



## The Tom Brady Award and the Merit of Reasoned Awards

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### TABLE OF CONTENTS

I. INTRODUCTION .....	148
II. THE BRADY AWARD: AN EXEMPLARY REASONED AWARD...	151
III. POINT: REASONED AWARDS INCREASE APPEALS AND VACATURS AND SO SHOULD BE AVOIDED .....	161
IV. COUNTERPOINT: REASONED AWARDS ARE MORE, NOT LESS, DEFENSIBLE AND SHOULD REDUCE, NOT INCREASE, APPEALS AND VACATURS .....	173
V. WAS THE BRADY AWARD REASONED ENOUGH? .....	189
VI. THE REST OF THE APPEAL .....	202
VII. REASONED AWARDS BUILD ARBITRATION’S LEGITIMACY ...	204

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## I. INTRODUCTION

The ruling that National Football League (NFL) Commissioner Roger Goodell issued on July 28, 2015 against New England Patriots quarterback Tom Brady, and the underlying decisions on May 11, 2015 to suspend Brady for four games and to dock the Patriots a million dollars as well as two draft picks, are fascinating for many reasons. A major reason for lawyers to be fascinated is that the sanctions, issued after a hearing held because Brady challenged his suspension, ended up being affirmed by the Commissioner in a highly publicized arbitration award. It is rare for the process of arbitration to be thrust so clearly into the national spotlight. Arbitration usually is not public and its awards usually do not become news items. But in law and in politics, as in cultural life, events that do overflow into public consciousness can produce quick changes beyond the reach of ordinary events. The Brady award publicized arbitration in a way beyond the power of the countless arbitrations that go on around the country day after day.<sup>1</sup> It created a national learning experience about arbitration. Arbitrators should try to learn from it, just as should other Americans.

The award sheds light on the old struggle between arbitrators who insist that silent “standard” awards should be the default format for awards and those who urge reasoned awards that explain the decision reached. Outside the United States, this is no contest: reasoned awards are expected. Reasoned awards are the default format in international arbitration.<sup>2</sup> Two of

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<sup>1</sup> This model of political change is perhaps most persuasively articulated in JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICES* (1995), itself substantially an application of Michael D. Cohen, James March, and Johan Olsen, *A Garbage Can Model of Organizational Choice*, 17 *Admin. Science Q.* 1 (1972). Before policies get enacted, a problem has to get on the policy “agenda,” which often occurs when an unusual or shocking event grabs the public mind. KINGDON, *supra*, at 94–100. The *Brady* award brought unusual attention to a specific arbitration and to the process of arbitration.

<sup>2</sup> The United Nations UNCITRAL Code requires arbitrators to state their reasons, absent contrary agreement. UNCITRAL ARB. RULES, Art. 34.3 (rev. 2010). So do the London Court of International Arbitration rules. LCIA ARB. RULES, Art. 26.2 (2014) (award “shall state the reasons upon which such is based” unless all parties agree otherwise in writing). The ICC agrees. ICC RULES OF ARB., Art. 31(2) (2012) (“The award shall state the reasons upon which it is based”). The ALI/UNIDROIT Principles for Transnational Civil Procedure require a “reasoned explanation of the essential factual, legal, and evidentiary basis of the decision.” ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, Prin. 23.2 (2010).

Tellingly, the AAA, CPR, and JAMS international rules also make a reasoned decision their default model. AAA, INT’L DISP. RESOL. PROCS., Art. 30.1 (2014) (tribu-

the major domestic providers, CPR and JAMS, also treat reasoned awards as the ordinary model for arbitration.<sup>3</sup> A new entrant, Palo Alto's FedArb, whose roster of arbitrators includes over fifty former federal judges as well as a select group of experienced practitioners, bases its rules upon the *Federal Rules* and requires an opinion with "findings, reasons, and conclusions" in addition to an award (although FedArb of course lets the parties opt out of this requirement, just as it lets them customize other parts of its rules).<sup>4</sup> But the AAA and FINRA treat silent awards, not reasoned awards, as their "standard,"<sup>5</sup> and the idea that silent awards are preferred crops

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nal "shall state the reasons upon which an award is based" unless parties agree otherwise); CPR, RULES FOR NON-ADMIN. ARB. INT'L DISPS., Rule 15.2 (2007) (all awards in writing and "shall state the reasoning on which the award rests unless the parties agree otherwise"); CPR, ADMIN. ARB. OF INT'L DISPS., Rule 15.2 (2014) (awards "shall state the reasoning on which the award rests," no mention of parties' being able to agree otherwise); JAMS, INT'L ARB. RULES, Rule 32.2 (2011) ("The Tribunal will state the reasons upon which the award is based" unless parties agree otherwise). If the parties opt for CPR's accelerated international rules, awards will be reasoned unless parties agree otherwise, although in this setting reasoned means "as concise as circumstances permit." CPR, GLOBAL RULES FOR ACCELERATED COMM. ARB., Rule 16.1 (2009).

<sup>3</sup> CPR, RULES FOR NON-ADMIN ARB., Rule 15.2 (2007). CPR's rules for administered arbitration have the same provision. CPR, RULES FOR ADMIN. ARB., Rule 15.2 (2013). For JAMS, see JAMS, COMP. ARB. RULES & PROCS., 24(h) (2014) (requiring "concise written statement of the reasons for the Award" unless all parties agree to dispense with reasons). JAMS policy statement on consumer cases requires a statement of the "essential findings and conclusions on which the award is based." JAMS POL'Y ON CONS. ARBS. PURS. TO PRE-DISP. CLAUSES, MIN. STDS. OF PROC. FAIRNESS 10 (2009). Even JAMS streamlined rules assume arbitrators will give reasons: STREAMLINED ARB. RULES AND PROCS., Rule 19(g) (2014).

<sup>4</sup> FEDARB RULES, Rule 11.01 (2015) ("Unless the parties agree otherwise, the Arbitrator or Panel shall also issue an opinion in writing . . . that should include the findings, reasons, and conclusions upon which the Award is based").

<sup>5</sup> AAA, COM. ARB. RULES, Rule 46(b) (2013) (arbitrators need not write reasoned award unless both sides ask for one before appointment, or arbitrators otherwise determine that "a reasoned award is appropriate"); FINRA, Code of Arbitration Procedure for Customer Disputes, pt. IX (Fees and Awards) § 12904(g)(1), (3) (rules only require explained decision if both parties request by time of prehearing exchange of documents and witness lists; and even then explained award does not have to contain "legal authorities or damage calculations," *id.* § 12904(g)(2)), *available at* [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4192,{https://perma.cc/3NNG-PDUU}](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192,{https://perma.cc/3NNG-PDUU}). The construction rules do not require reasons, although they do require, unless waived, a "concise written financial breakdown" of monetary awards. AAA, CONST. IND. ARB. RULES & MED. PROCS., Rule 47(b) (2015).

up often in judicial decisions about arbitration in the United States, too.<sup>6</sup>

The Brady award is a very reasoned award. It has all the strengths and, to devotees of silent awards, weaknesses, of any explained decision. Even better for analytic and educational purposes, the two courts that reviewed the award reached opposite conclusions about its validity. The trial court penalized and vacated the award based largely on its reaction to Commissioner Goodell's reasoning, while the court of appeals, reversing, used some of the same reasoning to demonstrate the award's adequacy. The 2-1 appellate majority deferred to arbitrator Goodell's judgment. One has to think that the majority found the award easier to protect precisely because it is very reasoned.

Brady and the National Football League Players Association (NFLPA) asked for rehearing (by the panel or *en banc*), but that request was denied and Brady voluntarily dropped further proceedings.<sup>7</sup> Whatever low odds he had of overturning the award did not stem from the fact that it was reasoned. The award would have been much more vulnerable unexplained. To the extent that it turned out to be vulnerable at the first level of appeal for alleged lack of notice and inconsistency with past sanctions, the same issues would have surfaced had the award been totally silent. Moreover, the fact

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<sup>6</sup> For example: "Accordingly, the default rule in an arbitration in which the parties have not requested a specific form of award is that the arbitrator may issue a "standard" award (also referred to as a 'general,' 'regular,' or 'bar' award) that simply announces the result." *Tully Const. Co. v. Canam Steel Corp.*, 2015 WL 906128, 13 (S.D.N.Y. 2015) (citing *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011)), Second Circuit appeal withdrawn (June 15, 2016); *see generally* *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). ("Arbitrators have no obligation to the court to give their reasons for an award"). Although *Tully's* summary statement about reasons reflects an earlier period, not (as the CPR and JAMS default rules indicate) the variety in arbitral practices today, the *Domke* Treatise reflects this same orientation when it concludes that "commercial arbitration awards, unlike labor awards, are rarely accompanied by written opinions." MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATIONS* § 34:7 (Gabriel Wilmer, 3rd ed. 2015). That no longer is the case for general commercial arbitration awards.

<sup>7</sup> Petition for Panel Rehearing or Rehearing En Banc of Appellees NFLPA and Tom Brady at 8–15, *NFL Management Council* [hereinafter, "NFL" in case names] v. NFLPA, 823 F.3d 527 (2d Cir. 2016). Brady has announced that he does not intend to pursue a writ in the United States Supreme Court. Ken Belson, *Deflategate is Over: Tom Brady Ends Appeals Process*, N.Y. TIMES, July 15, 2016, <http://www.nytimes.com/2016/07/16/sports/football/deflategate-tom-brady-ends-appeals-process-nfl.html>, {<https://perma.cc/6EGL-49D2>}. The sequence of challenges to the award is: *NFL v. NFLPA*, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016), *rb'g and rb'g en banc denied* (2016).

that Goodell explained his reasoning helped the Second Circuit panel majority determine that vacatur was erroneous and that the award needed to be reinstated. Reasoning, then, strengthened the arbitration process. The detailed award communicated that, right or wrong, Goodell took his job seriously and did not act thoughtlessly.

## II. THE BRADY AWARD: AN EXEMPLARY REASONED AWARD

The NFL sanctioned Brady on May 11, 2015. It suspended him for four games after finding, based upon the Wells Report (the “Report”) prepared by Paul, Weiss lawyer Theodore Wells and his partners, that Brady had “general awareness” of a “scheme” involving two other Patriots employees to deflate game footballs in the American Football Conference Championship Game between the Patriots and the Indianapolis Colts on January 18, 2015.<sup>8</sup> Brady appealed. Sitting as an arbitrator over his own decision, as is authorized by the Collective Bargaining Agreement (CBA) between the NFL and the players, Commissioner Goodell held a hearing on June 23, 2015 and issued an award a little over a month later on July 28, 2015. He affirmed his initial decision to suspend Brady and denied the appeal.

The Brady case erupted after the Colts, who had fallen behind 20–7 at halftime, raised a concern that the Patriots were using underinflated footballs. NFL rules allow teams to pick their footballs and make each team responsible for ensuring that the game footballs used in their offensive plays are within pressures of 12.5 and 13.5 pounds per square inch (psi). Referees receive balls from both teams shortly before the game, test the pressures, adjust them as needed, and supposedly keep the balls under their control from then on.

Toward the end of the first half, the Colts notified the NFL that it believed the balls the Patriots used in the first half were too soft.<sup>9</sup> The NFL tested the balls at halftime and agreed. Playing with new, more scrutinized footballs in the second half, the Patriots added 27 more points, performing

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<sup>8</sup> See *infra* notes 18–20 and accompanying letter.

<sup>9</sup> Shortly before the half ended, “[t]here was a knock on the door by the General Manager from the Indianapolis Colts. He proceeded in the room . . . , and said, ‘We are playing with a small ball.’ That was my first knowledge of the situation.” Transcript of Appeal Hearing at 229, In the Matter of Thomas Brady (Troy Vincent, NFL’s Executive Vice President of Football Operations) (June 23, 2016), available at <https://nbcprofootballtalk.files.wordpress.com/2015/08/ex-204-appeal-hearing-transcript-t-brady.pdf>, {<https://perma.cc/L7Q5-49JJ>} [hereinafter Appeal Hearing Transcript].

even better than in the first half, while the Colts did not score at all during that period. The Patriots beat the Colts 45-7.<sup>10</sup>

On the surface, ball pressure and results certainly did not seem correlated. The Patriots did better in the second half when they were using more-inflated replacement balls. They also did better in the first quarter within each half, for instance scoring 14 of their 20 points in the first quarter when the balls likely were more inflated (because the balls would keep getting cooler, and therefore losing pressure, the longer they were outdoors during each half).<sup>11</sup> In the second half, the bulk of the Patriots' points again came in

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<sup>10</sup> For the score, see the Week 20 Scores, NFL, <http://www.nfl.com/scores/2014/POST20>, {<https://perma.cc/3FEZ-ALQH>}, [hereinafter "Score"] with the listing for the 2014 season "Conference" games, played in early 2015.

<sup>11</sup> One of the oddities of the NFL's pressure limits, which are mandated as a range between 12.5 psi and 13.5 psi, is that, because balls lose pressure, balls that start out at the minimum 12.5 psi are certain to be below the minimum whenever used on days when the outside temperature is much below the locker room temperature. This loss in pressure, one aspect of the "Ideal Gas Law," is not acknowledged in fixed ranges. Balls should be tested and air added to keep them within the range on cold days, with air sometimes released on hot days. League officials apparently were not aware of the Ideal Gas Law when they set the standard. Appeal Hearing Transcript, *supra* note 9, at 231 (NFL executive Vincent testifying that while he had been familiar with the testing process for balls on game day before the AFC Championship Game, neither he nor anyone in NFL Gameday Operations, as far as he knew, had heard about the Ideal Gas Law).

Two of the environmental factors that might affect use continue as a game progresses: ball use and, as just mentioned, the temperature variation from the indoor locker room where the balls were inflated. (Whether the ball surface is wet, another potentially varying factor, also can vary with time of play on wet days and how balls are stored on the field when not in use). The investigators hired by the NFL retained a California consulting firm called Exponent to study issues like these. It found that ball use did not materially reduce ball pressure: surprisingly, subjecting a ball to 650 pounds of pressure every second for 1,000 cycles did not lower its pressure. PAUL, WEISS, THEODORE V. WELLS, ET AL., INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 Ex. 1 at 32 (May 6, 2015) [hereinafter *Wells Report*], Ex. 1 at 32 (Exponent, The Effect of Various Environmental and Physical Factors on the Measured Internal Pressure of NFL Footballs, Wells), both available at <http://static.nfl.com/static/content/public/photo/2015/05/06/0ap3000000491381.pdf>, {<https://perma.cc/5CW9-VVPX>} (scientific report attached as exhibit to Wells Report). On the other hand, outside temperatures did matter. Ball pressure plummets at first when a ball is exposed to colder outdoor temperatures and keeps falling at a slower rate until the balls are brought back indoors; pressure then rises back toward the starting level. *See id.* at 42-44 & Fig. 21. The effect of temperature makes the time when the balls were tested during halftime important, even though Exponent found that measurement timing could not fully explain the pressure differences between the teams' balls. *Id.* at 43.

the earlier quarter, the third quarter, when the balls were warmer.<sup>12</sup> The Patriots went on the beat the Seattle Seahawks 28–24 in Super Bowl XLIX, with both teams presumably using adequately inflated and much more scrutinized footballs.<sup>13</sup>

When the League tested the Patriots' game balls at halftime, all eleven failed to meet the minimum 12.5 pounds per square inch (psi) pressure requirement under two different test gauges. The League tested only four Colts balls, because it ran out of time. All passed using one test gauge, while three of the four failed using the other gauge.<sup>14</sup> In addition, the pressures in

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<sup>12</sup> See Score, *supra* note 10.

<sup>13</sup> Week 22 Scores, NFL, <http://www.nfl.com/scores/2014/POST22>, {<https://perma.cc/JMM5-86HC>}.

<sup>14</sup> A dispute existed over which testing tool was accurate: three of the four Colts' balls failed using one gauge, but all four passed when measured using the other gauge. *Wells Report*, *supra* note 11, at 7–8. Only four Colts balls were tested, while all eleven Patriot balls were, because the testers were short on time before the second half began. *Id.* at 7.

Exponent and Dr. Daniel Marlow, a physicist at Princeton University and former chairman of Princeton's Physics Department, were the NFL's two experts. *Id.* at 9. They concluded that innocent factors could not account for all of the loss in pressure in the Patriots' game balls. The Patriots' balls lost more pressure even when their lower starting pressures were considered and the "Ideal Gas Law" could not explain the full drop in the Patriots' balls. *Id.* at 9–10, 114. The scientists, however, excluded many other possible innocent factors. *Id.* at 10–11, 117. For the somewhat unexpected and fascinating process of selecting game footballs and preparing them, see *id.* at 38–39 (describing Patriots' ball preparation, including wiping with wet towel to remove protective covering, brushing, treating with dirt, and applying leather conditioner, a process that usually took an hour to break in a single ball, by "principal 'game ball maker" John Jastremski), 41 (describing Brady's selection of footballs by feel after Jastremski has treated a group of balls). Exponent could not replicate the full drop in pressure of the Patriots' game-day footballs. *Id.* at 10–11, 118–19. Overall, it "could identify no set of credible environmental or physical factors that completely accounts for the Patriots halftime measurements or for the additional loss in air pressure by the Patriots game balls, as compared to the loss in air pressure exhibited by the Colts game balls." *Id.* at 12–13. It rejected Coach Belichick's theory that the vigorous rubbing applied to Patriots' footballs in the "gloving process" explained the pressure drop. *Id.* at 119–20. Rubbing *increases* pressure, but the balls return to base pressure fairly quickly. Exponent Report, *supra* note 11, at 33–35. For a contrary view of ball pressures in a pro-Brady amicus brief filed by a large group of physicists and engineers who criticized the number of assumptions that Exponent had to make, see Brief of Professors of Physics and Engineering as *Amicus Curiae*, *NFL v. NFLPA*, Case No. 15-2805 (2d Cir. 2016). Evidence suggested that Brady worried about pressures and always wanted the lowest pressures possible. There was no direct evidence, however, that he asked anyone to fix an illegally low pressure below the minimum 12.5/psi. His desire for low pressures somewhat oddly ended up being cited in the Wells Report as a circum-

the Colts' footballs were not as low on average as the Patriot ball pressures. The Patriots' balls also lost more pressure from their assumed starting pressure than the Colts' footballs and that difference was statistically significant.<sup>15</sup>

The CBA governs most player conduct, although players also sign standardized individual contracts. The CBA's provisions make the Commissioner responsible to discipline players for "conduct detrimental" to the game,<sup>16</sup> as well as for levying other sanctions for certain conduct.

In its investigation of ball pressures, the Wells Report concluded that it was "more probable than not" that two low-level Patriot employees who handled the game balls, officials locker room attendant Jim McNally (a Patriots, not NFL, employee) and Patriots "game ball maker" Jim Jastremski,

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stantial factor supporting his guilt. *Wells Report*, *supra* note 11, at 19. That Brady has a "particular interest" in ball pressure and wanted his footballs to be at the minimum of 12.5 psi was included as a finding in Commissioner Goodell's award, too. Commissioner Goodell, National Football League, Final Decision on Article 46 Appeal of Tom Brady at 2 (July 28, 2015), available at <https://nfl-labor.files.wordpress.com/2015/07/07282015-final-decision-tom-brady-appeal.pdf>, {<https://perma.cc/CSU5-7G8P>} [hereinafter Brady Award]. Yet there is nothing wrong or illegal about a quarterback being interested in football pressure. The NFL even changed its rules to let teams choose their footballs in part due to a campaign that Peyton Manning and Tom Brady led because these two quarterbacks wanted more control over the balls they used. *Wells Report*, *supra* note 11, at 34–35, 129. On appeal from the Brady award, Brady's lawyers would deny that this campaign had anything to do with ball pressure. NFL v. NFLPA, Amended Answer and Counterclaim, Cause No. 1:15-cv-05916, at 32, § 98 (Aug. 4, 2015). That Brady wanted the pressure at the *legal* minimum in isolation seems more likely to support his innocence than his guilt.

Now that the specter of pressure tampering has raised its ugly head, the NFL may decide that the strong team and player incentives to win at all costs make it wise for the League to take back full control of ball preparation. On the other hand, and particularly given the elaborateness of nonpressure ball preparations, it should be sufficient for the League to better enforce officials' undivided control over the balls after the officials first test pressures and that testing and re-pressurization occur more often. The NFL should record pressures as balls are tested, preserve those records, and make sure it uses gauges calibrated to each other so that each side gets equally accurate readings.

Exponent did concede that its data could not "alone" prove "with absolute certainty whether there was or was not tampering, . . ." but it also concluded that "no set of credible environmental or physical factors [ ] completely accounts for the Patriots halftime measurements or for the addition loss in air pressure exhibited by the Patriots game balls, as compared to the loss in air pressure exhibited by the Colts game balls." *Wells Report*, *supra* note 11, at 131.

<sup>15</sup> *Wells Report*, *supra* note 11, at 10, 114.

<sup>16</sup> See *infra* notes 71–72 and accompanying text.



