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## Unnecessary Roughness: The NFL's History of Domestic Violence and the Need for Immediate Change

Jerri Kay-Phillips

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# Unnecessary Roughness: The NFL's History of Domestic Violence and the Need for Immediate Change

Jerri Kay-Phillips

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## I. INTRODUCTION

One week after the start of the National Football League (NFL)'s 2014-15 season, TMZ.com publicly released a video showing the Baltimore Ravens' star running back, Ray Rice, knocking his fiancée Janay Rice unconscious in an Atlantic City casino elevator. The couple is seen arguing in the casino lobby as they walk towards a waiting elevator. Less than ten seconds after entering the elevator, the grainy surveillance video shows Ray Rice slap Janay across the head. She immediately lunges towards him in the elevator to confront him and he punches her in the temple. Her head hits the metal safety rail in the elevator as she falls, rendering her unconscious. When the elevator doors reopen, Ray Rice, who has been described as a 212-pound "fire hydrant of muscle and speed"<sup>1</sup> drags the unconscious body of his fiancée halfway out of the elevator as her small black dress gathers around her waist.<sup>2</sup>

The video shocked and horrified the nation. The footage went viral, generating more than 11 million hits on YouTube and consuming the media news cycle for weeks.<sup>3</sup> In the months prior to the public release of the video, Atlantic City prosecutors had quietly allowed [Rice] to enter a pretrial intervention program that spared him jail time, probation and even a criminal record if he does not commit another offense.<sup>4</sup> It was an outcome that made the public suspect that Rice, a wealthy athlete and a sports legend in New Jersey, was given preferential treatment.<sup>5</sup> However, in New Jersey Rice's sentence was not an anomaly, as most first-time offenders often walk away with little more than court-ordered counseling in the small percentage of cases that are elevated to involve felony charges<sup>6</sup>, whereas in California, diversion programs for felony domestic violence offenses are not permitted.<sup>7</sup>

The graphic video prompted immediate calls to the NFL for disciplinary action, ultimately resulting in Rice's indefinite suspension from the league and

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1. See Jon Finkel, *The Beast of Baltimore*, MUSCLE & BODY MAGAZINE (Nov. 1, 2013), <http://www.muscleandbodymag.com/the-beast-of-baltimore/>.

2. See, e.g., *Ray Rice Knocked Out Fiancee – Full Video*, TMZ SPORTS (Sept. 8, 2014), <https://www.youtube.com/watch?v=VbwTMJroTbI>.

3. See *id.* (showing the video currently has 11,649,192 online views as of Mar. 20, 2016).

4. See David Kocieniewski, *Ray Rice Case Draws Attention to a Crime Often Obscured*, NEW YORK TIMES, Sept. 12, 2014, available at [http://www.nytimes.com/2014/09/13/sports/football/ray-rice-case-highlights-a-crime-often-overlooked.html?\\_r=0](http://www.nytimes.com/2014/09/13/sports/football/ray-rice-case-highlights-a-crime-often-overlooked.html?_r=0).

5. See *id.*

6. See *id.* See also Eric L. Nelson, "Investigating Domestic Violence: Raising Prosecution and Conviction Rates" FBI Law Enforcement Bulletin, Dec. 2013, available at <http://leb.fbi.gov/2013/december/investigating-domestic-violence-raising-prosecution-and-conviction-rates>. Eighty percent of domestic violence cases are filed as misdemeanors and between 93 and 98 percent of all criminal cases are resolved through a plea bargain.

7. See CAL. PEN. CODE §§ 243(e)(1), 273.5 (2012).

his immediate removal from the team.<sup>8</sup> Many members of the public did not realize, however, that the NFL was well aware of Rice's domestic violence episode before the media firestorm ignited on September 8, 2014. The NFL had already imposed a two-game suspension against Rice for the Atlantic City assault over the summer of 2014 as punishment for violating the league's Personal Conduct Policy.<sup>9</sup> The punishment—which NFL Commissioner Roger Goodell said was based on historical precedent from two other players who received similar punishments for domestic violence against their intimate partners—was widely criticized at the time for being too light on Rice.<sup>10</sup> Upon reflection, Goodell said the two-game suspension led the public to “question our sincerity, our commitment, and whether we understood the toll that domestic violence inflicts on so many families.”<sup>11</sup> In response to these criticisms, the league announced on August 28, 2014 that any NFL employee found to have engaged in assault, battery, domestic violence or sexual assault that involved physical force would be suspended without pay for six games for a first offense.<sup>12</sup> Second-time offenders would be banished from the league for at least one year.<sup>13</sup> However, the NFL's new policy recommendations were quickly put to the test when just three days later San Francisco 49ers defensive end Ray McDonald was arrested for felony domestic violence, and the following week the elevator video with Ray Rice went viral.<sup>14</sup>

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8. See Tom Pelissero & Gary Mihoces, *Ray Rice Cut by Ravens, Suspended by NFL Indefinitely*, USA TODAY SPORTS, Sept. 8, 2014, available at <http://www.usatoday.com/story/sports/nfl/ravens/2014/09/08/baltimore-ravens-cut-ray-rice/15291729/>. Rice's indefinite suspension was overturned on November 28, 2014 after neutral arbitrator, former U.S. District Judge Barbara Jones, found that “because Rice did not mislead the commissioner and because there were no new facts on which the commissioner could base his increased suspension, the imposition of the indefinite suspension was arbitrary.” Judge Jones vacated the second penalty imposed on Rice and he became eligible to be resigned by an NFL team. See also Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN.COM (Nov. 30, 2014), <http://www.cnn.com/2014/11/28/us/ray-rice-reinstated/>.

9. See Ken Belson, *Ravens' Rice Draws 2-Game Suspension From Goodell*, NEW YORK TIMES, July 24, 2014, available at [http://www.nytimes.com/2014/07/25/sports/football/ray-rice-draws-2-game-suspension-from-nfl.html?\\_r=0](http://www.nytimes.com/2014/07/25/sports/football/ray-rice-draws-2-game-suspension-from-nfl.html?_r=0).

10. See generally Justin Worland, *Roger Goodell Defends Ray Rice's 2-Game Suspension*, TIME MAGAZINE, Aug. 1, 2014, available at <http://time.com/3072840/roger-goodell-ray-rice-suspension-nfl/>.

11. See Sam Farmer, *NFL Sets New Penalties on Domestic Violence, Sexual Assault Violations*, LOS ANGELES TIMES, Aug. 28, 2014, available at <http://www.latimes.com/sports/nfl/la-sp-nfl-domestic-violence-20140829-story.html>.

12. See Ken Belson, *N.F.L. Domestic Violence Policy Toughened in Wake of Ray Rice Case*, NEW YORK TIMES, Aug. 28, 2014, available at [http://www.nytimes.com/2014/08/29/sports/football/roger-goodell-admits-he-was-wrong-and-alters-nfl-policy-on-domestic-violence.html?\\_r=0](http://www.nytimes.com/2014/08/29/sports/football/roger-goodell-admits-he-was-wrong-and-alters-nfl-policy-on-domestic-violence.html?_r=0). Commissioner Goodell intends that the disciplinary standards of the Personal Conduct Policy apply to all NFL personnel, although it is unclear how non-players (i.e. NFL administrative staff) could be suspended from games.

13. See *id.*

14. See Lindsay H. Jones, *49ers' Ray McDonald Arrested on Domestic Violence Charge*, USA TODAY, Aug. 31, 2014, available at <http://www.usatoday.com/story/sports/nfl/2014/08/31/ray-mcdonald-san-francisco-49ers-domestic-violence-charge/14899677/>.

As sports commentators, media personalities, and NFL coaches struggled to make sense of the incident, many cautioned that Rice, McDonald, and future players accused of domestic violence should still be afforded due process and not be judged solely in the court of public opinion. Even among league officials, there were split opinions on whether there should be strong condemnation of domestic violence coupled with an immediate disciplinary response, or if a player's criminal case needed to be fully adjudicated before the NFL could impose punishment and sanctions against the player. Given that in 2009, only 35 percent of domestic violence cases at large in the U.S. resulted in criminal conviction, with many more cases being either dismissed or dropped to misdemeanors,<sup>15</sup> the public is still left to wonder, what is an appropriate League response to domestic violence?

Although the Ray Rice assault video shocked the consciences of many Americans, the NFL actually has a long history of domestic violence and inconsistent remediation, depending on the nature of the abuse, the amount of media attention involved, and the player who finds himself at the center of the controversy.<sup>16</sup> Law enforcement has also exhibited varied responses to NFL players engaged in domestic violence for many of the aforementioned reasons.<sup>17</sup> (cite) This paper will argue that the NFL's domestic violence policy needs immediate reform. In order to make the necessary changes, player misconduct needs to be disciplined at the League level and removed from the discretion of individual owners and teams. In so doing, this policy will promote consistency, fairness, and provide the "due process" that many players seek. In support of this argument, this paper will examine the history of domestic violence in the NFL through case studies of individual players from the 1960's to the present, demonstrating how domestic violence in the NFL parallels issues presented by domestic violence experienced in our broader society, including no-drop prosecutions, domestic violence in same-sex relationships, and separation homicide. Additionally, this paper will analyze why domestic violence seems more endemic to the NFL, will explore various ways the league can respond to domestic violence from a labor and employment perspective, and will finally conclude with policy recommendations for how the NFL should create a new and improved framework for responding to domestic violence among its players.

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15. Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, NAT'L INST. OF JUSTICE SPECIAL REPORT (2009), <http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/ch6/Pages/successful-prosecution.aspx>.

16. See Brent Schrottenboer, *History of leniency: NFL domestic cases under Goodell*, USA TODAY, Oct. 2, 2014, available at <http://www.usatoday.com/story/sports/nfl/2014/10/01/nfl-domestic-abuse-history-under-roger-goodell/16566615/>.

17. See *id.*

## II. THE HISTORY OF DOMESTIC VIOLENCE AND THE NFL

We can learn much about the patterns of domestic violence and its various permutations by analyzing it through the lens of the NFL. Alicia Jessop, a former prosecutor and professor of sports law at the University of Miami, argues that “it is not that these players are committing crimes or abusing their spouses or children at a higher rate than the general populous.”<sup>18</sup> Instead, she says, “what is really going on is society’s fascination with the NFL.”<sup>19</sup> Indeed, it is quite possible that the rate of domestic violence involving professional athletes mirrors the violence against women that occurs in society at large.<sup>20</sup> But when committed by professional athletes and splashed across the sports page, the prevalence of such abuse in our society undeniably becomes more noticeable.<sup>21</sup> Accordingly, this section of the paper will explore some of the high-profile incidents of domestic violence involving NFL players and analyze how these incidents fit into the common pattern of domestic violence, along with the various legal and social responses that follow.

