

**COMMENT**

**THE PUCK STOPS HERE: A LEGAL ARGUMENT FOR THE ESTABLISHMENT OF A DOMESTIC VIOLENCE POLICY IN THE NATIONAL HOCKEY LEAGUE**

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Nearly a decade after the National Football League, the National Basketball Association, and Major League Baseball established their domestic violence policies, the National Hockey League (NHL) inexplicably remains the only major professional sports league in the United States without a league-specific policy. While the NHL and the NHL Players' Association do incorporate a provision regulating off-ice conduct in their collective bargaining agreement, the current provision is highly discretionary, overly vague, and ultimately insufficient to properly protect both survivors and accused players.

Domestic violence and sexual misconduct remain urgent issues in professional sports, and it is essential for the NHL to establish a league-specific policy. The NHL must codify a domestic violence policy in its collective bargaining agreement to ensure justice for survivors and fair process for accused players, following the lead of the other major sports leagues. This Comment evaluates the inadequacy of both available judicial remedies for survivors and the league's current regulation of off-ice player conduct. It concludes by providing policy recommendations for drafting an NHL-specific domestic violence policy based on a comparative analysis of existing major professional league policies.

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#### INTRODUCTION

In September 2014, a disturbing TMZ video of Baltimore Ravens running back Ray Rice assaulting his then-fiancée Janay Palmer was leaked, rocking the world of professional sports.<sup>1</sup> The grainy footage opens with Rice and Palmer arguing in the elevator of an Atlantic City hotel in the early hours of the morning on February 15, 2014.<sup>2</sup> Rice abruptly delivers a single, crushing blow to Palmer's face, leaving her unconscious.<sup>3</sup> The video clip comes to a close as Rice drags Palmer's limp body into the hall.<sup>4</sup> The footage served as a powerful catalyst, forcing the National Football League (NFL) to publicly confront the reality of player-perpetrated domestic violence, which had long been concealed behind closed doors. The league's response to the video was decisive: within ten hours of the TMZ video leak, the Ravens terminated Rice's contract, and the NFL suspended Rice indefinitely soon after.<sup>5</sup>

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1. Jean Marbella & Yvonne Wenger, *New Video, Outcry Lead Ravens to Cut Rice*, BALT. SUN (Sept. 8, 2014, 10:17 PM), <https://www.baltimoresun.com/sports/ravens/bs-md-ray-rice-ledeall-20140908-story.html> [<https://perma.cc/GBK4-24AJ>].

2. *Id.*; *Ray Rice -- Elevator Knockout . . . Fiancee Takes Crushing Punch*, TMZ, <https://www.tnz.com/watch/0-ekaflcq/> [<https://perma.cc/25F3-7KWM>] [hereinafter *Ray Rice -- Elevator Knockout*].

3. *Ray Rice -- Elevator Knockout*, supra note 2.

4. *Id.*

5. Marbella & Wenger, supra note 1.

Player-perpetrated domestic violence was certainly nothing novel in professional sports,<sup>6</sup> but public outrage surrounding the Ray Rice controversy prompted the NFL to finally take action. Within months of the video leak, the NFL became the first major league to enact an official domestic violence policy.<sup>7</sup> Major League Baseball (MLB) followed close behind, incorporating their domestic violence policy as an addendum to the league's collective bargaining agreement in 2015.<sup>8</sup> The National Basketball Association's (NBA) own policy went into effect in 2017.<sup>9</sup>

Unlike its counterparts, the National Hockey League's (NHL) response to player-perpetrated domestic violence has been lukewarm. One year after Ray Rice's violent attack, Chicago Blackhawks right winger Patrick Kane was involved in a highly publicized scandal in which he was accused of sexually assaulting a college student in Buffalo, New York, during the NHL off-season.<sup>10</sup> The incident sparked public outcry, with many fans and commentators questioning the NHL's handling of the case and the league's broader approach to issues of domestic violence and sexual assault.<sup>11</sup> Kane—one of the league's most popular and successful players—was cleared of all charges,<sup>12</sup> but the case left a lasting impression on the hockey world and raised important questions about the culture of violence that has been allowed to persist in the sport.<sup>13</sup>

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6. See Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 147 (2010).

7. *The NFL's Response to Domestic Violence and Sexual Assault*, NFL (Dec. 5, 2014, 2:57 PM), <https://www.nfl.com/news/the-nfl-s-response-to-domestic-violence-and-sexual-assault-0ap3000000439286> [https://perma.cc/4SJ3-GSHE].

8. Paul Hagen, *MLB, MLBPA Reveal Domestic Violence Policy*, MLB (Aug. 21, 2015), <https://www.mlb.com/news/mlb-mlbpa-agree-on-domestic-violence-policy/c-144508842> [https://perma.cc/8XJC-3ZHV].

9. Diana Moskovitz, *The NBA's New Policy on Domestic Violence, Sexual Assault, and Child Abuse Is Here*, DEADSPIN (May 24, 2017), <https://deadspin.com/the-nbas-new-policy-on-domestic-violence-sexual-assault-1795378340> [https://perma.cc/GC5J-4R94].

10. Matt Higgins, *Patrick Kane Will Not Face Rape Charges*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/sports/hockey/chicago-blackhawks-patrick-kane-will-not-face-rape-charges.html> [https://perma.cc/Y8JJ-242P].

11. See, e.g., Jared S. Hopkins & Stacy St. Clair, *After Rape Case Ends, Blackhawks' Patrick Kane Says 'I Did Nothing Wrong'*, CHI. TRIB. (Nov. 5, 2015, 6:08 PM), <https://www.chicagotribune.com/news/ct-patrick-kane-rape-case-decision-20151105-story.html> [https://perma.cc/2S9F-TAXF]. See also Nina Liss-Schultz & Edwin Rios, *Here's What We Know About the Rape Case Rocking the NHL*, MOTHER JONES (Sept. 28, 2015), <https://www.motherjones.com/media/2015/09/patrick-kane-sexual-assault-case-explainer/> [https://perma.cc/AX9M-A9VK].

12. Higgins, *supra* note 10.

13. See, e.g., Hopkins & St. Clair, *supra* note 11 (noting crowd chants of "She said no!" and "No means no!" persisted even after the conclusion of the criminal investigation). See also Cari Grieb, *Patrick Kane Case Hasn't Changed NHL's Attitude on Sexual Assault*, SPORTING NEWS (Aug. 21, 2015),

Now, nearly ten years after the Ray Rice and Patrick Kane cases, the NHL inexplicably remains the only one of the four major leagues without an official domestic violence policy.<sup>14</sup> The NHL clearly recognizes action is necessary, as evidenced by holding domestic violence trainings shortly after the Rice and Kane incidents.<sup>15</sup> However, while trainings remain an important tool to mitigate player-committed sexual assault (or NHL liability),<sup>16</sup> they are not a sufficient replacement for the protections and remedies offered by an official league policy. Moreover, existing judicial and private remedies for survivors of domestic violence and sexual assault perpetrated by professional hockey players are inadequate. To ensure justice for survivors and fair process for accused players, the NHL must follow the other major leagues in establishing a specific domestic violence policy in its collective bargaining agreement.

This Comment proceeds in three parts. Part I provides an overview of the current state of affairs in the National Hockey League, illustrating the prevalence of domestic violence and sexual misconduct in professional hockey and outlining current league treatment of off-ice conduct. Part II analyzes the inadequacy of currently available judicial remedies for survivors of sexual assault committed by professional hockey players. It then argues that establishing an official NHL domestic violence policy would provide closure for survivors, solve current issues with fair process, and mitigate instances of sexual and domestic violence within the league and beyond. This Comment concludes by offering policy recommendations for the drafting of an NHL-specific domestic violence policy based on a comparative analysis of existing major league policies.

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<https://www.sportingnews.com/us/nhl/news/patrick-kane-arrest-crime-charge-suspended-rape-sexual-assault-blackhawks-buffalo/zx67lhrucyry12bg03kudj20t> [https://perma.cc/YWJ4-VNMM].

14. See Charlotte Edmonds, *Notable Cases of Domestic Violence and Assault in Sports*, NBC SPORTS CHI., <https://www.nbcsportschicago.com/nfl/notable-cases-of-domestic-violence-and-assault-in-sports/325218/> [https://perma.cc/8TTA-Q4AC] (May 23, 2022, 11:01 AM).

15. John Wawrow, *NHL Begins Domestic Violence and Sexual Assault Training*, USA TODAY (Jan. 15, 2016, 2:24 AM), <https://www.usatoday.com/story/sports/nhl/2016/01/15/nhl-begins-domestic-violence-and-sexual-assault-training/78835292/> [https://perma.cc/ZP54-EZXM].

16. See *Addressing Domestic Violence in Professional Sports: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 113th Cong. 7 (2014) [hereinafter *Addressing Domestic Violence in Professional Sports*] (statement of Troy Vincent, Executive Vice President for Football Operations, National Football League).