“participated in a deliberate effort to release air from Patriots game balls” after the referee examined the balls and cleared them for use.<sup>17</sup>

The Report identified a third culpable participant: Tom Brady. But it treated Brady as less culpable than McNally or Jastremski, finding him “at least generally aware of the inappropriate activities.”<sup>18</sup> In reaching this conclusion, the Report was careful to note that “there is less direct evidence linking Brady to tampering activities than either McNally or Jastremski.”<sup>19</sup> In fact, the case against Brady is largely circumstantial. In the Wells Report’s carefully-hedged language:

... We nevertheless believe, based on the totality of the evidence, that it is more probable than not that Brady was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.<sup>20</sup>

As for the team, the Report found no evidence that any other Patriot “personnel,” including head coach Bill Belichick, “participated in or had knowledge of the violation of the Playing Rules or the deliberate effort to circumvent the rules described in this Report.”<sup>21</sup> The Report even praised the Patriots for their cooperation while signaling Brady out for not cooperating because he refused to produce texts, emails, and phone records.<sup>22</sup>

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<sup>17</sup> *Wells Report*, *supra* note 11, at 2 (“more probable than not” that McNally and Jastremski “participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee”), 121–22. The Patriots suspended McNally and Jastremski indefinitely, with a very public dispute ensuing over whether the NFL told the team to suspend these two employees (the Patriots’ version) or the team did so spontaneously (the NFL version); in either event, the employees were reinstated in the fall of 2015 with the proviso that neither could work their old jobs. See Ben Volin, *Patriots Ask NFL to End McNally, Jastremski Suspensions*, BOSTON GLOBE (Sept. 9, 2015), <https://www.bostonglobe.com/sports/2015/09/09/patriots-ask-nfl-end-mcnally-jastremski-suspensions/vNG9lt6W3X7rzh3FTGIY0O/story.html>, {<https://perma.cc/NTD6-QWV4>}; Ben Volin, *NFL Allows Patriots to Reinstatement Suspended Employees*, BOSTON GLOBE (Sept. 16, 2015), <https://www.bostonglobe.com/sports/2015/09/16/nfl-reinstates-suspended-patriots-employees/Sy3ZSgdFXcUW5wtemJMFFL/story.html>, {<https://perma.cc/CN2H-MMN6>}.

<sup>18</sup> *Wells Report*, *supra* note 11, at 2, 17 (basing general awareness finding on “totality of the evidence”), 126–29. After 119 pages of analysis, *see id.* at 3–121, the Wells’ Report conclusions can be found on its pages 121–38.

<sup>19</sup> *Id.* at 17; *see also id.* at 126.

<sup>20</sup> *Id.* at 17 (emphasis added).

<sup>21</sup> *Id.* at 3.

<sup>22</sup> The Patriots provided “substantial cooperation throughout the investigation . . . .” *Id.* at 23. On Brady, in contrast, the Report claimed that “Brady’s refusal to provide us with his own emails, text messages and phone records on relevant topics . . . limited the evidence available for our review and analysis.” *Id.* at 130; *see also id.*

On May 11, 2015, five days after release of the Wells Report, NFL Executive Vice President Troy Vincent sent Brady a disciplinary letter “pursuant to the authority of the Commissioner under Article 46” of the CBA. The letter recited that “[t]he Commissioner has authorized me” to inform Brady that he would be suspended for the first four games of the 2015 season.<sup>23</sup> It concluded that

the report established [it did not, but should have, said that “the Commissioner finds, based upon the report”] that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots’ employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge.”<sup>24</sup>

It added that the report “documents your failure to cooperate fully and candidly,” including by refusing to produce electronic information (“emails, texts, etc.”) but also by providing “testimony that the report concludes was not plausible and [that was] contradicted by other evidence.”<sup>25</sup> It then imposed the four-game suspension.<sup>26</sup> On the same day, in spite of the Wells Report’s conclusion that the Patriots as a team did not deliberately underinflate footballs or participate in a scheme to do so, Goodell fined the team \$1,000,000 and made it forfeit a first-round pick in the 2016 draft and a fourth-round pick in the 2017 draft.<sup>27</sup>

The Patriots’ owner, Robert Kraft, decided not to rock the boat and the team did not appeal. Brady, however, did, with the NFLPA representing him. The resulting process featured some unique aspects of labor law. The parties were governed by the CBA, which gave Commissioner Goodell the key power to decide what is conduct detrimental to the game of football, to issue discipline, and to decide appeals of his own disciplinary decisions.<sup>28</sup>

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at 21. The Patriots, however, did not cooperate fully either. They refused to make McNally available for a final interview, a refusal that the Wells Report claimed “violated the club’s obligations to cooperate with the investigation . . . .” *Id.* at 20. The report found no merit in a second question that “arose” during the game about the “authenticity” of one of the Patriots’ kicking balls. *Id.* at 132–39.

<sup>23</sup> Letter from Troy Vincent, Sr., Executive Vice President of Football Operations, National Football League, to Tom Brady, at 1, (May 11, 2015), available at <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Media%20Resources/Ex.%20010.pdf>, {<https://perma.cc/9M83-M3JX>}.

<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2.

<sup>27</sup> See *NFL v. NFLPA*, 125 F. Supp. 3d at 452.

<sup>28</sup> 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 46, Sec. 1(a) (Aug. 4, 2011), available at <https://nflabor.files.wordpress.com/2010/>

The CBA process is in some ways closer to administrative procedures than to an ordinary commercial arbitration. For instance, unlike a judge or an ordinary arbitrator, the League can collect its own evidence, as the NFL did by commissioning the Wells Report and authorizing Paul, Weiss to hire scientific experts to study technical issues surrounding ball pressures. The Commissioner, the League's head and an adverse party to Brady as far as investigation and discipline,<sup>29</sup> decided how much discovery would occur. He decided whether Brady was involved in illegal deflation and, when he found that Brady was, also decided the penalty. Finally, in two labor-based policies that do not apply to ordinary arbitration, parties are assumed to have some right to notice of potential violations and possible sanctions for disciplinary violations, and there is no "precedent" limiting the particular remedy the arbitrators can award. Due to these policies, football players have a labor-based right to some kind of notice of potential violations and punishments, and punishment must be "consistent with" past punishments.<sup>30</sup> These two standards formed the basis for much of Brady's appeal.

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01/collective-bargaining-agreement-2011-2020.pdf, {<https://perma.cc/KVT3-CA45>}. See also *infra* note 72.

<sup>29</sup> The NFL argued that the Commissioner does not really have an interest in a particular outcome in disciplinary proceedings, but only a single overarching interest, one shared by players and managers/owners, in the integrity of the game. Brief for Appellants 5–8, *NFL v. NFLPA*, 820 F.3d 527 (No. 15-2805) [hereinafter *NFL Appellants Brief*] ("The Commissioner has no incentive to favor one team over another; he has no incentive to favor one player over another. His primary responsibility is to protect the game of professional football"). It was in this sense that Wells claimed that his investigation was "independent." He argued that "you should view us like a judge or a court that's hiring an expert. I said we have no dog in this race." Appeal Hearing Transcript, *supra* note 9, at 284. Whether Goodell or Wells were fully independent or not, they were part of a structure the parties inserted into the CBA.

<sup>30</sup> Although notice and consistency have been problems in past NFL disciplinary appeals, see, e.g. *infra* note 68 (discussing the New Orleans Saints bounty problem), these added issues ultimately did not change the outcome that much because the Second Circuit judged the issues under the broadly-deferential umbrella that shields awards, including the Brady award. For the authority the NFLPA claimed to require full notice that ball deflation and withholding, later destroying, a phone could result in a four game suspension, see Brief for Appellees at 12–13, *NFL v. NFLPA*, 820 F.3d 527 (No. 15-2805) [hereinafter *Brady Appellees Brief*]. The NFLPA cited among other sources past NFL positions in support of its argument for notice, and traced the policy to a treatise. *Id.* (citing, *inter alia*, ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 15–71 (7th ed. 2012)). The NFLPA then followed with a section listing times it claimed that Goodell handed out disciplines that had been rejected for lack of notice. *Id.* at 14–16. The trial court, which vacated the award in part because of lack of notice and treated notice as part of the "law of the shop," cited

Such an unusual arrangement can be rational for both sides as long as they believe that the Commissioner's role really is primarily to define and protect their joint interest in the legitimacy of the game. Like an agency officer, the Commissioner should have specialized expertise, in this case in the interests of the game, as well as an institutional concern with the game as a whole. It is in the players' self-interest, too, as it is in the teams', that the game's integrity is protected.

The award exhibited other differences from an ordinary commercial arbitration award, too. Twenty pages long, it relied heavily on the 139-page Wells Report. It also gave significant weight to a fact not known when the investigators did their work and issued their report: Tom Brady decided "on or about" the day he was interviewed by the Paul, Weiss investigators, March 6, 2015, to tell an assistant to destroy his cellphone.<sup>31</sup> With the phone went "nearly 10,000 text messages,"<sup>32</sup> although many of those texts would turn out to be available elsewhere. Per Goodell, Brady was aware of the request for this information at the time he had his phone destroyed.<sup>33</sup>

Still, in most ways Commissioner Goodell was free to act like an ordinary commercial arbitrator. He held a merits hearing on June 23, 2015 that lasted "almost" ten hours. The parties presented over 300 exhibits and generated a transcript more than 450 pages long. A little over a month later, Goodell issued his award. Not surprisingly, given the evidence, he upheld the four-game suspension.

For purposes of considering whether awards should be silent or speaking, the award's salient aspect is that it was thoroughly reasoned. Goodell identified "[t]he Governing Standards," the law, and rooted his authority in CBA Article 46.<sup>34</sup> He made "Factual Determinations and Findings."<sup>35</sup>

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past NFL arbitrations for the notice principle. *NFL v. NFLPA*, 125 F. Supp. 3d at 462–63.

For authorities for the argument on consistency, see *infra* note 122. Just how much notice is required often is hotly contested, as it was in the *Brady* case.

<sup>31</sup> Brady Award, *supra* note 14, at 4.

<sup>32</sup> *Id.* at 1–4, 12.

<sup>33</sup> For the cell phone and its significance, see *id.* at 1–4, 11–13; for the role of the phone's destruction in supporting the sanction, see *id.* at 17–18. The phone's destruction played a material role in persuading the Commissioner to stick to his earlier findings and the four-game suspension. See, e.g., *id.* at 19 ("Especially in light of the new evidence introduced at the hearing – evidence demonstrating that [Brady] arranged for the destruction of potentially relevant evidence that had been specifically requested by the investigators – my findings and conclusions have not changed in a manner that would benefit Mr. Brady").

<sup>34</sup> *Id.* at 2, 5.

<sup>35</sup> *Id.* at 2–5.

Here, he recited the key factual evidence about deflation and what he interpreted as Brady's obstruction. He addressed and rejected the NFLPA's claims that the ball pressure drop was innocent, not a result of "tampering"; its denial that Brady had been part of a "scheme to tamper"; and its denial that Brady refused to cooperate.<sup>36</sup> Goodell then turned, logically enough, to "The Discipline," and discussed in detail why he believed that a four-game suspension was an appropriate sanction, compared to other penalties, for conduct he found unique.<sup>37</sup> He added a short section rejecting the NFLPA's other arguments, which were about notice, improper delegation to Paul, Weiss, and the Wells Report's alleged lack of independence.<sup>38</sup>

Agree or disagree, Brady and the NFLPA knew why Goodell ruled as he did and could hardly have disputed that he was carrying out functions allocated to him under the CBA and that he drew his award from the CBA's essence. Under labor arbitration and ordinary commercial arbitration standards, both of which require a court to grant extreme deference to an award, there was enough reasoning to uphold this decision.<sup>39</sup>

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<sup>36</sup> *Id.* at 6–13.

<sup>37</sup> *Id.* at 14–16. On uniqueness, Goodell wrote that "[n]o prior conduct detrimental proceeding is directly comparable to this one." *Id.* at 14. Not only did the case present a player's "uncoerced participation in a scheme to violate a competitive rule" but, in addition, "[u]nlike any other conduct detrimental proceeding of which I am aware, and certainly unlike any cited by either party, this scheme involved undermining efforts by game officials to ensure compliance with League rules." *Id.* Goodell distinguished this scheme from the Saints bounty scandal, Brett Favre's not being "fully candid" when investigated for violating workplace policies, the Panthers' ball warming incident, a Jets employee's use of unauthorized equipment, and Aaron Rodgers's statement about underinflating balls before officials measured them. *Id.* at 14–15, n.15.

<sup>38</sup> *Id.* at 16–19.

<sup>39</sup> To understand the required extreme deference to awards, consider the *Domke* Treatise's summary of Federal Arbitration Act's standard of review: an award cannot be overturned even for "serious factual or legal errors" or even when a court finds "woefully inadequate or [ ] contrary to basic principles of justice," *DOMKE supra* note 6, at §38:1, §38:14; and see the extraordinarily rarity of appeals that prevail using the manifest disregard test (to the extent that test applies at all these days), *see infra* note 195. For the interchangeability of labor and ordinary commercial standards of review, *see infra* note 121 and accompanying text. The essence test originated as a standard for review in labor arbitration. *See, e.g., Steelworkers*, 363 U.S. at 597 ("He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award"). This labor principle would end up spreading as the standard of review across all commercial arbitration.

Given that Goodell affirmed the remedy imposed back in May, he could have entered a silent award that merely rejected the appeal. But not only was Goodell's award very reasoned, it included key *new* findings. The Wells Report concluded, as already discussed, that Brady "was at least generally aware of the inappropriate activities."<sup>40</sup> But this conclusion had weaknesses as a basis for sanctioning players who were (1) supposed to have prior notice of prohibited conduct and likely sanctions, and (2) supposed to be punished fairly and consistently with other players and past violations. It was hard to analyze notice or comparable punishment when it was not really clear what "generally aware" meant. The term is not a common legal category of intent. Did the Wells Report mean that Brady was not *specifically* aware of "inappropriate activities," just generally aware of something fishy, and, if so, did this mean that Brady did not really know of anything illegal, but merely sensed (or should have sensed?) that something was wrong? That he smelled smoke and should have guessed fire? From the report's long recitation of suspicious evidence surrounding Brady, "generally aware" probably meant more than this. But what? The Wells Report contained quite a few facts from which one could conclude that Tom Brady knew about and was actively involved in a plot to deflate Patriots' footballs, but it seemed to deliberately avoid answering with precision the material question of how much Brady knew.<sup>41</sup>

The same cannot be said of the award. Perhaps because he sensed that the suspension was vulnerable without a stronger basis than the Wells Report, Goodell made more specific and much more incriminating findings. He found Brady an active participant in an illegal (under NFL rules) scheme. In a section titled "What role, if any, did Mr. Brady have in the scheme to tamper with the footballs?," he drew on facts from the Wells Report as well as the hearing testimony and, perhaps above all, the new post-Report information that Brady had the cellphone he used before and after the Colts game destroyed, and on that basis reached the stronger conclusion that "Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, with Mr.

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An arbitrator who fails to rest decisions on the essence of the agreement in any commercial setting exceeds legitimate powers. *See infra* notes 193, 195.

<sup>40</sup> *Wells Report*, *supra* note 11, at 17.

<sup>41</sup> Given the way it was written, the natural way to read the Wells Report is that it found Brady "only" guilty of general awareness of wrongdoing. "General awareness" is flexible language, so it can be stretched a bit. But when cross-examined, Wells himself resisted a limited reading and tried to argue that the report found knowing culpability. He testified to a more aggressive reading of the Report than can be found in the words of the report itself. *See infra* note 49.

Jastremski's support, Mr. McNally tampered with the game balls."<sup>42</sup> This holding found knowledge and participation and even a bribe-like exchange of gifts as a payoff for lowering ball pressures. The Commissioner thus moved from the Wells Report's lukewarm general awareness finding to a very specific determination that Tom Brady intentionally participated in an illegal "scheme" to deflate game footballs (the choice of the word "scheme" is redolent of "scheme to defraud," criminal law, and criminal conspiracies). Naturally, such conduct was "detrimental" to the game.<sup>43</sup>

The award also differed from the Wells Report and the suspension letter in the weight Goodell gave to obstruction after he learned that Brady had his phone destroyed.<sup>44</sup> Goodell repeatedly mentioned this destruction as a strong basis for finding conduct detrimental to the game and for imposing the suspension.<sup>45</sup>

When Brady appealed, the two reviewing courts had diametrically opposite views of the award and the merits of its reasoning. The trial court, going first, used Goodell's reasons to vacate the award. A majority of the court of appeals panel, however, reversed the lower court and used the award's reasoning to help justify confirming the award.

### III. POINT: REASONED AWARDS INCREASE APPEALS AND VACATURS AND SO SHOULD BE AVOIDED

One theory of arbitrating is that arbitrators should avoid giving reasons whenever possible, and should be curt in doing so if it is not possible to avoid them entirely, in order to not provide fodder for appeals. A silent

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<sup>42</sup> Brady Award, *supra* note 14, at 10.

<sup>43</sup> *Id.* at 13. As the trial judge who vacated the award correctly stated, this finding "goes far beyond the 'general awareness' finding in the Wells Report or in Vincent's May 11, 2015 Disciplinary Decision Letter to Brady." *NFL v. NFLPA*, 125 F. Supp. 3d at 461.

<sup>44</sup> See Brady Award, *supra* note 14, at 13 (listing Brady's participation in scheme to tamper with game balls and Brady's obstruction as two numbered bases for finding conduct detrimental to the game). The award concluded that "[a]ll of this indisputably constitutes conduct detrimental," *id.*, but it did not state what Goodell almost certainly also must believe, namely, that *either* conduct is seriously detrimental. The conclusion included one line that might imply otherwise, holding as it did that "[e]specially in light of the new evidence introduced at the hearing," evidence about "the destruction of potentially relevant evidence that had been specifically requested," Goodell's findings and conclusions had not changed. *Id.* at 19.

<sup>45</sup> See Brady Award, *supra* note 14, at 17,18. For analysis of whether obstruction was an independent basis for Goodell's findings, see *infra* notes 147–50 and accompanying text.

award, so this theory goes, is the most defensible award.<sup>46</sup> The fate of the Brady award on the first appeal would seem to support this view.

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<sup>46</sup> In *Wilko v. Swan*, 346 U.S. 427 (1953), the United States Supreme Court held that when arbitrators issue an award without explanation or a record, “the arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact,’ . . . cannot be examined.” In other words, that award is bullet proof. *Wilko*, 346 U.S. at 436. Similarly, in the *Steelworkers* trilogy the Court warned that if courts begin reversing awards for ambiguity, it “may lead arbitrators to play it safe by writing no supporting opinions.” *United Steelworkers*, 363 U.S. at 598. Being silent only plays it safe, of course, if silence actually does immunize awards from review – otherwise not explaining a decision likely would, if anything, increase risk because courts would have to reconstruct the path of decision-making in order to judge it. Both Supreme Court decisions assume that it is factually true that silence shields awards from inquiry upon review. This older view is still prominent in the *Domke* Treatise, too, with its statement that the drawbacks of written opinions in commercial disputes outweigh any benefit that reasoned awards might help provide guidance for other relationships, and that giving reasons jeopardizes the finality of awards: “The general view is that a detailed opinion written by a layman might expose the award to challenge in the courts, jeopardizing both the speed and finality of arbitration.” *DOMKE*, *supra* note 6, at §34:7; *see also id.* at §38:23 (“Thus, the lack of an explanation makes it extremely difficult to determine whether the arbitrator acted with manifest disregard of the law.” (citations omitted)); *id.* at §39:13 (arguing that when arbitrators fail to state reasons, the fact findings “are effectively insulated from judicial review, . . .”). In Stephen Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 *GEO. WASH. L. REV.* 443, 446–47 (1998) [hereinafter Hayford], the author argued that it remained the “conventional wisdom” that providing reasons opens awards to challenges, as well as adding formality, cost, and delay. *See id.* at 446. The AAA’s retention of a presumption against reasoned awards (parties are not entitled to such awards as a matter of right unless they both ask for them quite early in the proceeding, *see supra* note 5), presumably is also a residue of this earlier preference. The old view that reasons expose awards, an expression of a striking lack of confidence in the caliber of arbitrators’ work, is slowly losing adherence as reasoned awards move toward the center of modern arbitration practice. For example, CPR’s Commentary on Individual Rules, which make a reasoned award CPR’s default form of award, states that though “[c]ertain administering organizations and practitioners favor ‘bare’ awards without explanation of any sort,” CPR does not because “[i]n CPR’s view, the risk that a reasoned award will be successfully challenged normally is small and outweighed by the other considerations mentioned” (basically, having to give reasons improves arbitrator reasoning and neutrality). CPR, *RULES FOR NON-ADMIN. ARB. INT’L DISPS*, Commentary on Individual Rules, Rule 15 (2007). Steven Hayford has argued that the extreme narrowness of statutory grounds for vacatur under the Federal Arbitration Act (standards that guide most state statutes, too), means that those grounds “present no disincentive to substantive reasoned commercial arbitration awards.” Hayford, *supra* note 46, at 460. He perceived non-statutory grounds as somewhat changing that picture. For instance, manifest disre-



The award was reviewed by federal judge Richard Berman in the Southern District of New York. The NFL had moved to confirm the award, the NFLPA to vacate. Judge Berman decided to vacate. He used Goodell's reasoning as part of his explanation for overturning the award. To that extent, the result of this first-level appeal supports the oft-heard claim that giving reasons unwisely increases the risk of vacatur.

Judge Berman had three broad, somewhat overlapping reasons for vacating: (1) lack of notice to Brady about the standard for violation and likely penalties, (2) the supposed invalidity of Goodell resting the suspension on a broad "conduct detrimental" finding, and (3) Goodell's decision to deny Brady the right to question NFL Executive Vice-President and General Counsel Jeff Pash and to see the investigative files underlying the Wells Report.

The first concern, lack of notice, had three subparts. The first is that Judge Berman believed Brady did not receive notice of the risk that he could be sanctioned for mere general awareness of improper participation in a deflation scheme and for not cooperating with the investigation.<sup>47</sup> This concern that Brady was not told that "general awareness" of misconduct could lead to sanctions can hardly be said to emerge from the award's reasons because Goodell did *not* ground the suspension on Brady's general awareness. Instead, he found that Brady actively participated in the deflation scheme, a more damning finding on liability.

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gard, that highly contested challenge, tempts courts to excessive intervention, but Hayford argued that this common-law doctrine had arisen to deal with judicial frustration with decisions that lack any reasoning, *id.* at 472, a frustration that presumably would disappear if arbitrators habitually did write reasoned awards. He also argued that if courts applied a proper manifest-disregard standard, they almost never would be able to vacate on this ground. *Id.* at 476. Taking the long view on this and other nonstatutory grounds, as with statutory grounds, Hayford concluded that the "conventional wisdom that substantive reasoned awards are not worth the risk of vacatur," which leads to silent awards, in turn forces courts to adopt excessively interventionist tests to provide some check that silent arbitrators actually had done their jobs. *Id.* at 499. This in turn destabilizes arbitration because, without reasons, the fairness of the award becomes much harder to judge (and easier, for the loser particularly, to disbelieve). *Id.* at 499–500. Not unexpectedly, Hayford's solution was to encourage reasoned awards. *Id.* at 501–07.