### A. *The NFL’s Early Years: Jim Brown*

NFL Hall of Fame running back Jim Brown is considered one of the Top 10 NFL players of all time.<sup>22</sup> He is also infamously known for his long history of abuse towards women. Jim Brown played nine seasons for the Cleveland Browns, from 1957-1965. His off-the-field troubles with women coincided with the sunset of his career, when in the summer of 1965, a jury found Brown not guilty of assault and battery against 18-year-old Brenda Ayres. Brown was accused of assaulting Ayres in a Cleveland-area Howard Johnson motel.<sup>23</sup> Brown testified during his trial that he knew Ayres and she visited his room, but he said he never assaulted her or had sex with her as she alleged. A jury acquitted Brown.<sup>24</sup>

The most notorious charge against Brown came after his NFL career ended, when in 1968 police say Brown threw model Eva Bohn-Chin off the second-floor balcony of his Los Angeles home.<sup>25</sup> He was initially arrested on

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18. See Michelle Kaufman, *Domestic-Abuse Scandals Nothing New for Miami Dolphins*, MIAMI HERALD, Sept. 19, 2014, available at <http://www.miamiherald.com/sports/nfl/miami-dolphins/article2175411.html#storylink=cpy>.

19. See *id.*

20. See Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 149 (2010).

21. See *id.*

22. See Gary Myers, *Top 50 Players in NFL History: Daily News Assembles Panel of Experts to Select Best Football Players of All Time*, NEW YORK DAILY NEWS, Sept. 4, 2014, available at <http://www.nydailynews.com/sports/football/nfl-top-50-daily-news-elects-greatest-football-players-time-article-1.1927116>.

23. See Mark Naymik, *Before Ray Rice, There Was Jim Brown and the NFL’s Indifference Toward Off-the-Field Behavior*, NORTHWEST OHIO MEDIA GROUP, Sept. 10, 2014, available at [http://www.cleveland.com/naymik/index.ssf/2014/09/before\\_ray\\_rice\\_there\\_was\\_jim.html](http://www.cleveland.com/naymik/index.ssf/2014/09/before_ray_rice_there_was_jim.html).

24. See *id.*

25. See *id.*

suspicion of assault with intent to murder.<sup>26</sup> However, charges against Brown were dropped after Bohn-Chin, who was found semiconscious on the ground below the balcony, insisted she slipped.<sup>27</sup> Next in 1971, misdemeanor charges of battery and disturbing the peace were filed against Brown, but were dropped after the two women who made the allegations failed to testify at his trial.<sup>28</sup> Brown was still accruing charges for violence against women at the ripe age of 66, when in 2002 he went to jail after smashing the windows of his wife's car with a shovel.<sup>29</sup> The judge sentenced him to a year of domestic violence counseling and ordered community service, but Brown chose a six-month jail term instead and was released after two months.<sup>30</sup>

Both the NFL and the public seemed very forgiving of Brown's transgressions against women. In fact, Cleveland Browns owner Jimmy Haslan brought Jim Brown back to work with the team as a special advisor in 2013.<sup>31</sup> When asked about Brown's new role with the team in light of his checkered past with women, the team responded in a statement that Jim Brown's "experience and perspective, especially with the valued benefit of time, can positively impact our organization as we continue to evolve and grow."<sup>32</sup>

The passage of time has inevitably worked in Brown's favor by distancing him from the scandals of his past. But perhaps the most enduring reason why Jim Brown continues to be revered is because he was never actually convicted for many of the heinous acts of violence of which he was accused. Five times Brown was accused of threatening or attacking women, and five times his accusers refused to testify against him.<sup>33</sup> This response is not uncommon. The failure of women who have been battered to participate in prosecutions is largely attributed to the victims' fear of repercussions at the hands of their abusers.<sup>34</sup> Although the NFL continues to embrace Brown as one of its all-time greats, his legacy is tainted by his continued acts of aggression and violence towards women.

### B. No-Drop Prosecutions: Warren Moon

The advent of mandatory arrest laws were seen as a major advancement

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26. See John L. Mitchell, *Spousal Abuse Trial of Jim Brown Opens*, LOS ANGELES TIMES, Aug. 28, 1999, available at <http://articles.latimes.com/1999/aug/28/local/me-4466>.

27. See Naymik, *supra* note 23.

28. See Mitchell, *supra* note 26.

29. See George Vecsey, *Jim Brown, Still a Hometown Hero*, NEW YORK TIMES, Apr. 30, 2013, available at <http://www.nytimes.com/2013/05/01/sports/football/nfl-great-jim-brown-returns-to-manhasset-still-a-hometown-hero.html>.

30. See *id.*

31. See Naymik, *supra* note 23.

32. See *id.*

33. See Mike Freeman, *On Pro Football; Jim Brown Is a Prisoner on His Own Terms*, NEW YORK TIMES, Mar. 28, 2002, available at <http://www.nytimes.com/2002/03/28/sports/on-pro-football-jim-brown-is-a-prisoner-on-his-own-terms.html>.

34. See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 10 (2009).

towards protecting women from domestic violence.<sup>35</sup> Starting in the late 1970's, but gathering momentum in the early 1980's, legislatures and police departments across the U.S. implemented policies requiring arrests in domestic violence cases whenever police had probable cause to do so, "ending the era of unfettered police discretion in determining whether individual incidents of domestic violence should be classified as crimes."<sup>36</sup> Mandatory arrest laws require the officer to make an arrest whenever the officer has probable cause to believe that an act of domestic violence has been committed.<sup>37</sup> These new, stronger laws resulted in the arrest and indictment of one of the NFL's top quarterbacks at that time, Warren Moon.

Police were called to the Moon residence on July 18, 1995 after the couple's 8-year-old son called 911 for help because his parents were fighting.<sup>38</sup> When police arrived, Felicia Moon claimed that she was at fault for an altercation with her husband that left scratches and bruises on her face, neck, back and legs.<sup>39</sup> She said she threw a candleholder at her husband and kned him in the groin during an argument over credit cards.<sup>40</sup> She also claimed that her injuries were the result of her husband trying to "restrain" her.<sup>41</sup> In spite of Felicia Moon's insistence that she did not want to file a complaint against her husband, under Texas law prosecutors exercised their option to charge Warren Moon with a Class A misdemeanor assault, which carried with it a maximum punishment of a year in jail and a \$4,000 fine.<sup>42</sup>

Texas state prosecutors were able to move forward with their case against Moon because of newly adopted no-drop prosecution laws.<sup>43</sup> No-drop prosecution means that prosecutors would not dismiss criminal charges in otherwise winnable cases simply because the victim was not interested in, or was even adamantly opposed to pursuing the case.<sup>44</sup> Thus, Felicia Moon was compelled to testify by subpoena under a Texas state law passed on September 1, 1995, even though she did not want to press charges against her husband or testify against him.<sup>45</sup> After three days of testimony from Felicia Moon during

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35. See Goodmark, *supra* note 34, at 6.

36. See *id.* at 3.

37. See *id.* at 6.

38. See Kate Murphy, *Pro Football; Jury Rapidly Acquits Moon of Spousal Abuse Charges*, NEW YORK TIMES, Feb. 23, 1996, available at <http://www.nytimes.com/1996/02/23/sports/pro-football-jury-rapidly-acquits-moon-of-spousal-abuse-charges.html>.

39. See *id.*

40. See *id.*

41. See *id.*

42. See Leonard Shapiro, *Vikings Tackle Controversies: Pro Football: Minnesota can't wait to play after troubles involving Moon, coaches and player discontent*, LOS ANGELES TIMES, Aug. 25, 1995, available at [http://articles.latimes.com/1995-08-25/sports/sp-38905\\_1\\_minnesota-vikings](http://articles.latimes.com/1995-08-25/sports/sp-38905_1_minnesota-vikings).

43. See Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations In the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 97 (1997).

44. See Goodmark, *supra* note 34, at 12.

45. See *Pro Football; Moon's Wife, on Stand, Blames Her Temper*, NEW YORK TIMES,



the eight day trial, in which she shouldered the blame for the entire altercation and even claimed that some of her wounds “might have been self- inflicted,” jurors acquitted Moon of spousal abuse after less than thirty minutes of deliberation.<sup>46</sup> When members of the jury were later asked why they voted to acquit, two jurors said they felt the star quarterback “needed another chance.”<sup>47</sup> The jurors reasoned that violence is common in marriages, with one juror stating his belief that, “there’s some sort of slapping in most marriages.”<sup>48</sup>

Both the NFL and Warren Moon’s team, the Minnesota Vikings, were conspicuously silent during the entire controversy. When asked specifically about the incident, the Vikings’ team president and chief operating officer Roger Headrick simply said, “Every team has its problems, that’s nothing new.”<sup>49</sup> Moon was never suspended by the Minnesota Vikings nor mandated to counseling.<sup>50</sup> Several members of Congress wrote to then-NFL commissioner Paul Tagliabue, urging the league to address the problem.<sup>51</sup> The Congressmen argued that the failure of the league to punish Moon for the alleged assault against his wife “sends an insidious and harmful message to many Americans.”<sup>52</sup> The NFL responded to Congress three months later with denials and implied that raising such concerns could be considered racist, since Moon was one of only three African-American starting quarterbacks in the League.<sup>53</sup> Ultimately, rather than benching Moon, imposing fines, or taking any disciplinary action for his role in the incident, Moon was allowed to start the entire season for the Minnesota Vikings, passing for more than 4,200 yards that year.<sup>54</sup> Moon was later inducted into the NFL Hall of Fame in 2006.<sup>55</sup>

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Feb. 17, 1996, available at <http://www.nytimes.com/1996/02/17/sports/pro-football-moon-s-wife-on-stand-blames-her-temper.html> (the statutory change applied to Mrs. Moon’s testimony at trial in 1996, even though the law compelling her testimony was not in effect at the time of the incident in July, 1995).

46. See Murphy, *supra* note 38.

47. See *id.*

48. See *id.*

49. See Shapiro, *supra* note 42.

50. See Marcus Baram, *NFL Denied Domestic Violence Problem, Played Race Card When Star Player Was Arrested Back In 1995*, INT’L BUS. TIMES, Sept. 18, 2014, available at <http://www.ibtimes.com/nfl-denied-domestic-violence-problem-played-race-card-when-star-player-was-arrested-back-1690652>.

51. See *id.*

52. See Jim Abrams, *Lawmakers Ask NFL, NCAA To Campaign Against Domestic Violence*, ASSOCIATED PRESS, Jan. 25, 1996, available at <http://www.apnewsarchive.com/1996/Lawmakers-Ask-NFL-NCAA-to-Campaign-Against-Domestic-Violence/id-9133d72fda3730622fa3e86375c0cbd1>.