I. CURRENT TREATMENT OF DOMESTIC VIOLENCE  
AND SEXUAL MISCONDUCT IN THE NHL

In 2016, while the NFL and MLB were busy implementing their new domestic violence policies and the NBA was finalizing its own, NHL Commissioner Gary Bettman insisted the National Hockey League did not need a policy at all. When asked about an NHL-specific domestic violence policy, Bettman replied:

I'm not sure for us there is any need for any code of conduct other than our players, who overwhelming[ly] conduct themselves magnificently off the ice—we deal with it on a case by case basis. I don't think we need to formalize anything more. Our players know what's right and wrong, and as I said, we have the mechanisms in place to hopefully not get to that point.<sup>17</sup>

Commissioner Bettman was wrong on two counts: many of his players do not “conduct themselves magnificently off the ice;” nor does the league possess the proper mechanisms to respond to or mitigate players' poor behavior.

*A. Misogyny and Violence in Hockey Culture*

Like many other sports, violence and misogyny are endemic in hockey culture both on and off the ice. Professional hockey “promotes a hard, aggressive masculinity” that is exemplified in the celebration of mid-game brawls and fans' worship of players who “give and take the biggest hits.”<sup>18</sup> Hockey is unique in the world of professional sports in that bloodshed is not “incidental” but instead “expected, accepted, and encouraged.”<sup>19</sup> This violence has never been restricted to the rink.<sup>20</sup>

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17. Elliott Teaford, *Here's What NHL Commissioner Gary Bettman Said About Domestic Violence Early This Month*, INSIDE THE KINGS (Oct. 20, 2014), <http://www.insidesocal.com/kings/2014/10/20/heres-what-nhl-commissioner-gary-bettman-said-about-domestic-violence-early-this-month/> [https://perma.cc/VJM4-RBHR].

18. Mary Louise Adams, *The Game of Whose Lives? Gender, Race, and Entitlement in Canada's "National" Game*, in ARTIFICIAL ICE: HOCKEY, CULTURE, AND COMMERCE 71, 73–74 (David Whitson & Richard Gruneau eds. 2012).

19. JASON BLAKE, CANADIAN HOCKEY LITERATURE 86 (2010).

20. See, e.g., Katie Strang, *Slava Voynov to Be Arraigned Dec. 1*, ESPN (Nov. 20, 2014, 5:04 PM), [https://www.espn.com/los-angeles/nhl/story/\\_/id/11910261/slava-voynov-los-angeles-kings-charged-felony-domestic-violence](https://www.espn.com/los-angeles/nhl/story/_/id/11910261/slava-voynov-los-angeles-kings-charged-felony-domestic-violence) [https://perma.cc/D7PB-EDSW].

Some argue that professional athletes have a higher propensity for domestic abuse than the rest of society because they are immersed in a hyper-masculine subculture that equates masculinity with violence and disparages all things feminine.<sup>21</sup> In hockey, these behaviors are learned at the junior level, where the sport's most promising players are cordoned off from the rest of society at a young and impressionable age.<sup>22</sup> The effect of being immersed in this culture and isolated from peers is two-fold. First, junior hockey players are too often victims of sexual misconduct themselves, often at the hands of their coaches.<sup>23</sup> Second, the abuse and objectification of women is normalized, as degrading women is often an essential part of team bonding.<sup>24</sup> Thus, the cycle of sexual trauma continues, sometimes by victims who have themselves become perpetrators. In *Crossing the Line: Violence and Sexual Assault in Canada's National Sport*, Laura Robinson writes that, in the social context of junior hockey, "young men see themselves treated as objects, and consequently readily objectify young women."<sup>25</sup> This objectification cultivates a rape culture, which Robinson describes as a "sex-segregated, male-dominated culture that displays a high degree of hostility to, and contempt for, women."<sup>26</sup> Given the well-documented history of both sexual abuse of youth players and player-perpetrated violence against

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21. Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1050 (1996).

22. See LAURA ROBINSON, *CROSSING THE LINE: VIOLENCE AND SEXUAL ASSAULT IN CANADA'S NATIONAL SPORT* 5 (1998) ("It is these boys, the most vulnerable and weak . . . who are most at risk within the hockey subculture."); see also Mark Lazerus, *Lazerus: Another Horrifying Sexual-Assault Lawsuit Underscores How Deeply Broken the Hockey World Is*, ATHLETIC (May 27, 2022), <https://theathletic.com/3336346/2022/05/27/hockey-sexual-assault-lawsuit/> [https://perma.cc/FZ3A-ZCFA].

23. See generally M. Bradford Preston, *Sheldon Kennedy and a Canadian Tragedy Revisited: A Comparative Look at U.S. and Canadian Jurisprudence on Youth Sports Organizations' Civil Liability for Child Sexual Exploitation*, 39 VAND. J. TRANSNAT'L L. 1333 (2006). Preston emphasizes that "child sexual exploitation occurs at the hands of youth coaches across geographic and class boundaries and across individual and team sports." *Id.* at 1333. See also Katie Strang, *USA Hockey Among Institutions Being Sued Over Alleged Sexual Abuse by Ex-Coach*, ATHLETIC (May 12, 2021), <https://theathletic.com/news/usa-hockey-among-institutions-being-sued-over-alleged-sexual-abuse-by-ex-coach/R6cndZqgA0as/> [https://perma.cc/D2LJ-AFKU].

24. See Shannon D. M. Moore, Teresa Anne Fowler & Tim Skuce, *Showered in Sexism: Hockey Culture Needs a Reckoning*, CONVERSATION (July 5, 2022, 9:52 AM), <https://theconversation.com/showered-in-sexism-hockey-culture-needs-a-reckoning-186002> [https://perma.cc/3PBL-WHGQ]; see also ROBINSON, *supra* note 22, at 5 ("In the rape culture of the hockey locker room, where [women] are often referred to as 'groupies,' 'puck bunnies,' 'pucks,' and 'dirties' among the players, there are also the 'designated females': the rookies, the new kids, the more vulnerable boys . . .").

25. ROBINSON, *supra* note 22, at 5.

26. *Id.*

women,<sup>27</sup> Commissioner Bettman's willful ignorance and the NHL's blatant omission of a domestic violence policy is all the more negligent.

*B. Current Regulation of Off-Ice Conduct*

The NHL currently handles domestic violence and sexual misconduct on a case-by-case basis, governed by Article 18-A of the National Hockey League's Collective Bargaining Agreement, entitled "Commissioner Discipline for Off-Ice Conduct."<sup>28</sup> Procedurally, Article 18-A.2 vests in the commissioner the power to determine whether a player has violated a league rule applicable to off-ice conduct, or is guilty of conduct that is "detrimental to or against the welfare of the League or the game of hockey."<sup>29</sup> If the commissioner finds that a player has violated either of these provisions, he may discipline the player by expelling or suspending the player for a definite or indefinite period of time, cancelling any standard player contract the player holds, or imposing a fine on the offending player.<sup>30</sup>

If a player is suspected of engaging in prohibited off-ice conduct, the commissioner may choose to conduct an investigation after notifying the National Hockey League Players' Association (NHLPA).<sup>31</sup> The commissioner conducts initial interviews and may then opt to conduct a hearing if he finds that the results of the interviews warrant further investigation.<sup>32</sup> Prior to the hearing, the league must provide the NHLPA with a written statement specifying the factual allegations against the player and explaining why the league believes the player's conduct warrants the commissioner's discipline for off-ice conduct.<sup>33</sup> The league must also disclose to the NHLPA all witnesses and evidence it plans to present against the player, and the NHLPA must disclose to the league any witnesses or evidence that the NHLPA or the accused player intends to introduce at the hearing.<sup>34</sup> Following the hearing, the commissioner

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27. See, e.g., Lazerus, *supra* note 22.

28. NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, SEPTEMBER 16, 2012–SEPTEMBER 15, 2022, at 124–27 (2013) [hereinafter NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT].

29. *Id.* at 124.

30. *Id.*

31. *Id.*

32. *Id.* at 124–25.

33. *Id.* at 125.

34. *Id.*

renders a verdict.<sup>35</sup> Players have the right to appeal the commissioner's decision to an impartial arbitrator, who reviews the commissioner's decision to determine whether it was reasonable and supported by substantial evidence.<sup>36</sup>

The subjective nature of the proceeding intensifies at this point, increasing the opportunity for bias and fraud. The language of Article 18-A is incredibly broad and consequently affords the commissioner a high level of discretion in choosing whether to discipline off-ice conduct and in determining the scope of punishment.<sup>37</sup> It is likely that the drafters of the Collective Bargaining Agreement intended this effect to afford flexibility in disciplinary action for categories of off-ice conduct that might not have been anticipated by the drafter. The practical effect of this language, however, is that players are essentially disciplined at the whim of Gary Bettman—who has served as the NHL's first and only commissioner for nearly thirty years.<sup>38</sup>

### *C. Inconsistent Implementation of Article 18-A Discipline*

In recent years, hockey analysts and fans have published a slew of op-eds arguing for the development of an NHL-specific domestic violence policy.<sup>39</sup> Despite public criticism, league leadership seems to remain comfortable with regulating domestic violence and sexual assault solely through Article 18-A. In 2018, one NHL general manager affirmed his support of the league's handling of off-ice conduct, noting that “[i]t probably would be good to have some guidelines on paper,” but

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35. *Id.* at 125–26. Note that the commissioner may not suspend a player from play without a hearing, except in cases where a criminal investigation is involved. *Id.* at 127.

36. *Id.* at 126. Appellate proceedings are governed by Article 17 of the Collective Bargaining Agreement. *See id.* at 109–15.

37. *See id.* at 124–27.