This article argues that the core issues upon which a party might challenge an award often will be obviously "in the case" and appear in challenges even when the award is silent, as they would have in the Brady Award. It agrees with Hayford that giving persuasive reasons is often the best deterrent against challenges in the first place and, when the loser does seek vacatur, it is also the best defense against that judicial disruption of arbitrators' decisions.

<sup>47</sup> *NFL v. NFLPA*, 125 F. Supp. 3d at 463–69.

Goodell may have reinforced the liability findings in the award, compared to the Wells Report, out of concern that mere “general awareness” of improper conduct was not a strong enough basis to support a player’s suspension. But even if he approached the appeal with that concern, that does not mean that the evidence did not support his new decision or that it was improper for him to provide whatever justifications he believed the evidence, including the evidence introduced post-report at the arbitration hearing, provided for the suspension. The NFL must have been uneasy with the adequacy of the Report’s limited general-awareness finding to support Brady’s suspension. This was apparent when the League argued on appeal that the Wells Report was *not* limited to findings of Brady’s general awareness,<sup>48</sup> and by the fact that, when cross-examined at the arbitration hearing, Wells refused to agree that the Report’s findings on Brady’s intent were so limited.<sup>49</sup> If Goodell shared this unease, he had good reason to bolster the decision if the evidence at hearing confirmed and even intensified his opinions. In any event, the district court did not explain why the CBA authorized the Commissioner to hold arbitration hearings to decide appeals if Goodell could not use new evidence to reach new conclusions.

Issuing a reasoned award did not create added exposure for the significance of the citation to the Wells Report’s “general awareness” finding in

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<sup>48</sup> The NFL argued that it is a misreading of the Wells Report to conclude that it only finds Brady guilty of general awareness of a deflation scheme. *See NFL Appellants Brief, supra* note 29, at 43, 54 (“In fact, the Wells Report itself went ‘far beyond the “general awareness finding” and found it unlikely that McNally and Jastremski acted “without Brady’s knowledge *and approval*” or engaged in their scheme without Brady’s “awareness *and consent*”’) (emphasis in original). This hardly seems a fair summary of the Wells Report’s very carefully limited finding about how far it would go on Brady’s own culpability, but see the discussion of Wells’ similar oral testimony on this subject in the next footnote.

<sup>49</sup> Wells resisted agreeing that his report’s only finding about the intentionality of Brady’s involvement is its general awareness finding. Appeal Hearing Transcript, *supra* note 9, at 273–76 (Wells claiming that he did “not believe that these two gentlemen [McNally and Jastremski] would have engaged in their deflation activities without – I may use the world knowledge and awareness of Mr. Brady”; agreeing that his report does not say that Brady directed McNally and Jastremski, but insisting, “What I say is that I believe that they would not have done it unless they believed he wanted it done in substance”; citing text message from Jastremski to McNally stating that Brady asked about McNally and that it “must have a lot of stress trying to get them done” [see text accompanying note 91 *infra*] as “direct evidence of [Brady’s] knowledge and involvement”). Wells did admit that the “obstruction” evidence was very important to his overall view of the case. *See* Appeal Hearing Transcript, *supra* note 9, at 304 (Wells testimony), discussed in note 144 *infra*.

the May 11, 2015 Brady suspension letter.<sup>50</sup> Had the award been silent, perhaps just confirming Brady's liability and the suspension without more, the NFLPA still would have appealed, claiming that Brady had received no notice that general awareness could lead to suspension, and Judge Berman presumably would have been just as persuaded that was so and that the lack of notice was relevant and, indeed, fatal.

The second subpart of Judge Berman's three-part notice concern was that Brady was not warned that he might be suspended for four games in a sanction likened to that for serious drug use. It is hard to say whether adding reasons created exposure here. Had Brady received a four-game suspension without any explanation, the NFLPA theoretically might have chosen to attack the award for equating deflation with drug abuse instead of with equipment problems—the less incriminating-sounding category the NFLPA liked to use—but this is unlikely. Realistically, the NFLPA still likely would have concentrated on its arguments about allegedly incommensurate penalties and contrasted penalties for equipment violations, but it also still might have pointed out that the suspension was more like penalties doled out for serious problems like drug use and domestic violence as a criticism. Even if the NFLPA did not raise that argument, an NFL guided by Commissioner Goodell, who apparently thought Brady's violations did pose as much threat to the game as serious drug abuse, probably would have used that analogy to defend the award.<sup>51</sup> Either way, the parties would have been fighting over the same kind of reasoning.

It is true that when Goodell explained why he found violations of the NFL's drug policy the closest violation to gaining an advantage by deflating

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<sup>50</sup> May 11, 2015 letter, *supra* note 23, at 1 (stating that Wells Report found Brady "at least generally aware" of actions of those involved in deflation and that it was unlikely they would have acted without Brady's knowledge).

<sup>51</sup> *NFL v. NFLPA*, 125 F. Supp. 3d at 463–66. The trial court classified the award's base finding in a one-sided and aggressively narrow manner that underlined the court's strong feeling that the award was unfair:

**The Court finds that no player alleged or found to have had a general awareness of the inappropriate ball deflation activities of others or who allegedly schemed with others to let air out of footballs in a championship game and also had not cooperated in an ensuing investigation, reasonably could be on notice that their discipline would (or should) be the same as applied to a player who violated the NFL Policy on Anabolic Steroids and Related Substances.**

*Id.* at 465 (emphasis in original). In a disciplinary scheme endowing the Commissioner with wide latitude to define and sanction misbehavior, a requirement like this would add a judicial "one free pass" amendment to the CBA. That a Second Circuit majority would reverse the aggressively judgmental vacatur was no surprise.

footballs, while distinguishing equipment violations (for instance, a Panthers player warming their team's footballs on a cold day and a Jets employee using unapproved machinery to prepare a kicking ball) as much less significant,<sup>52</sup> he gave Judge Berman material to cite in explaining why he was vacating the award. But the district court almost certainly would have disagreed with Goodell's reasoning that deflation violations were enough to suspend Brady, whether Goodell tried to justify the penalty or not.<sup>53</sup> After all, the court's stated basis for vacatur in this area was very general, and not tied to drug violations:

The Court concludes that, as a matter of law, no NFL policy or precedent notified players that they may be disciplined (much less suspended) for general awareness of misconduct of others."<sup>54</sup>

This issue, and the same conclusion by the court, surely would have been in the case even had the award been silent.

The only award likely to have avoided this vacatur was one that contained no suspension, and perhaps no discipline at all, no matter what Brady's level of intent. Had Goodell said nothing to justify the remedy, the NFLPA still would have argued just as vociferously that no NFL policy nor precedent told players that they risked major discipline, including suspension—indeed anything but minor fines—for a deflation scheme.

Subpart three of the “notice” basis for reversal approached notice from the other end, focusing not on what Brady had *not* been told, but on what he was told. Judge Berman concluded that Brady was on notice that equipment violations fell under the Players Policies on “Other Uniform/Equipment Violations,” which provided that “[f]irst offenses will result in fines.”<sup>55</sup> The court believed this specific policy—not the League's “Competitive Integrity Policy” included in the “Game Operations Manual” and distributed to owners and managers but not to players, which the court incorrectly believed that the NFL had relied on—applied to deflated footballs.<sup>56</sup>

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<sup>52</sup> Brady Award, *supra* note 14, at 14–16. For the two more innocuous equipment examples in text, see *id.* at 15.

<sup>53</sup> *NFL v. NFLPA*, 125 F. Supp. 3d at 463–69.

<sup>54</sup> *Id.* at 467. It is not clear why the court felt this was different from the first point.

<sup>55</sup> *Id.* at 467–68 (emphasis in original Policies for Players [hereinafter Players Policies]).

<sup>56</sup> *Id.* at 468–49. The court's comparison to the Competitive Integrity Policy is perplexing because the award relies upon CBA Article 46, not that policy, as the basis for the suspension. See Brady Award, *supra* note 14, at 2, 5, 14 & n. 13–14, 16, 18. The NFLPA (not the award) did portray the award as relying upon the CIP, but the award so plainly states the opposite, see *infra* notes 57–59 and accompanying

It is hard to claim that the award caused this part of the vacatur, either. After all, the award did not rely upon the Player Policy *or* the Competitive Integrity Policy. Judge Berman misread the award in thinking that it did. True, the pre-suspension investigation was “conducted pursuant to the Policy on Integrity of the Game & Enforcement of Competitive Rules,”<sup>57</sup> but the investigation was just a preliminary data collection exercise. Brady had no reason to think he was immunized from sanction for player-rule violations merely because the investigation of the whole team did not cite the CBA or particular Players Policies. The suspension letter clearly mentioned “conduct detrimental,”<sup>58</sup> the standard used for general player discipline under CBA Article 46, as the basis for the authority to discipline Brady. And the award specifically disclaimed reliance upon the NFL’s “Policy on Integrity of the Game & Enforcement of Competitive Rules” and stated plainly that it rested on Article 46.<sup>59</sup>

Had the award been silent, simply announcing the four-game suspension, the NFLPA would have made the same argument that Brady was only on notice of possible sanctions under the Players Policies, that remedies under the Players Policies are limited to fines for first violations (an argument Judge Berman accepted but the Second Circuit majority rejected), and that the team-oriented Competitive Integrity Policy does not apply to Brady.

The second major reason Judge Berman vacated the award, after his three-part concerns about notice, was its reliance upon Article 46’s “conduct detrimental” standard. Here, knowing Goodell’s reasoning again likely did not “cause” vacatur. Suppose the award simply stated that Brady damaged the game and would be suspended for four games. The NFLPA still would have argued that the Players Policies applied and that they only allowed a fine for a first offense. The League presumably still would have responded that CBA Article 46 authorized the suspension.<sup>60</sup>

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text, that it is surprising the court relied upon the NFLPA’s implausible characterization.

<sup>57</sup> *Wells Report*, *supra* note 11, at 1.

<sup>58</sup> May 11, 2015 letter, *supra* note 23, at 1 (“discipline that, pursuant to his authority under Article 46 of the CBA, . . .”), 2 (“Accordingly, pursuant to the authority of the Commissioner under Article 46 of the Collective Bargaining Agreement and your NFL Player Contract . . .”).

<sup>59</sup> Brady Award, *supra* note 14, at 17 n. 19 (“The Policy was not the source or the basis for the discipline imposed here.”); *see generally id.* at 2, 5.

<sup>60</sup> The League also might have argued that the Players Policies provided ample authority for a multi-game suspension. The fines listed for violation of the “Other Uniform/Equipment Violations” were only “minimums” and the same listing expressly provided that “[o]ther forms of discipline, including higher fines and sus-

Berman's criticism did not concern the authority to discipline, but Goodell's choosing a four-game suspension as the sanction. The judge believed that ball-related infractions by the Panthers and the Jets were comparable to a player involved in a deflation scheme, apparently even when the latter including obstruction as well, and disagreed that deflation-and-obstruction should be treated as seriously as steroid drug use.<sup>61</sup> Yet had the award given no analogies to any suspension at all, presumably the NFL would have injected arguments like the steroid comparison to defend the award, even if the NFLPA did not do so first to argue that the analogy showed why suspension was *not* appropriate. It was far better for the NFL that Goodell took a position on an analogy that made the most sense to him. Had the NFL simply put these same reasons in a brief, they would not have gotten the deference they are owed when it is the arbitrator who offers them.

Finally, the trial court vacated for a third reason. It decided that Goodell's decisions to deny the NFLPA's request to examine NFL Executive Vice-President and General Counsel Jeff Pash—who according to the NFLPA and the court was "Designated Co-Lead Investigator"<sup>62</sup> in the Wells investigation (but who, according to the NFL, played no substantive role)<sup>63</sup>—and to deny its request for the investigative files behind the Wells Report were erroneous, prejudicial, and warranted vacatur.<sup>64</sup> This portion of the vacatur did not turn on what Goodell wrote. Judge Berman's sense of fair discovery and that the denials of information were prejudicial were sufficiently strong that they seem likely to have existed no matter what Goodell wrote.<sup>65</sup>

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pension may also be imposed"; in addition, the provision did not mention or appear to deal with tampering or football preparation. *See NFL v. NFLPA*, 820 F.3d 527, 539 (2d Cir. 2016).

<sup>61</sup> The trial court had problems with what it perceived as a lack of notice that Brady might be sanctioned similarly to a player who violated the NFL's "*sui generis*" anti-drug policy, with what it saw as a lack of comparability between steroid use and the alleged ball tampering, and with comparisons between domestic violence cases and ball tampering. *See NFL v. NFLPA*, 125 F. Supp. 3d at 463–65, 470.

<sup>62</sup> This trial court title for Pash as a co-lead investigator is in a section heading in its decision. *Id.* at 470.

<sup>63</sup> Brady Award, *supra* note 14, at 19 & n.21.

<sup>64</sup> The court stated that Goodell's denying Brady a chance to examine Pash warranted vacatur, *NFL v. NFLPA*, 125 F. Supp. 3d at 472, but its language and reasoning on the investigative files and its finding that Goodell had an "affirmative duty" to make sure Brady could see the files, *id.* at 473, left little doubt that Judge Berman found denial of access to the investigative files sufficient to justify vacatur, too.

<sup>65</sup> For Judge Berman's forceful phrasing on what discovery should allow and the denial of information, see *id.* at 470–73. The trial court mentioned three other legal arguments raised by the NFLPA—Goodell's alleged "evident partiality," attacks on

There is one subtle way in which reasons might have subconsciously prompted vacatur. It always is possible that something in Goodell's language or tone was the last straw that persuaded Judge Berman to vacate an award he otherwise would have confirmed. This is the imponderable in all judicial decisions. Are judges propelled by logic and reason, or from a general feeling about a case? Can the tone of a party's brief, or of an award or court order, wholly independent of its substance, cause a reviewing court to reject a decision it otherwise would accept? (Was a decision based on frontal-lobe logic, or driven by the more emotional reptilian brain, or did it emerge from a struggle between the two?). But given the logical and reasoned tone of the award, it is likely that the reasons made it *harder* for Judge Berman to vacate.

Another intangible is that prior Goodell-initiated NFL discipline for domestic violence and for brutality on the field had been harshly criticized for being too lenient. The NFL had been publicly condemned for being too lenient in domestic violence cases, yet at the same time, in the two most publicized cases, the *Ray Rice* and *Adrian Peterson* cases, the sanctions were reversed as too great, one by an arbitrator Goodell appointed to hear the appeal in the *Rice* case<sup>66</sup> and one by a federal court reviewing the decision of

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his extrapolation from the Wells Report's general awareness finding to Goodell's conclusion that Brady "knew about, approved of, consented to, and provided inducements and rewards" finding, and complaints about his lauding the Wells Report when it came out. But it held that in view of its holdings on notice and discovery, it did not need to reach these claims. *Id.* at 473–74.

<sup>66</sup> The *Ray Rice* appeal was decided by a retired federal judge, the Honorable Barbara Jones. The case concerned Rice's hitting his then-fiancée, Janay Palmer, in a hotel elevator after a night of drinking in Atlantic City. After an interview with Rice and Palmer, by then Rice's wife, Goodell ordered a two-game suspension, "the likely maximum punishment for any conduct categorized as domestic violence." *In the Matter of Ray Rice, Decision by Arbitrator Barbara Jones*, at 5 & n.4 (Nov. 28, 2014), available at <http://espn.go.com/pdf/2014/1128/2014-11-28%20In%20the%20Matter%20of%20Ray%20Rice.pdf>, {<https://perma.cc/JF4K-CUFG>}. The decision was widely criticized as too lenient and Goodell changed NFL policy to impose a presumptive six-game suspension for a first violation for domestic violence. *See id.* at 6. Although Goodell had access to a video of Rice pulling his knocked-out fiancée out of the elevator, NFL security knew before Goodell issued his initial suspension decision that another video showing what happened inside the elevator existed, *id.* at 1, 3–4, but NFL did not secure it. The second video later became public. When Goodell later saw that video, he suspended Rice indefinitely, claiming that the new video showed a "starkly different sequence of events" from the first video and Rice's prior statements, statements on which Goodell had relied. *Id.* at 7. Judge Jones found that Rice had been forthright and the new video did not portray a fundamentally different picture, so she reinstated the original two-game suspension. *See id.* at 9–15, 17.

a former NFL executive Goodell appointed to hear an appeal.<sup>67</sup> A perhaps more neutral review of Goodell's decision-making occurred in the New Orleans Saints "bounty" case, in which his predecessor, former Commissioner Paul Tagliabue, upheld Goodell's finding of conduct detrimental, but nonetheless still lifted entirely the heavy sanctions imposed on the four players because Tagliabue thought that the suspensions were far more severe than prior sanctions in what he thought to be similar cases.<sup>68</sup> Far from improving

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<sup>67</sup> The *Adrian Peterson* case considered another penalty that was imposed by Commissioner Goodell, but then was reduced by the arbitrator, Harold Henderson, whom Goodell appointed to handle the appeal. Peterson was indicted by a Texas grand jury for reckless or negligent injury to a child after he severely punished his son. *NFLPA v. NFL*, 88 F. Supp. 3d 1084, 1087 (D. Minn. 2015), *rev'd and remanded*, 831 F.3d 985 (8th Cir. 2016). Peterson entered a plea that included deferred adjudication. The NFL then gave him only three days' notice of its hearing. The NFLPA questioned various aspects of the hearing and asked for a slightly later date due to scheduling issues, but agreed that Peterson would attend. *Id.* at 1087. In response, the NFL preemptorily stated that it would proceed on the initial date because Peterson had "elected not to participate or attend as requested." *Id.* at 1088. This was a harsh misreading of a reasonable request, given the slight change requested in hearing date. The NFLPA then offered to submit its position in writing, but it did not get a chance to do so. *Id.* The Commissioner applied a new policy that had not been in effect when Peterson punished his son and pursuant to that policy suspended him without pay for "at least the remainder of the 2014 season," fined him, and ordered him into a counseling program that would determine when, and if, he could return to the game. *Id.* Goodell appointed a former NFL executive, who "apparently continues in a part-time capacity" and had been paid \$2.5 million by the NFL since 2009, as appeal arbitrator. *Id.* at 1092 n.2. The arbitrator rejected all NFLPA arguments. Like the *Brady* award, so the Peterson award was vacated by the first level review in federal district court, but then upheld on appeal. At trial, Judge Doty vacated. Among several bases for doing so, he accepted the NFLPA's retroactive-punishment argument that Goodell impermissibly applied a new, longer suspension that had not been authorized by the NFL policy in effect at the time Peterson hit his son. *Id.* at 1088–89. The court pointed out that even the Commissioner had acknowledged as recently as the *Rice* arbitration that he could not apply a new policy retroactively. *Id.* But on appeal, when Peterson already was back playing, the Eighth Circuit held on the main ground for appeal that Goodell acted within the discretionary powers granted to him, that the appeal really was a challenge to the arbitrator's conclusions on the merits, and that it was therefore an impermissible intrusion into the award. See *NFLPA v. NFL*, 831 F.3d at 993–96.

<sup>68</sup> The Tagliabue award is interesting right off the bat because Commissioner Goodell appointed his predecessor as arbitrator. Goodell imposed a series of heavy sanctions on the New Orleans Saints for running a bounty-for-injuring-opposing-players program, in findings that were final and not at issue in the award. He also suspended four players without pay for periods ranging from one game to the entire 2012 season. *In the Matter of the New Orleans Saints Pay-for-Performance "Bounty," Final Decision on Appeal*, at 1–2, 7–8 (Dec. 11, 2012), available at <http://www.nfl>



.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal, {<https://perma.cc/R9VZ-WMPK>} [hereinafter Tagliabue Saints Bounty Award]. Goodell appointed Paul Tagliabue as arbitrator to decide the players' appeals.

Although acknowledging that he was not exercising the same broad powers under which Goodell acted and that he had to defer to Goodell's "reasonable findings" and not substitute his judgment for Goodell's, Tagliabue decided that he could review the discipline for "consistency of treatment, uniformity of standards for parties similarly situated and patent unfairness or selectivity." *Id.* at 3. He took a split-the-baby position: he upheld all of Goodell's findings about conduct detrimental, but he lifted all discipline, even though he found that the behavior could have warranted fines. *See id.* at 2. Interestingly for a decision that is based so much on the precedent of past decisions, Tagliabue disavowed any precedential import for his own decision. *Id.* (An arbitrator's trying to define the precedential effect of his own decision seems somewhat like Glendower trying to "call spirits from the vasty deep." WILLIAM SHAKESPEARE, *THE FIRST PART OF HENRY IV*, part 1, Act 3, sc. 1. As usual, Shakespeare unerringly pointed out the problem with a common human undertaking, the time the presumption to call upon powers one may not have. Shakespeare lodged what likely is his true view of the precariousness of such efforts in Hotspur's response to Glendower: "Why, so can I, or so can any man. But will they come when you do call for them?" *Id.* Although he thought he could replace the suspensions with fines, Tagliabue prudentially decided not to impose fines either for reasons that included "the best interests of all involved in professional football." *Id.*). Tagliabue thus was saying that some penalties had been within the Commissioner's power, but he, Tagliabue, was going to decide that none should be granted. This was hardly a deferential review.

