA can argue that if Goodell and the league truly care about the integrity of the game, sound governance, and public credibility, they should be willing to accept the proposed procedural protections to strengthen the arbitration process. The best way to ensure fairness and integrity is a transparent process that affords opportunities for both sides to be heard, present evidence, and examine witnesses.

Negotiating such language into a CBA would be a difficult task. In addition to agreeing to language, the players would have to make concessions for a reform that would affect very few players each year, which is likely why the NFLPA has not previously prioritized disciplinary reform.² Perhaps the NFLPA would need to sweeten the deal with concessions it has previously sidestepped, such as an 18-game schedule (Florio, 2016). Although such concessions do not have to be absolute, the NFLPA should negotiate in good faith to work toward an acceptable proposal. Perhaps, to entice the majority of its membership, the union could convince players to agree to an 18-game schedule in exchange for proportionate salary or cap increases, the elimination of Thursday night games, or a shorter preseason. This may help account somewhat for players’ financial and health concerns, and allow most players to receive more financial benefits given their short career span. Such an offer would help generate more revenue, moving Goodell closer to achieving his goal of producing \$25 billion in annual revenue by 2027 (Kaplan, 2016), but also creating more player revenue.

Whether to return to the bargaining table or continue litigating is not a strategic decision limited to player discipline (LeRoy, 2012). Data on antitrust lawsuits among the major sports leagues show that among the major professional players’ unions, the “NFLPA relies the least on collective bargaining” and that “[p]layers simply moved their bargaining from the labor-management realm to the federal courthouse” to gain antitrust leverage and negotiate a more favorable CBA (LeRoy, 2012, p. 44). LeRoy argued that antitrust litigation produced a “narcotic effect” on players’ unions; when courts permit suits circumventing the CBA, players develop “an easy and habit-forming release from the obligation of hard, responsible bargaining” (LeRoy, 2012, p. 57). Each *Trilogy* case produced wins for the players at the district court level, whetting the NFLPA’s appetite for more attempts to win in court what it failed to win at the bargaining table. This strategy, although it facilitated a short-term win, undermined the industrial relationship between the parties, lessening the likelihood of working together to amicably address issues that lead to labor strife. In addition to producing broad, appellate-level precedent favoring the league, such a negotiation-by-litigation

² For example, tight end Greg Olsen has declared that “[t]he Conduct Policy is very low on my totem pole,” suggesting that the “vast majority of NFL players ... want to be held to a high standard” (Hurley, 2017, para. 4).



strategy also “subverts” the parties’ collective bargaining relationship (LeRoy, 2012, p. 57). The union is by no means solely to blame for the fraught NFL bargaining relationship, but attempting to properly negotiate the aforementioned disciplinary reform proposals is a first step toward repairing the broken relationship.

The NFL’s Policy Strategy

Legally, the NFL is correct in thinking that the appellate courts vindicated the league in the *Trilogy* cases. From a business perspective, however, the *Trilogy* is a series of case studies in misguided management, poor leadership, and communication failures. A significant part of the NFL’s problems has been its inability to view its relationship with the NFLPA as anything but adversarial. The NFLPA and its leadership have also contributed to the breakdown of the relationship as discussed. But rather than seeing a strong working relationship as valuable to its business model, the NFL appears to view its players as obstacles to its financial success. The players are the opposition in this zero-sum game, as opposed to the heart of the league’s economic engine.

The NFL, and Goodell in particular, should look at the *Trilogy* as an opportunity to improve its relationship with the NFLPA and eliminate future mistakes. If some players are truly bad actors, fans want them punished appropriately. But no one is well-served when the NFL fails to fully investigate, conducts sham arbitrations and appeal hearings, and hands down heavy or inconsistent punishments in light of suspect evidence. The NFL should come to the table at the next CBA negotiation with an eye toward giving the NFLPA what it wants regarding crafting a more equitable commissioner discipline policy. If the NFL wants concessions from the NFLPA in exchange for a player discipline reforms, the league should offer a reasonable tradeoff and put the onus on the players to refuse—show fans that the NFL is more interested in fairly policing the workplace than one-upping its own employees.

If a new Article 46 process cannot be agreed upon in negotiations, and an impasse occurs, the NFL should consider creating its own internal procedures and making them public. By increasing the transparency of its investigations, the league would allow players and the public to understand what allegations have been made and the nature and context of an investigation. By disclosing accurate information, the public will not have to rely on behind-the-scenes leaks that characterized investigations such as Deflategate, Bountygate, and the Ray Rice case.

Another proposal is to make all investigations truly independent. The NFL should attempt to avoid the appearance of any impropriety by preventing league employees, former league employees, and league attorneys or other representatives from investigating misconduct. When the public views investigators as potentially biased, public confidence in the NFL is undermined. There is no point to assigning a supposedly “independent” investigation to the NFL’s own counsel, as the league essentially did in Deflategate. For example, one legal scholar criticized the NFL for commissioning an NFL-sponsored Wells Report where the league’s own lawyers “also doubled as independent investigators” (Blecker, 2015, para. 8). In addition to Judge Berman questioning whether the NFL’s investigation in



Deflategate was truly independent, others watching the proceedings unfold also wondered whether the league played a role in guiding the investigation (Jenkins, 2016). Moreover, this saves the league from dealing with legal scrutiny about the independence and fairness of the investigator's conclusions.

