

Without Consequence: When Professional Athletes Are Violent Off the Field

I. INTRODUCTION

In Spring 2010, I wrote an article reviewing the treatment by Major League Baseball (“MLB”), the National Football League (the “NFL”) and the National Basketball Association (the “NBA”) of professional athletes who are accused of domestic violence.¹ At the time, there was very little written on the subject—a number of articles in the late 1990s focusing on the murders of Nicole Brown Simpson and Ron Goldman by famous former running back, O.J. Simpson (and the countless 911 domestic violence calls placed by Nicole Brown Simpson that preceded those deaths) and some pioneering works by author Jeff Benedict.²

Just five years later, the story is quite different. The NFL’s treatment of domestic violence was selected as the sports story of 2014 in an annual vote conducted by the Associated Press.³ For the first time since the late 1990s, the media is publicly recognizing the silent story that has laid dormant, overshadowed by the story of fame, glory, athleticism and America’s favorite pastimes.

As in the late 1990s, the recent media attention on professional athletes and acts of off-field violence was precipitated by a widely publicized act of violence. Ray Rice, the esteemed running back for the Baltimore Ravens,⁴ was caught on camera punching Janay Rice—his then fiancée and now wife—unconscious in a casino elevator and then, with seeming indifference, dragging her limp body from the elevator. This action resulted in an initial two-game suspension handed down by NFL Commissioner Roger Goodell, but was later increased to an indefinite suspension after the graphic video of the events that took place inside the elevator surfaced.⁵ Ray Rice appealed the indefinite suspension and, ultimately, it was overturned by a neutral arbitrator, former U.S. District Judge Barbara S. Jones, who found the penalty “arbitrary” because Ray Rice admitted he struck Janay Rice and never misrepresented the facts to Commissioner Goodell⁶—the increase in the suspension seemed solely linked to the public

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¹ *Id.* For purposes of this article, the “leagues” means MLB, the NFL and the NBA, and “professional athletes” means players in the leagues.

² Jeff Benedict is now a contributor for *Sports Illustrated*, and a writer for SI.com. His books on professional athletes and violence against women (*Public Heroes, Private Felons: Athletes and Crimes against Women; Pros and Cons: The Criminals Who Play in the NFL*; and *Athletes and Acquaintance Rape*) were, and still are, groundbreaking.

³ Rachel Cohen, *NFL Domestic Violence, LeBron Top Sports Stories of Year*, DAILY HERALD, Dec. 25, 2014, archived at <https://perma.cc/RQ4R-A6WF>.

⁴ Throughout this article, when referencing allegations against players, I refer to the team on which they played at the time of the allegation, even if the player no longer plays for that team.

⁵ Ken Belson, *Ray Rice Wins Reinstatement to N.F.L. in Arbitration*, N.Y. TIMES, Nov. 28, 2014, archived at <http://perma.cc/C3HZ-TZ2G>.

⁶ *Id.* Despite his reinstatement, Rice has not been picked up by a team for the 2015 season as of the date this article is written.

backlash, largely influenced by the images caught on camera, rather than any new evidence. As Judge Jones wrote, “That the League did not realize the severity of the conduct without a visual record also speaks to their admitted failure in the past to sanction this type of conduct more severely.”⁷

As in many domestic violence cases, Janay Rice has supported her husband throughout the media storm, criminal process and league punishment.⁸ It is unfortunate that her personal life has become the fodder for a much-needed debate that should have been happening for some time. The point of the debate should never be the reaction of the survivor. However, it is telling to learn that the Baltimore Ravens suggested that *she*, Janay Rice, apologize for her role in the domestic violence incident alongside her husband. The Ravens tweeted (and later deleted): “Janay Rice says she deeply regrets the role that she played the night of the incident”.⁹

Janay Rice has since said that she is glad the incident brought awareness to the issue of domestic violence.¹⁰ The leagues, the public and even Congress are now debating the issue of violence against women.¹¹ Violence against women is not unique to professional sports, but professional sports provides a unique platform from which we can judge not only the leagues’ reaction to violence against women, but also the consequent response (or lack of response) by the criminal justice system. Some may argue that MLB, the NFL and the NBA should only be concerned with the on-field behavior of their respective athletes, but this is not the stance the leagues have taken. Each of MLB, the NFL and the NBA has consistently doled out punishment for off-field conduct unrelated to the game, such as driving under the influence, using non-performance enhancing drugs like marijuana and even making racist or homophobic statements (which, while repugnant, is not criminal behavior). If the leagues were only to concern themselves with on-field behavior (or off-field behavior that affects the outcome of games, such as use of performance-enhancing drugs), at least it would be a logically consistent policy. Instead, the leagues have been inconsistently punishing players for certain off-field criminal behavior—arguably implicitly condoning the off-field criminal behavior that typically goes unpunished, such as violence against women. As Senator Claire McCaskill (Democrat of Missouri) said in her testimony at a Senate Committee on Commerce, Science and

⁷ *Ray Rice Wins Appeal, Eligible to Sign*, ESPN.COM (Dec. 1, 2014), http://espn.go.com/nfl/story/_/id/11949855/ray-rice-baltimore-ravens-wins-appeal-eligible-reinstatement, archived at <http://perma.cc/DME3-RECL>.

⁸ Aaron Wilson, *Janay Rice Says Ravens Suggested She Apologize*, THE BALT. SUN, Dec. 2, 2014, at 5D.

⁹ *Id.* Others also rushed to a victim-blaming response, such as color commentator Stephen A. Smith, who, in the wake of the Rice controversy, suggested that women should not do things to provoke their spouses or boyfriends to assault them. ESPN suspended Mr. Smith for one week for his comments. Kevin E. Reed, *ESPN Fumbles on Domestic Abuse Issue*, THE COMMERCIAL APPEAL, Sept. 9, 2014, at 7.

¹⁰ Wilson, *supra* note 8.

¹¹ Domestic violence and sexual assault are also perpetrated against men. The focus on violence against “women”, and reference to victims/survivors using female pronouns, in this article is not meant to diminish the gravity of such offenses when perpetrated against men. However, each reported case of alleged domestic violence or sexual assault by a professional athlete in the NFL, NBA or MLB has been of such athlete committing such violence against a woman. Thus, I refer to violence against women, and use female pronouns, to focus the problem being addressed in this article.

Transportation hearing on the issue of professional sports and violence against women: “With great power and influence comes great responsibility.”¹²

The leagues seem to understand their responsibility now—or at least that there will be a media backlash if they do not think critically about drafting and, even more importantly, implementing policies that recognize violence against women as a punishable offense by the leagues. The NFL is leading the way, with Commissioner Goodell having hired three female experts in the field to inform NFL policy—Lisa Friel, the former head of the Sex Crimes Prosecution Unit in the New York County District Attorney’s Office, Jane Randel, co-founder of NO MORE, and Rita Smith, the former executive director of the National Coalition Against Domestic Violence.¹³ Further, the NFL owners have approved a revised personal conduct policy that, among other things, sets forth a process of review and punishment with respect to allegations of domestic violence and sexual assault (the “Revised NFL Policy”).¹⁴ Commissioner Goodell stated, “Character and values sit[s] above everything else because [the NFL represents] something that means so much to so many people.”¹⁵ Specifically with respect to domestic violence and sexual assault, Commissioner Goodell stated: “Each is a societal problem that is frequently underreported . . . As a league, we must have a continued focus on the needs of victims and families; among other things, we must encourage victims and those who observe such misconduct to come forward, to report offenses, and to seek help.”¹⁶

Unfortunately, this recent rhetoric does not align with the way the leagues handled domestic violence and sexual assault prior to the media maelstrom—in fact, it is a departure. A review of domestic violence and sexual assault allegedly perpetrated by athletes in MLB, the NFL and the NBA from January 1, 2010 through December 31, 2014 shows that the leagues have not had such a “continued focus” to date. Based on a Westlaw search of newspapers across the United States,¹⁷ there were 64 reported incidents of domestic violence or sexual assault allegedly committed by athletes in MLB, the NFL and the NBA during this five-year period. **The results show that only one of the 64 reported allegations resulted in conviction for the alleged crime (though four players pleaded guilty to lesser charges and five pleaded no contest), only seven players were punished by their league, and only two players were punished by their team.**¹⁸

¹² Steve Kraske, *TheChat: Claire McCaskill Goes after Domestic Abuse in Pro Sports*, KANSAS CITY STAR, Dec. 3, 2014, archived at <http://perma.cc/DV9Y-AY7M>.

¹³ Will Brinson, *NFL Hiring Female Advisers to Shape Domestic Violence Policies*, CBSSPORTS.COM (Sept. 15, 2014), <http://www.cbssports.com/nfl/eye-on-football/24710845/nfl-hiring-female-advisors-to-shape-domestic-violence-policies>, archived at <http://perma.cc/89M7-XF4K>.

¹⁴ *Owners OK New Conduct Policy*, ESPN.COM (Dec. 11, 2014), http://espn.go.com/nfl/story/_/id/12009596/memo-roger-goodell-nfl-owners-outlines-conduct-policy-changes, archived at <http://perma.cc/4P6W-6EU2>. See NFL Personal Conduct Policy (Dec. 2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>, archived at <http://perma.cc/Q78G-XX9A> [hereinafter “Revised NFL Policy”].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The Westlaw search captured all articles that included the terms “Major League Baseball,” “National Football League,” “National Basketball Association,” “MLB,” “NFL” or “NBA” and “domestic violence,” “sexual assault” or “battery” that were published from January 1, 2010 through March 31, 2015.

¹⁸ The NFL Collective Bargaining Agreement and the NBA Collective Bargaining Agreement expressly indicate that league action supersedes team discipline; thus, players may only be punished by the league or by their team so

If this statistic is not shocking enough, it is likely that the actual odds of a professional athlete being punished, by the criminal justice system, leagues or teams, for domestic violence or sexual assault are even lower than is evidenced by calculations based on media reports of such incidents. First, many victims of domestic violence and sexual assault do not report to the police. As discussed below, domestic violence and sexual assault have distinct complicating factors, including, for domestic violence, an intimate relationship with the perpetrator and related emotional and economic dependencies, and, for sexual assault, the reality that the victim will likely not be believed and can even be blamed for her own assault.

Second, even when victims have the courage to report to the police, allegations of domestic violence or sexual assault often go unreported by the media until formal charges are pressed. For instance, on January 14, 2015, it was reported that Josh McNary, a linebacker for the Indianapolis Colts, was formally charged with rape, criminal confinement and battery for an incident that took place on December 1, 2014.¹⁹ The original incident and police report were never publicized despite having taken place a month and a half prior to the formal charges—even the Colts indicated that they were unaware of the allegations until the charges were pressed. It is unlikely that we would have learned of the allegations if the prosecutor declined to press criminal charges, which, as detailed below, happens more often than not.

The research suggests that professional athletes are rarely formally charged with crimes related to domestic violence or sexual assault, even when there is evidence against them.²⁰ And in the cases where these professional athletes are indicted, they are almost never convicted. If the leagues continue to shape their collective bargaining agreements and/or personal conduct policies²¹ based on the results of the justice system, we cannot solve this problem—professional athletes are not punished as harshly or as consistently as their general public counterparts.²² We

as to avoid a double penalty. *See* NFL Collective Bargaining Agreement, art. 42, § 3(b) (Aug. 4, 2011), <http://nflcommunications.com/current-cba>, <http://perma.cc/6J3X-CPV3> [hereinafter “NFL CBA”]; NBA Collective Bargaining Agreement, art VI, § 10(a) (Dec. 8, 2011), <http://nbpa.com/cba/2011>, <http://perma.cc/ZGP4-EXX7> [hereinafter “NBA CBA”]. Note, however, that the NBA allows a double penalty where the player’s act or conduct is so egregious as to warrant it, but no such instances were found from 2010-2014. *See id.* The MLB 2007-2011 Basic Agreement does not specifically prohibit a double penalty, but it is a moot point for the purposes of this article; neither MLB nor any of the MLB clubs punished a player for domestic violence or sexual assault from 2010-2014.

