
Volume 4

Issue 1 *Summer 2007: Symposium - Regulation
of Coaches' and Athletes' Behavior and Related
Contemporary Considerations*

Article 5

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Kimberly M. Trebon

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Recommended Citation

Kimberly M. Trebon, *There is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DePaul J. Sports L. & Contemp. Probs. 65 (2007)

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THERE IS NO “I” IN TEAM: THE COMMISSION OF GROUP SEXUAL ASSAULT BY COLLEGIATE AND PROFESSIONAL ATHLETES

INTRODUCTION

Group sexual assault is so heinous that many people refuse to acknowledge that this kind of brutality takes place in our modern society. Some people have even more difficulty believing that collegiate and professional athletes are frequent perpetrators of this egregious type of sex crime. Rather than calling it “group sex,” making excuses for the assailants, and/or performing character assassinations on those victims courageous enough to come forward, it is time to confront the problem head-on, recognize that athletes *do* commit group sexual assault, analyze its occurrence, examine how it is currently addressed, and consider proposals for more effective treatment in the future.

The purpose of this article is to explore the behavior of collegiate and professional athletes and the commission of group sexual assault, more commonly known as gang rape. This article is divided into four sections. The first section briefly discusses the crime of sexual assault as a preliminary introduction to this area of criminal law. This section also explains the crime of group sexual assault and includes a general overview of its occurrence and enforcement generally. Section two summarizes the various schools of thought regarding the relationship between athletes and sexual violence. That summary is followed by an in-depth examination of athletes committing gang rapes, the frequency of its occurrence, and enforcement. The third section presents a selection of case studies of group sexual assault committed by both collegiate and professional athletes. Finally, the fourth section of this article surveys the various remedies and solutions that currently exist and how they have been implemented, as well as suggesting some additional proposals that might better address the issue of athletes committing gang rapes.

II. BACKGROUND

A. Sexual Assault Generally

“Most people, including those who have experienced it, have trouble understanding sexual assault.”¹

1. CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS* 18 (MacMillan 1993).

In order to recognize and understand the above observation, it is important to begin any analysis of group sexual assault with an introduction to the crime of sexual assault. Traditionally, rape laws only applied to male-female forced vaginal intercourse.² As a result of the womens' movement in the 1970s, however, there was an effort to revise the traditional rape laws.³ The goals of such revisions included making the laws more gender neutral and less punitive toward women, and rectifying the crime's low conviction rate.⁴ Additionally, many states replaced the term rape with "sexual assault."⁵ Sexual assault is a criminal offense as well as a behavior for which there is a civil remedy.⁶

B. Group Sexual Assault Generally

1. Occurrence

Most men who rape act alone. In some cases, however, the offender is joined in the commission of the assault by others.⁷ It has been suggested that group sexual assault, or "gang rape," is the most socially acceptable form of rape.⁸ Gang rape has traditionally been considered less perverted than solitary rape based on the belief that gang raping is a proof of masculinity, a sort of "rite of passage for young men."⁹ Gang rape is often condoned by a society that believes boys must "sow their wild oats," and if they happen to do so with their friends, then the notion that such activity is "normal" is preserved.¹⁰ Further, society still tends to equate masculinity with sexual dominance.¹¹ Male aggression is channeled into social and sexual domination; society's acceptance of such domination permits men to believe that women are objects from whom sex is taken, and it is this view of sexual dominance that can lead to gang rape.¹²

2. *Id.* at 4.

3. *Id.* at 3.

4. *See id.* (At the time rape had the lowest conviction rate of any major felony).

5. *Id.*

6. *Id.*

7. A. NICHOLAS GROTH & H. JEAN BIRNBAUM, *MEN WHO RAPE THE PSYCHOLOGY OF THE OFFENDER* 110 (Perseus Publishing 1979).

8. *See generally* HELEN BENEDICT, *RECOVERY: HOW TO SURVIVE SEXUAL ASSAULT FOR WOMEN, MEN, TEENAGERS, AND THEIR FRIENDS AND FAMILIES* (Columbia University Press 1994).

9. *Id.*

10. ROBIN WARSHAW, *I NEVER CALLED IT RAPE THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE* 102 (Harper Perennial 1988).

11. Linda Robayo, *The Glen Ridge Trial: New Jersey's Cue to Amend Its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 283 (1994).

12. *Id.*

Gang rape is markedly different from individual or one-on-one rape. One significant difference is that in a gang rape, the rape is used as a reinforcing mechanism for membership within the group.¹³ For instance, men who gang rape typically experience increased camaraderie with those involved.¹⁴ Stated differently,

One of the unique dynamics in gang rape is the experience of rapport, fellowship, and cooperation with the co-offenders. The offender is not only interacting with the victim, he is also interacting with his co-offenders. [I]t appears that he is using the victim as a vehicle for interacting with other men. He is behaving, or performing, in accordance with what he feels is expected of him by them. He is validating himself and participating in a group activity.¹⁵

The unique group dynamic of a gang rape gives anti-social behavior peer sanction, support, and validation.¹⁶ Thus, gang rape is an extreme example of the dangerous results that can occur when a man's identity becomes submerged into that of the group.¹⁷

A second difference between one-on-one rape and gang rape is that gang rape serves to reinforce a man's masculinity within the group.¹⁸ According to Robin Warshaw, "as men participate in gang rape, they experience a special bonding with each other, a unity of purpose that comes from the pride they feel in reducing their victim to nothing more than a collective vessel for their 'masculinity.'"¹⁹ The fact that gang rape has traditionally been viewed as less perverse than individual rape is due, in large part, to the assumption that gang rape tests each participants' masculinity.²⁰

A third difference is that gang rape tends to involve increased humiliation of the victim.²¹ The following events, which add to the victim's humiliation, have been estimated to be twice as likely to occur in a gang rape: insult, forced fellatio, pulling, biting, and burning the breasts, urinating on the victim, putting semen on her body, and demanding manual masturbation or masturbating in her presence.²²

13. See WARSHAW, *supra* note 10 at 101.

14. ANDREA PARROT & LAURIE BECHHOFFER, *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 146 (John Wiley & Sons 1991).

15. See GROTH & BIRNBAUM, *supra* note 7 at 115.

16. *Id.* at 118.

17. See WARSHAW, *supra* note 10 at 101.

18. See Robayo, *supra* note 11 at 283.

19. See WARSHAW, *supra* note 10 at 101.

20. *Id.* at 102.

21. *Id.*

22. See Patricia Rozee-Koker and Glenda C. Polk, *The Social Psychology of Group Rape, SEXUAL COERCION & ASSAULT*, 57-65 (1986).

The amount of aggression towards and degradation of the victim also increases as each group member “takes his turn.”²³ The simple presence of others increases the shame and intimidation of the victim who is at both a disadvantage due to the physical strength of her attackers and because she is outnumbered.²⁴ Group members who do not physically rape the victim may still take an active role by holding down or restraining the victim, watching the assault, encouraging the others, and even filming the encounter.²⁵ Some group members, although not present in the location where the assault is taking place, may know what is going on and choose to do nothing to discourage the assault or alleviate the plight of the victim because the rape serves to enhance the group’s good opinion of itself.²⁶

Most men who commit gang rape normally would not rape individually.²⁷ However, in the context of a gang rape, group members provide each other with additional “courage,” enabling one another do something they might not have done individually.²⁸ Through participation in a gang rape, the group members seek to not only confirm their masculinity, but also achieve recognition, and/or retain acceptance within the group.²⁹ According to research conducted by A. Nicholas Groth Ph.D., the “leaders” of gang rapes are just as likely to commit individual rapes as to the other group members or “followers,” who commit sexual assaults only in the context of a group.³⁰

Individuals are shown to be more aggressive in groups. Social psychologists use the following three factors to help explain why groups are easily spurred into aggressive behavior: (1) diffusion of responsibility, (2) deindividuation, and (3) modeling.³¹ Each of these factors can also be used to analyze and better understand the dynamics of gang rape.³² First, diffusion of responsibility refers to situations where the presence of others acting in a similar manner diminishes the feeling of responsibility that any one person may feel; therefore, no one individual believes he is solely to blame.³³ Second, deindividuation is the loss of self-awareness of one’s beliefs, morals, and standards in a

23. *Id.*

24. *See* GROTH & BIRNBAUM, *supra* note 7, at 112.

25. *See* WARSHAW, *supra* note 10 at 102.

26. *See* GROTH & BIRNBAUM, *supra* note 7, at 112.

27. *See* WARSHAW, *supra* note 10 at 101.

28. *See* GROTH & BIRNBAUM, *supra* note 7, at 112.

29. *Id.* at 113.

30. *Id.* at 114.

31. *Id.* at 148.

32. Rhonda Oneslager, *Gang Rape: A Psychological Perspective of Group Dynamics*, AssociatedContent.com, 23, Oct. 2006 (quoting PARROT & BECHHOFFER, *supra* note 1).

33. *See* PARROT & BECHHOFFER, *supra* note 14, at 148.

group setting.³⁴ Deindividuation explains why participants in a gang rape often do not think of what they have done as rape.³⁵ They tend to believe, and will tell others, that what occurred was group sex and that the victim was, at least, a willing participant, and, at most, the person who initiated the encounter.³⁶ Third, when group identity produces conformity, modeling of aggression takes place.³⁷

Groups most likely to engage in gang rape are those which express hostility and aggression toward women in other aspects of the group's culture.³⁸ Dominating and overpowering a woman allows these types of groups to reassert their basic beliefs.³⁹ These sorts of groups may be loosely organized—i.e., men who are roommates, or they may have a definite structure and identity, such as fraternities and athletic teams.⁴⁰

2. *Enforcement*

When a victim reports a sexual assault to the police, she is sometimes not believed or even blamed, not only by law enforcement, but also by her peers.⁴¹ A similar response occurs when a victim reports a gang rape. It is a commonly held belief that women falsely "cry" rape either because they feel guilty after a consensual sexual encounter or to retaliate against men who have "wronged them."⁴² However, according to a Federal Bureau of Investigation ("FBI") study quoted by the National Coalition Against Violent Athletes, more people falsely report their own death than file a false report alleging sexual assault.⁴³

Gang rape, once charged, is difficult to prove.⁴⁴ Prosecutors face the challenge of providing a clear consistent account of what typically is a traumatic and disorienting event for the victim, which makes proof beyond a reasonable doubt very difficult to satisfy.⁴⁵ Often, when a victim attempts to recall her behavior after the fact, it does not always make a coherent rational picture.⁴⁶ As a result, prosecutors talk to victims prior to making a charging decision because they know

34. *Id.*

35. See WARSHAW, *supra* note 10, at 102.

36. *Id.* at 103.

37. See PARROT & BECHHOFFER, *supra* note 14, at 148.

38. See WARSHAW, *supra* note 10 at 103.

39. *Id.*

40. *Id.*

41. See BOHMER & PARROT, *supra* note 1, at 32.

42. *Id.*

43. See generally www.NCAVA.org.

44. See BOHMER & PARROT, *supra* note 1, at 35.

45. *Id.*

46. *Id.*

that if they pursue the case it is the victim who will be on trial. This also explains why prosecutors are more likely to take a group sexual assault case when there is corroborating evidence such as DNA, injuries to the victim or witnesses. "The nature of sex crimes is such that the victim and perpetrator[s] are typically the only people with direct knowledge of the assault; thus, corroborating the victim's version of events is of paramount importance."⁴⁷

If a prosecutor takes the case and the alleged aggressors are formally charged, typically they will be prosecuted at once under a theory of accountability. However, once charged, only a minority of sexual assault cases go to trial and are instead dismissed for evidentiary reasons or a plea bargain.⁴⁸ Many reported sexual assaults are not accepted by the prosecuting authority because they will not press charges unless they believe there is a reasonable likelihood of conviction.⁴⁹

III. GROUP SEXUAL ASSAULT AND ATHLETES

A. *The Different Schools of Thought Regarding the Relationship Between Athletes and Sexual Violence*

Do athletes possess a greater propensity to engage in sexually violent acts? A number of scholars have attempted to answer this question.⁵⁰ Yet, despite the growing amount of research on this topic, there is no definitive answer.⁵¹ Two principal schools of thought have emerged.⁵²

Some authorities argue that athletes are no more prone to commit sexually violent acts than other males.⁵³ According to this argument, much greater media attention is given to cases involving athlete versus non-athlete sexual assaults, and it is that notoriety in the press which

47. See generally, JEFF BENEDICT, *PUBLIC HEROES, PRIVATE FELONS* (Northeastern University Press, 1997).

48. See BOHMER & PARROT, *supra* note 1, at 32.

49. *Id.* at 33.

