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To Protect the Shield: Combatting Domestic Violence in the NFL

HELEN A. DREW†

“It’s been a year like no other,” said New York Giants owner John Mara, as the 2014-2015 NFL season drew to a close.¹ As the delirious fans in Buffalo celebrated the purchase of the Bills franchise by the Pegula family,² Cleveland debated the performance of “Johnny Football,”³ and a previously unknown running back made Patriots and NFL history with a 200-yard game,⁴ media coverage of the NFL was dominated by some of the most ugly off-field incidents in the League’s history. This Article will examine the most significant of these incidents, involving NFL players Ray Rice, Ray McDonald, Adrian Peterson, Jonathan Dwyer, and Greg Hardy. Ironically, as this piece is published, former New England Patriots Pro Bowler, Aaron Hernandez, is the defendant in a murder trial, and may well face a second murder charge due to evidence uncovered during the

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1. Jenny Vrentas, *Three Months After Ray Rice*. . . , THE MMQB (Dec. 10, 2014), <http://mmqb.si.com/2014/12/10/nfl-new-personal-conduct-policy-explained>.

2. *Pegulas Buy Bills to Cement Commitment to Buffalo*, USA TODAY (Oct. 11, 2014, 1:53 AM), <http://www.usatoday.com/story/sports/nfl/2014/10/11/pegulas-buy-bills-to-cement-commitment-to-buffalo/17091827>.

3. Jim Corbett, *Manziel or Hoyer? QB Debate has Browns Fans Split*, USA TODAY (Dec. 2, 2014, 7:35 PM), <http://www.usatoday.com/story/sports/nfl/browns/2014/12/02/quarterback-debate-in-cleveland-splits-browns-fans/19801915>.

4. Dan Hanzus, *Pats’ Jonas Gray has 201-yard Game after Stat Change*, NFL, <http://www.nfl.com/news/story/0ap3000000430522/article/pats-jonas-gray-has-201yard-game-after-stat-change> (last updated Nov. 18, 2014, 9:58 PM).

prosecution of the first case.⁵ The reaction of the media, teams, and NFL sponsors to the NFL's treatment of these events will be examined for the impact upon the NFL brand. Next, this Article will detail the actions of the National Football League Players' Association ("NFLPA") in response to the NFL's efforts to protect its brand through disciplinary procedures.⁶ The NFL brand will be compared to The Disney Look,⁷ a highly effective international entertainment image which is also implemented in a collectively bargained environment. Finally, this Article concludes that the NFL and NFLPA can best protect the NFL brand and ensure its continued success by instituting swift, comprehensive, and substantial disciplinary measures in conjunction with scrupulous adherence to detailed, impartial due process procedures for each alleged incident and any and all appeals.

I. THE EVENTS OF 2014

A. *Ray Rice and Domestic Violence*

The unlikely kickoff for the nightmare season was, ironically, Valentine's Day weekend, 2014. Ray Rice, a talented Baltimore Ravens running back and franchise icon, celebrated the holiday with his then-fiancée, Janay Palmer, at a New Jersey casino complex.⁸ After consuming a considerable amount of alcohol, the couple entered an elevator in the adjoining hotel while arguing.⁹ As the dispute became more heated, Ms. Palmer allegedly spat at Mr. Rice,¹⁰

5. Jon Schuppe, *Former NFL Star Aaron Hernandez Starts Murder Trial*, NBC NEWS, <http://www.nbcnews.com/storyline/aaron-hernandez/former-nfl-star-aaron-hernandez-starts-murder-trial-n282556> (last visited Feb. 2, 2015). Mr. Hernandez was cut by the Patriots following his arrest in 2013. *Id.*

6. *See infra* Part II.D.

7. *See infra* Part III.

8. Don Van Natta, Jr. & Kevin Van Valkenburg, *Rice Case: Purposeful Misdirection by Team, Scant Investigation by NFL*, ESPN (Sept. 19, 2014), http://espn.go.com/espn/otl/story/_/id/11551518/how-ray-rice-scandal-unfolded-baltimore-ravens-roger-goodell-nfl.

9. *Id.*

10. John Barr, *Sources: Ray Rice Spat at Fiancee*, ESPN, http://espn.go.com/espn/otl/story/_/id/11503496/ray-rice-spat-face-fiancee-twice-

who responded with a left hook, which, it was ultimately determined, knocked Ms. Palmer out.¹¹ The initial video of the incident shows Mr. Rice attempting to drag Ms. Palmer's inert body out of the elevator as it opens, then dropping her unceremoniously on the floor.¹² Both Ms. Palmer and Mr. Rice were arrested, but the charges against Ms. Palmer were dropped.¹³ Mr. Rice was indicted by an Atlantic City Grand Jury for third degree aggravated assault on March 27, 2014.¹⁴ The couple was married the next day.¹⁵

Ultimately, Mr. Rice pled not guilty to the charge and was accepted into a diversionary program for first-time offenders, with the potential to have the charges cleared after a year.¹⁶ Approximately three months later, NFL Commissioner Roger Goodell suspended Mr. Rice for two games after meeting with Mr. and Mrs. Rice in New York.¹⁷

Significantly, the Commissioner never addressed the disciplinary issue with the media until the NFL Hall of Fame ceremonies in Canton, Ohio, a week after imposing the suspension.¹⁸ The only official acknowledgment was a press conference by the Ravens on May 23, 2014, three weeks after Mr. Rice was accepted into the diversionary program.¹⁹ During that press conference, a live tweet read: "Janay Rice

punch-lines-reports (last updated Sept. 11, 2014); Stephen A. Crockett Jr., *New High-Def Version of Ray Rice Assault Reveals Obscenities and Spitting*, THE ROOT (Sept. 9, 2014, 9:41 AM), http://www.theroot.com/articles/culture/2014/09/new_hi_def_version_of_ray_rice_assault_reveals_obsценities_and_spitting.html.