¹⁹ *See* Michael Anthony Adams et al., *Prosecutor Sought No-Contact Orders for Witnesses in McNary Case*, INDIANAPOLIS STAR, Jan. 16, 2015, *archived at* <http://perma.cc/5UUF-BWVP>.

²⁰ For purposes of this article, I have not included domestic violence charges that are dismissed (or conditionally dismissed) in exchange for participation in counseling, treatment, community service or other diversionary programs as “formal charges”.

²¹ *See* Section IV below (League Action) for more on personal conduct policies.

²² It is generally difficult to generate and compare statistics related to domestic violence and sexual assault arrests, prosecution and convictions, given the level of under-reporting and distinctions in how the statistics are tallied. For instance, in domestic violence cases, it is difficult to draw comparisons regarding rates of formal charges or prosecution, as many published statistics do not expressly state whether dismissal of charges in exchange for participation in a diversionary program is counted as a case that was “prosecuted”. Similarly, statistics regarding “conviction” rates often do not distinguish between cases that go to trial and result in conviction for the charged crime, versus cases in which the defendant pleads down to a lesser charge or pleads no contest. That said, research has shown that the average arrest prosecution rate of domestic violence cases was 63.8% when looking at intimate partner prosecutions between 1973-2006. Andrew R. Klein, *Practical Implications of Current Domestic Violence Research*, Apr. 2008, *archived at* <https://perma.cc/Y35L-TERQ>. In comparison, the rate of professional athletes formally charged for domestic violence in the past five years is 25% (11 formal charges / 44 arrests—this number of

value professional athletes for their aggressiveness and brute strength and, without consequence, we have created a class of individuals who are above reproach when these characteristics present outside of the game.

In this article, I review my findings based on the above-described search related to incidents of domestic violence and sexual assault allegedly perpetrated by players in MLB, the NFL and the NBA in the years 2010 through 2014²³ and highlight certain allegations, the handling of which should inform our approach to such allegations in the future. Next, I review the league responses to the recent media attention on domestic violence and sexual assault and, in particular, describe and analyze the Revised NFL Policy. Lastly, I consider what steps should be taken to create effective policies in MLB, the NFL and the NBA that account for the realities of domestic violence and sexual assault and ensure that this behavior is no longer left unpunished—even for our most decorated athletes.

II. A FIVE-YEAR REVIEW: 2010-2014

The five-year search results based on a review of local and national newspapers are illuminating, not so much because of the total number of allegations, but because of the failure of the criminal justice system, the leagues and the teams to properly investigate and address these allegations. Of the 64 total reported allegations of domestic violence and sexual assault by professional athletes from 2010 through 2014, 39 were against NFL players, 16 were against NBA players and 9 were against MLB players.²⁴ 18 were allegations of sexual assault and 46 were of domestic violence. **Only one of the allegations of domestic violence resulted in conviction (though four players pleaded guilty to lesser charges and three players pleaded no contest),²⁵ and none of the allegations of sexual assault resulted in conviction (though**

arrests does not include the domestic violence allegation against Robert Sands, which did not result in arrest, or the murder-suicide committed by Javon Belcher). Even if we assume that the 63.8% prosecution statistic includes cases in which charges are dropped in exchange for participation in a diversionary program as cases that were “prosecuted”, the equivalent statistic for professional athletes would be 52.3% (11 formal charges + 12 diversionary program / 44 arrests). In sexual assault cases, statistics show that only 32% of cases are reported to the police and, of those cases, only 6.25% result in felony conviction. *Reporting Rates, RAPE, ABUSE, & INCEST NATIONAL NETWORK*, archived at <https://perma.cc/4DRL-HWWV>. While that statistic is shocking enough (and yet another reason why the leagues should not necessarily use the results of the criminal justice system as a measure for punishment), 0% of professional athletes have been convicted over the past five years for felony sexual assault.

²³ The statistics presented in this article do not capture allegations that were made against college athletes (even if such athletes are now members of the leagues) or that were made against retired professional athletes. “Domestic violence” as used herein does not encompass violence against (a) family members other than spouses (e.g., the alleged violence committed by Adrian Petersen against his children) or (b) women who appear to have been unknown to the athlete prior to the incident (e.g., the alleged violence perpetrated by Santonio Holmes and Adam Pacman Jones, each of whom were accused of hitting women in bars who they did not know prior to the alleged incidents). “Sexual assault” as used herein includes any type of sexual contact or behavior that occurs without the consent of the victim, regardless of whether the victim knew the athlete prior to the incident.

²⁴ Note that, given the number of players in each league, it is logical that the NFL has the highest number of allegations. There are 1,696 players in the NFL (not including the five practice squad players on each team), 750 players in MLB (based on the 25-man roster, and not including the 15 additional players that make up the 40-man roster) and at most 450 players in the NBA.

²⁵ Milton Bradley was convicted of the crime with which he was charged (nine counts of spousal battery). NBA players Greg Oden and Jeff Taylor, and NFL players, A.J. Jefferson and Daryl Washington, pleaded guilty to lesser charges. NBA player Jordan Hill and NFL players Tony McDaniel and Brandon Underwood pleaded no contest.

two players pleaded no contest).²⁶ Let that sink in for a minute. These numbers reflect a systemic failure, from the leagues to law enforcement to the justice system.

Breaking it down by league, there were four sexual assault allegations²⁷ and five domestic violence allegations²⁸ against MLB players from 2010 through 2014. **Only two players, Milton Bradley and Evan Reed, were formally charged with a crime. Only Milton Bradley was later convicted.**²⁹ Bradley was sentenced to three years in prison. Prosecutors indicated that he attacked his wife five times in 2011 and 2012, in one incident pushing her against a wall and choking her after she asked him to stop smoking marijuana in front of their children.³⁰ **Not one of these nine MLB players was punished by his respective team or the league,** though Bradley was released by the Seattle Mariners in 2011 after requesting a leave of absence.³¹

There were two sexual assault allegations³² and 14 domestic violence allegations³³ against NBA players from 2010 through 2014. **Only three NBA players had formal charges**

Even though Greg Hardy was originally convicted on domestic violence charges, his appeal was thrown out and thus he is not counted as having been “convicted” for purposes of this article.

²⁶ Brandon Underwood of the Green Bay Packers pleaded no contest to a lesser charge of prostitution-nonmarital sexual intercourse (originally sexual assault) and Albert Haynesworth of the Washington Redskins pleaded no contest to a lesser charge of simple assault (originally misdemeanor sexual abuse). *NFL Arrests Database*, UTSANDIEGO.COM, available at www.utsandiego.com/nfl/arrests-database.

²⁷ Evan Reed of the Detroit Tigers was accused of third-degree criminal sexual conduct in 2014, Alfredo Simon of the Cincinnati Reds was accused of rape in 2013, Pablo Sandoval of the San Francisco Giants was accused of sexual assault in 2012, and Starlin Castro of the Chicago Cubs was accused of criminal sexual assault in 2011.

²⁸ The following players were arrested for domestic violence: Everth Cabrera, Francisco Rodriguez, Manny Ramirez, Jeremy Jeffress and Milton Bradley.

²⁹ The case against Reed is pending; trial is scheduled for July 13, 2015. Holly Fournier, *July Trial Set for Ex-Tiger Evan Reed in Rape Case*, DETROIT NEWS, Mar. 13, 2015, archived at <http://perma.cc/7NGV-2DLW>. He is accused of leading an incapacitated woman back to his hotel room and raping her on March 29, 2014. The case was originally dismissed by 36th District Judge Kenneth King, who criticized the alleged victim’s actions (questioning why she did not immediately report to the hotel or the police car that she passed when she left the hotel) and questioned her credibility. Wayne County Circuit Court Judge Michael Callahan heard the prosecutor’s appeal and ruled that Judge King had abused his discretion in dismissing the charges. Holly Fournier, *Sexual Assault Charges Reinstated for Ex-Tiger Reed*, DETROIT NEWS, Nov. 21, 2014, archived at <http://perma.cc/6DAD-3ZPT>.

³⁰ Associated Press, *Former MLB Player Milton Bradley Gets Three Years in Jail for Spousal Abuse*, N.Y. DAILY NEWS, July 3, 2013, archived at <http://perma.cc/5573-GXXA>.

³¹ *Id.* 15 of the professional athletes that were accused of sexual assault or domestic violence from 2010-2014 were released by their teams relatively soon after the incidents occurred, or at the end of the then-current season. However, in each case, the team made a point of emphasizing poor athletic performance or remaining silent on the reason for release. Though it seems that the allegations may have at least been a tipping point in deciding to release these players, given that the teams did not expressly make the connection, this article does not consider a player being released by his team during or shortly after the season in which an allegation surfaced as “punishment”. Players are frequently released, so whether or not these allegations factored in the decision to release these players is difficult to discern; besides, the overall message to the public is that the players were released in the ordinary course—not because the teams were taking a stand against violence against women.

³² Andray Blatche of the Brooklyn Nets and Michael Beasley of the Memphis Grizzlies were each accused of sexual assault in 2013. *In Brief*, CHI. TRIB., July 10, 2013, at 6; Seth Pollack and Kevin Zimmerman, *Michael Beasley Sexual Assault Investigation Resolved by Police*, GRIZZLYBEARBLUES.COM, Sep. 24, 2014, available at <http://www.grizzlybearblues.com/2014/9/24/6839521/michael-beasley-sexual-assault-investigation-resolved-by-police>.

brought against them.³⁴ Of these three players, Jordan Hill pleaded no contest, and Greg Oden and Jeff Taylor pleaded guilty to lesser charges—none were convicted of the crime with which they were charged. Only one team, the Boston Celtics, punished its player—Jared Sullinger, who was arrested for assault and battery, intimidation of a witness and malicious destruction of property after allegedly pinning his girlfriend to a bed and the floor, received a one-game suspension.³⁵ The charges against Sullinger, like the large majority of other professional athletes who are arrested on domestic violence charges, were ultimately dismissed.³⁶ The league also punished one player—Jeff Taylor of the Charlotte Hornets received an unprecedented 24-game suspension after he was charged with misdemeanor domestic violence assault and malicious destruction of hotel property.³⁷ Significantly, Taylor is the only NBA player who was arrested for domestic violence or sexual assault since the recent public focus on the issue—it is unimaginable that NBA Commissioner Adam Silver would have handed down a similar suspension had the Ray Rice incident, and related criticism of Commissioner Goodell’s response, not occurred.³⁸ Commissioner Silver stated, “This suspension is 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.”³⁹

Lastly, there were 12 sexual assault allegations and 27 domestic violence allegations⁴⁰ against NFL players from 2010 through 2014. Ten of the sexual assault allegations were for rape or attempted rape,⁴¹ while the other two allegations related to other sexual acts committed

³³ The following players were arrested for domestic violence: Jeff Taylor, Greg Oden, James Johnson, DeAndre Liggins, Jared Sullinger, Terrence Williams, Matt Barnes, Dante Cunningham (on two separate occasions), Ty Lawson, Jordan Hill, Hamed Haddadi, Lance Stephenson and Charlie Villanueva.

³⁴ Jordan Hill was charged with felony assault in 2012; Greg Oden was charged with felony battery resulting in serious bodily injury, misdemeanor domestic battery and misdemeanor battery resulting in serious bodily injury in 2014; and Jeff Taylor was charged with misdemeanor domestic violence assault and malicious destruction of hotel property in 2014.

³⁵ *NBA Report*, HOUSTON CHRON., Nov. 2, 2013, at 2; *In Brief*, THE SPOKESMAN-REVIEW, Sept. 4, 2013, at 2B.

³⁶ *NBA Report*, *supra* note 35.

³⁷ *Jeff Taylor Suspended 24 Games*, ESPN.COM (Nov. 20, 2014), http://espn.go.com/nba/story/_/id/11904798/jeff-taylor-charlotte-hornets-suspended-total-24-games-pleading-guilty-domestic-violence-case, *archived at* <http://perma.cc/573T-ZFKN>.

