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THE PROSECUTION OF MICHAEL VICK: OF DOGFIGHTING, DEPRAVITY, DUAL SOVEREIGNTY, AND “A *CLOCKWORK ORANGE*”

ADAM HARRIS KURLAND*

INTRODUCTION

The passage of time often provides the necessary perspective to evaluate how an event has actually influenced the legal landscape. Viewed some years later, the actual impact often differs quite markedly from the instant “conventional wisdom” articulated in its immediate aftermath.

This has long been the case. For example, in the immediate aftermath of the presidential election of 1928, with the landslide victory of Herbert Hoover and the election of huge “dry” majorities in both houses of Congress, few at the time predicted that Prohibition would be gone—constitutionally eliminated from the Constitution—just five years later.¹ Moreover, even fewer could have predicted that the prohibition experience, in one sense a profound failure of the expansion of federal criminal law enforcement, nevertheless would spawn a myriad of legal doctrines critical to the modern expansion of federal criminal law and procedure.²

On a far more modest scale, the federal prosecution of Michael Vick (Vick) on dogfighting related charges in 2007 was, at the time, seen by some as marking a critical turning point in the federal government’s recognition of dogfighting as a significant federal prosecutorial priority, as well as a significant benchmark for the animal rights community in its conscience-raising quest regarding the value of canine life.³

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1. Prohibition was repealed by the Twenty-Third Amendment in December 1933. For a thorough discussion, see DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010).

2. See KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* (1994) (discussing lasting effects of Prohibition era doctrines on federal criminal law and procedure).

3. Diane M. Sullivan et al., *A Modest Proposal for Advancing Animal Rights*, 71 ALB. L. REV.

However, with the passage of only a few years time, some of the lasting lessons of the Vick prosecution have emerged. The lessons are complex and somewhat unflattering and are not necessarily the lessons that many thought would be the case's enduring legacy.

Vick's conduct was depraved and deserving of punishment. Largely because of the gruesome images of dog torture associated with his conduct, to many, Vick remains, to many, a particularly unsympathetic figure. Nonetheless, the Vick case raises a number of troubling questions concerning the criminal justice process. A detailed critical analysis of the relevant substantive and procedural issues is necessary.⁴

Far from being the impetus for the federal government's new and prolonged focus on the ills of dogfighting, the Vick case stands, at best, as an outlier case and, at worst, as a strange example of the misuse of federal power. The prosecution of Vick became oppressively exceptional when local Virginia prosecutors belatedly brought additional state felony charges after the successful federal prosecution. Both prosecutorial entities engaged in weird, and somewhat disingenuous, legal gymnastics in determining what charges to pursue and ultimately accept through guilty pleas in order to resolve the respective prosecutions. As such, the Vick case exemplifies the misuse of both state and federal prosecutorial discretion—hardly a model to emulate in the future. This is particularly sobering in light of the fact that the federal-state jurisdictional overlap continues to expand, and successive prosecutions, while still relatively uncommon, have the potential for substantial increases in the future.

The case also raises questions concerning Vick's legal representation, particularly how counsel handled the prospects of successive prosecutions by federal and state entities. Some of the questionable strategy decisions directly increased the possibility that Vick would be subjected to the unusual dual prosecutions, and his counsel offered surprisingly little legal resistance.

1129, 1131 (2008); K. Michelle Welch, *Animal Law*, 44 U. RICH. L. REV. 185, 187 (2009); Rosemary Thompson, *The Cruel Web of Dog Fighting: Breaking the Chain of Violence*, 21 CBA RECORD 14, 14 (Nov. 2007). See also Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL'Y 1 (2010) (discussing a comprehensive study of current dogfighting laws enacted in the aftermath of Vick's case, contending that much more needs to be done, and offering recommendations for more effective enforcement).

4. This inquiry is necessary regardless of the risk of being labeled insufficiently sympathetic to the scourge of animal abuse. All defendants, even those accused of atrocities far worse than Vick, are entitled to the fair administration of justice. At the Nuremberg trials, some of the non-American Allied prosecutors, more familiar with Continental criminal justice systems, protested the application of American criminal procedures as unfair to the accused Nazis. NEIL COHEN & DONALD HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS 387 (3d. ed. 2000) (citing William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1,4 (1990)).