11. Natta & Valkenburg, *supra* note 8.

12. *Id.*

13. *Id.*

14. *Key Events in the Ray Rice Story*, CNN, <http://www.cnn.com/2014/09/09/us/ray-rice-timeline/#> (last updated Sept. 16, 2014, 10:34 AM); *see also* Indictment for Aggravated Assault, New Jersey v. Rice, No. 14-03-0713 (Filed Mar. 27, 2014), *available at* <http://www.wbaltv.com/blob/view/-/25200438/data/1/-/r0ajofz/-/Ray-Rice-Indictment-PDF.pdf>.

15. *Key Events in the Ray Rice Story*, *supra* note 14.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

says she deeply regrets the role that she played the night of the incident[,]”²⁰ unleashing a firestorm of protest from advocates for victims of domestic violence.

The Commissioner’s remarks at the Hall of Fame induction ceremony did not put out the fire. Rather, by late August it became clear that the two-game suspension was fanning the flames of controversy.²¹ In response, Commissioner Goodell took the unprecedented step of issuing a public apology:

My disciplinary decision led the public to question our sincerity, our commitment, and whether we understood the toll that domestic violence inflicts on so many families. I take responsibility both for the decision and for ensuring that our actions in the future properly reflect our values. I didn’t get it right. Simply put, we have to do better. And we will.²²

The Commissioner also announced a new, revised Personal Conduct Policy with substantially harsher penalties for incidents of domestic violence. A first offense results in a six-game suspension, and a lifetime ban is imposed for a second offense.²³ Significantly, the Commissioner stated:

The public response reinforced my belief that the NFL is held to a higher standard, and properly so. Much of the criticism stemmed from a fundamental recognition that the NFL is a leader, that we do stand for important values, and that we can project those values in ways that have a positive impact beyond professional football. We embrace this role and the responsibility that comes with it.²⁴

What appeared to be the beginning of a new era in NFL discipline was short-lived, however. Ray McDonald, a

20. *Id.*

21. Roxanne Jones, *NFL, Apologize to Women for Ray Rice*, CNN, http://www.cnn.com/2014/08/01/opinion/jones-roger-goodell-ray-rice/index.html#top_of_page (last updated Aug. 28, 2014, 4:42 PM).

22. *Key Events in the Ray Rice Story*, *supra* note 14.

23. Letter from Roger Goodell, NFL Comm’r, to NFL Owners (Aug. 28, 2014) (on file with author), *available at* <http://www.nfl.com/static/content/public/photo/2014/08/28/0ap3000000384873.pdf>.

24. *NFL Commissioner Addresses Domestic Violence*, CNN, <http://www.cnn.com/2014/08/28/sport/nfl-goodell-domestic-violence-memo/index.html> (last updated Aug. 28, 2014, 4:12 PM).

defensive end for the San Francisco 49ers, was arrested on August 31, 2014, on felony domestic violence charges.²⁵ Although the charges were ultimately dropped due to conflicting stories and a lack of cooperation from McDonald's fiancée, the investigation revealed that police had been called for at least one similar incident at the McDonald home three months earlier.²⁶ Inexplicably, although Commissioner Goodell indicated that McDonald would be subject to the newly announced policy, McDonald continued to play while Ray Rice, Adrian Peterson, and Jonathan Dwyer did not.²⁷ As a result of McDonald's arrest, the 49ers held the dubious distinction of having the most players arrested (ten) over the course of the last two years.²⁸

Then, on September 8, 2014, less than two weeks after the announcement of the revised Personal Conduct Policy, TMZ released video footage that was taken inside the elevator, which clearly showed Ray Rice punching Janay Palmer in the face, knocking her unconscious.²⁹ The NFL immediately suspended Mr. Rice indefinitely, claiming that Mr. Rice had misled the Commissioner about the nature of the incident, and the Ravens terminated his contract.³⁰ President Barack Obama and Maryland Governor Martin O'Malley both issued statements condemning the actions depicted in the TMZ video.³¹ Amid widespread outrage over

25. Tim Keown, *No Charges in Ray McDonald Case*, ESPN, http://espn.go.com/nfl/story/_/id/11852824/ray-mcdonald-san-francisco-49ers-cleared-domestic-violence-case (last updated Nov. 10, 2014, 3:13 PM).

26. *Id.*

27. *Id.*

28. Ann Killion, *49ers Lead NFL in Arrests Past 3 Years*, SF GATE (Aug. 31, 2014, 9:40 AM), <http://blog.sfgate.com/killion/2014/08/31/49ers-under-harbaugh-lead-league-in-arrests>.

29. *Key Events in the Ray Rice Story*, *supra* note 14.

30. See Gregg Rosenthal, *Ray Rice Released by Ravens, Indefinitely Suspended*, NFL, <http://www.nfl.com/news/story/0ap3000000391538/article/ray-rice-released-by-ravens-indefinitely-suspended> (last updated Sept. 11, 2014, 1:20 PM).

31. Frank Schwab, *President Barack Obama Comments on Ray Rice Situation*, YAHOO! SPORTS (Sept. 8, 2014, 9:46 PM), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/president-barack-obama-comments-on-ray-rice-situation-014612086.html>.

the brutal nature of the attack, a contentious debate ensued over whether NFL officials had access to the second video prior to issuing the two-game suspension.³² In response, the NFL appointed former FBI Director, Robert S. Mueller, III, to conduct an independent investigation into the matter.³³ Mr. Mueller concluded there was no evidence that the NFL had received the second video prior to suspending Mr. Rice the first time, but also noted that the NFL “should have done more with the information it had, . . . and should have taken additional steps to obtain all available information about the February 15 incident.”³⁴ Of note, Mr. Mueller’s appointment as independent investigator also gave rise to criticism because of connections between Mr. Mueller’s law firm and the NFL.³⁵

Meanwhile, the NFLPA promptly appealed Mr. Rice’s suspension by the Commissioner,³⁶ and shortly after that, Rice filed a grievance for wrongful termination by the Ravens.³⁷ The NFLPA requested a neutral arbitrator for the suspension appeal, citing the involvement of the

32. *See id.*

33. John Breech, *NFL: Ex-FBI Director Robert Mueller Will Investigate Ray Rice Situation*, CBS SPORTS (Sept. 10, 2014, 11:21 PM), <http://www.cbssports.com/nfl/eye-on-football/24704905/nfl-ex-fbi-director-robert-mueller-will-investigate-ray-rice-situation>.