50. See Todd Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, J. SPORTS & SOCIAL ISSUES, May 1995, at 126, 128 (1995) (Prior 1990, researchers paid little attention to determining whether there is a correlation between athletes and sexual assault).

51. Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 60 (1997).

52. *Id.*

53. *Id.* (citing Merrill Melnick, *Male Athletes and Sexual Assault*, J. PHYSICAL EDUC., RECREATION & DANCE, May-June 1992, at 32; Hal Bock, *College bad Boys: Not Just A Game: Even NCAA Unsure How to Best Tackle Lawless Athletes*, CHI. TRIB., Dec. 8, 1996, at C6; Jimmy Smith, *The Spotlight Is on Domestic Violence*, NEW ORLEANS TIMES PICAYUNE, Jan. 14, 1996, at C1).

creates the misleading impression that athletes have a greater propensity to commit sexually violent acts.⁵⁴ Advocates of this school of thought also argue that the "empirical data has failed sufficiently to support assumptions that the violent overtones of football, hockey, and other sports are integral to the other parts of athletes' lives."⁵⁵

Other authorities reject that view and instead argue that athletes are disproportionately involved in incidents of sexual assault.⁵⁶ These authorities stress two particularly important factors in support of their position. First, they argue that existing research does in fact establish that athletes may be slightly more prone to violence; for example, Todd Crosset's 1995 study found that athletes appear to be disproportionately involved in incidents of sexual assault on college and university campuses.⁵⁷ Second, although adherents to this view recognize that sexual violence is the product of multiple variables—i.e., media promotion of violence, a patriarchal system, myths about rape, and sexual values they identify the athletic sub-culture as the significant contributor to an individual athlete's greater propensity to engage in sexual violence.⁵⁸ For example, physical aggression during games and sexist conduct/language in the locker room combine together in ways that predispose some male athletes towards off-field sexual violence.⁵⁹ Based on this line of reasoning, involvement in sports may cause athletes who commit sexual assault to deem such behavior acceptable because, in their minds, the act of rape is immunized and overcome by the familiar feelings of power, control, and strength normally associated with sports.⁶⁰ According to this school of thought, our society endorses aggressive, violent behavior from males, when such conduct is manifested through sports.⁶¹

Many people fall somewhere between these two views. A commonly held belief is that sports culture plays some role in inciting sex-

54. Thomas L. Jackson, *A University Athletic Department's Rape and Assault Experiences*, 32 J. C. STUDENT DEV. 77 (1991).

55. Richard Lapchick, *Justice Always Deserves a Second Look*, THE SPORTING NEWS, Feb. 19, 1996, at 8.

56. See Crosset, *supra* note 50, at 135.

57. *Id.*

58. See Davis & Parker, *supra* note 51, at 61 (citing Mary P. Koss & John A. Gaines, *The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation, and Fraternity Affiliation*, J. INTERPERSONAL VIOLENCE, Mar. 1993, at 94, 94-5 and Merrill Melnick, *Male Athletes and Sexual Assault*, J. PHYSICAL EDUC., RECREATION & DANCE, May-June 1992, at 32).

59. Merrill Melnick, *Male Athletes and Sexual Assault*, J. PHYSICAL EDUC., RECREATION & DANCE, May-June 1992, at 33).

60. SUSAN BROWN MILLER, AGAINST OUR WILL 290 (Simon and Schuster 1975).

61. Kathy Barret Carter, *Justice Turns Blind Eye to Violence Against Women*, 134 N.J.L.J. 584, June 14, 1993, at 20 (stating how male athletes receive college scholarships, multi-million dollar professional contracts, and have women making themselves available to them).

ually violent behavior in the minority of athletes who are predisposed to it.⁶² This view shifts the emphasis from athletics per se to the socialization process that takes place away from the playing field.⁶³ For instance, the celebrity status afforded athletes exposes them to exceptional amounts of illicit sexual behavior.⁶⁴ Operating under an increased sense of power and the mantle of public trust, athletes inclined to sexual violence are given ample opportunity to exploit women.⁶⁵

B. Occurrence

Sports organizations, teams, and coaches typically demand group loyalty.⁶⁶ That group loyalty is reinforced by promoting the superiority of athletic team members over outsiders.⁶⁷ As a result, members of athletic teams tend to view themselves as a better—more talented and more successful.⁶⁸ This group identity that exists in many athletic teams tends to discourage moral self-scrutiny, which in turn leads some athletes to believe that rules are for others, not for them.⁶⁹ The combination of group loyalty and loss of moral self-scrutiny likely contribute to the commission of gang rape, and it is within this subculture that gang rape tends to be seen by athletes as “group sex.”⁷⁰

The sex-segregated nature of sports teams is another factor that may contribute to the commission of gang rape by athletes. Gang rape is typically associated with sex-segregated institutions and is relatively rare in other circumstances.⁷¹ Many athletes who become involved in a gang rape play contact, team-sports like football, basketball, hockey, or lacrosse.⁷² This type of behavior occurs much less frequently in non-contact, individual sports such as cross country, tennis, and swimming that lack the same degree of physicality and hyper-masculinity.⁷³

Talented athletes, whether high school, collegiate, or professional, possess a certain prestige and status that wins them public attention,

62. *Id.* at 26.

63. *Id.*

64. *Id.*

65. *Id.*

66. See WARSHAW, *supra* note 10 at 113.

67. *Id.*

68. *Id.*

69. Anastasia Toufexis, *Sex and the Sporting Life: Do Athletic Teams Unwittingly Promote Assaults and Rapes?*, TIME, Aug. 6, 1990, at 76.

70. See PARROT & BECHHOFFER, *supra* note 14 at 144.

71. Erik Brady, *Duke Lacrosse Allegations Fit Mold*, USA TODAY, Apr. 7, 2006, at 10C.

72. *Id.*

73. *Id.*

fame, and sometimes even adoration.⁷⁴ The exceptional treatment athletes receive comes from all directions: parents, coaches, peers, friends, fans, and even owners, managers, agents, and lawyers.⁷⁵ Some women afford athletes special treatment. It is not unusual for women to flirt with athletes, and even proposition them simply because of their status as athletes.⁷⁶ An athlete can quickly grow accustomed to this treatment and develop a warped sense of entitlement that becomes dangerous when he is denied something he wants and believes an acceptable response is to take it by force.⁷⁷

Scholars suggest that athletes are most likely to commit sexual assault after a game when they are either out celebrating a win or mourning a loss.⁷⁸ Many times, both females and alcohol are present in these situations.⁷⁹

C. Enforcement

Sexual assault is a felony, but gang rape cases involving athletes are rarely brought to trial and successfully prosecuted. One explanation is that the victim in this type of case is usually intoxicated and/or employed in a sex-related profession—i.e., stripping or prostitution, and her credibility is greatly diminished as a result. “Because of the status afforded athletes, women who accuse them of rape come under exceptional scrutiny.”⁸⁰ Prosecutors know this and, therefore, must place great emphasis on a victim’s credibility, regardless of the character of the athletes involved.⁸¹ Another explanation is that the accused athletes typically agree amongst themselves that consensual group sex took place. Sexual assault cases are difficult enough to prosecute when there is one defendant, but when there are numerous defendants, who all have the same story, the difficulties prosecutors face are multiplied. As a result, the issue in most gang rape cases becomes one of consent. One final explanation is that many jurors are simply unwilling to look at a talented young man, or a group of talented young men, and take away their ability to play sports by convicting them of a serious sex crime, which will undoubtedly send them to prison for some time and leave them with the stigma that results from being a convicted sex offender entails. This reluctance to destroy the future of a talented

74. See WARSHAW, *supra* note 10, at 113.

75. *Id.*

76. *Id.*

77. *Id.*

78. See BOHMER & PARROT, *supra* note 1, at 22.

79. *Id.*

80. See BENEDICT, *supra* note 47, at 123.

81. *Id.*

athlete is often justified with excuses such as, the incident was nothing more than a “miscommunication,” or both parties were merely “experimenting.”

Law enforcement officials sometimes overcompensate in their efforts to maintain impartiality in an attempt to counter a growing public perception that athletes receive preferential treatment by the criminal justice system.⁸² Yet, when athletes are arrested for sex crimes, they enjoy a significantly lower likelihood of being convicted.⁸³ Evidence of the high arrest and low conviction rates does not seem to be the result of preferential treatment by law enforcement officials, but rather a reluctance on the part of juries to convict popular athletes.⁸⁴

Juries typically have a hard time convicting well-known athletes. When jurors see a number of fine-looking, handsomely-dressed, seemingly well-mannered young men sitting at the defense table admitting that they did something morally questionable, but not illegal, they are usually treated as more credible than the victim. Accused athletes also tend to benefit from popularly held images of athletes’ endless accessibility to women. Jurors are often unable to comprehend why a group of successful, talented, young, athletes would resort to force when they have seemingly limitless access to women willing to engage in all sorts of sexual activities.⁸⁵ This prejudicial association of athletes with women and sex often proves an insurmountable obstacle for juries, preventing them from overcoming the ‘reasonable doubt’ threshold required for conviction.”⁸⁶

Effective enforcement is further strained by the media. Prosecutors assigned to these types of cases must deal with the media attention that comes along with a sexual assault allegations against well-known collegiate or professional athletes.⁸⁷ The excessive media attention creates increased scrutiny of the prosecutor’s every decision and it works against the victim by discouraging her from going through with the trial.⁸⁸

82. *Id.* at 79.

83. See BENEDICT, *supra* note 47, at 80 (citing Jeffery Benedict and Alan Klein, “Arrest and Conviction Rates for Athletes Accused of Sexual Assault,” *SOCIOLOGY OF SPORT* 14, no. 1, 86-94 (1997)).

84. *Id.*

85. See BENEDICT, *supra* note 47, at 80 (highlighting that college and professional athletes who rely on the “consensual group sex” defense are acquitted more than 75% of the time).

86. *Id.* at 81.

87. *Id.*

88. *Id.*

Further, athletes typically have the resources necessary to hire powerful criminal defense attorneys. Defense attorneys in these types of cases are skilled in using the media to bolster their clients' images at the expense of the victim.⁸⁹ As a result, victims who are able to withstand the media scrutiny and still want to go through with the trial usually suffer character damage in the process that reduces the likelihood of obtaining a conviction.⁹⁰ Not only will the victim have to endure attempts to destroy her character and undermine her credibility in the media, but she will also likely have to overcome the "groupie defense." Almost every defense attorney who represents athletes that face such charges will attempt to shift the focus away from the culpability of his client by raising the "groupie defense." Employment of this defense forces the victim and the prosecutor to address the difficult issue that some women do hang around athletes solely to have sex with them and share briefly in celebrity by association.⁹¹ As a result, prosecutors are unable to ignore the fact that unless the case is really strong, most juries, and some judges, are likely to conclude that the victim assumed the risk by hanging around athletes because there are simply too many other possible motivations—money, notoriety, admirations—that could be used to explain away this type of incident.