38. *Builder Inductees: Gary Bettman*, OFFICIAL SITE OF THE HOCKEY HALL OF FAME, <https://www.hhof.com/HonouredMembers/MemberDetails.html?type=Builder&mem=b201801&list=ByName> [https://perma.cc/C8PR-RMJ2].

39. *See* Jonathan Willis, *As Slava Voynov Seeks a Return, the NHL Needs a Specific Policy on Domestic Violence*, ATHLETIC (Nov. 2, 2018), <https://theathletic.com/629416/2018/11/02/as-slava-voynov-seeks-a-return-the-nhl-needs-a-specific-policy-on-domestic-violence/> [https://perma.cc/YV94-K5Q5]; Jaime McLaughlin, *The NHL Needs a Domestic Violence Policy*, VARSITY (Oct. 22, 2018), <https://thevarsity.ca/2018/10/22/the-nhl-needs-a-domestic-violence-policy/> [https://perma.cc/VY7N-4EMH] (going so far as to argue that an NHL-specific domestic violence policy is only a “first step”).



that he had not heard of anyone who had a problem with current disciplinary procedures, so long as procedures remain “consistent.”<sup>40</sup>

Despite this general manager’s optimistic view, the NHL has witnessed a number of high-profile domestic violence and sexual misconduct cases over the past several years, and disciplinary action remains inconsistent. During the 2013 season, for example, Colorado Avalanche goaltender Semyon Varlamov was charged with the assault and kidnapping of his girlfriend.<sup>41</sup> Varlamov was never suspended from play, although Article 18-A.5 provides for suspension without a hearing in cases of concurrent criminal investigation.<sup>42</sup> In fact, he played in a game just two days after his arrest.<sup>43</sup> By contrast, the NHL suspended the Nashville Predators’s Auston Watson for twenty-seven games after he pleaded no contest to a misdemeanor charge of domestic assault.<sup>44</sup>

In addition to its inconsistent disciplinary action, the NHL lacks a clear formal or customary league policy regarding the investigation and signing of players with previous convictions or accusations. In November 2022, Commissioner Bettman determined that it is unlikely defenseman Mitchell Miller will ever be eligible to play for the Boston Bruins after a report revealed that Miller was convicted in juvenile court in 2016 for racially abusing and bullying a middle school classmate.<sup>45</sup> By contrast, during the previous season, defenseman Logan Mallioux withdrew himself from the NHL Draft, stating that he believed he lacked the requisite character to play in the NHL after his conviction in Swedish court for photographing a woman performing a sex act and distributing

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40. Emily Kaplan, *Answering the Big Questions on the NHL’s Domestic Violence Policy*, ESPN (July 2, 2018, 9:00 AM), [https://www.espn.com/nhl/story/\\_/id/23968215/nhl-slava-voynov-attempts-return-league-questions-league-domestic-violence-policy-lack-thereof](https://www.espn.com/nhl/story/_/id/23968215/nhl-slava-voynov-attempts-return-league-questions-league-domestic-violence-policy-lack-thereof) [https://perma.cc/N86N-AZER].

41. *Avs’ Semyon Varlamov Arrested*, ESPN (Oct. 30, 2013, 10:08 PM), [https://www.espn.com/nhl/story/\\_/id/9905014/semyon-varlamov-colorado-avalanche-arrested-domestic-abuse-case](https://www.espn.com/nhl/story/_/id/9905014/semyon-varlamov-colorado-avalanche-arrested-domestic-abuse-case) [https://perma.cc/8XL7-VQXM].

42. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 28, at 127.

43. Associated Press, *Avalanche Goalie Back After Arrest*, N.Y. TIMES (Nov. 1, 2013), <https://www.nytimes.com/2013/11/02/sports/hockey/avalanche-goalie-plays-after-arrest.html>.

44. Adam Vingan, *Austin Watson and the Predators Are Moving on from His Arrest. It Feels like Most Others Are, Too*, ATHLETIC (Nov. 19, 2018), <https://theathletic.com/657087/2018/11/19/austin-watson-suspension-domestic-violence-nhl-predators/> [https://perma.cc/F4RL-5RJR]. Watson’s suspension was later reduced to eighteen games by an independent arbitrator. *See id.*

45. Ryan S. Clark, *Gary Bettman: Bruins Signee Mitchell Miller ‘Not Eligible,’* ESPN (Nov. 5, 2022, 2:14 PM), [https://www.espn.com/nhl/story/\\_/id/34954408/gary-bettman-bruins-signee-mitchell-miller-not-eligible](https://www.espn.com/nhl/story/_/id/34954408/gary-bettman-bruins-signee-mitchell-miller-not-eligible) [https://perma.cc/K7C2-F724].

the image to his teammates.<sup>46</sup> Despite Mailloux's conviction and his own objections, the Montreal Canadiens drafted him in the first round.<sup>47</sup> It is clear from these differences in disciplinary approaches that there is little consistency in the consideration of players' previous criminal behavior and in how seriously allegations of domestic violence and sexual misconduct are taken in the NHL.

Certain proponents of the current arbitration system maintain that an official league policy is superfluous because domestic violence and sexual misconduct are non-issues within the league.<sup>48</sup> This could not be further from the truth: sexual misconduct and domestic violence are endemic to the National Hockey League.<sup>49</sup> In addition to the above referenced cases, several other instances of sexual misconduct have made headlines over the last decade. The NHL has investigated sexual assault allegations against Tampa's Ian Cole and Chicago's Patrick Kane.<sup>50</sup> The New Jersey Devils's Ben Johnson served a three-year prison sentence for the rape of a sixteen-year-old girl and promptly resumed his professional career with the East Coast Hockey League in 2018.<sup>51</sup> In 2020, the Washington Capitals terminated Brendan Leipsic's contract after he degraded women (including teammates' wives) in an Instagram group chat.<sup>52</sup> The Chicago Blackhawks *grossly* mishandled the sexual assault of

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46. *Canadiens Draft Logan Mailloux, Who Faced Conviction in Sweden, in First Round*, ATHLETIC (July 23, 2021), <https://theathletic.com/4204157/2021/07/24/canadiens-draft-logan-mailloux-who-faced-conviction-in-sweden-in-first-round/> [https://perma.cc/8X9R-XVWH].

47. *Id.*

48. When asked if he believed the NHL should adopt a specific domestic violence policy, then-Florida Panthers General Manager Dale Tallon replied: "It's something I've never even thought of because we've never had any issues." Kaplan, *supra* note 40.

49. Compare *supra* note 48 and accompanying text with *infra* notes 50–52 and accompanying text.

50. See *NHL Finds 'No Evidence' to Substantiate Allegations Against Lightning's Ian Cole*, ATHLETIC (Oct. 15, 2022), <https://theathletic.com/3696272/2022/10/15/nhl-investigation-ian-cole-allegations/> [https://perma.cc/X6YH-BWJS]; Allan Muir, *Patrick Kane Cleared by NHL*, SPORTS ILLUSTRATED (Mar. 9, 2018), <https://www.si.com/nhl/2016/03/09/patrick-kane-sex-assault-investigation-cleared-nhl>.

51. See Kevin Grasha, *New Cincinnati Cyclones Player Is on Parole for Sexually Assaulting Teen in 2013*, CIN. ENQUIRER (Dec. 20, 2018, 5:11 PM), <https://www.cincinnati.com/story/news/crime/crime-and-courts/2018/12/20/cincinnati-cyclones-player-parole-sexually-assaulting-teen/2378474002/> [https://perma.cc/M268-E5XJ].

52. Samantha Pell, *Capitals Waive Brendan Leipsic After His Vulgar Remarks on Social Media*, WASH. POST (May 8, 2020, 1:46 PM), <https://www.washingtonpost.com/sports/2020/05/08/capitals-waive-brendan-leipsic-after-his-misogynistic-reprehensible-remarks-social-media/> [https://perma.cc/ZG6Q-WF9M].

one of its own players at the hands of an assistant coach, sweeping the assault under the rug until after the team's Stanley Cup win in 2016.<sup>53</sup> Most recently, eight players on the gold medal-winning Team Canada roster were involved in a lawsuit in which they were accused of sexually abusing a woman over the course of several hours—all but two played in the 2021–22 NHL season.<sup>54</sup> Considering the often covert nature of domestic violence and sexual misconduct,<sup>55</sup> there are almost certainly other cases that have not been uncovered by the media. Domestic violence and sexual misconduct within the NHL are real, urgent issues. The prevalence of sexual misconduct cases and the inconsistency in their treatment demonstrate a pressing need for the league to establish a clear and official domestic violence policy.

## II. THE NHL MUST ESTABLISH A DOMESTIC VIOLENCE POLICY

This Part provides an analysis of the inadequacies of the current legal treatment of sexual violence perpetrated by professional hockey players and argue for the development of a comprehensive domestic and sexual violence policy based on existing policies in other leagues. First, it addresses the shortcomings of judicial remedies for victims of sexual and domestic violence perpetrated by professional hockey players. Then, it outlines the benefits of establishing an NHL-specific domestic and sexual violence policy. Finally, it offers policy recommendations based on a comparative analysis of the other major professional leagues' existing policies.

### *A. Regulating Off-Ice Conduct via Judicial Remedy Alone Is Not Effective*

The NHL must provide a private cause of action for domestic violence and sexual assault because the judicial system fails to protect survivors of domestic and sexual violence, especially when perpetrated

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53. Jaclyn Diaz, *Chicago Blackhawks Settle with a Former Player Who Says He Was Sexually Assaulted*, NPR (Dec. 16, 2021, 8:08 AM), <https://www.npr.org/2021/12/16/1064766946/chicago-blackhawks-kyle-beach-sexual-assault-settlement>.