Vick's case serves as yet another cautionary tale concerning the lurking pitfalls of successive prosecutions.

Lastly, and somewhat unexpectedly, the Vick case has emerged as a harbinger case where professional athletes now have to factor the difficult calculus of not only criminal defense strategy considerations but also of strategy considerations concerning possible punishment from the league commissioner, regardless of whether criminal charges were proven or even brought in the first place. Athletes now must understand that they may be whipsawed to provide full disclosure to the commissioner and must recognize that their disclosures could be used against them in a subsequent criminal prosecution. Prior generally accepted assumptions and procedures concerning the timing of these investigations, the requirement that criminal guilt first be established and the "finality" of prior criminal investigations, no longer apply. This article undertakes an examination of these issues.

I. VICK'S FALL FROM GRACE

During the off-season after the end of the 2006 football season, National Football League (NFL) star quarterback Vick signed a \$120 million contract. He had lucrative endorsement contracts with Nike, and his number seven Atlanta Falcons football jersey was one of the most popular items of NFL properties.⁵ If Vick was not on top of the world of professional celebrity, he was close to it.

Less than a year later, Vick was under an indefinite NFL suspension, had been stripped of his endorsements, had been essentially pauperized, his number seven jersey had been banned from sale,⁶ had agreed to pay approximately \$900,000 to the federal government to care for his dogs,⁷ and had been sentenced to twenty-three months in federal prison. Later, a state prosecution commenced, where he would eventually plead guilty to another dogfighting related felony that did not result in any additional prison time.⁸

Vick has now served his time, and almost everyone involved has undergone a rehabilitation of sorts. His former dogs were stars of a cable

5. *Falcon's Vick Has Second-Best Selling Jersey*, ESPN.COM, Dec. 30, 2004, <http://sports.espn.go.com/nfl/news/story?id=1956185>.

6. *Nike Ices Vick's Pact; Reebok Halts Sale of No. 7 Jersey*, ESPN.COM, July 28, 2007, <http://sports.espn.go.com/nfl/news/story?id=2951789>.

7. *Jailed Quarterback to Pay for Care of Seized Pit Bulls*, ESPN.COM, Nov. 29, 2007, <http://sports.espn.go.com/nfl/news/story?id=3133102>.

8. *Vick Pleads Guilty to State Dogfighting Charges*, NBCSPORTS.COM, Nov. 26, 2008, <http://nbcsports.msnbc.com/id/27907258/>.

television series⁹ and even made the cover of *Sports Illustrated*¹⁰ and, later, *Parade Magazine*.¹¹ Vick was able to return to the NFL for the 2009 season, subject to a two-game suspension, after having undergone some type of psychological reeducation where, despite a lifetime of participation, he now professed the utter depravity of dogfighting. Vick recently completed an extraordinarily successful 2010 season, where he was selected to the Pro Bowl by a league wide vote of players, coaches, and fans.¹²

Just what was Vick's federal crime? He pled guilty to a felony conspiracy to violate the Travel Act, officially titled "Interstate . . . travel . . . in aid of racketeering enterprises,"¹³ a point graphically illustrated when the federal sentencing judge observed that the federal sentence he was about to impose was for a racketeering offense.¹⁴

In more precise legal terms, Vick was involved in interstate dogfighting, which, at the time of the acts alleged in the indictment, was a rarely prosecuted federal misdemeanor. The government was able, by legal sleight of hand, to indict Vick for a federal felony conspiracy offense. The primary reasons for his harsh sentence, however, were allegations of severe animal cruelty, including the gruesome execution of some of his dogs, and an apparent lack of candor concerning the extent of his involvement in bankrolling a gambling enterprise. The extensive punishment based on the animal cruelty was somewhat remarkable because "animal cruelty" is not even a federal crime. By the end of 2008, Vick was about to be released from federal prison, contingent upon resolution of additional state criminal charges arising out of the same dogfighting episode.

9. The dogs were featured on the popular National Geographic Channel program, "DogTown." See Francisco Vara-Orta, "DogTown" Returns Tonight with Focus on Michael Vick's Dogs, LA TIMES BLOG, (Sept. 5, 2008, 8:21 AM), <http://latimesblogs.latimes.com/unleashed/2008/09/dogtown-returns.html>. Vick's own personal journey of redemption was chronicled on a BET television series. See Lisa de Morales, *Coming to BET: Michael Vick's Contrition*, WASH. POST, Oct. 9, 2009, at C6.