IV. CASE STUDIES

A. Collegiate

The typical college sports scandals—recruiting violations, grade fixing, illegal payments to players, steroid use—pale in comparison to the incidents of gang rape on campus. According to an FBI survey, football and basketball players from National Collegiate Athletic Association ("NCAA") colleges and universities were reported to police for committing sexual assault thirty-eight percent more often than the average for male students on campus.⁹² Based on that statistic, although unsettling, it is not surprising that group sexual assault is most common on college and university campuses.⁹³

In the past two decades there have been numerous instances where collegiate athletes have been accused of gang rape. In 1985, four Duquesne University basketball players were accused of raping a woman

89. *Id.*

90. BENEDICT, *supra* note 47, at 81.

91. See BENEDICT, *supra* note 47, at 81.

92. E. Hoffman, *Rape and the College Athlete: Part One*, PHILADELPHIA DAILY NEWS, March 17, 1986 at 104.

93. See BOHMER & PARROT, *supra* note 1, at 21-2.

in their dorm;⁹⁴ in 1985, five West Virginia University basketball players were accused of raping a woman in a campus dorm;⁹⁵ in 1991 three members of St. Johns University men's lacrosse team were accused of gang rape;⁹⁶ three Southern Methodist University football players were accused of raping a 16-year-old girl at a motel in 1994;⁹⁷ five members of the Southwestern Michigan basketball team were also charged with raping an 18-year old and videotaping the incident in 1994;⁹⁸ in 1996, five Clemson University football players were accused of raping and sodomizing a woman;⁹⁹ later that same year, two football players for Virginia Tech were accused of gang rape;¹⁰⁰ four Grambling State football players were accused of raping a 14-year-old girl in a dorm room in 1996;¹⁰¹ in 2001, three Navy football players were accused of sexually assaulting a female midshipman.¹⁰² The fol-

94. *Duquesne Expels 2*, THE NEW YORK TIMES, June 21, 1985, at A22 (describing how all four players were suspended by the University pending their trial. Three of the athletes were acquitted and charges against the fourth were dropped. After the trial, two of the suspensions were continued until the middle of basketball season and two of the athletes were expelled from school).

95. *Jurisprudence*, THE WASHINGTON POST, Oct. 31, 1985, at D2 (stating that no criminal charges were filed, but two players were suspended from the team for the entire season and three received one-semester suspensions).

96. See BOHMER & PARROT, *supra* note 1, at 22 (describing how the three athletes allegedly took turns making the woman perform oral sex on them as she faded in and out of consciousness. The jury rejected the victim's allegations and acquitted the three lacrosse players). See also Gerald Eskenazi, *The Male Athlete and Sexual Assault*, THE NEW YORK TIMES, June 3, 1990, at 8.

97. *Cases Involving Athletes and Sexual Assault*, USA TODAY, Dec. 22, 2003, at 8A (stating that two of the accused pleaded guilty to a reduced charge of sexual assault and each received seven years of probation. The third pleaded guilty to a reduced charge of aggravated assault and received four years probation. The University subsequently expelled all three from school).

98. Hal Bock, *College Bad Boys: Not Just a Game; Even NCAA Unsure How to Best Tackle Lawless Athletes*, CHIC. TRIBUNE., Dec. 8, 1996, at 6 (describing how all 5 players were expelled after their arraignment).

99. See generally ABC World News Tonight 06:30 pm ET, Sept., 6, 1996, available in NEXIS, News Library, Curnews File.

100. Alison Blake, *Victim Advocates Fear Effect of Suit Against Accuser*, ROANOKE TIMES, Jan. 26, 1997, at A1; available in 1997 WL 7291611 (describing how both athletes were charged with rape and attempted sodomy. Each conceded that the prosecution had enough evidence to convict them of attempted aggravated sexual battery, but did not admit guilt and received a one-year suspended sentences).

101. *Report Says Grambling Forcing Robinson Out*, NEW YORK TIMES, Dec. 10, 1996, at B17 (explaining that the student-athletes involved were charged with having sex with a juvenile, they pleaded guilty to a reduced charge of contributing to the delinquency of a minor and received suspended sentences of 6 months in jail). See also Richard Roeper, *Athletes' Records are Made to be Busted*, CHICAGO SUN TIMES, Jan. 6, 1997, at 11.

102. Corey Masisak, *Navy QB Charged with Rape; Owens Awaits a Hearing*, THE WASHINGTON TIMES, Feb. 23, 2006, at C01 (reporting how all three were charged with sexual assault, agreed to leave the naval academy, and the charges against them were placed on the inactive docket).

lowing section looks in detail at two examples of gang rapes alleged to have been committed by college athletes.

1. *University of Minnesota Basketball*

In 1986, three University of Minnesota ("U of M") basketball players, Mitchell Lee, Kevin Smith, and George Williams Jr., were accused of raping a 19-year-old woman in a hotel room in Madison, Wisconsin.¹⁰³ The three men allegedly met the victim at local a bar while celebrating their team's victory over the University of Wisconsin. The athletes invited her to their hotel room for a "party."¹⁰⁴ Back at the hotel, the three players took turns watching each other sexually assault the intoxicated young woman.¹⁰⁵ The victim was allegedly penetrated orally, vaginally, and rectally, no fewer than twelve times.¹⁰⁶ The assaults stopped only after the hotel phone rang at 6:00 a.m. as a wake-up call.¹⁰⁷

The athletes left the woman on the floor as they gathered their belongings for the flight back to Minnesota.¹⁰⁸ In their rush to leave, Lee left behind his wallet.¹⁰⁹ On the way to the airport, Lee called the hotel to ask about his missing wallet.¹¹⁰ Housekeeping was sent to the room to look for Lee's wallet and instead found "a young woman curled up in a fetal position under a wad of sheets."¹¹¹ When asked if she was alright, the victim told the hotel maid she had been gang raped.¹¹²

The hotel called the police and reported that an alleged rape had been committed by three members of the visiting University of Minnesota men's basketball team.¹¹³ The police contacted the airport and successfully delayed the plane's departure.¹¹⁴ All of the players on board the flight disembarked and walked by the police car where the victim was seated.¹¹⁵ The victim identified two of the three men at that time. The third man admitted his involvement later when ques-

103. Nadine Brozan, *Gang Rape: A Rising Campus Concern*, THE NEW YORK TIMES, Feb. 17, 1986, at B8.

104. See Benedict, *supra* note 47, at 174-75.

105. *Id.* at 175.

106. *Id.* at 179.

107. *Id.* at 175.

108. *Id.*

109. *Id.*

110. See BENEDICT, *supra* note 47, at 175.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 176.

115. *Id.*

tioned by the police.¹¹⁶ The victim was then taken to the hospital and examined.¹¹⁷

Upon news of the allegations against Lee, Smith and Williams, U of M forfeited the next game.¹¹⁸ One month later, Judge Robert Pekowsky of the Dane County Circuit Court in Madison, Wisconsin ruled that there was enough evidence to try the three basketball players.¹¹⁹ The athletes were charged with twelve counts first-degree sexual assault. Shortly after they were formally charged, all three were dismissed by the U of M and the men's basketball coach resigned.¹²⁰

The trial began six months after the alleged assault.¹²¹ The players admitted that there was sexual contact, but insisted that it was consensual.¹²² Lee, perhaps the most talented player on the nationally ranked Gophers team, was represented by an experienced and expensive private defense attorney.¹²³ Ultimately, the jury acquitted each of the three athletes on all twelve counts.¹²⁴ Following the trial, each of the three athletes resumed their basketball careers either at another institution or overseas.¹²⁵

2. *Notre Dame Football*

At approximately 4:00 a.m. on March 28, 2002, a 20-year-old female student at the University of Notre Dame was allegedly gang raped by three current and one former Irish football players.¹²⁶ The victim ran

116. See BENEDICT, *supra* note 47, at 176 (describing how the victim was unable to identify Williams because he had come into the room after the lights had been shut off and he penetrated her anally while her face was pushed towards the floor, so she never saw his face).

117. See Benedict, *supra* note 47, at 179 (explaining that test results from the victim's post-rape examination indicated that she had Gonorrhea both orally and vaginally. During the exam, the victim told the doctor that she remembered smelling strong odors and seeing what looked like a skin infection on Lee's genitals. Based on this information, the prosecutors subpoenaed urine and blood specimens from each of the accused and Lee tested positive for Gonorrhea. The prosecution decided not to introduce that evidence at Lee's trial because they were not sure they could prove who gave it to whom and its introduction also would have opened the door to the victim's prior sexual experiences. Counting on a guilty verdict, the prosecutors anticipated using the evidence as an aggravating factor at the sentencing hearing).

118. *Id.*

119. See Brozan, *supra* note 103, at B8.

120. See BENEDICT, *supra* note 47, at 183-5.

121. *Former U. of Minnesota Players to Stand Trial on Rape Charges*, THE LOS ANGELES TIMES, July 13, 1986, at 2.

122. See BENEDICT, *supra* note 47, at 177.

123. See BENEDICT, *supra* note 47, at 180-82 (explaining how Lee's attorney had also previously represented him in his trial for raping a University of Minnesota student. Lee was acquitted of those charges only ten days before the incident in Madison).

124. *Id.* at 186.

125. *Id.*

126. Helena Payne, *ND Student Alleges Gang Rape*, ONLINE OBSERVER, April 11, 2002, Vol. XXXV, No. 122.

into the athletes, Justin Smith, Abram Elam, Donald Dykes, and Lorenzo Crawford, at a local college-bar.¹²⁷ She admitted to authorities that she consumed three drinks over the course of the night, but insisted that she was not drunk when she left the bar.¹²⁸ The victim agreed to accompany the athletes to an off-campus "party," but was instead taken to a house just outside South Bend city limits and raped repeatedly before being driven back to campus by one of her assailants.¹²⁹

Five days passed before the victim went to the hospital. Four more days passed before she filed a police report.¹³⁰ The victim later explained that these delays were the result of the high profile of her assailants and because she was unsure of her rights at the time.¹³¹

Both the University and the police investigated the allegations. Notre Dame's internal investigation began after the victim took her case to the Office of Residential Life and Housing and submitted a statement detailing the events of the alleged gang rape.¹³² As a result, the victim and the four men were subject to on-campus hearings.¹³³ Notre Dame expelled the athletes in May of 2002.¹³⁴

Shortly after, the athletes were charged with rape and conspiracy to commit rape.¹³⁵ Each of the athletes maintained that the sexual acts were consensual.¹³⁶ Of the four, only Abram Elam was found guilty.¹³⁷ Elam was convicted of the least serious of the charges against him, sexual battery, and was placed on probation.¹³⁸ Donald Dykes was acquitted by a jury and the charges against Lorenzo Crawford and Justin Smith were dismissed by the special prosecutor.¹³⁹

127. See Marti Goodland Heline, *ND Former Irish Football Players Sued over Claimed Sexual Assault*, IRISH SPORTS REPORT.COM, April 11, 2003; see also Marti Goodland Heline, *ND, Former Irish Football Players Sued Over Claimed Sexual Assault*, IRISH SPORTS REPORT.COM, April 11, 2004 (explaining that the woman knew the football players because she previously had been a student manager for the football team).

128. See Payne, *supra* note 126 (reporting how during an interview with the victim, she stated that she wished she was drunk so that then she might not "remember every single thing" that happened that evening).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. See Heline, *supra* note 127.

135. *Id.*

136. *Id.*

137. *Id.*

138. See Heline, *supra* note 127 (reporting how, as of April 2004, Elam was enrolled at Kent State University, where he planned to play football).

