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Domestic Violence & Men's Professional Sports: Advancing the Ball

DOMESTIC VIOLENCE & MEN'S PROFESSIONAL SPORTS: ADVANCING THE BALL

By: Chelsea Augelli & Tamara L. Kuennen*

ABSTRACT

This article examines how men's professional sports leagues treat domestic violence committed by players. Over the past twenty years, but particularly over the last five, the public has criticized, and the media has shone a spotlight on, the big leagues' ignoring of the issue. Many call for parity between how the criminal justice system treats the issue of domestic violence and how the leagues should treat it, arguing for a zero-tolerance approach. This article applies lessons learned by feminist law and policy makers and legal scholars in the development of the larger justice system response to domestic violence to the nascent development of the same in men's professional sports. It uncovers the unintended consequences of a zero-tolerance approach that over-relies upon punitive sanctions. These consequences include the loss of victim voice and autonomy, the erosion of due process for alleged perpetrators, and the limiting of our understanding of the intersectionality of race, class, and gender identity that individually and institutionally contribute to the norm of domestic violence, to name but a few. Applying masculinities theory, the article argues for tempered measures to decrease players' perpetration of domestic violence and for resources deployed to a cultural shift in attitude about masculinity, women, and intimate relationships.

The article proceeds in five parts. After a brief introduction in Part I, Part II demonstrates why society generally and feminist law and policy makers particularly should care about how men's professional sport treats the issue of domestic violence, by documenting the ubiquity of men's professional sports and consequent viewing of athletes as role models, particularly by youth. Part III describes each of the four big league's historic treatment of domestic violence committed by players and traces the development of policies (or lack thereof) to address the issue. Part IV identifies the unintended consequences of the development of criminal and civil justice law and policy addressing domestic violence in the United States over the past fifty years and applies lessons learned, from a feminist legal perspective, to leagues' policies. It concludes that on balance, the Major League Baseball and National Basketball League are headed in the right

* Juris Doctor Candidate and Professor of Law, University of Denver Sturm College of Law.

direction. Its policies simultaneously have teeth while providing the most due process and individually tailored treatment of perpetrators. In Part V, however, the article argues that to address most meaningfully the issue of domestic violence the leagues should proactively take steps, even if baby steps, to foster a cultural downshift in hypermasculine norms that underlie the use of violence against women. Such significant change cannot happen overnight. Hence the title of this article. The goal is not the immediate slam dunk, but rather to advance the ball down the field, deliberately, incrementally and patiently.

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I. INTRODUCTION

Many legal and sports commentators writing about how to effectively address the problem of domestic violence in sports – particularly in the NFL, NBA, MLB and NHL¹ – argue that the arrest, prosecution and conviction rates of athletes should be on par with those in the general population.² They rightfully criticize the gross disparity. In the four leagues combined, between January 1, 2010 and December 31, 2014 (five years) only one of sixty-four reported allegations of domestic violence or sexual assault resulted in a conviction.³ Interestingly, after 2014, when three of the four leagues significantly changed or added a domestic violence policy,⁴ there is no single source of compiled data that documents these same statistics spanning across all four leagues.⁵

The criticism of this disparity is not a new one; on the contrary, it harkens back to the start of the Battered Women's Movement. In the 1970s, before

¹ Known as the “big four,” these are the National Football League, National Basketball Association, Major League Baseball, and National Hockey League, respectively.

² Bethany P. Withers, *Without Consequence: When Professional Athletes Are Violent Off the Field*, 6 HARV. J. SPORTS & ENT. L. 373, 377 (2015); Nicole K. Repetto, *Domestic Violence, Sexual Assault, and Elite Athletes: Analyzing Arrest and Conviction Rates*, Senior Honors Theses 485, available at

<http://commons.emich.edu/cgi/viewcontent.cgi?article=1483&context=honors> (arguing that elite athletes are not convicted at the same rate as the general population because of their elite status). See, e.g., Joshua S.E. Lee & Jamie K. McFarlin, *Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner and Athletic Discipline in the NFL & NBA*, 23 JEFFREY S. MOORAD SPORTS L.J. 69 (2016).

³ JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN 80 (1999) (describing how professional athletes “enjoy a significantly lower likelihood of being convicted” and noting that 85% of the athletes tried before a jury for felonious sexual assault between 1986 and 1995 were acquitted whereas nationally more than half of arrests for rape result in a conviction); Repetto, *supra* note 2; see also Withers, *supra* note 2, at 377 and note 22 (comparing rates of prosecution of athletes (25%) with those in the general population (63.8%)).

⁴ Documenting changes in arrest and conviction rates is the subject of a future article.

⁵ Due to the sensitive nature of domestic violence cases, accurate arrest and case disposition reporting is extremely difficult to track, aside from what is contained in the media. There are two databases, USA Today NFL Arrest Database and ArrestNation.com, that keep track of athlete arrests; however, these databases provide very basic and somewhat incomplete information spanning across all leagues.

“domestic violence”⁶ as a legal or social concept existed, battered women’s activists who sought to reform the government’s disregard of violence against women when perpetrated by a spouse or partner (versus a stranger) urged the government to arrest, prosecute and convict domestic violence at the same rate as stranger violence.⁷ By so doing, they argued, the government would show that it takes domestic violence seriously.

Viewed in hindsight from a feminist legal perspective, a number of unintended, negative consequences appear to have flowed from battered women’s activists’ early call for parity in the criminal justice system. As just one example,⁸ pro-arrest policies resulted in not merely more arrests of perpetrators, but in significantly more “dual arrests” (both parties being arrested) at the scene of domestic disputes, causing a disproportionate increase in women’s and victims’ arrests when compared with perpetrators’.⁹ As a result of counter-intuitive, unintended consequences such as this one, feminist legal scholars have argued that over-reliance on the criminal justice system has been a mistake, and to more effectively

⁶ Or “intimate partner violence” as it is often called and as we mean in this article, which discerns between violence amongst family members generally (and including intimate partners) versus between intimate partners only. We prefer the term “intimate partner violence” but because none of the leagues use this term, instead using “domestic violence,” we follow suit here, and discuss this problem of definition in part IV *infra*. We acknowledge but do not explore in this article the rich scholarly debate over defining and labeling the problem of violence against women. For a recent example of this debate, see Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 165 (2016) (arguing that “violence against women” should be reframed as “gender violence”); Julie Goldscheid, *Gender Neutrality, the “Violence Against Women” Frame, and Transformative Reform*, 82 UMKC L. REV. 623 (2014). For a historical overview of the empirical problem of defining the problem, see EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 84-86 (Oxford University Press 2007).

⁷ See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 9-28 (2012) (a thorough discussion of the arguments made by activists in the 1970s).

⁸ The article will explore a number of such unintended consequences, in addition to this example.

⁹ See L. Kevin Hamberger, *Female Offenders in Domestic Violence: A Look at Actions in Their Contexts*, 1 J. OF AGGRESSION, MALTREATMENT & TRAUMA 117 (1997). In another criminal justice context – that of prosecution, rather than arrest – “no-drop prosecution of DV” policies have had the unintended consequence of diminishing women’s calls to the police for help for fear that, if they change their minds about supporting the prosecution they will be held in contempt for not showing up at trial or if they do show up, being charged with perjury if they recant. See Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837 (2013).

prevent and redress domestic violence, alternative remedies must be sought.¹⁰

Men's professional sports leagues are trying to do just this. While in the past "the sports industry has in effect embraced those men who demonstrate a disdain for women through repeated acts of criminal violence,"¹¹ three of the four big leagues now have adopted anti-domestic violence policies.¹² These employment policies are the kinds of alternative remedies legal feminists have urged. While the call for parity of prosecution rates is understandable, nuanced employment policies that provide significant procedural due process and individualized assessment, punishment and treatment of perpetrators would more effectively advance the ball in the right direction.

More importantly, this article asks: why replicate an ineffective response? Domestic violence has not decreased because of a tough-on-crime approach to the problem. One of the greatest lessons taught by feminist legal theorists is that the criminal justice system replicates the very norms it seeks to eradicate: male dominance and violence. Rather than focusing on punishment after the fact, men's professional sports would do better by meaningfully changing institutional culture to prevent domestic violence to begin with. Not only should men's professional sports care about what feminist legal scholars have to say, feminist legal scholars should care about how the sports industry acts. Many consider professional athletes to be role models, if not heroes. Given the worldwide platform on which these athletes perform, a cultural shift could have a ripple effect. Imagine a world in which men and boys watched their role models take gender equality in relationships seriously and saw an institutional culture that fostered this value with humanity and dignity rather than punishment and shame.

¹⁰ GOODMARK, *supra* note 7, at 21-22 (describing the history of the Violence Against Women Act and development of pro-arrest and prosecution policies in domestic violence and arguing that the "intense focus on the criminal justice system crossed out other potential strategies for addressing domestic violence. Invoking the power of the criminal justice system should have been one strategy, not the lone strategy, for combating abuse...").

¹¹ BENEDICT, *supra* note 3, at 26.

¹² Michael McCann, *Biggest Takeaways: The NBA's New CBA Deal*, SPORTS ILLUSTRATED, <https://www.si.com/nba/2016/12/15/nba-cba-details-takeaways-adam-silver-michele-roberts> (Dec. 15, 2016); Paul Hagen, *MLB, MLBPA Reveal Domestic Violence Policy*, MLB.COM (Aug. 21, 2015), <http://m.mlb.com/news/article/144508842/mlb-mlbpa-agree-on-domestic-violence-policy>; *NFL Owners Endorse New Personal Conduct Policy*, NFL (Dec. 10, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy> (Dec. 10, 2014). The NHL does not have a policy addressing domestic violence, which will be discussed *infra* section III.

The argument proceeds as follows. Part II documents why society, professional sports leagues, and legal feminists in particular, should care about how professional sports associations treat domestic violence. Part III carefully traces the leagues' treatment of domestic violence by providing an overview of its employment policies. Part IV applies the lessons learned in the broader development of anti-domestic violence law and policy in the U.S., focusing somewhat on MLB, which has taken many promising steps from which other leagues could learn. None of the leagues, however, have forged a path toward meaningfully changing players' or fans' perceptions of domestic violence. Part V argues that if the leagues took the problem of domestic violence seriously, they would be engaged in a cultural shift within their organizations to delegitimize domestic violence as a social norm.

II. WHY WE SHOULD CARE ABOUT HOW PROFESSIONAL SPORTS ASSOCIATIONS TREAT DOMESTIC VIOLENCE

Society, and legal feminists in particular, should care about domestic violence in professional sports given the ubiquity of live sports and the glorification of professional athletes. These men are considered heroes in the public eye and are seen as a "symbol of what so many boys desire to become."¹³ Not only does their conduct matter, but how professional sports associations treat their conduct matters.

A. Ubiquity of Live Sports

Sixty-nine percent of Americans talk about, read about, or watch sports every day, and eighty-nine percent do so once per week.¹⁴ A 2007 report concluded that "not only does a very significant portion of the population make a serious emotional commitment to sports (through participation and spectatorship), but that this unbridled enthusiasm cuts across age, race, gender, and income and education levels."¹⁵ "A more recent study of over 1000 college students found similar results, with approximately seventy percent of participants reporting that they watched sports on television and discussed sports with others at least weekly."¹⁶

¹³ BENEDICT, *supra* note 3, at 3.

¹⁴ Traci A. Guiliano et al., *Gender and the Selection of Public Athletic Role Models*, 30 J. SPORT BEHAVIOR 161, 162 (2007) (citations omitted) (citing Miller Brewing Company, The Miller Lite report on American attitudes toward sports (1983)).

¹⁵ *Id.*

¹⁶ *Id.* (citations omitted).

However, a 2015 survey conducted on behalf of the SportsBusiness Journal found one-third of people who responded stated that they are watching less sports than one year ago, and fifteen percent stated they have “cut the cord” and walked away from traditional cable service the past year.¹⁷ Many millennials¹⁸ have changed the viewership of sports and specifically on cable networks.¹⁹ In a 2017 online survey by McKinsey&Company, forty-five percent of Generation Xers consider themselves committed sports fans, in comparison to thirty-eight percent of millennials.²⁰ Millennials are watching live games nearly as often as Generation Xers (3.2 games per week and 3.4 games per week, respectively); however, fifty-six percent of millennials are streaming sports in comparison to twenty-nine percent of Generation Xers.²¹

Sports teams, leagues and networks will need to maximize their audience through not only traditional television, but also through online and streaming.²² What must be kept in mind though is the larger picture. Although viewership is down, it has gone from massive to slightly less than massive.

Although women have historically been less likely than men to be the most avid fans, evidence shows that the gender gap in sports viewership is beginning to narrow. Females comprise thirty-five percent of the “regular season TV audience” for the NFL, thirty-percent for the NBA, thirty-percent for the MLB, and thirty-two percent for the NHL.²³

Due to the expansion of cable packages, competition from increased use of streaming devices and digital video recording, and the omnipresence of

¹⁷ Rick Maese, *Sports Viewership is Changing, but the Costs and Benefits to Fans Remain Murky*, WASH. POST (Dec. 14, 2016), https://www.washingtonpost.com/sports/sports-viewership-is-changing-but-the-costs-and-benefits-to-fans-remain-murky/2016/12/14/9b794fc6-c090-11e6-897f-918837dae0ae_story.html?utm_term=.05a8bc3e5ba3.

¹⁸ Millennials are classified as people born between 1980 to 1996 and Generation Xers are classified as people born between 1965 and 1979, *see* note 16.

¹⁹ Dan Singer, *We are Wrong About Millennial Sports Fans*, MCKINSEY&COMPANY (Oct. 2017), <https://www.mckinsey.com/industries/media-and-entertainment/our-insights/we-are-wrong-about-millennial-sports-fans>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Kristi Dosh, *The Evolution in Marketing to Female Sports Fans*, FORBES, (Feb. 22, 2016), <https://www.forbes.com/sites/kristidosh/2016/02/22/the-evolution-of-marketing-to-female-sports-fans/#2681f9587fc3> (citing “Ads & The Female Fan Base infographic” created by MBA@UNC).

smartphones, ratings across television have fallen in the past decade.²⁴ Until recently, live sports were immune to this trend, but some leagues have now suffered the same decline in ratings.²⁵ There are various theories, aside from the changing world of TV, for reduced ratings in live sports. The NFL, which has the highest viewership amongst professional sports leagues, experienced a 9.7% decline in viewership during the 2017 season alone.²⁶ Some speculate that the decline in NFL viewership is due to a number of issues such as players kneeling during the National Anthem in protest of police brutality, concerns about player concussions and brain damage, and how the NFL has handled incidents of domestic violence.²⁷

In contrast, the NBA started the 2017-2018 season off with an eighteen percent increase in viewership from the prior season, which some commentators attribute to the NBA's focus on the game itself, rather than the league's drama.²⁸ The MLB's national viewership has maintained steady and increased by ten percent for Sunday Night Baseball, but viewership has decreased at the local level in certain areas based on how well the local team is doing.²⁹ The NHL's TV and digital viewership on NBC/NBCSN was up seven percent from the 2015-2016 season because of

²⁴ Kevin Draper, *Reading Something in the NFL Ratings? You're Probably Wrong*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/sports/football/nfl-ratings-trump.html>.

²⁵ Frank Pallotta, *Yes, the NFL's TV Ratings Are Down, but so is the Rest of Network Television*, CNN (Oct. 26, 2017), <http://money.cnn.com/2017/10/26/media/nfl-ratings-tv-networks/index.html>.

²⁶ Darren Rovell, *NFL Television Ratings Down 9.7 Percent During 2017 Regular Season*, ESPN (Jan. 4, 2018), http://www.espn.com/nfl/story/_/id/21960086/nfl-television-ratings-97-percent-2017-regular-season.

²⁷ James Doubek, *Knees, Domestic Violence and CTE: Why You Stopped Watching Football*, NPR (Feb. 4, 2018), <https://www.npr.org/2018/02/04/583093472/knees-domestic-violence-and-cte-why-you-stopped-watching-football> ([Listener Annie Callahan told NPR] "After it came out about abuse of their spouses or girlfriends, I actually refuse to watch the NFL anymore because I really don't think they take the safety of women seriously.").

²⁸ Richard Morgan, *NBA Enjoying Ratings Surge While NFL Flounders*, N.Y. POST (Dec. 21, 2017), <https://nypost.com/2017/12/21/nba-enjoys-ratings-renaissance-as-nfl-flounders/> ("[The NFL's] story lines these days encompass a panoramic sweep of protest rights, brain-damage risks, squabbling owners, media oversaturation, even subpar play.").

²⁹ Ben Cafardo, *ESPN's Sunday Night Baseball Ratings Up Double-Digits in 2017*, ESPN (Sept. 27, 2017), <https://espnmediazone.com/us/press-releases/2017/09/espn-sunday-night-baseball-ratings-double-digits-2017>. See also Derek Helling, *MLB TV Ratings for National Broadcasts Up, But Local TV Uneven*, FANSIDED (June 2017), <https://fansided.com/2017/06/01/mlb-tv-ratings-national-broadcasts-local-tv-uneven/>.

a record increase in streaming; however, the NHL saw a significant drop in exclusive TV cable viewership.³⁰

The NFL's decline in viewership must not be analyzed in a vacuum. In 2011, the NFL signed record-setting television broadcasting deals with three major networks who collectively paid twenty-eight billion to broadcast the games from post-season in 2013 through 2022.³¹ Similarly:

Major League Baseball's national television landscape is set through 2021. MLB [on October 2, 2012] announced an eight-year national media rights agreement [sic] with FOX and TBS, and combined with the recently announced ESPN deal, the three contracts will deliver a combined \$12.4 billion – more than a 100-hundred percent increase in annual rights fees to MLB over the current arrangements.³²

In the NBA, ESPN and Turner will together pay around two billion dollars – six-hundred thousand annually beginning in the 2016–17 season and lasting through the 2024–2025 season – representing “a one-hundred and eighty percent increase in the amount of money flowing into the league's coffers. By comparison, when the nine hundred and thirty million dollar deal was signed in 2007, it represented only a twenty-one percent increase from the previous one.”³³ In 2011 the NHL reached a ten-year television and media rights deal with NBC Sports Group through the 2020–21 season for around two hundred million dollars annually, in addition to the existing exclusive network deal with NBC and Versus.³⁴

Although there are no conclusive determinations for these trends, it is important to note that the media coverage surrounding off-the-court conduct by players may play some part in this, and the ubiquity of live sports may see varied trends based on each league's handling of these

³⁰ Austin Karp, *NHL Regular-Season Viewership Sees Sharp Drop on TV, but Streaming Sets New Record*, SPORTS BUS. DAILY (Apr. 14, 2017), <https://www.sportsbusinessdaily.com/Daily/Issues/2017/04/14/Media/NHL-audience.aspx>.