53. See Baram, *supra* note 48. NFL Senior Vice President of Communications and Government Affairs Joe Brown said, “to single out athletes will unfavorably serve to perpetuate stereotypes – including as to ethnic and racial groups.†.†[it] is highly inappropriate and necessarily open to criticism as discriminatory.” The other two African-American quarterbacks at the time were Kordell Stewart of the Pittsburgh Steelers and Randall Cunningham of the Philadelphia Eagles.

54. See, e.g., *Warren Moon*, PRO FOOTBALL HALL OF FAME (Mar. 20, 2016, 5:32 PM), [http://www.profootballhof.com/hof/member.aspx?PLAYER\\_ID=256](http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=256).

55. See *id.*

C. *Domestic Violence in the Gay Community: Kwame Harris*

Domestic violence touches all aspects of society, including the LGBT community. The vast majority of states have consequently broadened their domestic violence statutes to include individuals in same-sex relationships.<sup>56</sup> Studies suggest that violence occurs in LGBT relationships at about the same rates as heterosexual relationships, with approximately eleven percent of lesbian and gay male relationships self-reporting domestic violence.<sup>57</sup> Although the NFL just drafted its first openly gay player in 2014 when University of Missouri's Michael Sam was selected in the seventh round by the St. Louis Rams,<sup>58</sup> several players have come out as gay after their NFL careers were over.<sup>59</sup> Such was the case with the San Francisco 49ers' top draft pick from 2003, former offensive tackle Kwame Harris, who was charged with a domestic violence assault against his boyfriend after the end of his seven-year career in the NFL.<sup>60</sup>

On August 21, 2012 Kwame Harris was arrested and charged with domestic violence, battery, and assault after an argument with his boyfriend turned violent.<sup>61</sup> Harris, a 6-foot-7, 240 pound man allegedly pinned his ex-boyfriend against a plate-glass window of a Menlo Park restaurant and hit him several times in the face and head.<sup>62</sup> The punches were hard enough to cause facial fractures that required surgery and the insertion of a metal plate in his victim.<sup>63</sup> Harris claimed that his ex-boyfriend, Dimitri Geier, started the physical fight.<sup>64</sup> After a six-day trial, in which noted domestic violence expert Nancy Lemon testified for the prosecution, a jury acquitted him of felony domestic violence and felony assault counts, but found Harris guilty of

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56. See Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259, 260 (2008).

57. See *id.*

58. See Ken Belson, *Rams Cut Michael Sam, First Openly Gay Player Drafted in N.F.L.*, NEW YORK TIMES, Aug. 30, 2014, available at <http://www.nytimes.com/2014/08/31/sports/football/rams-cut-michael-sam-first-openly-gay-nfl-draft-pick.html> (After surviving a series of pre-season cuts, Sam failed to make the St. Louis Rams' final 53-man roster. Team officials said Sam lacked the ideal height and weight associated with NFL defensive ends and was too slow to play outside linebacker). See also Thomas Barrabi, *Why Was Sam Cut By The Rams? Personnel Decision, Not Homophobia*, INT'L BUS. TIMES, Sept. 2, 2014, available at <http://www.ibtimes.com/why-was-michael-sam-cut-rams-personnel-decision-not-homophobia-1676156>.

59. See, e.g., ESERA TUAOLO, *ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL*, 2006.

60. See Vivian Ho, *Ex-Niner Kwame Harris Guilty of Domestic Violence*, SF GATE, Nov. 6, 2013, available at <http://www.sfgate.com/crime/article/Ex-Niner-Kwame-Harris-guilty-of-domestic-violence-4958587.php>.

61. See *id.*

62. See *id.*

63. See *id.*

64. See Bonnie Eslinger, *Ex-49er Kwame Harris Sentenced to Five Days in Jail for Beating Up Ex-Boyfriend*, SAN JOSE MERCURY NEWS, Dec. 21, 2013, available at [http://www.mercurynews.com/peninsula/ci\\_24769685/ex-49er-kwame-harris-sentenced-five-days-jail](http://www.mercurynews.com/peninsula/ci_24769685/ex-49er-kwame-harris-sentenced-five-days-jail).

misdemeanor charges of domestic violence.<sup>65</sup> Harris was sentenced to five days in jail, three years of probation, ordered to take 104 hours of domestic violence counseling,<sup>66</sup> and pay \$700 towards a battered women's shelter and a domestic violence fund.<sup>67</sup>

Harris's public fight with his boyfriend demonstrated many of the characteristics of domestic violence that are specific and unique to the LGBT community. For example, in many LGBT domestic violence cases there is uncertainty among police about the aggressor in the situation, reflecting a notion that the physical altercations is one of "mutual battering," where the violence is reciprocal and both parties are abusers as well as victims.<sup>68</sup> The term "mutual battering" was introduced in the late 1970's to describe heterosexual women who defended themselves against a male perpetrator through physical aggression.<sup>69</sup> The term has been refined over time to refer to those situations where two individuals are generally engaged with one another in a self-defense milieu.<sup>70</sup> In the case of gay male domestic violence, however, a person trying to assist a domestic violence victim may be met with a confusing or ambiguous situation, in that he or she may perceive both parties as participating equally in the violence.<sup>71</sup> As a result, police dismiss the majority of same-sex domestic violence reports as mutual combat,<sup>72</sup> even though further inquiry police could often reveal that there is a "victim" and "perpetrator," similar to what they would find in a heterosexual relationship. Although mutual battering is sometimes raised as a defense in heterosexual situations, researchers argue that law enforcement's misunderstanding and mischaracterization of abuse is particularly pervasive in same-sex relationships.<sup>73</sup>

Additionally, same-sex abuse can take the form of threats to "out" a partner who is not public with her or his sexual identity.<sup>74</sup> Living in this closeted way "creates a layer of oppression" that is unique and specific to the LGBT community.<sup>75</sup> The dynamic of power shifts in the relationship, where the closeted party must consider the shame, potential ostracism, and possible loss of income or housing as a result of being "outed" to family, friends, landlords, employers, and coworkers.<sup>76</sup> While it is unclear if this scenario is applicable to

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65. See Ho, *supra* note 60.

66. See CAL. PEN. CODE §1203.097(e)(6) (requiring successful completion of a batterer's program after a misdemeanor conviction for a period not less than one year).

67. See Eslinger, *supra* note 64.

68. See Little, *supra* note 56, at 263.

69. See Michael J. Potoczniak, et. al, *Legal and Psychological Perspectives on Same-Sex Domestic Violence: A Multisystemic Approach*, 17 J. OF FAMILY PSYCHOL. 252, 254 (2003).

70. See *id.* at 255.

71. See *id.*

72. See *id.*

73. See Little, *supra* note 56, at 263.

74. See *id.* at 261-62.

75. See *id.* at 262.

76. See Potoczniak, *supra* note 66, at 257.

Harris and Geier, it could have been a particularly poignant fear for him as a former NFL football player. As a consequence of Harris' actions in the fall of 2012, he found himself charged with domestic violence *and* publicly outed as gay at the same time. He revealed in a CNN interview several months after his trial that he never considered coming out during his playing days (no NFL player ever has), but that in retrospect, he wishes he could have found the "strength and the fortitude" to do so.<sup>77</sup>

The NFL never had to publicly respond to the charges against Harris because he had already retired from the league when he was arrested, but his case demonstrates that the NFL is not immune to domestic violence incidents—even among gay players.

#### D. Separation Homicide: Rae Carruth

One of the most dangerous situations for domestic violence victims is when they make the bold step to separate from their abuser. Evidence shows that many intimate partner homicides come on the heels of the abused woman's attempt to end the relationship, or after she already ended the relationship.<sup>78</sup> Such was the case for Cherica Adams, who after separating from her former boyfriend and the father of her unborn child, Carolina Panthers star wide receiver Rae Carruth, was killed in a drive-by shooting orchestrated by Carruth.<sup>79</sup>

On November 16, 1999, Cherica Adams made a chilling phone call to 911 operators after being shot in the chest four times by unknown assailants while driving her vehicle.

CHERICA: Police. I've been shot. I've been shot.

MEDIC: Okay. How did this happen?

CHERICA: I was following my baby's daddy, Rae Carruth, the football player. . . He was in the car in front of me and he slowed down and somebody pulled up beside me and did this.<sup>80</sup>

Prosecutors alleged that Carruth was the mastermind of the ambush slaying of Cherica on a twisting, two-lane Charlotte, North Carolina road past midnight.<sup>81</sup> She was also eight months pregnant at the time with Carruth's

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77. See Katie Dowd, *Kwame Harris Talks About Being Gay in the NFL*, SFGATE.COM (March 29, 2013), <http://blog.sfgate.com/49ers/2013/03/29/kwame-harris-talks-about-being-gay-in-the-nfl/>.

78. See Bay Area Legal Aid et al. as Amici Curiae Supporting the People, *The People of the State of California v. Tare Nicholas Beltran*, 2012 WL 1859371 (citing Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder* (1982) BULL. AM. ACAD. PSYCHIATRY & L. 271, 274, table 2).

79. See Kevin Armstrong, *Before Aaron Hernandez Murder Case, There Was The Story of Rae Carruth*, NEW YORK DAILY NEWS, Jan.11, 2014, available at <http://www.nydailynews.com/sports/football/zone-carruth-consequences-article-1.1576536>.

80. See *id.*

81. See *id.*

child.<sup>82</sup> Based on the 911 call implicating Carruth, he and three other men were initially charged with conspiracy, attempted murder and related charges.<sup>83</sup> While Cherica lay in a hospital bed fighting for her life, Carruth was freed on \$3-million bail.<sup>84</sup> Their son, Chancellor, miraculously survived the attack and was delivered by Caesarean section six weeks before full term.<sup>85</sup> Unfortunately, however, he was born developmentally disabled and suffered from cerebral palsy as a result of his early delivery and the physical trauma preceding his untimely birth.<sup>86</sup> Cherica died one month after the shooting from her injuries.<sup>87</sup> After Cherica's death, Carruth failed to surrender himself to authorities on murder charges and instead fled.<sup>88</sup> Police tips from the public later directed authorities to a motel in Tennessee where Carruth was found hiding in the trunk of a friend's car.<sup>89</sup> He was then taken into police custody.<sup>90</sup>

Carruth was ultimately found guilty of conspiring with three co-defendants to kill Cherica because he did not want to pay child support.<sup>91</sup> Carruth escaped the death penalty when the jury returned a not-guilty decision regarding his first-degree murder charge.<sup>92</sup> However, he was found guilty of shooting a firearm into occupied property, conspiracy to commit murder, attempted murder and using an instrument or other means to destroy an unborn child.<sup>93</sup> He was sentenced to twenty-four years and four months in prison, without the possibility of parole.<sup>94</sup>

At the time of his arrest, Carruth was the first active NFL player to face a murder charge.<sup>95</sup> Carruth, who was drafted by the Carolina Panthers in the first-round of the NFL draft in 1997, was in the third year of a four-year, \$3.7 million contract at the time of the shooting.<sup>96</sup> The Panthers excused Carruth from all team activities immediately following the shooting, but said that "in accordance with National Football League rules, [Carruth] would most likely

82. *See id.*

83. *See Carruth Is Found Hiding in Car Trunk in Tennessee*, LOS ANGELES TIMES, Dec. 16, 1999, available at <http://articles.latimes.com/1999/dec/16/sports/sp-44629>.