139. See Heline, *supra* note 127 (explaining how two years after the assault, the victim and her parents filed a civil suit seeking damages from the players and the university. The victim blamed

These two collegiate case studies are admittedly not the most recent or the most factually-horrific examples available. However, they serve as examples that regardless of the year, school, or sport, gang rapes are committed by athletes on college campuses. Moreover, each of the case studies involved incidents of gang rape by athletes that have been “resolved.” Currently, there are a number of alleged gang rapes in different stages of investigation or trial and are, thus, still awaiting “resolution.” These unresolved cases bear special mention because their outcomes will likely demonstrate the continuation, rather than a shift, in the treatment of gang rapes committed by college athletes. Most notable, perhaps, are the three Duke Lacrosse players who were accused of gang raping an African American stripper in a bathroom at an off-campus house party in 2004.¹⁴⁰ However, the status and the strength of that case continued to change as time passed and new information was released, until the attorney general declared the three athletes innocent of all charges on April 11, 2006.¹⁴¹ Another unresolved case stemming from 2005, involves seven University of Tennessee at Chattanooga football players charged with taking turns raping a drunken student after a party.¹⁴² More recently ten men allegedly gang raped an eleven-year-old child, at least six of whom were local college football players in Fresno, California.¹⁴³

the defendants' actions for causing her to legally change her name and she contended that she experienced great physical pain, suffering post-traumatic stress, incurred medical bills, lost income, and other harms. The victim's parents claimed they too suffered emotional distress as a result of the incident, as well as lost income and other damages).

140. DeWayne Wickham, *Race and Sex Cast Long Shadow Over Duke*, USA TODAY, Apr. 18, 2006, at 13A (describing how the accuser claims to have been raped and sodomized in a bathroom at the party. In response to the allegations, the NCAA suspended the remainder of the team's season and the coach resigned shortly afterwards).

141. See R. Cort Kirkwood, *What Did or Didn't Happen at Duke: A Look at the Case of an Alleged Rape at Duke University Reveals the Bias of the Major Media and the Need for Moral Order to Once Again be Upheld on College Campuses*, THE NEW AMERICAN, Vol. 22 No. 19, at 29 (reporting that the two DNA tests of the three alleged attackers came back negative, the other stripper at the party claimed that the attack never occurred, and an ATM surveillance video shows one of the accused players retrieving money at the time the alleged gang rape took place); see also Duff Wilson and David Barstow, *Duke Prosecutor Throws Out Case Against Players*, THE NEW YORK TIMES, April 12, 2007, at A1 (according to the attorney general, the players were wrongly accused by an “unchecked” and “overreaching” district attorney who ignored contradictory evidence and relied too heavily upon the alleged victim's accusation.).

142. *Hearing in UTC rape case moved to Dec. 12*, CHATTANOOGA TIMES FREE PRESS, Nov. 8, 2005, at B5 (reporting that the coach suspended those players charged, but a judge later threw out the case, ruling that there was not enough evidence to prove that the sexual acts were not consensual).

143. Mandalit del Barco, *Arrests Made in Fresno Gang Rape of Girl*, 11, NPR.com, July 12, 2006 (describing how two college athletes in Fresno, California have been arraigned and charged in the gang rape of the girl. Police have also questioned 6 Fresno City College Football players, but no charges have been filed against them).

B. Professional

According to a study conducted by Jeff Benedict, a lawyer and former Director of Research at the Center for Sports in Society, 172 professional athletes were arrested for sex-related felonies between 1986 and 1995.¹⁴⁴ The same study found that of those 172 professional athletes, only thirty-one percent were successfully prosecuted.¹⁴⁵ Considering that so few cases involving professional athletes who commit sexually violent crimes ever make it to the conviction stage, these statistics are even more dramatic.¹⁴⁶

In the past two decades there have also been a number of instances where professional athletes have been accused of committing gang rape. For example, in 1990, four members of the Washington Capitals hockey team were accused of attacking a seventeen-year-old girl in a limo following a team party.¹⁴⁷ In 1992, three New York Mets baseball players were accused of gang rape.¹⁴⁸ In August of 1995, four New Orleans Saints football players are accused of gang rape by a thirty-three year old woman.¹⁴⁹ Todd Harvey and Grant Marshall, hockey players for the Dallas Stars, were charged with sexually assaulting a woman at a party in 1996.¹⁵⁰ In 1997, St. Louis Rams running back Lawrence Phillips was arrested for his involvement in an alleged gang rape.¹⁵¹ Then, in 2002, Oakland Raiders defensive tackle Darrell Russell and two of his friends allegedly videotaped themselves gang raping a woman whom they drugged.¹⁵²

144. See BENEDICT, *supra* note 47, at 84.

145. *Id.*

146. Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS LAW. J. 69, 70 (2004).

147. See Eskenazi, *supra* note 96, at 8.

148. See Kevin Lamb, *They aren't Used to Being Told No*, CHICAGO TRIBUNE, June 24, 1992, at 8C (reporting that the three players were exonerated because prosecutors lacked evidence).

149. See BENEDICT, *supra* note 47, at 43-59 (prosecutors acknowledged that the players had sex with her at the team's training dorm, but refused to press charges due to lack of evidence the sex was not consensual).

150. See Roeper, *supra* note 101, at 11 (reporting that none of the hockey players were indicted by the grand jury).

151. See Jim Mone, *Ohio St. Shut Out of Draft for 1st Time*, CHICAGO SUN TIMES, April 20, 1998, at 81.

152. Kristin Bender, *Police Say Raiders Russell Taped Gang Rape; Lawyer says Sex on Video was 'Consensual'*, SAN MATEO COUNTY TIMES, Feb. 5, 2002 (describing how all three were charged with 25 counts of rape and related sex charges).

1. *Cincinnati Bengals*

In 1992, twenty members of the Cincinnati Bengals, including star player Ickey Woods, were accused of gang rape.¹⁵³ The victim, Victoria Crytzer, a divorced thirty-four-year-old mother of four, was allegedly gang raped in a Seattle hotel room while the Bengals were in town to play the Seahawks.

Crytzer arrived at the hotel in hopes of meeting a professional athlete.¹⁵⁴ After being approached by two players, Lynn James and Solomon Wilcotts, she offered to drive them to a nearby liquor store.¹⁵⁵ Crytzer then accepted James' invitation to his room for a drink.¹⁵⁶ Crytzer spent about thirty minutes with James in his room, where the two had consensual sex, before accompanying him to Woods' adjoining suite where a party was underway.¹⁵⁷ Crytzer was the only female in the room and the attention she received from the players quickly spiraled out of control. Crytzer claimed that while in Ickey Woods' suite, she was repeatedly raped and sodomized by a number of the players.¹⁵⁸

Rather than calling the police, Crytzer chose to contact the Bengals' administration.¹⁵⁹ The general manager then advised some of the players to contact a local attorney.¹⁶⁰ Fourteen players hired the attorney to draft an agreement releasing them from liability and barring Crytzer from publicly disclosing information about the incident.¹⁶¹ In return for her signature on the agreement, Crytzer was paid \$30,000.¹⁶²

153. See PARROT & BECHHOFFER, *supra* note 14, at 9; see also Benedict, *supra* note 154, at 187 and 218-9.

154. See BENEDICT, *supra* note 47 at 8.

155. *Id.*

156. *Id.* at 9.

157. *Id.*

158. *Id.*

159. This case study is distinguishable from the others mentioned in this article because the victim never sought medical attention nor reported the assault to law enforcement officials. Furthermore, criminal charges were never pressed against any of the Bengals alleged to have been involved in the gang rape. Despite these differences, some important similarities exist. For example, in response to the allegations, the accused players quickly assembled powerful legal defense teams and insisted that what had taken place was consensual group sex. Perhaps, the most disturbing similarity is that the athletes accused of committing such a horrific crime ultimately walked away from the legal system and back onto the football field. In light of these observations, and because this incident was one of the first gang rapes involving a large number of professional athletes to really capture the public's attention, I decided to include it as a case study in this article.

160. See BENEDICT, *supra* note 47 at 5.

161. *Id.*

162. *Id.*

Within five months, Crytzer spent the money and sought legal help.¹⁶³ Her attorney was unsuccessful in his attempts to convince the Bengals organization to pay Crytzer a more equitable settlement, so he filed suit against the franchise in April of 1992 and later amended the lawsuit to include the individual players involved.¹⁶⁴

The Seattle-based defense attorneys that represented the players, who admitted to engaging in various forms of consensual sexual contact with Crytzer, had to overcome significant challenges. The most substantial challenge was identical to one faced by most criminal defense attorneys whose clients are accused of committing gang rape, namely, how to convince a jury that a woman voluntarily engaged in multiple, serial sexual encounters with a roomful of strange men twice her size.¹⁶⁵ Second, and unique to the Bengals' case, a number of the accused players had previously attempted to pay off Crytzer in a failed attempt to keep her quiet and dispose of the issue.¹⁶⁶ The players' defense attorneys feared that their clients' actions might be interpreted as an admission of guilt or an indication that the players had something to hide.¹⁶⁷

As the trial neared, the judge assigned to the case recused himself and Judge McGovern was assigned by the Federal Court to preside over the case.¹⁶⁸ On February 19, 1993, Judge McGovern suspended the rape trial and ordered a preliminary trial to determine the validity of the confidentiality agreement.¹⁶⁹ Thus, according to this stunning announcement, a finding of validity would prevent a jury from ever addressing the issue of whether the gang rape had taken place.¹⁷⁰ After only a two week trial, the jury determined that Crytzer understood the agreement when she signed and accepted \$30,000, and although she might have been raped, her state of mind was not impaired when she agreed to settle.¹⁷¹ After the jury's verdict was announced, Ickey

163. *Id.* at 11.

164. *Victoria C. v. Cincinnati Bengals, Inc.*, 194 U.S. App. LEXIS 34276, No. 93-35595, 1994 WL 727752 (9th Cir. Dec. 5, 1994) (explaining how Crytzer initially filed this action in state court for damages for personal injuries arising out of multiple rapes, and for rescission of a release of all claims. The Bengals removed the action to federal court and shortly thereafter Crytzer filed an amended complaint naming the specific athletes involved as co-defendants).

165. *See* BENEDICT, *supra* note 47, at 18.

166. *Id.*

167. *Id.*

168. *Id.* at 19.

169. *Id.* at 22. *See also* *Victoria C.*, 194 U.S. App. LEXIS 34276, No. 93-35595 at 4.

170. *See* BENEDICT, *supra* note 47, at 23.

171. *See generally* *Victoria C.*, 194 U.S. App. LEXIS 34276, No. 93-35595, (following the District Court's decision granting judgment in favor of the defendant football team and players, Crytzer appealed the decision. On appeal, Crytzer urged that (1) the district court should have granted her motion for partial summary judgment, (2) the release was ambiguous, not certain or

Woods did his famous "Ickey Shuffle" touchdown dance on the steps of the federal courthouse.¹⁷²

2. *New York Mets*

In 1998, five minor league baseball players for the New York Mets were accused of gang raping a seventeen-year-old girl in a Florida hotel room.¹⁷³ The victim was on vacation at the time of the assault.¹⁷⁴ The athletes were staying at the same Port St. Lucie hotel as the victim while they participated in the Mets' extended spring training.¹⁷⁵

According to the victim, she met Vincent Rosario, one of the accused athletes, a few days before the assault.¹⁷⁶ On the day of the assault, she ran into him at the hotel swimming pool and agreed to return to his hotel room to "say goodbye" because she was leaving later that afternoon.¹⁷⁷ Back in the room, Rosario and a second athlete, Natividad Tavarez, removed the victim's clothes.¹⁷⁸ Too afraid to stop them, the victim was placed on the bed where Tavarez and Rosario each sexually assaulted her before three other men, Jose Brea Tucent, Milton Gonzales, and Ruddi De La Cruz entered the room and joined in the assault.¹⁷⁹

definite, and lacked consideration, and (3) the bifurcation of her claims was an abuse of discretion. The appellate court affirmed holding that Crytzer's testimony that she understood what events the release covered demonstrated the release's subject matter was neither uncertain or ambiguous. The appellate court also found that the Bengals' players' good faith settlement of the disputed claims was sufficient consideration of Crytzer's promise to release all claims).