On the individual players and their suspensions, Tagliabue lifted Anthony Hargrove's seven-game suspension as "unprecedented and unwarranted," questioned whether Hargrove really lied to investigators, and expressed sympathy for the pressure players are under from their team. *Id.* at 8–9. Because Scott Fujita offered teammates bonuses for big plays like sacks and interceptions, but did not participate in the team's own bonus program, Tagliabue found his actions "not conduct detrimental" and vacated his suspension. *Id.* at 9–10. He removed the suspension of Will Smith, even though Tagliabue did not believe Smith's self-serving position that he offered payments if an opposing player was "disabled for a play or two" but not for injuries as such, because other Saints defenders who had committed similar acts were not penalized. *Id.* at 11. And, most extreme of all, he removed the suspension of Jonathan Vilma for offering a \$10,000 bounty for any player who could knock Brett Favre out of the Saints-Viking Championship game because Goodell saw no evidence that the offer caused misconduct on the field, or that it warranted a suspension, and because he thought that Saints management bore blame for creating an environment that could lead to such an offer. *See id.* at 12–14.

Lifting all four suspensions was flatly inconsistent with professions Tagliabue made about the fundamental importance of safety, for instance, that "[s]trict enforcement of safety rules and policies serves the interests of all players and teams and is essential to the integrity of and public confidence in the game." *Id.* at 4. It surely did not take the 42 years of experience that Tagliabue mentioned he brought to the case to

the culture of the game, Tagliabue's decision not to sanction players involved in a program that paid them for injuring opposing players made a mockery of the reassuring statements elsewhere in his decision that safe play is essential to the game.<sup>69</sup>

Given the criticism that rained down on some of his recent disciplinary decisions, Goodell should have expected that anything he wrote would receive great attention inside and outside the League. He had to know that the NFLPA would appeal any suspension. He also must have known that disciplinary awards always affect NFL culture. He may have decided that his reasons were needed to improve NFL culture even if they subjected the award to an added risk of vacatur. But, as just shown, the reasons he gave addressed issues that were almost certain to be in the case, and available for appeal, no matter what he put in the award. In addition, his reasons helped provide the kind of notice to future violators that would surmount objections like the NFLPA's and Judge Berman's.

On first blush, the trial court's aggressive rejection of almost every reason Goodell advanced in the award would seem to be Exhibit A for the perils of including reasons. But is it? Not as argued here. Many of the same issues would have surfaced whether Goodell explained his decisions or not, and some of the reasons are the strongest basis *for* the award, even if the trial court incorrectly refused to treat them with proper respect (a judicial mistake quickly fixed by the Second Circuit).

Without reasons, Goodell also would have risked having the NFLPA claim bias and appeal, precisely because he did *not* address key issues. For

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reach that conclusion: it is basic common sense. Nonetheless, Tagliabue lifted all penalties, not even imposing fines, because "this entire case has been contaminated by the coaches and others in the Saints' organization" and because the suspensions were, in his view, unprecedented for similar activities. *Id.* at 2. Yet whatever poor behavior others may have committed, Tagliabue did not question that three of the four sanctioned players had indeed committed the dangerous conduct alleged and, after all, it is what players do that most determines whether football is a game of intentionally-inflicted injury upon opponents or a legitimate sport.

Had the NFL wanted to challenge Tagliabue, it surely exceeded Tagliabue's power for him to reverse the entire suspension of a player the Commissioner had determined obstructed the investigation (Hargrove), a serious problem whether past obstruction had been similarly sanctioned or not; of a player who admitted paying for successful injury to an opposing player but claimed the injuries were minor ones that only left the victim "disabled for a play or two" (Smith); and of a player who offered \$10,000 to anyone who threw such a hit on Favre that he fell out of the game (Wilma). Tagliabue's remedial decisions are entirely *inconsistent* with the danger that inducements to injure opposing players pose to the game and to those players.

<sup>69</sup> See *supra* note 68 (last two paragraphs).

instance, one of the NFLPA's appellate arguments was that Goodell's failure to mention the NFLPA's Players Policies argument indicated bias.<sup>70</sup> Goodell had been too silent, the NFLPA thus claimed, and his silence, it argued, showed bias, too.

That Goodell gave explanations did not significantly expand the issues raised on appeal. Perhaps the main impact of his explanations was that they focused the appeal more narrowly; the reasons did not inject issues that otherwise would not have been raised, but they defined the main terrain of argument. If there was any cost to the NFL from this narrowing of possible justifications for awards, it almost certainly was far outweighed by the gain in persuasiveness and legitimacy from the award's explanations. The reasons made it easier for the Second Circuit majority (which unlike the trial court, applied a properly deferential standard of review) to reverse and reinstate the award.

#### IV. COUNTERPOINT: REASONED AWARDS ARE MORE, NOT LESS, DEFENSIBLE AND SHOULD REDUCE, NOT INCREASE, APPEALS AND VACATURS

Judge Berman's decision might superficially seem to support the prediction of many arbitrators to make awards as narrow and unspooking as possible, but the Second Circuit's reversal and reinstatement of the award suggest that including reasons can strengthen awards and bolster their legitimacy.

It is worth stepping back and considering what happened thus far before turning to the second appeal. Roger Goodell issued an arbitration award. He sat as an arbitrator under the CBA, an NFL-deferential agreement. The CBA empowers Goodell to decide in part "[a]ll disputes involving a fine or suspension imposed upon a player . . . involving action taken against a player by the Commissioner for conduct detrimental to the integ-

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<sup>70</sup> See *Brady Appellees Brief*, *supra* note 30, at 3 ("Remarkably, Goodell's award made NO mention of the Discipline for Game-Related Misconduct Policy, the collectively bargained fine schedule, . . .") (emphasis in original), 6 (award "said not ONE WORD about the governing Player Policy, the bargained-for fine, . . .") (emphasis in original), 30 (making same point), 36 (accusing Goodell of "ignoring" same), 39 (same, including "Yet Goodell never even discussed this unambiguous, collectively bargained remedy"). This rhetorical overkill would boomerang when it turned out that the NFLPA had told the Commissioner that the provision upon which these claims rely did not apply to the ball deflation dispute. See *infra* note 125 and accompanying text.

rity of, or public confidence in, the game of professional football, . . .”<sup>71</sup> If a player disagrees with a fine or suspension for Section 1(a) (conduct detrimental) violations, he can appeal within three days in writing to the Commissioner, who can but is not required to appoint one or more designees to hear the appeal; alternatively, the Commissioner “may serve as hearing officer” himself “at his discretion.”<sup>72</sup> This last clause is the magic phrase through which the CBA authorizes the Commissioner to judge his own decisions.

The form of Goodell’s lengthy reasoned decision is impeccable. He explained the dispute and its procedural history at the outset.<sup>73</sup> He laid out his

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<sup>71</sup> CBA Art. 46, Sec. 1(a), available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>, {<https://perma.cc/KVT3-CA45>}.

<sup>72</sup> *Id.* at Art. 46 Secs. 1(a) and 2(a). The Commissioner has the authority to delegate authority for hearings on appeals of disciplinary matters involving fines or suspensions, *id.* Sec. 2(a), but the CBA also expressly authorizes him to hear them if he chooses, *id.* (“Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion”). The choice to let the Commissioner decide these disputes even though he also sets discipline not only is obviously deliberate, but in other areas – the enforcement of Articles 1, 4, 6–19, 26–28, 31, and 68–70, for instance – the CBA has very different rules that provide for appointment of third-party “System Arbitrator[s].” *Id.* Art. 15. Yet other matters are resolved by an “Impartial Arbitrator.” *Id.* Art. 16. So too are “noninjury” grievances under Article 43 and “injury” grievances under Article 44. Even within Article 46, fines and suspensions for “unnecessary roughness or unsportsmanlike conduct” are decided first by a person the Commissioner appoints after consulting with the NFLPA’s Executive Director, with the Commissioner also required to consult with the NFLPA’s Executive Director before any fine over \$50,000 or suspension are imposed for on-field conduct issues. *Id.* Art. 46, secs. 1(b)–(c). For these “1(b)” violations, the “parties” (the Commissioner and the NFLPA, or the team or Management Council and the NFLPA?) will choose two or more designees who will serve as hearing officers. *Id.* sec. 2(a). Thus the decision to give the Commissioner discretionary power to appoint himself as appeals arbitrator for Article 46, sec. 1(a) violations was a very deliberate decision. In many other parts of the CBA, he does not get to review his own decisions.

One has to have sympathy for any player who falls afoul of minor provisions of the CBA. The text of that agreement alone is 255 pages long and full of quite dense text. With attachments A-O in the Appendix, it is 301 pages long. It is the kind of contract that may warm a lawyer’s heart, but for all that it is a very complex, sometimes tortuous document. The role of the conduct detrimental standard in this long document, however, is not complex, peripheral, or hidden. That broad game-protecting standard is not a small, obscure provisions that might escape an untrained reader on his first time through the contract.

<sup>73</sup> Brady Award, *supra* note 14, at 1–2.

“Factual Determinations and Findings” clearly.<sup>74</sup> He established his source of authority in Article 46.<sup>75</sup> He separated the issues he found needed to be decided and analyzed each.<sup>76</sup> The NFL commissioned a detailed factual investigation by a respected law firm.<sup>77</sup> The award contained a lengthy summary of the evidence Goodell found relevant on each issue.<sup>78</sup> His conclusions were sufficiently compelling that the NFLPA did not even challenge Goodell’s conclusion that Brady was guilty,<sup>79</sup> a point often forgotten by sports-writers criticizing the award. The section on “The Discipline” contained a thoughtful, reasoned discussion of Goodell’s reasons for the suspension.<sup>80</sup> The award even had a separate section on lesser issues titled “Notice and Other Legal Issues Advanced on Appeal.”<sup>81</sup>

This award was defensible for the same reasons as most well-reasoned commercial awards. The arbitrator acted within his area of authority. He applied his reading of the contract. Some labor cases get special deference when the arbitrators are crafting a common law not directly grounded in the labor contract.<sup>82</sup> That kind of penumbral authority was not needed here. The

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<sup>74</sup> *Id.* at 2–5.

<sup>75</sup> *Id.* at 5.

<sup>76</sup> *Id.* at 6–19.

<sup>77</sup> Skeptics and cynics will quibble that the investigators could not be “independent” because the law firm does other work for the NFL. The NFLPA attacked Paul, Weiss for not being independent because it “represented the NFL in a number of important legal matters,” including a recently settled concussion class action. Amended Answer and Counterclaim, *supra* note 14, at 25. The NFL commissioned another Wells Report issued the year before, for instance, on the culture of bullying at the Miami Dolphins after offensive lineman Jonathan Martin abandoned the team because of extremely abusive conduct by a group of players. PAUL, WEISS, THEODORE V. WELLS, JR., ET AL., REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS (Feb. 14, 2014), available at <http://workplacebullying.org/multi/pdf/PaulWeissReport.pdf>, {<https://perma.cc/QCL4-ZK7P>}. But it is striking that the NFLPA did not challenge the substance of the Wells Report’s findings.

<sup>78</sup> See Brady Award, *supra* note 14, at 6–19.

<sup>79</sup> Even the NFLPA at one point noted that it was not challenging Goodell’s factual findings. See *Brady Appellees Brief*, *supra* note 30, at 39.

<sup>80</sup> Brady Award, *supra* note 14, at 14–16.

<sup>81</sup> *Id.* at 16–19.

<sup>82</sup> In such situations, when the labor arbitrator is chosen to step beyond anything in the contract, the Supreme Court has described the arbitrator as rendering services that may be “foreign to the competence of courts” – and, it might as well have said, ordinary commercial arbitrators, too – and as beyond the contract. Here “[t]he labor arbitrator 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 to bring to bear *considerations which are not expressed in the contract* as criteria for judgment.”

CBA gave Goodell very broad contractual authority to determine conduct detrimental and to fashion remedies.

Here was an arbitrator doing his best to weigh the evidence. Any reasonable arbitrator could have reached the same conclusions based on these core facts:

- The Patriots' locker room attendant, Jim McNally, took the balls from the officials' locker room to the field without an accompanying NFL official and said that he had done so on other occasions, but the experienced officiating referee never had seen this happen before, nor had "[n]umerous game officials";<sup>83</sup>
- McNally locked himself with the game balls into a bathroom away from the officials for a minute and forty seconds (something he claimed to have done "many times");<sup>84</sup>
- McNally did not mention this detour at all the first time he was interviewed. In the next interview, he claimed that he entered the bathroom to use its urinal, although it turned out that the bathroom had no urinal. Finally, almost a month later, McNally denied his prior statements;<sup>85</sup>
- Brady exchanged an unprecedented flurry of phone calls and texts with Jim Jastremski, the employee who prepared the balls, after the Colts game, but had no calls or texts with him in the prior six months, and invited Jastremski to meet in the "QB room" the day after the game for the first time in Jastremski's twenty-year employment with the Patriots, all while Jastremski traded contemporaneous messages with McNally;<sup>86</sup>

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United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) [hereinafter *Warrior & Gulf*] (emphasis added); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (citations omitted); see generally *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–50 (1986); *McDonald v. City of West Branch*, 466 U.S. 284, 290–92 (1984); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–97 (1960). The arbitrator is to apply practices of the industry, which may be "unknown, except in hazy form, even to the [contract] negotiators." *Warrior & Gulf*, 363 U.S. at 581.

<sup>83</sup> *Wells Report*, *supra* note 11, at 4, 16, 57–62, 123. For Goodell's reliance upon McNally's suspect removal of the balls without an official accompanying him or approving the removal, see *Brady Award*, *supra* note 14, at 3.

<sup>84</sup> *Wells Report*, *supra* note 11, at 4, 9, 15, 57–62, 124.

<sup>85</sup> *Id.* at 9, 15, 58–59, 124.

<sup>86</sup> *Id.* at 18–19, 101–10, 124–25, 127–28. As the Second Circuit recited, these communications came "after more than six months of not communicating by phone or message . . . ." *NFL v. NFLPA*, 820 F.3d at 534.

- Brady instructed an assistant to destroy Brady's cellphone at roughly the time Brady was interviewed;<sup>87</sup>
- Brady testified that he routinely destroyed his old cellphones, but it turned out that that he had kept his prior phone;<sup>88</sup>
- An expert analysis concluded that the full drop in pressure in all eleven Patriot balls could not be explained by natural causes (such as ball use and lower outside temperatures).<sup>89</sup>

Other facts are even more directly unfavorable to Brady himself. Brady told the investigators that he did not know McNally's name or position,<sup>90</sup> but McNally, a part-time Patriots employee for 32 years, claimed that Brady instructed him to tell the referees that balls should be inflated only to 12.5 psi.<sup>91</sup> Jastremski said that Brady knew McNally and talked to Jastremski about McNally.<sup>92</sup> Most incriminating of all, text messages between McNally and Jastremski, sent after an October 2014 game against the New York Jets when the game balls were severely *overinflated*, stated:

"Bird" [McNally] to Jastremski 10.17.14 at 9:05:45: Tom sucks . . . im going make that next ball a fuckin balloon

Jastremski to Bird 10.17.14 at 9:07:08: **Talked to him last night. He actually brought you up and said you must have a lot of stress trying to get them done . . . .**<sup>93</sup>

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<sup>87</sup> The Brady Award stated that Brady gave his phone to an assistant to destroy "on or about March 6, 2015, the very day that he met with Mr. Wells and his team," Brady Award, *supra* note 14, at 4, and that he gave the phone to his assistant to destroy "on either March 5 or, more likely, March 6, the first date of active use of the second cellphone . . . ," *id.* at 12. Brady's counsel only disclosed the destruction of his cell phone on June 18, 2015, *id.* at 3–4, five days before the hearing.

<sup>88</sup> *Id.* at 12. Brady provided "no explanation" for why he destroyed his phone at essentially the time of his interview. *Id.*

<sup>89</sup> *Wells Report, supra* note 11, at 11–12, 110–19 (discussing Exponent Report).

<sup>90</sup> Appeals Hearing Transcript, *supra* note 9, at 81–82; *see also Wells Report, supra* note 11, at 19, 76, 87 n.52, 129.

<sup>91</sup> *Wells Report, supra* note 11, at 3, 15, 19–20, 129. The Patriots refused to make McNally available for a final requested review, and may not even have told McNally about the request. *Id.* at 20, 28.

<sup>92</sup> *Id.* at 15, 19, 129.

<sup>93</sup> For this text exchange, *see id.* at 77 (emphasis added). On Brady's denial that he knew McNally's name or even his position, *see supra* note 90. McNally told investigators that Brady told him directly about Brady's preferred ball pressures. *See supra* note 91. On the innocent explanation for this email advanced by McNally and Jastremski but rejected by the Wells Report, *see Wells Report, supra* note 11, at 78–79, 83–87.

This evidence is even more incriminating because none of McNally's responsibilities had anything to do with ball pressure.<sup>94</sup> McNally and Jastremski's answers cannot be reconciled with Brady's denial that he knew McNally's responsibilities or even his name (calling McNally just someone whose face he recognized) until the allegations arose. Brady never explained why he destroyed the cell phone at the time he did,<sup>95</sup> or why he had kept his prior phone.<sup>96</sup> It is possible that as a public figure, Brady was only trying to protect his family's privacy, which is what his lawyers argued,<sup>97</sup> but that would not explain why he destroyed his phone when he did.

The sudden appearance of a rash of calls between Brady and Jastremski, after no such calls in the prior six months, also appears inexplicable – or a sign of very poor judgment. Brady argued that these calls probably concerned legitimate non-pressure ball preparation for the Super Bowl.<sup>98</sup> Yet Jastremski had been preparing balls for some time. Unless he and Brady were talking about pressure, what was new that required the unprecedented number of calls and texts? And if the two needed lengthy talks about innocent preparation topics whenever a big game loomed, why didn't similar communications occur *before* the Colts game, a hugely important championship game?

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<sup>94</sup> The inappropriateness of McNally's dealing with pressure is understated in the briefs. It is incriminating if Brady knew McNally was doing *anything* about ball pressure. When pressed on cross-examination about Brady's only having general awareness of a deflation scheme, Wells pointed to McNally's responsibilities having nothing to do with ball pressure. Appeal Hearing Transcript, *supra* note 9, at 276.

<sup>95</sup> *Wells Report*, *supra* note 11, at 19–20. The NFLPA argued that Brady had a "regular and long-standing practice of recycling phones in order to protect his family's and friends' privacy." Amended Answer and Counterclaim, *supra* note 14, at 32. But Brady did not claim a regular schedule for replacing his phones or explain why he destroyed this very relevant phone at roughly the same time as his interview. He implausibly denied any connection between the investigation and his ordering the phone destroyed. Appeal Hearing Transcript, *supra* note 9, at 87–88. He explained that he "always" had old phones destroyed because of concerns for family and friends' privacy. *Id.* at 90–91. He even equivocated oddly on whether the phone actually was gone. *See id.* at 108 ("... whether he destroyed it or not. . . ."); Answering "Not sure," when asked whether the phone destruction policy Brady had portrayed as routine and as the reason his phone was unavailable actually was followed).

<sup>96</sup> Brady Award, *supra* note 14, at 4, 12. The award recited that Brady "offered no explanation of why, on March 5 or 6, 2015, he replaced the cellphone that he had been using since November 6, 2014." *Id.* at 12. Brady did testify that he did not have a regular schedule for replacing phones. *Id.* at 87–88 (Brady testifying that he had phone destroyed "periodically" but then clarifying not as a "very regular practice").

<sup>97</sup> *See supra* note 95.

<sup>98</sup> Appeal Hearing Transcript, *supra* note 9, at 76–77.



Perhaps the best evidence of illegal deflation, although not strong evidence on its own against Brady, were the many communications between Jastremski and McNally about needles and identifying McNally as the “deflator,” sent in very close proximity to the rush of texts and calls between Brady and Jastremski. As the “game ball maker,” Jastremski, not McNally, was supposed to inflate the balls.<sup>99</sup> McNally, in contrast, was the “Officials Locker Room attendant.” His primary job was to assist game officials, including having an air pump and pressure gauge for them (not him) to measure ball pressure.<sup>100</sup> His duties included moving game balls to the field but, according to referee evidence, only under their supervision.<sup>101</sup> Thus there was no legitimate reason for McNally to have anything to do with ball pressure beyond having a needle and pump ready for the officials.<sup>102</sup> The “constant” references between McNally and Jastremski to Brady and ball pressure support the view that McNally was involved in improper activities far outside the scope of his job.<sup>103</sup>

Some of the points stressed in the Wells Report and the award, on the other hand, seem more exculpatory, or at least neutral, than they seem evidence of participation or even general awareness in a deflation scheme. These points include: citing Brady’s unhappiness with overinflated balls in the earlier Jets game;<sup>104</sup> Brady’s successful efforts (along with Peyton Manning) to persuade the NFL that teams should be able to prepare their own game balls;<sup>105</sup> Brady’s known preference for low pressure balls and concern that game balls be inflated only to the 12.5 psi minimum level; McNally’s knowledge of these preferences;<sup>106</sup> and Brady’s giving McNally and Jastrem-

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<sup>99</sup> *Wells Report*, *supra* note 11, at 38–39.

<sup>100</sup> *Id.* at 42.

<sup>101</sup> *See supra* note 83. *See infra* note 102 and accompanying text.

<sup>102</sup> That McNally had no assigned role related to the balls except moving them when an official instructed—and made his many communications about pressures, the “deflator,” and needles—was hugely incriminating. *See, e.g.*, Brady Award, *supra* note 14, at 9 (prefacing finding about incriminating email with “Given that there is no dispute that Mr. McNally’s only assigned responsibility with respect to the game balls was to deliver them . . .”).

<sup>103</sup> *Wells Report*, *supra* note 11, at 17–18, 126; Brady Award, *supra* note 14, at 3–4, 8–10.

<sup>104</sup> *See Wells Report*, *supra* note 11, at 4–5, 39–41, 75–83.

<sup>105</sup> *Id.* at 19, 34–35, 129. Brady testified that the rule change had nothing to do with ball pressures. *See Appeal Hearing Transcript*, *supra* note 9, at 64–66. In contrast, the Wells Report cites at least one public statement by Brady at that time about ball pressure. *See Wells Report*, *supra* note 11, at 34 & n.8.