84. *See id.*

85. *See Steve Henson, Carruth Sentence Near the Maximum Possible*, LOS ANGELES TIMES, Jan. 23, 2001, available at <http://articles.latimes.com/2001/jan/23/sports/sp-15724>.

86. *See id.*

87. *See Carruth, supra* note 83.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See Henson, supra* note 85.

92. *See id.*

93. *See Armstrong, supra* note 79.

94. *See Henson, supra* note 85.

95. *See Carruth, supra* note 83.

96. *See PRO FOOTBALL: Carruth Arrested In Shooting Of Woman*, NEW YORK TIMES, Nov. 26, 1999, available at <http://www.nytimes.com/1999/11/26/sports/pro-football-carruth-arrested-in-shooting-of-woman.html>. *But see Carruth's Assets Are Frozen*, NEW YORK TIMES, Dec. 31, 1999, D6 (Judge Yvonne Mims Evans said that Carruth's assets would be frozen with the exception of \$35,000 he could use to help pay for his lawyers); *see also Henson, supra* note 82 (Carruth's defense was paid for by the state because he was indigent at the time of trial).

be placed on a paid leave of absence.”<sup>97</sup> Bill Polian, the former Panthers General Manager who selected Carruth in the draft said, “[w]e had no inkling there was anything like this in his future. We did pretty extensive research on him. It was pretty shocking.”<sup>98</sup> That the team was caught off guard by Carruth’s actions is not surprising, considering that “abusers methodically, intentionally, and strategically deploy violence as a means of controlling their partners.”<sup>99</sup> Often this violent aspect of their persona is hidden from public view, so it comes as a surprise to everyone—except perhaps the victim—when the abuser’s violent actions finally come to the public fore.

The NFL moved quickly to distance itself from Carruth when he was named a suspect in the shooting.<sup>100</sup> He was initially put on paid personal leave by the NFL after Cherica was critically wounded in the November 16<sup>th</sup> shooting.<sup>101</sup> On December 2, 1999 his status was changed to a leave of absence without pay.<sup>102</sup> Panthers owner Jerry Richardson made the decision to stop paying Carruth after consulting with team officials as well as NFL Commissioner Paul Tagliabue and Gene Upshaw, head of the NFL Players’ Union.<sup>103</sup> The team stipulated though that if Carruth were exonerated, he would get whatever money the team owes him.<sup>104</sup> Ultimately, however, that remedy proved unnecessary, as the Panthers released him from the team and terminated his contract on December 16, 1999.<sup>105</sup> NFL commissioner Paul Tagliabue simultaneously suspended Carruth from the league indefinitely because of his failure to turn himself in to police on first-degree murder charges.<sup>106</sup>

The NFL’s response to Carruth’s arrest and subsequent conviction can be explained by the league’s concern for preserving both its multi-million dollar business interests and its reputation. However, in its haste to distance itself from Carruth, the NFL missed an opportunity to make a statement about its stance on violence towards women. Then-NFL Commissioner Paul Tagliabue stated that although he would prefer to preside over a league in

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97. *See id.*

98. *See* Armstrong, *supra* note 79.

99. *See* Minouche Kandel et al, Amici Brief, *The People of the State of California v. Tare Nicholas Beltran*, 2012 WL 1859371 (Cal.), 23.

100. *See* Chip Scoggins, *Carruth’s Girlfriend Dies, Panthers’ Player Sought In Murder*, CHICAGO TRIBUNE, Dec. 15, 1999, available at [http://articles.chicagotribune.com/1999-12-15/sports/9912150043\\_1\\_cherica-adams-theodry-carruth-rae-carruth/2](http://articles.chicagotribune.com/1999-12-15/sports/9912150043_1_cherica-adams-theodry-carruth-rae-carruth/2).

101. *See* NFL DAILY REPORT; *Panthers Stop Paying Carruth; Another Arrest Is Made in Case*, LOS ANGELES TIMES, Dec. 3, 1999, available at <http://articles.latimes.com/1999/dec/03/sports/sp-40084>.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See* Nancy Gay, *Shocking Story Of Rae Carruth Grips Charlotte*, SAN FRANCISCO CHRONICLE, Dec. 18, 1999, available at <http://www.sfgate.com/sports/article/Shocking-Story-Of-Rae-Carruth-Grips-Charlotte-2889945.php>.

106. *See id.*

which no players had been accused of violent crimes, professional football players, despite public perception, had behaved themselves better than society at large.<sup>107</sup> “Most statements that have been made about the criminal records in the NFL have been nonsensical and stupid,” Tagliabue said in his annual State of the NFL address.<sup>108</sup> “We’ve had 11 convictions. . . most of those convictions — putting aside Rae Carruth — were minor offenses.”<sup>109</sup> In effect, by dismissing Carruth’s actions as an anomaly, the NFL missed an opportunity to educate the players and the public about how domestic violence, financial pressures, and relationship separation can sometimes tragically lead to death. Instead, Tagliabue’s position was, “we’ve got policies in place. . . I think that’s all you can do.”<sup>110</sup>

### III. IS DOMESTIC VIOLENCE AGAINST WOMEN MORE PREVALENT IN THE NFL?

#### *A. Are Those Who Play a Violent Sport More Violent Than Average Men?*

Identifying the characteristics of domestic violence abusers is challenging and often inaccurate. Some argue that athletes are predisposed to commit acts of domestic abuse and sexual assault because sports create a “macho subculture” that equates masculinity with violence.<sup>111</sup> In the NFL specifically, the hard-hitting, aggressive nature of the game attracts individuals who understand what makes a good football player. And one of the characteristics of good football players is to be violent on the field—in a controlled situation.<sup>112</sup> However, some argue that players trained to use violence and intimidation on the field may have difficulty preventing these lessons from carrying over into their personal relationships.<sup>113</sup>

On the other hand, many dismiss the violent-player theory outright, arguing that NFL players have no more of a predilection towards domestic violence than any other man in society. John Lynch, former safety for the Tampa Bay Buccaneers and Denver Broncos said, “I think most players know how to leave violence on the field. You only read or hear about the guys who step over the line. But it’s only a few who give the rest of us a bad name.”<sup>114</sup> NFL Commissioner Paul Tagliabue agreed, stating, “I don’t buy the notion that

107. See Mike Freeman, *Tagliabue Counters Critics of Players*, NEW YORK TIMES, Jan. 29, 2000, at D3.

108. Carl Kotala, *Tagliabue Lauds Players’ Conduct*, USA TODAY, Jan. 26, 2001, available at <http://usatoday30.usatoday.com/sports/nfl/super/2001-01-26-tags.htm>.

109. *Id.*

110. *See id.*

111. See Withers, *supra* note 20, at 148.

112. See Leonard Shapiro & Thomas Heath, *Leaving It All on the Football Field: When It Comes to Violence, That Is What NFL Wants*, WASHINGTON POST, Feb. 7, 2000, available at <http://www.washingtonpost.com/wp-srv/WPcap/2000-02/07/050r-020700-idx.html>.

113. See The Harvard Law Review Association, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1050 (1996).

114. See Shapiro & Heath, *supra* note 112.

because they play a collision, contact sport that there's a greater propensity to violent conduct."<sup>115</sup>

The few studies that have been conducted on the subject actually bear out this latter position. Alfred Blumstein, a professor at the Heinz School of Public Policy and Management at Carnegie Mellon University co-authored a study on NFL player assaults, published by the American Statistical Association in 1999.<sup>116</sup> The study said the rate of assault arrests from a pool of 509 NFL players, out of about 1,500 in the league at the time, was just under half (about 46 percent) of the rate of assault arrests experienced by men of a similar race and age in society.<sup>117</sup> The authors acknowledge that although in their initial assessment they thought that NFL rates of assault arrests looked high, they ultimately found those rates to be well below the rates for the general population.<sup>118</sup> Citing this study, Commissioner Tagliabue boasted, "If the rest of society could do as we do in the NFL, America's crime problem would be well addressed."<sup>119</sup>

However, evidence is inconclusive regarding whether athletes are more likely to commit violent acts against women. The San Diego Union-Tribune reviewed news reports and public records from January 2000 to April 2007 and concluded that the biggest problems for NFL players were the same as those of the general population: drunken driving, traffic stops, and repeat offenses.<sup>120</sup> Nonetheless, even if the nature of the game does not make NFL players more likely to engage in violence against women, their privileged status as football players makes them less likely to be held accountable for actions when instances of violence do occur.

*B. The "Privileged Athlete" or "Million Dollar Babies"? A Psychological Explanation for Athlete Violence*

The NFL is the highest grossing sport in the United States and its star athletes—the football players—are revered for their prowess on the field and for their celebrity off the field.<sup>121</sup> As a result of this celebrity, however, many players are not held personally accountable when they engage in conduct

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115. *See id.*

116. *See* Alfred Blumstein & Jeff Benedict, *Criminal Violence of NFL Players Compared to the General Population*, 12 CHANCE 12-15 (1999), available at <http://dx.doi.org/10.1080/09332480.1999.10542151>.

117. *See id.* at 13-14 (defining "assault arrests" as both DV and non-DV offenses; also looking at assault arrests rather than assault convictions because conviction statistics are far more difficult to obtain for the general population).

118. *See id.* at 14.

119. *See* Kotala, *supra* note 108.

120. *See* Withers, *supra* note 20, at 148.