34. Conor Orr, *Robert Mueller Releases Report on Rice Investigation*, NFL, <http://www.nfl.com/news/story/0ap3000000455483/article/robert-mueller-releases-report-on-rice-investigation> (last updated Jan. 9, 2015, 2:01 PM).

35. Josh Peter & Jim Corbett, *NFL’s Investigation Not Truly Independent, Critics Say*, USA TODAY (Sept. 11, 2014, 8:32 PM), <http://www.usatoday.com/story/sports/nfl/2014/09/11/roger-goodell-ray-rice-robert-mueller-independent-investigation/15454847>.

36. Marc Sessler, *Ray Rice Appeals Indefinite Suspension*, NFL, <http://www.nfl.com/news/story/0ap3000000396009/article/ray-rice-appeals-indefinite-suspension> (last updated Sept. 17, 2014, 9:19 AM).

37. Aaron Wilson, *Ray Rice Files Formal Grievance Against Ravens for Wrongful Termination, Sources Say*, BALTIMORE SUN (Oct. 21, 2014, 10:27 PM), <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-ray-rice-files-formal-grievance-against-ravens-for-wrongful-termination-of-contract-sources-say-20141021-story.html>.

Commissioner in the lengthy, involved disciplinary process.³⁸ Former U.S. District Judge Barbara S. Jones heard the appeal, and overturned the indefinite suspension as an abuse of the Commissioner's discretion.³⁹ Judge Jones noted that there was no evidence to suggest that Mr. Rice had intentionally deceived the NFL about what had happened in the elevator.⁴⁰ Mr. Rice's grievance hearing against the Ravens was scheduled for January 15 and 16, 2015,⁴¹ but was settled just prior to the hearing for \$1,550,000—approximately half of the \$3,529,000 he was seeking.⁴²

B. *Adrian Peterson and Child Abuse*

On May 18, 2014, in Montgomery, Texas, Adrian Peterson, an All-Pro running back for the Minnesota Vikings, disciplined his four-year-old-son by using a “switch” on the boy's back, legs, and genitals.⁴³ When the child returned home to his mother in Minnesota and was taken to a routine medical appointment, the physician deemed the injuries consistent with child abuse.⁴⁴ Consequently, on September

38. *Ray Rice Wins Appeal, Eligible to Sign*, ESPN, http://espn.go.com/nfl/story/_/id/11949855/ray-rice-baltimore-ravens-wins-appeal-eligible-reinstatement (last updated Dec. 1, 2014, 7:57 PM).

39. *Id.*

40. *Id.*

41. Aaron Wilson, *After Resolving Grievance with Ray Rice, Ravens Say It's Time to Turn the Page*, BALTIMORE SUN, (Jan. 16, 2015, 5:10 PM), <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-after-resolving-grievance-with-ray-rice-ravens-say-its-time-to-turn-the-page-20150116-story.html>.

42. *Report: Ray Rice Gets \$1.588 Million*, ESPN, http://espn.go.com/nfl/story/_/id/12412931/ray-rice-baltimore-ravens-reach-settlement-1588-million (last updated Mar. 3, 2015, 10:56 AM); Tom Pelissero, *Ray Rice Grievance Against Ravens is Settled*, USA TODAY, (Jan. 15, 2015, 11:34 AM), <http://www.usatoday.com/story/sports/nfl/ravens/2015/01/15/ray-rice-grievance-settled-baltimore-ravens/21804389>.

43. Steve DiMatteo, *A Timeline of the Adrian Peterson Child Abuse Case*, SB NATION (Sept. 17, 2014, 12:22 PM), <http://www.sbnation.com/2014/9/17/6334793/adrian-peterson-child-abuse-statement-vikings-timeline>; Nick Wright, *Updated: Exclusive Details on Adrian Peterson Indictment Charges*, CBS Houston (Sept. 12, 2014, 5:17 PM), <http://houston.cbslocal.com/2014/09/12/exclusive-details-on-adrian-peterson-indictment-charges>.

44. DiMatteo, *supra* note 43.

12, 2014, Mr. Peterson was indicted in Texas on charges of recklessly or negligently causing injury to a child.⁴⁵ Less than an hour later, the Minnesota Vikings deactivated Mr. Peterson for the game that weekend against the New England Patriots.⁴⁶ Mr. Peterson surrendered to authorities and was released on bail.⁴⁷ That Sunday, September 14, 2014, Cris Carter, NFL Hall of Fame member and ESPN analyst, made an impassioned plea to the Vikings ownership to keep Peterson off the field indefinitely.⁴⁸ On Monday, September 15, 2014, Mr. Peterson issued a statement explaining his actions, and the Vikings reinstated Mr. Peterson, characterizing the incident as the “disciplining [of] a child.”⁴⁹

Vikings and NFL sponsors reacted immediately. Carlson Hotels, parent company of Radisson, suspended its sponsorship of the Vikings, with a strongly worded statement: “Radisson takes this matter very seriously particularly in light of our long-standing commitment to the protection of children. We are closely following the situation and effective immediately, Radisson is suspending its limited sponsorship of the Minnesota Vikings while we evaluate the facts and circumstances.”⁵⁰

The Radisson logo had been on the backdrop to the podium where Peterson’s reinstatement was announced.⁵¹

45. See *Adrian Peterson Booked, Released*, ESPN (Sept. 14, 2014, 9:49 AM), http://espn.go.com/nfl/story/_id/11514522/adrian-peterson-minnesota-vikings-indicted-child-case; see also DiMatteo, *supra* note 43; Mike Durkin, *Adrian Peterson Indicted for Child Abuse in Texas*, KMSB-TV (Sept. 12, 2014, 4:41 PM), <http://www.myfoxtwincities.com/story/26520293/tmz-adrian-peterson-indicted-for-child-abuse>.