³¹ Joe Flint, *NFL Signs TV Rights Deals with Fox, NBC and CBS*, L.A. TIMES (Dec. 15, 2011), <http://articles.latimes.com/2011/dec/15/business/la-fi-ct-nfl-deals-20111215>.

³² MANIACDESORTS, <http://maniacdesports.com/2017/12/22/le-nerf-de-la-guerre-pour-les-sports-majeurs-est-certainement-la-tele/> (last visited Apr. 24, 2018).

³³ Kevin Draper, *What the NBA's Insane New TV Deal Means for the League and For You*, DEADSPIN (Oct. 6, 2014), <http://deadspin.com/what-the-nbas-insane-new-tv-deal-means-for-the-league-a-1642926274>.

³⁴ Bob Condor, *NHL, NBC Sign Record-Setting 10-year TV Deal*, NHL (Apr. 19, 2011), <https://www.nhl.com/news/nhl-nbc-sign-record-setting-10-year-tv-deal/c-560238>.

issues. Many fans cite the importance of these issues in determining whether to watch because they, or their children, understand athletes to be role models.

B. Athletes as Role Models

For years, data has shown that athletes are role models. A large study in 1983 found seventy-five percent of Americans polled believe that athletes are good role models for children, and fifty-nine percent felt that athletes are often the *best* role models a child can have.³⁵ Children and adolescents (especially males) seem to agree, as numerous studies show that famous athletes are either at or near the top of lists of people that they most admire or want to be like.³⁶ For this reason, athletes find themselves subject to increased scrutiny because of their status and their visibility.³⁷

Athletes are not merely role models, but “heroes” to some. This is at a time when the existence of heroes in society has, for decades, undergone considerable scholarly debate.

Heroes provide active displays of prominent human characteristics and social relationships. Whether personal acquaintances or distant famous figures, they are socially constructed symbols They are thought to help define individual and collective identity, compensate for qualities perceived to be missing in individuals or society, display ideal behaviors that people strive to emulate, and provide avenues for temporary escape from the rigors of daily life.³⁸

“Youths choose more athletes as heroes than adults do. If we are interested in conceptualizations of athletic heroes in American society, then it makes sense to focus on children and adolescents because of the relatively heavy emphasis they place on such individuals.”³⁹ Many scholars refer to “sports heroes” when discussing well-known athletes that are admired by people; however, the “public athletic role model” is one who potentially influences the attitudes, behaviors and values of individuals who admire them from the

³⁵ Guiliano, *supra* note 14, at 163-64.

³⁶ *Id.* at 164.

³⁷ Kenon A. Brown et al., *Tried in the Courts of Public Opinion: Effects of Involvement in Criminal Transgressions on Athlete Image*, COMMUNICATION & SPORT, published March 6, 2017, available at <http://journals.sagepub.com/doi/pdf/10.1177/2167479517697426>.

³⁸ JANET C. HARRIS, *ATHLETES AND THE AMERICAN HERO DILEMMA* 1 (Human Kinetics Publishers 1994).

³⁹ *Id.* at 24.

vision of a culturally agreed upon hero who is often held to a higher standard.⁴⁰ The dynamic between these two different classifications of athletes as role models has been the subject of debate for many years not only by academics, but by society as well. The “sports hero” takes on the role of admiration for his or her individualistic talent, unique abilities and embodiment of what it means to be a successful athlete.⁴¹ The “public athletic role model” takes on the role that society historically has grown to give athletes by not only admiring their talent and success, but by using their platform as an athlete to influence others.⁴²

Athletes in the 1960s and 1970s used their platform as an athlete and public figure to stand up for social injustice and advocate for social change.⁴³ Namely, athletes such as Jackie Robinson, Muhammad Ali, Billie Jean King, Tommie Smith, and John Carlos took this opportunity with grace, and surely had a substantial influence after using their platform in this way.⁴⁴ Now, with the ways in which technology has expanded viewership, athletes have the ability to send a worldwide message through a single gesture. Take for example former San Francisco 49ers quarterback Colin Kaepernick’s silent gesture of kneeling for the national anthem before an NFL game as protest against social justice and police brutality.⁴⁵ This not only stirred controversy amongst NFL fans, but caught the immediate attention of President Donald Trump. President Trump condemned NFL players kneeling during the national anthem on Twitter, tweeting over twelve sports-related tweets in a thirty-six-hour period condemning both players for protesting and the NFL for allowing players to protest.⁴⁶

⁴⁰ Guiliano, *supra* note 14, at 161, 163-164.

⁴¹ *Id.* at 163.

⁴² *Id.*

⁴³ Travis Waldron, *Where Did All the Activist Athletes Go?*, THINKPROGRESS (Jan. 7, 2014), <https://thinkprogress.org/where-did-all-the-activist-athletes-go-be6e62592e9e/> (stating that “...athletes are, obviously, human beings with opinions and causes and issues they care about, and unlike many “ordinary” people, they stand on a platform that gives them major influence in American culture.”).

⁴⁴ *Id.*

⁴⁵ John Branch, *The Awakening of Colin Kaepernick*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/sports/colin-kaepernick-nfl-protests.html>; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 25, 2017 @ 5:39 AM), <https://twitter.com/realdonaldtrump/status/91228028224525312?lang=en>; (Nov. 28, 2017 @ 5:45 AM) <https://twitter.com/realdonaldtrump/status/935489831005810688?lang=en>.

⁴⁶ Hoffman, Mather & Fortin, *After Trump Blasts NFL, Players Kneel and Lock Arms in Solidarity*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html>.

When viewership is considered along with the development of social media platforms such as Facebook, Instagram, and Twitter, athletes' capacity to influence can occur with one single post. For example, LeBron James posted a photograph of a sign on Instagram that says "I Am More Than an Athlete" with the caption "#wewillnotshutupanddribble" in response to Fox News host Laura Ingraham's criticism of athletes' comments on social issues.⁴⁷

Athletes have come to share a specific role in our society, and whether that is of the "sports hero" or "public athletic role model," that role is an important piece to the way in which young children look toward professional athletes' off-the-court conduct, in comparison to just their athletic performance.

C. *Should Professional Athletes be Role Models?*

Although there is not much debate about whether professional athletes *are* role models, there is considerable debate about whether they *should be*. Today's athletes are in the public eye more than ever, and as they have continued to gain celebrity status through increased media attention, their status in the eyes of young children has increased substantially.⁴⁸ Athletes endorse many products and popular brands which consumers equate with celebrity image and the companies they represent.⁴⁹

Not only are athletes subject to these expectations simply by becoming a professional athlete, but they are always in the spotlight, regardless of whether they want to be or not. The ways in which young children have access to their favorite athlete now, compared to the times of Billie Jean King or Muhammed Ali, is strikingly different. Their every move is subject to being posted on YouTube. Given this type of media exposure, their role cannot be reduced to simply playing sports and winning games.

The same exposure applies to every celebrity, but there is something unique about athletes compared to their celebrity counterparts. Society expects that

⁴⁷ Greg Beacham, *LeBron James Says He 'Will Definitely Not Shut Up and Dribble,'* ASSOCIATED PRESS (Feb. 17, 2018), <http://www.nba.com/article/2018/02/17/lebron-james-says-he-will-definitely-not-shut-and-dribble>. See also LeBron James (@kingjames) INSTAGRAM, (Feb. 16, 2018), https://www.instagram.com/p/BfSIOu_BMHF/?taken-by=kingjames.

⁴⁸ Brown, *supra* note 37, at 3, 5; see also BARRY SMART, *THE SPORT STAR: MODERN SPORT AND THE CULTURE ECONOMY OF SPORTING CELEBRITY* (2005).

⁴⁹ Kenon Brown, *Is Apology the Best Policy? An Experimental Examination of the Effectiveness of Image Repair Strategies during Criminal and Non-Criminal Athlete Transgressions*, COMMUNICATION & SPORT 4, 23-42 (2016), available at <http://journals.sagepub.com/doi/abs/10.1177/2167479514544950>.

athletes will perform, win games, and also manage to never make mistakes; the same cannot be said for musicians or actors. In some ways society excuses, or understands, the behavior of a celebrity like Miley Cyrus or Justin Bieber, but society does not make the same excuses for professional athletes. Professional athletes have a different type of talent that society holds a closer personal connection to and investment with, given the nature of sports. As a result, sports ethicists see a troubling quagmire with the standards society continues to hold athletes to.⁵⁰ On one hand, they are expected to perform, win games and provide entertainment. On the other hand, athletes are human and are capable of making mistakes that society judges them much more harshly for, compared to other types of role models. The quagmire is that there is no middle ground between these two worlds and athletes are now subject to an inescapable role they must play in society. In some circumstances, certain actions and behaviors by athletes are more forgivable than others, such as losing their temper on the field or making a bad play, versus a news report that they were involved in a bar fight.⁵¹

Scholars have noted as much. As stated by philosopher Randolph Feezell:

We should distinguish between being a role model in a descriptive sense and being a role model in a normative sense. A role model in a descriptive sense is one whose conduct (or life) is actually the object of imitation or is at least believed to be worthy of imitation. A role model in a normative sense is one whose conduct or life is worthy of being imitated or worthy of being some kind of exemplar.⁵²

Feezell argues that professional athletes should be considered role models but only within the world of the sport that they play.⁵³ If one aspires to be an outstanding baseball player, for example, one should consider Barry Bonds to be a role model. What Barry Bonds did or did not do off the field should not affect his status as a role model on the field.⁵⁴ Great ball players can be role models regardless of whether they are racists, homophobes or “wife abusers.”⁵⁵

⁵⁰ Shawn E. Klein, *An Argument against Athletes as Political Role Models*, 10 FAIR PLAY 25 (2017).

⁵¹ Brown, *supra* note 37, at 9.

⁵² Randolph Feezell, *Celebrated Athletes, Moral Exemplars, and Lusory Objects*, XXXII J. OF PHILOSOPHY OF SPORT 20, 22 (2005).

⁵³ *Id.* at 31 (discussing Barry Bonds’s performance as having occasioned reflections on aging, struggle, fathers and sons and other non-baseball topics but arguing that this “real” Barry Bonds should be irrelevant and not tarnish his hero status in the world of baseball).

⁵⁴ *Id.*

⁵⁵ *Id.* at 33.

Others disagree. Philosopher Christopher Wellman argues that professional athletes, because of their fame and influence, have a moral obligation to behave well.⁵⁶ Some athletes agree with this position. Famous NBA player for the San Antonio Spurs, Tim Duncan, stated:

I think automatically if you're a professional athlete that makes you a role model just because you're put into a situation where there are children that want to aspire to be like you. They want to get to where you are. And it doesn't matter if you're the [twelfth] guy on the bench or you're the number one star; you're in a spotlight, you're in a place that a kid wants to be in, and that's your responsibility to take that on.⁵⁷

Danny Villanueva, the first Mexican-American player in the NFL, similarly stated that "since he grew up without a Latin role model in the NFL, he was very conscientious and very deliberate in his attempt to be successful so that other Latin children would not feel the same void."⁵⁸

Other athletes disagree. Take Charles Barkley for example, who made an extremely bold statement in a Nike Air commercial, stating: "I'm not paid to be a role model. I'm paid to wreak havoc on the basketball court."⁵⁹ "Parents should be role models. Just because I dunk a basketball, doesn't mean I should raise your kids."⁶⁰

Courts tend to disagree with Barkley's attitude:

Professional athletes can hardly be permitted to hold themselves out as public figures, seeking a maximum

⁵⁶ Christopher Wellman, *Do Celebrated Athletes Have Special Responsibilities to be Good Role Models? An imagined Dialog between Charles Barkley and Karl Malone*, SPORTS ETHICS: AN ANTHOLOGY 333-337 (Jan Boxill ed., 2002) (arguing that the mere fact that famous athletes have influence is the basis for the special responsibility).

⁵⁷ Holly M. Burch & Jennifer B. Murray, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAWS. J. 249, 251 (1999) (citing *Meet the Press: NBA Commissioner David Stern and Players Kobe Bryant, Keith Van Horn, and Tim Duncan Discuss Various Issues Facing the NBA* (NBC television broadcast, Feb. 8, 1998), available in LEXIS, News Library, Script File).

⁵⁸ *Id.* at 252 (citing Christine Granados, *Setting the Pace: Top 10 Hispanic Trendsetters for 1998*, NEW AM. NEWS SERV. (Wash., D.D.), Dec. 31, 1998).

⁵⁹ Newsweek Staff, *I'm Not a Role Model*, NEWSWEEK (June 27, 1993), <http://www.newsweek.com/im-not-role-model-193808>.

⁶⁰ Nike Commercial, *Charles Barkley "I Am Not A Role Model,"* YOUTUBE (posted Mar. 9, 2007), <https://www.youtube.com/watch?v=nMzdAZ3TjCA>.

amount of publicity for themselves and their teams with respect to their athletic achievements, while successfully claiming strictly private status when misconduct is charged or proved. Their professional careers and those of other entertainers who seek the public spotlight are so intimately tied to their personal conduct that such a distinction would be entirely unrealistic.⁶¹

Whether athletes should be role models (or not) may be up for debate for several years to come. What is empirically true is that athletes are, rightly or wrongly, considered role models. Appreciation of this status should be important to those who seek to reform the ways in which society thinks about and deals with the issue of domestic violence. Most critical to these groups, namely legal feminists, is that the audience for whom these athletes are role models is comprised primarily of men and boys. Because men (and those about to become men) are overwhelmingly the primary perpetrators of domestic violence, professional athletes, and particularly the leagues that promote and govern them, possess a unique capacity to create a cultural shift in the ways in which men treat women.

Of course, cultural shifts do not happen overnight. Rather, they are incremental. It is to the incremental steps that leagues are taking that this discussion now turns.

III. LEAGUES' POLICIES AND PRACTICES

In recent years most of the leagues have put in place, or modified, personnel policies addressing players' perpetration of domestic violence. This section examines these policies as well as the leagues' enforcement of them.

A. MLB

The MLB's history of developing and implementing player discipline has been a long one. The first Commissioner in American professional sports was appointed to serve the MLB in 1920, in response to a scandal involving players and gambling.⁶² The MLB Commissioner's power has been rather broad since that time, including the authority to take disciplinary action to punish conduct that is detrimental to the best interests of the game. Under the MLB Collective Bargaining Agreement ("CBA") and the uniform

⁶¹ Bell v. Associated Press, 584 F.Supp. 128, 131-32 (D.D.C. 1984).

⁶² Bethany Withers, *Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L.J. 145, 151 (2010).

player contract (“UPC”), a player may be subjected to disciplinary action for “just cause” by the Club, Chief Baseball Officer or the Commissioner for any conduct that is “materially detrimental or materially prejudicial to the best interests of Baseball.”⁶³ The disciplinary action ranges from placing a player on administrative leave, suspension for a number of games or indefinite suspension from the league.⁶⁴ Under the MLB’s grievance procedure, after a disciplinary action is implemented, the player then has the opportunity for arbitral review.⁶⁵

Until 2015, the MLB had no policies in place and took no action whatsoever regarding domestic violence perpetrated by players. Before 2015, the MLB has had the opportunity to address issues with domestic violence, either through the Commissioner’s power or the collective bargaining process. However, the MLB consistently deferred to the justice system for any punishment and refused to issue any suspensions for almost 100 years, unless the teams themselves issued punishment first.⁶⁶ Of the four sports organizations, the MLB has the second-lowest arrest rate and fewer instances of violent crime.⁶⁷ However, the MLB has encountered several notable domestic violence incidents with extremely popular players and has handled these much more leniently than other off-the-field misconduct. Popular players in the 1990s, such as Barry Bonds, Daryl Strawberry, Jose Canseco, Albert Bell and Dante Bichette, were all accused of domestic violence (some on multiple occasions) and not a single one of them received punishment from their respective Clubs or the League.⁶⁸

It seems likely that the MLB’s decision (like other leagues’ decisions) to negotiate a policy with the players’ union was incited by the harsh public criticism of the NFL’s handling of Ray Rice’s videotaped assault of his fiancé.⁶⁹ Several years prior to the Ray Rice incident, the MLB failed to take action to suspend or discipline a player that was caught on video

⁶³ MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT 51-52 (2017), available at <http://www.mlbplayers.com/pdf9/5450407.pdf>.

⁶⁴ *Id.* at 54.

⁶⁵ *Id.* at 41-51.

⁶⁶ See Withers, *supra* note 62, at 158.

⁶⁷ See *id.*

⁶⁸ Mike Bates, *MLB’s Record on Domestic Violence Worse than NFL’s*, SB NATION (July 28, 2014), http://www.sbnation.com/mlb/2014/7/28/5936835/ray-rice-chuck-knoblach-minnesota-twins-mlb-domestic-abuse-violence?_ga=1.198265449.796088445.1470325899.

⁶⁹ See TMZ Sports, *Ray Rice Knocked Out Fiancée – Full Video*, YOUTUBE (Sept. 8, 2014), <https://www.youtube.com/watch?v=VbwTMJroTbI>.

assaulting his girlfriend.⁷⁰ In August 2006, Brian Giles, an outfielder for the San Diego Padres, knocked his girlfriend to the floor at a bar, and the incident was caught on surveillance cameras and witnessed by other bar patrons.⁷¹ Giles pled no contest to a misdemeanor battery charge, but did not face a suspension or any type of fine from the league—he received no punishment at all besides an anger management class.⁷² The victim did not release the video until two years later, allowing Giles to allude news coverage when the incident occurred.⁷³ Subsequent to the incident with Giles, Brett Meyers, a pitcher for the Philadelphia Phillies, was arrested and arraigned on charges for dragging his wife by the hair and slapping her across the face in front of various witnesses in Boston, MA outside of Fenway Park in 2006.⁷⁴ Meyers pitched the next day against the Boston Red Sox, and received boos from the stands from fans. Meyers’ wife later chose not to proceed with charges, and Meyers continued to play without a single fine or suspension from the MLB or the Phillies.⁷⁵

The MLB remained silent on the issue of domestic violence for another ten years until it implemented a mandatory domestic violence training during spring training in 2015.⁷⁶ The MLB contracted with *Futures Without Violence* to conduct the interactive sessions during spring training each year.⁷⁷ At the time, the players’ union and the MLB were negotiating a full policy to be placed in the CBA and the Commissioner wanted to implement a program to address the issues in the interim. On August 21, 2015, MLB and the MLB Players’ Association adopted a “Joint Domestic Violence,

⁷⁰ Brent Schrontenboer, *Before Ray Rice, MLB Had Its Own Player Video Incident*, USA TODAY SPORTS (Sept. 12, 2014), <https://www.usatoday.com/story/sports/nfl/2014/09/12/brian-giles-ray-rice-san-diego-padres-domestic-abuse-video/15500861/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Lee Jenkins, *Start Yields Boos for Myers and Criticism for Phillies*, N.Y. TIMES (June 25, 2006), <http://www.nytimes.com/2006/06/25/sports/baseball/25myers.html>.