³⁸ Though Commissioner Silver only assumed his position effective February 1, 2014, it is necessary to note that Greg Oden, James Johnson and Dante Cunningham were also involved in domestic violence incidents in 2014 – but prior to the release of the video of Ray Rice punching Janay Rice – and were not punished. Oden, like Taylor, was formally charged (in Oden’s case, with felony battery resulting in serious bodily injury, misdemeanor domestic batter and misdemeanor battery resulting in serious bodily injury) and later pleaded guilty to a lesser charge, and Commissioner Silver still refrained from handing down a suspension. *Oden Reaches Plea Deal Over Battery Charges*, NAT’L POST, Feb. 4, 2015, at B4.

³⁹ *Jeff Taylor Suspended 24 Games*, *supra* note 37.

⁴⁰ The following players were arrested for domestic violence: Kevin Alexander, Will Smith, Phillip Merling, Leroy Hill (on two separate occasions, in 2010 and 2013), Tony McDaniel, Jermaine Phillips, Erik Walden, Chris Cook, Brandon Underwood, Robert Sands (on two separate occasions, in 2012 and 2013), Bryan Thomas, Chad Johnson, Kelvin Hayden, A.J. Jefferson, Daryl Washington, William Moore, Amari Spivey, Chris Rainey, Jonathan Dwyer, Quincy Enunwa, Ray McDonald, Greg Hardy, Ray Rice and Junior Galette. This statistic also includes the murder-suicide committed by Jovan Belcher in 2012.

⁴¹ The following players were accused of rape or attempted rape: Brandon Underwood of the Green Bay Packers, Perrish Cox of the Denver Broncos, Eric Foster of the Indianapolis Colts, Jarriel King of the Seattle Seahawks, Ray McDonald of the San Francisco 49ers (shortly after he was arrested for felony domestic violence in 2014), Sammie Hill of the Tennessee Titans, Josh McNary of the Indianapolis Colts, C.J. Spillman of the Dallas Cowboys (who

against a woman's consent.⁴² Of the ten rape or attempted rape allegations, only four players were formally charged—Brandon Underwood and Perrish Cox were arrested and charged with sexual assault, Jarriel King was arrested and charged with first degree criminal sexual conduct and Josh McNary was arrested and charged with rape, criminal confinement and battery.⁴³ Of these cases, Brandon Underwood avoided trial by pleading no contest to a prostitution charge and paying a fine of \$379,⁴⁴ Perrish Cox and Jarriel King went to trial and both were acquitted, and Josh McNary's case is pending. **The result: 12 sexual assault allegations, and zero convictions (though two players pleaded no contest to lesser charges).** The only league or team punishment related to these allegations was the well-publicized six-game suspension (later reduced to four games) by the NFL of Ben Roethlisberger. Though the prosecutor declined to press charges against Roethlisberger (discussed in more detail below), Commissioner Goodell stated that Roethlisberger's conduct was not "admirable, responsible or consistent with either the values of the league or the expectations of the fans."⁴⁵

Of the 27 domestic violence allegations involving NFL players from 2010 through 2014, only seven allegations resulted in formal charges.⁴⁶ Of these seven allegations, four athletes pleaded down to lesser charges or pleaded no contest and three went to trial. Of those three trials, Chris Cook of the Minnesota Vikings was acquitted of felony domestic assault by strangulation after allegedly strangling his girlfriend, Chantel Baker. This, despite evidence that Baker suffered a perforated eardrum, lost hearing in that ear for two weeks, sustained a bloody nose, and had marks on her neck and hemorrhaging in her eyes consistent with strangulation.⁴⁷ Greg Hardy was convicted of assault on a female and communicating threats, after allegedly beating, strangling and threatening to kill his ex-girlfriend, though he appealed the conviction to a jury trial and the charges were ultimately thrown out when the victim could not be reached to testify at the jury trial.⁴⁸ While Hardy was awaiting the appeal, he was placed on the

counts for two of the allegations, having allegedly attempted to rape a woman in 2013 and raped a woman in 2014), and perhaps most infamously, Ben Roethlisberger of the Pittsburgh Steelers.

⁴² Julian Edelman of the New England Patriots was arrested for indecent assault and battery after allegedly reaching under a woman's costume at a Halloween party in Boston and grabbing her crotch. *Around the NFL: Patriots' Edelman is Facing Charges*, L.A. TIMES, Nov. 2, 2011, at 3. Albert Haynesworth of the Washington Redskins was arrested for sexual abuse after allegedly touching a waitress' breast at a Washington hotel. *Albert Haynesworth Pleads No Contest*, ESPN.COM (Aug. 22, 2011), http://espn.go.com/boston/nfl/story/_/id/6884993/new-england-patriots-albert-haynesworth-pleads-no-contest-assault, archived at <http://perma.cc/D6QA-PEYF>.

⁴³ Allegations of sexual assault against C.J. Spillman of the Dallas Cowboys, Ray McDonald of the San Francisco 49ers and Sammie Hill of the Tennessee Titans surfaced in 2014. The investigations are pending.

⁴⁴ Steve Eder, *N.F.L. Was Family, Until Wives Reported Domestic Violence*, N.Y. TIMES, Nov. 17, 2014, archived at <http://perma.cc/FC74-HQV2>.

⁴⁵ *Big Debate over Big Ben in Pittsburgh*, FOXNEWS.COM (May 3, 2010), <http://www.foxnews.com/sports/2010/05/03/big-debate-big-ben-pittsburgh>, archived at <http://perma.cc/Z7XE-YASG>.

⁴⁶ As noted above, with domestic violence allegations, formal charges are frequently not pressed in exchange for the accused agreeing to participate in community service, counseling or other diversionary program. In the past five years, ten NFL players did not face formal charges by instead agreeing to participate in such programs.

⁴⁷ *Vikings' Chris Cook Acquitted of Assaulting Girlfriend*, USA TODAY, Mar. 16, 2012, archived at <http://perma.cc/N9CG-YDEL>.

⁴⁸ See Joseph Person and Jonathan Jones, *Caroline Panthers' DE Greg Hardy's Court Date Pushed Back into 2015*, CHARLOTTE OBSERVER, Nov. 4, 2014, archived at <http://perma.cc/P9BL-LZB3I>; Joseph Person, *NFL Nears End of Greg Hardy Investigation*, CHARLOTTE OBSERVER, Mar. 25, 2015, archived at <http://perma.cc/RXL6-YAG9>.

Nicole Holder, Hardy's ex-girlfriend, received a financial settlement from Hardy after his conviction but prior to the

Commissioner Exempt List and collected his \$13.1 million salary for the 2014 season, as well as an additional \$48,000 from the Carolina Panthers' playoff victory.⁴⁹ Jonathan Dwyer's trial began March 4, 2015—he is facing one felony and eight misdemeanor aggravated assault charges for allegedly assaulting his wife during two separate arguments. Investigators indicate that Dwyer broke his wife's nose with a head butt, and the next day punched her.⁵⁰ **Of these 27 allegations, only five resulted in league punishment⁵¹ and one resulted in team punishment.⁵²**

Overall, the lasting message from these past five years is that professional athletes rarely face formal charges, and are almost never convicted, for domestic violence or sexual assault. The failure of the justice system has been replicated by the leagues themselves, which have only handed down seven punishments out of the 64 reported domestic violence and sexual assault allegations—six by the NFL, one by the NBA (only after the recent media attention on the issue) and none by MLB. While the leagues have spent countless hours developing stringent standards related to other off-field conduct, such as drug use, driving under the influence and even acceptable apparel, they have neglected to consider the prevalence and complexities of domestic violence and sexual assault and appropriate processes and procedures for addressing them. Professional athletes are admired for their talents on the field, but these talents should not excuse them from being held accountable for violent off-field behavior. The leagues' historical lack of action with respect to domestic violence and sexual assault suggests they tolerate this behavior, and do not see it as harmful to society as the other off-field behavior they consistently condemn. At this point, it is unclear whether the justice system is failing to successfully prosecute athletes because the public (i.e., jurors) has received the message from the leagues that domestic violence and sexual assault are mere distractions, or whether the leagues have failed to take action due to their reliance on flawed law enforcement practices. Either way, someone needs to step up to the plate.

III. FACTORS CONTRIBUTING TO THE LACK OF CONSEQUENCES AND RELATED CASE STUDIES

appeal date, allegedly in exchange for refusing to cooperate with prosecutors in the appeal. Christine Brennan, *Greg Hardy's Case a Test for NFL's New Approach*, DEMOCRAT & CHRON., Feb. 10, 2015, at D15.

⁴⁹ Des Bieler, *Panthers' Playoff Win Put an Extra \$48,000 in Greg Hardy's Pocket*, WASH. POST, Jan. 5, 2015, archived at <http://perma.cc/YU3M-L8CT>.

⁵⁰ *Cardinals Jonathan Dwyer Pleads Not Guilty to Hitting Wife*, AZCENTRAL.COM (Oct. 6, 2014), <http://www.azcentral.com/story/sports/nfl/cardinals/2014/10/06/cardinals-jonathan-dwyer-pleads-not-guilty-to-hitting-wife/16825571>, archived at <http://perma.cc/A4S3-N5KM>.

⁵¹ The NFL handed down one-game suspensions to Tony McDaniel of the Miami Dolphins in 2010 and Erik Walden of the Green Bay Packers in 2011 and two-game suspensions to Ray Rice of the Baltimore Ravens in 2014 (later increased to an indefinite suspension which was overturned on appeal) and Brandon Underwood of the Green Bay Packers in 2011 (though it was unclear if this punishment was for the domestic violence allegation or the preceding sexual assault allegation against him). Most recently, the NFL suspended Greg Hardy for ten games. In addition, A.J. Jefferson received a four-game suspension in 2013 after being charged with felony domestic violence, but Commissioner Goodell later lifted this suspension. The NFL also claimed it suspended Robert Sands of the Cincinnati Bengals after multiple allegations of domestic violence, but Sands was released by the Bengals for performance reasons, never served the suspension and claims he was unaware of it. Eder, *supra* note 44.

⁵² The Minnesota Vikings suspended Chris Cook for two games without pay in 2011 and then removed him from the active roster until his trial was completed and he was ultimately acquitted. *NFL Arrests Database*, *supra* note 26. As noted in note 31, *supra*, this does not account for NFL players that were released by teams the same year during which allegations of domestic violence surfaced, of which there were nine.

As Senator Claire McCaskill said, “By and large, professional sports teams have relied on the failure of the criminal justice system to get convictions as their excuse as to why very few players have been held accountable.”⁵³ So, what is happening with these domestic violence and sexual assault cases? Why are they not being successfully prosecuted? To answer this question, we must consider the societal biases and assumptions that affect our response to allegations of domestic violence and sexual assault and explore how these factors may have played a role in certain case studies—specifically, this section will analyze the domestic violence allegations against Chris Cook and DeAndre Liggins, and the sexual assault allegations against Ben Roethlisberger, Perrish Cox and Jarriel King.

Domestic Violence: Understandably Reluctant Witnesses

The U.S. Department of Justice reports that nearly one in four American women have experienced domestic violence, and, on average, more than three women are murdered by their intimate partners in the United States every day.⁵⁴ Both domestic violence and sexual assault typically take place behind closed doors, without witnesses, which make them difficult crimes to prosecute. The primary evidence is, of course, the victim herself. With domestic violence in particular, a victim may call 911 out of fear, but, once the situation is diffused, may be reluctant to testify against her current or former partner. Many victims of domestic violence are not in a position to leave their partners, due not only to an ongoing emotional connection but also due to economic dependencies and fear of further retaliation, in many cases fear of being murdered (which, as the U.S. Department of Justice statistic illustrates, is not unfounded). Even if an abused woman has the strength to leave her violent partner, going forward with charges against someone you at one time loved or cared for is complicated. When the alleged abuser is a professional athlete, in addition to the above-referenced considerations, many victims fear that their abuser’s career will be put in jeopardy if she reports the abuse or moves forward with charges against him. When these factors do not dissuade the survivor from testifying, professional athletes also have the financial resources to make an offer that the survivor cannot turn down in exchange for her silence, especially when the alternative is publicly reliving a terrifying event with no promise of punishment.