46. DiMatteo, *supra* note 43.

47. *Id.*

48. *Cris Carter Takes Fervent Stand Against Child Abuse*, ESPN (Sept. 14, 2014, 12:34 PM), <http://espn.go.com/video/clip?id=11524750>.

49. Jeff Gray, *Vikings Feel Adrian Peterson Was Just ‘Disciplining a Child’*, SB NATION (Sept. 15, 2014, 2:46 PM), <http://www.sbnation.com/nfl/2014/9/15/6153629/adrian-peterson-statement-arrest-child-abuse-vikings>.

50. *Radisson Statement on the Minnesota Vikings*, CARLSON (Sept. 15 2014), <http://www.carlson.com/news-and-media/news-releases.do?article=8660785>.

51. Soraya Nadia McDonald, *After Reinstating Him, Minnesota Vikings Ban Adrian Peterson from All Team Activities*, WASH. POST (Sept. 17, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/09/17/after->

Other sponsors quickly took action. The University of Minnesota Health announced it was re-evaluating its partnership with the team, while local Nike stores stopped selling Peterson jerseys.⁵² Meanwhile, Peterson lost several individual sponsors, as Minnesota Governor Mark Dayton and Minnesota U.S. Senator Al Franken both called for Peterson's suspension.⁵³ McDonald's, Campbell's Soup, and, most notably, premier NFL sponsor Anheuser-Busch, all issued statements condemning domestic violence and child abuse, and expressed concern about the League's treatment of the issues.⁵⁴ Notably, on the same day, the NFLPA filed an appeal of Ray Rice's suspension.⁵⁵

In retrospect, Vikings owners Zygi and Mark Wilf probably should have anticipated the overwhelming backlash to Mr. Peterson's reinstatement. The firestorm of controversy that had been swirling about the NFL due to the Ray Rice matter was still at a boiling point. The Peterson arrest added more fuel to a growing maelstrom of public repulsion for the image of overly privileged, fabulously wealthy athletes who acted as if they were above any common standards of law and moral decency. As Peterson dismissed the beating of his child as a "whooping," which Peterson claimed to be a common form of discipline in East Texas when he was a child,⁵⁶ the event generated closer scrutiny of Peterson's personal life, revealing a series of sordid episodes that are distinctly

reinstating-him-minnesota-vikings-ban-adrian-peterson-from-all-team-activities.

52. *Id.*

53. *Id.*

54. Cindy Boren, *Anheuser-Bush 'Increasingly Concerned' over NFL's Domestic-Violence Issues*, WASH. POST (Sept. 16, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/09/16/anheuser-busch-increasingly-concerned-over-nfls-domestic-violence-issues>; Ben Popken, *Major Sponsors Turn Up Heat Against NFL over Handling of Abuse Scandal*, NBC NEWS (Sept. 16, 2014, 4:13 PM), <http://www.nbcnews.com/storyline/nfl-controversy/major-sponsors-turn-heat-nfl-over-handling-abuse-scandal-n204736>.

55. *Timeline: NFL's Month of Woe*, USA TODAY (Oct. 8, 9:19 AM), <http://www.usatoday.com/story/sports/nfl/2014/10/08/timeline-nfls-month-of-woe/16889819>.

56. *Adrian Peterson Indicted for Child Abuse, Turns Himself In*, CBS MINNEOSTA (Sept. 12, 2014, 11:59 PM), <http://minnesota.cbslocal.com/2014/09/12/adrian-peterson-indicted-for-child-abuse>.

inconsistent with the image the Vikings, the NFL, and their respective sponsors seek to project.⁵⁷

Peterson entered a no-contest plea to a misdemeanor charge on November 4, 2014, under a plea deal resulting in a \$4,000 fine and eighty hours of community service.⁵⁸ On November 10, 2014, the NFLPA filed an expedited non-injury grievance seeking Peterson's reinstatement.⁵⁹ The NFL suspended Peterson for the remainder of the season on November 18, 2014, and Arbitrator Shyam Das upheld the League's right to keep Peterson on the Exempt List pending the appeal.⁶⁰ NFL Appeals Officer Harold Henderson upheld the suspension on December 12, 2014, leaving Peterson eligible for reinstatement in April 2015.⁶¹ The NFLPA promptly filed suit against the NFL in federal district court in Minnesota, alleging that the arbitration decision lacked fundamental fairness and was rendered by a biased party.⁶² On February 26, 2015, Judge David S. Doty vacated the arbitration award, overturning Peterson's suspension. The NFL promptly appealed.⁶³

57. Mike Kaszuba et. al., *Behind Peterson's Perfect Image Lay an Imperfect Human Being*, STARTRIBUNE, <http://www.startribune.com/sports/vikings/278137431.html> (last updated Oct. 7, 2014, 1:29 PM).

58. *Peterson Enters No Contest Plea*, ESPN, http://espn.go.com/nfl/story/_id/11819670/adrian-peterson-minnesota-vikings-enter-plea-lesser-charge-felony-child-abuse-charge-avoid-jail (last updated Nov. 5, 2014, 11:16 AM).

59. Mark Macke, *NFLPA Files Grievance Seeking Adrian Peterson's Reinstatement While League Conduct Policy Review Proceeds*, WASH. POST (Nov. 10, 2014), <http://www.washingtonpost.com/news/sports/wp/2014/11/18/adrian-peterson-could-return-this-weekend-to-vikings-or-not-for-a-long-time>.

60. *Id.*

61. Tom Pelissero, *NFL Denies Adrian Peterson's Appeal, Upholds Suspension*, USA TODAY (Dec. 12, 2014, 9:59 PM), <http://www.usatoday.com/story/sports/nfl/vikings/2014/12/12/adrian-peterson-appeal-denied-suspension-upheld/20321311>.

62. *NFLPA Sues NFL in Peterson Case*, ESPN, http://espn.go.com/nfl/story/_id/12031568/nfl-players-association-sues-nfl-ruling-case-adrian-peterson-minnesota-vikings (last updated Dec. 15, 2014, 8:03 PM).

63. Brian Murphy, *Vikings: Ruling, Appeal further Complicate Adrian Peterson Case*, TWINCITIES, http://www.twincities.com/sports/ci_27603938/vikings-adrian-peterson-reinstated-by-federal-judge (last updated Feb. 28, 2015).