121. *See, e.g.,* Mike Ozanian, *The NFL's Most Valuable Teams*, FORBES MAGAZINE, Aug. 20, 2014, available at <http://www.forbes.com/sites/mikeozanian/2014/08/20/the-nfls-most-valuable-teams/> (arguing the NFL is the most valuable sports league in the world).



outside the bounds of the law, including domestic violence against their wives and intimate partners. Psychologist Stanley H. Teitelbaum explains that “sports stars are conditioned to develop a view of themselves as special.”<sup>122</sup> The celebrity athlete is catered to, coddled, and adored by hero-hungry admirers.<sup>123</sup> In essence, many of them become programmed to embrace “the acquired distorted self-image.”<sup>124</sup> Randy Cross, former Pro Bowl Center for the San Francisco 49ers concurs with this assessment. “When I played in the 1980’s and early ‘90’s we did not have this breed-apart mentality,” he explained. “Now a lot of guys think. . .there are no rules for them. A lot of it comes from money.”<sup>125</sup> Don Sabo, a professor of sociology at D’Youville College in Buffalo, said a big contributor to violence among athletes is what he calls “the privileged athlete hypothesis.”<sup>126</sup> Sabo explains, “These guys in earlier careers in college. . .get into trouble and the coaches, athletic departments or support of the cops gets them off.”<sup>127</sup> By the time they reach the professional level, Sabo says players become accustomed to getting away with behavior for which most people are held accountable.<sup>128</sup>

Intimate partner violence is an area in which players are frequently not held accountable for their behavior by the police or their respective NFL teams. The wife of a former New Orleans Saints player, speaking under the condition of anonymity because her ex-husband is still associated with the league, recounted the story of what happened one evening when she dared to suggest to her husband during a celebratory party that they leave the event early.<sup>129</sup> She alleges that he dragged her into their apartment by her hair and punched her, knocking her unconscious.<sup>130</sup> When she regained consciousness, she was on the floor and her husband was kicking her in the stomach, to the point that she was left vomiting and gasping for air.<sup>131</sup>

Neighbors who saw the altercation begin outside their home had called the police.<sup>132</sup> Just before their arrival, however, she said her husband cleaned the blood from her face and ushered her downstairs to assure the police officers

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122. See Stanley H. Teitelbaum, *The NFL Finally Takes Violence Against Women Seriously*, HUFFINGTON POST, Sept. 4, 2014, available at [http://www.huffingtonpost.com/stanley-h-teitelbaum/the-nfl-finally-takes-vio\\_b\\_5742460.html](http://www.huffingtonpost.com/stanley-h-teitelbaum/the-nfl-finally-takes-vio_b_5742460.html).

123. See *id.*

124. See *id.*

125. See Shapiro & Heath, *supra* note 112.

126. See *id.*

127. See *id.*

128. See *id.*

129. See Simone Sebastian & Ines Bebea, *For Battered NFL Wives, A Message from the Cops and the League: Keep Quiet*, WASHINGTON POST, Oct. 17, 2014, available at <http://www.washingtonpost.com/posteverything/wp/2014/10/17/for-battered-nfl-wives-a-message-from-the-cops-and-the-league-keep-quiet/>.

130. See *id.*

131. See *id.*

132. See *id.*

all was well in the home.<sup>133</sup> She said police overlooked any evidence of abuse, and as far as she knows they never filed a police report.<sup>134</sup> What she observed instead were officers chatting and laughing with her husband about his successful game rather than arresting him, and one officer even requested an autograph for his child.<sup>135</sup>

The failure of police to make an arrest or to charge the abuser is especially common among professional athletes, and conviction rates for domestic violence are astonishingly low. On the whole, professional athletes are much less likely to be convicted on intimate violence crimes than are non-athletes.<sup>136</sup> In 1995, domestic violence cases involving athletes resulted in a 36 percent conviction rate, as compared to 77 percent for the general public.<sup>137</sup> In a 1997 study, Northeastern University's Jeffrey Benedict and Alan Klein found that the athletes in their sample who were charged with sexual assault were convicted only 31 percent of the time, compared with a 54 percent conviction rate for the general population.<sup>138</sup> There is evidence that the responsiveness of police and prosecutors to sexual assault complaints involving athletes is favorable, but there is an off-setting pro-athlete bias on the part of juries which leads to lower conviction rates.<sup>139</sup> This reality leaves the wives and intimate partners of NFL players uniquely vulnerable to violence. Dewan Smith-Williams, the former wife of an NFL player, felt "there was never any accountability" for men taught to attack on the field and enforce their wills on others.<sup>140</sup> "Some of these men are not equipped mentally or emotionally to turn off the aggression switch."<sup>141</sup> Unfortunately, she said, the women eventually come to believe there's nothing they can do fix the problem, so they focus on living with it.<sup>142</sup>

#### IV. A CHANGE IN POLICY: LEGAL AND ORGANIZATIONAL RESPONSE OPTIONS FOR THE NFL

The League, fortunately, is not hamstrung in the actions that it may take to curb domestic violence among its players. The League has already taken proactive steps—first with its Violence Prevention Policy, which later evolved

133. *See id.*

134. *See id.*

135. *See id.*

136. *See* Justin Peters, *No, Seriously, the NFL Really Does Have a Domestic Violence Problem*, SLATE MAGAZINE, Dec. 4, 2012, available at [http://www.slate.com/blogs/crime/2012/12/04/jovan\\_belcher\\_murder\\_suicide\\_no\\_seriously\\_the\\_nfl\\_really\\_does\\_have\\_a\\_domestic.html](http://www.slate.com/blogs/crime/2012/12/04/jovan_belcher_murder_suicide_no_seriously_the_nfl_really_does_have_a_domestic.html).

137. *See* Withers, *supra* note 20 at 149 (citing Jeffrey Benedict & Alan Klein, *Arrest and Conviction Rates for Athletes Accused of Sexual Assault*, 14 SOCIOLOGY OF SPORT J. 86-94 (1997)).

138. *See* Peters, *supra* note 136.

139. *See* Withers, *supra* note 20, at 149.

140. *See* Sebastian & Bebea, *supra* note 129.

141. *See id.*

142. *See id.*

into the Personal Conduct Policy—to respond to incidents of intimate partner violence.<sup>143</sup> However, to *strengthen* those policies to the point where the league can severely limit—if not eradicate—domestic violence in its ranks, it may take sophisticated legal maneuvering and player buy-in for such a proposal to actually gain traction.

Accordingly, this section of the paper will examine the organizational structure of the NFL, where it derives its authority to impose strengthened sanctions, the varied team responses to domestic violence, and how the league may provide due process to its players accused of domestic violence. This section will conclude by offering policy recommendations to Commissioner Goodell and the National Football League for how to strengthen its response and enforcement of the domestic violence portion of the Personal Conduct Policy.

#### A. Organizational Structure of the NFL

The NFL is a non-profit organization with a revenue sharing plan between the teams and their respective owners.<sup>144</sup> As the most profitable sports league in the United States, both owners and players have a stake in maintaining the public image of the game.<sup>145</sup> Thus, after a series of hits to its public image in the 1990's, including the infamous trial of NFL Hall of Fame running back O.J. Simpson,<sup>146</sup> NFL Commissioner Paul Tagliabue adopted the Violent Crime Policy in 1997 to outline the league's disciplinary stances towards players who were charged with crimes.<sup>147</sup> The policy was further revised in 2000, becoming a version of the current Personal Conduct Policy.<sup>148</sup> The NFL was the first of the three major American sports (NFL, NBA & MLB) to implement a personal conduct policy for its players.<sup>149</sup>

The NFL's traditional sources of authority to discipline players for their offensive conduct are generally found in three important documents: the NFL Constitution and By-Laws ("League Constitution"), the NFL Collective Bargaining Agreement ("NFL CBA"), and the NFL Player Contract ("Player Contract").<sup>150</sup> Under the League Constitution, the NFL Commissioner has the

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143. See Brant Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 AM. U. J. GENDER SOC. POL'Y & L. 741, 752-53 (2012).

144. See Ozanian, *supra* note 121.

145. See Harvard Law Review Association, *supra* note 113, at 1051.

146. See Chris Boyette, *20 Years Later: Key Moments from the O.J. Simpson Trial*, CNN.COM (Oct. 6, 2015), <http://www.cnn.com/2015/01/13/us/oj-simpson-trial/>. Often called "The Trial of the Century," O.J. Simpson was acquitted of murdering his ex-wife Nicole Brown Simpson and her friend, Ron Goldman at their Los Angeles home in 1994.

147. See Webb, *supra* note 143, at 752.

148. See Withers, *supra* note 20, at 147.

149. See *id.*

150. See Logan O'Shaughnessy, *After Review: An Open Letter to NFL Commissioner Roger Goodell Suggesting That Limiting the League's Disciplinary Power Under the Personal Conduct Policy May Be in the League's Best Interests*, 88 U. DET. MERCY L. REV. 527, 530-31

authority to impose disciplinary measures against a player who has “violated the [League] Constitution . . . or has been or is guilty of conduct detrimental to the welfare of the [NFL] or professional football.”<sup>151</sup> Additionally, Article XI, Section 1(a) of the NFL CBA expressly states that the authority to discipline players is a right vested in the Commissioner by the players.<sup>152</sup> Finally, the Player Contract contains an “integrity of the game” provision that permits the NFL Commissioner to discipline a player who “is guilty of any form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.”<sup>153</sup> Thus, it is legally permissible and generally accepted among players that the League’s commissioner has the authority to discipline players in the form of “a fine, suspension without pay and/or banishment from the League.”<sup>154</sup>

The NFL’s Personal Conduct Policy sets the standard for acceptable and unacceptable behavior among players, whether or not the questionable conduct occurred “on the job.”<sup>155</sup> Even though the Personal Conduct Policy has at times been seen as “an effort to police morality” among the league’s 1,700 players, because athletes are role models for children and adults, action by the league to discipline athlete-abusers might set an example for other social institutions.<sup>156</sup> On January 26, 2001, Commissioner Tagliabue commented in his annual State of the NFL address that “everyone in the League — from the commissioner to the players’ association, the players, the owners and (everyone) right through the organization — understands what our expectations are, what our standards are” for personal conduct.<sup>157</sup> The next League commissioner, Roger Goodell, agreed with his predecessor, stating in 2007 when he introduced the Personal Conduct Policy that, “Players need to be held to a higher standard to protect the image and integrity of the League.”<sup>158</sup> These sentiments were strengthened in an updated version of the NFL Personal Conduct Policy in December, 2014.<sup>159</sup> The policy states: “It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the

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(2011).

151. *See id.* at 531; *see also* NFL Collective Bargaining Agreement 2011-2020, *available at* <http://nflcommunications.com/current-cba/>.

152. *See* O’Shaughnessy, *supra* note 150, at 531-32.

153. *See id.* at 532.

154. *See* Kaufman, *supra* note 18.

155. *See generally* NFL Personal Conduct Policy 2014, *available at* <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf> [hereinafter “Personal Conduct Policy II”].

156. *See* Harvard Law Review Association, *supra* note 113, at 1052-53. *See also* *MLB Players Undergo Mandatory Domestic Violence Education*, USA TODAY, Feb. 24, 2015, *available at* <http://www.usatoday.com/story/sports/mlb/2015/02/24/mlb-players-to-undergo-mandatory-domestic-violence-education/23961535/> (reporting that Major League Baseball is now requiring that all major league players on 40-man rosters attend a mandatory education program on domestic violence during spring training).