54. See Lazerus, *supra* note 22.

55. See *False Reporting*, NAT'L SEXUAL VIOLENCE RES. CTR. (2012) [https://www.nsvrc.org/sites/default/files/2012-03/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf) [https://perma.cc/2NXP-AME9] (“The majority of sexual assaults, an estimated 63 percent, are never reported to the police.”); Donald Dripps, *Rape, Law and American Society*, in *RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 227, 228 (Clare McGlynn & Vanessa E. Munro eds., 2010).

by professional athletes. The prevalence of false reporting for crimes of sexual violence is low,<sup>56</sup> yet there is a “systemic hesitance” to believe rape allegations in criminal and civil courts.<sup>57</sup> To secure a criminal conviction, survivors of sexually violent crimes must jump through several highly discretionary procedural hoops: they must first convince the police and then a prosecutor of the truth of the charge, and then rely on the prosecutor to persuade a jury that the evidence demonstrates guilt beyond a reasonable doubt.<sup>58</sup> Only about sixteen percent of sexual assaults reported to the police lead to arrest, compared to about forty percent of assault and battery crimes.<sup>59</sup> Many survivors of sexual assault decline to report the crime at all,<sup>60</sup> often out of a belief that the police could or would not do anything to help.<sup>61</sup> A survivor might also decline to report their sexual assault out of a belief that sexual assault is a personal matter, fear of retaliation, or desire to protect their abuser.<sup>62</sup> For those survivors who do choose to report their assault, few cases are

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56. Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 *LAW & SOC’Y REV.* 161, 162 (2014) (“[T]he more methodologically rigorous research finds that the percentage of false reports [of sexual violence] ranges from 2 to 8 percent.”). Because of inconsistencies in defining “false report” across jurisdictions, estimates of the incidence of false reporting vary widely. Studies reporting inflated rates of false reports tend to draw from research that includes in its “false report” definition cases where there is insufficient evidence to proceed to prosecution, cases in which victims refuse to cooperate with investigators, and inconsistencies in victim statements. Although reports made under these circumstances do not amount to a viable sexual assault claim legally, this does not mean the reports are inherently false. For an overview of false reporting, see *False Reporting*, *supra* note 55. See also *Myths About Sexual Assault Reports*, BROWN UNIV.: BWELL HEALTH PROMOTION, <https://www.brown.edu/campus-life/health/services/promotion/sexual-assault-dating-violence/myths-about-sexual-assault-reports> [<https://perma.cc/88TX-AQ67>].

57. Aaron Horth, *Toward a Comprehensive Gender-Based Violence Court System*, 24 *B.U. PUB. INT. L.J.* 221, 230–31 (2015).

58. Dripps, *supra* note 55, at 225 (citing LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 55–57 (1993)).

59. *The Criminal Justice System: Statistics, RAPE, ABUSE, & INCEST NAT’L NETWORK*, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/6T9Y-H5JH>] (citing RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *NCJ 255113 CRIMINAL VICTIMIZATION*, 2019 (2020)).

60. Dripps, *supra* note 55, at 228 (“[R]ape remains the most under-reported major offen[s]e.”).

61. Michael Planty & Christopher Krebs, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010*, 7 *tbl.9* (2013) (revised May 31, 2016).

62. *Id.* This is not an exhaustive list.

prosecuted.<sup>63</sup> Those who do pursue criminal prosecution face the daunting task of reliving their assault at trial and may also be vulnerable to attacks on their character.<sup>64</sup> Rape shield laws offer some protection for survivors by barring the admission of evidence of a complainant's past sexual behavior or sexual propensity with narrow exceptions.<sup>65</sup> These protections do not, however, preclude zealous defense attorneys from humiliating and retraumatizing survivors on the stand.<sup>66</sup> Even if survivors choose to go to trial despite this ordeal, the likelihood of conviction or meaningful sentencing remains low.<sup>67</sup>

These challenges to the criminal enforcement of sexual and domestic violence are exacerbated by the notoriety of professional athlete offenders. The media maelstrom that typically accompanies celebrity criminal cases inherently influences the public as to the guilt or innocence of the celebrity defendant—increasing the difficulty of staffing an impartial jury and threatening the integrity of the case.<sup>68</sup> In fact, the integrity of celebrity trials is so often compromised that there have been calls for the establishment of a special court system for high-profile defendants.<sup>69</sup> Media bias is especially influential in cases involving professional athletes ensconced in a “halo effect.”<sup>70</sup> In worshiping their favorite players as heroes, fans tend to resist evidence that athletes have

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63. Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 278 (2005).

64. Lori C. Haskell & Melanie Randall, DEP'T OF JUST. CAN., *THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS* 32 (2019) (“Throughout the process of narrating her sexual assault and her reactions to it, the victim-witness, who has typically been isolated and without support, by herself in the witness box, must, under persistent and challenging questioning, lay bare her experience of being violated.”).

65. See FED. R. EVID. 412.

66. See, e.g., CHANEL MILLER, *KNOW MY NAME* 200–01 (2019). In this infamous case, defense counsel attempted to characterize survivor Chanel Miller as an unreliable, silly, promiscuous binge drinker in order to discredit rape allegations against Brock Turner. *Id.*

67. Dripps, *supra* note 55, at 228 (“A rape charge defended on consent is still the most likely accusation to be rejected by a jury although apparently well-founded in fact.”).

68. Jared Chamberlain, Monica K. Miller & Alayna Jehle, *Celebrities in the Courtroom: Legal Responses, Psychological Theory and Empirical Research*, 8 VAND. J. ENT. & TECH. L. 551, 553–54 (2006).

69. See, e.g., Laurie Nicole Robinson, Comment, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1314 (1998).

70. In this context, “halo effect” refers to the “tendency to presume that heroes in one domain are heroes in all. . . . Fans seek to emulate not only their success on the playing field but also their *presumed* success in life as well.” Thomas Morawetz, *Fantasy, Celebrity, and Homicide*, 6 HASTINGS WOMEN'S L.J. 209, 211 (1995) (emphasis added).

the same “failings, inconsistencies, and complexities that bedevil mere mortals.”<sup>71</sup> Even where criminal trials of professional athletes are insulated from the public,<sup>72</sup> pre-existing biases in favor of athletic heroes can result in preferential treatment.<sup>73</sup> This bias is compounded when a jury is predisposed to be wary of sexual assault allegations.<sup>74</sup>

Similar barriers prevent survivors of sexual misconduct and domestic violence perpetrated by professional hockey players from seeking remedy in civil court. Civil claims for pain and suffering, physical injury, and emotional distress stemming from intimate partner violence are all compensable through tort law, but these claims are seldom filed.<sup>75</sup> For cases of sexual assault, enduring rape myths present barriers to civil remedy,<sup>76</sup> even though civil cases require a less stringent burden of proof than criminal cases.<sup>77</sup> Complainants raising a civil claim for rape in state courts must often expose themselves to humiliating and traumatizing lines of questioning, as many states provide significant exceptions to rape shield laws in civil cases.<sup>78</sup> Moreover, civil suits take a long time. The extensive discovery process, settlement negotiations, and preparation for a trial that will likely take place years after the event can significantly impede the psychological recovery of the survivor.<sup>79</sup>

This emotional trauma is compounded when the respondent is a professional athlete. Survivors must generally reveal their identity to file a civil claim,<sup>80</sup> thereby subjecting themselves to public vitriol and

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71. *Id.*

72. Chamberlain, Miller & Jehle, *supra* note 68, at 554 (“Because of the added attention, celebrity defendants often need, and sometimes receive, extra protections of their rights like special jury instructions, sequestrations, and postponement.”).

73. *See* Robinson, *supra* note 69, at 1331.

74. Horth, *supra* note 57, at 231 (“This [negative] view of victims’ credibility results from a historical legal climate wherein rape victims were frequently interrogated to the point of nearly being ‘put on trial’ themselves.”).

75. Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 KAN. L. REV. 695, 695 (2014).

76. *See* Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 446 (2013).

77. Carey, *supra* note 75, at 747.

78. *See* Michelle J. Anderson, *Understanding Rape Shield Laws*, VAWNET 3–7 (Sept. 2004), <https://vawnet.org/sites/default/files/assets/files/2016-10/RapeShield.pdf> [<https://perma.cc/MW7Q-8QHL>] (summarizing state legislative exceptions to rape shield law, including exceptions for prior patterns of sexual conduct with third parties; prior prostitution with third parties; and prior sexual conduct with the defendant); *cf.* FED. R. EVID. 412 (prohibiting admission of evidence exhibiting a victim’s sexual predisposition in federal civil courts unless its probative value substantially outweighs the danger of harm to any victim and unfair prejudice to any party).

79. Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479, 482 (1978).