C. *Jonathan Dwyer, Greg Hardy, and Domestic Violence*

The NFL's "worst week ever"⁶⁴ continued on September 17, 2014, with the arrest of Arizona Cardinals running back Jonathan Dwyer for two incidents of domestic violence against his wife in July.⁶⁵ According to a police report, Mr. Dwyer head-butted his wife, breaking her nose, after she refused to have sex with him.⁶⁶ Police were called by neighbors, but when they arrived Mrs. Dwyer told them that she had been having an argument on the phone with a relative, and that only she and her son were at home.⁶⁷ The following day, Mr. Dwyer punched his wife in the face, punched a wall, and then threw a shoe, striking their seventeen-month-old son in the stomach.⁶⁸ Later, Mrs. Dwyer admitted that she had fled the home following the first incident, but returned when Mr. Dwyer texted her a picture of a knife and threatened to kill himself in front of their son.⁶⁹ Mrs. Dwyer also stated that Mr. Dwyer had been at home when the police arrived, but she was afraid and lied about his presence.⁷⁰ Mrs. Dwyer was eventually able to leave the state, at which time she reported the domestic violence to the police.⁷¹

On September 17, 2014, the Cardinals placed Mr. Dwyer on the reserve/non-football illness list.⁷² On the same day,

64. Daniel Berger, *How Much Do you Know About the NFL's Worst Week Ever?*, MSNBC, <http://www.msnbc.com/msnbc/how-much-do-you-know-about-the-nfls-worst-week-ever> (last updated Sept. 20, 2014, 11:40 AM).

65. Adam Howard, *NFL Running Back Jonathan Dwyer Arrested for Domestic Violence*, MSNBC, <http://www.msnbc.com/msnbc/minnesota-vikings-bans-adrian-peterson> (last updated Sept. 17, 2014, 8:53 AM).

66. Erin McClam, *Police Detail Assault Allegations Against NFL's Jonathan Dwyer*, NBC NEWS (Sept. 18, 2014, 1:39 PM), <http://www.nbcnews.com/storyline/nfl-controversy/police-detail-assault-allegations-against-nfls-jonathan-dwyer-n206466>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Howard, *supra* note 65; McClam, *supra* note 66.

Carolina Panthers defensive end Greg Hardy agreed to be placed on the Exempt Commissioner's Permission List, along with Ray Rice and Adrian Peterson.⁷³ Mr. Hardy appealed his July criminal conviction for two counts of domestic assault and threatening to kill his former girlfriend.⁷⁴ The evidence presented at trial revealed another story of substantial intoxication, drug abuse, and excess.⁷⁵ As the jury trial was to begin, however, prosecutors were unable to locate the alleged victim, Nicole Holder.⁷⁶ The prosecutor informed the court that Ms. Holder had reached a civil settlement with Mr. Hardy—and vanished.⁷⁷

Shortly after the news broke of Jonathan Dwyer's arrest, the CEO of PepsiCo, Indra Nooyi, addressed the "NFL's acknowledged mishandling" of the domestic violence and child abuse issues.⁷⁸ Pepsi is in the midst of a decade long \$1 billion deal as a marketing partner of the League.⁷⁹ Ms. Nooyi decried the behavior of Rice, Peterson, and Dwyer as "disgusting, absolutely unacceptable, and completely fly[ing] in the face of the values we at PepsiCo believe in and cherish."⁸⁰ NFL sponsors Bose, Visa, and Verizon issued

73. Craig Stephenson, *Greg Hardy Reportedly Placed on Exempt List by Carolina Panthers; Out Indefinitely*, ALA. MEDIA GROUP, http://www.al.com/sports/index.ssf/2014/09/greg_hardy_reportedly_placed_o.html (last updated Sept. 17, 2014, 2:00 PM).

74. See Michael Gordon et al., *Panthers Greg Hardy Guilty of Assaulting Female, Communicating Threats*, CHARLOTTE OBSERVER (July 16, 2014), <http://www.charlotteobserver.com/2014/07/15/5044910/parthers.greg-hardy-arrives-for.html>.

75. *Id.*

76. Michael Gordon et al., *Greg Hardy Case was Unraveling for Weeks*, CHARLOTTE OBSERVER, <http://www.charlotteobserver.com/incoming/article10422650.html> (last updated Feb. 15, 2015, 9:53 PM).

77. *Id.*

78. Eliana Dockterman, *Pepsi Exec Calls NFL Players' Behavior 'Repugnant'*, TIME (Sept. 18, 2014), <http://time.com/3398991/pepsi-nfl-ray-rice-adrian-peterson>.

79. *PepsiCo, NFL Renew Sponsorship Deal*, ESPN, http://espn.go.com/nfl/story/_id/6935541/pepsico-nfl-renew-long-term-sponsorship-deal (last updated Sept. 6, 2011, 6:13 PM).

80. Dockterman, *supra* note 78.

similar statements.⁸¹ The worst was yet to come. On September 19th, 2014, Procter and Gamble announced that it was dropping its sponsorship of the NFL's annual breast cancer awareness campaign for October 2014.⁸²

II. THE EVOLUTION OF DISCIPLINE UNDER COMMISSIONER ROGER GOODELL

A. *Criminal Activity by NFL Players*

While the events described above seem to indicate a League of hoodlums, the actual rate of criminal activity in the NFL population since 2000 compared to national averages for men in their age range is actually rather low—at least for some types of crimes.⁸³ Unfortunately for the NFL, however, the *types* of crimes NFL players are most habitually arrested for are domestic violence, gun-related/nonviolent crimes, and sex offenses.⁸⁴ In absolute numbers, USA Today's NFL Arrest Database shows that driving under the influence, domestic violence, and gun-related offenses are first, second, and third in order of prevalence since 2010.⁸⁵ Moreover, the fact that there is sufficient data to maintain such a database is, in and of itself, a significant problem for a League, which has as its mission “[t]o provide our fans, communities and partners the highest quality sports and entertainment in the world, and to do so in a way that is

81. See Howard, *supra* note 65.

82. Tadd Haislop, *Procter & Gamble Cancels Breast Cancer Awareness Month Initiative Amid NFL Issues*, SPORTINGNEWS (Sept. 19, 2014, 1:09 PM), <http://www.sportingnews.com/nfl/story/2014-09-19/nfl-domestic-violence-sponsors-procter-and-gamble-breast-cancer-awareness-month-pink-crest-roger-goodell>.