157. *See* Kotala, *supra* note 108.

158. *See* Kaufman, *supra* note 18.

159. *See* NFL Personal Conduct Policy II, *supra* note 155.

NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime.”<sup>160</sup>

The language that a criminal conviction is not required for League discipline is key in domestic violence cases, where in many instances the victim withdraws her complaint or refuses to testify.<sup>161</sup> Even in cases where the survivor or the District Attorney chooses to follow through with criminal charges, conviction rates of abusers are extremely low. As mentioned above, a 1995 study revealed that athletes charged with domestic violence were convicted only 36 percent of the time, compared with a 77 percent general conviction rate.<sup>162</sup> Countless occurrences of domestic violence would go unaddressed and unpunished by the League if the commissioner were restricted to disciplining only those players who had been convicted of a crime.<sup>163</sup> However, preemptively punishing players who have yet to be convicted of a crime creates due process concerns for the players who must adhere to the policy.

#### *B. Due Process for Players*

In the criminal justice system, the standard for criminal defendants is “innocent until proven guilty.” However, the NFL’s Personal Conduct Policy allows the League commissioner to discipline a player at the mere accusation of domestic violence or sexual assault and does not require a legal finding of guilt.<sup>164</sup> Historically, the NFL and club executives have been reluctant to discipline athletes who committed crimes that did not directly affect the business of football.<sup>165</sup> Prior to 1997, no NFL commissioner had disciplined an alleged domestic abuser, even though fifty-six current and former NFL players were reported for violent behavior toward women between January 1989 and November 1994.<sup>166</sup> Commissioner Tagliabue’s first version of the Personal Conduct Policy required that the commissioner wait until the criminal justice system had concluded its process before imposing a punishment, thereby

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160. See generally NFL Personal Conduct Policy 2008, nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf [hereinafter NFL Personal Conduct Policy I].

161. See Teitelbaum, *supra* note 122.

162. See Peters, *supra* note 136 (referring generally to a Los Angeles Times survey conducted in 1995 which derived its statistical analysis from a sample of 252 police incidents involving 345 active U.S. or Canadian sports figures).

163. This would include many of the players referenced within this paper, including Ray McDonald, Warren Moon, Jim Brown, and more.

164. See NFL Personal Conduct Policy II, *supra* note 155.

165. See Anna L. Jefferson, *The NFL and Domestic Violence: The Commissioner’s Power to Punish Domestic Abusers*, 7 SETON HALL J. SPORT L. 353, 362 (1997).

166. See Withers, *supra* note 20, at 171.

precluding immediate action.<sup>167</sup> However, the current version of the policy<sup>168</sup> allows Commissioner Goodell to assess each situation on its own merits and take into consideration patterns of abusive behavior and criminal conduct—even when there have not been convictions.<sup>169</sup>

After the Ray Rice incident in 2014, Commissioner Goodell updated the Personal Conduct Policy and declared that players charged with domestic violence would face a mandatory six-game suspension.<sup>170</sup> A more severe penalty could ensue if the player had an incident of domestic violence prior to joining the NFL, or used “violence involving a weapon, choking, repeated striking, or when the act is committed against a pregnant woman or in the presence of a child.”<sup>171</sup>

Many current and former players feel that the broad authority that the commissioner exercises over player discipline for domestic violence allegations—not convictions—is arbitrary and capricious. Some have argued that the Personal Conduct Policy “licenses [Goodell] to be equal parts Wyatt Earp and Judge Potter (“I know it when I see it”) Stewart.”<sup>172</sup> Not only does the commissioner get to decide if the alleged misconduct “tarnishes the League’s image in the eyes of the general public,” if the player is subjected to League discipline, there is no independent arbitrator available to review, and possibly undermine, the commissioner’s disciplinary action for off-field conduct.<sup>173</sup> Should an offending player want to appeal the punishment he received by the League, the NFL CBA states that the offending player may raise the appeal only to the NFL Commissioner or his designee and that the original disciplinary decision “may only be affirmed, reduced, or vacated.”<sup>174</sup> Although the NFL Players Association allows its union members to challenge disciplinary actions taken by League officials, even the appeals process is still governed by the League, so the player is left without an independently neutral party to evaluate his conduct.<sup>175</sup>

167. *See id.* at 168.

168. *See generally* *NFL Owners Endorse New Personal Conduct Policy*, NATIONAL FOOTBALL LEAGUE (Dec. 10, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>. The League’s Personal Conduct Policy was updated by Commissioner Goodell and the League owners in December, 2014 largely as a response to the Ray Rice scandal and the Commissioner’s acknowledgment that he did not “get it right” the first time he disciplined Rice.

169. *See* Withers, *supra* note 20, at 174.

170. *See* Kaufman, *supra* note 18.

171. *See* Cindy Boren, *49ers’ Ray McDonald says ‘truth will come out’ as arrest tests NFL’s new rule on domestic violence*, WASHINGTON POST, Sept. 1, 2014, available at <http://www.washingtonpost.com/blogs/early-lead/wp/2014/09/01/49ers-ray-mcdonald-says-truth-will-come-out-as-arrest-tests-nfls-new-rule-on-domestic-violence>.

172. *See* Gwen Knapp, *NFL Did What It Had To Do With New Conduct Policy*, SF GATE, Apr. 12, 2007, available at <http://www.sfgate.com/sports/knapp/article/NFL-did-what-it-had-to-do-with-new-conduct-policy-2565255.php>.

173. *See* Withers, *supra* note 20, at 157.

174. *See* O’Shaughnessy, *supra* note 150, at 532.

175. *But see* Childs Walker & Aaron Wilson, *Ray Rice Wins Appeal of Suspension, But*

The debate over what constitutes “due process” in League disciplinary actions reached a crescendo when the San Francisco 49ers refused to immediately suspend defensive tackle Ray McDonald after an allegation of domestic violence.<sup>176</sup> Ray McDonald was arrested on August 31, 2014 on a felony domestic violence charge after reports of a domestic disturbance at his home.<sup>177</sup> McDonald was taken into custody after allegedly assaulting his fiancée, who was 10 weeks pregnant at the time.<sup>178</sup> The arrest occurred just one week after Commissioner Goodell announced that players would face a mandatory six-game suspension for domestic violence.<sup>179</sup> However, the 49ers refused to suspend McDonald, saying instead that they would refrain from suspending McDonald until due process had played out.<sup>180</sup>

San Francisco 49ers Head Coach Jim Harbaugh claimed that he did not want to “rush to judgment” and suspend McDonald on the basis of an unfounded domestic violence allegation.<sup>181</sup> “This is a legal matter,” Harbaugh said. “We all owe, to everyone involved, the ability for due process to take place. This is a process that has to be conducted, has to be concluded, and then we’ll be in a better place to have [a] discussion and/or make judgments.”<sup>182</sup> When reporters at Harbaugh’s press conference noted that due process is a legal term that does not necessarily apply to a company or a football team as far as suspending its employees, Harbaugh replied, “This is America. You’re innocent until you’re proven guilty. I don’t know what more I can say about that.”<sup>183</sup> The League’s Personal Conduct Policy actually allows for discipline before the courts rule if Commissioner Goodell feels there is an “immediate and substantial risk to the integrity and reputation of the NFL.”<sup>184</sup> The key

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*Future Uncertain*, THE BALTIMORE SUN, Nov. 28, 2014, available at <http://www.baltimoresun.com/sports/ravens/bs-sp-ray-rice-appeal-decision-story.html#page=1>. Due to the high profile nature of Rice’s case, an independent arbitrator, former U.S. District Judge Barbara S. Jones, was appointed for the appeal. She found that Rice “did not lie or mislead the NFL” at its investigatory meeting with League officials on June 16, 2004. Therefore she found the second, indefinite suspension “arbitrary” and an abuse of discretion. His indefinite suspension from the NFL was thereby vacated.

176. See Cam Inman, *Jim Harbaugh says ‘no tolerance’ for domestic violence, yet seeks ‘due process’ for Ray McDonald*, Sept. 2, 2014, SAN JOSE MERCURY NEWS, available at <http://blogs.mercurynews.com/49ers/2014/09/02/jim-harbaugh-says-no-tolerance-for-domestic-violence-yet-seeks-due-process-for-ray-mcdonald/>.

177. See Jones, *supra* note 14.

178. See Inman, *supra* note 176.

179. See Dan Hanzus, *Ray McDonald Arrested on Domestic Violence Charges*, NFL.COM (Aug. 31, 2014), <http://www.nfl.com/news/story/0ap3000000386508/article/ray-mcdonald-arrested-on-domestic-violence-charges>. Additionally, players could face banishment from the league for a second domestic violence offense, with the possibility to petition for reinstatement after a year.

180. See Inman, *supra* note 176.

181. See *id.*

182. See *id.*

183. See Matt Barrows, *Harbaugh: ‘This is America. You’re innocent until you’re proven guilty.’* SACRAMENTO BEE, Sept. 3, 2014, available at <http://www.sacbee.com/sports/nfl/san-francisco-49ers/article2608523.html>.

184. See Boren, *supra* note 171.

differentiator for Harbaugh, however, was whether a player's case had gone through the court system. Because McDonald had not been convicted, the team allowed McDonald to practice with the team and play in games while he was free on \$25,000 bail.<sup>185</sup> After playing in nine regular season games, the Santa Clara County District Attorney's Office announced that it would not file charges against McDonald because of a lack of eyewitnesses, conflicting accounts, and a lack of cooperation from McDonald's fiancée.<sup>186</sup>

The inconsistency in League responses to domestic violence has two key consequences: it leaves domestic violence survivors feeling as if there are no repercussions for their partners' egregious conduct,<sup>187</sup> and it sends the message to teams that it is best to ignore domestic violence allegations and allow the case to meander through the legal system so you can keep your best players on the field for the time being.