⁷⁵ Associated Press, *After Wife’s Request, Charge Dropped vs. Philly’s Myers*, ESPN (Oct. 5, 2006), <http://www.espn.com/mlb/news/story?id=2614037>.

⁷⁶ Associated Press, *MLB Players to Attend Mandatory Domestic Violence Education Program*, SI WIRE (Feb. 25, 2016), <https://www.si.com/mlb/2015/02/25/mlb-domestic-violence-education-program>.

⁷⁷ David Lennon, *MLB Learns from NFL’s Mistake Implementing Domestic Violence Education Program*, NEWSDAY (updated Feb. 28, 2015), <https://www.newsday.com/sports/columnists/david-lennon/mlb-learns-from-nfl-s-mistake-implementing-domestic-violence-education-program-1.9990592>.

Sexual Assault and Child Abuse Policy.”⁷⁸ The new policy created a Joint Policy Board of seven individuals, including three experts in the field of domestic violence, two members from the Players’ Association and two members from the Commissioner’s Office.⁷⁹ The Board is charged with, where necessary, creating a treatment plan for players. The plan requires, if the experts so conclude, that the player “submit to psychological evaluations, attend counseling sessions, comply with court orders (including child support orders), relocate from a home shared with his partner, limit his interactions with his partner, relinquish all weapons, and other reasonable directives designed to promote the safety of the player’s partner, children or victims.”⁸⁰

While treatment is within the purview of the Joint Board, discipline is administered solely by the Commissioner’s Office. When a player is accused of committing domestic violence, the Commissioner may place the player on administrative leave for up to seven days. This paid leave becomes unpaid leave if the Commissioner finds that the policy has been violated.⁸¹ The Commissioner’s investigation is independent of the filing or outcome of criminal charges, though the Commissioner may wait until legal proceedings have concluded before reaching a determination. The policy gives the Commissioner broad authority regarding the scope of disciplinary actions: “There is no minimum or maximum penalty prescribed under the policy, but rather the Commissioner can issue the discipline he believes is appropriate in light of the severity of the conduct.”⁸² The MLB created a player-friendly, confidential arbitration process that includes the opportunity for discovery and appeal options. The policy is treatment and intervention oriented, focusing on the individual player and individual context of each situation.

Shortly after the implementation of the new policy, Colorado Rockies shortstop Jose Reyes was arrested on October 31, 2015 and charged with abuse of a ‘family and/or household member’ in Maui, Hawaii for a physical altercation with his wife, Katherine Ramirez.⁸³ Ms. Ramirez told the police that Reyes grabbed her by the throat and shoved her into a sliding

⁷⁸ Paul Hagen, *MLB, MLBPA Reveal Domestic Violence Policy*, MLB.COM (Aug. 21, 2015), <http://m.mlb.com/news/article/144508842/mlb-mlbpa-agree-on-domestic-violence-policy>.

⁷⁹ MLB Joint Policy, Section A (“Treatment and Intervention”).

⁸⁰ *Id.*

⁸¹ *Id.* at Section C (“Investigations”).

⁸² *Id.* at Section C (“Discipline”).

⁸³ Jade Walker, *Rockies Shortstop Jose Reyes Arrested for Domestic Violence*, HUFF. POST (Nov. 10, 2015, 1:33 AM), https://www.huffingtonpost.com/entry/jose-reyes-arrest-domestic-violence_us_56418ac1e4b0307f2caecfd3.

glass door before security called the police, prior to which she sustained injuries to her side, neck and wrist and went to the hospital.⁸⁴ Criminal charges were filed, but dismissed, when Ms. Ramirez, did not support the prosecution. After the MLB conducted their investigation, the Commissioner, Rob Manfred, suspended Reyes for fifty-one games and he was required to contribute one-hundred thousand dollars to a charity focused on domestic violence.⁸⁵ This was the second longest of the three punishments the MLB had given out under the new domestic violence policy, and resulted in a nearly seven-million dollar loss to Reyes from his salary.⁸⁶ Reyes made a public apology to his wife, family, team, and fans and he was subsequently traded from the Rockies to the New York Mets.

On the same October weekend that Reyes assaulted his wife, Aroldis Chapman, then the closing pitcher for the Yankees, was accused by his girlfriend of pushing her, putting his hands around her neck and choking her.⁸⁷ At some point, while alone in his garage, Chapman fired eight bullets with a handgun, seven of which went into a concrete wall inside his garage and the other went through a window into an open field.⁸⁸ Although Chapman was arrested, prosecutors did not file criminal charges, citing insufficient evidence and conflicting accounts of what occurred.⁸⁹ The Commissioner suspended Chapman for thirty games and Chapman agreed to the punishment without filing any subsequent appeals, although he lost one million, seven hundred thousand dollars in salary.⁹⁰ When this decision was announced, Chapman denied hurting his girlfriend but admitted firing a gun. He apologized for firing the gun, calling this conduct “bad

⁸⁴ *Id.*

⁸⁵ SI Wire, *Jose Reyes Suspended Through May 31 After Domestic Violence Incident*, SPORTS ILLUSTRATED (Apr. 12, 2016), <https://www.si.com/mlb/2016/05/13/colorado-rockies-jose-reyes-suspended-domestic-violence>.

⁸⁶ Mike Vorkunov, *As Jose Reyes Joins Mets, Domestic Violence Experts Hope Nuance Isn't Absent*, USA TODAY SPORTS (July 5, 2016), <https://www.usatoday.com/story/sports/mlb/2016/07/05/jose-reyes-joins-mets-domestic-violence-advocates-ponder-punishment/86698770/>.

⁸⁷ Tim Brown & Jeff Passan, *Police Report: Aroldis Chapman Allegedly Fired Gunshots, 'Choked' Girlfriend in Domestic Incident*, YAHOO SPORTS (Dec. 7, 2015, 7:36 PM), <https://sports.yahoo.com/news/aroldis-chapman-s-girlfriend-alleged-he--choked--her--according-to-police-report-023629095.html>.

⁸⁸ *Id.*

⁸⁹ *Prosecutors Decline to Charge Aroldis Chapman*, ESPN (Jan. 21, 2016), http://www.espn.com/mlb/story/_/id/14620135/aroldis-chapman-not-face-charges-domestic-dispute.

⁹⁰ Paul Hagen & Bryan Hoch, *Chapman Gets 30-game Suspension from MLB*, MLB NEWS (Mar. 1, 2016), <http://m.mlb.com/news/article/165860226/yankees-aroldis-chapman-suspended-30-games/>.

judgment.”⁹¹ After the suspension, Chapman was traded to the Chicago Cubs, which stirred up some controversy. A Cubs fan and journalist, Caitlin Swieca, decided that she would donate ten dollars for every Chapman save to a domestic-violence charity in Chicago called the Domestic Violence Legal Clinic.⁹² Ms. Swieca announced her donation campaign on Twitter using #pitchin4DV in July 2016 and by November 2016, after only five months, the donations totaled thirty-five thousand dollars for the Domestic Violence Legal Clinic.⁹³ After the Cubs won the World Series in 2016, Chapman re-signed with the New York Yankees. During the 2017 season, the Yankees listed Chapman as “Mr. October” in the official team calendar, which is also Domestic Violence Awareness month in the United States.⁹⁴

On April 13, 2016, Hector Olivera, then an Atlanta Brave, was arrested for assaulting his girlfriend in a hotel. She had visible bruises and was taken to the hospital and released later in the day.⁹⁵ The Commissioner suspended Olivera for eighty-two games, he was released by the Atlanta Braves and was subsequently sentenced in the criminal proceedings to ninety days in prison for misdemeanor domestic assault; however, he was released after ten days.⁹⁶ After serving his suspension Olivera was traded to the San

⁹¹ Wallace Matthews, *Aroldis Chapman Apologizes for 'Bad Judgment' in Using Gun*, ESPN (Mar. 2, 2016), http://www.espn.com/mlb/story/_/id/14884190/aroldis-chapman-accepts-suspension-apologizes-only-using-gun.

⁹² Billy Witz, *Cubs Fans Root for Aroldis Chapman While Deploing His History*, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/sports/baseball/chicago-cubs-fans-aroldis-chapman-domestic-violence.html>.

⁹³ Caitlin Swieca, *Aroldis Chapman, Morality in Sports, and the Final Out of the World Series*, BASEBALL PROSPECTUS (Nov. 9, 2016), <http://wrigleyville.locals.baseballprospectus.com/2016/11/09/aroldis-chapman-morality-in-sports-and-the-final-out-of-the-world-series/>.

⁹⁴ Andy Clayton, *Tone-Deaf Yankees Make Chapman Mr. October in Giveaway Calendar*, N.Y. DAILY NEWS (Apr. 16, 2017), <http://www.nydailynews.com/sports/baseball/yankees/tone-deaf-yankees-chapman-mr-october-giveaway-calendar-article-1.3059134>.

⁹⁵ A.J. Perez, *Braves' Hector Olivera Arrested for Assault, Placed on Leave by MLB*, USA TODAY SPORTS (Apr. 13, 2016), <http://www.usatoday.com/story/sports/mlb/braves/2016/04/13/hector-olivera-arrested-assault/82979822/>.

⁹⁶ Mike Axisa, *Hector Olivera Sentenced to 90 days in Prison for Domestic Assault*, CBS SPORTS (Sep. 8, 2016), <https://www.cbssports.com/mlb/news/hector-olivera-sentenced-to-90-days-in-prison-for-domestic-assault/>.

Diego Padres on July 30, 2016, and released by the team on August 10, 2016.⁹⁷

After Olivera's suspension, the MLB suspended two other players in 2017 for violation of the domestic violence policy. The MLB Commissioner concluded that Jeurys Familia, a relief pitcher for the Mets, did not physically assault his wife, but concluded his overall conduct was "inappropriate, violated the policy and warranted discipline."⁹⁸ Familia was suspended for fifteen games, lost roughly seven-hundred thousand dollars in pay, and was required to speak with other players about domestic violence issues and donate his time and money to domestic violence organizations.⁹⁹ Derek Norris, a catcher for the Tampa Bay Rays, was suspended September 1, 2017 for the rest of the 2017 season based on an Instagram post from his ex-fiancée that Norris verbally and physically abused her.¹⁰⁰ Norris forfeited one-hundred thousand dollars in pay, which he was required to donate to a domestic violence organization. In December 2017 Norris signed a minor-league contract with the Detroit Tigers, in which the General Manager justified signing Norris by stating that "he wasn't charged...the guy served his penalty... he should be able to sign, that's the way the process works."¹⁰¹

B. NFL

The NFL Commissioners historically have been given and exercised their disciplinary power under the NFL's Constitution and Bylaws, along with the CBA with the National Football League Players Association

⁹⁷ David Hill, *Dodgers Bust Hector Olivera to Sign with Sugar Land Skeeters*, FOX SPORTS (Jun. 30, 2017), <http://www.foxsports.com/mlb/story/dodgers-bust-hector-olivera-to-sign-with-sugar-land-skeeters-060117>; see also MLB, *Hector Olivia Player Stats*, MLB (accessed on March 16, 2017), <http://m.mlb.com/player/493343/hector-olivera>.

⁹⁸ SI Wire, *Jeurys Familia Suspended 15 Games for Violating MLB Domestic Violence Policy*, SPORTS ILLUSTRATED (Mar. 29, 2017), <https://www.si.com/mlb/2017/03/29/new-york-mets-jeurys-familia-suspended>.

⁹⁹ *Id.*

¹⁰⁰ Billy Witz, *Catcher Derek Norris Suspended for Season Under Domestic Violence Policy*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/sports/baseball/catcher-derek-norris-suspended-for-season-under-domestic-violence-policy.html>.

¹⁰¹ Tony Paul, *Tigers GM Defends Signing Derek Norris*, DETROIT NEWS (Dec. 6, 2017), <http://www.detroitnews.com/story/sports/mlb/tigers/2017/12/06/tigers-gm-defends-signing-derek-norris/108372530/>.

("NFLPA").¹⁰² Pursuant to all of these documents, the Commissioner has the authorization, and power, to take disciplinary action if a player's conduct is found to be "detrimental to the best interests of the League or professional football."¹⁰³ The Commissioner also has the power to establish policy and procedure in respect to the enforcement of the Constitution and Bylaws.¹⁰⁴

Prior to 1997, the National Football League was reluctant to discipline NFL players involved in criminal acts and other off-the-field problems aside from violations of the drug policy. Between January 1989 and November 1994, fifty-six current and former NFL players were reported for violent behavior towards women, with not a single incident of discipline from an NFL Commissioner.¹⁰⁵ In fact, in the early 1990's the only criminal charge that would bar an athlete from playing in the NFL was murder.¹⁰⁶

Until the O.J. Simpson murder trial in 1995, the conversation surrounding domestic violence, specifically in the NFL, was almost nonexistent. In July 1995, during the middle of Simpson's year-long trial, Sports Illustrated published "Sport's Dirty Secret, When Scarcely a Week Passes Without an Athlete Being Accused of Domestic Violence, It Is No Longer Possible to Look the Other Way."¹⁰⁷ The article exposed some of the most celebrated athletes arrested or convicted of domestic violence, and the ways in which the continued glorification of athletes has allowed society to turn a blind eye. The same week, one of the NFL's top quarterbacks, Warren Moon, was arrested and charged for misdemeanor assault against his wife, Felicia

¹⁰² Janine Young Kim & Matthew J. Parlow, *Sports and Criminal Law: Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 591 (2009).

¹⁰³ Nat'l Football League, Constitution and Bylaws of the National Football League, 28-29 (rev. 2006) [hereinafter NFL Const.].

¹⁰⁴ *Id.* at 29.

¹⁰⁵ See Withers, *supra* note 2.

¹⁰⁶ JEFF BENEDICT & DON YAEGER, PROS AND CONS: THE CRIMINALS WHO PLAY IN THE NFL 40 (1998) ("[T]he authors asked player agent Leigh Steinberg if there were any criminal offenses that would altogether bar a player from playing in the NFL. 'Murder,' he replied . . ."); see also Robert Ambrose, Note, *The NFL Makes it Rain: Through Strict Enforcement of Its Conduct Policy, The NFL Protects Its Integrity, Wealth & Popularity*, 34 WM. MITCHELL L. REV. 1069, 1071 (2008).

¹⁰⁷ William Nack and Lester Munson, *Sports Dirty Secret When Scarcely A Week Passes Without An Athlete Being Accused of Domestic Violence, It is no Longer Possible to Look the Other Way*, SPORTS ILLUSTRATED (July 31, 1995), <https://www.si.com/vault/1995/07/31/204992/sports-dirty-secret-when-scarcely-a-week-passes-without-an-athlete-being-accused-of-domestic-violence-it-is-no-longer-possible-to-look-the-other-way#>.

Moon.¹⁰⁸ Warren Moon's domestic violence charge resulted from a call by his eight-year-old son to 911 asking for help because his parents were fighting.¹⁰⁹ When the police arrived, Felicia Moon claimed that she was at fault for the altercation that left scratches and bruises on her face, neck, back and legs, and insisted that she did not want to file a complaint against her husband; however, Warren was still charged but later acquitted.¹¹⁰ Throughout the controversy and adjudication of Moon's case, the NFL and the Minnesota Vikings were silent, and Moon was never suspended nor mandated to counseling after his acquittal.¹¹¹

In 1997, after increasing public concern about player conduct and specifically violence against women, the NFL Commissioner Paul Tagliabue adopted a "Violent Crime Policy" that covered any offense, misdemeanor or felony, involving a crime of violence, including hate crimes and domestic abuse.¹¹² This was the first "crime policy" of its kind in any arena of professional sports that specifically detailed offenses, such as domestic violence, that would be punishable if there was a conviction. The 1997 Violent Crime Policy gave the Commissioner a full array of disciplinary powers ranging from fines to indefinite suspension from the league. However, these punishments were only prescribed if there was a conviction or its equivalent, rather than based on arrest, allegations, or investigation by the police without formal charges.¹¹³ Without a requirement for immediate action by the Commissioner, players could continue to play and be paid until a criminal proceeding was fully adjudicated.

In 2000, after collective demands from NFL club owners, Paul Tagliabue revised the Violent Crime Policy to encompass other non-violent crimes and off-the-field conduct.¹¹⁴ After the revised 2000 Personal Conduct Policy went into effect, there were around forty arrests made between 2000 and 2006 for incidents involving domestic violence.¹¹⁵ Of the forty arrested between 2000 and 2006, around eleven pled guilty or no contest, around thirteen were placed in a diversion program or anger management, and the

¹⁰⁸ Jerri Kay-Phillips, *Unnecessary Roughness: The NFL's History of Domestic Violence and the Need for Immediate Change*, 5 BERKELEY J. ENT. & SPORTS L. 65, 71 (2016).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 71-72.

¹¹¹ *Id.*

¹¹² John Gibeaut, *When Pros Turn Cons*, ABA J., July 2000, at 38-42, 102-03, 106-09; see also NFL Violent Crime Policy, 2000.

¹¹³ *Id.* at 108.

¹¹⁴ Withers, *supra* at note 2, at 403.