10. SPORTS ILLUSTRATED, Dec. 29, 2008 (Cover); see also Jim Gorant, *Happy New Year*, SPORTS ILLUSTRATED, Dec. 29, 2008, at 72-77 (recounting rehabilitation efforts for abused pit bulls).

11. PARADE, Aug. 15, 2010 (Cover); see also Jim Gorant, *Can You Teach a Bad Dog New Tricks?* PARADE, Aug. 15, 2010 at 4-5 (excerpting Gorant's forthcoming book, JIM GORANT, THE LOST DOGS: MICHAEL VICK'S DOGS AND THEIR TALE OF RESCUE AND REDEMPTION (2010)).

12. See Sean Gregory, *Prison to Pro Bowl: The Meaning of Michael Vick*, TIME.COM, Jan. 30, 2011, <http://www.time.com/time/nation/article/0,8599,2044938,00.html>.

13. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises, 18 U.S.C. § 1952 (2011).

14. The trial judge's comments are reported at George Dohrmann, *What's Next for Michael Vick After Agreeing to Plea?*, SPORTS ILLUSTRATED.COM, Aug. 20, 2007, <http://sportsillustrated.cnn.com/vault/article/web/COM1058212/index.htm> (discussing a district judge's comment noting that Vick's guilty plea was based on federal racketeering charges and that his sentence would be calculated accordingly).

Vick's conduct was cruel and reprehensible. Nonetheless, Vick was treated incredibly harshly by the criminal justice system, and he had already paid an enormous price for, at the outset, foolishly thinking about his public relations image and standing with the NFL, rather than focusing exclusively on the best course of legal action. A careful review of the details of the federal prosecution is in order.

II. THE FEDERAL GOVERNMENT AND ALL THINGS DOG

Dogs have been chasing mailmen since the inception of home delivery of mail. A 1929 front page *Washington Post* headline proclaimed that "Unleashed Dogs Bring Woe to Suburban Mail Carriers."¹⁵ Despite the decrease in the mail monopoly over the last eight decades because of the rise of e-mail, electronic bill payment, and private delivery services, the canine interference problem still persists. The United States Postal Service designated a week in May 2008 as National Dog Bite Prevention Week, emphasizing the fact that, in 2007, more than 3000 city and rural postal carriers were bitten by canines.¹⁶ Local newspapers still report on instances where dogs impede the home delivery of mail.¹⁷ Nevertheless, despite the fact that dogs have long interfered with this important federal function identified in the Constitution, Congress has heretofore resisted the federal regulation of all things canine.

The Vick dogfighting prosecution brought massive short-term publicity to the inhumane treatment of dogs, pit bulls in particular, raised for blood sport. As a consequence, several states responded and increased the penalties for dogfighting.¹⁸ Even before Vick's case achieved extensive notoriety, Congress raised interstate dogfighting from a misdemeanor to a felony in 2008.¹⁹

15. *Unleashed Dogs Bring Woe to Suburban Mail Carriers*, WASH. POST, July 12, 1929, at A1.

16. *US Postal Service Dog Bite Awareness: Learn More About It*, USPS.COM, May 15, 2008, <http://www.usps.com/communications/community/dogbite.htm>.

17. See, e.g., Hallie Woods, *Postal Carriers' Plight More Than a Cliché*, FT. COLLINS COLORADOAN, Nov. 11, 2007, at 4A; Tami Abdollah, *Postman Recovering After Pit Bull Attack*, L.A. TIMES, Aug. 23, 2007, at 4B; Erin Cargile, *Loose Dogs Interfere With Mail Delivery*, KRISTV.COM, July 17, 2007, <http://kristv.com/global/story.asp?s=6802717> (July 17, 2007) (reporting on loose dog problem in Corpus Christi, Texas); Ameilia Nielson-Stowell, *Stoppage of Mail Service due to Dog Causes Growls*, DESERET (Salt Lake City) MORNING NEWS, Apr. 26, 2007 (reporting that five houses in cul-de-sac were cut off from mail delivery because of recurring problem with golden retriever).