172. *Id.* at 23 (explaining how following the trial, Crytzer suffered from depression and other medical problems, her children were removed from her home, she remained unemployed, and divorced a fourth time). *See also* Barber v. Cincinnati Bengals, 41 F.3d 553 (9th Cir. 1994) (the guardian for Crytzer's children filed suit on their behalf to recover loss of parental consortium after Crytzer lost her action against the Bengals for damages for personal injuries and for rescission of the release of her claims. The United States District Court for the Western District of Washington dismissed the plaintiff's action. On appeal, the court vacated the district court's order and remanded the case with instructions that the district court consider whether to join or consolidate the children's action with the mother's pending personal injury action. The court reasoned that the lower court's dismissal was based on an erroneous conclusion that Crytzer's entire action had concluded. The court further reasoned that the lower court erred in concluding that Crytzer's release extended to and extinguished her minor children's loss of parental consortium claim. In a separate memorandum disposition, the appellate court affirmed the jury verdict on Crytzer's rescission claim). *See* Victoria C. v. Cincinnati Bengals, Inc., 1994 U.S. App. LEXIS 34276, No. 93-35595.

173. *Three Minor-Leaguers Sentenced for Gang Rape*, SUN-SENTINEL (Ft. Lauderdale), Dec. 21, 1998, at 2D.

174. *Id.*

175. *Id.*

176. Rafael Hermoso, *Met Minors in Major Trouble*, DAILY NEWS, Jul. 5, 1998, at 68.

177. *Id.*

178. *Id.*

179. *Id.*

The victim was later discovered crying in her room.¹⁸⁰ When asked what was the matter she responded that she was raped. The victim's relatives then called the police and reported the incident.¹⁸¹ The victim identified Rosario and Tavarez out of a line up in the hotel parking lot.¹⁸² Tavarez then told the police the names of the other athletes involved.¹⁸³ Following their arrests, the athletes' employer, the New York Mets, quickly distanced itself from the situation by suspending each of the accused from the extended training camp and offering them little assistance.¹⁸⁴

Three of the five accused athletes, Brea-Tucent, Tavarez, and Gonzales, were tried together.¹⁸⁵ Their defense attorneys argued that the victim consented to group sex with the athletes.¹⁸⁶ After deliberating for two hours, the jury found each of the three athletes guilty of sexual battery.¹⁸⁷ At sentencing, the prosecutor argued that gang rape was not just some youthful prank, but a violent crime, with serious and lasting effects upon the victim, and requested sentences of fifteen years incarceration and fifteen years probation.¹⁸⁸ Circuit Court Judge Trowbridge instead sentenced the three athletes to two years in prison and two years probation as youthful offenders.¹⁸⁹

The state of Florida dropped its case against the fourth alleged participant in the gang rape, De La Cruz, in return for his promise to testify against Rosario.¹⁹⁰ De La Cruz testified that Rosario called him into the motel room where the girl was naked on the bed.¹⁹¹ Convicted participant, Brea-Tousent, also testified that he had received a similar phone call from Rosario.¹⁹² The victim, who did not testify in the previous trial, testified against Rosario.¹⁹³ According to her testimony, Rosario forced her to have sex with him and the four other athletes.¹⁹⁴ Based on this testimonial evidence, the prosecutor argued

180. *Id.*

181. Hermoso, *supra* note 176, at 68.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Baseball*, TAMPA TRIBUNE, Oct. 17, 1998, at 8.

186. *Id.*

187. *Id.*

188. *Met Farmhands Sentenced*, THE NEW YORK POST, Dec. 21, 1998, at 057.

189. *Id.*

190. Charlie Nobles, *Baseball: Notebook; Mets*, THE NEW YORK TIMES, Jul. 13, 1999, at 7.

191. *Id.*

192. *Id.*

193. *Met Prospect Cleared of Sexual Battery*, THE NEW YORK POST, Jul. 17, 1999, at 038.

194. *Id.*

that Rosario was the ring-leader of the gang rape; nevertheless, Rosario was found not guilty.¹⁹⁵

In order to prevent the aforementioned cases from being misleading, it is important to point out that only some allegations of actual gang rapes by athletes are successfully prosecuted, and, likewise, only some accusations made against athletes are grounded in fact. This is indeed a tragic reality that makes successful prosecution much more difficult in cases where women are actual victims of athlete gang rape. For instance, in 1997 Dallas Cowboys Michael Irvin and Erik Williams were accused of gang rape.¹⁹⁶ The accuser, a former stripper, later signed a statement admitting her story was a lie after being confronted with evidence that Irvin could not have been present at the time of the alleged assault. As a result, a warrant was issued for the woman's arrest. The woman was sentenced to ninety days in jail and fined \$1,500.¹⁹⁷

In 2004, a thirty-eight-year-old woman, who claimed she was gang raped by St. John's University basketball players after meeting them at a strip club, was charged with filing fictitious police reports, attempted extortion, and prostitution.¹⁹⁸ The gang rape accusations were proven false after a video of the incident taken by one of the athletes on his cell phone surfaced showing the woman having consensual sex with the players, asking for money, and then getting upset after the players refused to pay her.¹⁹⁹ Despite the false accusations, the university, nevertheless, expelled one of the athletes and disciplined four others for conduct code violations.²⁰⁰

V. A SURVEY OF THE VARIOUS REMEDIES AND SOLUTIONS

A. *Current/Existing*

The following section analyzes how gang rapes committed by athletes are currently addressed by the various authorities—i.e., the individual college/university, the NCAA, and/or the professional league and individual team. Carrie A. Moser, makes a valid point in her article, *Penalties, Fouls, and Errors: Professional Athletes and Violence*

195. *Id.*

196. See Bill Pennington, *These are Champions? America's Team a Source of Embarrassment*, *THE RECORD*, Jan. 1, 1997 at S01.

197. *Accuser of Cowboys Gets 90 Days*, *ST. PETERSBURG TIMES* (Florida), Sep. 17, 1997, at 3C.

198. Lenn Robbins, Darch Gregorian, & Marianne Garvey, *Hoops Rape "Scam"—Woman Faces "Lie" Rap After Accusing 3 St. John's Players*, *THE NEW YORK POST*, Feb. 6, 2004, at 7.

199. *Id.*

200. *Id.*

Against Women, argues that athletes' off-the-field conduct can have detrimental effects on society when behavior, which in normal circles would carry jail time and public scorn, is accepted and treated with indifference.²⁰¹ The accepting and indifferent treatment afforded sexual assaults committed by athletes cannot be blamed on one group or entity. Rather, schools, leagues, teams, coaches, other players, the media, and the public all must take some responsibility for contributing to the problem.²⁰² With that in mind, the remainder of this article will explore various means, both legal and non-legal, for addressing the issue of gang rapes committed by athletes.

1. Collegiate

The two major disciplinary authorities in collegiate athletics with the power to combat this issue are the individual institutions and the NCAA. The individual schools have the authority to discipline the athletes, and the NCAA has the authority to discipline the colleges and universities.²⁰³

a. The Individual College/University

Few people on campus seem to have a clear idea about how to handle the problem of gang rapes committed by athletes; however, that is not to say that the problem has gone unnoticed by all college communities.²⁰⁴ Some schools are trying to educate players and students about gang rape and change the attitudes that breed it, but many schools continue to struggle to develop policies and procedures to adequately address this problem.²⁰⁵ The way colleges and universities respond varies considerably, but most schools' responses fit into one of the following general examples.²⁰⁶

One institutional response is to take all gang rape allegations seriously and, after careful consideration of the facts, initiate formal action including adjudicating the case in the campus judicial system and always referring the case to the criminal prosecuting authority.²⁰⁷ This type of response is intended to send a clear message that sexual assault on campus will not be tolerated, regardless of who commits it,

201. See Moser, *supra* note 146, at 72.

202. *Id.*

203. Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 187 (1998).

204. See BOHMER & PARROT, *supra* note 1, at 3.

205. Gil B. Fried, *Illegal Motives Off-the-Field*, 7 SETON HALL J. SPORTS L. 69, 92 (1997).

206. See BOHMER & PARROT, *supra* note 1, at 9.

207. *Id.* at 10.

and anyone who is found guilty of such an offense will be punished accordingly.²⁰⁸

A second response is to deal with these types of incidents as a "serious university matter."²⁰⁹ This response views group sexual assault as an internal matter that, if not dealt with properly by the institution, could have school-wide effects, such as a negative impact on admissions and fewer alumni donations.²¹⁰ Institutions also fear being named as a third party defendant in a civil case.²¹¹

The third general response is to view allegations with extreme skepticism and, in some instances, persuading the victim from pursuing the matter further.²¹² This response is most damaging because it tends to discourage other women who are similarly victimized from reporting attacks.²¹³

In addition to these three general types of school-wide responses, campus judicial systems and coaches have the ability to discipline athletes accused of gang rape. These two avenues of discipline each provide unique and effective means of addressing this problem.

Campus judicial systems hear charges brought against athletes by other students.²¹⁴ Students who are gang raped by collegiate athletes have the option of asking their school's campus judicial system to hear the matter and discipline the athletes.²¹⁵ Campus judicial systems have broad authority to hear a variety of complaints, such as those where the alleged assailants have already been found not guilty in a criminal trial, cases where prosecutors decide not to go forward because of a lack of evidence, and where incidents were never reported to the police.²¹⁶ Under this broad authority to discipline, "campus judicial processes are able to find more defendants guilty of sexual assault. . . than the criminal courts, provided that the system is well-designed and administered."²¹⁷ However, the power of campus judicial systems is limited in terms of the types of punishments available.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*; see generally *Brzonkala v. Virginia Polytechnic Inst. & St. Univ.*, 169 F.3d 820 (4th Cir. Va. 1999) and *Simpson v. Univ. of Colorado, Boulder*, 372 F. Supp. 2d 1229 (2005).

212. See Bohmer and Parrot, *supra* note 1, at 10.

213. *Id.*

214. See Dabbs, *supra* note 203, at 187.

215. *Id.* at 190.

216. See Bohmer and Parrot, *supra* note 1, at 29 (explaining that just because an individual is acquitted in a criminal trial does not necessarily mean that he is innocent; rather, it means that there was not sufficient evidence to convince the jury that the defendant committed the crime of which he was accused beyond a reasonable doubt).

217. *Id.* at 33.

The most serious penalty that may be administered via a campus judicial system is expulsion, which is not comparable to the penalty and the loss of liberty that usually follows a guilty verdict in criminal court.²¹⁸

Exactly how campus judicial systems have treated student athletes accused of gang rape is largely unclear because such proceedings are closed to non-parties under a federal law that protects the privacy of student records.²¹⁹ How an allegation of sexual assault is treated by a campus judicial system also varies from school-to-school. For example, on some campuses, instances of sexual assault brought before the campus judicial system almost always result in a guilty verdict, while the opposite is true elsewhere.²²⁰ This variation in treatment can be explained by looking at a couple of different factors. First, the way the individual college or university's campus code is written directly impacts the likelihood of a guilty verdict.²²¹ Second, the outcome frequently depends on the mind set of the administrators hearing the case.²²² Finally, the thoroughness of the investigation by campus authorities impacts how campus judicial systems treat sexual assault differently from other cases.²²³

The effectiveness of campus judicial systems is disputed.²²⁴ Advocates argue that they provide victims the opportunity to pursue an action against her assailant(s) much later than she would be afforded in criminal court because of the extended statute of limitations. Further, cases will proceed with much less evidence than is required in criminal court.²²⁵ Critics counter that not only are campus judicial systems used to keep the incidents quiet and thereby avoid negative publicity, but they also give in to the demands of powerful coaches and are, thus, used to keep athletes out of serious trouble and on the team.²²⁶

218. *Id.*

219. John Ritter, *When Schools Act as Courts*, USA TODAY, Feb. 16, 1997, at A3.

220. See Bohmer and Parrot, *supra* note 1, at 32.

221. *Id.* at 33.

222. *Id.*

223. *Id.*

224. See Dabbs, *supra* note 203, at 190.

225. *Id.* citing Geoff Calkins, *Athletes and Domestic Violence*, SUN-SENTINEL (Ft. Lauderdale), Oct. 17, 1995.