¹¹⁵ NFL Arrest Database, USA TODAY, <https://www.usatoday.com/sports/nfl/arrests/all/all/all/> (last visited Mar. 16, 2018).

remaining players' charges were dropped due of lack of cooperation by the victim or lack of evidence, with only one player being cut from their team.¹¹⁶ Out of the forty players arrested for domestic violence incidents from 2000-2006, the NFL fined approximately three players, and suspended at least three players for one to three games.¹¹⁷

In 2006, Roger Goodell was elected as the new NFL Commissioner and, by March 2007, he introduced an updated Personal Conduct Policy that strengthened the existing conduct guidelines.¹¹⁸ Several major changes to the language required that those arrested for or charged with prohibited conduct undergo "an immediate, mandatory clinical evaluation and, if directed, appropriate counseling," and the policy would not only apply to players, but all League and team employees, and prospective players and employees.¹¹⁹ The new Personal Conduct Policy did not apply exclusively to players, nor was it collectively bargained for with the National Football League Players Association (NFLPA).¹²⁰ This gave the NFL Commissioner an unprecedented expansion of power under the NFL by-laws and NFL Constitution to play 'the judge and jury' in handling conduct violations, because it was not collectively bargained for with the players.¹²¹

Yet, the NFL continued to ignore domestic violence. From 2006 to 2014, law enforcement authorities pursued at least fifty domestic violence cases against NFL players, including one for murder and at least five for assaulting or choking pregnant women.¹²² Of these fifty cases, USA Today

¹¹⁶ *Id.*

¹¹⁷ Withers, *supra* note 62, at 174.

¹¹⁸ Brant Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 AM. U. J. GENDER SOC. POL'Y & L. 741, 753 (2012).

¹¹⁹ NFL PERSONAL CONDUCT POLICY (2007), <http://www.espn.com/nfl/news/story?id=2798214>.

¹²⁰ National Football League, *NFL Owners Endorse New Conduct Policy*, NFL (Dec. 10, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy> (Of note, the NFLPA was consulted and in support of the policy, but it was not collectively bargained for).

¹²¹ Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, The NFL Protects Its Integrity, Wealth & Popularity*, 34 WM. MITCHELL L. REV. 1069, 1071 (2008).

¹²² Brent Schrotenboer, *History of Leniency: NFL Domestic Cases under Goodell*, USA TODAY SPORTS (Oct. 1, 2014), <https://www.usatoday.com/story/sports/nfl/2014/10/01/nfl-domestic-abuse-history-under-roger-goodell/16566615/>.

Sports uncovered resolutions to forty-three:¹²³ eighteen players were able to avoid charges or prosecution after completion of rehabilitative programs or probation; nine players pled no contest, guilty, or were convicted by a judge; twelve players' charges were dropped, usually because of lack of cooperation by the victim; three players were acquitted; and one player fatally shot his girlfriend and then himself.¹²⁴ Of the players that technically violated the Personal Conduct Policy, a majority were suspended by the Commissioner for no more than two games, had no disruption in getting paid, and were able to finish out the rest of the NFL season.¹²⁵ Sports commentator Mike Bates pointed out in response to publicity criticizing NFL's failure to address its players' violent conduct: "At no time in the last quarter of a century has there been a commissioner-level sanctioning of any player for domestic violence, and most teams haven't bothered either."¹²⁶

The NFL's response to domestic violence changed in September 2014, when TMZ¹²⁷ released a video that went viral. It showed Baltimore Ravens' player, Ray Rice, violently striking his fiancé Janay Rice unconscious and dragging her body out of an Atlantic City casino elevator.¹²⁸ Within hours of the video's release, the Ravens cut Rice and the NFL suspended him indefinitely.¹²⁹ This stark change in both a team's and the NFL's response to domestic violence is chalked up by many as a frantic and desperate cover up of their knowledge of the incident months prior to the release of the video. Not only was Rice cut and suspended, but the NFL immediately began drafting a new policy to further broaden its Personal Conduct Policy to encompass minimum suspensions in cases of domestic violence regardless of criminal conviction.

NFL Commissioner Roger Goodell created the December 2014 Personal Conduct Policy pursuant to the authority given to him under the NFL Constitution and Bylaws to address and sanction conduct detrimental to the

¹²³ Unfortunately, as noted in footnote 3, we found that it was extremely difficult to find a complete and accurate database compiling arrests and prosecutions, aside from the USA Today Arrest Database. This database is presumed to be the largest compilation available of NFL arrests to date, but there is not a publicly available bank of this information otherwise found in any of our research. The USA Today Arrest Database also lacks complete information on the disposition of many of the arrests accounted for.

¹²⁴ *NFL Arrest Database*, *supra* note 115.

¹²⁵ *Id.*

¹²⁶ Bates, *supra* note 68.

¹²⁷ TMZ is an online magazine specializing in celebrity gossip. See <http://www.tMZ.com/>.

¹²⁸ Jane McManus, *If Not the Player, Ray Rice Asks You to Forgive the Man*, ESPN-W (Apr. 28, 2017), <http://www.espn.com/espnw/culture/feature/article/19248874/if-not-player-ray-rice-asks-forgive-man>.

¹²⁹ *Id.*

league and professional football.¹³⁰ The NFL consulted with experts inside and outside of the league, including lawyers, domestic violence and sexual assault experts and advocates, law enforcement officials, academic experts and business leaders to ensure that this new policy would significantly build upon the previous policies.¹³¹ This policy was not however collectively bargained for with the NFLPA.

The new policy included making threats of violence (not just actual violence) and acts of stalking, harassment and even intimidation. Of key importance was the addition that

[V]iolations that involve assault, battery, domestic violence, dating violence, child abuse and other forms of family violence, or sexual assault involving physical force or committed against someone incapable of giving consent, a first offense will subject the offender to a baseline suspension **without pay** of **six** games, with consideration given to any aggravating or mitigating factors.¹³²

In the eyes of domestic violence advocates “the NFL ha[d] taken some good first steps to build a meaningful strategy that deals effectively with violence against women.”¹³³ Nonetheless, the NFL has continued to face public criticism about investigating accusations and handing down inconsistent punishments.¹³⁴

In May 2015, Josh Brown, a former kicker for the New York Giants, was arrested for the fourth-degree assault of his wife, Molly Brown.¹³⁵ Not only did Josh Brown admit to a pattern of physical, verbal and emotional abuse of his then wife, but further documentation indicated that Brown had

¹³⁰ NFL PERSONAL CONDUCT POLICY (Dec. 2014),

<http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>

¹³¹ National Football League, *NFL Owners Endorse New Policy*, NFL (Dec. 10, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>.

¹³² NFL PERSONAL CONDUCT POLICY, *supra* note 130.

¹³³ Mark Maske, *NFL Toughens Punishment Guidelines for Domestic Violence*, WASH. POST (Aug. 28, 2014), https://www.washingtonpost.com/news/sports/wp/2014/08/28/nfl-toughens-punishment-guidelines-for-domestic-violence/?utm_term=.9771677b1b17.

¹³⁴ Mary Pilon, *Inside the NFL's Domestic Violence Punishment Problem*, BLEACHER REPORT (Jan. 31, 2017), <http://mag.bleacherreport.com/nfl-domestic-violence-policy-suspensions/>.

¹³⁵ *NFL Reopening Josh Brown Probe; He Won't Travel to London*, NFL NEWS (Oct. 20, 2016), <http://www.nfl.com/news/story/0ap3000000724307/article/police-documents-say-josh-brown-admitted-to-domestic-violence>.

violated a restraining order after his arrest.¹³⁶ Initially, the NFL did not follow the 2014 Personal Conduct Policy, but rather only placed Brown on a one-game suspension in August 2016 after a ten month investigation by the NFL.¹³⁷ During the investigation, the Giants re-signed Brown for a two-year four million dollar contract.¹³⁸ In the initial investigation, the NFL blamed the King County, Washington Sheriff's office with failing to provide any documents from the investigation and further blamed Molly Brown for failing to cooperate with the league in being non-responsive to investigator's inquiries.¹³⁹ In October 2016 once the King County (WA) Sheriff's Office closed their investigation and the NFL obtained documents that were previously unavailable, they re-opened the league investigation.¹⁴⁰ The documents contained information indicating documented assaults nearly two-dozen times, including at least once while Molly Brown was pregnant, e-mails and journal entries of Brown admitting to the abuse, and various 911 calls.¹⁴¹

After the NFL received the documents and re-opened the investigation, it put Brown on the Reserve/Commissioner Exempt List and then the New York Giants released him.¹⁴² After the second investigation, the NFL suspended Brown for six-games, which he accepted, for violating the Personal Conduct Policy.¹⁴³ But because Brown had been released, this suspension would only be served if he were re-signed to another team. The NFL received a tremendous amount of criticism for the initial one-game suspension handed down to Brown, as the incident and allegations were a clear violation of the domestic violence section of the Personal Conduct

¹³⁶ *Id.*

¹³⁷ Press Release, National Football League, *Josh Brown Suspended Six Games for Violation of NFL's Personal Conduct Policy* (Sept. 8, 2017),

<https://nflcommunications.com/Pages/JOSH-BROWN-SUSPENDED-SIX-GAMES-FOR-VIOLATION-OF-NFL%E2%80%99S-PERSONAL-CONDUCT-POLICY.aspx>

¹³⁸ Adam Schefter, *NFL Suspends Former Giants Kicker Josh Brown for Six More Games*, ESPN (Sept. 8, 2017), http://www.espn.com/nfl/story/_/id/20629879/nfl-suspends-former-new-york-giants-kicker-josh-brown-six-more-games.

¹³⁹ *NFL Reopening Josh Brown Probe; He Won't Travel to London*, *supra* note 135.

¹⁴⁰ *Id.*

¹⁴¹ Juliet Macur, *N.F.L. Shows It Doesn't Really Care About Domestic Violence*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/sports/football/nfl-domestic-violence-josh-brown-new-york-giants.html?mcubz=3>.

¹⁴² Around the NFL Staff, *Kicker Josh Brown Released by New York Giants*, NFL NEWS (Oct. 25, 2016), <http://www.nfl.com/news/story/0ap3000000727860/article/kicker-josh-brown-released-by-new-york-giants>.

¹⁴³ *NFL Reopening Josh Brown Probe; He Won't Travel to London*, *supra* note 135; Press Release, National Football League, *supra* note 137.

Policy.¹⁴⁴ This was the first opportunity the NFL had to demonstrate a serious commitment to implementing its policy. Instead, it blamed law enforcement and the victim.¹⁴⁵ Unlike many of the other players accused of domestic violence, Josh Brown admitted to the abuse, and well before the re-opening of the investigation; nonetheless the NFL took nearly two years to implement a six-game suspension.¹⁴⁶

After Brown, the NFL got a chance to get implementation right. Ezekiel Elliott, a 2016 fourth-round draft pick running back for the Dallas Cowboys, was accused by his ex-girlfriend, Tiffany Thomson, of five separate allegations of domestic violence between July 17 and July 22, 2016, right after Elliott was drafted by the Dallas Cowboys.¹⁴⁷ Ms. Thompson's allegations ranged from Elliott grabbing her by the arm, throwing her against a door, choking, and smacking her.¹⁴⁸ By September 6, 2016, the Columbus District Attorney's office conducted a full investigation of the alleged incidents, including interviews of various witnesses, concluding that "due to conflicting and inconsistent information" no charges would be filed against Elliott.¹⁴⁹

The NFL subsequently confirmed that it would continue its investigation into whether there was a violation of the personal conduct policy because "it is simply not enough to avoid being found guilty of a crime."¹⁵⁰ While it investigated, Elliott was caught on camera on March 11, 2017 pulling

¹⁴⁴ Steve Almasy, *One Game? NFL Ban for Alleged Violence on Wife Draws Renewed Rage*, CNN (Oct. 25, 2016), <http://www.cnn.com/2016/10/21/us/nfl-josh-brown-suspension/index.html>.

¹⁴⁵ Around the NFL Staff, *NFL Details Probe Behind Josh Brown's Suspension*, NFL (Aug. 19, 2016), <http://www.nfl.com/news/story/0ap3000000687596/article/nfl-details-probe-behind-josh-browns-suspension>.

¹⁴⁶ Tyler Conway, *Josh Brown Admitted to Physical, Emotional Abuse of Wife, Per Police Documents*, BLEACHER REPORT (Oct. 2016), <http://bleacherreport.com/articles/2670708-josh-brown-admits-to-physically-emotionally-abusing-wife-per-police-documents>.

¹⁴⁷ Sarah Hardy, *A Comprehensive Timeline of Ezekiel Elliott's Domestic Violence Case*, SB NATION (Nov. 30, 2017), <https://www.sbnation.com/2017/8/29/16151642/ezekiel-elliott-timeline-domestic-violence-police-report-nfl-suspension-appeal>.

¹⁴⁸ *Id.*

¹⁴⁹ Press Release, Richard C. Pfeiffer, Jr., City Attorney, City Attorney's Office Columbus Ohio (Sept. 6, 2016), <http://www.columbuscityattorney.org/pdf/press/EZEKIEL%20ELLIOTT%20PRESS%20RELEASE%209-6-16.pdf>.

¹⁵⁰ NFL PERSONAL CONDUCT POLICY (2016), <http://static.nfl.com/static/content/public/photo/2017/08/11/0ap3000000828506.pdf>.

down a woman's top and exposing her breast in public.¹⁵¹ Although charges were not filed, the NFL reviewed the incident and spoke to the woman but ultimately concluded that his behavior was "inappropriate and disturbing, and reflected a lack of respect for women," but did not discipline him for the incident.¹⁵² The year-long investigation of the domestic violence was in the spotlight nearly the entire time. Much of the media focused on the credibility of Elliott's accuser, and the NFLPA engaged in various forms of victim shaming.¹⁵³ Throughout the investigation, there were documents leaked to the public or obtained through public record searches including police reports, witness statements, text messages and photos of the alleged injuries that also drew media attention regarding Ms. Thompson's credibility.¹⁵⁴

On August 11, 2017, the NFL determined that there was substantial and persuasive evidence that Elliott physically abused his accuser and the Commissioner, Roger Goodell, handed down a six-game suspension for the 2017 season for the violation of the Personal Conduct Policy.¹⁵⁵ The NFLPA immediately appealed the decision to the NFL arbiter, and subsequently filed a Petition in U.S. District court arguing that he did not receive a fundamentally fair arbitration hearing, and that it was a "League-orchestrated conspiracy to withhold critical information," such that Elliott was not even able to face his accuser in order to cross-examine her credibility.¹⁵⁶ Ezekiel Elliott's case then went through an unprecedented series of multijurisdictional appeals, emergency stays, and injunctions during the span of four weeks that went up to both the 5th Circuit and then ultimately ended in the 2nd Circuit upholding his suspension.¹⁵⁷ During

¹⁵¹ Jeanna Thomas, *Ezekiel Elliott Pulled Down Woman's Top During a St. Patrick's Day Parade*, SB NATION (Mar. 13, 2017), <https://www.sbnation.com/2017/3/13/14911080/ezekiel-elliott-st-patricks-day-parade-cowboys-dumb-bad-decision>.

¹⁵² *Id.*; see also Scott Davis, *The Cowboys Have Reportedly Grown 'Concerned' with Ezekiel Elliott's 'Lifestyle and Choices'*, BUS. INSIDER (Aug. 11, 2017), <http://www.businessinsider.com/cowboys-reportedly-concerned-ezekiel-elliott-life-choices-2017-8>.

¹⁵³ Darin Gantt, *NFL Accuses NFLPA of Shaming Ezekiel Elliott's Accuser*, NBC SPORTS (Aug. 16, 2017), <http://profootballtalk.nbcsports.com/2017/08/16/nfl-accuses-nflpa-of-shaming-ezekiel-elliotts-accuser/>.

¹⁵⁴ *Id.*

¹⁵⁵ Press Release, NFL Communications, *Ezekiel Elliott Suspended Without Pay for Six Games* (Nov. 15, 2017), <https://nflcommunications.com/Pages/EZEKIEL-ELLIOTT-SUSPENDED-WITHOUT-PAY-FOR-SIX-GAMES.aspx>.

¹⁵⁶ Petition to Vacate Arbitration Award, NFLPA v. NFL, No. 4:17-CV-00615, (E.D. Tex., 8/31/17).

¹⁵⁷ Hardy, *supra* note 147.

those four weeks, Elliott continued to play based on the complicated procedural posture of his case that changed day-by-day based on the court's rulings, appeals by both parties and oral arguments in front of the circuit courts.¹⁵⁸ Ultimately, on November 9, 2017, the 2nd Circuit denied Elliott's request for a preliminary injunction and reinstated the six-game suspension.¹⁵⁹ Elliott chose not to pursue any further appeal options and served his six game suspension, although he made clear in a statement from the NFLPA that "this is no way an admission of any wrongdoing."¹⁶⁰

Elliott's case created a serious rift in the relationship between the NFLPA and the NFL, specifically with the NFL Commissioner. The NFLPA issued a statement riddled with criticism of the NFL's investigation and disciplinary process:

[O]ur vigilant fight on behalf of Ezekiel once again exposed the NFL's disciplinary process as a sham and a lie... they brought in 'experts' and imposed a process with the stated goal of 'getting it right,' yet the management council refuses to step in and stop repeated manipulation of an already awful League-imposed system.¹⁶¹

Others share these criticisms. Commentators now criticize the NFL for swinging the pendulum too far in the other direction.¹⁶² For example, NFL commentator Judy Battista stated that "The NFL should do all it can to make sure it knew everything and had the most complete picture of the events it could piece together before rendering a judgment...too often in the past, we've been left to wonder why that wasn't the case."¹⁶³ Others such as Stephanie Stradley, a Houston attorney who writes about legal issues in football stated "Roger Goodell says that NFL players are held to a higher

¹⁵⁸ *Id.*

¹⁵⁹ Jeanna Thomas, *Ezekiel Elliott Suspension Back On Effective Immediately with 2nd Circuit's Latest Ruling*, SB NATION (Nov. 9, 2017), <https://www.sbnation.com/2017/11/9/16603064/ezekiel-elliott-6-game-suspension-domestic-violence-appeal>.

¹⁶⁰ Jeanna Thomas, *Ezekiel Elliott Drops his Appeal, Will Serve Full 6-game Suspension*, SB NATION (Nov. 15, 2017), <https://www.sbnation.com/2017/11/15/16505302/ezekiel-elliott-suspension-appeal-drop-nfl-roger-goodell>.

¹⁶¹ Press Release, NFLPA, *NFLPA Statement on NFL Disciplinary Process* (Nov. 16, 2017), <https://www.nflpa.com/news/ezekiel-elliott-disciplinary-process>.