Given all of these factors weighing against continuing to cooperate in pressing charges, many women alter their testimony or refuse to show up for court appearances. For instance, in 2011, the girlfriend of Erik Walden of the Green Bay Packers, who was treated at a hospital for injuries to her head and hand after calling the police and alleging Walden pushed her, changed her story claiming that she hit him first.⁵⁵ Similarly, Chantel Baker testified that she lied to police because she was angry with Cook—prosecutors contended she backed off her story under coercion and because she was afraid of ruining his career.⁵⁶ Victims of abuse allegedly perpetrated by Quincy Enunwa of the New York Jets, Kelvin Hayden of the Atlanta Falcons, James Johnson of the Memphis Grizzlies, Matt Barnes of the Sacramento Kings, Francisco

⁵³ Kraske, *supra* note 12.

⁵⁴ U.S. Dept. of Justice Access to Justice Initiative, *Civil Legal Aid Supports Federal Efforts to Help Prevent Domestic Violence*, U.S. DEPT. OF JUSTICE, Apr. 2014, archived at <http://perma.cc/WP7M-5R36>.

⁵⁵ *NFL Packers Expected to Start Walden, Arrest Over Weekend under Review*, THE COMMERCIAL APPEAL, Dec. 1, 2011, at D6.

⁵⁶ *Vikings’ Chris Cook Acquitted of Assaulting Girlfriend*, *supra* note 47.

Rodriguez of the Milwaukee Brewers and Manny Ramirez of the Oakland Athletics, also decided not to pursue charges—prosecutors declined to press formal charges in each case.

Despite the understandable considerations that convince many women not to testify against former or current loved ones, there is other evidence upon which the leagues and law enforcement can rely. For instance, County Attorney Mike Freeman, who prosecuted the case against Cook, indicated jurors could have still believed Baker's initial statements over her retractions.⁵⁷ He went forward with the case despite Baker changing her story, stating that his office turned in convictions in other domestic violence cases when alleged victims denied abuse even more vehemently than Baker.⁵⁸ In some cases, there are eyewitnesses, and even when there are not eyewitnesses, prosecutors can present evidence consisting of the 911 calls, photographs of the crime scene and victim's injuries, hospital reports and first responder interviews of the victim.⁵⁹ In addition, domestic violence is generally a pattern of abusive behavior that is used by one partner to gain or maintain power and control over another partner; as such, it is not unusual for one to discern this pattern from prior allegations of abuse.

Unfortunately, many prosecutors do not ultimately press formal charges against domestic violence offenders—whether due to the lack of victim cooperation or otherwise. For instance, the charges against DeAndre Liggins of the Oklahoma City Thunder were ultimately dropped, despite his being arrested for two counts of kidnapping, two counts of domestic violence and battery with a dangerous weapon, three counts of domestic abuse in the presence of a minor and one count of violating a protective order.⁶⁰ In this case, there was also a witness other than Liggins and his girlfriend who he allegedly attacked. This witness, Marcus Rogers, allegedly taunted and made fun of the victim in a cellphone recording of the attack, but later as the attack ensued stepped in between Liggins and the victim allowing her to run to a neighbor's house.⁶¹ According to the probable cause affidavit, she was thrown out of bed to the ground, punched 11-12 times, stomped on and kicked and then dragged back into the house upon trying to escape twice—all in front of their two-year old son.⁶² The doctor who examined her indicated she suffered a shoulder separation, bruising on the back of her head and multiple scrapes.⁶³ Liggins never faced legal or league punishment—the Thunder released him, but he returned to the NBA after the charges were dropped.

The leagues have followed the prosecutors' lead, rarely doling out punishment despite, in some cases, overwhelming evidence of illegal violent behavior. Instead of focusing on this distortion of justice, the public focus tends to shift to why the victim continues to support, or at

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The Greg Hardy case is particularly troublesome. The prosecutors dropped his case when it was on appeal, even after Hardy was convicted in a bench trial in which the survivor testified as well as two witnesses—one who was in the apartment at the time of the incident and heard arguing and someone being slammed into a wall and the other who saw the pile of guns on Hardy's futon and took a picture of it. Michael Gordon, Joseph Person & Jonathan Jones, *Panthers Greg Hardy Guilty of Assaulting Female, Communicating Threats*, CHARLOTTE OBSERVER, July 15, 2014, archived at <http://perma.cc/EX8U-XZ6V>.

⁶⁰ Associated Press, *DeAndre Liggins Signs 10-Day Contract with Miami Heat*, CHARLESTON DAILY MAIL, Feb. 26, 2014, at 4B.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

least not outwardly accuse, the alleged abuser. Why is the onus on the victim, who has been both physically and emotionally harmed and may remain fearful for her life or wellbeing, to determine whether or not a professional athlete should be punished for a crime evidence suggests was committed? Why can we not prosecute domestic violence committed by professional athletes? Is it the continuing sense that domestic violence is a family matter? Or the stereotype of the victim who deserves the punishment if she refuses to leave? Or is it our tendency to look past all evidence to the contrary to believe that the professional athletes we idolize are incapable of such repulsive conduct?

Sexual Assault: Victim Blaming and Fear of False Accusation

Misguided focus on the victim and her actions is also apparent in sexual assault cases; in this case the public (and, by extension, law enforcement and the leagues) envision that the victim somehow “asked for it”, by drinking, wearing revealing clothing or consenting to some sexual contact, or that the accusation is false—a cry for attention and, in the case of professional athletes, money. With these often-held stereotypes, the fact is that “reasonable doubt” always already exists with rape accusations in a way that it doesn’t always already exist for accusations of other criminal activity—we are culturally trained to doubt the victim, especially when the alleged rapist does not match our idea of who a rapist is. The combination of public perception of alleged rape victims and, in contrast, professional athletes, makes it next to impossible to prosecute rape in this context.

The fear of false accusation is one of the driving forces behind the public’s immediate inclination to blame the victim and disbelieve her story. It has been reported that “[m]any men in college—athletes, fraternity members, and others—believe they or their friends are at a significant risk of being falsely accused of rape by a woman.”⁶⁴ Yet, credible sources report that false rape accusations range between two-percent and eight-percent.⁶⁵ In comparison, the approximate false accusation rate for all criminal offenses is two-percent to three-percent. Thus, false rape accusations are, at most, slightly above average, but also quite possibly occurring at exactly the same rate as false accusations of other crimes. Thus, the American public “dramatically overestimates the percentage of sexual assault reports that are false.”⁶⁶ Interestingly, commentators have used sexual assault cases involving athletes as an example of such fears:

[W]e have all seen how victims are portrayed in the media accounts of rape accusations made against popular sports and cultural figures. These media accounts show us just how easy it is for us as a society to believe the suspect’s statements (a respected cultural icon) and both discount the victim’s statements and disparage her character. This tendency to overestimate the percentage of false reports can then introduce bias into an investigation and prosecution because it causes us to give less credibility to victims and more credibility to suspects.⁶⁷

⁶⁴ JACKSON KATZ, *THE MACHO PARADOX* 218 (2006).

⁶⁵ See, e.g., *id.* at 219; Kimberly A. Lonsway et al., *False Reports: Moving beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 43-MAR PROSECUTOR 10, 11 (2009).

⁶⁶ Lonsway et al., *supra* note 65, at 13.

⁶⁷ *Id.*

The FBI statistic that should startle people is that 80%-90% of rapes go unreported.⁶⁸ Instead of solely focusing on potential false accusations, we should consider the number of rapists that continue to walk our streets (and play professional sports), either because the victim's accusation is never prosecuted or because the victim never reports in the first place, likely because she is aware that her allegation will result in her disparagement and his continued freedom.

There are significant odds that work against rape victims, especially those who are raped by professional athletes. Remember, of the 18 reported allegations of sexual assault committed by professional athletes in the past five years, only seven arrests were made and no convictions (though two players pleaded no contest to lesser charges). The sexual assault cases involving Ben Roethlisberger, Perrish Cox and Jarriel King illuminate how the above-described biases, victim blaming and pro-athlete sentiment coalesce, despite seemingly convincing evidence of wrongdoing.

While most people remember the headlines regarding an alleged sexual assault committed by Roethlisberger against a Georgia college student, the details of the Roethlisberger case are important—including, for instance, that he has reportedly also been accused of sexual assault on *three* other occasions. He was publicly accused of sexual assault by a woman in Nevada—the prosecutor declined to press charges on her behalf, so she initiated a civil suit.⁶⁹ In addition, two other sexual assault accusations surfaced against Roethlisberger that were not as publicized, given the accusers' reluctance to come forward to the police or to initiate a civil suit.⁷⁰

The much publicized Georgia case against Roethlisberger was mishandled at best, and a total failure of the justice system allowing a serial rapist to continue playing professional football at worst. In the case against Roethlisberger, a Georgia college student was at a bar with her sorority sisters, allegedly led down to a bathroom by Roethlisberger's bodyguards and then raped by Roethlisberger. The alleged victim immediately reported the rape and Sergeant Jerry Blash conducted the initial interviews—he was the only individual to interview Roethlisberger and he was the officer to whom the accuser made her initial report and, as such, would ordinarily be a key witness in her case, as he could attest to her condition and what was said immediately after the alleged assault. Blash had been pictured smiling with the quarterback earlier in the evening and was overheard by multiple witnesses calling the accuser a “drunken bitch” and saying, “This pisses me off, that women can do this,” statements which Blash later admitted making.⁷¹ He also discouraged her from reporting the rape and immediately notified Roethlisberger of the

⁶⁸ Katz, *supra* note 64, at 218.

⁶⁹ See generally, Jack McCallum, *The Hangover: Roethlisberger*, SIVAUULT.COM (May 10, 2010), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1169185/1/index.htm>, archived at <http://perma.cc/L75J-3C8R>.

⁷⁰ Jonathan D. Silver, *Lawyer Says Client Made Roethlisberger Allegation*, PITTSBURGH POST-GAZETTE (Apr. 13, 2010), <http://www.post-gazette.com/steelers/2010/04/13/Lawyer-says-client-made-Roethlisberger-allegation/stories/201004130232>, archived at <http://perma.cc/PQ5U-6WFD> (reporting that another alleged sexual assault victim contacted Boston attorney Harry Manion but ultimately decided not to press charges); Timothy Egan, *Nike's Women Problem*, N.Y. TIMES, Apr. 21, 2010, archived at <http://perma.cc/P8ZH-CMAF> (reporting that the 500-plus page investigatory report in the Georgia case revealed another Georgia woman had claimed Roethlisberger accosted her repeatedly on two occasions).

⁷¹ McCallum, *supra* note 69.

allegation.⁷² Further, he coordinated with the off-duty police officer and state trooper that served as Roethlisberger's bodyguards that night.⁷³ Blash has since resigned from the Milledgeville police force.⁷⁴ The crime scene was never sealed off and, twelve hours after the incident, the club's janitor swabbed the bathroom with Clorox and Pine-Sol.⁷⁵

Georgia District Attorney Fred Bright was in charge of examining the evidence and concluding whether it was sufficient for the state to press charges against Roethlisberger. In the press conference in which Bright announced his decision not to press charges, he stressed the accuser's intoxication and her inconsistent statements. Bright mentioned Roethlisberger's drunken state only once when he said "[b]oth parties had been drinking alcohol."⁷⁶ Bright overlooked the botched investigation and Blash's biased statements and neglected to recount the accuser's version of events, as well as her sorority sisters' eyewitness accounts.