80. FED. R. CIV. P. 10(a).

bullying perpetrated by impassioned fans who perceive the complainant as a threat to their favorite team or player.<sup>81</sup> Plaintiffs in a celebrity trial expose themselves to public assault on their privacy: there are no protections against broadcasting and publishing a rape survivor's name.<sup>82</sup> For the duration of the infamous Kobe Bryant trial, for example, the survivor was unable to go out in public without facing hostility from fans—including death threats.<sup>83</sup> Deeply personal information—including DNA evidence from the rape kit and evidence of two recent suicide attempts—was leaked to the press and subsequently weaponized by Bryant's fans.<sup>84</sup>

Survivors might also fear filing a civil claim because of the stigma associated with suing for damages against a wealthy celebrity respondent. This fear is well-founded, as the public is often highly skeptical of plaintiffs' claims in cases involving celebrity defendants, despite evidence supporting the validity of the claim.<sup>85</sup> The unwavering support of fans for Patrick Kane, notwithstanding serious rape allegations against him, serves as an example. One fan went so far as to declare, "I feel like he didn't do it. She got up from the bed and thought 'Payday!'"<sup>86</sup> Such a mindset highlights a common misconception held by the public regarding survivors' motivations for raising civil claims against celebrity defendants. In reality, survivors of rape are burdened with enormous financial cost, including medical bills, lost wages, and professional services.<sup>87</sup> As a Department of Justice report notes, "if rape's effect on the victim's quality of life is quantified, the average rape costs \$87,000 . . . . When pain, suffering, and lost quality of life are quantified, the aggregate cost of rape [is] \$127 billion."<sup>88</sup>

If a survivor does opt to brave the social stigma of raising a civil claim against a professional hockey player, the survivor is at an economic

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81. See, e.g., Moira E. McDonough, Note, *Internet Disclosures of a Rape Accuser's Identity (Focus on the Kobe Bryant Case)*, 3 VA. SPORTS & ENT. L.J. 284, 308 (2004) (highlighting the egregious harassment experienced by Kobe Bryant's accuser at the hands of both Bryant's supporters and media outlets).

82. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989).

83. Thomas B. Kelley, *Oh No! Here Comes a Celebrity Rape Trial!*, 22 COMM'N LAW., Spring 2004, at 2, 35.

84. *Id.*

85. See, e.g., Greg Couch, *Blackhawks Fans Unbowed in Support of Patrick Kane Despite Rape Allegations*, GUARDIAN (Oct. 8, 2015, 11:44 AM), <https://www.theguardian.com/sport/2015/oct/08/blackhawks-fans-unbowed-in-support-of-patrick-kane-despite-allegations> [<https://perma.cc/BB52-327H>].

86. *Id.*

87. Ted R. Miller, Mark A. Cohen & Brian Wiersema, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 1 (1996).

88. *Id.*

and power disadvantage from the outset. Bringing a civil claim requires financial capital a survivor might not have. Even where a survivor has the finances to file a suit, whether the player committed the tortious act is not necessarily determinative of the outcome. Professional hockey players enjoy an advantageous position in the courtroom in that they are paid millions of dollars annually and therefore likely have access to superior lawyers.<sup>89</sup>

Because of these emotional, legal, and financial barriers to raising a successful civil claim, survivors frequently settle.<sup>90</sup> Survivors may seek closure and remedy by negotiating for financial compensation or nonmonetary compensation such as an apology.<sup>91</sup> Indeed, the public typically tends to perceive settlement as an indication of a defendant's responsibility for the tortious act.<sup>92</sup> However, when it comes to sexual assault claims involving financial compensation, there is a "widespread suspicion against plaintiffs and plaintiff lawyers."<sup>93</sup> The prevailing public skepticism of survivors' motives undermines the validity of their experiences as legitimate victims of wrongful conduct. Furthermore, the private nature of settlement actions fails to publicly condemn sexual misconduct and does not effectively deter future offenders, as settlements lack the capacity to impose sanctions that outweigh the perceived benefits of engaging in sexual misconduct.<sup>94</sup>

These barriers to judicial enforcement of sexual and domestic violence demonstrate the need for a league-sponsored policy. Moreover,

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89. For the 2022–23 season, the minimum player salary is fixed at \$750,000. NATIONAL HOCKEY LEAGUE & NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, MEMORANDUM OF UNDERSTANDING 23 (2020). Edmonton's Connor McDavid was the NHL's highest paid player for the 2021–22 season, with an annual salary of \$12.5 million, while the average player earns \$3.5 million each year. Bryan Murphy, *Kane, Toews Among the Highest-Paid Players in the NHL This Season*, NBC SPORTS CHI. (Oct. 15, 2021, 12:03 PM), <https://www.nbcsportschicago.com/nhl/chicago-blackhawks/kane-toews-among-highest-paid-players-in-the-nhl-this-season/184487/> [https://perma.cc/6LDN-FWSX].

90. Jessica Bregant, Jennifer K. Robbennolt & Verity Winship, *Perceptions of Settlement*, 27 HARV. NEGOT. L. REV. 93, 142 (2021).

91. Swan, *supra* note 76, at 429.

92. Bregant, Robbennolt & Winship, *supra* note 90, at 145.

93. Swan, *supra* note 76, at 453 (quoting William S. Friedlander & Alexandra Rudolph, *The Bias Beneath: Uncovering Juror Bias in Sexual Assault Cases*, PLAINTIFF MAG., June 2010, at 2).

94. *Id.* at 430 n.165 (quoting Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCIS. 206, 216 (2006)). Others argue that the settlement process commodifies rape by creating "an imperfect market in which the rape is legitimized, after the fact, for a price." Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1587 n.150 (quoting William H.J. Hubbard, Note, *Civil Settlement During Rape Prosecutions*, 66 U. CHI. L. REV. 1231, 1241 (1999)).



judicial action is an after-the-fact, “catch me if you can” process that does nothing to deter, prevent, or regulate conduct. The other major leagues have recognized and responded to these deficiencies in the judicial process; the National Hockey League must follow in their footsteps.

### *B. Balancing Justice and Fair Process*

Instead of a post-violence punishment approach, the NHL needs a preventative policy focused on people, not hockey. The NHL believes its current regulation of off-ice player conduct constitutes a set of “responsibly developed, implemented, and enforced strict policies . . . which extend to . . . situations of domestic abuse.”<sup>95</sup> However, the operative provision of the NHL’s Off-Ice Conduct policy merely provides an avenue for disciplinary action of conduct that is “detrimental to or against the welfare of the League or the game of hockey.”<sup>96</sup> Despite the NHL’s beliefs, the policy is clearly not responsibly implemented or enforced, as the provision is so vague that it gives no notice of prohibited conduct and is inconsistently applied by the commissioner.<sup>97</sup> Notwithstanding the social and moral repugnance of acts of sexual and domestic violence, a player could reasonably argue that—without special guidance on the matter—he had no awareness that his specific sexual misconduct could negatively impact the league or the game of hockey. While the existing policy may be *extended* to situations of abuse, given the prevalence of sexual misconduct among professional hockey players and the precedent set by other major league policies,<sup>98</sup> it is essential to adopt a clear and official position against sexual assault and domestic violence—rather than treat them as secondary concerns. To this end, this Section argues an official NHL policy is desirable as a matter of public policy—to ensure justice for victims and survivors, and to protect fair process rights for accused players.

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95. *Addressing Domestic Violence in Professional Sports*, *supra* note 16, at 73 (statement of Jessica Berman, Vice President and Deputy General Counsel, National Hockey League).

96. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 28, at 124.

97. *See supra* Section I.C.

98. *See supra* Section I.C.

1. THE NHL MUST ESTABLISH A DOMESTIC VIOLENCE AND SEXUAL MISCONDUCT POLICY TO ENSURE JUSTICE FOR SURVIVORS AND MITIGATE FUTURE OFFENSES

Domestic violence is one of the nation's most serious epidemics, and the situation is growing increasingly urgent. Between 2016 and 2018, instances of intimate partner violence increased by 42 percent.<sup>99</sup> Over the same period, the number of sexual assault victimizations increased by 146 percent.<sup>100</sup> Professional hockey players are complicit in this epidemic,<sup>101</sup> and, as public figures, have an obligation to repudiate it. As Senator Jay Rockefeller noted in a 2014 Commerce, Science, and Transportation Committee hearing on domestic violence and professional sports, "given the high-profile nature of professional sports, when a celebrity athlete is charged with committing domestic violence, it uniquely reverberates throughout our society."<sup>102</sup> As the only remaining league without a domestic violence and sexual misconduct policy, the NHL demonstrates it does not take these issues seriously.

Opponents to detailed domestic violence and sexual assault policies argue professional sport leagues' purpose is to facilitate gameplay, and that leagues should therefore refrain from regulating off-ice conduct, or only do so in very limited circumstances. Some argue that, because athletes have relatively short playing careers, even short-term exclusion from play for reasons not related to skill or health may cause irreparable harm to an athlete's ability to "develop their unique talents."<sup>103</sup> Others argue that suspension and expulsion based on off-ice conduct have much greater exclusionary and economically detrimental effects on professional athletes than in other industries because only one major professional league exists for each sport in the United States.<sup>104</sup> Where welders, electricians, and carpenters, for example, may seek employment with non-union employers, professional athletes do not have that option.<sup>105</sup> To this end, some courts have recognized that professional athletes may not

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99. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *Domestic Violence*, [https://assets.speakcdn.com/assets/2497/domestic\\_violence-2020080709350855.pdf?1596811079991](https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596811079991) [<https://perma.cc/F2VF-6N6D>].

100. *Id.*

101. *See supra* Sections I.A, I.C.