<sup>106</sup> *See Wells Report*, *supra* note 11, at 4, 15, 19, 34–35, 123, 129. The award relied in part upon evidence of Brady’s desire for a low-pressure ball. Brady Award, *supra* note 14, at 2, 11 n.9. This potentially innocent evidence became at least

ski signed footballs and autographed sneakers near the Colts game.<sup>107</sup> Brady had a right to be unhappy with overinflated or “hard” balls; he had a right and could have many innocent reasons to lobby along with other quarterbacks to let teams control ball preparation; and there was nothing sinister on its own in his wanting balls inflated to the League minimum. Brady’s stated desire was legal and seems at least as exculpatory as incriminatory. That Brady gave a few gifts to McNally and Jastremski could be signs of a payoff for illegal deflation, but also just the kind of gifts a superstar is asked to give to staff.<sup>108</sup> One would expect Goodell’s interpretation of the gifts to be upheld because it was his job to weigh the evidence, but on their own the gifts were not much evidence of culpability.

The McNally and Jastremski emails are harder to analyze because they contain exaggeration, occasional obscenity, and joking. They certainly displayed poor judgment and hyperbole.<sup>109</sup> The Wells Report argued that it was implausible that lower level employees would have underinflated balls on their own, and Brady agreed with that assessment.<sup>110</sup> Were their commu-

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somewhat supportive of the award when Brady less plausibly denied that he was *ever* focused on pressure at all, but instead just on the feel or “grip” of the ball. *See id.* at 11 n.9.

<sup>107</sup> *See Wells Report, supra* note 11, at 13–14, 87–94, 124–25.

<sup>108</sup> For Brady’s argument that he went along whenever anyone asked him for autographs or gifts like a jersey, see Appeal Hearing Transcript, *supra* note 9, at 83–84.

<sup>109</sup> *See, e.g., Wells Report, supra* note 11, at 122–23 (McNally/Jastremski text excerpts: “im going make that next ball a fuckin balloon . . . Make sure you blow up the ball to look like a rugby ball . . . . Fuck tom . . . fuckin watermelons coming. . . . The only thing deflating sun . . is his passing rating.”); *see also id.* at 14 (McNally excerpt that he was “*not going to espn . . . yet*”)(emphasis added). The Patriots’ tried to explain many of the emails as innocuous jokes, an interpretation the Wells investigators found sometimes true but not sufficient to explain the more incriminating emails. *See, e.g., id.* at 16 (finding a number of internal emails between McNally and Jastremski were “attempts at humor,” but even if jokes, they were “based on actual events”); *id.* at 81 (discussing McNally email as joke but also as threat); *id.* at 81–82, 88 (interpreting second email about “needle” as joke but joke about deflating balls); *id.* at 105 (Jastremski claiming incrimination email reference as joke); *id.* at 125–26 (Wells finding Patriot counsel’s interpretation of emails as jokes implausible because even if “attempts at humor,” they were “jokes based on actual [and damning] events”).

<sup>110</sup> *See Wells Report, supra* note 11, at 19, 128; *see also* Appeal Hearing Transcript, *supra* note 9, at 148 (Goodell asking Brady the leading question: “Would the equipment managers do anything without your approval, essentially, that you are aware of with the footballs, just specifically the footballs?”). Brady agreed that they would not, and he indicated that it was unlikely that these employees would act independently because: “. . . I believe they didn’t do anything, because I know that,

nications the only evidence against Brady, however, it would not be a fair basis for penalizing him.

As is often the case in a lawsuit, the result was not foretold. Not all reasonable arbitrators necessarily would agree with the award. This was not a summary judgment record. But any reasonable arbitrator *could* have found Brady culpable. A reasonable arbitrator also *could* have read the evidence, however, as insufficient to establish that Brady was involved in ball deflation. Critics of the award should not forget, though, that Goodell had an advantage they never will have: he got to observe Brady while he was testifying, always an important way to measure credibility.<sup>111</sup>

One sign of the strength of Goodell's substantive conclusions on liability is that the NFLPA did not attack those findings. In part, this surely is because review of awards is so severely limited.<sup>112</sup> But most aggressive ap-

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you know, how particular I am with the way the ball feels. So I don't think anyone would tamper with the ball." *Id.*

<sup>111</sup> Lack of credibility was very much part of the basis for the *Brady* award. Commissioner Goodell tied his finding that Brady failed to cooperate to, in part, "the Wells Report's conclusion that Mr. Brady's denials of involvement in the tampering scheme were not credible," *Brady Award*, *supra* note 14, at 3; *see id.* at 8 and n. 6 (not "fully credit[ing]" Brady's account of his post-game flurry of calls with Jastremski); *see also id.* at 12 (finding "anomaly" in Brady's explanation for his phone destruction policy).

<sup>112</sup> In general, courts will set aside awards "only in very unusual circumstances" or "only in certain narrow circumstances." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995). They can do so only when the arbitrators engage in "egregious departures from the parties' agreed-upon arbitration," "extreme arbitral conduct," or "specific instances of outrageous conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) [hereinafter *Hall Street*]. These two Supreme Court decisions interpret vacatur standards under the Federal Arbitration Act, but most arbitrations are covered by that Act and, in addition, even when review falls under one of the state statutes, those standards generally are as deferential as the FAA's compared to ordinary standards of judicial review in civil matters. As is well demonstrated by the *Brady* case, the most interesting question is whether courts ever, in any circumstances, can vacate an award because they think it is wrong. The law is clear that courts are not to review the merits of a case and cannot overturn a decision just because the arbitrators appear to have made an error, not even if a serious error. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) (citations omitted); *see generally* CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 518 (5th ed. 2014) ("Finally, judicial review of the merits of awards . . . is not contemplated under FAA § 10").

Yet sometimes decisions seem so wrong that they lack any feel of a judicious judgment. The courts of the United States have struggled mightily with how to articulate a test that captures, and vacates, awards whose authors seem to have run away from any sense of justice, even if this feeling derives from the outcome or, in explained awards, the reasoning provided by the arbitrators. The closest, most direct

peals of arbitration awards ignore the deferential standard of review, frequently allege errors of substance in spite challenges to the merits being the least likely way to secure vacatur, and claim that the errors are so egregious that in one way or another they reveal bias, manifest disregard of the con-

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approaches to that conundrum have played out under the “manifest disregard” standard. The Supreme Court seemed to put a stop to that effort in *Hall Street*, when it held that the bases for vacatur in the Federal Arbitration Act are exclusive and cannot be supplemented by a common-law doctrine of manifest disregard. *Hall Street*, 552 U.S. at 583–88. Other than a possible exception for arbitrations reviewed under state statutes or common law, *id.* at 1406, here was seemingly a hard and fast rule. Yet courts have remained split on what *Hall Street* really means on this point. Please correct this- thank you.

as has even the Supreme Court, which put *Hall Street*’s meaning back into play not that many years later in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 672 n. 3 (2010). For discussion, see 2 DOMKE, *supra* note 6, § 38:23 at 38–83 to 38:65. Carbonneau describes the Court’ retreat in *Stolt-Nielsen* as an occasion when it “recognized that its attempt to gain support for expunging manifest disregard had failed.” CARBONNEAU, *supra*, at 337 & n. 213.

Much of the *Hall Street* conundrum is of more academic than practical interest because no one doubts that very few awards will fail under any of the articulations of the manifest disregard test. *All* circuit standards for manifest review display a test designed to fail in almost all circumstances. Courts of appeal correctly have variously called the doctrine (even assuming it still applies) “severely circumscribed” and “among the narrowest [standards of review] known at law.” *Jones v. Dancel*, 792 F.3d 395, 401 (4th Cir. 2015) (citations omitted); and “one of the narrowest standards of judicial review in all of American Jurisprudence,” *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418 (6th Cir. 2008) (citations omitted). Theoretically, the test generally requires showing both objectively and subjectively that arbitrators knew the law but intentionally refused to apply it. Hayford, *supra* note 46, at 468. But because subjective intent is hard to determine, particularly when the arbitrators are not witnesses who can be questioned under oath, manifest disregard tests tend to degenerate into quests for objective factors likely to reveal subject intent. Hayford argues that the manifest disregard doctrine in large part has been prompted by the court’s inability to discern intent when awards give no reasons. *Id.* at 472; see generally *id.* at 475–76 (“The preceding commentary makes one thing abundantly clear: in the absence of substantive reasoned awards, proper application of the ‘manifest disregard of the law’ ground for vacatur is impossible”). Thomas Carbonneau is even more skeptical of the doctrine, treating it as invariably an improper intrusion into the merits. CARBONNEAU, *supra*, at xxx–xxxii, ch. nine, sec. 5, especially *id.* at xxxii (in the “few cases” where manifest disregard causes vacatur, “the litigation ordinarily involves circumstances in which the court disagrees with the arbitrators’ interpretation or application of the law.”) (citation omitted). Manifest disregard was the *least* successful basis for challenging awards, according to one study of a large body of federal and state challenges to awards. See *infra* notes 184–87. For another general survey of manifest disregard cases, see DOMKE, *supra* note 6, at §38:23.

tract or the law, or an arbitrator who exceeded his powers. Aggressive appeals may even take an in-for-a-penny, in-for-a-pound strategy and make all three arguments. The NFLPA, however, made no merits arguments. Its beefs involved notice, which rules govern player behavior, and the scope of discovery. The NFLPA attacked the suspension as unfair, as well as Goodell's right to strengthen his liability finding, but it did not argue that a reasonable arbitrator could not have found Brady generally aware of or even actively involved in a scheme to deflate and obstruct. On appeal to the Second Circuit, the NFLPA even admitted (when discussing Goodell's conduct detrimental findings), "[n]or did anyone challenge Goodell's factual findings."<sup>113</sup>

In any event, faced with this reasoned award, a Second Circuit majority found Judge Berman's decision insufficiently deferential and reversed. That panel and the Second Circuit *en banc* then denied a request for rehearing and Brady thereafter indicated he would not seek certiorari in the United States Supreme Court.<sup>114</sup>

The majority set the stage by noting that it was limited to deciding whether the award "met the minimum [labor law] legal standards," whether Goodell acted within his contractual authority, and whether he ignored the CBA's plain language.<sup>115</sup> This standard of review is indistinguishable from the standard used on appeal of any regular commercial award.<sup>116</sup>

The Second Circuit did mention that labor arbitrators are chosen to apply their judgment as they form a "common law of the shop" and that review of their judgment about shop practices is "'very limited.'"<sup>117</sup> Accordingly, reviewing courts do not get to decide whether the arbitrator made factual errors, misinterpreted the CBA, applied the "most appropriate" penalty, or reached decisions with which the court disagreed.<sup>118</sup> But courts reviewing an ordinary arbitration are not to make these decisions either.

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<sup>113</sup> *Brady Appellees Brief*, *supra* note 30, at 39.

<sup>114</sup> *See supra* note 7.

<sup>115</sup> *NFL v. NFLPA*, 820 F.3d at 532.

<sup>116</sup> *See, e.g., infra* note 121 and accompanying text.

<sup>117</sup> *NFL v. NFLPA*, 820 F.3d at 536–37 (citations omitted). Review is limited to seeing whether the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority." *Id.* at 537 (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 38 (1987)).

<sup>118</sup> *Id.* at 536–37 (citations omitted).

The question was whether the Award “drew its essence” from the CBA,<sup>119</sup> and it obviously did. The CBA granted “especially broad” contractual authority:

In their collective bargaining agreement, the players and the League mutually decided many years ago that the Commissioner should investigate possible rule violations, should impose appropriate sanctions, and may preside at arbitrations challenging his discipline. Although this tripartite regime may appear somewhat unorthodox, it is the regime bargained for and agreed upon by the parties . . . .<sup>120</sup>

In spite of a few tips of the hat to labor-management standards, almost all of the majority’s analysis was substantially the same as a review of an ordinary commercial arbitration award.<sup>121</sup> The Second Circuit thought the NFLPA’s

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<sup>119</sup> *Id.* at 537 (citations omitted).

<sup>120</sup> *Id.* at 532.

<sup>121</sup> The review of labor awards often is identical to that of ordinary commercial awards. For instance, the NFLPA’s brief asking Judge Berman to vacate Goodell’s award stated that, while the case arose under the Labor Management Relations Act, that Act “does not articulate the substantive or procedural rules” for reviewing awards and the court therefore could look to the Federal Arbitration Act, which governs commercial arbitration generally, for guidance. Amended Answer and Counterclaim, *supra* note 14, at 1 n.1. Similarly, in its decision vacating the *Adrian Peterson* award, the Minnesota federal court began by stating that “[f]or purposes of this case, the standard of review under the LMRA and the FAA is the same.” *NFLPA v. NFL*, 88 F. Supp. 3d at 1089, *rev’d and remanded*, 831 F.3d 985 (8th Cir. 2016). The Supreme Court often cites the standard of review in labor cases in decisions about commercial arbitrations and vice versa. In *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013), for instance, a commercial case about whether the arbitrator exceeded his powers in a medical reimbursement dispute, the Supreme Court repeatedly cited labor cases for the strongly deferential standard of review applicable to reviewing awards. This broad deference dominates judicial review of labor and commercial cases. On appeal of the *Brady* award to the Second Circuit, although the League argued that the district court erred in using FAA standards, even it agreed that the standard of review in FAA and LMRA cases are the same. *NFL Appellants Brief*, *supra* note 29, at 32 n.1.

For the high level of deference generally for awards, see *DOMKE*, *supra* note 6, at §38:1 (“Thus, a court will not overturn an arbitration award for serious factual or legal errors.”) (citations omitted).

At times the “law of the shop” principle seems to give labor arbitrators authority to craft rules and remedies that would be unusual in an ordinary commercial case. See *supra* note 82 and accompanying text. But the law of the shop can also restrict arbitral authority, as it did in the *Bounty* case and might have in the *Peterson* case. Ordinarily a commercial arbitrator does not look to, nor is bound by, other arbitration decisions. But as labor arbitrators build a law of a given shop, they have to ensure that rules and penalties are fair and consistent in the context of prior prac-

“chief ground for vacatur” was that the Players Policies’ fine provisions pre-empted broader exposure for conduct detrimental. In the absence of claims of ambiguity, Goodell’s interpretation that he had “broad authority” under Article 46 was “plausibly grounded in the parties’ agreement.”<sup>122</sup> His reading of the contract therefore could not be overturned.<sup>123</sup> Moreover, the majority observed cuttingly that even the Players Policies gave Goodell authority to impose “[o]ther forms of discipline, including suspensions.”<sup>124</sup> So Goodell could have suspended Brady under those policies, too, had they applied.

This was not all. The NFLPA’s Players Policies argument fell apart as soon as the League’s counsel remembered (apparently sometime between preparing the NFL’s initial Appellants Brief and its Reply Brief) that the NFLPA’s lead counsel told the Commissioner in opening argument that the Players Policies on Uniform/Equipment Violations—policies upon which the NFLPA relied vigorously when it appealed the adverse award—did *not* apply to Brady’s conduct.<sup>125</sup> The Second Circuit majority noted that it was

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tices, *NFLPA v. NFL*, 88 F. Supp. 3d at 1090–91; Tagliabue Saints Bounty Award, *supra* note 68, at 3, and that players have fair notice of prohibited conduct and likely remedies, *see supra* note 30. Consistency is not an absolute requirement. In the *Peterson* appeal, the Eighth Circuit found sufficient latitude to uphold the initial fine, and reminded the trial court as it reversed that “the law of the shop included arbitral precedent stating that the Commissioner is not forever bound to historical precedent if prior discipline under the Personal Conduct Policy provided insufficient deterrence.” *NFLPA v. NFL*, 831 F.3d at 995. It is easy to forget that when arbitrators deserve deference, they deserve deference in their determination of whether the punishment fits the crime (crime in a colloquial sense), on remedies as well as liability.

Labor and commercial arbitration were not always on the same page. For background on the sometimes implausible transformations that brought them together, *see* CARBONNEAU, *supra* note 112, at 38–46; for an argument that further unification was needed, *see* Stephen Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781 (2000) (at least some of the further unification that Hayford advocated, that to the law of vacatur, has been accomplished by *Hall Street*, the decision discussed in note 112; for an argument that these two bodies of arbitral law already are closer than they should be, *see* Allison Anderson, *Labor and Commercial Arbitration: The Court’s Misguided Merger*, 54 B.C. L. REV. 1237 (2013).

<sup>122</sup> *NFL v. NFLPA*, 820 F.3d at 539.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Once its counsel remembered NFLPA counsel’s position in opening argument, the NFL’s Reply Brief gloried in the gross inconsistency between the NFLPA’s position at the hearing and its claim on appeal that a section of the Players Policies was the exclusive, specific remedy governing the case. *See* Reply Brief for

sufficient to reject the Players Policies argument due to the fact that the NFLPA told the Commissioner that this policy did not apply. In the end, the majority rejected the argument on the merits as well.<sup>126</sup>

When the Second Circuit majority addressed Goodell's comparison of Brady's suspension to penalties imposed for steroid use and his failure to apply lesser penalties like those meted out for using "stickum," the court found that not only did Goodell have "generous latitude in phrasing his conclusions," but he did not have to fully explain his decisions.<sup>127</sup> The

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Appellant at 3, *NFL v. NFLPA*, 820 F.3d 527 (2d Cir. 2016) (No. 15-2805) [hereinafter *Reply Brief for Appellant*] ("Appellees expressly told the Commissioner during arbitration that the Uniform Policy was inapplicable, . . ."); *id.* at 6 (" . . . both parties took the position [at the Hearing] that the policy was inapplicable"). At the arbitration hearing, the NFLPA's lead counsel, Jeffrey Kessler, had claimed that no prior policy existed to sanction general awareness of anything, Appeal Hearing Transcript, *supra* note 9, at 8–9, and then, after a lengthy argument on why it would be unfair to apply the Competitive Game Policy, a policy for teams, to a player, argued that none of the Players Policies applied either. In relation to the "Other Uniform Equipment Violations," the policy that the NFLPA would argue on appeal after the award was issued limited all punishment in the Brady case to a fine appropriate for first violations, Kessler uttered the fateful words:

And then it says 'Other Uniform Equipment Violations,' okay. *And it doesn't mention balls at all, but I'm trying to be creative.* Was there anything that could possibly apply to this? And what it specifically says under this thing is the first offense will be a fine. That's what it says.

This is Mr. Brady's—*we don't believe it did anything*, but this would be a first offense even if it came under this policy, *which we don't believe this policy applies either, because there is nothing about the balls.* . . .

*Id.* at 26 (emphasis added). Judged by this standard, the NFLPA got very creative very quickly on appeal.

<sup>126</sup> *NFL v. NFLPA*, 820 F.3d at 538–39. The majority found the uniform policy inapplicable to ball tampering and that the policy did not preempt the broad conduct-detrimental powers under the CBA. *Id.* at 539. It also pointed out that the 2014 Schedule of Fines applicable to uniform and equipment violations indicated that serious violations could result in stronger discipline than fines, including suspension. *Id.* The NFLPA thus struck out on virtually all aspects of its preemption argument.

<sup>127</sup> *Id.* at 539–41. In general, courts have given arbitrators very broad power to define the appropriate remedies. *United Steelworkers*, 363 U.S. at 597 (arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations"). This is one of the principles that has made the leap from labor arbitration into commercial arbitration more broadly. As a sign of this migration, Thomas Carbonneau lists the *Steelworkers* trilogy as the first of three "decisional trilogies [that] constitute the pillars of U.S. arbitration doctrine." CARBONNEAU, *supra* note 112, at 40. For some thoughts on



award was not weakened because Goodell “explained why he found the analogy to steroid use persuasive.”<sup>128</sup>

As for Goodell’s step beyond the Wells Report in determining culpability, the Second Circuit majority found that not only did Article 46’s provision for a hearing carry with it the right to draw new findings from the hearing, but that Goodell had discretion to decide whether the behavior he found warranted suspension.<sup>129</sup> “[A]ll parties” understood that the hearing’s purpose was to test the Wells Report’s findings and that the CBA did not preclude Goodell from using new evidence to conclude “that Brady’s conduct was more serious than was initially believed.”<sup>130</sup> As a result, Goodell’s consideration of Brady’s phone destruction was not improper since Brady’s failure to cooperate was put in issue by the initial suspension letter and the NFLPA itself treated obstruction as at stake, too.<sup>131</sup>

The majority also held that Goodell’s refusal to order testimony by Executive Vice President and General Counsel Jeffrey Pash under the Federal Arbitration Act did not violate fundamental fairness.<sup>132</sup> The Pash issue turned out to be a silly issue, as it was based on a press release the League published at the initiation of the investigation that described Pash as co-lead investigator.<sup>133</sup> Wells testified that as soon as he read the press release, he called Pash and confirmed that he, Wells, was to be an “independent” investigator and that the substance of the Wells Report was entirely the work of Wells and a few of his partners, even though Wells conceded that Pash may have submitted oral comments (if so, Wells did not see them) upon a draft report.<sup>134</sup> The Pash-bias complaint did influence Judge Berman, who

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the migration of labor arbitration principles into broader commercial arbitration, see *NFL v. NFLPA*, 820 F.3d at 539.

<sup>128</sup> *Id.* at 540. The majority similarly rejected the NFLPA’s complaint about the Commissioner’s failure to discuss the “stickum” (a “substance that enhances a player’s grip”) policy because it believed, correctly, that this was another merits question left to the Commissioner. *Id.* at 540, 552 (defining stickum). It rejected that argument in part because the CBA did not make the Commissioner “fully explain his reasoning,” *id.* (citing dissent), but this seems unfair: the Commissioner did fully explain his reasoning. This award surely would satisfy any contractual requirement for a reasoned award.

<sup>129</sup> *Id.* at 541–42.

<sup>130</sup> *Id.* at 541.

<sup>131</sup> *Id.* at 542–44. The majority pointedly added that “any reasonable litigant would understand that the destruction of evidence, revealed just days before the start of arbitration proceedings, would be an important issue.” *Id.* at 544.

<sup>132</sup> *Id.* at 545–46.

<sup>133</sup> Appeal Hearing Transcript, *supra* note 9, at 261–62 (Wells testimony).