As revealed in the report by the Georgia Bureau of Investigation, which investigated the Georgia allegations along with the Milledgeville police force, the accuser said that one of Roethlisberger's two bodyguards, later identified as police officer Anthony Barravecchio, escorted her into a hallway and sat her on a stool, at which point Roethlisberger walked down the hallway and exposed himself.⁷⁷ It was at this point that she said it wasn't okay, tried to leave, and went to the first door she saw, which happened to be a bathroom—Roethlisberger followed her into the bathroom, shut the door, and then, allegedly, had sex with her against her will.⁷⁸ Her friend, Nicole Biancofiore said that she saw the accuser "dragged by a bodyguard to the back room."⁷⁹ Two other friends said they saw the bodyguard lead the accuser down the hallway and knew she was drunk and were worried about her.⁸⁰ Ann Marie Lubatti claims she approached one of Roethlisberger's two bodyguards and said, "This isn't right. My friend is back there with Ben. She needs to come back right now."⁸¹ According to her, the bodyguard, later identified as Pennsylvania state trooper Ed Joyner, would not look her in the eye. Upon questioning, Bright conceded that the accuser's friends said they spoke to one of the bodyguards in an effort to get their friend from the bathroom and that he would not look at them.⁸² Further, he said that the accuser's friends confronted the manager who "basically said, look, he's an NFL quarterback with the Steelers – something to that effect – he's not going to risk his career doing anything foolish."⁸³ After the accuser reported the alleged assault to the police, she then went to the

⁷² Christian Boone et al., *QB's Case in Trouble from the Start*, ATLANTA JOURNAL-CONSTITUTION, Apr. 26, 2010, archived at <http://perma.cc/T6V7-GVCK>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Big Debate over Big Ben in Pittsburgh*, *supra* note 45; McCallum, *supra* note 69.

⁷⁷ *Accuser: Roethlisberger Exposed Self*, ESPN.COM (Apr. 16, 2010), <http://sports.espn.go.com/nfl/news/story?id=5094224>, archived at <http://perma.cc/8S9X-3HGS>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Georgia DA: 'Don't Even Have Probable Cause', STEELCITY INSIDER, Apr. 12, 2010, <http://www.scout.com/nfl/steelers/story/961691-georgia-da-don-t-even-have-probable-cause#/story/961691-georgia-da-don-t-even-have-probable-cause>, archived at <http://perma.cc/3WS4-8JVS> (citing D.A. Fred Bright Transcript plus the Post-Statement Interview).

⁸³ *Id.*

hospital and the examination showed lacerations, bruising, and bleeding in her genital area, though the doctor indicated that he could not conclusively say if these resulted from trauma or sexual assault.

Roethlisberger was never prosecuted—a discouraging outcome, given that many rape victims (a) do not immediately report to the police, (b) do not go to the hospital, (c) lack evidence of physical trauma to the genital area (whether conclusive or not) and (d) are not raped in public places with multiple witness accounts as to suspicious behavior of the alleged rapist. This evidence provides valuable insight into the events that occurred that night, and more evidence than many other rape victims have when faced with the decision of whether to report a sexual assault. If this allegation of rape does not lead to prosecution in a court of law, it is not hard to figure out why so few women report rape.

The cases against each of Perrish Cox and Jarriel King were not as publicized as Roethlisberger's case, though, unlike Roethlisberger, each player was formally charged with sexual assault. Perrish Cox was in his rookie year with the Denver Broncos when he was accused of sexual assault in 2010. Cox's accuser claimed that she, Cox, his teammate Demaryius Thomas and Cox's girlfriend, Carthy Che, went out together and then returned to Cox's apartment.⁸⁴ The alleged victim believed she was drugged, as she remembered little about what happened that evening even though she only had four drinks.⁸⁵ Though she was suspicious that something had happened the next morning, she did not file a complaint because she could not remember the details and did not want to make unfounded charges.⁸⁶ Instead, she came forward on October 28, 2010 after learning she was pregnant, with the doctors placing the date of conception around the date that she was at Cox's apartment.⁸⁷ Both before and after the alleged victim came forward with the accusation, Cox repeatedly denied having sex with the alleged victim,⁸⁸ thus restricting him from using the defense most commonly used by men accused of rape—that the sex was consensual. Nonetheless, the DNA sample taken from the fetus matched the sample taken from Cox.⁸⁹

Not only was there DNA evidence, coupled with a history of Cox vehemently denying that he had sex with the woman, there were also witnesses. Thomas testified against Cox and indicated that the alleged victim was passed out at Cox's home, and Cox then brought her into his bedroom and said to Thomas: "I think she's ready."⁹⁰ Thomas left the apartment shortly thereafter.⁹¹ While many things were debated during the trial, it was not contested that the alleged victim was passed out, incapacitated—unable to consent.

⁸⁴ P. Solomon Banda, *Trial opens for former Broncos CB Perrish Cox*, NFL.COM (Feb. 28, 2012), <http://www.nfl.com/news/story/09000d5d8273ddac/printable/trial-opens-for-former-broncos-cb-perrish-cox>, archived at <http://perma.cc/HCV9-DBLJ>.

⁸⁵ Carlos Illescas, *Broncos Ex-Teammate's Testimony Scathing at Perrish Cox Sex-Assault Trial*, THE DENVER POST, Mar. 1, 2012, archived at <http://perma.cc/APM7-HWZM>.

⁸⁶ Banda, *supra* note 84.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Illescas, *supra* note 85.

⁹¹ *Id.*

Without having the typical defense of consensual sex to rely on, the defense attorney, Harvey Steinberg, went to the second best option—painting a picture that the alleged victim was a drunk party girl and arguing that the DNA results were unreliable.⁹² Steinberg clinched his case, saying, “Let’s just call this what it is. These were a couple of party girls . . . What did [the alleged victim] herself do?” Prosecutor Bob Chappell countered, “You just heard why, the reason women are reluctant to report rape.”⁹³ And the jury followed through—they acquitted Cox shortly thereafter.

The case against Jarriel King of the Seattle Seahawks was similar to Cox’s, given the unusual amount of evidence that was present for a rape case. A woman alleged that King and his friend, Arthur Lee Denson-Holmes, drugged her and raped her in a North Charleston, South Carolina apartment despite her cries to stop the sexual assault.⁹⁴ In this case, the defense attorneys argued that the sex was consensual and that the woman concocted the accusations in order to get her hands on King’s money.⁹⁵ But unlike typical he-said, she-said cases in which, due to the lack of physical evidence, the prosecution relies almost exclusively on the victim’s word alone, there was a text message sent from King’s cellphone at 4:20 a.m. the morning of the incident that said, “Let’s get her sleepy.”⁹⁶ King also sent the woman a text to apologize for anything that might have happened to her.⁹⁷ In addition, a drug often used in sleeping pills and cold medicine was found in the woman’s system.⁹⁸ Despite all of this evidence, a jury acquitted King.⁹⁹

The Roethlisberger, Cox and King cases illustrate the uphill battle women face in pressing sexual assault charges generally, but more specifically, against professional athletes. Typically, prosecutors must rely on the word of the victim, together with accounts of the officers who take the initial report. If they are lucky, the victim may have had the strength to go to the hospital immediately after the attack and have evidence of physical trauma, though most rape kits do not produce such results in adult women. The above-referenced cases had additional evidence including witness testimony, DNA evidence, evidence of the use of sleeping pills and text messages documenting the state of mind of the alleged perpetrator. And yet one case did not even get to court, and the other two resulted in acquittals.

It is not surprising that there have been no convictions of professional athletes for sexual assault from 2010-2014, despite 18 allegations, and that prosecutors rarely even press formal charges—their cases are already lost. Instead of focusing on the rates of false accusation, these numbers and stories suggest we should focus on the sexual assaults committed by professional

⁹² Associated Press, *Perrish Cox Acquitted of Sexual Assault*, ESPN.COM (Mar. 2, 2012) http://espn.go.com/nfl/story/_id/7638140/ex-denver-broncos-player-perrish-cox-acquitted-sexual-assault, *archived at* <http://perma.cc/C3YC-CVBJ>.

⁹³ Katherine Redmond, *Perrish Cox Verdict the Result of Victim Blame, Sexism and Status*, HUFFINGTON POST (Mar. 7, 2012), http://www.huffingtonpost.com/katherine-redmond/perrish-cox-trial_b_1322908.html, *archived at* <http://perma.cc/GWX3-MEWG>.

⁹⁴ Christina Elmore, *Charleston County Jury: Jarriel King, Friend, Not Guilty of Criminal Sexual Conduct*, THE POST AND COURIER, July 31, 2014, *archived at* <http://perma.cc/TE7G-U29W>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

athletes that go unreported given the likely outcome—being vilified in the media as a party girl and liar and having only a slim chance of seeing even an incredibly strong case result in conviction. The arrest affidavit for Cox’s accuser stated:

“She said she was worried about filing a police report because she saw how the media tormented the victim in the Kobe Bryant case. She feels that society has the mentality that because of an athlete’s social status he wouldn’t have to force someone to have sex with him. She said all of the athletes have the money to get big lawyers and they pay their way out of it. She said she doesn’t want to be harassed in the media.”¹⁰⁰

Team Complicity with Law Enforcement

In addition to general victim blaming and stereotypes that exist with respect to victims of domestic violence or sexual assault, forming a strong case against a professional athlete is complicated by the relationship between team security, a player’s personal security and law enforcement. In many cases, there is a comradery amongst these individuals, oftentimes due to mutual friends and connections. In many other cases, members of law enforcement supplement their income by actually serving as team security or player personal security while off-duty—thus, making it difficult to discern in what capacity they are acting and creating a conflict of interest. The teams foster this relationship, routinely employing such off-duty officers as uniformed escorts or team security, paying them, providing perks and covering travel costs.¹⁰¹

As discussed previously, the fact that Roethlisberger’s two bodyguards, Barravecchio and Joyner, were an off-duty police officer and state trooper responsible for leading the alleged victim to the bathroom and then barring her sorority sisters from assisting her indicates some level of complicity—at the very least, they knew they were facilitating some sort of private interaction, likely sexual, between Roethlisberger and a drunk, underage woman whose friends were concerned for her. At the worst . . .

The formal relationship between Roethlisberger’s bodyguards and law enforcement (and other bodyguards and team security with law enforcement) underlies and informs the bias that police officers have exhibited in favor of professional athletes accused of domestic violence and sexual assault. Roethlisberger’s bodyguards were not the only biased witnesses on hand when, and shortly after, the alleged attack occurred—witnesses claim that Sergeant Jerry Blash demonstrated little patience with the alleged victim, allegedly saying, “You can file a statement but this man has a lot of money and good attorneys.”¹⁰² After the accusation was made, Blash warned Roethlisberger and his bodyguards, telling Barravecchio, “We have a problem, this

¹⁰⁰ A woman alleged that Kobe Bryant, a basketball player for the Los Angeles Lakers, gripped her by the neck, bent her over a chair and raped her on June 30, 2003 in a Colorado hotel room. The case of *People v. Kobe Bean Bryant* was eventually dismissed by prosecutors when the 20-year-old woman declined to testify after evidence of her sexual activity was ruled admissible at trial (information that is typically protected from disclosure under “rape shield” laws). Prior to this ruling, the woman’s name and sealed transcripts regarding her sexual history were leaked to the press by court staff. See T.R. Reid, *Rape Case Against Bryant is Dropped*, WASH. POST, Sept. 2, 2004, at A01.

¹⁰¹ Steve Eder, *Whisked Out of Jail, and Back to the NFL*, N.Y. TIMES, Nov. 16, 2014, archived at <http://perma.cc/2HB6-JLKZ>.

¹⁰² Boone et al., *supra* note 72.

drunken bitch, drunk off her ass, is accusing Ben of rape.”¹⁰³ He told Joyner, “There is no way it could have happened.”¹⁰⁴ Former District Attorney J. Tom Morgan observed, “With that kind of attitude, what victim would want to go through with a prosecution? . . . After the way she was treated, it was going to be hard to move forward with this case.”¹⁰⁵

Ray McDonald’s recent run-ins with the police have been no different. The defensive end for the San Francisco 49ers was arrested for felony domestic violence against his then-pregnant fiancée in August 2014, and accused of sexual assault more recently in December 2014.¹⁰⁶ In each case, McDonald reached out to the 49ers organization when police became involved. In fact, Sergeant Sean Pritchard, who provided private security to the 49ers, was already present at the house when the officers arrived on the scene to investigate the domestic violence allegations.¹⁰⁷ After this apparent conflict of interest arose, the San Jose Police Department later suspended its officers from working private security for the 49ers but claimed it had no bearing on the investigation; nevertheless, it took a month for the San Jose Police to forward its investigation of McDonald to the District Attorney’s office.¹⁰⁸ The 49ers stood behind McDonald, allowing him to play for the entire 2014 season even though he was facing the domestic violence charge; since the sexual assault allegation surfaced, the 49ers released him citing a “pattern of poor decision-making”.¹⁰⁹ He still has not been formally punished by the league or a team for these incidents, other than his release from the 49ers which occurred after the completion of the 2014 season—he has since been signed by the Chicago Bears, so he will seemingly not miss a game.¹¹⁰

It is not only team and player security and law enforcement that may be biased, but also third parties to whom alleged victims report. In 2010, Eric Foster of the Indianapolis Colts was accused of sexual assault by a 22-year old hotel clerk who claimed Foster confined her in a hotel room and had sex with her against her will, hours before the AFC Championship game.¹¹¹ She returned to the hotel lobby to report the incident to a hotel security official, who then promptly called the Colts security liaison but not police.¹¹² The accuser’s attorney claims that both hotel security and the police mishandled the investigation—for instance, the police later failed to take

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ As of the date this article is written, the sexual assault allegation against McDonald is still pending and no formal charges have been filed. McDonald has vehemently denied the allegations and filed a suit against the accuser for defamation—an unusual tactic with potentially far-reaching consequences, given that her account was given to the police and not to the public. Evan Sernoffsky, *Ex-49er Sues Rape Accuser for Defamation*, S.F. CHRON., Mar. 17, 2015, at C2.