83. See Benjamin Morris, *The Rate of Domestic Violence Arrests Among NFL Players*, FIVETHIRTYEIGHT (July 31, 2014, 12:50 PM), <http://fivethirtyeight.com/datalab/the-rate-of-domestic-violence-arrests-among-nfl-players>.

84. See *id.*

85. Steven Ruiz, *A Closer Look at NFL Arrests Since 2010*, USA TODAY (Sept. 24, 2014), <http://q.usatoday.com/2014/09/24/infographic-nfl-arrests-since-2010-ray-rice-greg-hardy-ray-mcdonald-domestic-violence-adrian-peterson-child-abuse>.

consistent with our values.”⁸⁶ Of course, the high profile nature of the League’s players exacerbates the notoriety of the relatively few people engaged in criminal conduct.

B. *The 2007 Personal Conduct Policy Revisions*

Although 2014 has certainly been the most disastrous year for the League in terms of player disciplinary issues, there have been other seasons with similar challenges. It is no accident that the first revisions to the initial NFL Personal Conduct Policy promulgated in 1997 occurred in 2007⁸⁷ after the new Commissioner suspended Adam “Pacman” Jones, a Tennessee Titans cornerback, for an entire season after he was indicted on felony charges in two separate incidents.⁸⁸ At the same time, Goodell suspended Cincinnati Bengals wide receiver Chris Henry for eight games after he was arrested four times in fourteen months.⁸⁹ The new policy was announced a month after Chicago Bears defensive lineman Tank Johnson was imprisoned for probation violations—after being allowed a dispensation from house arrest to practice and play in the Super Bowl.⁹⁰

The key difference in the 2007 Personal Conduct Policy was that it did not apply only to players.⁹¹ Therefore, it was not collectively bargained, although the NFLPA was consulted while it was being developed, and then-NFLPA

86. *Mission and Values*, NFL, <http://static.nfl.com/static/content/public/photo/2014/12/19/0ap3000000445869.pdf> (last visited Feb. 3, 2015).

87. *NFL Owners Endorse New Personal Conduct Policy*, NFL, <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy> (last updated Dec. 19, 2014, 10:35 AM); *NFL Personal Conduct Policy*, ESPN (Mar. 13, 2007), <http://sports.espn.go.com/nfl/news/story?id=2798214>.

88. Judy Battista, *Tougher N.F.L. Suspends Two Players for Conduct*, N.Y. TIMES (Apr. 11, 2007), <http://www.nytimes.com/2007/04/11/sports/football/11nfl.html>.

89. *Id.*

90. *Bears’ Johnson Sentenced to 120 Days in Jail*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=2800083> (last updated Mar. 15, 2007, 8:45 PM).

91. *NFL Owners Endorse New Personal Conduct Policy*, *supra* note 87.

Director Gene Upshaw was supportive of the Policy.⁹² Under the 2007 Policy, all “Covered Persons” were required to refrain from “violent and/or criminal activity.”⁹³ Domestic violence was specifically identified as a violation of the Policy, which applied to all League and team employees and prospective employees.⁹⁴ Significantly, the failure to report prohibited conduct was an additional violation that could subject a club to discipline.⁹⁵

Critics noted that the 2007 Policy gave the Commissioner broad powers to act as judge and jury, but unfortunately it did not achieve its objectives.⁹⁶ A 2013 analysis revealed that the rate of arrest of NFL players actually increased slightly following implementation of the 2007 Policy⁹⁷—even before the debacle that unfolded in 2014.

C. *Discipline of Owner Jim Irsay*

An interesting counterpoint developed when Indianapolis Colts owner Jim Irsay pled guilty to driving while under the influence.⁹⁸ Commissioner Goodell suspended Irsay for six games and fined him \$500,000—the maximum allowable under the NFL Constitution.⁹⁹ Some players objected, claiming that the punishment was

92. Goodell *Strengthens NFL Personal Conduct Policy*, USA TODAY, http://usatoday30.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm (last updated Apr. 11, 2007, 8:28 AM).

93. *NFL Owners Endorse New Personal Conduct Policy*, *supra* note 87.

94. *Id.*

95. *Id.*

96. See Christopher Hansen, *Is Roger Goodell's Personal Conduct Policy Working?*, BLEACHER REPORT (July 2, 2013), <http://bleacherreport.com/articles/1691244-is-roger-goodells-personal-conduct-policy-working>.

97. *Id.*

98. Alex Marvez, *This Time Around, Goodell's Punishment Fits the Crime*, FOX SPORTS (Sept. 2, 2014, 5:45 PM), <http://www.foxsports.com/nfl/story/roger-goodell-s-punishment-seems-to-fit-jim-irsay-s-crime-090214>.

99. *Id.*

relatively light.¹⁰⁰ Still, the suspension demonstrated the Commissioner's intent to hold all "Covered Persons" accountable under the new, revised Personal Conduct Policy that he had revised just the previous month in response to the Ray Rice outcry.

D. *NFLPA Reaction to Events of 2014*

Nevertheless, the NFLPA continued to resist the Commissioner's disciplinary actions, appealing the actions taken against Rice and Peterson.¹⁰¹ When the NFL announced its review of the Personal Conduct Policy, the Commissioner made the unprecedented statement that "[e]verything is on the table."¹⁰² Meetings with the NFLPA in October 2014 were not fruitful, with the NFLPA taking the position that the event was a "bargaining session."¹⁰³ That tact was forcefully rejected by the NFL, with Greg Aiello, NFL Senior Vice-President, Communications, citing the decades of precedent for the Commissioner's authority in disciplinary matters.¹⁰⁴ Further discussions resulted in a stalemate.¹⁰⁵ The NFLPA's primary concerns about the prospective Policy revisions included a concern that all players were viewed as "perpetrators," and a laundry list of other items, including the unnamed former players who

100. Mike Wells, *NFL Players Rip Jim Irsay Punishment*, ABC NEWS (Sept. 3, 2014, 6:27 PM), <http://abcnews.go.com/Sports/nfl-players-rip-jim-irsay-punishment/story?id=25238565>.