<sup>134</sup> *Id.* at 261–62; *id.* at 264–65 (Wells explaining report’s statement that it is an “independent” report and stating “So I cut Mr. Pash out, . . .”); *id.* at 266–67

labeled the investigation the “Pash/Wells Report” and cited Goodell’s refusal to order Pash to testify as one reason for vacating the award.<sup>135</sup>

Finally, the majority upheld Goodell’s denial of access to the Paul, Weiss investigative files, pointing out that the CBA’s discovery clause stated only that the parties would exchange copies of exhibits before hearing and that the Commissioner’s decision to bar inquiry into the Paul, Weiss files was an arguable construction of the CBA.<sup>136</sup>

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(explaining that “independent” means the report and its conclusions “were those of myself and the Paul, Weiss team,” that Pash did not attend any interviews, was not involved in deliberations about the interviews, and “played no substantive role in the investigation itself”); *id.* at 268–69 (explaining that he was unaware of whatever comments Pash made and that they “couldn’t have been that big a deal” because Wells did not hear about them).

<sup>135</sup> *NFL v. NFLPA*, 125 F. Supp. 3d at 453 (titling section “Pash/Wells Investigation and Wells Report”); *id.* at 454 (mentioning the “Pash/Wells ‘independent’ investigation”); *id.* at 463 (listing as one reason for vacatur that Goodell denied Brady opportunity to examine “one of two lead investigators, . . . Pash”); *id.* at 470–72 (repeatedly treating Pash and Wells as co-investigators, citing Wells’ admission that Pash may have made some comments on the draft Wells Report but not his explanation that Pash had no investigatory role, that the comments could not have been important, and that the report was entirely Wells team’s independent work). Whatever the trial court was doing, deferring to the arbitrator’s judgment it was not.

<sup>136</sup> *NFL v. NFLPA*, 820 F.3d at 546–47.

Presumably to avoid unnecessary delay, but perhaps also to give guidance to the judge who had been reversed on so many grounds, the majority went on to decide the issues Judge Berman decided he need not decide. They held that Goodell acted within “the broad discretion afforded arbitrators” in rejecting claims that he improperly delegated his authority to the NFL representative, Troy Vincent, who signed the disciplinary letter to Brady. *Id.* at 547–48. When the May 11, 2015 suspension letter began by stating that “[t]he Commissioner has authorized me” and ended by citing the “authority of the Commissioner under Article 46,” May 11, 2015 letter, *supra* note 23, at 1–2, this never was a persuasive argument. And the majority affirmed Goodell’s refusal to recuse himself for “evident partiality,” noting that Article 46 authorized Goodell to arbitrate appeals on his own disciplinary decisions and that “the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen.” *NFL v. NFLPA*, 820 F.3d at 548. The dissenter was the Second Circuit’s Chief Judge Robert Katzmann, who raised two concerns. First, though he agreed that the CBA gave Goodell “exceptional discretion to impose discipline for ‘conduct detrimental,’” Katzmann did not think that Goodell had authority to change the Wells Report’s finding of general awareness or to make the new finding of active participation in the deflation scheme and willful obstruction. *Id.* at 549–52 (Katzmann, Chief J., dissenting). Presumably Judge Katzmann would have reached this conclusion even if Goodell had only written for his conclusion, without explanation, “Tom Brady knowingly participated in a scheme to deflate footballs.” Even with a purely silent award, Judge Katzmann

In sum, the panel majority reviewed the award the way courts are supposed to review commercial awards. It deferred to the arbitrator on the law, the facts, discovery, and the remedy. It did not substitute its views for the arbitrator's. Goodell's reasons display thoroughness and signal that he took his job seriously. His reasoning made the award stronger.

## V. WAS THE BRADY AWARD REASONED ENOUGH?

Labeling an award "reasoned," even well reasoned, says nothing about how detailed the reasons are or whether they are adequate in their substance. As a starting principle, in order for an arbitration award to be reasoned, it must thoroughly describe the reasoning behind the position reached on the issues the arbitrators found to be most serious, and it should at least indicate a reason for disposition of other lesser issues. And, of course, it helps if the reasons are correct, even though "mere" error is not sufficient to overturn an award.

The NFLPA predictably moved for rehearing by the panel or *en banc*, and the motion was denied. A number of amici joined it. Yet the objections they offered tended to caricature the award, instead of providing true assistance as a "friend of the court" should, and so the amici offered no help in assessing the award. Nonetheless, a proper assessment of the award would indicate that although the award's reasoning overall indicates a thoughtful, deliberate decision-making process, it still did not give enough of an explanation as to why it satisfied applicable legal standards in some areas. Thus it had too few reasons, not too many.

A first area that Goodell must have known would be a flashpoint for appeal was his deepening the liability findings after the hearing. His decision to strengthen that foundation for the award was bound to be controversial. It was no surprise that the NFLPA seized upon these expanded findings and argued that Goodell was not authorized to make new liability find-

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could have objected to the inadequacy of general awareness as a basis for sanctions. Better for the arbitrator to give reasons than to remain silent and prevent either court from seeing the true, much stronger basis for the four-game suspension.

Judge Katzmann also vacated because of what he found as Goodell's "strained reliance" on steroid penalties and the Commissioner's failure to discuss fines for using stickum, "a substance that enhances a player's grip" (as, of course, Brady believed low pressure did). This, coupled with Goodell's increased liability finding, persuaded Katzmann that Goodell was just enforcing "his own brand of industrial justice." *Id.* at 552-54. This was a coded way of saying either that Katzmann believed Goodell was biased or that he strayed beyond the powers given him. Yet the appropriate discipline for Brady's conduct was a merits issue given to Goodell.

ings.<sup>137</sup> Yet, somewhat ironically for a detailed 20-page decision in which Goodell clearly did not feel constrained by space, he nonetheless did not explain his power to draw new conclusions from the hearing. The award's failure to pinpoint the basis for this authority weakened it. The League's brief to the Second Circuit contains the kind of explanation the award lacks,<sup>138</sup> and presumably the same lawyers who prepared it helped Goodell draft his award. In a number of areas, not just this one, Goodell would have been better served had he put *all* of his basic reasoning in the award, rather than leaving some important points for the NFL's briefs.

Goodell surely knew that anything creative about changing punishment, as he had done in the *Ray Rice* arbitration,<sup>139</sup> or anything that lets a player challenge the authority for a remedy, as Adrian Peterson did when Goodell relied upon a policy not yet in effect when the misconduct occurred,<sup>140</sup> would be bound to draw extra scrutiny. It should have been obvious that changing the liability findings supporting an award, just like changing a punishment, also would draw intense objections from the NFLPA, yet Goodell did not explain the function of evidence in an NFL appellate arbitration. The award did have a short section on governing standards, but all it said was that a hearing officer must give "appropriate deference" to any findings below; that the "underlying standard of proof for factual findings" was preponderance of the evidence,<sup>141</sup> a standard the "find-

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<sup>137</sup> Petition for Rehearing, *supra* note 7, at 6.

<sup>138</sup> *NFL Appellants Brief*, *supra* note 29, at 55–56; *Reply Brief for Appellant*, *supra* note 125, at 13–14.

<sup>139</sup> See *Ray Rice*, *supra* note 66.

<sup>140</sup> See *NFLPA v. NFL*, 88 F. Supp. 3d at 1087–88.

<sup>141</sup> One sign that too little thought went into describing what exact role the appeal and its evidentiary hearing were to play is that the award does not even say who had the burden of proof on appeal, the player or the League. See *Brady Award*, *supra* note 14, at 5 (defining "underlying standard of proof" as preponderance of the evidence, this the familiar "more probable than not" standard, but not saying who bore that burden or whether Goodell intended the burden to be applied in the appeal, or instead only in his initial decision, or both). Both NFL counsel and Goodell (in the award) hinted that he was requiring himself to be persuaded again that it was more likely than not that a violation occurred and discipline was warranted. See *Appeal Hearing Transcript*, *supra* note 9, at 28–29 (NFL counsel's opening remarks telling Commissioner that "And so following this hearing, it will be up to you to make a judgment under the CBA regarding two issues. The first is whether Mr. Brady conducted conduct detrimental or engaged in conduct detrimental; and the second, assuming you make that conclusion, what is the appropriate discipline?"). That the Commissioner was making determinations anew is consistent with his labeling Part II of the award as "Factual Determinations and Findings," and his summary – after discussing a wide range of evidence – that the new record "fully

ings below more than satisfy” (without clearly identifying the burden on appeal or who bore it); and that any decision was bound by “standards of fairness and consistency of treatment,” standards not described in any detail.<sup>142</sup> Contrast this with the clearly stated justification for the Commissioner’s making new findings, if appropriate, and using whatever Goodell heard in the arbitration hearing in the League’s briefing before the Second Circuit.<sup>143</sup>

It may seem obvious that if one holds a hearing, one can use the results, as the League argued and the Second Circuit majority concluded,<sup>144</sup> but one can see a counterargument that an employee should not be deterred from appealing improper workplace discipline by risking worse findings if he or she appeals. The award should have explained why bolstering the suspension’s justifications was legitimate.

Second, the award was not clear about the connection between its two main liability findings, intent and obstruction, nor did it explain their relationship to the Wells Report’s lesser finding of general awareness and the Report’s somewhat noncommittal comments about Brady’s failure to cooperate.

Each of these omissions was a weakness. If a reviewing court decided that Goodell was not authorized to make new findings, the award did not state whether he still thought that general awareness, its old foundation, was enough to support the four-game suspension. Worse, the award needed to indicate, but it did not, whether the new findings of active participation and

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supports my findings” of active participation and willful obstruction. Brady Award, *supra* note 14, at 13. The award uses “find” and “findings” terminology throughout. Goodell’s later commented that he “entered into the appeal process open to reevaluating my assessment of Mr. Brady’s conduct and the associated discipline . . . ,” *id.* at 19, suggests that he still wanted to determine whether the evidence made a violation more likely than not.

The award does mention that Goodell’s “findings *below* more than satisfy” the preponderance of the evidence standard, “especially taking into account the credibility of the witnesses, including Mr. Brady,” whom Goodell heard at the hearing. *Id.* at 5 (emphasis added). One reading of “below” would be that Goodell may not have rethought his earlier conclusions under a preponderance of the evidence standard. But as already argued, the language in most of the award seemed to indicate that Goodell intended to re-analyze the evidence under the preponderance standard and see if the NFL still prevailed.

<sup>142</sup> Brady Award, *supra* note 14, at 5.

<sup>143</sup> See *NFL v. NFLPA*, 125 F. Supp. 3d at 453–54, 463, 470–72; see note 135.

<sup>144</sup> *NFL v. NFLPA*, 820 F.3d at 541 (concluding, among other things, that “it would be incoherent to both authorize a hearing and at the same time insist that no new findings or conclusions could be based on a record expanded as a consequence of a hearing”).

of “willful[ ]” and “active” obstruction only *jointly* supported the suspension, or whether Goodell meant to hold instead that *either* finding was sufficient to prove conduct so detrimental that it could justify a four-game suspension independently.<sup>145</sup> He should have foreseen that a reviewing court might decide that only one of these grounds was adequately supported, and would need to know if Goodell had determined that the surviving ground could support a four-game suspension. The award did say that “active obstruction,” which Goodell obviously found, can be conduct detrimental in itself,<sup>146</sup> for instance, but it did not state that Goodell would find conduct detrimental based only on the obstruction *on the facts of this case*, or if the obstruction was detrimental enough on its own to support the full suspension.<sup>147</sup> Goodell did not make clear whether he would uphold the sus-

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<sup>145</sup> The award’s two main grounds for suspending Brady were that “[t]he evidence” that “fully supports” Goodell’s findings were both “that (1) Brady participated in a scheme to tamper with the game balls” and that (2) “Mr. Brady willfully obstructed the investigation by, among other things,” having his phone destroyed. Brady Award, *supra* note 14. This evidence was glommed together: “All of this indisputably constitutes conduct detrimental to the integrity of, and public confidence in, the game of professional football.” *Id.* Goodell also claimed that both violations were a single scheme, calling the scheme one to secure an advantage by deflation “coupled with” a failure to cooperate and “destruction of potentially relevant evidence.” *Id.* at 14. The award does state that “[t]here should be no question in anyone’s mind that active obstruction of a conduct detrimental investigation may and will itself be deemed conduct detrimental and subject to discipline” by penalties ranging from fine to suspension or even termination. *Id.* at 17. But that language does not say that Goodell would have suspended Brady for the next four games but for his finding of active participation in the deflation scheme *and* willful obstruction. Just because he *could* have imposed such a penalty, were the only violation willful obstruction, does not mean that he concluded he *should* in this case. In the conclusion, Goodell again seemed to link his two main findings together. He explained that he did not change his findings and conclusions “in a manner that would benefit Mr. Brady,” which the new findings certainly did not, and prefaced this with “Especially in light of the new evidence introduced at the hearing – evidence demonstrating that he arranged for the destruction of potentially relevant evidence that had been specifically requested by the investigators — . . . .” *Id.* at 19.

<sup>146</sup> *Id.* at 17 (“There should be no question in anyone’s mind that active obstruction of a conduct detrimental investigation may and will itself be deemed conduct detrimental and subject to discipline, as the standard Player Contract provides, by a fine in a reasonable amount, by suspension for a period certain or indefinitely, or by termination of the player’s contract”).

<sup>147</sup> The NFLPA would have challenged any award that based a suspension upon obstruction. It tried to make much of the apparently undisputed fact, certainly one not challenged by the NFL, that “no player in NFL history had previously been suspended for obstructing an NFL investigation,” *Brady Appellees Brief, supra* note

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30, at 51, citing Paul Tagliabue's conclusion in the *Bounty* arbitration that the NFL's practice was to fine, not suspend, players for obstruction, *id.* at 51–52 (citation omitted). But it makes no sense to say that the NFL could not exercise its suspension policy in this area until it had suspended someone, making all penalties not yet used essentially inapplicable. This was something of a throw-away argument at the end of the NFLPA's brief because it still was riding its lead horse, the Players Policies uniform argument, the champion stallion that nonetheless stumbled and fell as soon as Appellants let the court know in their Reply brief that Appellees NFLPA had taken the opposite position in opening argument at the hearing. Any player should know from common-sense notice that you are not likely to be able to obstruct an investigation without a serious sanction picked at the Commissioner's discretion from a range of possible sanctions that include suspension and termination, and that the Commissioner has a wide range of discretion to choose the appropriate sanction.

It is unfortunate nonetheless that this case ended up turning so heavily upon obstruction, because the phone withholding and destruction findings always will have a scent of unfairness about them even if they fell within Goodell's discretion. Brady testified that he followed the advice of his counsel in withholding his phone before he was interviewed, that no one told him he could be sanctioned for doing so, and that he would have turned the phone over had anyone told him he was risking sanctions. Appeal Hearing Transcript, *supra* note 9, at 85–86 (Brady testifying his lawyers told him “we don't think it's proper for you to turn your phone over, so you don't need to do that”). This, of course, is an untestable statement once Brady had his phone destroyed. When Wells testified, he claimed that his team's requests for this information were shunted from the League to Brady's agent and that the agent repeatedly met all requests with a polite but blunt refusal (“we respectfully decline”), without reasons. *Id.* at 303–04, 313–14, 331–38. Brady knew that the phone information had been requested – it came up in his interview – but there is no evidence that he knew he could be sanctioned unless he overrode his lawyers' advice and produced his phone.

Wells waxed almost poetic on his regret that the evaluation of Brady included obstruction issues because Brady would not turn over his phone but instead destroyed it, Appeal Hearing Transcript, *supra* note 9, at 312 (“I did not want Mr. Brady in a position where I would have to write that he didn't cooperate . . . — everybody said the guy was a great guy. Everybody said he was a great guy, great reputation. . . . And I wanted to interview him without this cloud hanging over him, okay?”), 338 (“I did not want him in the position of not cooperating. . . . it put us in a hell of a spot because you have a person with this exemplary record and has done all these good things . . .” yet acting in ways suggestive of guilt). Goodell found the phone destruction “very troubling.” Brady Award, *supra* note 14, at 13. Wells interpreted Brady's withholding his phone as very, very telling, too. Appeal Hearing Transcript, *supra* note 9, at 304 (Wells rejected Brady's claim to know nothing about deflation in the Jets game “based on my assessment of his credibility and his refusal or decision not to give me what I requested in terms of responsive documents. . . . so we can all be clear and I will say it to Mr. Brady, I think that was one of the most ill-advised decisions I have ever seen because it hurt how I viewed his credibility.”) (emphasis added), 338 (“yet they are conducting

pension based upon one of his two key findings if a court rejected the other.<sup>148</sup>

Third, the award did not adequately address the NFLPA's serious "no harm, no foul" defense about destruction of the phone. The award treated the destruction of Brady's cellphone as a reason for finding him engaged in a

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themselves in a fashion that suggests they are hiding something and may be guilty and not forthcoming").

Given that both claimed to want what is best for the League, both respected Brady's accomplishments, and both surely watered down their true findings (using terms like "implausible" and "credibility" when they meant that they thought Brady was lying to them), and that this conclusion was furthered by Brady's not producing his phone, it makes one ask, "So, why didn't the League tell Brady he could be sanctioned, even found dishonest, if he didn't produce this phone?" Yes, Brady's lawyers should have notified him that withholding the phone might have severe consequences, but the League surely must bear some blame here, too. And, if Goodell had any doubt about whether Brady's lawyers advised that he not produce the phone as Brady claimed, he should have asked them. Brady waived any privilege on that issue by using their advice as one of two reasons (the other his concern with the privacy of family and friends) that he did not produce the phone.

The result of the failure to warn Brady adequately is that one of football's most storied players, and its Commissioner, have been tarnished, perhaps because of overlawyering. Goodell has become a still more divisive figure, certainly in his dealings with players but given Robert Kraft's clout with other owners and his publicly expressed anger about the sanction, almost certainly with more than one team owner as well.

Of course, one then returns to thinking that after all, Brady did destroy his phone about the time of the interview, yet he never explained why he did so *then*; instead, he let the League continue asking for a phone Brady knew no longer existed (another aspect of the destruction that angered Goodell) and denied knowing pretty much anything about pressure on a record that shows him heavily involved with ball pressure as well as feel. NFL counsel apparently did offer to have Brady's lawyers review the phone and just turn over responsive texts, which should have gone a long way to protecting family and friend privacy, although Brady testified that he did not remember knowing that (if true, another sign that neither side's lawyers did their job of keeping Brady informed of what was going on). Appeal Hearing Transcript, *supra* note 9, at 110. History is filled with regrets. That the NFL made no real effort to warn Brady that withholding information his lawyers told him he could withhold could be found to be obstruction should be one of them.

However, no regret should lead to a too phone-centric view of the *Brady* award. The Wells Report and the Commissioner viewed his "implausible" answers, answers lacking "credibility," as a form of obstruction independent of the phone issue.

<sup>148</sup> The NFLPA argued that the new participation and obstruction findings were inextricably "intertwined," so that if one falls all basis for Brady's suspension disappears with it. *Brady Appellees Brief*, *supra* note 30, at 32-33 ("Thus, the non-cooperation issue is inextricably intertwined [in the award] with the alleged equipment violation").



“deliberate effort” to block the investigators and held that he “willfully obstructed the investigation.”<sup>149</sup> Goodell believed Brady’s destruction of the phone was powerful evidence of “conduct detrimental.”<sup>150</sup> Wells admitted that his view of the evidence was powerfully colored by what he viewed as Brady’s uncooperative refusal to produce the phone.<sup>151</sup> If Brady’s contrary explanation that he would have produced his phone had anyone told him he could be sanctioned for not doing so is true,<sup>152</sup> and if the finding of Brady’s likely participation, lack of credibility, and the suspension itself all turned on this evidence, then the entire “Deflategate” saga is a tragedy borne of sloppiness on both sides.

It is possible that the obstruction evidence tipped the balance against Brady. Yet the NFLPA had a good case that it produced most, perhaps all, relevant evidence in substance, and that what was withheld would not have changed the basic case. It certainly proved that the NFL had access to the phones of the other two supposed conspirators, McNally and Jastremski, and it was able to identify from Brady’s phone company records (after the hearing) all calls and texts Brady made and received on the missing phone, so the Commissioner could confirm that he had access to all phone-based communications between Brady and Jastremski and Jastremski and McNally (no one argued that there were any Brady-McNally texts or calls).<sup>153</sup>

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<sup>149</sup> Brady Award, *supra* note 14, at 13; *see generally id.* at 11–13.

<sup>150</sup> The cellphone destruction played an important role in Goodell’s thinking. *See id.* at 13, 17, 19–20. Goodell purported to have begun the hearing open to reassessing his prior views, but the phone evidence pushed him in the opposite direction: “Especially in light to the new evidence introduced at the hearing—evidence demonstrating that [Brady] arranged for the destruction of potentially relevant evidence that had been specifically requested by the investigators—my findings and conclusions have not changed in a manner that would benefit Mr. Brady.” *Id.* at 19. Goodell found the phone destruction “very troubling.” *Id.* at 13.

<sup>151</sup> Appeal Hearing Transcript, *supra* note 9, at 304.

<sup>152</sup> For Brady’s assertion that he would have produced his phone information if anyone told him he could be sanctioned for not doing so, and the possibility that neither side thought to inform him of the risk he was running, *see supra* note 147.

<sup>153</sup> For the serious arguments that Brady was not fairly on notice that he could be sanctioned for not preserving his phone (a risk that Goodell, in contrast, called obvious, *see* Brady Award, *supra* note 14, at 17), and that the League had full access to all relevant information on Brady’s phone from other sources anyway, *see* Amended Answer and Counterclaim, *supra* note 14, at 31–35; *Brady Appellees Brief*, *supra* note 30, at 25. The NFL would respond that it may have had all of Brady’s communications with McNally and Jastremski because it secured their phones, but that it never got the full “bucket” of Brady’s texts and emails with *anybody else* about inflation and deflation (if such texts and emails exist). *See, e.g.,* Appeal Hearing Transcript, *supra* note 9, at 332–33 (Wells testifying about this request).