226. *Id.* citing Michel Wilbon, *Crime and Punishment*, WASHINGTON POST, Feb. 26, 1997, at C1, available in 1997 WL 9336832. See also Sara Lipka, *Punishing Personal Fouls – Conduct Codes are Giving Athletic Directors More Power to Bench Players Who Break the Rules*, THE CHRONICLE OF HIGHER EDUCATION, Vol. 52, Issue 19, Jan. 13, 2006, at A43.

Coaches also possess power to discipline athletes.²²⁷ Technically, a coach may dismiss a player or players for conduct in violation of team rules. However, because punishment is left to each individual coach's discretion, athletes at different schools, in different sports, and even different athletes on the same team, may receive different punishments for the same or similar acts.²²⁸ As a result, it is very difficult to speak in general terms about the types of disciplinary actions taken by coaches whose players have been accused of, charged with, or convicted of gang rape. The seeming willingness of some coaches to keep criminal athletes on their rosters arguably "perpetuates players' off-the-field problems, virtually assuring that trouble-prone players will become repeat offenders."²²⁹

b. NCAA

The NCAA is the governing body of intercollegiate athletics.²³⁰ It is comprised of member colleges, universities, and conferences.²³¹ The "members" appoint volunteer representatives that serve on various committees which introduce and vote on rules and bylaws.²³² The NCAA has the authority to promulgate rules and bylaws, which are binding on member universities.²³³ The NCAA also has the authority to determine the eligibility of student athletes to compete in NCAA events by incorporating eligibility rules into those bylaws.²³⁴ In turn, the NCAA also has the authority and responsibility to impose sanctions on member institutions for any violations. The NCAA enforces restrictions on the recruiting and training of athletes, as well as rules governing sportsmanship, sports wagering, agents and amateurism, and drug testing.²³⁵ Currently, there is no official policy governing athletes who commit acts of sexual violence.²³⁶

The NCAA instead leaves this specific misconduct questions to the discretion of the individual "members."²³⁷ Many colleges, universities, and conferences have general conduct codes, but, as discussed in the

227. *Id.* at 187.

228. *See* Caulkins, *supra* note 225.

229. *See* Benedict, *supra* note 47 at 221.

230. *See generally* www.NCAA.org.

231. *Id.*

232. *Id.*

233. *Id.*

234. *See* Dabbs, *supra* note 203 at 188.

235. *See* www.NCAA.org, *supra* note 233. *See also* Fried, *supra* note 205 at 90 citing Michelle Cole, *Expert Says Get Tough on Athletes*, THE IDAHO STATESMAN, Sept. 17, 1995, 1995 WL 10504383.

236. *Id.*

237. *See* Lipka, *supra* note 226, at A43.

previous section, they typically fall far short of addressing the problem of sexual assaults committed by student-athletes. Furthermore, many of these codes espouse vague ideals and function less like a set of concrete rules and more like a mission statement.²³⁸

2. Professional

There are two primary disciplinary authorities in professional sports: the leagues and the individual teams. Both bodies are in uniquely influential positions to discipline and deter players from sexually violent behavior, yet they often decline to do so.²³⁹ Leagues and teams have always taken disciplinarian roles in instances of on-the-field misconduct, but off-the-field misconduct is frequently tolerated so long as players continue to perform during games.²⁴⁰

a. League

According to Ellen E. Dabbs in her article, *Intentional Fouls: Athletes and Violence Against Women*, professional leagues seem unwilling to address the problem of athletes' sexual violence.²⁴¹ The inaction by leagues is often based on the following justifications: (1) sexual violence, unlike drug use or gambling, does not affect the game, and (2) the league has no place acting in a law enforcement capacity and such issues should be left to the criminal justice system.²⁴²

Traditionally, the commissioners of the various professional leagues have held the power to discipline players for off-the-field conduct.²⁴³ This power comes from individual league constitutions. However, as the amount of off-the-field misconduct has increased, some league commissioners have introduced and adopted more stringent policies. For example, the National Football league ("NFL") has introduced a Violent Crime Policy and the National Hockey League ("NHL") has adopted a Behavioral Health Program.²⁴⁴

238. *Id.*

239. *Id.* at 35.

240. *Id.*

241. See Dabbs, *supra* note 203, at 182-83.

242. *Id.* at 183.

243. *Id.* at 178 (citing LIONEL S. SOBEL, PROFESSIONAL SPORTS AND THE LAW § 7.3(a), at 420-22 (1977) and JOHN C. WISTART & CYM H. LOWELL, THE LAW OF SPORTS § 3.10(a), at 258-61 (1979)) (highlighting when NFL commissioner Paul Tagliabue disciplined former Eagles offensive tackle Kevin Allen in 1990 by denying him reentry into the league after he served 33 months in prison for rape, as an effective use of this authority).

244. See Moser, *supra* note 146, at 83 (explaining how the NFL's policy is directed at violent offenses generally, but nevertheless embodied the shared purpose of granting the league commissioner the power to fine or suspend players for engaging in off-the-field misconduct. Oppo-

Leagues also have the power to discipline players via individual player contracts. Each major sports league has standard player contracts which require the player to agree to a number of provisions, including disciplinary provisions.²⁴⁵ A typical disciplinary provision includes a promise to refrain from conduct detrimental to the best interests of the sport.²⁴⁶ In theory, if a player were to violate this specific provision, the league currently has the power to void the contract and release the player.²⁴⁷

In addition to league constitutions and standard player contracts, the third source of current league power comes from the provisions in collective bargaining agreements. More specifically, "all major sports leagues have provisions in their collective bargaining agreements that allow the commissioners to discipline an athlete if that athlete violates any league rules."²⁴⁸ Through collective bargaining agreements, commissioners are assigned the responsibility for guarding the "best interest of the sport."²⁴⁹ For example, the NFL's Constitution allows the commissioner to bar anyone from professional football if he is "guilty of conduct detrimental to the best interest of football."²⁵⁰

To summarize, leagues presently have three sources of power from which to deal with off-the-field athlete misconduct. However, how each league currently chooses to invoke its power varies dramatically among the different professional sports.²⁵¹ For example, Major League Baseball ("MLB") and the National Basketball Association ("NBA") both allow the commissioner to discipline players whenever the "best interests" of the game are at risk, as compared to the NFL and NHL, which both have individual policies outlining specific instances where the commissioner may invoke his power.²⁵² However,

nents of the implementation of similar policies in other leagues argue that such a policy constitutes at least interference with criminal proceedings and at most double jeopardy); *see also* Sean Bukowski, *Flag on the Play: 25 to Life for Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 109 (2001) (explaining how the commissioner acted under the NFL's policy to respond to Rae Caruth's murder indictment and Lawrence Phillip's assault conviction).

245. *See* Bukowski, *supra* note 244, at 109 (listing the NHL as an example and citing to the National Hockey League Players Association Collective Bargaining Agreement, Standard Player's Contract, 548 PLI/PAT 325 (1999)).

246. *See* O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATIONS 267 (3d ed. 1991).

247. *See* Bukowski, *supra* note 244, at 109 (citing PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 2 (West Group, 2d ed., American Casebook Series 1998) at 1).

248. *Id.*

249. *Id.*

250. NFL CONST. & BY-LAWS art. VIII, § 8.13.

251. *See* Bukowski, *supra* note 244, at 110.

252. *Id.*

"[off-the-field misconduct in the form of sexual violence] is not an unsolvable problem."²⁵³

b. Teams

Disciplining athletes' off-the-field misconduct is typically left to the discretion of the individual team.²⁵⁴ Professional sports teams currently have the power to discipline athletes' off-the-field misconduct. Teams, like league commissioners, can discipline sexually violent athletes through provisions agreed to in standard player contracts.²⁵⁵ Standard player contracts typically contain terms of employment, disciplinary provisions, and a "morals clause." A morals clause obligates an athlete to conduct himself in a socially acceptable manner and refrain from conduct detrimental to the best interests of the sport.²⁵⁶ A team may, therefore, void a player's contract and release him for his involvement in a group sexual assault because it is detrimental to the sport.²⁵⁷ Teams could also consider dismissing players for off-field misconduct that would damage the reputation or good will of the team.²⁵⁸ Courts have generally upheld this type of dismissal by private employers.²⁵⁹

However, despite the ability to do so, teams rarely discipline players for off-the-field misconduct unless it was particularly horrendous.²⁶⁰ When faced with disciplining off-the-field misconduct, many teams are willing to give an athlete second, third and even fourth chances, hoping he can help the team win.²⁶¹ One reason teams are reluctant to adequately address this problem is because there is no economic incentive for them to do so. Consider the following:

[I]f teams were encouraged to address the problem of . . . sexual assault, there would be a substantial risk that a free-rider problem would develop due to the competition among teams. A free-rider

253. *Id.* at 117.

254. *See* Dabbs, *supra* note 203 at 184-85.

255. *See* Bukowski, *supra* note 244, at 109; *see also* Dabbs, *supra* note 203 at 185.

256. *See* Bukowski, *supra* note 244, at 109.

257. *Id.*

258. *See* Dabbs, *supra* note 203, at 186.

259. *See United Transp. Union v. Union Pac. R.R.*, 593 F. Supp. 1193 (D. Wyo. 1984), *aff'd*, 812 F.2d 630 (10th Cir. 1987) (employee convicted of possession of marijuana).

260. *Id.* at 185.

261. *See* Bukowski, *supra* note 244, at 108 (describing how Lawrence Phillips, the sixth all-time leading rusher at the University of Nebraska, was convicted of assaulting his girlfriend and charged with drunk driving in college but was, nevertheless, drafted by the St. Louis Rams in the first round and signed to a \$5.6 million contract. The Rams released Phillips after he was convicted of drunk-driving. The Dolphins then signed Phillips only to later release him as well for disciplinary problems. Finally, the San Francisco 49ers gave Phillips his third chance in the NFL but released him for disciplinary problems).

problem exists when people other than those who are actually paying for an item are benefiting from the item.²⁶²

Thus, if only a couple of teams suspend or release players who commit acts of sexual violence, then the other teams could still benefit from the public approval created by the actions of those couple of teams. The other teams would benefit without ever punishing any of their own players or sacrificing their own record.²⁶³ Unless the majority of teams decide to discipline players who engage in this type of off-the-field misconduct, it is unlikely that any team will.²⁶⁴ The reality of the matter is, professional sports teams compete with one another, and in order to win they are typically willing to overlook certain off-the-field misconduct.²⁶⁵

3. *The Criminal Justice System*

Why is it that most athletes charged with sexually violent crimes walk away from the criminal justice system with either no conviction or significantly reduced charges and sentences? As mentioned previously, prosecutors are frequently wary of allowing these cases to go to trial because they are difficult to prosecute. To make matters worse, most athletes charged with gang rape are represented by defense "dream teams" that will inevitably raise the dreaded "groupie defense."²⁶⁶

Additionally, in most gang rape cases, the main legal issue is not whether the event in fact took place, but whether the woman consented.²⁶⁷ Jurors often do not believe that the defendant committed the crime for a number of different reasons.²⁶⁸ For example, the jury may find that the defendant was a credible witness and/or the victim was a poor witness.²⁶⁹ Likewise, the jury might conclude that there was simply not enough corroborating evidence.²⁷⁰ Most often, jurors simply cannot understand why such a young, talented, and successful young man would do such a thing, and rather than believe the unbelievable, they acquit.²⁷¹

262. See Dabbs, *supra* note 203 at 187 (citing JOSEPH E. STIGLITZ, *PRINCIPLES OF MICROECONOMICS* 182 (W.W. Norton & Company 1993)).

263. *Id.*

264. *Id.*

265. *Id.* at 187.