18. J.L. Miller, *Bills Toughen Penalties for Dog-Fighting*, THE NEWS JOURNAL, Dec. 20, 2007, at 3B.

19. Animal Fighting Prohibition Enforcement Act of 2007, 18 U.S.C. § 1 app. C, amend. 721 (2011).

However, Vick's offenses took place before the charge had been increased to a felony, and ex post facto considerations made it constitutionally impossible to prosecute Vick directly for the new federal dogfighting felony. Moreover, the United States Department of Justice does not consider, and has never considered, dogfighting a significant federal prosecutorial priority, even after Congress elevated the penalties to felony grade.²⁰

The circumstances that led to Vick's federal dogfighting prosecution, and the inquiry into whether additional state charges were valid, appropriate, and necessary, illustrate another example in the ongoing debate concerning the appropriate role of federal law enforcement and state law enforcement for conduct that violates both federal and state law. For a number of reasons that have been exhaustively analyzed over the last few decades, this subject matter overlap continues to grow, largely as a result of Congress's decisions to enact new federal crimes that cover conduct already criminal under state law.²¹ Multiple prosecutions for the same underlying conduct are rare and are usually reserved for situations when the first prosecution, often a state prosecution, results in an acquittal under circumstances that suggest some type of miscarriage of justice.

Vick, on the other hand, was the recipient of unusually harsh treatment from the tag-team of collective prosecutorial entities—where he ultimately pled guilty to both federal and state felony charges. Vick bears some responsibility for the sequence of events that led to both federal and state prosecutions and convictions. Vick and his advisors had to measure the probable consequences of both the criminal justice system and the NFL Commissioner and devise a strategy that addressed both concerns. As will be further discussed, some of Vick's decisions, legal or otherwise, were interpreted as a lack of candor or as a sign of insufficient remorse and made a

20. See, e.g., U.S. DEPT. OF JUSTICE STRATEGIC PLAN 2007-2012 (no mention of dog fighting).

21. See, e.g., ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME 1 (1998) (noting "core" of study concerns recent increase in federal criminal legislation over last few decades that significantly overlaps with crimes traditionally prosecuted by the states); H. Scott Wallace, *The Drive to Federalize is a Road to Ruin*, CRIM. JUST. 8 (Fall 1993) (noting corrosive effects of "overfederalization" of conduct traditionally prosecuted under state law). For a more mocking, but still serious, study of the over federalization and over criminalization issue in general, see HARVEY A. SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009) (contending that the American criminal justice system has become dysfunctional and that the typical American is likely unaware that he or she unwittingly commits several felonies per day based on absurdly vague and broad scope of scores of federal regulatory prohibitions, which results in vulnerability to arbitrary prosecution).

The recent elevation of federal dogfighting charges to felony status continues this trend. Although the measure passed with large congressional majorities, some members questioned the "need [for] greater federal intervention on dogfighting when it's already illegal in all 50 states." Ortiz, *supra* note 3, at 23 (comments of Rep. Westmoreland).

difficult legal situation even worse.

One cannot say with any degree of certainty that Vick could have achieved a better result had different decisions been made and different strategies adopted. Nevertheless, upon careful analysis of the record, Vick faced a multitude of successive prosecution and sentencing issues, some of which may have been able to be avoided altogether and others which may have been able to have been shaped or otherwise confronted in a more advantageous posture.

A. Federal Case Overview

In August 2007, Vick pled guilty to the lone federal criminal charge in a one count indictment arising out of an interstate dogfighting enterprise.²² The case began as an off-shoot of a narcotics investigation concerning individuals other than Vick. A search warrant of Vick's Virginia property yielded evidence of organized dogfighting, and state and federal investigations ensued.²³

Vick was allegedly the main financial backer in the enterprise, ominously named "Bad NewzKennels." The public outcry demanding prison for Vick, and worse,²⁴ was centered almost exclusively on the sensational allegations that underperforming dogs were systematically and brutally executed and less so on the scourge of interstate dogfighting per se.