### C. *The Cover Up: Inconsistent Team Responses to Domestic Violence*

NFL teams have been reticent to embrace a League policy on domestic violence because they are unsure if all teams are going to abide by the same terms. Some have described the quandary of whether to suspend or allow a player accused of domestic violence to play as a form of the "prisoner's dilemma."<sup>188</sup> Even though the team owner may want to suspend or terminate an athlete-abuser to protect the image of his or her team and the League, she or he cannot be certain that other teams will similarly impose discipline on their wayward players.<sup>189</sup>

The Ray McDonald case exemplifies why teams are reluctant to immediately bench a player accused of domestic violence—because they are not sure if the other teams in the League will do the same. The same week that Ray McDonald was arrested, Arizona Cardinals running back Jonathan Dwyer was arrested for allegedly assaulting a 27-year old woman and an 18-month

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185. *See id.*

186. *See* Hamed Aleaziz and Evan Sernoffsky, *49ers' Ray McDonald Not Charged in Domestic Violence Case*, SFGATE.COM (Nov. 10, 2014), <http://www.sfgate.com/bayarea/article/49ers-Ray-McDonald-not-charged-in-domestic-5883191.php>. *But see* Jill Martin, *49ers Release Ray McDonald Amid Sexual Assault Allegations*, CNN.COM (Dec. 17, 2014) <http://www.cnn.com/2014/12/17/us/ray-mcdonald-49ers-nfl-search-warrant/index.html> (reporting that McDonald was released by the San Francisco 49ers on December 17, 2014 after being named a suspect by the San Jose police department in a separate sexual assault investigation).

187. *See* Sebastian & Bebea, *supra* note 129. Former NFL wife Dewan Smith-Williams says dozens of football wives and girlfriends echo her feeling of powerlessness when law-enforcement, the NFL, and NFLPA officials all failed to intervene against signs of domestic-abuse.

188. *See* Harvard Law Review Association, *supra* note 110 at 1056. The Prisoner's Dilemma refers to the popular game theory in which two players can either cooperate or betray each other. Depending on what the other party chooses to do, cooperation could benefit both, mutual betrayal could harm both, and if each party acts opposite, one party is advantaged while the other is disadvantaged.

189. *See id.*



old child.<sup>190</sup> Like McDonald, Dwyer was also released from jail on \$25,000 bail while waiting to see if the prosecutor would charge him.<sup>191</sup> The key distinction between the two cases, however, is that Dwyer was immediately deactivated by the Cardinals, while McDonald was allowed to start in every game of the 2014-15 season.<sup>192</sup>

This type of disparate outcome in response to domestic violence is not uncommon. Individual NFL teams have economic and competitive interests that favor leniency toward offending players who have been contributing to team success.<sup>193</sup> In contrast, discipline imposed by the League would likely be more even-handed and would resolve the disparity in treatment of commercially valuable players vis-à-vis their less productive counterparts.<sup>194</sup>

However, this is precisely the reason that many teams prefer to keep their discipline in-house—because it enables them to maintain some control over the process. Former NFL Executive Jerry Angelo, who was general manager of the Chicago Bears from 2001 to 2011 and has been a part of the League in some capacity for more than thirty years, says that he did not report to the League cases of domestic violence involving players because disciplinary action would have put his team at a competitive disadvantage.<sup>195</sup> “We knew it was wrong,” Angelo said, “[but] for whatever reason, it just kind of got glossed over.”<sup>196</sup> As a way of explaining a team’s desire to handle domestic violence issues in-house, one player explained, “We’re talking about billion-dollar organizations, and maybe there’s a little bravado there, a little ego to say that we can handle this internally.”<sup>197</sup> While clubs may certainly have their own initiatives to combat domestic violence, it is against their economic interest to discipline players who have been contributing to the team’s success, particularly when the club does not know if its competitors are going to do the same.<sup>198</sup>

The desire to handle domestic violence issues on a team-by-team basis has led to inconsistent disciplinary outcomes, depending on the team philosophy, the player involved, and the coach at the helm of the organization. In some cases, the team’s response to domestic violence was swift and severe, such as coach Joe Philbin’s decision to waive Chad “Ochocinco” Johnson from

190. See Steve Almasy and Elliott C. McLaughlin, *Benched: NFL Players Out Amid Claims of Violence*, CNN.COM, (Sept. 18, 2014), <http://www.cnn.com/2014/09/18/us/nfl-off-field-problems/>.

191. See *id.*

192. See *id.*

193. See O’Shaughnessy, *supra* note 150 at 542-43.

194. See *id.*

195. See Josh Peter, *Former NFL Exec: Teams Hid ‘Hundreds’ of Abuse Incidents*, USA TODAY SPORTS, Oct. 9, 2014, available at <http://www.usatoday.com/story/sports/nfl/2014/10/09/jerry-angelo-chicago-bears-national-football-league/16981865/>.

196. See *id.*

197. See *id.* (quoting NFL player Tank Johnson of the Chicago Bears).

198. See Withers, *supra* note 20, at 176.

the Miami Dolphins in August 2012, less than 24 hours after the player was arrested for head-butting his wife.<sup>199</sup> However, the same organization had a completely different response a few years earlier when a different coach was leading the team. When Dolphins coach Nick Saban was asked to comment after tight end Randy McMichael was arrested for aggravated battery on a pregnant woman, his response was, “I’m not running the Father Flanagan boys’ home.”<sup>200</sup> McMichael was never suspended by the Dolphins, and the NFL docked him one week’s pay. In contrast, Chad Johnson never played for another NFL team.<sup>201</sup>

The people who unfortunately suffer the most from this level of inconsistency are the victims themselves. According to some NFL wives, there is an inherent disincentive to report abuse because going to authorities, whether police or hospitals, means social exclusion and, more importantly, negative media attention that could end their husband’s career.<sup>202</sup> Additionally, concerns about retribution, the need to protect her husband’s image and thereby safeguard her financial security, a fear of the legal system, and the feeling that she deserved to be mistreated, are among the chief reasons why these women back away from pressing charges.<sup>203</sup> When an NFL wife or girlfriend finally musters the courage to come forward and report incidents of abuse to the authorities, there needs to be some type of formal response from the League and from police authorities. The following policy recommendations outline the response that the League should take going forward.

#### V. POLICY RECOMMENDATIONS

If the NFL hopes to cure its public image, increase victim safety, and promote a culture of accountability, it needs a clear and consistent policy on domestic violence that can be embraced by players and used as a model for other sports institutions. When asked to weigh in on the NFL’s domestic violence controversy, President Obama remarked, “You don’t want to be winging it when something like this happens. [And] the way it was handled. . . indicates that the NFL was behind the curve, as a lot of institutions have been behind the curve, in sending a clear message.”<sup>204</sup> Accordingly, this paper outlines a four-step policy proposal for changes to the NFL’s protocol and response to allegations of domestic violence, and recommends that

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199. See Kaufman, *supra* note 18.

200. See *id.*

201. See *id.* (noting that Chad “Ochocinco” Johnson was not banned by the League as a consequence of his domestic violence charge, but as an 11-year veteran at the time of the incident, he was never resigned by another team after being cut by the Miami Dolphins).

202. See Sebastian & Bebea, *supra* note 129.

203. See Teitelbaum, *supra* note 122.

204. See Michael O’Keefe, *President Obama Says NFL Was ‘Behind the Curve’ on Dealing with Domestic Violence*, NEW YORK DAILY NEWS, Dec. 12 2014, available at <http://www.nydailynews.com/sports/football/obama-nfl-behind-curve-domestic-violence-article-1.2043121>.

Commissioner Goodell adopt the following policy changes immediately.

*A. Players need to be automatically benched and placed on paid administrative leave for six games following an arrest for domestic violence.*

Benching the player sends a strong signal to the player and the fans that the probable cause which gave rise to an arrest is serious, and warrants the time to conduct a thorough investigation. Whether or not charges are ultimately filed by the prosecutor, it should not be enough “to simply avoid being found guilty of a crime”<sup>205</sup> to avoid discipline. If at the end of the six-game suspension the investigation is not complete, the player may return to the team, but may be subject to further discipline at a later date depending on the outcome of the case.

This type of policy acknowledges that not all allegations will result in criminal charges being filed (for example, there may have been a shouting match between spouses that resulted in the authorities being called with no actual physical violence), but it serves as a reminder to the player that these types of allegations are serious, and will be investigated and pursued to the fullest extent of the law.

While it might seem that suspending players with pay gives a financial windfall to a suspected abuser, suspending players with pay actually creates an incentive for owners, general managers, and coaches to be more critical of players who either have a previous record of domestic violence or show a disposition towards misconduct.<sup>206</sup> Suspension with pay costs the owners financially and puts the onus on them to be more critical of the players they have screened, hired, and trained.<sup>207</sup> Owners stand to lose a lot of money when a player is benched for disciplinary issues. After Ray Rice’s indefinite suspension was overturned, he filed a separate grievance against the Ravens for wrongful termination of his \$35 million contract.<sup>208</sup> If he wins that case, he could collect as much as \$3.2 million in salary for [the 2014] season.<sup>209</sup> Thus, by failing to select players of high physical capabilities *and* high character, NFL owners may not only lose production value on the field, but they will also

205. See NFL Personal Conduct Policy II, *supra* note 155, at 2.

206. See, e.g., Greg Price, *Jameis Winston Draft Stock: Will He Be the No. 1 Pick In 2015?*, INT’L BUS. TIMES, Feb. 20, 2015, available at <http://www.ibtimes.com/jameis-winston-draft-stock-will-he-be-no-1-pick-2015-1823136>. Such character concerns surfaced about top college prospect Jameis Winston, quarterback from Florida State University, who had had several run-ins with law enforcement, including a shoplifting charge and a sexual battery allegation in 2012 from a college classmate that never resulted in formal criminal charges. His indiscretions did not affect his draft status though, as he was selected the number one player in the first round of the 2015 NFL draft to the Tampa Bay Buccaneers.

207. See Casey Gwinn, *Will the NFL “Get It Right” and Move the Dial for Social Change?* 20 DOMESTIC VIOLENCE REPORT 17-29, 27 (Dec./Jan. 2015).

208. See Walker & Wilson, *supra* note 175.

209. See *id.*

suffer the economic loss associated with paying a player for non-performance.

*B. The League—not individual teams—should be responsible for all discipline related to off-the-field conduct.*

Teams are too biased to act objectively, and there needs to be consistency among the thirty-two League teams for how these issues are handled. Fans, players, and other NFL employees appear to want a League-wide policy that produces fair, predictable outcomes for all interested parties.<sup>210</sup> The best way to achieve this goal is to remove discretion from the individual teams and coaches and have discipline be uniformly administered at the League level. This policy may unfortunately encourage teams to hide any reports of domestic violence for fear that the League may impose a harsher penalty than they may have imposed themselves. But with a clearly articulated policy in which all sides know the possible punitive ramifications *before* an incident of domestic violence has occurred, it reduces the likelihood that teams will try to impede the League's investigation.<sup>211</sup> Instead, issuing more predictable, consistent disciplinary decisions would prevent a player from feeling that he is being singled out for his misconduct. In turn, this would promote a sense of fairness between players and the League and positively impact the reputation of the NFL.<sup>212</sup>

Additionally, the League investigation needs to be administered by an independent board comprised of League officials and retired players, possibly comprised of a three to five member panel. Substantial potential for bias exists when a disciplinary process vests the investigative, prosecutorial, and adjudicatory functions in one office.<sup>213</sup> Indeed, under the current policy Commissioner Goodell acts as the “judge, jury, and executioner,” and even the appellate board. This is too much power concentrated in one office, and the player's concerns around due process on this issue are legitimate. The Commissioner should not be the only decision maker, but should likely be the *final* decision maker in ruling on appeals from decisions made by a well-trained and staffed adjudication body.<sup>214</sup> Therefore, the NFL's tougher policy would gain more traction if Commissioner Goodell appointed a panel to work with him in evaluating future incidents, rather than being the sole authority in such matters. An effective commissioner need not be a dictator.<sup>215</sup>

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210. See O'Shaughnessy, *supra* note 150, at 543.