This serious objection to the obstruction case deserved a serious response. Goodell may have discretion to sweep the objection away by treating obstruction as based upon what he found to be Brady's lack of credibility as well as phone destruction, but the award would have been stronger had he explained why he rejected the no-harm-no-foul defense—or, had the mixed nature of the evidence on the phone's destruction persuaded Goodell that it was not the clearest of evidence, he could have shown flexibility by reducing the suspension by one or two games, thus still publicly reprimanding Brady but displaying a visible proportionality in the punishment.

The award did not even explain why Goodell rejected Brady's sworn testimony that he refused to produce information on his phone because his lawyers told him that he did not have to, that Brady had no notice he could be punished for refusing to produce his phone, and that Brady would have produced the phone in spite of his privacy concerns had he been warned he could be sanctioned for not doing so.<sup>154</sup> The failure to address these points

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The idea of requiring production of all Brady texts and emails mentioning ball pressure to or from *anyone* and that failure to comply should be so severely punished seems entirely inconsistent with the NFL's justification for refusing to produce NFL Executive Vice President and General Counsel Jeff Pash for examination at the hearing and its refusal to order production of the Wells Report investigative files. On these issues, the NFL treated the arbitration as a narrow, focused, and expedited process that did not require wide witness testimony or document discovery. This imbalance created the appearance that the NFL wanted sauce for its goose but refused it to Brady's gander or, to employ an overused but at least a sports metaphor, that it intended an *unlevel* playing field.

<sup>154</sup> The award stated in passing that, "I do not accept the argument, advanced by NFLPA counsel on Mr. Brady's behalf, that in failing to provide information from his phones to the investigators, Mr. Brady was acting on the advice of counsel." Brady Award, *supra* note 14, at 13 n.12. When that very counsel, lawyers for major well-known law firms, wrote a brief citing Brady's testimony on this point and thus vouching for it, it seems insufficient for Goodell, if he wanted to provide adequate reasons, to say that he did not "accept the argument" without saying why. Did he find Brady not credible and believe the lawyers also were not telling the truth? Or did he think that players are responsible for their lawyers' decisions if the arbitrator disagrees with the lawyers' strategy, imposing upon non-lawyers a duty to know when the lawyer is correct? Given that Brady waived the privilege on the legal advice about producing his phone, Goodell certainly could have asked one or more of his lawyers if that is what they advised him, had Goodell felt he needed verification. When one couples this shortcoming with the award's failure to explain why a four-game suspension might be appropriate for the phone's destruction, and its failure, if Goodell thought that the League did not in fact have all relevant evidence from other phones, to explain *why* Goodell thought that, this aspect of the award's heavy reliance upon obstruction is disappointing and unpersuasive. Goodell did complain that the League would have to track down "numerous individuals" to

raises questions of fairness in an award that, by and large, is balanced and reasonable. Added explanation would have removed or at least reduced those questions.

Significant omissions like this are a reminder that for an award to be *reasonable*, even if it is *reasoned*, the arbitrator has to gauge the seriousness of party arguments and address them at something like the same level of detail, even if not the same relative length, as the parties used.<sup>155</sup> When the

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have information comparable to that on Brady's phone, *id.* at 12 n.11, but he made no effort to suggest who beyond McNally and Jastremski was reasonably likely to have exchanged relevant, material messages with Brady.

<sup>155</sup> Some courts mistakenly equate "reasoned" with saying almost anything and oddly have found adequate reasoning in awards that simply describe arbitrators' conclusions, or, if a bit more long-winded, recite the parties' positions and then the arbitrators' conclusions—even though this would seem the antithesis of reason and "reasoned." *E.g.*, *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 840–41, 844–45 (11th Cir. 2011) (upholding award that merely recited who prevailed, that all other claims and counterclaims were denied, and who deserved fees and costs, as satisfying contract that required "reasoned award," even calling award a "thoughtful, reasoned award."), *see also* *Rain CII Carbon v. Conoco Phillips*, 674 F.3d 469, 471, 474 (5th Cir. 2012) (upholding award that required reasoned award in baseball arbitration, even though award merely set out parties' contentions, awarded damages, and added that "[b]ased upon the testimony, exhibits, arguments, and submissions presented to me in this matter," the existing price formula should remain in effect); *accord*, *Leeward Constr. Co. v. Am. Univ. of Antigua*, 826 F.3d 634, 638–41 (2d Cir. 2016) (in spite of writing a thirty-three page award, arbitrators who described *what* they found in considerable detail did not explain their reasoning *why*; Second Circuit nonetheless upheld the award as reasoned after citing *Cat Charter* and *Rain* with approval and even accepting an unexplained reference to bad faith as a basis for lost-profit damages though bad faith had not been pled or argued to the arbitrators); *see also* *Green v. Ameritech Corp.*, 200 F.3d 967, 970–71, 974–76 (6th Cir. 2000) (accepting award that denied three racial discrimination claims because plaintiff had not "met his burden," without more, as adequate even though agreement required an award that "*explains the arbitrator's decision with respect to each theory advanced by each Plaintiff and the arbitrator's calculation of the types of damages*") (emphasis added). For a contrary and correct finding that an award that largely summarized the parties' positions and then chose a winner is not a "reasoned" award, *see* *Tully Constr. Co. v. Canam Steel Corp.*, 2015 WL 906128, slip op. at \*11–20 (S.D.N.Y. 2015) (arbitrator in steel supply dispute with agreement requirement of reasoned award, after 17 days of hearings and 800 exhibits, nonetheless issued a two-page award listing categories of damages and amount awarded, with Respondent owing over six million dollars, and denied request for true reasoned award with order stating that the initial award "sufficiently incorporates all credible evidence adduced during the hearings, detailed the liability for each item of claim and counterclaim [i.e., who won on each without explanations why], and, as such, is a 'reasoned award.'" Trial court found award not reasoned because it lacked the arbitrator's "rationale or reasoning" and contained "no explanation whatsoever,"

parties devote considerable briefing to an argument, a reasoned award should explain why the loser's arguments are wrong, in addition to why the winner is prevailing. The Brady award assumed that the obstruction was very severe, but it did not explain why in the context of the NFLPA's serious counterarguments.<sup>156</sup>

Similarly, while the award did a good job of explaining that Goodell viewed the deflation-cum-obstruction as similar to serious play-enhancement-through-drug-abuse when considering discipline, it does not provide a framework that persuasively explains *why* he found that equivalence. There certainly are reasons involving the integrity of the game that could justify that conclusion. Goodell left it to the NFL's brief to speak in detail about these reasons.<sup>157</sup> The award was the weaker for this omission from its pages, where Goodell should have included his full reasoning.

Fourth, given the emphasis the NFLPA put on its argument of pre-emption by the Players Policies, the award lacks an explanation of the outer bounds of conduct detrimental and why (and where) that power authorizes the Commissioner to go beyond the multiple specific areas in which Players Policies have been issued.<sup>158</sup> In contrast, again the NFL's brief contains a

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and vacated and remanded for arbitrator to provide properly reasoned award); *see also* Galloway Constr., LLC v. Utilipath, 2014 WL 3965118, at \*1–2 (E.D. Tenn. 2014) (finding award that denied two counterclaims without explanation inadequate when agreement required arbitrators to “[a]nalyze the issues, claims, counterclaims, and defenses of the parties submitted or presented at the hearing” and then issue a “reasoned award”); *see also* Componex Corp. v. Elecs. For Imaging, Inc., 2014 WL 5361946, at \*2 (W.D. Wis. 2014) (granting reconsideration to extent of remanding for clarification of reasoning on counterclaims and on retainage issue).

<sup>156</sup> The exasperation that may have been behind the award's statement that “[t]here should be no question in anyone's mind that active obstruction of a conduct detrimental investigation” can be conduct detrimental in and of itself, *see* Brady Award, *supra* note 14, at 17, seems to have diverted the Commissioner from explaining *why* he thought this obstruction was so dangerous to the integrity of the game. Wise arbitrators will avoid such phrases, because “should be no question in anyone's mind” is likely to preface unreasoned conclusions, not explanations. Reasoned awards must explain why arbitrators reach their conclusions.

<sup>157</sup> *See NFL Appellants Brief*, *supra* note 29, at 4–8 (explaining Commissioner's conduct detrimental powers and their fit into a larger disciplinary framework including in the NFL's Constitution and Bylaws and the standard Player Contract). Reasons do not necessarily require a lot of words. They just require (at times) a lot of thought and an explanation of *why* an arbitrator is reaching the findings and conclusions reached.

<sup>158</sup> The NFLPA argued that the standard form Player Contract also gives the Commissioner exclusive authority to discipline players who commit “conduct detrimental to the League,” *see* Amended Answer and Counterclaim, *supra* note 14, at 13, and that because the CBA does not define conduct detrimental, the League

strong explanation of why the CBA should be read to give the Commissioner a broader, overarching conduct-detrimental power.<sup>159</sup> Goodell should have put that explanation at the heart of his award instead of having the lawyers save it for post-award briefing. He should have explained why conduct detrimental is a broad enough phrase to authorize severe remedies for extreme misbehavior, even when a violation is one that never had come up before.<sup>160</sup> Goodell viewed Brady's misbehavior as sufficiently egregious to be an extreme case. He needed to explain *why* he felt that way.

As an example of what must be the Commissioner's broad authority in extreme cases, consider the Richie Incognito bullying fiasco (a fiasco for the Miami Dolphins, bad news and bad press for the League and the game). Had the Dolphins not already suspended Incognito, no reasonable person would have said that Goodell could not have suspended Incognito indefinitely or even banned him from the game for life for his prolonged bullying of Jonathan Martin, an unnamed Player A, and a Japanese trainer, all as conduct severely detrimental to the game of football.<sup>161</sup> Such strong penalties were not required, but surely they were within the Commissioner's power under the CBA. In the *Brady* case, Goodell should have shown why it was that he felt that Brady's conduct should be seen as similarly egregious. He was dealing with a new violation and what he viewed as unusually direct obstruction. He should have put more flesh on the structure that he employed to suspend Brady for four games in this setting. Had Goodell presented a rational framework for distinguishing deflation-cum-obstruction from past equipment violations on the one hand and domestic violence on the other, the award would have been far more persuasive. It would build a foundation for a wider range of sanctions in future cases of new and unprecedented violations.

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issued Players Policies for areas like Substances of Abuse Policy, Steroids Policy, and equipment-related violations under the "Game Related Player Conduct Rules," *see id.* at 14. It claimed that the current contract contained fourteen separate specific policies. *See id.* at 14. But the argument about the specific Players Policies, detailed and varied though they may be, fully drains the conduct detrimental standard of its broader natural meaning.

<sup>159</sup> *See NFL Appellants Brief, supra* note 29, at 41–45; *see also supra* note 154 (citing the broad powers in related documents).

<sup>160</sup> And it is not only the Article 46 conduct detrimental authority that gives the Commissioner this much leeway. As the Second Circuit noted, the schedule of fines upon which the NFLPA relied included power to impose greater sanctions, including suspensions. *See NFL v. NFLPA*, 820 F.3d at 539.

<sup>161</sup> *See supra* note 77.

Fifth, Goodell missed an opportunity to explain the important role that credibility played in his conclusions.<sup>162</sup> Findings based upon credibility tend to be upheld because a reviewing court cannot fairly gauge the credibility of a witness not before it. Yet Goodell never explained the weight he thought lack of credibility should have. Indeed, the term “credibility” is a euphemism; Goodell was really finding that Brady lied, even though neither he nor the Wells Report used that word.<sup>163</sup>

A sixth and final omission, at least an omission of emphasis, is perhaps the most surprising. If one reads the briefs and the award first, and only then reads Brady’s testimony, one will be startled by how inconsistent Brady’s testimony is with even seemingly uncontroversial portions of McNally and Jastremski’s testimony. The Wells Report and the award determined that Brady told these employees about his desire for a minimum legal pressure of 12.5 psi, that he was very concerned with ball pressure, and that he had told McNally to tell the officials of Brady’s pressure preference.<sup>164</sup> Yet Brady not only denied knowing McNally by name, but also that he ever was concerned with ball pressure.<sup>165</sup>

The full flavor of Brady’s denials of caring much at all about ball pressure does not really come through in the award or the briefing. Brady claimed that in his long career he *never* paid attention to ball pressures until he was given severely overinflated balls in a game against the Jets in Octo-

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<sup>162</sup> Goodell lists the evidence upon which he rested his finding that Brady was not credible in the *Brady Award*. See *Brady Award*, *supra* note 14, at 8–10.

<sup>163</sup> Goodell may have deliberately avoided describing in greater detail or with stronger words what he found lacking in Brady’s credibility. Preserving both Goodell’s own legitimacy but also Tom Brady’s is very important for the game of football. Goodell is a public figure and so is Brady. If Goodell wrote a stronger argument, saying flat out that he thought Brady lied or, even worse, then going into why in page after page, he was sure to generate a series of newspaper headlines stating “Commissioner Brands Top Quarterback A Liar” and magnifying the attention given the finding, making it harder for the game to move beyond this very public investigation and penalty. Every good trial lawyer and every good witness knows that any use of plain but emotionally charged words has to be done very carefully, that a jury or factfinder will punish a plain speaker if the evidence does not back up the language, and that searing accusations (even if true) can cause long-term damage to the parties, often impacting far outside the particular case. For the argument that Goodell and Wells both avoided using language as strong as the substance of their findings in their discussions of Brady’s culpability, see discussion toward the end of the note, *supra* note 145.

<sup>164</sup> See *Wells Report*, *supra* note 11, at 21 and text accompanying note 60.

<sup>165</sup> See *id.*

ber 2014, denied that he had a preference for pressure at 12.5 psi,<sup>166</sup> and even stated that “. . . in the history of my career, I never thought about the inflation level of a ball.”<sup>167</sup> This testimony was flatly inconsistent with testimony by both McNally and Jastremski that Brady instructed them that the balls had to be at the minimum 12.5 psi and that he talked to them directly about ball pressure.<sup>168</sup> In and of itself, the discrepancy between this testimony and that of McNally and Jastremski would have been great enough for any arbitrator to find Brady not credible. That the award does not emphasize this contradiction in testimony may be at least in part because Goodell totally discounted all testimony by McNally and Jastremski as unreliable.<sup>169</sup>

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<sup>166</sup> See Appeal Hearing Transcript, *supra* note 9, at 55–59, 73, 113–20, especially *id.* at 116 (Brady stating, “Like I said, *I never have thought about the ball, the air pressure in a football* [presumably meaning, except at the October 2014 Jets game when the balls were grossly overinflated]. . . . I still think it’s inconsequential to what the actual feel of a grip of a football would be.”) (emphasis added); *id.* at 118 (“No, we picked 12.5 because that was – I don’t know why we picked 12.5.”); *id.* at 119 (“I never thought about the inflation level, Lorin. *I never in the history of my career, I never thought about the inflation level of a ball.*”) (emphasis added); *id.* at 120 (“I don’t even squeeze the ball and I think that’s why it’s impossible for me to probably tell the difference between what 12.5 and 12.7 or 12.9 and 14 because I’m just gripping it like a golf club. . . . You don’t squeeze the golf club. You handle it very gently”). If Brady is in fact a noble savage playing football entirely by feel without any idea of ball pressures, then the suspension and the *Brady* award are both tragedies. But the vast gulf between his testimony and that of McNally and Jastremski, on issues where one would expect testimony to be entirely uncontroversial but consistent, surely was itself enough for the Commissioner to find Brady not credible.

<sup>167</sup> See Appeal Hearing Transcript, *supra* note 9, at 119.

<sup>168</sup> See *supra* notes 91–93 and accompanying text. Neither McNally nor Jastremski testified at the hearing, and, because Goodell did not order interview notes produced, we do not have a near verbatim record of their interview responses, but the Wells Report cites enough of what they said to give a clear indication of how far their testimony strays from Brady’s.

<sup>169</sup> See *Brady Award*, *supra* note 14, at 10 n.7 (claiming Goodell did not make any inference from Brady’s failure to call McNally or Jastremski because, in any event, any “exculpatory” evidence they offered would not be credible). Brady might have tried to use McNally and Jastremski’s lack of credibility in Goodell’s eyes to bolster his own position, testifying that if they said he talked to them about pressure they were lying, but he did not. Instead he testified that he thought Jastremski was honest, see Appeal Hearing Transcript, *supra* note 9, at 75, 97, and that he did not personally know McNally or his name even though he might have recognized him as a familiar face in the locker room, see *id.* at 81–83. Moreover, each side had limited time in a one-day hearing, so Brady’s side would have had to jettison part of the other examination that it clearly thought was important.

All in all, Goodell's beliefs about Brady's active participation and obstruction would not have created a new vulnerability had Goodell issued a silent award and never mentioned them. But had he not listed these new reasons, they could not have strengthened the award and would not have received the deference they ultimately received (from the Second Circuit, not from the trial court) as part of the arbitrator's decision. The award would have been where it was before the hearing, relying upon a report that only found Brady guilty of general awareness of a deflation scheme and some perhaps-implausible testimony, even though the arbitrator believed that the record showed much more.

As long as Goodell believed that the arbitration hearing evidence showed even greater culpability on Brady's part, he could write the most defensible award only if he fully explained his authority to make new liability findings after hearing the evidence (this he unfortunately failed to do) and if he fully engaged with the almost-certain objections the NFLPA would raise to the evidence on which he relied and to the new conclusions. In other words, it is not enough to give conclusory reasons or reasons only on some key points to get the full advantages of a reasoned award, although it helps. Smart arbitrators will give detailed reasons that truly explain, not just announce, a decision, and will deal with the issues the loser has raised. Providing complete reasons, rather than just summary reasons, adds muscle to an award.

## VI. THE REST OF THE APPEAL.

It is no surprise that the most recent event in the Deflategate saga is the denial of rehearing by the Second Circuit panel and *en banc*, followed by Brady's abandoning further resistance.<sup>170</sup> Given the deference accorded arbitrators, the NFLPA's arguments for rehearing were largely implausible.

For most of the life of the appeal, the centerpiece of the NFLPA's many complaints was the argument that the Players Policies preemptively addressed ball tampering; that those policies notified players that only a fine, and a quite low fine at that, would be levied for a first-time violation involv-

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The long paragraph in which Goodell announced that he would not draw an adverse inference from Brady's failure to call McNally and Jastremski, a paragraph that spent much of its length detailing the NFL's argument *for* drawing an adverse inference, makes one wonder if Goodell doth protest too much. The award would have been more impartial had he simply noted that Brady had a right to choose the best witnesses in a time-limited presentation and that in fairness he, Goodell, would draw no inference from either side's strategic choices.

<sup>170</sup> See Belson, *supra* note 7.



ing uniforms or “equipment”; and that the suspension therefore had to be thrown out.<sup>171</sup> That argument did itself in when it turned out that NFLPA counsel had taken the opposite position in its opening argument at the hearing.<sup>172</sup>

The other main complaint about the award, that suspending Brady for four games allegedly was vastly more punitive than past discipline for similar conduct,<sup>173</sup> ignored the severity of the combined findings of “uncoerced” participation to break the rules and of willful obstruction. The NFLPA of course disagreed with Goodell’s judgment about severity, but surely that is a matter the CBA appoints the Commissioner to judge.

The complaint about not getting to cross-examine Jeff Pash looked doomed as soon as, if not before, Wells explained under oath that Pash had no substantive role in the investigation or in the Wells Report.<sup>174</sup> The Commissioner had a right to reasonably limit discovery and the hearing to core issues and to avoid the rabbit trail of further analysis, as the argument for needing to get Pash under oath would require even Wells to not be telling the truth. And complaints about the lack of the investigative files for the many interviews behind the 139-page Wells Report look like another effort to make the case turn on discovery. Given that the NFLPA did not challenge the Commissioner’s factual determinations at all and made no effort to call either McNally or Jastremski at the arbitration hearing, that surely was much ado about nothing.

The Second Circuit majority summarily dismissed two other challenges the trial court had left unaddressed: the weak argument about partiality that was based heavily upon Troy Vincent instead of Roger Goodell being the signatory of the May 11, 2015 sanction letter and the claim that Goodell

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<sup>171</sup> Judge Berman agreed with the NFLPA’s Players Policies argument. *See NFL v. NFLPA*, 125 F.3d at 467–69.

<sup>172</sup> For the denouement of this once healthier argument, *see NFL v. NFLPA*, 820 F.3d at 538–39.

<sup>173</sup> A belief that the four-game suspension was disproportionate presumably lay behind Judge Berman’s finding that “no NFL policy or precedent notified players” that they could be disciplined based upon “general awareness of the misconduct of others.” *NFL v. NFLPA*, 125 F.3d at 466. Of course, this was hardly a fair characterization of what Goodell did in the suspension letter. Even when they focused on general awareness, both the Wells Report and the suspension letter clearly rested on the view that it was more likely than not that Brady had done several things wrong, and that fault did not solely lie with McNally and Jastremski.