¹⁶² Judy Battista, *Ezekiel Elliott Suspension suggests NFL Learned Critical Lesson*, NFL (Aug. 11, 2017), <http://www.nfl.com/news/story/0ap3000000828687/article/ezekiel-elliott-suspension-suggests-nfl-learned-critical-lesson> ("The league had in the past been inconsistent with its investigations and discipline which creates the impression this six-game ban is a bit harsh.").

¹⁶³ *Id.*

standard than [accused people who are not convicted of crimes are innocent], but his standard isn't by definition a standard... it is whatever Goodell says it is that day.”¹⁶⁴ Dom Consentino, a Deadspin reporter, criticized the NFL's handling of Elliott's case stating “several years ago, the NFL pledged to get it right with domestic violence. But this case, in some ways, parallels instead what happened with the league's investigation of Tom Brady: cooperate with us, or we'll screw you.”¹⁶⁵

C. NBA

The National Basketball Association's (NBA) approach was similar to the NFL's (pre-1990's) regarding lax player discipline for off the court criminal conduct and domestic violence. Like the NFL, the NBA created a Personal Conduct Policy in 1999 through union negotiations with the National Basketball Player Association (NBPA). It required that any player convicted of a violent felony would receive a minimum 10-game suspension, or the league could order the player into counseling if there is reasonable cause to believe the player engaged in any type of off the court violent conduct.¹⁶⁶ On average, the NBA season consists of eighty-two games, so a ten-game suspension only amounts to twelve percent of a player's season. Unlike the NFL, the NBA maintained its policy without major revision until the most recent CBA of January 2017.¹⁶⁷

In 2011 the NBPA updated the “Counseling for Violent Misconduct” section of the CBA,¹⁶⁸ but left untouched the “Unlawful Violence” section requiring a suspension only after a criminal conviction.¹⁶⁹ The update in 2011 provided that “if the NBA and the NBPA agree that there is reasonable cause to believe that a player has engaged in any type of off-court violent

¹⁶⁴ Stephanie Stradley, *Ezekiel Elliott and the NFL Domestic Violence Policy*, STRADLEY LAW FIRM, <http://www.stradleylaw.com/ezekiel-elliott-nfl-domestic-violence-policy/> (last visited Apr. 24, 2018).

¹⁶⁵ Dom Cosentino, *The NFL Seems to Have Punished Ezekiel Elliott for Not Cooperating with its Investigation*, DEADSPIN (Sept. 1, 2017), <https://deadspin.com/the-nfl-seems-to-have-punished-ezekiel-elliott-for-not-1798704936>.

¹⁶⁶ NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. VI §§ 4-5 (1999).

¹⁶⁷ National Basketball Players Association, *About & History*, NBPA.COM, <https://nbpa.com/about/> (last visited Apr. 24, 2018) (“Since 1999, the NBPA has negotiated three new CBA's, in 2005, 2011, and 2017.”).

¹⁶⁸ Larry Coon, *Breaking Down Changes in New CBA*, ESPN (Nov. 28, 2011), http://www.espn.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one (“There were no changes to the 1999 Unlawful Violence section of the CBA in the re-negotiated CBA in 2005.”).

¹⁶⁹ NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. VI § 7 (2011).

conduct . . . the player will be required to undergo a clinical evaluation by a neutral expert and if deemed necessary, appropriate counseling.”¹⁷⁰ In the CBA “violent conduct” is defined as:

any conduct involving the use or threat of physical violence, or the use of, or threat to use a deadly weapon, any conduct which could be categorized as a hate crime, sexual assault or any other sexual offense, acts of domestic violence, and any conduct involving dog fighting or animal cruelty.¹⁷¹

In addition, the 2011 CBA noted, “a Team shall not impose discipline on a player solely on the basis of the fact that the player has been arrested . . . unless the Team has an independent basis for doing so.”¹⁷²

Although the 2011 CBA indicated that NBA had the authority to investigate players who potentially engaged in off-the-court violent conduct, they continued to follow the NFL’s footsteps by turning a blind eye and simply allow the criminal justice system to address the conduct before taking any action. Prior to the institution of the 2011 expanded policy, the NBA suspended four players for violation of the policy: Glenn Robinson in 2002, Jason Richardson in 2003, Eddie Griffin in 2004 and Ron Artest in 2007.¹⁷³ As with the other professional sports organizations (NFL, MLB, NHL), the NBA was heavily criticized for its policies on domestic violence after the Ray Rice scandal.¹⁷⁴ Within a couple of weeks of the release of the Ray Rice video, Jeffery Taylor, a Charlotte Hornets forward, was arrested and charged with domestic assault, and assault and malicious destruction of property, for conduct toward his girlfriend.¹⁷⁵ After Taylor’s arrest, the Hornets banned him from all team-related activities while the NBA was continuing to conduct their investigation.¹⁷⁶ One month after the incident

¹⁷⁰ *Id.* at 82.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Withers, *supra* note 2, at 11.

¹⁷⁴ Howard Beck, *NBA Needs to Change Its Stance on Domestic Violence in Post-Ray Rice World*, BLEACHER REPORT (Sept. 26, 2014), <http://bleacherreport.com/articles/2211257-nba-needs-to-change-its-stance-on-domestic-violence-in-post-ray-rice-world>.

¹⁷⁵ Justin Hinkley, *Hornet’s Jeffery Taylor Charged with Domestic Assault*, USA TODAY SPORTS (Sept. 25, 2014), <https://www.usatoday.com/story/sports/nba/hornets/2014/09/25/jeffery-matthew-taylor-domestic-assault/16227257/>.

¹⁷⁶ Associated Press, *Jeff Taylor Pleads Guilty to Abuse*, ESPN (Oct. 24, 2014), http://www.espn.com/nba/story/_/id/11787131/jeff-taylor-charlotte-hornets-pleads-guilty-domestic-violence.

Taylor pled guilty to misdemeanor domestic violence assault and malicious destruction of hotel property, and was sentenced to eighteen months of probation and required to complete twenty-six weeks in a domestic violence intervention program.¹⁷⁷

But, in November 2014, after the NBA completed their independent investigation, NBA Commissioner Adam Silver suspended Taylor for twenty-four games.¹⁷⁸ Although the suspension was not in conformance with league standards, Silver indicated in a press release that the “suspension [was] necessary to protect the interests of the NBA and the public’s confidence in it... Mr. Taylor’s conduct violates applicable law and in my opinion, does not conform to standards of morality and is prejudicial and detrimental to the NBA.”¹⁷⁹ While the NBA bylaws provide the Commissioner with a broad scope to issue punishments, the NPBA believed that this suspension was “excessive,” “without precedent,” and “inconsistent with the CBA;” however, Taylor decided not to proceed with an appeal and accepted the suspension.¹⁸⁰ This twenty-four game suspension, occurring just after the media spotlight on NFL’s poor handling of the Ray Rice scandal, marked a turning point in the NBA’s approach to domestic violence.

Prior to Jeffery Taylor’s suspension, the most recent suspension for domestic violence was in 2007, over seven years earlier, to Sacramento Kings forward Ron Artest (now known as Metta World Peace).¹⁸¹ Artest was arrested for misdemeanor corporal injury to a spouse, battery, false imprisonment and dissuading a witness from reporting a crime as a result of a domestic violence incident with his wife and his three-year-old daughter at home at the time.¹⁸² Artest ultimately pled no contest to the charge of corporal injury to a spouse, and the remainder of the charges were

¹⁷⁷ *Jeff Taylor Suspended 24 Games*, ESPN (Nov. 20, 2014),

http://www.espn.com/nba/story/_/id/11904798/jeff-taylor-charlotte-hornets-suspended-total-24-games-pleading-guilty-domestic-violence-case.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Michael McCann, *Jeff Taylor’s Suspension for Domestic Violence Presents Compelling Debate*, SPORTS ILLUSTRATED (Nov. 21, 2014),

<https://www.si.com/nba/2014/11/21/jeff-taylor-domestic-violence-suspension-nba-adam-silver> (“Michele Roberts signaled reluctance to negotiating a new domestic violence policy before the next round of CBA discussions... the NBA appears reluctant as well. The league has already seen problems for the NFL in adopting a bright-line six-game suspension for domestic violence.”).

¹⁸¹ *Kings Suspend Artest After Domestic Violence Arrest*, ESPN (Mar. 6, 2007), <http://www.espn.com/nba/news/story?id=2788871>.

¹⁸² Associated Press, *Artest Sentenced to Community Service, Work Project*, ESPN (May 3, 2007), <http://www.espn.com/nba/news/story?id=2859498>.

dismissed pending his compliance with three-years of probation.¹⁸³ Artest was sentenced to a twenty-day work project with ten days suspended, a yearlong violence treatment program and a parenting class regarding the effects of domestic violence on young children.¹⁸⁴ During the pendency of his criminal case, Artest only sat out two games; the team did not suspend him, and the NBA only suspended him for seven games.¹⁸⁵ Of note, by 2013 the NBA and/or Artest's team suspended him on fourteen separate occasions for fighting or violent incidents with other players, and even fans, during games to which he received suspensions ranging from one to seventy-two games.¹⁸⁶

Within the span of ten years, between 2004 and 2014, the NBA only suspended four players for domestic violence.¹⁸⁷ As with the other professional sports organizations, in the NBA's fan base, the Ray Rice incident sparked public outcry for a stronger stance on domestic violence causing the NBA to re-evaluate its policies.¹⁸⁸ Although the incident with Jeffery Taylor in 2014 was the NBA's first attempt to handle these issues with teeth, a subsequent player arrest in 2016 for domestic violence resulted in the NBA's incorporation of a negotiated policy in the next round of collective bargaining. In May 2016, Darren Collison of the Sacramento Kings was arrested and charged with felony domestic violence after his wife called 911 for assault. She had visible injuries when the police arrived.¹⁸⁹ Collison pleaded guilty to misdemeanor domestic violence and was sentenced to twenty days in jail, community service and a yearlong program to deter domestic violence as part of a three-year informal probation sentence.¹⁹⁰ After the NBA conducted its own investigation, Collison was suspended for eight games; the NBA took into account the conduct, result,

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Chris Sheridan, *History of Metta World Peace Suspensions*, SHERIDAN HOOPS (Feb. 5, 2013), <http://www.sheridanhoops.com/2013/02/05/history-of-metta-world-peace-suspensions/>.

¹⁸⁶ *Id.*

¹⁸⁷ Phillips, *supra* note 108.

¹⁸⁸ Brian Mahoney, *Silver: NBA Will Review Domestic Violence Policies*, NBA (Sept. 22, 2014), <http://www.nba.com/2014/news/09/22/adam-silver-nba-domestic-violence.ap/>.

¹⁸⁹ Zach Harper, *Kings Guard Darren Collison Charged with Domestic Violence*, CBS SPORTS (June 18, 2016), <https://www.cbssports.com/nba/news/kings-guard-darren-collison-charged-with-domestic-violence/>.

¹⁹⁰ Associated Press, *Kings Guard Darren Collison Pleads Guilty to Domestic Battery*, ESPN (Sept. 2, 2016), http://www.espn.com/nba/story/_/id/17452571/darren-collison-sacramento-kings-pleads-guilty-domestic-battery.

his acceptance of responsibility, his cooperation with law enforcement and the NBA, and his voluntary participation in counseling.¹⁹¹

After these incidents, in January 2017, the NBPA and NBA came to an agreement in the CBA to include a joint policy prohibiting acts that constitute domestic violence, sexual assault, and child abuse.¹⁹² The CBA includes an attachment detailing the definitions of “domestic violence,” “sexual assault” and “child abuse,” the creation of a policy committee of expert and party representatives “to provide education, support, treatment, referrals, counseling and other resources for players, their family members and others at risk.”¹⁹³ The policy outlines the investigation procedures for the NBA, provides authority for the Commissioner to put a player on administrative leave while investigations are pending, and specifies that the Commissioner determine discipline on a case-by-case basis, including aggravating and mitigating factors.¹⁹⁴ The NBA also created a Policy Committee that operates outside of the disciplinary authority of the Commissioner, to essentially create and implement “Treatment and Accountability Plans” and any decision made by the committee is unappealable.¹⁹⁵

Although the NBA has now taken steps to remedy its past missteps in disciplining players for domestic violence, the future will determine whether it will follow and implement this new policy. The NBPA negotiated for more support, prevention and education rather than automatic player discipline when there is no conviction. Although there is no mandatory suspension based on a violation of the policy, the new CBA gives the Commissioner substantial power and discretion in choosing to suspend players for violating the policy. The NBA will have to depart from its past and demonstrate a commitment to implementing its new policy if it wants to be seen as taking seriously the issue of domestic violence.

D. NHL

The National Hockey League is arguably the least popular of the four major professional sports leagues in the United States. As such, the NHL has not

¹⁹¹ *Kings' Collision Suspended Eight Games for Domestic Violence*, NBA (Oct. 2, 2016), <http://www.nba.com/article/2016/10/02/kings-collision-suspended-eight-games#/>.

¹⁹² NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. VI § 16 exhibit F (2017), available at <http://nbpa.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

been subjected to the same number of public relations nightmares that have plagued other leagues following high-profile domestic violence and sexual assault cases.¹⁹⁶ Yet despite the media attention to professional sports' handling of high-profile cases, the NHL has failed to move in the direction of creating a policy regarding domestic violence and sexual assault. Gary Bettman, the NHL Commissioner, has indicated that he "is not sure there is any need for any code of conduct for our players... who overwhelmingly conduct themselves magnificently off of the ice... our players know what's right and wrong."¹⁹⁷ However, several notable cases demonstrate that the NHL has failed, and continues to fail, handling off-the-ice conduct and domestic violence.¹⁹⁸

Though the NHL does not have a domestic violence policy, it does have the ability to suspend players indefinitely for moral reasons according to broad clauses in Article 18-A of the NHL CBA, under the "Commissioner Discipline for Off-Ice Conduct."¹⁹⁹ Article 18-A.5 of the CBA states: "The League may suspend the Player pending the League's formal review and disposition of the matter where the failure to suspend the Player during this period would create a substantial risk of material harm to the legitimate interests and/or reputation of the League."²⁰⁰ Furthermore, Article 18-A.5 indicates that under a criminal investigation "the League may suspend the Player pending the League's formal review and disposition of the matter where the failure to suspend the Player during this period of time would create a substantial risk of material harm to the legitimate interests and/or reputation of the league."²⁰¹ While it is unclear what comprises a violation of this policy, the policy provides the Commissioner with the authority to discipline players even in situations where a player has not been charged with a crime, and still provides the player with the opportunity to request a

¹⁹⁶ Ben Harwich, *Domestic Violence in Professional Sports: An Analysis of Domestic Violence Through the Prism of Professional Sports League Collective Bargaining Agreements* (2016) (on file with author).

¹⁹⁷ Travis Hughes, *Gary Bettman Takes Shot at NFL That Totally Won't Backfire on Him*, SB Nation (Oct. 9, 2014), <https://www.sbnation.com/nhl/2014/10/9/6952037/gary-bettman-quote-nhl-arrests-nfl-c>.

¹⁹⁸ Joshua Kloke, *The NHL Is Making Up Its Domestic Violence Policy As It Goes*, VICE SPORTS (Dec. 3, 2014), https://sports.vice.com/en_us/article/aem97a/the-nhl-is-making-up-its-domestic-violence-policy-as-it-goes.

¹⁹⁹ NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 18-A (2013-2022), available at <https://www.nhlpa.com/the-pa/cba>.

²⁰⁰ *NHL Fans Create Petition to Urge League to Take Clear Stance on Domestic Violence*, FOXSPORTS (Oct. 19, 2015), <http://www.foxsports.com/nhl/story/nhl-chicago-blackhawks-patrick-kane-slava-voynov-domestic-violence-101915>.

²⁰¹ NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 199, at art. 18-A.3.

review by an independent arbitrator.²⁰² Like the league, the teams also have the option to invoke a “morals clause” in players’ contracts in which the player “agrees to conduct on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interests of the Club, the League or professional hockey generally.”²⁰³

Prior to 2013, many of the incidents surrounding domestic violence and sexual assault in the NHL went underreported, charges were dropped, or there was minimal media attention.²⁰⁴ In October 2013, Colorado Avalanche goalie Semyon Varlamov was arrested for second-degree kidnapping and third-degree assault charges.²⁰⁵ Varlamov’s girlfriend, Evgeniya Vavrinyukat, alleged that he drunkenly knocked her down with a kick, stomped on her chest, and dragged her by her hair the night of the incident.²⁰⁶ Varlamov posted bond, played in the next scheduled game, and continued to play despite the arrest and pending charges.²⁰⁷ The NHL released a statement that they were “aware of the situation... and will not comment unless or until we have a fuller understanding of all the facts and circumstances related to the legal charges that have been filed,” which was repeated in a statement by the Colorado Avalanche.²⁰⁸ After Varlamov’s

²⁰² Cari Grieb, *Patrick Kane Case Hasn’t Changed NHL’s Attitude on Sexual Assault*, SPORTING NEWS (Aug. 28, 2015), <http://www.sportingnews.com/nhl/news/patrick-kane-arrest-crime-charge-suspended-rape-sexual-assault-blackhawks-buffalo/zx67lhrucry12bg03kudj20t>.

²⁰³ Matthew Heimlich, *The NHL Morality Clause: Can Athletes be Fired for “Immoral Behavior?”*, THE WHITE BRONCO BLOG (Dec. 15, 2015), <http://thewhitebronco.com/2015/12/the-nhl-morality-clause-can-athletes-be-fired-for-immoral-behavior/>.

²⁰⁴ Greg Wynshynski, *NHL Fans Pressuring Teams on Assault, Domestic Violence*, YAHOO SPORTS (Apr. 28, 2017), <https://sports.yahoo.com/news/nhl-fans-pressure-teams-sexual-assault-domestic-violence-183350334.html> (“In 2014, [Gary] Bettman said the NHL didn’t have a domestic violence problem...but the NHL has had several recent high profile cases of sexual assault and domestic violence against women in recent years.”).

²⁰⁵ *Avs’ Varlamov Arrested on Domestic Violence Charges*, NHL (Oct. 31, 2013), <https://www.nhl.com/news/avs-varlamov-arrested-on-domestic-violence-charges/c-689289>.

²⁰⁶ Associated Press, *Semyon Varlamov Charges Dropped*, ESPN (Dec. 20, 2013), http://www.espn.com/nhl/story/_/id/10173198/semyon-varlamov-colorado-avalanche-charges-dropped.