The terms of the federal plea agreement made clear that prison time for Vick was allegedly appropriate because of the "heinous" acts of animal cruelty. Yet, Vick faced no specific federal animal cruelty charges because no such federal crime existed. The central "federal" aspect of the federal case against Vick, the fortuity of interstate transportation of dogs to engage in dogfighting, was a federal misdemeanor at the relevant times alleged in Vick's indictment. Conviction for such a crime ordinarily does not warrant federal prison time and rarely even warrants federal prosecution. Moreover, the prospect of any prison time was even more unlikely for someone like Vick, who had no prior criminal record.

22. See Indictment, United States v. Vick, Criminal No. 3:07CR (E.D. Va. filed July 17, 2007) [hereinafter Federal Indictment].

23. Ortiz, *supra* note 3, at 6 n.23.

24. For example, at one of the first hearings after the indictment, some animal rights protesters stood outside the federal courthouse, holding signs which read "Neuter Vick." Mike Kulick, *Vick's Mixed Welcome*, RICHMOND.COM, July 27, 2007, <http://www2.richmond.com/news/2007/jul/27/vicks-mixed-welcome-ar-593919/>. Later, some animal rights groups argued that Vick should be required to get a brain scan as a precondition to determine his fitness to return to professional football. Bob Molinaro, *What Does PETA Expect to Find Inside Vick's Head?*, VA. PILOT, Jan. 23, 2009, at C1.

B. The Curious Decision to Initiate Federal Prosecution

State and local prosecutors normally prosecute animal cruelty and dogfighting cases in order to vindicate the societal interest in protecting domestic animals. Just why, then, was Vick prosecuted in federal court? Dogfighting in Virginia is a state law felony, and Virginia gambling statutes reach a “gambling enterprise” if the conduct impacts a financial daily threshold of \$2,000,²⁵ a monetary threshold easily met in this case. In addition, a plethora of Virginia animal cruelty statutes abound.

Vick’s federal charges, as measured by the statutory elements, had nothing to do with the killing of the dogs. Vick’s federal dogfighting charges were dependent on the interstate fortuity that some of the dogs were allegedly purchased in New York and North Carolina.²⁶ Had Vick’s Bad Newz Kennels raised all its dogs locally, kept the gambling limited to locals, and only fought the dogs within Virginia, federal jurisdiction for these particular charges would have likely been absent. In that case, any prospective federal prosecution of Vick would have had to rely on an even more contorted exhaustive examination of the entirety of federal law to find an applicable indictable offense than what actually occurred.

The federal prosecution took shape only after local Virginia authorities signaled they were unlikely to pursue criminal charges against Vick, apparently because of a lack of evidence concerning Vick’s direct involvement.²⁷ Had the State decided to prosecute at the outset, a subsequent separate federal prosecution would have been unlikely, regardless of the outcome. Some media speculated that the local prosecutor, an African-American, was reluctant to prosecute a prominent African-American athlete. The local prosecutor defended his initial reluctance by commenting that he would not “be pushed into bringing charges that won’t stand.”²⁸

25. VA. CODE ANN. § 18.2-328 (2011).

26. See Animal Fighting Venture Prohibition, 7 U.S.C. §§ 2156(a)(1), (b) (2011). The interstate allegation is specifically set forth in the indictment.

27. This situation would change. As the federal investigation moved forward, other persons involved would eventually agree to testify against Vick. Whether the local prosecutor would have pursued this course of action without the initial federal impetus cannot be determined. The fact that, after the federal prosecution, the local prosecutor also relied on the same cooperators cannot be read to suggest that such cooperation would have materialized even without the initial federal prosecution. In any event, on this point, Vick could have taken lessons from Barry Bonds on finding loyal friends. See *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (noting significant evidentiary obstacles faced by prosecutors in perjury prosecution against Bonds as a result of Bonds’ friend’s refusal to testify even after a grant of immunity and an imposition of prison sentence for contempt).

28. *Vick Dogfighting Case Opens up Racial Divide*, MSNBC.COM, Aug. 3, 2007, <http://nbcsports.msnbc.com/id/20112312/>.