266. See Moser, *supra* note 146, at 81.

267. See BOHMER & PARROT, *supra* note 1, at 29.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

B. Suggestions/Proposals

Now that the various authorities' approaches to gang rape committed by athletes has been discussed, I will conclude this article by putting forward various suggestions and proposals for how this problem should be handled differently in the future. The followings suggestions and proposals are not intended to address the cause of the problem, but rather to create realistic boundaries and guidelines. The key to addressing the problem of athletes committing gang rape is to create and implement clear and unambiguous boundaries that the authorities, athletes, and victims, are aware of and understand.

*1. Collegiate**a. The Individual College/University:*

In general, the institutional responses to gang rapes committed by student-athletes have been inadequate. Colleges and universities need to send a message to student-athletes that sexual violence will not be tolerated, and one's status as an athlete does not warrant any special privileges or treatment. I think that the most effective way for colleges and universities to communicate this message is to (1) suspend the student athlete's scholarship once he is arrested or otherwise formally charged with sexually assaulting another student, (2) revoke the student's athletic eligibility if he is found guilty of criminal misconduct, and (3) file criminal complaints whenever an athlete is alleged to have engaged in sexually violent behavior.²⁷² In order to be effective, this approach must be applied consistently whether the accused is an individual athlete, a group of athletes, the star player, or a walk-on, red-shirt, freshman. This approach must also be applied uniformly regardless of the sport. For example, the big "money-making" sports like men's basketball and football cannot receive more preferential treatment than the smaller, non-revenue producing sports.

Suspending a criminally accused athlete's scholarship entails a determination by school officials whether to merely suspend the scholarship pending the outcome of the criminal proceedings or to revoke it all together.²⁷³ Even without a definitive conclusion that the alleged incident occurred, colleges and universities have the authority to formally revoke an athlete's scholarship.²⁷⁴ An athlete's scholarship should be revoked in two circumstances. First, if it can be established

272. PEGGY SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* xxiv (New York University Press, 1990).

273. See BENEDICT, *supra* note 47, at 224.

274. *Id.*

that additional, non-criminal, conduct code violations occurred during the incident—i.e., under age drinking or curfew infringement—the athlete should lose his scholarship. Related conduct code violations provide sufficient grounds for revocation without violating due process.²⁷⁵

Second, college and university authorities should revoke an arrested or formally charged student athlete's scholarship if it can be established that a "record of previous, albeit unrelated, criminal misbehavior by the athlete" led to the arrest or indictment.²⁷⁶ Prior involvement in criminal behavior is an important consideration that provides sufficient grounds for scholarship revocation.

Only an extremely small percentage of student-athletes are reported for criminal acts, and, the few who are accused of crimes more often than not have had previous trouble with the law, often going back to . . . high school. While evidence of prior arrests and convictions is generally not admissible in a criminal proceeding, it is certainly appropriate for institutions to consider prior incidents when assessing whether a criminally accused athlete is worthy of retaining scholarship privileges.²⁷⁷

Regardless of which ground a college or university bases its decision to revoke a student-athlete's scholarship, that decision and the investigation preceding it should be conducted independently of the athletic department.²⁷⁸

If the student is subsequently found guilty in the criminal proceedings he should not only lose his scholarship, but also any remaining athletic eligibility. The decision to take away a student's athletic eligibility should rest with the administration.²⁷⁹ Thus, colleges and universities should adopt athlete conduct codes that explicitly forbid all criminal behavior—particularly sexually violent crimes, and put the final decision making authority with the administration, not with the coach.²⁸⁰

A growing number of colleges and universities have adopted codes that espouse clear guidelines which apply consistently to all athletic teams.²⁸¹ In support of the decision to adopt such codes, these schools argue that a conduct code is both necessary and beneficial because it helps ensure that players as well as coaches and fans know what to

275. *Id.* at 225.

276. *Id.*

277. *Id.*

278. *Id.*

279. See Lipka, *supra* note 226, at A43.

280. *Id.*

281. *Id.*

expect when an athlete violates the rules.²⁸² Furthermore, adoption of a conduct code leaves little room for argument about the fairness of punishments because student-athletes are put on notice about what behavior will result in revocation of scholarships and loss of athletic eligibility. A conduct code will also help deter lawsuits by players who feel they have been punished arbitrarily.²⁸³ A few of the schools that have adopted conduct codes have made a variety of adjustments to the standard code to ensure that it addresses their school's individual concerns and achieves their goals as an institution.²⁸⁴

Unfortunately, the majority of schools have yet to adopt codes that vest the decision making authority in the administration rather than the coach. Analysis of codes adopted by different schools, such as the University of Wisconsin, the University of Iowa, and the University of Maine, reveals that a conduct code can be adjusted to fit the needs and goals of a particular school. The benefits of a conduct code, such as explicitly forbidding all criminal behavior and clarifying who has final decision making authority in regards to eligibility, far outweighs any of its costs. Therefore, colleges and universities should follow the examples set by these schools and adopt a conduct code for athletes. All codes should be presented to new and returning athletes during orientation and each athlete should be required to read aloud and sign a copy of the code to ensure that they know the rules.

Finally, all colleges and universities should adopt and strictly adhere to the policy that whenever an allegation of criminal misconduct is made against an athlete, a criminal complaint should immediately be

282. *Id.*

283. *Id.*

284. *Id.* (comparing and contrasting three school's recently adopted conduct codes. According to The University of Wisconsin at Madison's conduct code, which was introduced in 2003, coaches are cut out of the disciplinary process. Also, any student who is arrested for or charged with a felony or any violation of local, state, or federal law involving drugs, gambling, or violence is immediately suspended from both practice and games. The athlete's suspension stands while a committee investigates the incident and sets a penalty. More recently, the University of Iowa introduced a conduct code for athletes in response to accusations of sexual assault made against the school's star basketball player Pierre Pierce. Iowa's conduct code clarified the school's rules and expectations regarding the conduct of student-athletes. The code gives disciplinary authority for serious infractions to the athletic director. Additionally, Iowa's code identifies two distinct levels of misconduct (category 1 and 2) and the sanctions for each. If a player commits a category 1 offense, then the athletic director can suspend him from all participation in athletics and revoke or modify the student's athletic scholarship. If a player commits a category 2 offense, then the athletic director can place him on probation or suspend him from practice, games, or access to departmental services. The University of Maine incorporated summary suspensions into its recently adopted conduct code. According to Maine's code, all violations carry a point value: minor offenses are one point and major offenses are five. Any athlete who accumulates five points is suspended from ten percent of upcoming games and an accumulation of ten points results in suspension from fifteen percent of upcoming games).

filed with the appropriate legal authority. This policy should be fixed and in no way depend the type of allegation, who makes the allegation, and, most importantly, who is incriminated by the allegation. Gang rape is a serious crime and should be treated as such by every college and university. Regardless of how the school decides to handle the problem internally, it should not hesitate to call the law enforcement authorities when an athlete breaks the law. The decision whether to press charges is within the discretion of the local prosecutor, not the school, its administration, or a coach.

b. NCAA

Because the NCAA leaves misconduct questions concerning sexual assault to the discretion of member institutions, and their respective individual codes fail to act as anything more than mission statements, most colleges, universities, and conferences receive little guidance from this governing body. Member institutions need consistency and guidance, both ought to be provided by the NCAA.

Unfortunately, this seems unlikely to occur for a couple of reasons. First, NCAA rules and bylaws are proposed and voted on by member institutions. Therefore, enactment of specific rules addressing the problem of student-athlete sexual violence essentially requires the member institutions to police themselves. Because individual schools are typically responsible for disciplining player misconduct, an NCAA rule would require that member institutions relinquish some of that authority to the NCAA. Institutions are likely hesitant to do so because relinquishing some authority also entails forfeiting a like amount of autonomy and control. Possession of the power to punish provides individual institutions with the opportunity to protect the interests of the athlete, the athletic department, and the school. Given the status quo, no one seems to be looking out for the interests and rights of the victim.

Second, the NCAA has few incentives to establish such a rule or set of rules addressing this problem. The absence of outside pressure on the NCAA to act affirmatively from other students and the public-at-large allows the NCAA to continue to punish athletes for drug use and amateurism, while fully ignoring the problem of sexual assault.²⁸⁵ Until people are sufficiently outraged by this problem and willing to voice their outrage publicly, the NCAA has no reason to take a more pro-active approach in how it handles student-athletes committing gang rape.

285. See Dabbs, *supra* note 203, at 188.

It is imperative that the NCAA address this problem, but the big question is how it should be done. There appears to be a couple of options. One option is the NCAA could adopt a rule similar to the present rule prohibiting players from illegal drugs that would prohibit any players alleged to have committed group sexual assault from playing in NCAA sponsored tournaments. And, in appropriate circumstances, the NCAA could even take away the eligibility of any students found guilty of such acts.

Another option is the NCAA could take a less direct approach and provide member institutions with incentives to address the problem aggressively from within. According to this approach, the NCAA should refuse to hold NCAA-sponsored events and tournaments at schools that fail to enact minimum rules addressing the occurrence of group sexual assault committed by athletes. If the NCAA were to adopt this second alternative, it should provide a minimum standard rule that schools would then have the option of adopting the rule as is or modifying it to make it more strict. Furthermore, this second option should also require member institutions to not only adopt minimum rules in order to host NCAA events—e.g., the Final Four, but also implement, mandatory educational programs for athletes about the occurrence, impact, and consequences of sexually violent acts.

2. *Professional*

Not all professional sports leagues and teams have completely ignored the problem of sexual violence and shielded players from punishment; however, there is much more that both the leagues and the individual teams should do to combat this serious problem.²⁸⁶ Although countless professional male athletes never engage in sexual violence; nonetheless, the fact that sexual predators are playing professional sports demonstrates the degree of indifference exhibited by not only the leagues and teams, but also by individual owners, managers, and coaches.²⁸⁷ This indifference should no longer be tolerated by the fans in particular and the public in general.

a. *The Leagues*

Professional sports leagues must improve and strengthen the current approaches to handling of off-the-field misconduct. For example, the current approach by MLB and the NBA, which rely on the independent and unilateral action of the commissioner to discipline ath-

286. See Moser, *supra* note 146, at 81.

287. See BENEDICT, *supra* note 47, at 35.

letes' off-the-field misconduct under the "best interests" of the game clauses, is flawed for the following two reasons.²⁸⁸ First, relying on this power fails to inform the players of what behavior is forbidden.²⁸⁹ When the disciplinary power rests solely in the hands of an individual, such as the commissioner, the outcome is inconsistency in treatment.²⁹⁰ A definitive policy is, therefore, preferable to the current MLB and NBA policies because it would cause players guilty of identical offenses to receive identical punishments.²⁹¹ Second, due process is essential to maintain fairness and give the ever-important appearance of fairness, and continuing to rely solely on the commissioner's powers does not guarantee a player due process.²⁹²

Additionally, although the current approaches by the NFL and NHL are a step in the right direction, they too are problematic. For instance, the NFL and the NHL's policies essentially empower the commissioner to act "as judge, jury, and executioner," which raises some serious questions about an athlete's right to defend himself against accusations.²⁹³ As mentioned previously, the absence of consistent procedures results in a departure from due process, which, in turn, causes arbitrary rulings. Moreover, the fact that a private employer has more freedom to discipline an employee-athlete than a public employer does not mean that the private employee should be without of any protections.²⁹⁴

Whether it is the creation of a policy by leagues that do not currently have one (MLB and the NBA) or changes to a policy already in-place (NFL and NHL), the goal of all professional sports leagues should be to have a clear and definitive policy in place that addresses the problem of off-the-field misconduct. In order to create a powerful, yet well balanced policy, the leagues should draw-on all three sources of disciplinary power.

For example, because collective bargaining agreements require players to agree to abide by the rules that the league adopts, the

288. See Bukowski, *supra* note 244, at 111.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* citing *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967) (explaining how the Due Process Clause guarantees fundamental elements of fairness). See also *Tumey v. Ohio*, 273 U.S. 510 (1927); *Betts v. Brady*, 316 U.S. 455(1942); cf. *Gideon v. Wainwright*, 372, U.S. 355 (1963).