101. John Breech, *NFLPA Officially Appeals Ray Rice's Indefinite Suspension*, CBS SPORTS (Sept. 16, 2014, 9:33 PM), <http://www.cbssports.com/nfl/eye-on-football/24712363/nflpa-officially-appeals-ray-rices-indefinite-suspension>.

102. Will Brinson, *Roger Goodell: NFL Overhauling Personal Conduct Policy*, CBS SPORTS (Sept. 19, 2014, 4:11 PM), <http://www.cbssports.com/nfl/eye-on-football/24716413/roger-goodell-nfl-overhauling-personal-conduct-policy>.

103. *NFL, NFLPA Meet Four Hours to Discuss Conduct Policy*, SPORTS BUSINESS NEWS (Oct. 10, 2014, 10:00 PM), <http://www.sportsbusinessnews.com/content/nfl-nflpa-meet-four-hours-discuss-conduct-policy>.

104. Liz Mullen, *NFLPA: Changes in Conduct Code Require Bargaining*, SPORTS BUS. J. (Nov. 3, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/11/03/Labor-and-Agents/NFLPA.aspx>.

105. *Goodell, Smith Meet to Discuss NFL's Conduct Policy*, USA TODAY (Nov. 25, 2014, 10:42 PM), <http://www.usatoday.com/story/sports/nfl/2014/11/25/personal-conduct-policy-nflpa-roger-goodell-demaurence-smith/70127548>.

would serve as ambassadors under the program.¹⁰⁶ As public consciousness about the domestic violence and child abuse issues among NFL players continued to rise, Senator Jay Rockefeller conducted congressional hearings, which representatives of each of the four major professional leagues and their respective unions were expected to attend. During those hearings, Senator Rockefeller pointedly referenced the NFLPA's resistance to testifying at the hearing, and cited the "enormous amount of pressure" he felt not to hold the hearing.¹⁰⁷

E. *The 2014 Revised Personal Conduct Policy*

In the face of continued NFLPA objections, the revised Personal Conduct Policy, which the Commissioner had promised to issue by the Super Bowl, was unanimously endorsed by the NFL Owners at a meeting on December 10, 2014.¹⁰⁸ The revised Policy was "issued pursuant to the Commissioner's authority under the [NFL] Constitution and Bylaws to address and sanction conduct detrimental to the league and professional football."¹⁰⁹ The Policy begins with the statement: "It is a privilege to be part of the National Football League. Everyone who is part of the league must refrain from 'conduct detrimental to the integrity of and public confidence in' the NFL."¹¹⁰

Moreover, the Policy specifies that: "It is not enough simply to avoid being found guilty of a crime. We are all held to a higher standard and must conduct ourselves in a way

106. Tom Pelissero, *NFL Denies Domestic Violence Program Treats Players as Perpetrators*, USA TODAY (Oct. 14, 2014, 7:14 PM), <http://www.usatoday.com/story/sports/nfl/2014/10/24/nflpa-union-domestic-violence-training-prevention/17850673>.

107. Marissa Payne, *Updated: NFLPA Denies Union Pressured Sen. Jay Rockefeller Not to Hold Domestic Violence Hearing*, WASH. POST (Dec. 2, 2014, 6:15 PM), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/12/02/nflpa-denies-sen-jay-rockefellers-claim-that-union-pressured-him-not-to-hold-domestic-violence-hearing>.

108. *NFL Owners Endorse New Personal Conduct Policy*, *supra* note 87.

109. *Personal Conduct Policy*, NFL 1 (Dec. 2014), available at <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

110. *Id.*

that is responsible, promotes the values of the NFL, and is lawful.”¹¹¹

Consequently, even in the absence of a criminal conviction, conduct prohibited by the Policy will result in discipline.¹¹² The very first description of prohibited conduct includes “dating violence, domestic violence, child abuse, and other forms of family violence.”¹¹³ First offenses involving this type of conduct will incur a baseline suspension of six games,¹¹⁴ and a second offense will result in permanent banishment, subject to reinstatement after one year.¹¹⁵ Mitigating factors will be considered, with higher penalties for repeat offenders.¹¹⁶ Counseling and evaluation services are incorporated into the process, addressing one of the NFLPA’s concerns.¹¹⁷ While retaliation or interference with the process is prohibited, employees are required to cooperate *even where the Fifth Amendment would protect them in a legal proceeding*.¹¹⁸ The Policy specifically states that discipline will not be assessed by criminal legal standards, but rather by the Commissioner’s determination that the “circumstances and evidence warrant” action.¹¹⁹

Other significant changes to the Policy include the institution of a new, impartial special counsel to conduct investigations on behalf of the NFL, which will no longer wait for the disposition of criminal charges to take action under the Policy.¹²⁰ The special counsel will handle the initial imposition of discipline.¹²¹ While the Commissioner retains his authority to hear appeals, he also has discretion to

111. *Id.* at 2.

112. *Id.*

113. *Id.*

114. *Id.* at 6.

115. *Id.* at 7.

116. *Id.*

117. *Id.* at 3.

118. *Id.* at 4.