102. *Addressing Domestic Violence in Professional Sports*, *supra* note 16, at 1 (statement of Senator John D. Rockefeller IV, Chairman, Senate Committee on Commerce, Science, and Transportation).

103. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 106 (2008).

104. *Id.* at 105.

105. *Id.*

have access to alternative employment that is a reasonable substitute for a U.S. major professional sports league.<sup>106</sup>

This characterization of the lack of reasonable alternatives to employment with the NHL is misleading. Even where players are expelled from the league for personal misconduct, there are reasonable alternatives to play in the NHL. Unlike American football, for example, professional hockey is a much more international sport, and transfer between the NHL and European leagues is common.<sup>107</sup> Players that have been dismissed from the NHL for sexual misconduct under the current policy often transfer to Russia's Kontinental Hockey League, sometimes at a pay increase.<sup>108</sup>

Regardless, arguments that focus on unreasonable exclusion from the NHL wrongly presume an entitlement to play professional hockey.<sup>109</sup> It is well within the league's authority to terminate players whose off-ice conduct is deemed "detrimental to or against the welfare of the League or the game of hockey,"<sup>110</sup> and, as the league's deputy general counsel recognizes, domestic violence and sexual misconduct fall under this umbrella.<sup>111</sup>

Professional athletes and the teams for which they play are, "for better or worse, role models and opinion makers."<sup>112</sup> The other major leagues have seized the opportunity to set an example for the millions of

106. See, e.g., *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971).

107. See Andrew Podnieks, *More Europeans than Ever in the NHL*, INT'L ICE HOCKEY FED'N (Dec. 1, 2020), <https://www.iihf.com/en/news/23207/more-europeans-than-ever-in-the-nhl> [<https://perma.cc/TU8P-8U3C>]. In the 2019–20 season, 31.3% of NHL players were European Nationals. *Id.*

108. See, e.g., *Brendan Leipsic*, HOCKEYZONEPLUS, <https://www.hockeyzoneplus.com/salaries/40755-brendan-leipsic> [<https://perma.cc/CR5G-LWTF>]. Brendan Leipsic received a \$64,000 pay increase when he left the NHL to play for CSKA Moscow in the Kontinental Hockey League for the 2020–21 season. *Id.* Leipsic's departure from the NHL followed the termination of his contract with the Washington Capitals for making misogynistic and vulgar remarks on social media. See Pell, *supra* note 52.

109. *Universal Declaration of Players Rights*, NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, <https://www.nhlpa.com/the-pa/pa-programs-and-partnerships/universal-declaration-of-player-rights> [<https://perma.cc/LGA3-KLJQ>] (notably holding that "[e]very player has the right to access and pursue sport as a career and profession based solely on merit") (emphasis added).

110. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 28, at 124.

111. *Addressing Domestic Violence in Professional Sports*, *supra* note 16, at 75 (statement of Jessica Berman, Vice President and Deputy General Counsel, National Hockey League).

112. *Id.* at 4 (statement of Senator John Thune, Ranking Member, Senate Committee on Commerce, Science, and Transportation).

fans who idolize professional athletes.<sup>113</sup> The NHL itself recognizes this responsibility and has acted on it.<sup>114</sup> Establishing an official policy would demonstrate as a matter of public policy that the NHL's commitment to mitigating domestic violence and sexual assault is not merely superficial.

## 2. THE NHL MUST INSTITUTE A ROBUST DOMESTIC VIOLENCE AND SEXUAL MISCONDUCT POLICY TO ENSURE PLAYERS' RIGHTS TO FAIR PROCESS

As discussed above, off-ice behavior and player "morality" are already regulated in the NHL, just not well.<sup>115</sup> The existing provision vesting the commissioner with full discretion to discipline players who engage in behavior "detrimental to or against the welfare of the League or the game of hockey" is overly broad and vague,<sup>116</sup> resulting in a lack of notice for players facing disciplinary action and inconsistencies in league treatment of sexual misconduct and domestic violence. Because the NHL is a private association, due process rights enumerated in the Fifth and Fourteenth Amendments do not apply to league disciplinary proceedings.<sup>117</sup> However, courts have held that professional sports leagues are required to follow the "basic rudiments" of due process.<sup>118</sup> Although courts recognize that "[s]trict adherence to judicial standards of due process would be arduous and might seriously impair the . . . proceedings of voluntary associations," disciplinary proceedings, at the very least, "must not be a sham."<sup>119</sup> To this end, the commissioner's disciplinary action may be subject to judicial review if "it is wholly 'irrational' or 'arbitrary.'"<sup>120</sup>

To avoid judicial review on claims of arbitrariness or failing to adhere to rudimentary due process, the NHL should develop a more robust, detailed policy that provides notice of prohibited behaviors.

113. *See supra* pp. 1380–81.

114. *Addressing Domestic Violence in Professional Sports*, *supra* note 16, at 75 (statement of Jessica Berman, Vice President and Deputy General Counsel, National Hockey League) ("The NHL . . . believe[s] we have an obligation to raise awareness, provide education, and penalize offenders, all with the hope and intention of deterring future misconduct.").

115. *See supra* Section I.C.

116. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 28, at 124.

117. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he Fourteenth Amendment . . . erects no shield against merely private conduct, however discriminatory or wrongful.").

118. *See Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 544 (7th Cir. 1978).

119. *Id.* at 544 n.65 (quoting in part *Van Daele v. Vinci*, 283 N.E.2d 732 (Ill. 1972)).

120. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991).

Developing a more robust, detailed disciplinary procedure would provide for increased consistency in disciplinary action and protect against claims of arbitrariness on the part of Commissioner Bettman. This in turn would protect the integrity and legitimacy of the league's arbitration process and limit the interference of an independent arbitrator or judicial review.

### *C. Drafting Considerations for an NHL-Specific Policy*

Any domestic violence or sexual misconduct policy developed by the NHL will naturally reflect the specific goals and priorities of the league and the players' association. However, there are a few drafting considerations the NHL should keep in mind in creating a policy that balances fair process for players and justice for victims and survivors. This Section draws lessons from existing major league domestic violence policies and makes recommendations for the implementation of an NHL-specific policy.

#### 1. THE POLICY MUST BE INCORPORATED INTO THE NHL-NHLPA'S COLLECTIVE BARGAINING AGREEMENT

The NHL should incorporate its policy into its collective bargaining agreement to avoid a potential violation of antitrust law. While the NBA and MLB domestic violence policies are products of collective bargaining,<sup>121</sup> the NFL Personal Conduct Policy is issued unilaterally by the commissioner as a league policy distinct from the NFL Collective Bargaining Agreement.<sup>122</sup> There is a possibility that such a construction

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121. NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT F-1 (2023), <https://imgix.cosmicjs.com/25da5eb0-15eb-11ee-b5b3-fbd321202bdf-Final-2023-NBA-Collective-Bargaining-Agreement-6-28-23.pdf> [https://perma.cc/8M4F-A5EF] [hereinafter NBA-NBPA DOMESTIC VIOLENCE POLICY] ("Through this Policy, the . . . NBA . . . and the . . . NBPA . . . have agreed to work together to address domestic violence, sexual assault, and child abuse in the NBA."); MAJOR LEAGUE BASEBALL & MAJOR LEAGUE BASEBALL PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT 308 (2017), [https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/cba/2019/private\\_30majorclubs\\_k9831\\_060122.pdf](https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/cba/2019/private_30majorclubs_k9831_060122.pdf) [https://perma.cc/6D5P-VURA] [hereinafter MLB-MLBPA DOMESTIC VIOLENCE POLICY] ("Major League Baseball and the Major League Baseball Association Players Association . . . desire to formulate a Domestic Violence, Sexual Assault, and Child Abuse Policy . . .").

122. NATIONAL FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 1 (2018), <https://nflcommunications.com/Documents/2018%20Policies/2018%20Personal%20Conduct%20Policy.pdf> [https://perma.cc/LE7B-39N2] [hereinafter NFL PERSONAL CONDUCT POLICY] (This Personal Conduct Policy is issued pursuant to the Commissioner's Authority . . . .").

of a disciplinary policy violates Section 1 of the Sherman Antitrust Act by instituting an illegal group boycott.<sup>123</sup>

In determining whether conduct violates Section 1 of the Sherman Act, courts first ask whether the arrangement is a sufficient agreement between multiple parties to constitute a contract, combination, or conspiracy; and whether that agreement affects interstate commerce.<sup>124</sup> If these threshold elements are met and an agreement “seems to yield economic benefits,” courts apply the rule of reason test: a balancing test under which courts determine whether the arrangement enhances or suppresses competition.<sup>125</sup> Courts will also consider whether any affirmative defenses negate a finding of an antitrust violation.<sup>126</sup>

Applying this framework to the NHL, it is possible that a domestic violence policy unilaterally promulgated by the commissioner would violate the Sherman Act. As a preliminary matter, there is no question that the NHL affects interstate commerce: teams travel among states, games are broadcast nationally, and in the 2021–22 season, for example, the league generated over a billion dollars in revenue from sponsorships, ticket sales, and merchandise sales.<sup>127</sup> Second, a domestic violence policy unilaterally promulgated by the commissioner would certainly constitute a contract, as players would be required to adhere to its provisions to participate in the season. It is less certain, however, whether a domestic violence policy unilaterally promulgated by the commissioner would constitute an agreement between multiple parties. In *American Needle, Inc., v. National Football League*,<sup>128</sup> the Supreme Court held that the NFL does not constitute one single employer, but thirty-two distinct entities for the purposes of a Section 1 analysis.<sup>129</sup> However, the Court noted professional football teams “are not trapped by antitrust law” and that “[t]he special characteristics of this industry may provide a justification’ for many kinds of agreements.”<sup>130</sup> It is likely that the

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123. See Sherman Act, 15 U.S.C. § 1 (“Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”).

124. Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 640 (2009).

125. *Id.* at 640–41.

126. See *id.* at 641.

127. See Sean Shapiro, *NHL Revenues Reach Record High Thanks to Jump in Sponsorship, Licensing Deals*, ATHLETIC (June 25, 2022), <https://theathletic.com/3382650/2022/06/25/nhl-revenues-reach-record-high-thanks-to-jump-in-sponsorship-licensing-deals/> [<https://perma.cc/M79W-XFNN>].

128. 560 U.S. 183 (2010).

129. See *id.* at 201.

130. *Id.* at 202 (quoting in part *Brown v. Pro Football, Inc.*, 518 U.S. 231, 252 (1996) (Stevens, J., dissenting)).

Court's decision in *American Needle* could be extended to the NHL, in which case the NHL would meet the final requirement that the agreement exist between multiple parties.

If the policy meets the threshold questions, it is very possible a court may hold that an NHL policy unilaterally promulgated by the commissioner fails the rule of reason test. When applying the rule of reason test, courts assess whether there is (1) a presence of market power; and (2) a net anticompetitive effect.<sup>131</sup> In conducting this analysis, courts prioritize safeguarding economic competition over addressing threats to the public interest. The Supreme Court held in *United States v. National Society of Professional Engineers*<sup>132</sup> that, in determining economic effect, even important public policy concerns could not save a restraint that was net anticompetitive.<sup>133</sup> First, the NHL exerts market power as the only elite-level employer of professional hockey players in the United States. Second, a court may hold that an NHL domestic violence policy unilaterally promulgated by the commissioner has a net-anticompetitive effect by precluding NHL players from employment at the elite level and by preventing consumers from being able to watch games featuring boycotted players.<sup>134</sup> Under *National Society of Professional Engineers*, the desire to mitigate domestic violence and sexual assault as a matter of public policy would not be a valid consideration in this analysis.<sup>135</sup> However, the NHL may avoid the possibility of antitrust violation entirely by issuing its domestic violence and sexual conduct policy as an addendum to its collective bargaining agreement: the non-statutory labor exemption precludes antitrust liability for conduct that is the product of a collective bargaining process.<sup>136</sup>

## 2. THE NHL SHOULD ESTABLISH CLEAR DEFINITIONS OF COVERED BEHAVIOR

To provide better notice of prohibited conduct to players, the NHL should define covered parties and behavior in their league-specific policy. As a preliminary matter, the NHL should extend the application of its domestic violence policy to all employees affiliated with the league rather than limiting liability to players, as the current Off-Ice Conduct

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131. See Edelman, *supra* note 124, at 645–47.

132. 435 U.S. 679 (1978).

133. *Id.* at 693–94.

134. Edelman, *supra* note 124, at 647.

135. See *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695–96.

136. See *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 687–88 (2d. Cir. 1995).

policy does.<sup>137</sup> The NFL Personal Conduct Policy is already structured in this manner: the policy begins by acknowledging that it is a privilege—not a right—to be involved with the league, and stipulates that “[e]veryone who is part of the league must refrain from ‘conduct detrimental to the integrity of and public confidence in’ the NFL.”<sup>138</sup> Although victims of sexual assault and domestic violence are predominantly women,<sup>139</sup> the players themselves are also vulnerable to sexual violence.<sup>140</sup> Extending the application of a specific domestic violence and sexual misconduct policy to all league employees is particularly meaningful in the professional hockey context given the league’s dark history of mishandling sexual assault of players at the hands of coaches and administrators.<sup>141</sup> A league-wide policy will demonstrate the NHL’s commitment to protecting players from abuse at the hands of coaches and other league employees, and is a long-overdue step in the league’s total repudiation of domestic violence and sexual assault writ large.

In addition to expanding covered parties in its domestic violence policy, the NHL should also explicitly define covered behavior. The league’s current policy prohibiting conduct “detrimental to or against the welfare of the League or the game of hockey” is too vague to provide adequate notice of off-ice misconduct. By contrast, all three of the existing major league domestic violence policies offer definitions for three prohibited behaviors: domestic violence, sexual assault, and child abuse.<sup>142</sup> Each definition provides a list of actions which constitute the prohibited behavior.<sup>143</sup> No list is exhaustive,<sup>144</sup> affording the

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137. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 28, at 124 (“*Commissioner Discipline for Off-Ice Conduct* shall mean discipline imposed by the Commissioner or his designee for *Player* conduct. . . .”) (emphasis added in part).

138. NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 1 (emphasis omitted). The list of covered parties includes owners, coaches, players, other team employees, game officials, undrafted rookie players, free agents who were under contract in the prior league year, prospective players that have begun employment negotiations, and employees of the league office, NFL Films, NFL Network, or any other NFL business. *Id.*

139. *Victims of Sexual Violence: Statistics, RAPE, ABUSE, & INCEST NAT’L NETWORK*, <https://www.rainn.org/statistics/victims-sexual-violence> [https://perma.cc/6U5P-9APE] (noting that “90% of adult rape victims are female”).

140. *See generally* Preston, *supra* note 23.

141. *See, e.g.*, Diaz, *supra* note 53.

142. NBA-NBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at F-1 to -2; NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 2; MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 308-09.

143. *See supra* note 142.

144. Each definition uses uncomprehensive language such as “including but not limited to.” *See supra* note 142.



commissioner flexibility and discretion in determining disciplinary action, while providing notice sufficient to meet the ‘rudimentary due process’ standard.

The NHL should consider its goals in establishing a league-specific domestic violence policy, and craft its own definitions accordingly. The NFL, NBA, and MLB each construe prohibited behaviors with varying degrees of strictness.<sup>145</sup> The NFL, for example, has expanded the scope of covered behavior, and notes that, even if player conduct does not result in a criminal conviction, players are still subject to discipline if the league determines they have engaged in covered behavior.<sup>146</sup> In outlining prohibited conduct, the NFL provides a list of covered actions sufficient to provide notice to players, but leaves some room for discretion.<sup>147</sup> Broadly speaking, conduct that “undermines or puts at risk the integrity of the NFL” remains prohibited behavior,<sup>148</sup> but in other areas the league is more explicit. For example: “[a]ctual or threatened physical violence against another person, including dating violence, domestic violence, child abuse, and other forms of family violence” is also prohibited.<sup>149</sup>

The NBA similarly balances commissioner flexibility and player notice by outlining specific behaviors that fall under broader definitions of domestic violence, sexual assault, and child abuse.<sup>150</sup> For example, the league notes that, for the purposes of its policy, “‘sexual assault’ includes, but is not limited to, any actual or attempted sexual contact or act to which one party has not consented.”<sup>151</sup> Here, while the NBA provides notice of covered behavior, it leaves some room for commissioner discretion by noting that its definition of sexual assault may expand beyond the scope of the listed actions, if the situation calls for it.

MLB offers the narrowest construction of covered behavior. Its joint Domestic Violence, Sexual Assault, and Child Abuse Policy provides longer, more detailed definitions that rhetorically mirror language one might see in a traditional criminal statute.<sup>152</sup> Notably, the list of covered

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145. See NBA-NBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at F-1, -4, -8 to -9; NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 2; MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 308, 313, 316–17.

146. NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 2.

147. *See id.*

148. *Id.*

149. *Id.*

150. NBA-NBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at F-1 to -2.

151. *Id.* at F-1. The NBA Policy additionally offers its own definition of consent: “Lack of consent is . . . deemed to exist when a person is mentally incapable of giving consent, as a result of disability, incapacitation, intoxication, or otherwise.” *Id.*

152. See MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 308–09.

actions that constitute domestic violence is not conclusive, but the policy's definition of sexual assault is.<sup>153</sup> MLB's policy further narrows its construction of sexual assault by requiring the victim be "legally incapable of consent."<sup>154</sup> This sort of phrasing is undesirable in a league-specific policy, as it forces reliance on local statutes in whatever state the offense was committed, complicating league arbitration and rendering it redundant.

The NFL or NBA approaches serve as more desirable models for an NHL-specific policy, as MLB's model provides little additional protection for survivors beyond what they would receive in the criminal justice system.<sup>155</sup> Such a construction of covered behavior provides sufficient notice for players but involves no practical or actual commitment to mitigating domestic violence. The NFL and NBA's models are preferable because they provide enough notice to mitigate lawsuits from players alleging wrongful termination, and at the same time expand protections for survivors by establishing a viable course of disciplinary action.

The NHL should additionally consider providing a list of mitigating and aggravating factors considered by the commissioner in determining disciplinary action. Developing and publicizing these factors would further reduce the chance of the commissioner's determinations being ruled arbitrary or unreasonable. All three existing league policies consider factors such as: nature and severity of the allegations; whether the allegations are supported by credible information; risk of reputational damage to the league or the player's team; status of any criminal investigation; and vulnerability of the victim.<sup>156</sup> Structuring the disciplinary process this way affords the commissioner discretion to assess player conduct on a case-by-case basis, while still providing structure to the inquiry that affords players the basic due process rights required by law.