¹⁰⁷ Tim Keown, *No Charges in Ray McDonald Case*, ESPN.COM (Nov. 10, 2014), http://espn.go.com/nfl/story/_/id/11852824/ray-mcdonald-san-francisco-49ers-cleared-domestic-violence-case, archived at <http://perma.cc/FWL9-54RV>.

¹⁰⁸ *Id.*

¹⁰⁹ Christine Brennan, *McDonald Release Handled Correctly*, USA TODAY, Dec. 18, 2014, at 01C.

¹¹⁰ *Ex-49ers DE Ray McDonald Gets Second Chance with Bears*, FoxSports.com (Mar. 24, 2015), <https://www.foxsports.com/nfl/story/ray-mcdonald-chicago-bears-san-francisco-49ers-032415>, archived at <http://perma.cc/9HYC-SW6D>.

¹¹¹ *Colts Tackle Denies Sexual Assault*, THE INDIANAPOLIS STAR, Apr. 21, 2010, at A15.

¹¹² *Id.*

the uniform that she was wearing during the assault as evidence.¹¹³ Though the police filed a probable cause affidavit, the prosecutor declined to file charges.¹¹⁴

These issues may arise from the fact that the teams themselves encourage reporting criminal conduct internally, to the teams, instead of the police. Mercedes Sands indicated that the Cincinnati Bengals coach, Marvin Lewis, advised her and her husband, Robert Sands to reach out to the Bengals first if there were further problems after a domestic violence incident in 2012.¹¹⁵ Robert Sands agreed that Lewis encouraged them to keep their problems “in house.”¹¹⁶ When interviewed about a *New York Times* article that revealed this practice, Lewis stated, “Mercedes doesn’t have a very good memory of things” (despite the fact that Robert corroborated her story), and shrugged off the multiple alleged domestic violence incidents saying, “You had two young kids who didn’t really have a good feel for what life is . . . Their relationship was very tumultuous.”¹¹⁷ Lewis continued, “Domestic violence is a matter of law. It’s not our deal.”¹¹⁸ Apparently, Lewis is not aware of the NFL’s personal conduct policy (both the old policy and the newly revised version), which expressly makes it the NFL’s “deal.”

The overlap between local law enforcement and team and player security, and the potential influence that has over third parties, is a systemic problem. In fact, Broward County Sheriff Al Lamberti initiated an internal affairs inquiry into the special treatment of Miami Dolphins player Phillip Merling, after he was charged with aggravated domestic battery on a pregnant woman, Kristen Lennon, in 2010.¹¹⁹ Lamberti said that “deputies who were caught up in the glamour of a big-time sports franchise could lose sight of their allegiance.”¹²⁰ At the time of Merling’s arrest, six deputies from the Broward County Sheriff’s Office were employed by the Dolphins. Similarly, in a 2008 memoir, *Bodyguard to the Packers*, Jerry Parins, a police officer who became the security director for the Green Bay Packers, recounted how his connections to the police force were useful when players were in trouble.¹²¹

These stories are not fun to recount or acknowledge, but they happened, and we cannot pretend that they didn’t. The general discounting of evidence by the justice system and the leagues and teams is astounding. It is not surprising that, when Manny Ramirez was interviewed as he was released from jail after an arrest for domestic violence, he told the reporters, “The case is closed.”¹²² When the reporters questioned him further, he stated, “I closed it. I closed it because I’m the protagonist.” It would not be surprising if many professional athletes feel that

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Eder, *supra* note 44.

¹¹⁶ *Id.*

¹¹⁷ Jay Morrison, *Lewis: Abuse Story Not Truthful*, DAYTON DAILY NEWS, Nov. 20, 2014, at C1.

¹¹⁸ *Id.*

¹¹⁹ Eder, *supra* note 101. After Merling was taken into custody, Miami Dolphins’ security director, Stuart Weinstein, called the Sheriff’s Office to get information on the allegation and to ask a commander who worked side jobs for the Dolphins to notify him when Merling’s bond was posted. Against policy, Merling was allowed to leave the jail through a rear exit to evade reporters and was also taken to get his belongings, even though a judge had ordered Merling to stay away from Lennon.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Manny Ramirez Tells Reporters He “Closed” His Domestic Violence Case, Report Says*, CBSNEWS.COM (Sept. 14, 2011), <http://www.cbsnews.com/news/manny-ramirez-tells-reporters-he-closed-his-domestic-violence-case-report-says/>, archived at <http://perma.cc/UXU4-RQAY>.

they can close their own cases, given the dearth of league punishment and legal consequence over the past five years. We need to get beyond the stereotypes of false accusation, stop questioning the victims' actions, acknowledge that these are crimes and not personal or family matters and confront our pro-athlete bias. A shield has been created by the inextricably linked security, police, teams and leagues, creating a class of individuals that are seemingly above reproach.

IV. LEAGUE ACTION

Since the Ray Rice video surfaced and Commissioner Goodell's initial two-game suspension came under scrutiny, MLB, the NBA and the NFL have each dedicated more resources toward better understanding domestic violence and sexual assault and the impact that inaction may have on both the leagues and the players. As set forth below, each of the leagues' commissioners has a tremendous amount of discretion in punishing players for conduct that is detrimental to the league or impacts the integrity of the game. The question is how consistently this power is used, and the process that is used to determine whether or not certain conduct warrants punishment, especially when reliance on the criminal justice process has been proven ineffective.

The MLB commissioner has the authority to discipline "conduct by Major League Clubs, owners, officers, employees or players that is deemed by the commissioner to not be in the best interest of baseball."¹²³ Nonetheless, MLB has been the most reluctant to punish players for domestic violence and sexual assault. In fact, "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."¹²⁴ As stated earlier, there were nine allegations of sexual assault and domestic violence against MLB players from 2010 through 2014, and no league or team punishments for such incidents. The problem may be that former Commissioner Bud Selig is apparently unaware that MLB players commit these crimes.¹²⁵ In September 2014, Commissioner Selig said, "We haven't had any cases [of domestic violence] I'm happy to say for a long, long time. I can't remember when the last time was. . . We deal with situations as they occur."¹²⁶ But does he? He went on to say, "We are a social institution and I'm proud of our record in dealing with a myriad of subjects, and we deal with them, I think, quite effectively."¹²⁷

If inaction is a response, Commissioner Selig has been quite effective. MLB's reported allegations are admittedly fewer than those in the NFL and the NBA (which has fewer players), but that does not diminish the fact that MLB players have been involved in similar incidents. The case against Cincinnati Reds pitcher, Alfredo Simon, is particularly troubling. He was accused of anally raping a woman in April 2013—a rape kit revealed anal tears, abrasions and

¹²³ MAJOR LEAGUE CONST., art. II, § 3 (2005), *archived at* <http://perma.cc/6DAK-56JL>.

¹²⁴ Mike Bates, *MLB's Record on Domestic Violence Worse than NFL's*, SBNATION.COM (July 28, 2014) <http://www.sbnation.com/mlb/2014/7/28/5936835/ray-rice-chuck-knoblauch-minnesota-twins-mlb-domestic-abuse-violence>, *archived at* <http://perma.cc/C9FH-VAB8>.

¹²⁵ Rob Manfred succeeded Bud Selig as commissioner as of January 25, 2015.

¹²⁶ Craig Calcaterra, *Bud Selig Can't Remember the Last Domestic Violence Incident in Major Leagues Baseball*, NBCSPORTS.COM (Sept. 12, 2014), <http://hardballtalk.nbcsports.com/2014/09/12/bud-selig-cant-remember-the-last-domestic-violence-incident-in-major-league-baseball/>, *archived at* <http://perma.cc/C72U-HDVU>.

¹²⁷ *Id.*

protruding tissue. Despite the fact that the woman went to the hospital and testified before a grand jury, the U.S. Attorney's Office for the District of Columbia decided not to file charges against Simon without even polling the grand jury.¹²⁸ MLB and the Cincinnati Reds similarly took no action—it is unclear who, if anyone, fully investigated these allegations to determine if they were founded. Pete Rose—banished from MLB for gambling—observed, “I picked the wrong vice. I should have picked alcohol. I should have picked drugs or I should have picked beating up my wife or girlfriend because if you do those three, you get a second chance.”¹²⁹ Crass, but undeniably accurate.

Currently, MLB does not have a personal conduct policy but its collective bargaining agreement handles domestic violence through a treatment program administered jointly by MLB and the Major League Baseball Players Association.¹³⁰ This should not be downplayed, as treatment is an essential part of any comprehensive domestic violence program, but this internal process does not provide for any punishment that could act as a deterrent, and implicitly seems to suggest that this is a matter to be handled in-house. However, in December 2014, MLB indicated that it will be meeting to discuss parameters of a disciplinary program (likely in response to the negative press the NFL received regarding the Ray Rice incident).¹³¹ Further, MLB is implementing a mandatory domestic violence training for all teams in spring 2015—each team is required to meet with a local domestic violence and sexual assault prevention organization for such training.¹³² It is yet to be seen whether MLB will put in place a formal assessment and punishment process making clear that domestic violence and sexual assault are not tolerated in the way that MLB does not tolerate other off-field conduct, such as gambling and driving while intoxicated.

Under the NBA Constitution, Commissioner Silver has the right to impose fines or inflict suspensions on players who, in his opinion, are guilty of conduct that “does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the [NBA].”¹³³ In addition, the NBA Collective Bargaining Agreement indicates that, if the NBA and National Basketball Players Association (“NBPA”) agree there is reasonable cause that a player has engaged in any type of off-court violent conduct, the player will be required to undergo clinical evaluation and counseling.¹³⁴ Domestic violence and sexual assault are expressly considered types of “violent conduct.”¹³⁵

¹²⁸ Rachel Axon, *Woman Files Lawsuit Saying She Was Raped by Alfredo Simon*, USATODAY, Apr. 25, 2014, archived at <http://perma.cc/Z3DK-TB9G>.

¹²⁹ Craig Calcaterra, *Pete Rose: 'I Should Have Picked Alcohol . . . or I Should Have Picked Beating Up My Wife or Girlfriend'*, NBCSPORTS.COM (Aug. 12, 2013), <http://hardballtalk.nbcsports.com/2013/08/12/pete-rose-i-should-have-picked-alcohol-or-i-should-have-picked-up-beating-up-my-wife-or-girlfriend/>, archived at <http://perma.cc/7PW3-FLUJ>.

¹³⁰ Jon Paul Morosi, *MLB, Union to Meet This Month on Domestic Violence Policy*, FOXSPORTS.COM (Jan. 4, 2015), <http://www.foxsports.com/mlb/story/mlb-union-to-meet-this-month-on-domestic-violence-policy-010415>, archived at <http://perma.cc/Y9FA-AXDT>.

¹³¹ *Id.*

¹³² Janie McCauley, *A's Begin Baseball's Mandatory Domestic Violence Training*, SALON.COM (Feb. 26, 2015), http://www.salon.com/2015/02/26/as_begin_baseballs_mandatory_domestic_violence_training/, archived at <http://perma.cc/6P2P-BSHN>.