211. See also NFL Personal Conduct Policy II, *supra* note 155, at 3-4. The updated policy attempts to address this issue by stating that “[a]ny person who directly or indirectly through others interferes in any manner with an investigation, including by retaliating or threatening to retaliate against a victim or witness, will face separate disciplinary action under this policy.”

212. See O'Shaughnessy, *supra* note 150, at 543.

213. See Harvard Law Review Association, *supra* note 113 at 1061.

214. See Gwinn, *supra* note 207, at 27.

215. See Teitelbaum, *supra* note 122; see also Walker & Wilson, *supra* note 172 (where Judge Jones' reversal of Ray Rice's suspension raised further doubts about Goodell's oversight of a personal-conduct policy that's already under scrutiny from the players union: “in case after

No employers currently have any legal duty to girlfriends, spouses, or children of batterers.<sup>216</sup> This policy proposal thus puts the NFL in a unique position of going beyond their legal duty provide services and support to victims.<sup>217</sup> Some current and former NFL wives who have suffered silently through abuse agree that this radical step is necessary. They say that if the league is serious about ending domestic violence in its ranks, it must rehabilitate instead of punish.<sup>218</sup> Penalties should be less draconian, so wives don't worry about ending their husbands' careers or threatening their families' livelihoods.<sup>219</sup> Otherwise, the knowledge that the League will automatically discipline the abuser might create an even greater disincentive for the victim to participate in the League or criminal process, thus rendering her vulnerable to continued abuse.<sup>220</sup>

*C. Any disciplinary action for domestic violence must be coupled with rehabilitative or therapeutic services for both the player and his partner.*

The League has informed players that the Fifth Amendment's protection against self-incrimination does not apply in a workplace investigation, and the League "reserves the right to compel an employee to cooperate in its Investigations, even when the employee is the target of a pending law enforcement investigation or proceeding."<sup>221</sup> With respect to victims, however, the League should encourage an open-door policy which would allow victims to share their stories voluntarily and with anonymity.<sup>222</sup> Such a policy would be much more likely to produce valuable information and treat victims with greater respect. NFL Commissioner Goodell interviewed Janay Rice in the presence of her abuser.<sup>223</sup> And although it was a Texas statutory requirement rather than a League rule, Felicia Moon was compelled to testify in open court against her husband, Warren Moon.<sup>224</sup> Such requirements can often re-victimize the victim, and potentially place the victim in increased danger.<sup>225</sup> Therefore, psychological support for the victims of disciplined players is an

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case...players have questioned the commissioner's ability to render fair decisions.")

216. See Gwinn, *supra* note 207, at 27.

217. See *id.*

218. See Sebastian & Bebea, *supra* note 129.

219. See *id.*

220. See Harvard Law Review Association, *supra* note 113, at 1057.

221. See NFL Personal Conduct Policy II, *supra* note 155, at 4.

222. See *id.* at 3. In its updated policy, the League indicates that "in conducting investigations, the league office will make reasonable efforts to safeguard requests for confidentiality from witnesses and others with information," although anonymity is not guaranteed.

223. See Gwinn, *supra* note 207, at 27.

224. See *Pro Football; Moon's Wife, on Stand, Blames Her Temper*, *supra* note 43. Texas prosecutors wanted to treat Felicia Moon as an adverse witness, but the court would not allow it.

225. See Gwinn, *supra*, note 207 at 27.

essential element of any new League-wide domestic violence policy.<sup>226</sup> Additionally, providing counseling for the abuser will help him reshape his behavior so he can become a better partner, husband, father, and player.<sup>227</sup>

*D. The recommended changes to the League's domestic violence policy need to be codified into the next NFL Collective Bargaining Agreement.*

In spite of all of the negative publicity associated with NFL players engaged in domestic violence, so far there is no evidence that any athlete's problems with domestic violence have hurt any individual team or the League financially.<sup>228</sup> The player, if punished, may lose several game checks or not have his contract renewed with a particular team.<sup>229</sup> But if the negative publicity stemming from player involvement in domestic violence affects the League only over the long term,<sup>230</sup> players would have less of a stake than the owners in creating long-lasting, substantive change in the League due to the short duration of the average playing career.<sup>231</sup> Therefore, any proposed changes to the NFL's domestic violence policy contained in the League's

226. See Harvard Law Review Association, *supra* note 113, at 1057.

227. See CAL. PEN. CODE § 1203.097 (requiring that anyone convicted of a domestic violence misdemeanor must take 52-weeks of domestic violence counseling). The League could negotiate with the NFL Players' Union for a similar requirement for suspected batterers. See also NFL Personal Conduct Policy II, *supra* note 152, at 3. In cases of domestic violence or child abuse, the League will make assistance available to the families and the employee (player). Assistance may include "providing or direction to appropriate counseling, social and other services, clergy, medical professionals, and specialists in dealing with children and youth." However, this assistance is available after a report or allegation, and it is unclear if the player and his family may use these resources preemptively.

228. See Jefferson, *supra* note 162, at 369. But see Nancy Armour, *NFL Should Be Rattled By Budweiser Statement*, USA TODAY, Sept. 17, 2014, available at <http://www.usatoday.com/story/sports/nfl/2014/09/16/anheuser-busch-sponsor-statement-nfl-ray-rice-greg-hardy-adrian-peterson/15728397/>. Anheuser-Busch, which has a \$1.2 billion, six-year contract with the NFL said, "We are disappointed and increasingly concerned by the recent incidents that have overshadowed this NFL season. We are not yet satisfied with the league's handling of behaviors that so clearly go against our own company culture and moral code." Many felt this was both a warning and a wakeup call to the NFL that they could lose major corporate sponsors if they do not respond more decisively to domestic violence and child abuse among its players.

229. But see Kevin Patra, *Ray McDonald Reaches Deal With Chicago Bears*, NFL.COM (March 24, 2015), <http://www.nfl.com/news/story/0ap3000000481123/article/ray-mcdonald-reaches-deal-with-chicago-bears>. After being dismissed by the San Francisco 49ers in the wake of two separate domestic violence and sexual assault allegations against him, Ray McDonald was signed by the Chicago Bears for a one-year contract for the 2015-16 NFL season.

230. See, e.g., Ira Boudway, *NFL Scandals Reveal the Power of Corporate Sponsors*, BLOOMBERG BUSINESS, Sept. 17, 2014, available at <http://www.bloomberg.com/bw/articles/2014-09-17/ray-rice-adrian-peterson-scandals-reveal-the-power-of-nfl-sponsors> (arguing that "with the fallout from abuse scandals surrounding Ray Rice and Adrian Peterson (accused of child abuse for leaving welts and marks on his four-year old son), sponsors are scrambling to stay on the right side of consumer sentiment." "[Sponsors'] choice is whether their association with the league, team, or athlete does more damage than good").

231. See Harvard Law Review Association, *supra* note 113, at 1065.

Personal Conduct Policy needs to be bargained for and codified in the next collective bargaining agreement.

The collective bargaining agreement (“CBA”) precludes an employer from changing any of the terms and conditions of the CBA without first engaging in collective bargaining.<sup>232</sup> This feature of labor law dramatically limits the authority of the commissioner.<sup>233</sup> Although the commissioner should have the authority under existing labor law to enact a domestic violence policy, he can better minimize the likelihood of judicial intervention and having his decisions overturned if the change is codified in the CBA and players are part of the process.<sup>234</sup>

As the only employer of its kind, the NFL must also be uniquely sensitive to the needs of its union players and make sure that any new terms or conditions that it imposes are accepted by the players. Under normal circumstances, if an individual employer terminates a worker for off-duty misconduct, that worker may re-enter the labor market in search of other opportunities. By contrast, if a sports league imposes similar sanctions, the player is barred from playing not only for one particular team, but also for any other team in the league.<sup>235</sup> Therefore, getting player buy-in is especially critical to the long-term success of any new domestic violence policy. Even though any new policy would likely be harsher and stricter than the one currently in place, it is conceivable that the players’ association would be receptive to a stronger domestic violence policy since the vast majority of players are not domestic abusers, and thus share the owners’ financial interest in maintaining the public image of the League.<sup>236</sup>

## VI. CONCLUSION

The Ray Rice incident was sadly not new territory for the NFL, which has dealt for years with domestic abuse inflicted by some of its players on their wives and partners. The video of the incident did, however, open the national conversation on domestic violence, presenting an opportunity for the NFL to be a national leader on how to respond to and eradicate domestic violence. This paper has demonstrated through case studies of NFL players various forms of domestic violence and its permutations, the legal responses that ensue, and why the League in particular has either been reluctant to, or had difficulty

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232. See Jefferson, *supra* note 165, at 358.

233. See *id.*

234. See, e.g., Mark Maske, *Ray Rice Wins Appeal of NFL’s Indefinite Suspension, Is Eligible to Play Immediately*, THE WASHINGTON POST, Nov. 28, 2014, available at <http://www.washingtonpost.com/news/sports/wp/2014/11/28/ray-rice-wins-appeal-of-nfls-indefinite-suspension-is-eligible-to-play-immediately/> (explaining how Ray Rice’s indefinite ban from the League was overturned because it violated due process and constituted double jeopardy after the NFL Players Association successfully convinced an independent arbitrator that Rice had been punished twice for the same offense which violated the CBA).

235. See Harvard Law Review Association, *supra* note 113, at 1053-54.

236. See *id.* at 1065.

implementing reform to its domestic violence policy.

The policy changes that this paper offers to Commissioner Goodell would promote consistency and fairness for the players, support and protect victims, and make the NFL a leader among professional American sports leagues in its handling of domestic violence. Because athletes are role models for children and the general public, action by the League to discipline athlete-abusers can have a positive impact and set an example for other social institutions.<sup>237</sup> Therefore, these recommended policy changes should not be an end, but a start, to an ongoing dialogue for how to further improve and strengthen the NFL's response to domestic violence in its ranks.

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237. See Harvard Law Review Association, *supra* note 113, at 1052-53.