As a corollary to independent investigations, the NFL should voluntarily submit to more independent appeal hearings, especially on significant disciplinary cases. It should allow players to appeal to someone besides the commissioner, preferably someone who is truly independent. It would behoove the NFL to take the extra step to insulate these decisions from potential legal attack from the NFLPA, as well as public criticism from fans and the media. That means reforming the arbitration process itself, including allowing players' counsel to review relevant documents and present testimony and evidence of their choosing.

Quelling public criticism may help reverse a troubling trend for the league. NFL television ratings fell nearly 10% during the 2017 regular season from the previous season (Rovell, 2018). This development is significant because in 2016, the ratings were also down by 8% (Rovell, 2017). Those numbers don't compare favorably with the NBA, where ratings during the 2017 season were up 25% midway through the season (Morgan, 2017). In contrast to the NFL's contentious relationship with players as well as Goodell's continued public relations and labor relations missteps, the NBA and its commissioner, Adam Silver, appear to understand that a strong relationship with the players is good for business. NBPA Executive Director Michele Roberts and Silver learned from the mistakes made by their respective predecessors by eschewing an adversarial tone and striking a cooperative approach during talks (Cacciola, 2016; McCann, 2016). This decision turned what could have been an acrimonious legal battle into a public relations win by the sides negotiating a new CBA without a work stoppage.

Since extending its CBA, the NBA has continued to ride a wave of success, while the NFL has continued to flounder (Abdul-Jabbar, 2017; Bulpett, 2017). To explain the reason for the two leagues' divergence, it all comes back to what Tagliabue warned Goodell about in Bountygate: "[t]here's a huge intangible value in peace. There's a huge intangible value in having allies" (Sherman, 2015, para. 57). The NFLPA's continuous lawsuits over procedures that the NFL can change undermine the bargaining relationship, which in turn may encourage the league to further entrench its position and disregard the players' concerns.

Even though the precedent created by the *Trilogy* has provided the league with significant leverage, a recent point of contention between the NFL and NFLPA could be the springboard to produce a cooperative approach on player discipline. The NFL is embroiled in a dispute over various players' decisions to protest social justice issues by, among other means, kneeling during the national anthem before games. NFL owners attempted to change league policy regarding the anthem protests in May 2018 without significant input from the players (Maske, 2018). After the NFLPA filed a grievance, the parties reached a standstill agreement and promised to discuss the matter further, with some in the NFL speculating that a future resolution could involve owners conceding to player concerns about discipline for protests in exchange for players agreeing to stand for the national anthem (Maske, 2018).



This is an area in which both parties may be motivated to work together. The players have a strong interest in reforming the discipline and due process protections within the CBA's grievance arbitration system, while owners are attempting to end a significant public controversy. Moreover, the owners themselves are divided on this issue, with some expressing sympathy to the players' right to protest (Maske, 2018). With both sides agreeing to discuss the matter before announcing any further public action, an opening exists to work together to resolve a dispute and improve the bargaining relationship.

Conclusion

The outcome of the *Trilogy* demonstrates that the power granted to the commissioner involving conduct detrimental to the best interests of the game remains expansive in the area of player discipline. Read together, these three cases are a lesson to the NFLPA that it got what it bargained for according to the letter of the CBA and in line with the *Steelworkers Trilogy* precedent. With the CBA in force until March 2021, and the NFLPA preparing for a possible labor stoppage (Graziano, 2019; Pelissero, 2017), players seeking to renegotiate disciplinary due process must prepare to do so at the bargaining table, not in court. The NFLPA must find a way to persuade the NFL to change its views on commissioner discipline, perhaps by taking advantage of the league's recent anthem protest controversy. Rather than continuing to participate in the subversion of the collective bargaining relationship, and contrary to firmly established precedent, the NFLPA should eschew its litigious strategy of attempting to substitute judges for arbitrators in favor of improving the CBA with specific proposals negotiated at the bargaining table. Repairing its relationship with the NFL is paramount.

The *Trilogy* is also an opportunity. The NFL won these three cases, but they never should have happened. Had the NFL announced set punishments in advance, provided clear notice to players, followed standard procedures, and issued consistent discipline, the legal battles likely could have been avoided. Certainly, the NFL would have stood a better chance with the three district judges who ruled against the NFL. This may have also avoided the deluge of public criticism that accompanied each case in the *Trilogy*—potentially a reason why NFL ratings have been down the last two years—and possibly avoided ceding ground to the NBA when it comes to viewership. The NFL is at a tipping point: it remains a financial behemoth in American sports, but it is beset by controversies, scandal, and a changing cultural landscape. The key to maintaining its position is the essence of the game: the players. The NFL has an opportunity, from a position of strength, to learn the lessons of the *Trilogy* and avoid future mistakes by forging a better relationship with the players. Mending that relationship starts with, as several courts in the *Trilogy* suggested, both parties returning to the bargaining table.



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