293. *Id.* (describing the details of the NFL's Violent Crime Policy and the NHL's Behavioral Health Program); but see *NHL Alters Policy on Substance Abuse*, N.Y. TIMES, Sept. 27, 1996, at B12 (describing how a decision made by the commissioner of the NHL, unlike decisions made by the NFL's commissioner, is not appealable to an arbitrator).

294. See Bukowski, *supra* note 244, at 112, citing ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, 918-19 (Marlin M. Volz & Edward P. Groggins eds. 5th ed. 1997).

league may adopt a policy that incorporates rules specifically addressing sexual violence.²⁹⁵ This option should be given serious consideration by the leagues, if for no other reason than because the silent majority of professional athletes who do not sexually assault women would advocate. It would give them the opportunity to participate in combating a problem that tarnishes professional athletics generally.²⁹⁶ Additionally, a definitive policy would incorporate the power of league commissioners to unilaterally enact rules. Under this vested power, league commissioners could implement rules specifically addressing sexual violence that would succeed in shifting the focus from retroactive punishments to proactive rules and policies that define specific procedures and penalties.²⁹⁷ Officially promulgated rules of this sort would help put players on notice of the procedures they must go through and the penalties they will face if they engage in specific off-the-field misconduct.²⁹⁸

This definitive policy does not have to be the same in each league. Each league should strive to create a policy that includes uniformity of punishments and adequate notice.²⁹⁹ This will clarify and strengthen the policy by removing the arbitrariness and inconsistency that results when the power to discipline rests solely in the hands of one individual, while at the same time informing the players, teams, coaches, and fans what types of conduct will not be tolerated.

Each league should also implement more due process measures to protect the accused athlete's rights and the legitimacy of the policy.³⁰⁰ Most importantly, any proposed policy needs rigid standards in order to afford full due process protection.³⁰¹ For instance, when a player is subject to discipline for sexually violent misconduct, he should (1) be allowed to present a defense to the commissioner, (2) have a right to

295. See Moser, *supra* note 146, at 81, citing WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 20.5 at 371 (1990) (highlighting how incorporating such rules would entail negotiating with players' unions to reach a mutually agreeable policy. Ideally, players, through their union, would be involved in constructing the policy so that the result would be less susceptible to claims of aggrieved players).

296. *Id.* at 83.

297. See generally *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048 at 1063 (1996).

298. See Moser, *supra* 146, at 83 (describing how this form of constructive notice is currently not available in the ad hoc proceedings used by the commissioners of most professional sports leagues).

299. See Bukowski, *supra* note 244, at 117.

300. *Id.*

301. *Id.*

an attorney, and (3) be able to present extenuating circumstances or defenses in his favor.³⁰²

It is equally important that each league begin to take stronger disciplinary measures once a professional athlete is convicted of a crime. Once a professional athlete is convicted of a sexually-based offense in criminal court, the league must impose consequences. Policies addressing off-the-field misconduct will be meaningless if serious consequences are not imposed by the league once a player is criminally convicted. I agree with Jeff Benedict's proposal regarding consequences for criminally convicted athletes.³⁰³ According to his proposal, (1) misdemeanor convictions should result in a player being suspended by the league for twenty-five percent of regulation games, (2) multiple misdemeanor convictions involving sexual violence should be treated the same as a felony, (3) a felony conviction should result in an automatic suspension from the league for at least a year, and (4) if an athlete has previously been convicted of a felony during his professional athletic career, he should be suspended from the league indefinitely.³⁰⁴

Finally, before an effective policy can be created and implemented, the leagues first must recognize that there is a problem with athletes who commit acts of sexual violence. When leagues indeed do acknowledge the existence of this problem, it will facilitate a more honest and critical assessment of responsible and appropriate strategies for confronting it. To do otherwise would at best sustain the problem, and at worst exacerbate it. If the leagues adopted these proposals, certain legal obstacles would have to be overcome.³⁰⁵ Most likely, players unhappy with the league's policy regarding sexual violence and/or with the discipline imposed in response to criminal convictions would pursue a variety of legal remedies such as antitrust suits against the league or appeals from the commissioner's decision.³⁰⁶ While these proposals will most likely be controversial, each league should not use that as an excuse to continue ignoring or inadequately addressing this serious problem.

b. The Team

Professional sports teams possess the ability to thoroughly investigate many aspects of a prospective draftee's background; therefore,

302. *Id.*

303. *See* BENEDICT, *supra* note 47, at 226.

304. *Id.*

305. *See* Dabbs, *supra* note 203, at 180.

306. *Id.*

every team should adopt a policy of further investigating any athlete who has a history of sexual violence.³⁰⁷ For example, a team's screening guidelines could prohibit drafting any athlete who has more than one sex-based felony conviction.³⁰⁸ An athlete who has only one sex crime conviction, either a felony or a misdemeanor, should be labeled "probationary" on draft day. A "probationary" athlete who is drafted should be allowed to play, but with knowledge that he will be automatically kicked off the team if he is convicted of a second sex crime.³⁰⁹

Implementation of this sort of screening will help minimize the presence of athletes in professional sports who exhibit sexually violent behavior prior to entering the league and joining a team.³¹⁰ Screening for sexually violent athletes will also reduce the need to punish off-the-field sexual misconduct because fewer players inclined to commit such acts would be drafted.³¹¹ All professional sports teams have the resources necessary to add this type of screening procedure to their present pre-draft investigations. Implementation seems not to be a question of resources, but rather one of importance.³¹² Each team should commit to making the removal of sexually violent athletes from the playing field a priority by enacting effective screening procedures.³¹³

Leagues and teams alike should not overlook non-legal avenues for addressing this problem. For example, teams should implement education and counseling programs. Leagues and teams should also seek to incorporate issues surrounding sexual violence against women into training and maintain an open dialogue with law enforcement, players' families, and the medical community. Additionally, leagues and teams should not interfere with or discourage victims to come forward.³¹⁴ Some of the most effective means of addressing this problem are less punitive and take place outside the legal system.

Finally, although leagues and teams possess the legal powers necessary to punish players, they are unlikely to do so without external public pressure.³¹⁵ The public is arguably most effective and an underutilized tool for addressing the problem of sexually violent profes-

307. See BENEDICT, *supra* note 47, at 227.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. See BENEDICT, *supra* note 47, at 227.

314. See Moser, *supra* note 146, at 84.

315. *Id.*

sional athletes. The public reaction to professional athletes who commit gang rapes needs to be strong and unrelenting. Fans should refuse to cheer on players who perpetrate sexually violent acts.³¹⁶ Fans should further express their indignation over specific athletes' sexually violent behavior by refusing to nominate them to play on all-star teams and receive awards.³¹⁷ Fans should also stop buying tickets and refuse to watch games featuring players who commit sexually violent acts. Each of these acts will help provide the leagues and teams greater incentive to punish athletes who participate in gang rape.³¹⁸ Additionally, if fans stopped buying products endorsed by athletes accused of sexually violent behavior, those players' endorsements would suffer.³¹⁹ In other words, as consumers, fans should no longer take for granted their unique power to address and positively impact this problem.

3. *The Criminal Justice System*

While some of the prosecutorial decisions to reduce charges and settle prior to trial are products of legal strategy and the machinations of the criminal justice system, that is not always the case. Taken as a whole, the criminal justice system's treatment of sexually violent athletes can easily be interpreted as another authoritative body that is either too impressed or too intimidated by sports figures. Preferential treatment, and, in many cases, significantly reduced punishments for very serious crimes are the result.³²⁰

Therefore, it would be a step in the right direction if athletes were consistently prosecuted to the full extent of the law and prosecutors refused to back down in the face of high priced defense attorneys.³²¹ This may seem to be an overly-simplistic suggestion, but it is necessary considering that when athletes are on trial the public is watching.³²² Also, plea bargaining when faced with the "groupie defense" should be avoided if for no other reason than because it serves to reinforce the idea that women who associate with professional athletes somehow ask for negative attention and poor treatment, or worse, assume the risk of being sexually assaulted.³²³ Moreover, plea bargaining because of pressure from public relations campaigns should be avoided

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. See Moser, *supra* note 146, at 81.

321. *Id.* at 84.

322. *Id.* at 84-5.

323. *Id.* at 85.

it sends a dangerous message that sports and violence are an acceptable pairing.³²⁴

Judges too must make a deliberate effort to treat and sentence athletes in a manner comparable to the treatment afforded non-athletes. The law does not distinguish between athletes and non-athletes and therefore neither should judges. Some have argued, unpersuasively, that athletes should be sentenced differently because of their enhanced culpability.³²⁵ According to this argument, athletes are usually of a higher socio-economic status and correspondingly, a higher level of blameworthiness.³²⁶ They argue that the highly publicized nature of professional athletes' trials create a deterrent effect when stiff penalties are handed down.

In addition to prosecutors, judges juries must also take responsibility for holding athletes to the same standard they hold one another.³²⁷ The "groupie defense" would be much less effective if juries refused to buy into it. Presently, it is difficult to fault defense attorneys for assassinating victims' characters when juries are persuaded by this strategy. Juries must make a conscious effort to look past "smoke and mirrors" defenses because failing to do so is more damaging than a prosecutor's unwillingness to proceed or a judge's abuse of discretion.³²⁸

The legal advocacy community should also continue to develop and support organizations dedicated to serving the needs of victims.³²⁹ In doing so, it should not only seek to educate itself on the unique facets involved in prosecuting athletes, but it should also strive to better understand the substantial obstacles that the victims must face.³³⁰ Non-profit organizations such as the National Coalition Against Violent Athletes, which inform the public of the dangers of violent athletes and aims to provide guidance to victims and families as they navigate the legal system, should also receive greater support for their efforts.³³¹

324. *Id.*

325. *Id.* at 85 (arguing that elite athletes can be presumed to know the law and that just as disadvantaged backgrounds can be tied to less culpability, so, too can greater culpability be tied to an advantaged social status). *See also* Dabbs, *supra* note 203, at 172.

326. *See* Moser, *supra* note 146, at 85.

327. *Id.* at 86.

328. *Id.*

329. *Id.*

330. *Id.* at 85.

331. *See* Janna L. Graber, *Too Many Get Away with Crime*, THE GAZETTE (Montreal, Que.), Feb. 23, 2000, at E5; *see also* Stan Grossfeld, *A Voice for the Victims*, THE BOSTON GLOBE, June 16, 2004 (explaining that the founder of the National Coalition Against Violent Athletes is Kathy Redmond, who in 1991 was twice raped by University of Nebraska football player Chris-

Carrie A. Moser, in her article *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women* persuasively argues that until prosecutors, judges, and juries are ready to hold collegiate and professional athletes criminally accountable to the same standards that they hold the average citizen to, this type of abhorrent behavior will be looked at as part of being an athlete.³³²

VI. CONCLUSION

To summarize, the goal of this article was to explore collegiate and professional athletes and the commission of group sexual assault. The article's analysis was divided into four sections, which addressed: (1) the crimes of sexual assault and group sexual assault generally, (2) group sexual assault committed by athletes, (3) a selection of case studies involving collegiate and professional athletes, and (4) a survey of how the problem is currently addressed and proposals for more effective treatment in the future.

Why is it that instances of gang rape are often viewed as an anomaly when juxtaposed to athletes' successful, "morally-valued" sports careers? Should the fact that athletes commit gang rape be treated as a symptom of a flawed, overly-tolerant, sports-obsessed culture? The purpose of this article is not to answer those questions, but merely to raise them and, if nothing else, focus some much needed attention on a serious problem that permeates all levels of American collegiate and professional sports.

Kimberly M. Trebon*

tian Peter. The first rape occurred a week into her freshman year as a cornhusker, and the second rape occurred the following day while two of Peter's teammates kept watch).

332. See Moser, *supra* note 146, at 81.

* J.D. Candidate, 2008, DePaul University College of Law. I would like to thank my father, Ron Trebon, for all his help and support in preparing this Note.