²⁰⁷ Rick Maese, *Semyon Varlamov, Colorado Avalanche Goalie, Plays Despite Accusations He Beat Girlfriend*, WASH. POST (Nov. 12, 2013), https://www.washingtonpost.com/sports/capitals/semyon-varlamov-colorado-avalanche-goalie-plays-despite-accusations-he-beat-girlfriend/2013/11/12/7741d72e-4b20-11e3-bf60-c1ca136ae14a_story.html?utm_term=.d3b61c44f5be.

²⁰⁸ *Avs’ Varlamov Arrested on Domestic Violence Charges*, *supra* note 205.

release, Colorado Avalanche's Coach Patrick Roy made a statement after starting Varlamov in the next game: "we're all aware of what happened, but we just feel that he's our guy, we have confidence in him and feel that it's good for him to play tonight."²⁰⁹ Interestingly, almost exactly thirteen years prior in 2000, Patrick Roy was arrested on domestic violence and criminal mischief charges while playing for the Colorado Avalanche.²¹⁰ The NHL allowed Roy to play immediately; the criminal charges were dismissed three months later.²¹¹

Unfortunately the NHL never conducted an investigation into the allegations against Varlamov, and ultimately the district attorney dropped the charges based on information that led them to believe they could not prove the case beyond a reasonable doubt.²¹² Varlamov's former girlfriend, Evgeniya Vavrinyukat, filed a civil suit against him seeking general, compensatory and punitive damages for reduction in past, present and future income, damage to reputation, humiliation and emotional distress.²¹³ The jury in the civil case sided with Varlamov, and the judge ordered Vavrinyukat to pay Varlamov \$126,608 in damages for an abuse of process claim because the evidence did not support her claims of the abuse and attack.²¹⁴

After criticism of its failure to even investigate Varlamov's conduct and amidst the media storm regarding the Ray Rice scandal, the NHL reconsidered its approach. In October 2014, Los Angeles Kings defenseman Slava Voynov was arrested on domestic violence charges.²¹⁵ The police report indicates that during a heated argument at a party, Voynov punched his wife, Marta Varlamova, in the jaw. They left the party and when home he choked her three times, pushed her to the floor several times,

²⁰⁹ Matt Brigidi, *Patrick Roy on Semyon Varlamov Start: 'Why Wait?'*, SBATION (Nov. 1, 2013), <https://www.sbnation.com/nhl/2013/11/1/5055628/semyon-varlamov-arrest-assault-kidnapping-starting>.

²¹⁰ Aaron Lopez, *Roy Arrested on Domestic Violence Charges*, ABC News (Oct. 23, 2000), <http://abcnews.go.com/Sports/story?id=100258&page=1>.

²¹¹ *Id.*

²¹² Wynshynski, *supra* note 204.

²¹³ Katie Strang, *Semyon Varlamov Sued by Ex*, ESPN (Oct. 27, 2014), http://www.espn.com/nhl/story/_/id/11773836/semyon-varlamov-sued-civil-case-stemming-domestic-violence-incidents.

²¹⁴ *Avs' Varlamov Beats Domestic Violence Rap, Accuser Ordered to Pay*, FOXSPORTS (Feb. 3, 2016), <http://www.foxsports.com/nhl/story/colorado-avalanche-goalie-semyon-varlamov-accused-of-domestic-violence-by-ex-girlfriend-wins-civil-case-judgment-020216>.

²¹⁵ Billy Witz, *After Voynov's Arrest, the Kings Confront Domestic Violence*, N.Y. TIMES (Oct. 21, 2014), <https://www.nytimes.com/2014/10/22/sports/hockey/after-voynovs-arrest-the-kings-confront-domestic-violence.html>.

kicked her in several parts of her body and pushed her into the corner of a flat screen television causing a laceration to her face.²¹⁶ A neighbor called the police when she heard a female screaming next door.²¹⁷ Voynov was arrested in the hospital where his wife was being treated and charged with corporal injury to a spouse, and hours later was suspended indefinitely from the NHL pending a formal investigation based on the incident.²¹⁸

The NHL did not allow Voynov to play or participate in any team practices during the pendency of the investigation, nor did it allow him to play in the World Cup for Russia, and it fined the Los Angeles Kings one-hundred thousand dollars for allowing Voynov to skate during a club practice.²¹⁹ Although Voynov's attorney initially indicated that Voynov would be pleading not guilty to the charges, he eventually pled no contest and was sentenced to ninety days in jail, three years' probation, a seven-hundred dollar fine, and to participate in a fifty-two-week domestic violence prevention program including eight hours of community service.²²⁰ Because Voynov is a Russian citizen, prior to his release for serving his sentence, he was placed into the custody of U.S. Immigration and Customs Enforcement (ICE).²²¹ The Kings released Voynov and he decided to return to Russia rather than be deported.²²²

The NHL took a giant step forward in its handling of Voynov's case in comparison to Varlamov's just one year prior. The incident was a change

²¹⁶ Nathan Fennon, *Kings Slava Voynov Pleads No Contest in Deal in Domestic Violence Case*, L.A. TIMES (July 2, 2015), <http://www.latimes.com/sports/sportsnow/la-sp-sn-slava-voynov-pleads-no-contest-domestic-violence-case-20150702-story.html>; see also Redondo Beach Police Dept. Records for Slava Voynov, (Jan. 27, 2015), <http://www.trbas.com/media/media/acrobat/2015-02/82728341-04175255.pdf>.

²¹⁷ Greg Beacham, *Voynov Suspended on Domestic Violence Suspicion*, SAN DIEGO UNION-TRIB. (Oct. 20, 2014, 8:29 AM), <http://www.sandiegouniontribune.com/sdut-voynov-suspended-after-domestic-violence-charges-2014oct20-story.html>.

²¹⁸ *LA Kings Issue Statement Regarding Slava Voynov*, L.A. KINGS (Oct. 20, 2014), <https://www.nhl.com/kings/news/la-kings-issue-statement-regarding-slava-voynov/c-735338>.

²¹⁹ Chris Peters, *NHL Fines Kings \$100,00 for Violating Terms of Voynov Suspension*, CBS SPORTS (Dec. 2, 2014), <https://www.cbssports.com/nhl/news/nhl-fines-kings-100000-for-violating-terms-of-voynov-suspension/>.

²²⁰ Chris Peters, *Kings' Slava Voynov to Serve 90 Days in Jail Following Plea Deal*, CBS SPORTS (July 2, 2015), <https://www.cbssports.com/nhl/news/kings-slava-voynov-to-serve-90-days-in-jail-following-plea-deal/>.

²²¹ SI Wire, *Slava Voynov To Leave Kings, Voluntarily Departs U.S. for Russia*, SPORTS ILLUSTRATED (Sept. 16, 2015), <https://www.si.com/nhl/2015/09/16/los-angeles-kings-slava-voynov-leaving-russia>.

²²² Pierre LeBrun, *Slava Voynov Voluntarily Returning to Russia After Domestic Violence Case*, ESPN (Sept. 16, 2015), http://www.espn.com/los-angeles/nhl/story/_/id/13673270/slava-voynov-los-angeles-kings-returning-russia.

not only for other team owners and coaches, but the NHL as an organization.²²³ However, the NHL still has a long way to go, specifically regarding sexual assault cases. In August 2015, Patrick Kane, an NHL All-Star and three-time Stanley Cup Champion for the Chicago Blackhawks, was accused of rape and sexual assault.²²⁴ The accuser alleged that after going out to a nightclub, Kane invited her and a female friend back to his home for a private party and that he overpowered and raped her.²²⁵ The woman then left Kane's home with her friend and went to a local hospital for examination. The police were subsequently called but no charges were filed.²²⁶ The Erie County authorities conducted an investigation, and while the NHL conducted its own investigation it did not suspend Kane, and allowed him to attend training camp.²²⁷ Kane's case took an interesting turn when the accuser's mother lied about a rape kit being placed on her doorstep, which the District Attorney referred to as a "bizarre hoax" and a "dog and pony show" regarding the allegations of tampered evidence.²²⁸ Ultimately, the accuser declined to cooperate with the investigation and signed an affidavit declining to support prosecution. The Erie County DA believed that the case was "rife with reasonable doubt" and declined to press charges.²²⁹ The NHL made a statement in March 2016 that "based on its review, including the determination made by the Erie County District Attorney not to pursue charges, the NHL has concluded the allegations against Kane were unfounded and the League considers the matter closed and will have no further comment."²³⁰

²²³ Chris Johnston, *NHL Passes First New Domestic Violence Test*, SPORTSNET (Oct. 20, 2014), <http://www.sportsnet.ca/hockey/nhl/slava-voynov-los-angeles-kings-domestic-violence-charges-gary-bettman-nhl/>.

²²⁴ Jon Schuppe, *NHL Star Patrick Kane Facing Rape Investigation: Reports*, NBC NEWS (Aug. 7, 2015), <https://www.nbcnews.com/news/sports/nhl-star-patrick-kane-facing-rape-allegations-reports-n405916>.

²²⁵ Lou Michael & Dan Herbeck, *New Details Emerge in Allegations Against NHL Star Patrick Kane*, BUFFALO NEWS (Aug. 9, 2015), <http://buffalonews.com/2015/08/09/new-details-emerge-in-allegations-against-nhl-star-patrick-kane/>.

²²⁶ *Id.*

²²⁷ Tanya Arezak, *The NHL Has a Responsibility to Suspend Patrick Kane*, SBNATION (Sept. 24, 2015), <https://www.sbnation.com/2015/9/24/9372909/nhl-should-suspend-patrick-kane-pending-investigation>.

²²⁸ *District Attorney Says Accuser's Mom Lied About Bag*, ESPN (Sept. 27, 2015), http://www.espn.com/chicago/nhl/story/_id/13737595/frank-sedita-prosecutor-patrick-kane-case-says-accuser-mom-lied-bag.

²²⁹ Matt Higgins, *Patrick Kane Will Not Face Rape Charges*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/sports/hockey/chicago-blackhawks-patrick-kane-will-not-face-rape-charges.html>.

²³⁰ *NHL Statement Regarding Blackhawks' Kane*, NHL (Mar. 9, 2016), <https://www.nhl.com/news/nhl-patrick-kane-statement/c-279495418>.

In 2016, the NHL and the NHL Players' Association (NHLPA) developed a mandatory domestic violence, sexual assault and sexual harassment training for all players.²³¹ The program involves hour-long educational sessions with outside professionals that are in coordination with the behavioral health and wellness programs previously in place.²³² Although the NHL's education of players about domestic violence and sexual assault is a step in the right direction, it does not remedy the lack of a formal policy to hold players responsible for their off-the-ice conduct. The NHL fan base has voiced its concerns. A fan-created petition requesting that NHL implement a zero-tolerance policy for sexual assault and intimate partner violence is currently pending with over thirty-seven thousand signatures.²³³ Given the public concern and recent media attention and the lack of action by the NHL, many teams have taken the creation of policy, advocacy and education into their own hands. For example, in 2015 the Nashville Predators partnered with the YWCA of Nashville and Middle Tennessee and its MEND program targeted at ending violence against women by engaging and educating men and boys.²³⁴ The Nashville Predators and Bridgestone Arena President and CEO Sean Henry announced the NHL team and Allstate Foundation's commitment to donate five-hundred thousand dollars over a five-year period to support the MEND initiative.²³⁵ Along with the five-hundred thousand dollar donation, the Predators also have a Public Service Announcement video titled "Unsilence the Violence"

²³¹ John Wawrow, *NHL Begins Domestic Violence and Sexual Assault Training*, NHL (Jan. 15, 2016), <https://www.nhl.com/news/nhl-begins-domestic-violence-and-sexual-assault-training/c-797688>.

²³² *NHL Statement Regarding Blackhawks' Kane*, *supra* note 230 (The NHL indicates in its Press Release that there are "hour-long" sessions and players will complete this seminar over the span of "two months," but the NHL has not released any further statements or information regarding how many hour-long sessions the program includes.).

²³³ Michelle Geschwind, *Petition to the NHL: Take Violence Against Women Seriously*, CHANGE.ORG, https://www.change.org/p/gary-bettman-bill-daly-demand-the-nhl-take-sexual-assault-and-domestic-violence-seriously?recruiter=401241624&utm_source=petitions_show_components_action_panel_wrapper&utm_medium=copylink (last visited Apr. 24, 2018).

²³⁴ Brooks Bratten, *Preds, Mend Look to End Domestic Violence in Middle Tennessee*, NHL-PREDATORS (June 18, 2015), <https://www.nhl.com/predators/news/preds-mend-look-to-end-domestic-violence-in-middle-tennessee/c-771401>.

²³⁵ *YWCA's MEND Program Scores Significant Support from Nashville Predators and Allstate*, YWCA (Jan. 25, 2017), <https://ywcannashville.com/about/news-archives/ywcas-mend-program-scores-significant-support-from-nashville-predators-and>.

“encouraging men and boys to speak up,” because “the end of violence against women starts with men.”²³⁶

IV. APPLYING LESSONS LEARNED IN THE DEVELOPMENT OF LAW IN THE UNITED STATES TO THE DEVELOPMENT OF POLICY IN SPORTS

Beginning in the 1970s and for two decades thereafter, law and policy in the U.S. redressing the problem of domestic violence exploded.²³⁷ This section identifies the unintended consequences of this explosion and applies lessons learned to the development of domestic violence policy in the sports world. It argues that intuitive approaches to the problem of domestic violence, including harsh punishment, curtailed due process, and zero-tolerance have the potential to do more harm than good. If sports leagues truly want to say “no more” to domestic violence, as the NFL (for example) proclaims to do,²³⁸ they should pay close attention to these lessons.

A. Thumbnail Sketch of Criminal and Civil Remedies

Fifty years ago, there was no criminal or civil justice system response to the problem of domestic violence. In fact, the concept of domestic violence, at least as far as the law was concerned, did not even exist. Today, sending a harassing email to an ex who lives across state lines is a federal crime (and potentially several state crimes or a civil contempt of court).

The seriousness with which the justice system now, theoretically at least, takes domestic violence is a response to the state’s history of indifference. Police historically avoided responding to calls for help from victims of domestic violence; when they did respond, it was with reluctance to

²³⁶ *MEND: Unsilence the Violence*, NHL- NASHVILLE PREDATORS (Jan. 19, 2017), <https://www.nhl.com/predators/video/mend-unsilence-the-violence/t-277437416/c-48538703>.

²³⁷ LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 10 (2012) (“Over the course of the last 40 years, the mushrooming response to domestic violence has transformed the legal landscape for women seeking relief from abuse.”); *Id.* at 16-28 (providing a comprehensive overview of the development of the legal response to domestic violence in the United States from the 1970s to present day).

²³⁸ *Roger Goodell Letter to NFL Owners*, ESPN (Aug. 29, 2014), http://www.espn.com/nfl/story/_/id/11425532/roger-goodell-letter-nfl-teams-domestic-violence-policy (publishing a letter written by NFL Commissioner Roger Goodell to all NFL team owners on Aug. 28, 2014 “Domestic violence and sexual assault are wrong. They are illegal. They are never acceptable and have no place in the NFL under any circumstances.”).

interfere in a private, family matter and might end with (if the squabble was sufficiently serious) a walk around the block for a perpetrator but certainly not an arrest.²³⁹ To address this problem, feminist activists and victim advocates reformed the law to require police to arrest alleged perpetrators at the scene of a domestic violence disturbance. Interestingly, these mandatory arrest laws proliferated around the time of the murder of O.J. Simpson's wife, Nicole Brown Simpson.²⁴⁰

Around the time of the trial, feminists began winning hard-fought policy battles to require district attorneys to prosecute aggressively domestic violence. "No drop" prosecution policies give prosecutors no or little wiggle room to dismiss criminal charges in cases of domestic violence.²⁴¹ By 1994, Congress passed the first federal law prohibiting domestic violence, the Violence Against Women Act, making it a federal crime to cross state lines to abuse or stalk an intimate partner, or to possess a gun if convicted of even a misdemeanor crime of domestic violence.²⁴²

On the civil side of the law, civil protection orders (or restraining orders) became available to victims in the late 1970s and throughout the 1980s. By 1989 every state provided for this emergency civil remedy that restrains the perpetrator from coming near or contacting the victim, amongst other forms of relief.²⁴³ The Violence Against Women Act mentioned above provides an array of protections in the civil justice system as well. These range from new remedies for immigrant victims

²³⁹ Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1851-53 (2002).

²⁴⁰ G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 238 (2005) ("Soon after [the murder of Nicole Brown Simpson], New York joined a majority of states in passing mandatory arrest laws in cases involving domestic violence. Most of the legislation passed that day had languished for years in state legislatures. With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the "zero tolerance" bandwagon.").

²⁴¹ See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (describing, and supporting, aggressive prosecution policies in domestic violence cases). For a compilation of representative aggressive or "no-drop" prosecution policies, see Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 B.Y.U. L. REV. 515, 592-95 (documenting policies in thirty-five states).

²⁴² GOODMARK, *supra* note 7, at 18-21 (describing the creation of the Violence Against Women Act and its reauthorizations against the backdrop of the many legal reforms occurring in the 1990s).

²⁴³ *Id.* at 17.

to gain lawful immigrant status to prohibitions on landlords for discriminating against victims who apply for housing.²⁴⁴

In short, in the last half century, U.S. law and policy reforms have caused a change in how the civil and criminal justice systems respond to domestic violence.²⁴⁵ While there have been tremendous benefits for victims who are able and who desire to use the justice systems for help, feminist activists who advocated these landmark reforms have questioned their effectiveness in ending domestic violence and meaningfully advancing the rights and safety of victims.²⁴⁶ These questions flow from a number of unintended consequences of the reforms, to which this discussion now turns.

B. Over-Reliance on the Criminal Justice System and Consequent Erosion of Due Process

Despite the skepticism of some, the criminal justice response has, over time, become increasingly relied-upon as the primary solution to domestic violence. Women's advocates and activists played a major role in crafting the Violence Against Women Act ("VAWA") and in shaping federal funding priorities under that Act. "Their priority was using federal funds to reinvent the legal system to make police, prosecutors and judges more responsive."²⁴⁷ The single largest pool of money under the VAWA when it initially passed was the STOP (Services for Training Officers and Prosecutors) grant, specifically intended to increase the apprehension, prosecution and adjudication of persons committing

²⁴⁴ Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA III), Publ. L. No. 109-121, 119 Stat. 2960 (2005).