<sup>174</sup> *See NFLPA v. NFL*, 88 F. Supp. 3d at 453.

lacked authority to arbitrate the appeal hearing because he was judging his own conduct.<sup>175</sup>

## VII. REASONED AWARDS BUILD ARBITRATION'S LEGITIMACY

One of the more thoughtful justifications for reasoned awards was penned some years ago by major rules-and-arbitrator provider CPR. It claimed that reasoned awards, rather than silent awards, are better for the parties and for arbitration for the following reasons:

. . . Most parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision. CPR, moreover, considers it good discipline for arbitrators to require them to spell out their reasoning. Sometimes this process gives rise to second thoughts as to the soundness of the result. . . . [In addition, any] tendency on the part of arbitrators to reach compromise awards should be restrained by the requirement of a reasoned award.<sup>176</sup>

The Brady award is a useful prism to analyze these and other justifications for reasoned awards. The supposed big downside of reasoned awards is, of course, the belief that they create fodder for appeals, thus raising vulnerabilities that silence avoids.<sup>177</sup> Presumably were this theory correct, the worst exposure would be on appeals of the merits, because by providing reasons

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<sup>175</sup> *NFL v. NFLPA*, 820 F.3d at 547–48. The atmospherics of the NFLPA's Vincent argument never were attractive. It contended that Vincent, not Goodell, really made the suspension decision and that players had a contractual right to have the Commissioner (not a designee) make this decision, which it claimed was nondelegable. Yet at the same time, the NFLPA was attacking the Commissioner for bias, claiming that he could not fairly hear the appeal of his own decision and arguing that he should have delegated the appeal to someone else as he did the *Rice* and *Peterson* appeals. There is nothing illogical in taking the position that a contract appoints one party to decide discipline, but that the same person should not be a judge of his own decision. What *was* inconsistent was the NFLPA's treating Brady as allegedly injured by not having Goodell make the discipline decision when the main thrust of its briefing was that Goodell was too biased to decide the case. Another weakness of this NFLPA argument is the CBA envisioned this dual role. The Association tried to get around that problem by claiming that the CBA may let the Commissioner generally hear appeals of his own decisions, but not when his own knowledge is at stake, and then claiming, bootstrappingly, that the dispute over whether Goodell or Vincent made the initial decision put Goodell's conduct at issue. At some point the series of hypotheses upon which this argument rested was too thin and its branch of plausibility snapped.

<sup>176</sup> CPR, RULES FOR NON-ADMIN. ARB, Commentary on Individual Rules, Rule 15 (2007).

<sup>177</sup> See Hayford, *supra* note 46.

the arbitrator opens up the substance of his or her thinking. This Article has shown that many of these vulnerabilities exist because of the outcome of the award, whether reasons are given or not, and that giving reasons may be the best defense even if doing so may narrow the justifications available to defend an award on appeal. The standards for reversing decision *on their merits* are extremely narrow, as the Second Circuit majority reminded Judge Berman.<sup>178</sup> Merits complaints have become even less likely to prevail in federal court and in the many state jurisdictions that have relied on Federal Arbitration Act precedent since 2008, when the Supreme Court held in *Hall Street Associates, LLC v. Mattel, Inc.* that the Federal Arbitration Act does not authorize appeals for manifest disregard of the law.<sup>179</sup> Exactly what *Hall Street* does and will mean remains a hotly contested topic in arbitration circles, but whatever vitality it does have undoubtedly narrows the range of appeals and further limits the odds of success in any appeal based upon this merits challenge.<sup>180</sup> Commissioner Goodell's highly publicized decision in the *Adrian Peterson* case, confirming the arbitrator's award with reasons, and

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<sup>178</sup> A not-infrequent route for appealing the merits of awards was, until 2008, under the judicially created "manifest disregard" doctrine. Then the Supreme Court undercut that doctrine, at least as a gloss on the Federal Arbitration Act, in *Hall Street*. See *supra* note 112. But even if manifest disregard applied, it was a rare case indeed that could satisfy the doctrine. The challenge was to find a category of error so severe that it had to be reversed because the decision could not be a just decision, yet not let courts interfere with decisions of fact and law that the arbitration agreement indicates are for the arbitrators to determine, for example a case that would prevent severe harm to arbitration but allow the ordinary harm of merely wrong decisions to continue. While circuits varied on the verbal articulation of their standard, it is a fair summary that their purpose was to intervene mainly, or only, in the extreme case in which "the arbitrator appreciated the existence of a clearly governing principle but decided to ignore or pay no attention to it." DOMKE, *supra* note 6, at §39:8. Such a standard creates a funny incentive, of course. The winner should hope that the arbitrators were really dumb, because if so it should be harder to prove that they appreciated the "clearly governing principle," and if they don't understand it, that they are not going to be able to deliberately ignore it. In theory, the loser should want smart arbitrators who "must have" understood the law so that they could make the inferential argument that if the arbitrators were this smart, they must have chosen to disregard the law intentionally. But how to demonstrate "dumb" or "smart" if there are no reasons, or even if there are? For a pre-*Hall Street* argument that too few courts were honoring the subjective *mens rea* prong of manifest disregard tests, improperly inferring deliberate disregard of known law using an implicit "big error of law" test, see Hayford, *supra* note 46, at 465–76.

<sup>179</sup> 552 U.S. 576 (U.S. 2008).

<sup>180</sup> On the uncertainty surrounding what *Hall Street* really should mean, but certainty that it confirms that manifest disregard never can be more than a very, very rarely successful basis for vacatur, see *supra* note 112.

the reversal of the trial court's vacatur by the Eighth Circuit offer another reminder of just how narrow any exposure created by giving reasons really is.<sup>181</sup>

In 2005, a group of well-known arbitrators published a study of every motion to vacate filed in the state and federal courts of the United States between January 1, 2002 and October 31, 2002.<sup>182</sup> The authors identified 182 motions, which contained 277 grounds for vacatur.<sup>183</sup> Manifest disregard, the second most common basis for appeal, was raised 52 times but succeeded *only twice* – approximately 4% of the times attempted.<sup>184</sup> Manifest disregard was the *least successful* of all grounds of appeal.<sup>185</sup>

These outcomes track those the Second Circuit found when it looked at reversals of awards for manifest disregard in that jurisdiction in a 2002 decision. The Second Circuit, the country's leading federal jurisdiction for business disputes, calculated that it had handled only 48 arbitration appeals for manifest disregard since 1960, barely one per year in this 42-year period.<sup>186</sup> Of these, only four awards had been vacated in whole or in part.<sup>187</sup> Moreover, three of those vacatures involved an award that exceeded the arbitrators' powers, and "it is arguable that manifest disregard need not have been the basis for vacating the award . . ." <sup>188</sup> By 2008, the circuit had considered 18 more challenges for manifest disregard, so the rate of appeals on this ground had increased. But the court vacated only one more award, so the loser's

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<sup>181</sup> For the history of the Peterson discipline, see *supra* note 67.

<sup>182</sup> Lawrence R. Mills et al., *Vacating Arbitration Awards: Study reveals real-world odds of success by grounds, subject matter and jurisdiction*, Disp Resol. Mag. 23 (Summer 2005).

<sup>183</sup> *Id.* at 23.

<sup>184</sup> *Id.* at 23, 25.

<sup>185</sup> The "[m]ost potent" ground for appeal was that the arbitrators exceeded their powers, a challenge tried in 101 cases and successful 21 times, 20.8% of the time. Other grounds were prejudicial misbehavior, successful only 7 out of 42 times, 17% of the time; refusal to postpone the hearing, tried 12 times but successful twice, 16.7% of the time; evident partiality or corruption, tried 33 times but successful only 4 times, 12.1% of the time; refusal to hear evidence, tried 24 times but succeeding only 3 times, 12.5% of the time; and that the award was procured by corruption, fraud or undue means, tried 13 times but succeeding only once, 7.6% of the times attempted. *Id.* at 25–26. One hopes that the rarity of challenges based on "corruption, fraud or undue means" and its poor success ratio both reflect the general integrity of commercial arbitration in the United States. For arbitration to prosper it has to add to the Rule of Law, not detract from it.

<sup>186</sup> *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

success ratio in manifest-disregard challenges in the Second Circuit had fallen from a poor 8.5% success rate (at best) to an even more measly 5.5%.<sup>189</sup>

The 2005 arbitration study found that the most common basis for appeal and for vacatur was exceeding powers.<sup>190</sup> One can imagine awards that would have been upheld if silent, because the arbitrator had power under some contract provision to reach the conclusions on liability and damages, but that end up reversed on exceeded-powers grounds because the arbitrator's reasons indicated reliance upon a forbidden basis of authority.<sup>191</sup> If the award were silent, the court would have analyzed all grounds upon which the arbitrator might have ruled and could have assumed a legitimate ground.<sup>192</sup> But because the arbitrator narrowed the reasons to one ground,

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<sup>189</sup> See *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 91 n.7 (9th Cir. 2008), *rev.d on other grounds*, 130 S. Ct. 1758 (2010). The Second Circuit also remanded two cases for clarification in this later period. *Id.*

<sup>190</sup> See *Mills*, *supra* note 182.

<sup>191</sup> One of the statutory grounds for vacatur under the Federal Arbitration Act arises when arbitrators "exceeded their powers." Federal Arbitration Act, 9 U.S.C. § 10(a)(4). Usually a party agreement creates those powers, and as long as the "award draws its essence" from the contract, it is unimpeachable and should not be vacated. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 30 (1987) (citation omitted). Whenever the arbitrators are trying to apply their contractual powers, their decision on their scope of authority will get deference. "But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 39. So this ground for vacatur, too, will rarely succeed. For more, see, e.g., *DOMKE*, *supra* note 6, at §38:12; *CARBONNEAU*, *supra* note 112 at 542–52.

<sup>192</sup> For an example of the oft-expressed principle—one that is parallel to the principle that arbitrators do not have to explain their awards unless a reasoned award or findings of fact and conclusions of law are specified—that silent awards will be treated as presumptively correct, see, e.g., *STMicroelectronics NV v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) ("Where, as here, the arbitrators do not explain the reason for their decision, we will uphold it if we can discern any valid ground for it.") (citing *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2d Cir. 2003)). *Duferco* implies that a court should uphold an award upon any possible ground under which the law might support it, even if it is a reasoned award and the arbitrators did not mention that ground, by citing the general principle of upholding an award upon any ground before later discussing silent awards as but one example of this principle. *Duferco*, 333 F.3d at 390. But this should not be correct of reasoned awards. If an award is silent, the court cannot know what the arbitrators thought and the parties, who did not ask for reasons, took the risk that their award will be upheld on any possible reason. (Indeed, one can even ask what power the court is exercising to see if *it* can think of a legitimate reason when that is the arbitrators' job; they may have seen a

and did not indicate that he or she considered others, an articulated error on that ground may lead to vacatur.

As an example, Judge Berman interpreted the award as showing that Goodell relied on the Competitive Integrity Policy (CIP) and believed that players were not fairly on notice that they could be sanctioned under that team policy. In contrast, had the award been silent, even if Goodell subjectively intended the same reliance upon the CIP, the court should have refused vacatur because there was a conceivable, legitimate ground (reliance upon the CBA's broad authority) on which Goodell might have relied and Goodell said nothing to exclude that legitimate ground (in this hypothetical, he would have said nothing at all about the basis for decision). The court would not know what a silent Goodell thought about provisions not mentioned, but it should assume the best. By giving some reasons, the award excludes other reasons.

Yet how much does giving reasons really make awards vulnerable even when there is an exceeded powers attack? These disputes usually turn upon the scope of contractual authorization for arbitration, and the arbitrator gets to read the contract. Thus here, too, the award should get deference.<sup>193</sup> It is

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reason the court does not consider, yet that should not tarnish their award). But if we know the basis for an award, because it is reasoned and explains itself, this tells the reviewing court that the arbitrators did not think of other bases, and if anyone is to search for alternative explanations, shouldn't it be the arbitrators whom the parties require to explain their decision? And failure to explain can lead to a vulnerable award if the reviewing court believes that the award almost certainly ignores governing law, in which case, whether the arbitrators say so expressly or not, the court may take the absence of any plausible justification *for* an award they have decided is unjustified as an added reason to vacate. *Cf.* *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) ("At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account"). One portion of *Halligan*, its at-least-dicta-and-perhaps-more analysis of courts being able to vacate for manifest disregard of the facts, has been overturned by the Second Circuit. *Wallace v. Buttar*, 378 F.3d 182, 191–93 (2d Cir. 2005). The Second Circuit's list of federal trial courts in New York that already had cited *Halligan* for a manifest disregard of the facts principle, *id.* at 192–92 (citations omitted) suggests a tidal wave of federal judges just waiting for any chink in the dike holding manifest disregard back to break, so that they can indeed begin enforcing their readings of the evidence, or, for that matter, the law.

<sup>193</sup> The exceeded-powers basis for appeal is very narrowly construed and violated only if arbitrators decide issues not asked of them at all or award relief barred by the agreement. *DOMKE*, *supra* note 6, at §39:6 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced"). It is a skittish, anxiety-ridden arbitrator indeed (or one who is incompetent and knows it) who fears vacatur's approach along this

no surprise that even the success rate on exceeded-powers appeals in the study was only 20.8%,<sup>194</sup> as one would expect for decisions that receive deference. By the time of follow-up studies, the success rate had fallen well below that.<sup>195</sup> The arbitrator's interpretation of contractual authority is entitled to the same broad deference as decisions about the facts and substantive law. And if an arbitrator does exceed his or her powers, surely it is fairer for the parties and better for arbitration that the arbitrator state the basis for the decision, thus making an error easier to spot and for courts to correct them, rather than that arbitrations forge ahead into unauthorized terrain.

What of the impact of Goodell's reasoning on the quality of his decision-making? While no direct evidence of that process exists except the award, Goodell's thinking about what happened and about the penalty Brady deserved must have come after more internal "second guessing" because Goodell knew that the award would be subject to scrutiny—indeed, in

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tiny path. The kind of decisions *Domke* lists as violating this standard should be easy to spot – and to avoid: (1) determining unauthorized secondary liability; (2) awarding relief wrongfully to non-grievance employees; (3) awarding larger unrequested damages; (4) addressing legal questions when the contract limits arbitrators to factual ones or other questions beyond the agreement; (5) using a definition contrary to a contractual definition; (6) awarding remedies outside the agreement; (7) adopting a remedy that adds to or changes the agreement; (8) deciding an untimely grievance; (9) awarding punitive damages when barred by agreement; (10) relying on a contract outside the arbitrator's authority; (11) proceeding without the panel as called for in the agreement; and (12) awarding punitive damages against nonparties. *Id.* (combining two lists of exceeded powers violations in *Domke*). This article discusses another way to exceed powers: failing to comply with the mandatory form of the award.

<sup>194</sup> See Mills, *supra* note 182.

<sup>195</sup> This subsequent study by two of the authors of the initial study on manifest disregard looked at all cases filed in nine months in 2008 in which motions to vacate were filed based upon an exceeded-powers ground—the most frequent basis for seeking vacatur found in their earlier work—and found that these challenges were successful only 6.3 percent of the time. Tom Brewer and Lawrence Mills, *When Arbitrators Exceeded Their Powers: A New Study of Vacated Arbitration Awards*, *Disp. Res. Mag.* 46, 48 (February/April 2009). In a recent follow-up, a study looking at all cases with exceeded-powers motions filed in state and federal court from July 2014 to July 2015, a search that yielded 273 cases, found there were 34 cases, or 12 percent after subtracting certain reversed vacaturs, in which the court vacated the award. Karen Fitzgerald and Thomas Brewer, *Red Flags and Risk Areas for Arbitrators: A Review of Recent Cases Challenging Arbitrator Authority*, at 5, presented at 2016 AAA/ICDR Conference (Feb. 19-20, 2016, New Orleans, LA). Because thousands of awards are issued in the United States in any given twelve-month period, the percentage of cases overturned is far, far lower than the percentage of successful motions among the pool of motions studied. Most cases are never challenged, much less challenged successfully.

this unusual case, immense public scrutiny. Contrary to much of the popular commentary on the Brady award, it is hard to believe that Goodell would be eager to punish a star quarterback of one of the League's most successful teams unless he strongly believed that violations occurred, were severe, and badly damaged the game. After all, two of his most recent sanctions, those of Ray Rice and Adrian Peterson, met with popular derision, albeit for being too lenient rather than too tough, and other recent sanctions had been changed or vacated, too.<sup>196</sup> Goodell likely spent more time on the award because its legitimacy mattered greatly to the League and it needed reasons to be legitimate.

The public hoopla about whether Goodell was biased has obscured the seriousness of the violations he found. We should not allow critics (who seem to assume that every explanation is just "spin" when what they really disagree with is the outcome) to obscure the reasons in the award. In the long run, at least in a largely rational world, these reasons should boost the award's legitimacy (and it is in players' interests, not just the owners', that whoever administers discipline over players, teams, and owners be viewed as highly legitimate by all three groups). The Wells Report and the Brady award tell a plausible story. It is plausible because both give detailed expla-

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<sup>196</sup> Proving that lawyers sometimes do have more fun, the NFLPA's counsel mocked the Commissioner by identifying the impressive credentials of those who overturned recent Goodell disciplines as follows:

64. Commissioner Goodell's arbitrary disciplinary actions accordingly have been rejected by, among others, (a) the former Commissioner of the NFL, Paul Tagliabue; (b) a retired federal district court judge from this District; (c) a sitting federal district judge who presided over disputes between the parties for more than 25 years; and (d) the NFL's former Executive Vice President for Labor Relations [the arbitrator who substituted for Goodell and whom Judge Doty overturned in *Peterson*, but who later halved Goodell's ten-game suspension in a matter involving Dallas Cowboy defensive end Greg Hardy].

Amended Answer and Counterclaim, *supra* note 14, at 21 § 64. The NFLPA cited this history, of course, in an effort to show that Goodell regularly overpunishes players. But mockery is a dangerous weapon. Presumably all humor vanished for the NFLPA when it realized that its main argument, based on the Players Policy for uniforms and equipment, contradicted the position it had taken in opening argument. *See supra* note 125. And arguing that Goodell had been so consistently wrong had a potential risk when the *Peterson* award also had not become final. The Eighth Circuit ultimately would resoundingly reject the vacatur upon which the NFLPA relied. *See supra* note 67. With Goodell prevailing before the Second Circuit on April 25, 2016 and the Eighth Circuit on August 4, 2016, his record looks a lot better than it did just a year before.



nations. The award's addressing of each basis for the decision and each of the NFLPA's points on appeal produced a much stronger decision.

At the end of the day, the most important reasons to explain awards involve their legitimacy to the parties and to their larger audience. Awards and judicial decisions always face the problem that the losers naturally are aggrieved by losing. But on balance a reasoned award, one that demonstrates that the arbitrator truly heard the evidence, considered both sides' positions fully, exercised authority only within proscribed limits, and studied and applied the law should tend to satisfy winners and help losers adjust.<sup>197</sup> Reasons provide the material for the loser's lawyers, friends, and business associates to help explain that the loss was fair and not arbitrary—even if the loser still thinks the result is wrong.

Legitimacy to the larger public, which includes future users of arbitration (clients and lawyers), politicians who may pass laws governing arbitration, and judges who bring their biases and preconceptions and, yes, institutional jealousy to their review of awards, matters even more for arbitration's long run. Here the award has had an uphill battle because so much commentary about Tom Brady's suspension has been written in the horse-race manner of too much American news reporting. Did Brady do it, or is Goodell carrying out a power-hungry assertion of his power as Commissioner?<sup>198</sup> Any reader who takes the time to read the award, however, or, better yet, the award and the Wells Report too, will find substantial evidence that something was wrong with the Patriots' first-half AFC Championship Game footballs. There are too many untrue statements and implausible aspects of the Brady-McNally-Jastremski side of the story to believe it all. Reasonable people can differ, and indeed have differed widely,

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<sup>197</sup> For a summary of research on how the participants' perceived fairness of the arbitration process contributes to satisfaction with arbitration, including whether the arbitrator appears to have given "fair consideration to their evidence," been "devoted to understanding of the facts of the dispute," and been neutral, see Deborah Hensler, *Judging Arbitration: The Findings of Procedural Justice Research*, AMERICAN ARBITRATION ASSOCIATION, HANDBOOK ON COMMERCIAL ARBITRATION ch.1 (3d ed. 2016). A sensibly explained decision conveys all of these factors.

<sup>198</sup> Even after rehearing was denied, journalists continued to write articles that treat the sanction as a vendetta by Roger Goodell without discussing the underlying evidence at all. See, e.g., Adam Killgore, *The trust is gone: NFL beats Tom Brady but loses in the process*, WASHINGTON POST, July 15, 2016, <https://www.washingtonpost.com/news/sports/wp/2016/07/15/the-trust-is-gone-nfl-beats-tom-brady-but-loses-in-the-process/>, {<https://perma.cc/8DY8-DB93>}; Ken Belson, *Roger Goodell's Power Play*, N.Y. TIMES, Sept. 8, 2016, <https://www.nytimes.com/2016/09/09/sports/football/roger-goodell-nfl-players-union.html?ref=international>, {<https://perma.cc/NQ7M-5LVQ>}.

on whether they think that Brady is “guilty”—the use of a term more suited to criminal law showing how far off track discussion can get—but one obvious fact about the entire saga is that any reasonable arbitrator *could* (not necessarily *would*, but *could*) reach the same conclusions as Commissioner Goodell.

Moreover, not only is the remedy justified by Goodell’s explanations, but, in spite of the outcry that deflating footballs should not be equated to domestic violence, the potential for damage to the game and the well-founded expectations of fans who invest their time and money in watching football games and all that goes with this addictive American pastime could be catastrophic. Professional sports, a huge and valuable industry, depend upon integrity. Whether deflated “small balls” helped Brady win the Colts game or not, the League has inflation rules grounded in the belief that balls outside the pressure range are unfair and the belief that teams should compete using roughly the same tools. Letting players or a team think that they can bend the rules encourages wider cheating. On top of all this, false responses and obstruction pose a challenge to the disciplinary system itself.

To see the importance of reasons for the award’s legitimacy, imagine if Goodell had simply announced that Brady participated in a deflation scheme and would be suspended for four games. None of the evidence, truly compelling evidence, suggesting that Brady broke NFL rules and resisted investigation would be public. Outraged Brady supporters could pick away at the award, citing lower penalties for “equipment” violations and the fine-for-first-violation portion of the Players Policies, without any response. The award would not have a voice. It truly would appear arbitrary, without its best defender, the arbitrator who went through the evidence and did the work to reach the outcome. The award and the larger arbitration process would appear unfair and prejudicial, and the institution of arbitration would be unfairly tarnished, too.

Reasons matter. The appearance of justice matters and is inextricably part of the substance of justice. Silent awards forfeit the right to set out the strongest case in substance and in appearance. Arbitrators should issue silent awards only when the parties agree that is all they want. Generally, they should welcome the opportunity to write reasoned awards and explain themselves.