119. *Id.*

120. *Id.*

121. *Id.* at 5.

appoint an independent expert panel to make recommendations on an appeal.¹²² By its terms, the Policy applies to everyone employed by the League, including the Commissioner.¹²³ Clubs are also encouraged to incorporate the Policy into their relationships with third parties.¹²⁴

The preface to the revised Policy—a principle reiterated frequently by the Commissioner—is that employment by the NFL is a privilege. By contrast, DeMaurice Smith, the head of the NFLPA, has emphasized that “due process for our players is not a privilege; it’s a right.”¹²⁵ Moreover, from Smith’s perspective: “While the league might be concerned about its brand, the issue of due process and justice for our players is equally if not more important.”¹²⁶

Technically, Mr. Smith is incorrect. The players’ rights in disciplinary procedures are set forth in Article 46 of the 2011 NFL-NFLPA Collective Bargaining Agreement.¹²⁷ Those procedures resemble in many ways the traditional due process protections required for criminal matters under the Fifth and Fourteenth Amendments, such as notice, discovery, and testimony of witnesses.¹²⁸ What Mr. Smith is objecting to is the absence of a requirement for a *neutral* party to make disciplinary decisions, and, in particular, to hear appeals of those decisions. That particular aspect of due process has always been resisted by the NFL in collective bargaining negotiations because of the owners’ reluctance to cede the Commissioner’s discretion to take action concerning “any conduct detrimental to the League, its member clubs or employees, or to professional football,” as authorized by the

122. *Id.* at 7.

123. *Id.* at 1.

124. *Id.*

125. Dan Graziano, *Talks on New Conduct Policy Hit Snag*, ESPN, http://espn.go.com/nfl/story/_/id/11702390/nflpa-wants-new-conduct-policy-part-cba (last updated Oct. 15, 2014, 10:39 AM).

126. *Id.*

127. NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. 46 (2011), available at https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf.

128. *Id.*

NFL Constitution.¹²⁹ The Commissioner of the NFL is charged with “protecting the shield,”¹³⁰ and the ability to discipline League employees for action potentially damaging to the NFL brand is integral to that duty. Ironically, Mr. Smith and others have alleged that the NFL brand actually has been damaged by the inconsistent imposition of discipline under the previous Personal Conduct Policy.¹³¹

III. HOW TO BREAK THE STALEMATE: OR, WHAT WOULD DISNEY DO?

Like the NFL and every other professional sports league, the Walt Disney Company’s success is inherently tied to its image as projected by every aspect of its operations, including, most specifically, its employees. When compared to the requirements of the Disney Look, for example, the NFL Personal Code of Conduct requirements seem almost trivial (restrictions upon hair length, style and color versus a prohibition upon violent criminal actions?).¹³² Although most professional sports leagues have some minimum player dress code requirements¹³³—some of which occasioned more debate

129. Const. & Bylaws of the Nat’l Football League art. VIII, § 8.6 (effective Feb. 1, 1970, Revised 2006), available at http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

130. *Roger Goodell and NFL are Protecting a ‘Shield’ that Fails to Protect its Own Players and Families*, DAILY NEWS (Sept. 14, 2014, 1:30 AM), <http://www.nydailynews.com/sports/football/lupica-shield-nfl-protecting-article-1.1938945>; Justin Hathaway, *Roger Goodell Had One Job—To Protect ‘The Shield’—and Might Have Failed*, NESN (Sept. 10, 2014, 6:35 PM), <http://nesn.com/2014/09/roger-goodell-had-one-job-to-protect-the-shield-and-might-have-failed>.

131. *NFL Union Wants Change on Personal Conduct Policy*, USA TODAY (Nov. 13, 2014, 7:41 PM), <http://www.usatoday.com/story/sports/nfl/2014/11/13/nfl-union-wants-change-on-personal-conduct-policy/18983405>; see also *Bill Cowher: NFL Inconsistent with Discipline, Needs Uniform Guidelines*, CBS NEWS (Sept. 15, 2014, 4:30 PM), <http://www.cbsnews.com/news/former-steelers-coach-bill-cowher-nfl-inconsistent-with-discipline-needs-uniform-guideline>.

132. See *The Disney Look*, DISNEY CAREERS, <http://cp.disneycareers.com/en/about-disney-college-program/disney-look>.

133. Scott Burnside, *Dress Code Suits NHLers Just Fine*, ESPN, <http://sports.espn.go.com/nhl/columns/story?id=2198862> (last updated Oct. 20, 2005, 6:16 PM).

than others¹³⁴—the essence of Disney’s success internationally has been explained in part by an extensive training program known as “Traditions.”¹³⁵ The program seeks to inculcate a sense of shared business culture in new employees so that they “buy in” to the Disney philosophy.¹³⁶ A concerted effort is made to build connections among employees at all levels, including a universal first-name policy throughout the organization, which, together with the uniforms utilized in various job titles, helps build community.¹³⁷ Moreover, Disney makes it a policy to promote from within, while recognizing employees whose work is exceptional.¹³⁸

While the NFL’s Rookie Success Program and the rookie trip to the Football Hall of Fame incorporate some aspects of “Traditions,”¹³⁹ clearly more can be done to develop the NFL community, which encompasses not just players, but employees at all levels. Mentoring rookie players is a significant step in the right direction, but there is no guarantee that the mentor is positioned to provide the type of guidance that would help protect the NFL brand. Moreover, it is of the utmost importance that all stakeholders in the NFL community—League and team employees, owners, and players—recognize and appreciate the importance of the NFL shield. The astronomical revenue generated by the NFL is dependent upon the maintenance of that brand.

134. See Chris Sheridan, *Stern: Dress Code Debate is ‘Live, Unscripted Drama’*, ESPN, <http://sports.espn.go.com/nba/columns/story?id=2201231> (last updated Oct. 26, 2005, 3:51 PM).

135. Lauren A. Newell, *Happiness at the House of Mouse: How Disney Negotiates to Create The ‘Happiest Place on Earth’*, 12 PEPP. DISP. RESOL. L.J. 415, 452 (2012).

136. *Id.*

137. *Id.* at 452-53.

138. *Id.* at 455-56.

139. See *History Lessons: Education of a Rookie*, NFL, <http://www.nfl.com/more/rookie-education> (last visited Feb. 25, 2015); Jeff Darlington, *Robert Griffin III Inspired by Rookies’ trip to Hall of Fame*, NFL, <http://www.nfl.com/news/story/09000d5d82a2b0d5/article/robert-griffin-iii-inspired-by-rookies-trip-to-hall-of-fame> (last updated Aug. 4, 2012, 10:56 PM).