²⁴⁵ Kuennen, *supra* note 241, at 527.

²⁴⁶ ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 52 (2000) ("The promise of 'legal liberalism is disconnected from the realities of women's lives. Legal intervention alone cannot do the job. Legal intervention may provide women certain protection from battering, but it does not provide women housing, support, child care, employment, community acceptance, or love.... The contradiction is profound."); *see also* GOODMARK, *supra* note 7, at 28 ("[T]he movement fought for and won legislative victories that allowed it to reconstruct the legal landscape, creating criminal and civil justice remedies and funding the development of those systems. But those victories came at a price. The movement went from being woman-centered to victim-centered, from self-help to saving, from working with women to generate the options that best met their needs to preferring one option, separation, facilitated by the intervention of the legal system, from being suspicious of and cautious about state intervention to mandating such intervention. The question is whether, for women subjected to abuse, that price has been worth paying.").

²⁴⁷ GOODMARK, *supra* note 7, at 19.

violent crimes against women.²⁴⁸ Arrest and prosecution of domestic violence has increased; so too has the reporting of domestic violence to the police. More importantly, rates of domestic violence are down, though this decline tracks the overall decrease in crime rates. “What has not declined is the rate at which women are killed by their male partners, which decreased less than the rates of other homicides between 1976 and 2004.”²⁴⁹

Some argue that, even if the criminal justice system response worked perfectly, and every perpetrator of domestic violence was arrested, prosecuted and convicted, the reliance on the criminal justice response as a one-size-fits-all solution to domestic violence has posed problems.²⁵⁰ It has “crowded out other strategies” to end domestic violence and “in the zero-sum game of funding, monies spent on law enforcement are not spent on other crucial services like housing, job training, education or economic development.”²⁵¹

In the world of sports, where professional athletes are charged but rarely convicted, it is especially critical that a criminal conviction is not a prerequisite to holding accountable perpetrators of domestic violence that the MLB, NFL and NBA have so recognized. The very existence of these leagues’ employment policies that explicitly address domestic violence is proof.²⁵² The NHL is a half-century behind. Like the police and prosecutors in the 1960s, Commissioner Bettman has chosen to bury his head in the sand.²⁵³

The MLB, NFL and NBA policies make explicit a grant of authority to the leagues to discipline players regardless of the criminal justice system. This response is key. MLB’s policy states that the “Commissioner’s authority to discipline is not dependent on whether the player is convicted or pleads guilty to a crime.”²⁵⁴ The NFL’s and NBA’s policies are similar.

²⁴⁸ GARRINE P. LANEY, CONG. RESEARCH SERV., VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 4 (2005).

²⁴⁹ GOODMARK, *supra* note 7, at 21.

²⁵⁰ For a summary of the one-size-fits-all critique of the criminal justice system respect to domestic violence, see Kuennen, *supra* note 9, at n. 239 and accompanying text.

²⁵¹ *Id.* at 22.

²⁵² See generally Deseriee A. Kennedy, *Using the NFL as a Model? Considering Zero Tolerance in the Workplace for Batterers*, 45 U. BAL. L. REV. 293 (2015).

²⁵³ See note 239 *infra* and accompanying text.

²⁵⁴ MLB Joint Policy, Section C (“Discipline”).

Commissioner Manfred has put his money where his mouth is. In several of the cases he has presided over since MLB's policy went into effect, he doled out punishment where criminal charges were dismissed (Reyes, Chapman and Familia) and where they were not even filed (Norris). In the remaining case (Olivera), Manfred issued his decision while the criminal case was ongoing and before its resolution.

The MLB sends the message that even if a player's actions are not deemed criminal, they are deemed reprehensible and punishable by the League. That the punishments have teeth backs up that message. For players, being benched has been described as one of the most impactful punishments. In the words of one professional athlete:

I don't think fines have all that much impact on very many players, even the lower-paid players. The real impact on players comes when it affects their playing time. You work so hard to get on the field and you become proud of what you do. When the league suspends players and takes away their playing time, it has more of an impact than taking the money away. You can always make more money, and money is kind of an abstract thing to some guys because at our age, some of us have made so much we don't even know what that money means. There are guys who are fined \$10,000, it is only a tenth of what they are making that week. When the league affects play time is really when they have an impact.²⁵⁵

Commissioner Goodell has been less successful. He botched the first case to come before him only five months after implementing the 2014 Policy. Initially, Goodell suspended Josh Brown for only one game after a ten-month NFL investigation, despite the Policy's mandate that the minimum disciplinary action was suspension for six games. At first Goodell blamed the police for refusing to release evidence during its investigation, and then he blamed the victim herself for not cooperating. But Josh Brown admitted to a pattern of abuse.

In what appeared to be a response to public criticism, Goodell then overcompensated by shortchanging player Ezekiel Elliott of a full and fair procedure. The NFLPA made a convincing case that Elliott was

²⁵⁵ See BENEDICT, *supra* note 3, at 223-24 (quoting a NFL player).

never given the opportunity to confront his accuser in various phases of the proceedings. And because the policy itself was never collectively bargained for, their accusations that Goodell has swung the pendulum too far have merit.

When perpetrators feel that they are being treated unfairly, they are less likely to comply with court orders, treatment and other interventions.²⁵⁶ Thus from the perspective of effectiveness of interventions, due process is extremely important. The MLB and the NBA got it right in their implementation of joint policies, collectively bargained for, between the leagues and the players' associations.

The NFL has mis-stepped here. By failing to get player buy in, in the form of collective bargaining, it has now put itself in a position that compromises the integrity of its investigations in order to make up for its past failure to properly address issues of domestic violence. It will likely be forced to face this issue head on with the NFLPA in the next round of collective bargaining negotiations in 2020.

While the NBA collectively bargained with the NBAPA, the NBAPA has filed a grievance against the NBA for what it believes to be excessive and inappropriate discipline in the first case of domestic violence following its most recent policy revisions. The NBA suspended Piston's center Willie Reed for six-games following an August 2017 domestic violence arrest.²⁵⁷ The NBA stated that "the six-game suspension is based on all facts and circumstances of this matter and considers the conduct and its result, the outcome of the criminal matter, and Reed's voluntary participation in counseling as well as the court-mandated program, among other factors."²⁵⁸

Though NBAPA filed a grievance, it has not characterized the policy itself to be a sham. The joint policy is noteworthy for a couple of reasons. First, there is no mandatory minimum sentence when the league implements discipline. On one hand, this might allow the league to go light on accountability. On the other, mandates have appeared to backfire in the larger context of domestic violence criminal law reform, as seen in mandatory arrest and prosecution policies discussed above.

²⁵⁶ See Epstein, *supra* note 239, at 1870-71 (arguing that even when these perceptions are unrealistic, if accused perpetrators perceive they are being treated unfairly they are less likely to comply with court orders and/or the law).

²⁵⁷ Dan Gartland, *Pistons Willie Reed Suspended Six Games for Domestic Violence*, SPORTS ILLUSTRATED (Feb. 6, 2018), <https://www.si.com/nba/2018/02/06/piston-willie-reed-suspension-six-games-domestic-violence-arrest>.

²⁵⁸ *Id.*

Although the NBA investigation of Darrell Collison occurred prior to implementation of its most recent policy, his case is worthy of mention here. He pled guilty to domestic violence and was sentenced to twenty days in jail, a yearlong domestic violence intervention program, and three years of probation. The NBA took into account Collison's conduct of taking responsibility for the abuse, voluntarily participating in counseling, and cooperating readily with the investigation. It suspended him for eight games. This approach seems more balanced than the kneejerk reaction Commissioner Silver had taken two years before with Jeff Taylor, who he suspended for twenty-four games and which the NBPA proclaimed excessive.

Second, the NBA's 2017 policy as a whole focuses on remedies that are alternatives to harsh, discretion-less punishments typical of the criminal justice system. It eschews a one-size-fits-all approach to domestic violence, a critique deservedly and widely leveled at the criminal justice system.²⁵⁹ Instead, the policy provides that discipline shall be determined on a case-by-case basis that includes consideration of both aggravating and mitigating factors.

The MLB's policy also incorporates individualized rather than one-size-fits-all strategies. For example, the policy emphasizes individualized treatment of the player, assigns experts in the field to evaluate the player's needs and take responsibility for monitoring compliance, and gives very broad discretion regarding the content of the treatment plan, including that the plan may provide (in addition to an enumerated list of directives) "other reasonable directives designed to promote . . . safety"²⁶⁰ Reyes met with psychologists, was prescribed a counseling plan, and support groups working against domestic violence.²⁶¹ He also publicly apologized.

Significantly, Reyes has gotten a second chance with the Mets. The opportunity to continue to be employed is important for several reasons. First, unemployment amongst perpetrators is a significant risk factor for

²⁵⁹ For a summary of the one-size-fits-all critique of the criminal justice system response to domestic violence, Kuennen, *supra* note 9, at n. 239 and accompanying text.

²⁶⁰ MLB Joint Policy, Section A ("Treatment and Intervention").

²⁶¹ Billy Witz, *Jose Reyes Returns to the Mets, Baggage and All*, N.Y. TIMES (June 25, 2016), <https://www.nytimes.com/2016/06/26/sports/baseball/jose-reyes-mets-domestic-violence.html>.

lethality in domestic violence cases.²⁶² Second, as stated by Cindy Southworth, the executive director of the National Network to End Domestic Violence: “What we don’t want is for someone, the moment the police are called, is for an athlete to lose his entire career . . . It would create huge, unfathomable pressure not to call 911 if they knew their loved one’s career would be in jeopardy.”²⁶³

But this position also requires balance. Compare Reyes to Chapman, who did a stint with the Cubs before signing with the Yankees the year following his suspension. Unlike Reyes, Chapman never publicly apologized; to the contrary, he publicly denied the allegations. The Yankees named him “Mr. October” in October 2017. October is Domestic Violence Awareness month.

C. The Challenge of Defining Domestic Violence

Over-reliance on the criminal justice system response had another unintended consequence in the broader social context. The definition of “domestic violence” changed from what activists in the early battered women’s movement intended.²⁶⁴ The criminal law definition focuses – as it does in cases of assaults perpetrated by a stranger – on a discrete, physical incident of violence.²⁶⁵ But activists’ and advocates’ definition focuses on a pattern of behavior in which one party seeks to exert power and control over another. In this pattern, physical violence is but one of many control tactics a perpetrator uses. As a result, many advocates have argued that the law’s myopic focus on physical violence alone has not adequately addressed the abuse many women suffer.

The MLB defines domestic violence just as activists would hope: it is “a pattern of abusive behavior in any intimate relationship that is used by one partner to gain or maintain power and control over another intimate partner.”²⁶⁶

²⁶² See Jacquelyn C. Campbell, *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003) (identifying unemployment of perpetrator as most significant demographic in cases involving femicide).

²⁶³ Witz, *supra* note 261 (quoting Cindy Southworth, executive vice president of the National Network to End Domestic Violence).

²⁶⁴ For a concise summary of this topic, see STARK, *supra* note 6, at 84-92.

²⁶⁵ See generally Deborah Teurkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960 (2004) (arguing for an overhaul of the criminal law, which is “premised on a transactional model of crime that isolates and decontextualizes violence”).

²⁶⁶ MLB Joint Policy, Section A (“Treatment and Intervention”).

The NBA policy is more detailed:

“Domestic violence” includes, but is not limited to, any actual or attempted violent act that is committed by one party in an intimate or family relationship against another party in that relationship. Such an act may include physical assault or battery, sexual assault, stalking, harassment, or other forms of physical or psychological abuse. It may also include behavior that intimidates, manipulates, humiliates, isolates, frightens, terrorizes, coerces, threatens, injures, or places another person in fear of bodily harm. Domestic violence can be perpetrated by current or former spouses, current or former domestic or same sex partners, persons who are living together or have cohabitated, persons with children in common, persons who have or had an intimate or dating relationship, and family members. Domestic violence can be a single act or a pattern of behavior in a relationship.²⁶⁷

The NFL does not contain such clear or comprehensive language. It vaguely refers to:

A crime of violence, meaning he is accused of having used physical force or a weapon to injure or threaten another person, of having engaged in a sexual assault by force or a sexual assault of a person who was incapable of giving consent, of having engaged in other conduct that poses a genuine danger to the safety or well-being of another person, or having engaged in animal abuse.²⁶⁸

It appears both from the text of the policy and based on the Commissioner's enforcement of the policy thus far to encompass incidents of physical violence against a person with whom the player has some sort of an intimate relationship.

The lack of specificity in the NFL definition is problematic. First, as sociologists have pointed out, there are many types of domestic violence.²⁶⁹ These include singular, one-off sorts of incidents that occur

²⁶⁷ NBA/NBPA Joint Policy, Appendix F (“Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse”).

²⁶⁸ NFL PERSONAL CONDUCT POLICY, *supra* note 150.

²⁶⁹ See Stark, *supra* note 6, at 103-06 (describing sociologists' typologies of domestic violence).

in intimate relationships in which factors such as stressful circumstances or poor communication skills are apparent. The three leagues' policies may address this type of "common couple violence."²⁷⁰

But the kind of domestic violence that concerns feminist legal scholars and advocates for domestic violence victims is distinct in kind. It involves the perpetrator's systematic use of coercion and control and is done for the purpose and with the intent of diminishing the victim's autonomy. Sociologists call it "coercively controlling" violence. Physical acts of aggression may accompany coercively controlling violence, but they are not a prerequisite. It is coercion itself – the restraint of another from engaging in conduct in which she has a right to engage or abstaining from conduct in which she has the right to abstain – that comprises the act of domestic violence. The NBA alone captures these critical nuances.

The NFL, by failing to include coercively controlling domestic violence, misses what is widely considered the most dangerous type of domestic violence. In coercively controlling domestic violence, there is a heightened risk of lethality and, counter-intuitively, this risk is most prominent at the moment that the victim makes a decision to separate from the perpetrator.

D. Diminishment of Victim Autonomy

Perhaps the most prevalent feminist critique of the criminal justice system response is that, by mandating arrest and encouraging prosecution regardless of the victim's wishes, the current criminal regime erodes victim autonomy.

There are myriad reasons why victims do not cooperate with the prosecution. The victim may feel, for example, that she wants to salvage the intimate partnership because she still loves her partner; conversely, she may be desperate to escape him but feel that she will be in more danger, rather than less, by testifying for the prosecution and supporting conviction.

In all prosecutions of violence, whether they be in the context of intimate partners or in that of strangers, the state and the perpetrator are the only

²⁷⁰ See Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 479 (2008) (describing types of domestic violence and specifically describing situational, or "common couple" violence).

parties in the case and the victim is merely a witness who has little voice and no authority to decide when a given case should be prosecuted. Many victim witnesses feel fearful. But in the context of domestic violence, a number of factors exacerbate the victim's fear. First, no-drop prosecution policies provide victims with no choice about testifying. Prosecutors, under the gun to aggressively prosecute, have been known to charge victims who do not show up at trial with contempt of court. And they charge victims who recant with perjury. Second, as discussed above, if the type of domestic violence in the relationship is coercively controlling violence, the victim may be putting herself at heightened risk of homicide if the perpetrator perceives her to be supporting the prosecution as a means of ending the relationship. In addition, victims in domestic violence cases, unlike stranger assaults, may share children with the perpetrator, own a home with him, or be married to him. In short, when compared with stranger prosecutions, domestic violence prosecutions remove a victim's ability to order her private life across a broad spectrum of issues. This erosion of decision-making autonomy was not what early activists intended.

In the sports world, there is no question that many victims' voices are not heard.²⁷¹ Victims involved with professional athletes might be doubly worried about confidentiality, their partner losing their job, being in the media spotlight and subject to public criticism, and reliving the domestic violence every time a new story comes out. Janay Rice is one such example. She was panned by the public for sticking with Ray, and she knew it.²⁷² She talked publicly about how much she loved him, how worried she was about him losing his job, and how relieved she felt when

²⁷¹ Ines Bebea & Simone Sebastian, *For Battered NFL Wives, a Message from the Cops and the League: Keep Quiet*, WASH. POST (Oct. 17, 2014),

https://www.washingtonpost.com/posteverything/wp/2014/10/17/for-battered-nfl-wives-a-message-from-the-cops-and-the-league-keep-quiet/?utm_term=.11fc2ab18e5b ("The NFL is a unique universe with an overwhelmingly male workforce whose members are lionized in the press and in their communities; a we're all-in-this-together class, and incentives for the managers, coaches, and union reps to keep negative stories under wraps."); ("You get brainwashed. It's so ingrained that you protect the player, you just stay quiet. You learn your role is to be a supportive NFL Wife... otherwise, you'd cost him his job.").

²⁷² Jemele Hill, *Janay Rice, In Her Own Words*, ESPN (Nov. 28, 2014),

http://www.espn.com/nfl/story/_/id/11913473/janay-rice-gives-own-account-night-atlantic-city ("I still find it hard to accept being called a 'victim.' I know there are so many different opinions out there about me – that I'm weak, that I'm making excusing and covering up abuse – and that some people question my motives for staying with Ray. However, I'm a strong woman and I come from a strong family. Never in my life have I seen abuse, nor have I seen any woman in my family physically abused.").

initially the NFL suspended him for only two games.²⁷³ Then, when seven months after the incident, more footage of the assault was released, she had to relive it. She talked about “going into a shell” when this occurred, and about how angry she was when the Ravens cut Ray, and how worried she was about his future.²⁷⁴

Even in the investigatory process it is unclear whether victims’ voices are meaningfully heard. Janay Rice, for example, stated that she was asked only one question during the NFL investigation: how she felt about everything.²⁷⁵ She replied: “I broke down in tears. I could hardly get a word out. I just told him that I was ready for this to be over.”²⁷⁶

E. The Absence of Intersectionality in the Legal Response

The justice system response, both criminal and civil, has been criticized for sensationalizing both victims and perpetrators. If a victim does not fit the mold of a weak, passive, helpless person who wants to leave the abusive relationship if only she could, she is viewed with incredulity and hostility.²⁷⁷ This paradigmatic victim is both white and heterosexual, depriving women of color and lesbians of victim status and its associated protections.²⁷⁸ “Reliance on these stereotypes and on the experiences of white, straight women to shape law and policy pushed the experiences of other women to the margins.... Race, sexual orientation, immigration status, class, disability status, and location all shape women’s experiences with abuse, reinforcing their disempowerment and dictating their needs.”²⁷⁹

Just as women are viewed stereotypically, so too are men. They are often seen as monsters and the explanation for their conduct lacks nuance: they all are asserting dominance over their partners to keep their partners in line.²⁸⁰ Though psychologists and sociologists have well-documented

²⁷³ *Id.*

²⁷⁴ *Id.* (“I was extremely surprised and angry that the Ravens released him, because they know him. They were our family, but I felt like the Ravens completely disregarded the past six years with him. Anytime the Ravens needed someone for a community event, Ray was their man. It seemed like a knee-jerk reaction for publicity reasons.”).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 991 (2014).