Lastly, the NHL should establish a baseline for disciplinary action for certain offenses. This would provide a starting framework from which the commissioner may either increase or decrease disciplinary action based on mitigating or aggravating factors. The NFL, for example,

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153. *See id.* ("Domestic violence includes, but is not limited to . . ."). Meanwhile, MLB policy defines sexual assault as "a range of behaviors, including a completed nonconsensual sex act, an attempted nonconsensual sex act, and/or nonconsensual contact." *Id.* at 309.

154. *Id.* at 309.

155. As illustrated above, these protections are very minimal. *See supra* Section II.A.

156. NBA-NBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at F-7, -9; NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 6-7; MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 315.

offers in its disciplinary proceedings a default of suspension without pay for six games for three categories of prohibited behavior: (1) criminal assault or battery; (2) domestic violence, dating violence, child abuse, and other forms of family violence; and (3) sexual assault involving physical force or committed against someone incapable of giving consent.<sup>157</sup> Providing similar guidelines for the commissioner's disciplinary proceedings would further reduce the chance of the commissioner's determinations being appealed to an independent arbitrator or subjected to judicial review.

### 3. THE NHL SHOULD INCORPORATE PROVISIONS FOR PREVENTATIVE PROGRAMMING AND VICTIM SUPPORT

In addition to protecting against lawsuits from disgruntled players, the development of a league-specific policy presents the NHL with an opportunity to address the domestic and sexual violence epidemic at its root by codifying preventative programming. The NHL already offers domestic violence and sexual assault training for rookie players,<sup>158</sup> but there are benefits to enumerating educational programming in an official policy, which all three of the other leagues already do.<sup>159</sup> First, incorporating educational programming in the collective bargaining agreement would allow the players' association to have some input into the formatting and content of programming. This input from the players' association would allow the league to tailor programming to players' needs in the unique context of sexual violence in the world of professional hockey. Second, codifying the educational policy would allow the league to formally establish a committee of experts, who would be able to keep abreast of developments in best practice and revise programming policy accordingly. All three existing major league policies have established expert committees comprised of representatives from the league and players association, with the NBA and MLB specifically including three experts in the fields of domestic violence, sexual assault, and child

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157. NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 6–7.

158. See Wawrow, *supra* note 15. In 2022, the NHL also sponsored a one-time, mandatory ninety-minute training for all league employees to combat abuse and promote a culture of inclusivity in the league. Greg Wyshynski, *NHL Unveils Initiatives Aimed at Combating Abuse, Improving Inclusivity*, ESPN (Dec. 9, 2021, 7:42 PM), [https://www.espn.com/nhl/story/\\_/id/32832342/nhl-unveils-initiatives-aimed-combating-abuse-improving-inclusivity](https://www.espn.com/nhl/story/_/id/32832342/nhl-unveils-initiatives-aimed-combating-abuse-improving-inclusivity) [https://perma.cc/Y6C7-JF29].

159. NBA-NBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at F-3; NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 1; MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 324.

abuse.<sup>160</sup> Lastly, formalizing the educational policy would make it more readily available to the public. Publicizing educational programming would spread awareness of domestic violence and sexual assault beyond the confines of the league, and perhaps lead hockey fans to think critically about their own behaviors. To this end, the NHL might also consider creating a separate educational outreach policy to mitigate domestic violence and sexual assault in hockey culture and amongst fans.<sup>161</sup>

In addition to developing a more robust educational program, the NHL should provide resources for survivors, taking into account the financial and power disparities between player and survivor.<sup>162</sup> To this end, both the NBA and MLB provide for a twenty-four hour confidential hotline service, from which players, their families, and other victims of domestic violence may seek assistance.<sup>163</sup> These tools would also be invaluable for the players themselves, as league-provided resources are uniquely able to respond to the specific pressures faced by professional athletes who have engaged in or been victims of sexual misconduct or domestic violence. MLB's policy stipulates additional requirements that the hotline be staffed by Masters-level or highly experienced counselors and that assistance be provided in both English and Spanish.<sup>164</sup> If the NHL opts to provide a confidential counseling line, it should consider providing these services in Swedish and Russian in addition to English, considering the proportion of NHL players who hail from these countries.<sup>165</sup> Expanding the language options of an NHL hotline would

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160. NBA-NBPA Domestic Violence Policy, *supra* note 121, at F-2; NFL Personal Conduct Policy, *supra* note 122, at 1; MLB-MLBPA Domestic Violence Policy, *supra* note 121, at 324.

161. MLB's Joint Domestic Violence, Sexual Assault, and Child Abuse Policy provides for a community outreach program of this type. The policy requires MLB's policy committee to develop an annual outreach program to mitigate domestic violence via donations to charitable organizations, public service announcements featuring players, domestic violence awareness days at ballgames, and other educational activities. MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 324.

162. *See supra* pp. 1391-94.

163. NBA-NBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at F-3; MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 324-25. The NHL already operates a hotline for whistleblowers to anonymously report inappropriate conduct by team officials. However, access to the hotline is limited to current and former team personnel. Greg Wyshynski, *NHL Plans Platform for Whistleblowers of Abuse, Training Program*, ESPN (Dec. 9, 2019, 10:09 PM), [https://www.espn.com/nhl/story/\\_/id/28262966/nhl-plans-platform-whistleblowers-abuse-training-program](https://www.espn.com/nhl/story/_/id/28262966/nhl-plans-platform-whistleblowers-abuse-training-program) [<https://perma.cc/6446-Y7NU>].

164. MLB-MLBPA DOMESTIC VIOLENCE POLICY, *supra* note 121, at 324.

165. Ryan Szporer, *NHLers by Country: On Top of Their Game and the World*, HOCKEY WRITERS (Jan. 21, 2023), <https://thehockeywriters.com/current-nhl-players-by-country/> [<https://perma.cc/97G4-8TR2>]. For the 2022-23 season, 9.4% of NHL players hail from Sweden, 5.6% are from Russia, and 4.6% are from Finland. *Id.*

improve resource accessibility for players and their families who do not speak English well or at all.

Most importantly, establishing an official league policy provides the NHL with the opportunity to reframe the narrative adopted by the existing off-ice conduct policy. The current language only prohibits conduct that is “detrimental to or against the welfare of the League and the game of hockey.”<sup>166</sup> The NHL’s current policy is wholly centered around discipline,<sup>167</sup> and is primarily concerned with preserving the reputation of the league, rather than protecting players and survivors.<sup>168</sup> The NHL should take this opportunity to reach beyond the criminalization of their players, and instead establish a domestic violence policy that focuses on their education and rehabilitation—with disciplinary action applied where those options fail. A rehabilitative framework can be achieved through mandating counseling sessions for players under investigation<sup>169</sup> and developing the educational programming described above.<sup>170</sup> Ultimately, framing a league-specific policy as rehabilitative will do more to constructively combat domestic violence than does a policy focusing on punishment, which alienates players and leads them to not take these actions seriously.

#### CONCLUSION

As rates of domestic violence and sexual assault in professional sports continue to rise, preventing and mitigating these harms is more crucial than ever. The NFL, the NBA, and MLB recognized this urgency nearly a decade ago and responded accordingly. Years later, the NHL persists in its stubborn refusal to take a stand against domestic violence and sexual assault in a manner that is more than merely superficial. Meanwhile, increasing numbers of survivors of domestic violence and sexual assault struggle to find legal remedy in a system designed to work against them. Survivors participating in criminal proceedings or seeking civil damages are met with an inhospitable judicial system. Where the defendant is a professional athlete, barriers to judicial remedy make justice for survivors nearly impossible.

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166. NHL-NHLPA COLLECTIVE BARGAINING AGREEMENT, *supra* note 28, at 124.

167. *See generally id.* at 124–27 (solely outlining procedures for commissioner discipline and appeal of disciplinary action—with no discussion of available resources for players, their families, or victims).

168. *Id.* at 124.

169. In the NFL, for example, players’ participation in counseling or treatment programs is considered a mitigating factor in determining disciplinary action if an offense is found. NFL PERSONAL CONDUCT POLICY, *supra* note 122, at 6.

170. *See supra* Section II.C.3.

The NHL's refusal to establish an official domestic violence policy is irresponsible—both as a matter of public policy and as a matter of law. By failing to establish a league-specific policy, the NHL is failing its players, future generations of players, and the sport itself. Hockey is an inherently violent sport, and there is no question the league encourages this violence for the sake of spectacle. It is duplicitous for the league to nurture this violence, then punish players with no notice or consistency when that very violence bleeds off the ice and into their personal lives. The NHL must provide its players with the tools to end the cycle of player-committed sexual assault and domestic violence.

By failing to establish a league-specific policy, the NHL is also failing its fans. The NHL and its players serve as role models for millions of people across North America, but the league currently demonstrates that mitigating domestic violence is not a priority. Faced with an opportunity to address domestic violence and sexual assault nationwide, the league instead remains resolute in its stance that its current regulation suffices.

Most importantly—and most urgently—the NHL is failing the many victims and survivors of domestic violence and sexual assault at the hands of professional hockey players and beyond. The effort to eradicate domestic violence and sexual assault from professional sports has entered overtime. The NHL's legal and moral obligation to repudiate domestic violence and sexual assault is long overdue.