¹³³ NBA Constitution R. 35(d).

¹³⁴ NBA CBA, *supra* note 18, art. VI, § 8.

¹³⁵ *Id.*

Mandatory punishment for violent off-court conduct is limited to convictions for felony violent conduct, and the NBA Collective Bargaining Agreement expressly states that a team shall not impose discipline on a player solely on the basis of the fact that the player has been arrested, but can do so if the conduct underlying the arrest “has an independent basis for doing so”.¹³⁶

Unlike MLB, the NBA has not suggested that it will reform its policies with respect to violence against women; however, Commissioner Silver exhibited a change in his approach through his punishment of Jeff Taylor. The NBA launched an investigation of Taylor’s case independent of law enforcement and conducted separate interviews of all parties.¹³⁷ Commissioner Silver also involved domestic violence experts in the investigation and assessment of the appropriate punishment.¹³⁸ In addition to the 24-game suspension, Taylor was sentenced to 80 hours of community service, and Commissioner Silver suggested that he direct his community service toward helping victims of domestic violence.¹³⁹ Though Commissioner Silver indicated that he would continue to assess player conduct on a case-by-case basis, with no formal change to the NBA’s policies,¹⁴⁰ each of these actions was a departure from how domestic violence allegations have been handled by the NBA in the past. So much so that the executive director of the NBPA, Michele Roberts, criticized the decision, stating, “We have a scheme of discipline that was the result of collective bargaining between the parties that has been applied consistently over the years. While we appreciate the sensitivity of this societal issue, the Commissioner is not entitled to rewrite the rules or otherwise ignore precedent in disciplinary matters.”¹⁴¹ Roberts is wrong that Commissioner Silver rewrote the rules, though she is correct that Taylor’s punishment was not consistent with past inaction by the league—but sometimes change is warranted and, here, long overdue. As Commissioner Silver explained, “While the suspension is significantly longer than prior suspensions for incidents of domestic violence by NBA players, it is appropriate in light of Mr. Taylor’s conduct, the need to deter similar conduct going forward, and the evolving social consensus—with which we fully concur—that professional sports leagues like the NBA must respond to such incidents in a more rigorous way.”¹⁴²

Of course, even with murmurings of a revised MLB disciplinary program and Commissioner Silver’s evolving mindset, focus remains on the NFL. Under the Constitution and By-Laws of the NFL, the NFL commissioner may discipline players who are “guilty of conduct detrimental to the welfare” of the NFL.¹⁴³ The recent media attention on the NFL distracted the public from the fact that it is the only league to have developed a distinct personal conduct

¹³⁶ *Id.* at §§ 8 & 15. Conviction of an NBA player, which according to the NBA Constitution includes a plea of guilty, no contest or nolo contendere, for a felony violent crime results in automatic suspension for a minimum of ten games.

¹³⁷ Smriti Sinha, *The NBA Just Showed the NFL How to Handle Domestic Violence Cases*, VICE SPORTS (Nov. 26, 2014), <https://sports.vice.com/article/the-nba-just-showed-the-nfl-how-to-handle-domestic-violence-cases>, archived at <https://perma.cc/2U54-4L2C>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Jeff Taylor Suspended 24 Games*, *supra* note 37 at 7.

¹⁴¹ Sam Amick, *NBPA Chief: NBA Tried to ‘Out-Muscle’ NFL with Jeffery Taylor Suspension*, USA TODAY, Nov. 21, 2014, archived at <http://perma.cc/HE9B-EK4A>.

¹⁴² *Jeff Taylor Suspended 24 Games*, *supra* note 37 at 7.

¹⁴³ Constitution and By-Laws of the National Football League, art. VIII, § 8.13(A) [hereinafter “NFL Constitution”].

policy, and has been the most consistent in doling out punishments related to off-field violent conduct.¹⁴⁴ However, it can obviously do better.

In the wake of the Ray Rice backlash, Commissioner Goodell made a number of changes, including to personnel, policy and procedure. First, as mentioned above, he hired Lisa Friel, Jane Randel and Rita Smith to advise him—each experts in the fields of domestic violence and/or sexual assault. In addition, Anna Isaacson, currently the NFL’s vice president of community affairs and philanthropy, was tapped to take an expanded role as vice president of social responsibility.¹⁴⁵ It is important for the leagues to not only have input from knowledgeable sources on domestic violence and sexual assault, but also to have female voices present in this predominantly male atmosphere—a different perspective could be refreshing.

Initially, the public and media was skeptical about the female hires, suggesting that they were publicity driven and did not reflect an honest commitment by the NFL to understand and discipline for domestic violence and sexual assault. Lindsay Jones, a journalist who currently works for *USA Today* and has historically covered many stories on professional athletes and violence against women, interviewed Friel and came to the opposite conclusion. Jones thinks that, while part of the hirings were for the sake of public appearance (since the NFL looked like an old boys’ club that did not know how to handle the Rice incident), Friel is not going to be pushed around. Jones stated, “[Friel] would not do this for a PR move and she won’t be used as a pawn.”

Friel, Randel and Smith will assist with building training curricula and educational programs for NFL personnel and identifying and managing domestic violence and sexual assault resources for NFL personnel and their families.¹⁴⁶ In addition, they have already provided valuable assistance regarding the Revised NFL Policy, which was unanimously approved by the owners in December 2014.¹⁴⁷ The Revised NFL Policy is much more specific with respect to procedures and processes to be used when assessing allegations of violent off-field conduct than its predecessor policy. Friel played a large role in forming the policy with Commissioner Goodell and other advisors. As she revealed in an interview with Jones, much of her focus was on considering the stage at which you take a player off the field and, secondly, the stage at which you impose discipline—after an allegation, arrest, formal charges or conviction?¹⁴⁸ The NFL

¹⁴⁴ In 1997, the NFL adopted the violent crime policy under Commissioner Paul Tagliabue’s leadership, which became the personal conduct policy in 2000, was revised in 2007 and has now evolved into the Revised NFL Policy. In 2000 alone, Corey Dillon, Rod Smith and Dana Stubblefield were fined and Mario Bates, Mustafah Muhammad and Denrad Walker were suspended for one or two games—all for domestic violence incidents. *NFL Players Arrested in 2000*, SAN DIEGO UNION-TRIB., Jan. 22, 2001, at D4.

¹⁴⁵ Brinson, *supra* note 13.

¹⁴⁶ *Id.*

¹⁴⁷ *Owners OK New Conduct Policy*, *supra* note 14. Neither the Revised NFL Policy nor the earlier version implemented in 2000 was collectively bargained. They were issued pursuant to the commissioner’s authority under the NFL Constitution. NFL Constitution, *supra* note 143. The NFL Players Association filed a grievance challenging the Revised NFL Policy, arguing that it violates the NFL CBA. Michael O’Keeffe, *Union Files Grievance over NFL’s Conduct*, N.Y. DAILY NEWS, Jan. 24, 2015, at 34.

¹⁴⁸ Lindsay H. Jones, *Lisa Friel Addresses Challenges Developing NFL’s New Conduct Policy*, USA TODAY, Oct. 7, 2014, archived at <http://perma.cc/5SME-6NZC>.

wants to ensure that it balances due process and the rights of the accused with the interest of the leagues and teams to uphold a certain standard of behavior.¹⁴⁹

Commissioner Goodell stated that the steps taken to improve the NFL's prior personal conduct policy come from a clear, simple principle: "Domestic violence and sexual assault are wrong. They are illegal. They have no place in the NFL and are unacceptable in any way, under any circumstances. That has been and remains our policy."¹⁵⁰ The new policy states that, if the NFL becomes aware of a possible "violation", it will undertake an investigation, which may be conducted by NFL security, independent parties or a combination of the two.¹⁵¹ A "violation" occurs if: (a) the player has a "disposition of a criminal proceeding", which includes "an adjudication of guilt or admission to a criminal violation; a plea to a lesser and included offense; a plea of nolo contendere or no contest; or the disposition of the proceeding through a diversionary program, deferred adjudication, disposition of supervision, conditional dismissal or similar arrangements" or (b) if the evidence gathered by the league's investigation demonstrates that the player engaged in conduct prohibited by the Revised NFL Policy.¹⁵² Players may be placed on paid administrative leave or the Commissioner Exempt List¹⁵³ if formally charged with a crime of violence (which may be in the form of an indictment by a grand jury, the filing of charge by a prosecutor or an arraignment in a criminal court), or if an investigation leads the commissioner to believe that there has been a violation of the Revised NFL Policy.¹⁵⁴ Josh McNary is currently on the Commissioner Exempt List, as the NFL conducts its internal investigation regarding his conduct. The commissioner's discretionary decision to place a player on paid leave "will not reflect a finding of guilt or innocence and will not be guided by the same legal standards and considerations that would apply in a criminal trial."¹⁵⁵ This leave with pay will last until it is determined whether or not a player has violated the policy.¹⁵⁶

As such, the much discussed mandatory punishment for violations 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, only kick in upon a "disposition of a criminal proceeding" or if the "evidence gathered by the league's investigation demonstrates" a violation of the policy. A first offense receives a baseline suspension without pay of six games, while a second offense results in permanent banishment, though a player can petition for reinstatement after one year.¹⁵⁷ The commissioner will consider mitigating and aggravating circumstances when determining the extent of the

¹⁴⁹ *Id.*

¹⁵⁰ *NFL Commissioner Addresses Domestic Violence*, CNN.COM (Aug. 28, 2014), <http://www.cnn.com/2014/08/28/sport/nfl-goodell-domestic-violence-memo/index.html>, *archived at* <http://perma.cc/AL9B-RPMG>.

¹⁵¹ Revised NFL Policy, *supra* note 14.

¹⁵² *Id.*

¹⁵³ A player on the Commissioner Exempt List cannot practice or attend games, but may be present at the club, with the club's permission, for individual workouts, meetings or therapy, and continues to get paid.

¹⁵⁴ Revised NFL Policy, *supra* note 14.

¹⁵⁵ *NFL Owners Endorse New Personal Conduct Policy*, NFL.COM (Dec. 10, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>, *archived at* <http://perma.cc/3J7X-FCUQ>.

¹⁵⁶ *Id.*

¹⁵⁷ Revised NFL Policy, *supra* note 14.

suspension.¹⁵⁸ If a player appeals his punishment, the process will unfold pursuant to Article 46 of the NFL Collective Bargaining Agreement, under which players may appeal disciplinary action to the commissioner. However, the commissioner can name a panel that consists of independent experts to recommend a decision on the appeal pursuant to the NFL Collective Bargaining Agreement.¹⁵⁹

Importantly, the Revised NFL Policy also states that NFL teams are obligated to report any matter that comes to their attention that may constitute a violation, and failure to report is grounds for disciplinary action.¹⁶⁰ “This obligation to report is broader than simply reporting an arrest; it requires reporting to the league any incident that comes to the club’s attention which, if the allegations were true, would constitute a violation of the Revised NFL Policy.”¹⁶¹

Each of these changes is a step in the right direction, but does the new policy go far enough? What is the real-life impact of these changes? How does it differ from the previous NFL regime, and can we expect real change? While some may view professional sports leagues and violence against women as disparate topics, the overlap between renowned athletes and a profoundly serious societal problem has created an opportunity for widely impactful social change. As Kim Gandy, president and CEO of the National Network to End Domestic Violence stated, “Beyond addressing issues of player discipline, I would hope that they would use the power of the NFL’s brand to begin changing public attitudes about masculinity and violence . . . I think few entities in the country that have the ability—both financially and in terms of impact—to accomplish a thing like that.”¹⁶²

V. ENSURING CHANGE IN THE NEXT FIVE YEARS

The Revised NFL Policy is a good starting point, especially as compared to MLB’s inaction and the NBA’s less structured approach of dealing with domestic violence and sexual assault allegations on a case-by-case basis under the commissioner’s disciplinary authority (which is, essentially, what each of the leagues has done unsuccessfully and inconsistently in the past). The practical impact of the Revised NFL Policy was already evidenced by the NFL’s ten-game suspension of Greg Hardy. Even though Hardy’s conviction was thrown out, as discussed above, the NFL conducted its own internal investigation of his conduct and concluded that Hardy “violated the [Revised NFL Policy] by using physical force against Nicole Holder in at least four instances.”¹⁶³ Commissioner Goodell wrote in his decision, “The net effect of these acts was that Ms. Holder was severely traumatized and sustained a range of injuries, including bruises and scratches on her neck, shoulders, upper chest, back, arms and feet.”¹⁶⁴ He continued, “The use of physical force under the circumstances present here, against a woman substantially smaller than

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Erik Brady, *NFL’s Domestic Violence Policy Could Undergo Numerous Changes*, USA TODAY, Oct. 9, 2014, archived at <http://perma.cc/H5R7-KXKL>.