²⁷⁸ GOODMARK, *supra* note 7, at 70-71.

²⁷⁹ *Id.* at 71.

²⁸⁰ *Id.* at 148 (Dominance feminist explanation of why men abuse is one dimensional; maybe it’s not about purposefully trying to control someone but rather about acting in ways that they were raised in a patriarchal society.).

various typologies of violence that occur in intimate partnerships, most advocates working in the field believe that perpetrators commit domestic violence to assert power and control over their partners, as discussed *supra*.²⁸¹ In addition:

The feminist approach can be faulted for minimizing or denying the role of substance abuse, mental illness, childhood trauma, race, culture, and poverty in intimate-partner abuse.... Failure to take such factors into account perpetuates a one-dimensional image of the batterer as a controlling, heterosexual, male villain – a stereotype that impedes efforts to coordinate effective responses to domestic violence and entrenches gendered hierarchies that affect men, as well as women.²⁸²

To address men's violence against women, we must better understand the complexity of manhood and theories of masculinity. Masculinity theorists understand that masculinity is not innate but a social construct; like other gender identities, it is learned and performed.²⁸³ Performance occurs along a continuum of conduct that differentiates itself by degrees from stereotypically feminine conduct. As put by Angela Harris, "[M]asculinities of all varieties share the requirement that men establish themselves on the ground of what they are not.... at best by being 'not a woman,' at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women."²⁸⁴

Sport is one of the primary sites at which masculinity is taught.²⁸⁵ "The particular masculinity produced through participation in sports is shaped by

²⁸¹ See *supra* section III.C.

²⁸² Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337, 337-338 (2015).

²⁸³ Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 3-4 (FRANK RUDY COOPER & ANN G. MCGINLEY, EDS., 2012) ("In contrast [to feminist theorists], masculinities theorists see masculinity as a social construct that encourages men to compete with one another in order to prove their masculinity to each other. Those behaviors, in turn, harm women because as men anxiously compete to prove their masculinity to one another, they often use women as pawns or props in the competition.") (citation omitted).

²⁸⁴ Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STANFORD L. REV. 777, 785 (2000).

²⁸⁵ Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 207 (Frank Rudy Cooper & Ann G. McGinley, eds., 2012).

race, class, and the kind of sport played. The world of men's sports contains layers of privilege and hierarchies of masculinity within it."²⁸⁶

Masculinities theorists posit, for example, that the more physically violent and aggressive the sport, the greater status the sport and the athlete have in the masculinity hierarchy.²⁸⁷ Men who excel at football, basketball and hockey therefore reap the greatest rewards of the hetero-masculinity that sports construct.²⁸⁸ But this hierarchy is complicated by issues of race, class and sexual orientation.

In contrast to other sites where masculinity is developed, men of color, and black men in particular, have succeeded in developing a celebrated masculinity through sports participation, especially in football and basketball. Through excelling in sports, black boys and men have been able to construct a higher-status masculinity and more varied life paths. And yet, their success is paradoxical because it does not challenge the institutions or structures that situate black men in a position of inequality, nor provide any but a very few with any real economic security through professional sport.²⁸⁹

Most of the sociological research on race and gender in sports has focused on black male athletes, some has focused on Latinos' inroads into baseball, and almost no research exists regarding Asian men in sports.²⁹⁰

Yet, the MLB, NFL and NBA players are racially diverse,²⁹¹ and NHL players are diverse in terms of nationality, with players from Russia,

²⁸⁶ *Id.* at 207-08.

²⁸⁷ BRIAN PRONGER, *THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX* 19-20 (1990).

²⁸⁸ Brake, *supra* note 285, at 210 (arguing that in high school and college sports, the most masculine sports, football and men's basketball, sit at the top of the athletic hierarchy and that men who excel in these "reap the greatest rewards of the hetero-masculinity sport constructs.")

²⁸⁹ *Id.* (citations omitted).

²⁹⁰ *Id.* at 211.

²⁹¹ See *The Racial and Gender Report Card*, TIDES, <http://www.tidesport.org/reports.html> (last visited Apr. 24, 2018). NHL players are not racially or socio-economically diverse; they are largely white and middle class. See Evan F. Moore, *NHL Looks to Inner-Cities for New Generation of Diverse Players*, ROLLING STONE (Dec. 8, 2016), <https://www.rollingstone.com/sports/nhl-looks-to-fix-diversity-issues-w454345>.

Sweden and Canada.²⁹² While cultural background can never excuse domestic violence, interventions to address it must be culturally sensitive and individually tailored to the diverse cultural background and experiences of the player.²⁹³

More importantly, taking a player's race, class and cultural background into account helps us better understand why a one-size-fits-all policy in sport might be a kneejerk rather than deliberate response. Our society emasculates African-American and Latino men intellectually and financially,²⁹⁴ and incarcerates them disproportionately. Simultaneously these groups have enjoyed some success in an institution (sport) that promotes violence and particularly violence against women as a demonstration of masculinity. Sport offers marginalized individuals a rare chance at the privileges associated with hegemonic masculinity. These paradoxes explain in greater depth how domestic violence committed by professional athletes deserves closer attention and more thoughtfulness than the standard criminalization strategy provides.

Other factors, such as players' dramatic increase in earnings, or move to the U.S. from another country, or language barrier, or overnight publicity if not fame, further complicate this inquiry.

F. The Unforeseen Stickiness of Norms

One issue that was not foreseen by activists was the fact that domestic violence convictions would be so difficult to obtain, and that these convictions would be overwhelmingly misdemeanors, rather than felonies, when compared with convictions of stranger violence.

Despite the reform of law and policy making domestic violence a crime, the average juror has been reluctant to view acts of violence between intimate partners as criminal. This problem, where the law is too disparate from a cultural norm, has been described as a problem of "sticky

²⁹² Antonio De Loera-Brust, *The Problem with U.S. Hockey: Racial Diversity*, THE JESUIT REVIEW (Feb. 20, 2018), <https://www.americamagazine.org/arts-culture/2018/02/20/problem-us-hockey-racial-diversity>.

²⁹³ MLB has paid attention to points of intersectionality in other contexts, but has it addressed intersectionality in its treatment of domestic violence? See, e.g., *Latino Players Stress the Exact Spelling of Their Names*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/07/sports/baseball/eduardo-nunez-putting-accent-on-spanish-names.html> (describing MLB campaign to both get spelling and pronunciations of Latino names right and also describing the 2015 Spanish-language outreach campaign).

²⁹⁴ "African-American men have long argued that they are 'emasculated' by white supremacy, both materially and culturally." Harris, *supra* note 284, at 783.

norms.” As Dan Kahan has written, sometimes law is capable of changing cultural norms, such as laws requiring the use of seat belts. Other laws, when too different from the majority of people’s values and beliefs, are not capable of instigating cultural change. While both law and lawmakers profess “zero tolerance” for domestic violence, many people believe that some use of physical force is not only an acceptable, but legitimate, way to resolve conflict in an intimate relationship.²⁹⁵

The immediate firing of a player might be perceived to be a draconian response, and this would conflict with the sticky norms problem. If players, or fans, perceived the penalty to be too great for the crime, they might consider it to be outrageous and unfair. For example, commentator John Harper called for a penalty for MLB player Jose Reyes more in line with what Ray Rice got:

Manfred needs to come down hard on Reyes with a punishment that gets players’ attention and, in the best-case scenario, acts as a deterrent to such behavior in the future. How hard? Obviously, a major suspension is warranted. Something like 81 games, or half of the MLB 162-season, sounds right for a first-time offender, if the new policy is going to be taken seriously.²⁹⁶

If Reyes had been banned from MLB altogether for a “single mistake,” as some have characterized it, perhaps there would be backlash. Indeed, player David Ortiz commented on February 23, 2016 (before the Commissioner’s decision was rendered): “I know Jose well. Jose is not a troublemaker. He’s a good guy . . . We’re not perfect. . . . We all make mistakes. That’s no excuse, but people are judging him without knowing everything.”²⁹⁷

²⁹⁵ See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 609 (2000) (arguing that the average juror believes that some amount of violence within an intimate relationship is acceptable, and thus might be disinclined to convict in the case of domestic violence, and calling this a sticky norm that is not going to be easily changed by feminist law reforms reflecting values not yet adopted by society at large).

²⁹⁶ John Harper, *Jose Reyes Should be Banned 81 Games if Baseball Wants Domestic Abuse Policy to be Taken Seriously*, N.Y. DAILY NEWS (Nov. 10, 2015), <http://www.nydailynews.com/sports/baseball/harper-mlb-send-message-ban-jose-reyes-81-games-article-1.2429659>.

²⁹⁷ Bob Nightengale, *David Ortiz: ‘I was Never Trying to be a Role Model’*, USA TODAY (Feb. 23, 2016), <https://www.usatoday.com/story/sports/mlb/2016/02/23/red-sox-david-ortiz-domestic-abuse/80808174/>.

In hockey, fans frustrated with the NHL's silence on the issue of domestic violence are calling for the league to do something. Understandably so, they seek "a clear, comprehensive policy of zero tolerance for players who commit acts of intimate partner violence or sexual assault" with "harsh, truly consequential punishment" for violation of the policy.²⁹⁸

But such cannot be the case if what the fans really want is for the NHL to effectively address domestic violence, which continues to be a sticky norm.

V. ADVANCING THE BALL: TOWARD A CHANGE IN SPORT'S CULTURAL NORMS

To address domestic violence meaningfully, the leagues must change the cultural norms that make it legitimate. Change must start from within or, as Commissioner Goodell put it: "We must get our own house in order first."²⁹⁹ Goodell was referring to improving the disciplinary action taken against a player after he has committed domestic violence. These changes are critical. However, addressing domestic violence after-the-fact will never be enough to change the institutional norm of domestic violence.

One thing that all of the leagues – even the NHL – have done is educate themselves about domestic violence prevention. Some of the leagues have also partnered with domestic violence prevention agencies in the community to both educate and serve the public. Many of these partnerships have not been trivial.³⁰⁰

²⁹⁸ Geschwind, *supra* note 233.

²⁹⁹ Everett Rosenfeld, *NFL's Goodell: We Will Get Our House in Order*, CNBC (Sept. 19, 2014), <https://www.cnbc.com/2014/09/19/nfls-goodell-we-will-get-our-house-in-order.html>.

³⁰⁰ See, e.g., *NFL Players Say No More to Domestic Violence & Sexual Assault in New PSA*, NO MORE CAMPAIGNS, <https://nomore.org/campaigns/public-service-announcements/nflplayerspsa/> (last visited Apr. 24, 2018); Press Release, Phoenix Suns, *Suns to Host Domestic Violence Awareness Night* (Oct. 11, 2017), <http://www.nba.com/suns/press-release/phoenix-suns-host-domestic-violence-awareness-night/#gref>; Jane McManus, *New York Sports Figures, Teams Join Anti-Domestic Violence Campaign*, ESPNW (Oct. 6, 2016), <http://www.espn.com/espnw/sports/article/17719313/many-new-york-pro-sports-teams-taking-part-national-campaign-domestic-violence-awareness-month>; Christine Williamson, *Broncos Partnering with Project PAVE*, DENV. BRONCOS (Oct. 8, 2015), <http://www.denverbroncos.com/news-and-blogs/article-1/Broncos-partnering-with-Project-PAVE/ee44dd87-5aee-47f6-8c75-58df58a13cce> (discussing the Denver Broncos's partnership with Project PAVE for the "True Man" Project); Brooks Bratten, *Preds, MEND Look to End domestic Violence in Middle Tennessee*, NHL

Nonetheless, to truly change the norm of domestic violence, leagues must understand the culture of hypermasculinity from which domestic violence, and many forms of male violence, springs. Hypermasculinity, sometimes referred to as “hostile masculinity,” is an exaggerated form of physical strength and personal aggression that is common in certain contexts,³⁰¹ such as in the military, among police, and in men’s college and professional sports.³⁰² These are contexts connected by physical size requirements, the ability to brutalize, and an “us versus them” mentality.³⁰³ Eruptions of force are glorified on a daily basis, leading to a culture in which physical dominance and even violence are always just below the surface.³⁰⁴

In addition, these contexts are known for hostile attitudes toward women.³⁰⁵ Certainly violence against women occurs outside of these contexts. But, a large body of research demonstrates a significant correlation between violence against women and peer support of aggression against women.³⁰⁶

Hypermasculinity is also a way that gender is performed by men, and it allows men to establish themselves on the grounds of what they are not: feminine. The good news here is that something that is “performed” means that it is not innate. The bad news is that “something that is

(June 18, 2018), <https://www.nhl.com/predators/news/preds-mend-look-to-end-domestic-violence-in-middle-tennessee/c-771401> (discussing the Nashville Predators’s partnership with the YMCA of Nashville and Middle Tennessee); Emma Cueto, 5 *Athletes Who Fight Domestic Violence, Because They Are Just That Awesome*, Bustle (May 2, 2015), <https://www.bustle.com/articles/80453-5-athletes-who-fight-domestic-violence-because-they-are-just-that-awesome> (discussing specific athletes who have campaigns, most notably William Gay and Russell Wilson from the NFL); Ross Jones, *Why Russell Wilson’s Stance Vs. Domestic Violence is Greater than Any On-Field Achievement*, FOX SPORTS (Oct. 4, 2014), <http://www.foxsports.com/nfl/story/russell-wilson-why-not-you-seattle-seahawks-quarter-pass-the-peace-washington-redskins-100414>.

³⁰¹ Coker, *supra* note 6, at 184.

³⁰² Harris, *supra* note 284; Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 B.Y.U. F. Rev. 1183, 1208 (2015) (making connection generally between military and police hypermasculinity); *see also* Coker, *supra* note 6, at 183 (making connection generally between men’s sports and hypermasculinity).

³⁰³ Harris, *supra* note 284, at 794.

³⁰⁴ *Id.* at 796.

³⁰⁵ *See* note 301 *infra* and accompanying text.

³⁰⁶ Coker, *supra* note 6, at 180 (summarizing the empirical research and its three key findings: assaulters’ peer support sexual aggression toward women; assaulters themselves hold hostile attitude toward women; and assaulters engage in problematic use of alcohol).

conventional and not innate does not necessarily make it easier to change.”³⁰⁷

Former NFL player Derek McCoy has ideas about disrupting the connection between professional sports, masculinity, and domestic violence.³⁰⁸ He urges that the root problem is “what we are all being taught about masculinity.” In professional sports, a central focus is on the “importance of seeing yourself as above what is ‘feminine,’ such as expressing emotion as one example.” The leagues institutionalize this type of thinking.

In the context of domestic violence, McCoy argues, players must be conditioned to think about women, and relationships with women, differently. Because players learn to alienate and feminize emotions, they in turn become aggressive towards females in order to see themselves above feminine, or feminine traits. McCoy notes that once players create a level of dominance towards others, they are more likely to bottle up these emotions until they build and finally blow up. These emotions become buried inside and eventually turn into anger, aggression, violence towards self and violence towards others.³⁰⁹ In sports, success is predicated upon dominance, and players have likely been conditioned from a young age to exert dominance and masculinity, not only in their sport, but in day-to-day life. For a player to be conditioned to think about women and relationships with women differently, the leagues must provide rehabilitative resources for players to learn how to process emotions and learn equitable communication. McCoy wants to see leagues implement prevention-based measures, enforce positive social norms and to own, as an institute, that masculinity and violence are a result of this psychological conditioning.

McCoy works with Project PAVE, a non-profit in Denver, Colorado, that focuses on ways to end cycles of relationship violence. Project PAVE has created a partnership with the Denver Broncos called the “True Man” program that challenges boys and men to become allies in the prevention of gender-based violence through a team framework, and to address the psychological conditioning of masculinity in sports.³¹⁰ McCoy believes

³⁰⁷ Harris, *supra* note 284, at 803.

³⁰⁸ Interview of Derek McCoy by authors, January 9, 2018 (notes on file with authors).

³⁰⁹ Rachel Estabrook, *Former Buff, NFL Vet: Football Culture Can Be Manly, Not Violent, Off the Field*, NPR (Nov. 8, 2017), <http://www.cpr.org/news/story/former-buffs-star-and-nfl-vet-wants-to-change-masculine-culture-in-football>.

³¹⁰ PROJECT PAVE, <https://www.projectpave.org/prevention.html> (last visited Apr. 24, 2018).

that this prevention and intervention program in partnership with NFL teams is a large step towards addressing the inherent issues surrounding relationship violence. Rather than teams just “checking the box” by donating money to domestic violence organizations, they have a unique opportunity to address this institutional conditioning by engaging in programs like those offered by organizations like Project PAVE.

Changes like these do not occur overnight. There is no easy fix to a problem so deeply embedded in society as a whole, not just in the United States, but worldwide. Hence, the title of the article: Advancing the Ball. What is important here is the long game, requiring incremental, deliberate, strategic, patient movement forward.

VI. CONCLUSION

The temptation is strong to implement zero-tolerance, punitive sanctions for domestic violence perpetrated by professional athletes. This article has argued that lessons learned in the reform of the legal system’s response to domestic violence in the United States over the past fifty years demonstrates that zero-tolerance, punitive sanctions have had a number of unintended, negative consequences, including over-reliance on the criminal justice system to solve the problem; diminishing victim autonomy; and seriously limiting our understanding of the intersectionality of race, class, and gender identity that individually and institutionally contribute to the norm of domestic violence. The most important of these unintended consequences is that zero-tolerance, punitive policies have not greatly diminished the occurrence of domestic violence. As a result, we have urged that fans and policy makers alike pay attention to these lessons as they consider the future of sport’s treatment of domestic violence perpetrated by players, and that they take care to think strategically and proactively about the long game in the call for reform.