¹⁶³ Dan Hanzus, *Greg Hardy Suspended 10 Games Without Pay*, NFL.COM, Apr. 22, 2015, available at <http://www.nfl.com/news/story/0ap3000000487503/article/greg-hardy-suspended-10-games-without-pay>.

¹⁶⁴ *Id.*

[Hardy] and in the presence of powerful, military-style assault weapons, constitutes a significant act of violence in violation of the [Revised NFL Policy].”¹⁶⁵

That said, there is still room for improvement—certainly within the NBA and MLB, and even within the NFL. With the backdrop of 64 allegations resulting in only one conviction,¹⁶⁶ seven league punishments and two team punishments in the past five years, we should take some time to get this right and consider where even the NFL Revised Policy may continue to fall short. Namely, more attention needs to be given to (a) the punishment that players face who are never formally charged with crimes or convicted, since these players account for the large majority of players who face allegations of domestic violence or sexual assault, (b) the role and duration of paid leave, (c) team accountability and reporting, including with respect to player and team security personnel who moonlight as police officers, and (d) effective efforts to train and educate both the players and the public and to, especially, debunk the myths surrounding domestic violence and sexual assault.

As the statistics from the past five years indicate, professional athletes are rarely formally charged with crimes. Even if initially arrested for domestic violence, those charges are typically dropped altogether or in exchange for counseling, treatment or community service. Conviction is even more rare—actually non-existent with respect to rape allegations against MLB, NFL and NBA players in the past five years. As such, the new structure which introduces mandatory paid leave upon formal charges and mandatory suspension upon conviction would only affect outlier cases.

That said, the new definition of a “violation” of the Revised NFL Policy moves the pendulum in the right direction. A violation includes not only convictions or guilty pleas, but also pleas to a lesser and included offense, pleas of *nolo contendere* or no contest and the disposition of a proceeding through a diversionary program, deferred adjudication, disposition of supervision, conditional dismissal or similar arrangements. In the past five years, there were 22 professional athletes that would have fallen into this category. The large majority of these players were facing domestic violence charges and agreed to participate in counseling, educational programs and/or community service in exchange for dismissal (sometimes conditional dismissal) of such charges. While only nine punishments related to domestic violence or sexual assault were doled out by teams or leagues in the past five years, if the Revised NFL Policy had been in effect in all leagues during this period, this number would have been at least 22.¹⁶⁷

¹⁶⁵ *Id.*

¹⁶⁶ As noted earlier, there were also nine players who plead no contest or guilty to lesser charges.

¹⁶⁷ In the NFL, Will Smith of the New Orleans Saints, Leroy Hill of the Seattle Seahawks, Jermaine Phillips of the Tampa Bay Buccaneers, Erik Walden of the Green Bay Packers, Bryan Thomas of the New York Jets, Chad Johnson of the Miami Dolphins, Amari Spivey of the Detroit Lions, Robert Sands of the Cincinnati Bengals, Quincy Enunwa of the New York Jets and Ray Rice of the Baltimore Ravens agreed to such diversion programs in exchange for dismissal of charges; Tony McDaniel of the Miami Dolphins, Brandon Underwood of the Green Bay Packers and Albert Haynesworth of the Washington Redskins pleaded no contest (Brandon Underwood pleaded no contest to two separate incidents that took place on different occasions—one for domestic violence and the other for sexual assault—and thus counts twice under this statistic); and A.J. Jefferson of the Minnesota Vikings and Daryl Washington of the Arizona Cardinals pleaded guilty to lesser charges. In the NBA, Hamed Haddadi of the Memphis Grizzlies agreed to participate in a diversion program, Jordan Hill of the Houston Rockets pleaded no contest and

Commissioner Goodell has recognized that it is not enough to “defer entirely to the decisions of the criminal justice system, which is governed by processes and considerations that are not appropriate to a workplace, especially a workplace as visible and influential as [the NFL’s].”¹⁶⁸ So, what do the leagues do if they do not defer to the decisions of the criminal justice system? The Revised NFL Policy puts in place an investigatory process under which claims will be assessed but ultimately does not answer this question. As USA Today reporter Lindsay Jones considers, “The foundation of the legal system is due process and the leagues need to give all players this right and an unbiased investigation; however, there comes a point in the investigation when you realize a player should not be continuing to play and this is not always after formal charges have been pressed.”

The investigatory procedure outlined in the Revised NFL Policy will aid in the NFL’s private investigations into player conduct. Not only should the NFL consider reports and evidence provided to it by law enforcement, but it should conduct comprehensive interviews of the involved parties, as well as teammates and coaches. Both sexual assault and domestic violence are crimes that can sometimes be predicted, as they are typically committed by repeat offenders. As I suggested in my 2010 article, the leagues should consider a three-strikes policy (possibly, a two-strikes policy) under which a player will be suspended if he has multiple allegations of domestic violence or sexual assault reported to the team, league and/or law enforcement, regardless of whether such allegations result in arrest.¹⁶⁹ Even without formal charges, such a pattern of misconduct is problematic and the likelihood that the player is being pre-judged or punished without fault is diminished.

The paid leave policy also needs to be reexamined. While it is undoubtedly trying to strike a middle ground between allowing the player to continue playing until the internal investigation and/or law enforcement proceedings conclude and suspending the player upon the report of an unsupported allegation, an indefinite leave with pay also seems unfair under certain circumstances. In cases where the facts suggest that criminal conduct indeed occurred, I would suggest placing the player on leave without pay until the internal NFL investigation concludes, at which point the player should be punished regardless of the stage of the criminal proceeding, which can take far longer than the leagues’ assessment of the facts. For instance, while the Indianapolis Colts requested that Josh McNary be added to the Commissioner Exempt List, resulting in his full payment while the sexual assault allegation against him unfolds, the Arizona Cardinals placed Jonathan Dwyer on the reserve/non-football injury list, which gives them the option of not paying Dwyer.¹⁷⁰ In appropriate circumstances, the league should also consider placing players on a similar list that maintains the player’s status in the league but does not reward him with ongoing payment. At the very least, there should be a time limitation on how long a player remains in this limbo status, whether paid or unpaid. Whether or not a player is

Jeff Taylor and Greg Oden pleaded guilty to lesser charges. In MLB, Jeremy Jeffress of the Kansas City Royals agreed to community service and counseling, while Milton Bradley of the Seattle Mariners was the lone professional athlete to be convicted of the crime with which he was charged.

¹⁶⁸ *Owners OK New Conduct Policy*, *supra* note 14.

¹⁶⁹ Withers, *supra* note 1.

¹⁷⁰ Despite the distinction, the Cardinals indicated that they will continue paying Dwyer while he is on the reserve/non-football injury list. Josh Alper, *Cardinals Place Jonathan Dwyer on Non-Football Illness List, Cut Chris Rainey*, NBCSPORTS.COM (Sep. 18, 2014), <http://profootballtalk.nbcsports.com/2014/09/18/cardinals-place-jonathan-dwyer-on-non-football-illness-list-cut-chris-rainey/>, archived at <http://perma.cc/8F82-D2PX>.

placed on paid leave versus unpaid leave would inevitably come down to the commissioners' discretion, but it is better than having a presumption that runs in the face of the facts presented in certain cases.

Next, as illustrated above, the role of team security and player personal security in internal investigations and law enforcement proceedings needs to be addressed. The pro-player bias that results from the overlap between teams and local law enforcement is tremendously damaging to a survivor's case—it is not irrational to conclude that people invested in the team and its reputation may, at best, be biased in their assessment of the facts and, at worst, cover them up and discourage victims from reporting. As Jones observed from her experience, “There is a sense that the team will cover for the guys.” The mandatory reporting under the Revised NFL Policy, and added pressure from the media, will help keep teams honest, but why don't we go one step further? Should team or player security personnel ever be involved in processing a domestic violence or sexual assault allegation? There is no reason that I can think of where this would be rational or desirable. The leagues should implement a bright line rule that team and player security must recuse itself from any such investigation.

Further, the teams should be prohibited from suggesting that domestic violence is an internal issue that should be referred to the team alone. Domestic violence is a crime that can result in severe injury, including death, and its proper place of referral is law enforcement. Suggesting that players have team resources and support available if players have issues outside of the clubhouse is one thing; using this suggestion as an attempt to divert all criminal conduct to a biased forum that can keep the matter from being released to the public or law enforcement is another. Victims should be encouraged to come forward, not stifled. And any support system that is extended to the families of players should not be retracted if a member of that family determines that she also needs assistance from law enforcement during a domestic dispute.

Lastly, the leagues' efforts to educate and train both their personnel and the public need to be in earnest—not as an effort to placate the recent media attention, such that we will hear no more of this training after a few months have passed. In particular, the content of the training and public education is critical. According to Jones, the initial training that each of the NFL teams attended in 2014 was based on a very basic PowerPoint presentation that outlined the definitions of domestic violence and sexual assault, and what actions could be considered to fall in these categories. This may be where the leagues need to start, since they have not previously confronted these issues head-on. However, in addition to covering basic topics, the leagues have a duty to target and address the public's misconception about, and myths surrounding, domestic violence and sexual assault. The NFL has started to foster this larger public dialog by providing each team with lists of domestic violence and sexual assault groups in its community. However, only some teams have moved forward with establishing those relationships.¹⁷¹ For instance, after Ray McDonald was arrested in 2014 for domestic violence, a group of Bay Area domestic violence support groups proactively reached out to the 49ers and offered their services and

¹⁷¹ The Tennessee Titans, Denver Broncos, Cleveland Browns and Detroit Lions are cited as having developed strong community partnerships. Ann Killion, *49ers Disappointing on Domestic Violence*, S.F. CHRON., Mar. 15, 2015, at A.

expertise.¹⁷² Five months later, even after 49ers' fullback Bruce Miller was arrested on March 5, 2015, the 49ers still have yet to respond to this letter.¹⁷³

We must first change our cultural understanding of domestic violence and sexual assault before we can expect justice—changing league policy or law will make no difference if the public (including the very jurors who decide the cases as well as the prosecutors who decide whether to press charges) are still operating under false conceptions of domestic violence and sexual assault. We need to accept that domestic violence victims may amend their stories or decline to take the stand, for the variety of reasons considered in this article. We need to accept that sexual assault victims may have been drinking or willing to consent to certain sexual activities, but that these factors do not mean they were not raped. That incredibly talented players in MLB, the NFL and the NBA may also be beating their girlfriends or raping women. And that none of these factors should keep us from assessing the actual facts and determining whether one of our culturally elite abused his power and deserves to be punished.

VI. CONCLUSION

The NFL has put a tremendous amount of resources into addressing domestic violence and sexual assault by its players since the Ray Rice incident surfaced, but we still must question if the proposed solutions actually address the problem, and also what the NBA and MLB are doing to address the same violent conduct by players in their leagues. It is not clear that a change in policies and procedures is going to result in real change unless we change the perception that the public and other players and league employees have about domestic violence and sexual assault. Leagues and teams, who likely know their players and their behaviors better than law enforcement, should take action when there is evidence of domestic violence or sexual assault regardless of whether the athlete is prosecuted or convicted through our criminal justice system—a system which rarely punishes professional athletes. Athletes are the culturally elite; they are placed on pedestals, respected, and imitated. While they should be admired for the work they do on the field, we cannot ignore their conduct off the field.

¹⁷² *Id.*

¹⁷³ *Id.*