This statement suggests that the local prosecutor was not convinced of the strength of the evidence based on the available evidence at the time. If a local prosecutor chose not to prosecute a case that he would have otherwise prosecuted solely because of race, that would have strengthened the federal government's decision to consider federal prosecution by applying well-recognized Department of Justice principles.²⁹ However, even in that extreme situation, it still is unclear if the normal federal policies and guidelines on whether to initiate a prosecution of non-violent offenders for relatively minor offenses would have justified federal prosecution.³⁰

At this point, two ancillary points must be noted. First, when the story first broke, it seemed Vick was primarily concerned with not being implicated in anything related to gambling. The gambling aspect may have seemed relatively unimportant to law enforcement, particularly after evidence of torture of dogs emerged. However, Vick was obviously concerned about running afoul of NFL policy and the NFL Commissioner's authority to suspend Vick based on involvement in gambling.³¹ Undoubtedly, Vick's initial—and ultimately devastating—step was viewed through the prism of seeking to avoid a gambling suspension from the NFL as a first priority and not protecting himself from criminal prosecution.

Second, as evidenced by the state prosecutor's initial reaction that little evidence directly implicated Vick, Vick seemed to be deluded into thinking that his friends and accomplices would not implicate him. This gambit rarely works, regardless of celebrity status. The prosecution simply holds too many cards and too many inducements.³²

Nevertheless, apart from Vick's notoriety, the Vick federal prosecution did not fit the model of when the federal government should get involved in

29. See UNITED STATES ATTORNEYS' MANUAL § 9-27.240(A)(2) (2007) [hereinafter U.S.A.M.] (discussing other jurisdiction's ability and willingness to prosecute effectively as a factor in determining whether federal prosecution was appropriate). The companion comment further notes that "the Federal prosecutor should be alert to any local . . . attitudes . . . or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution." *Id.* § (B)(2).

30. See generally U.S.A.M. § 9-2.031(A) (2009) (discussing policy for dual and successive prosecutions where the matter must involve a substantial federal interest).

31. NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012, art. XI, sec. 1 (discussing Commissioner authority to suspend players). The new NFL Personal Conduct Policy is further discussed at Part IV, *infra*. In addition to this policy, the NFL Collective Bargaining Agreement contains an "integrity of game" provision, which gives the commissioner authority to suspend a player for, inter alia, "knowingly associate[ing] with gamblers or gambling activity." *Id.* at app. 15. For a further discussion of significant pro football gambling suspensions, see note 153, *infra*.

32. This point is further discussed at text and accompanying note 54, *infra*. After Vick pled guilty, he acknowledged that he thought that his fame and money would insulate him from any adverse consequences. See also notes 107 and 168, *infra*.

dogfighting cases.³³ Department of Justice guidelines specifically provide that an individual's notoriety and the surrounding public sentiment should not influence the decision to initiate a federal prosecution unless the prosecution can be otherwise justified under the applicable guidelines.³⁴ Thus, as noted above, unless it was definitively established that state authorities were relying on illegitimate motives in not pursuing a case they would otherwise have pursued, no overriding policy basis existed that required this federal prosecution.

Moreover, Vick's case arguably should not have been brought in federal court under any circumstances because no *substantial* federal interest was present.³⁵ If no substantial federal interest is present, federal prosecutors should exercise their discretionary authority and limited resources to investigate and prosecute far more serious crimes that warrant federal attention as designated federal priorities and that do not overlap with minor state crimes.

This is no idle academic point. At the time of Vick's prosecution, violent crime was on the increase.³⁶ Given the multitude of federal statutes enacted over the last few decades that reach violent crime, scarce federal prosecutorial resources should have been directed toward this stated federal priority.³⁷ Moreover, in the post-9/11 world, federal prosecutorial resources have shifted toward antiterrorism efforts, leaving federal prosecutors unable to effectively prosecute significant cases like public corruption—another subject which implicates significant federal prosecutorial priorities.³⁸ As further illustration, during this same time period, the *Washington Post* reported in a front page article that, as a result of the shift in focus to terrorism and immigration cases, “[t]he Justice Department. . .has retreated from prosecutions of mobsters, white-collar criminals, environmental crimes and traditional civil rights infractions.”³⁹

Under these circumstances, it is hard to justify Vick's federal prosecution no matter how gruesome the evidence of animal abuse. In a society where

33. See generally U.S.A.M., 9-27.000, Principles of Federal Prosecution.

34. U.S.A.M. § 9-27.230 (B)(2) (2009).

35. *Id.* § 9-27.230 (A).

36. *FBI: Violent Crimes in U.S. Rise*, MSNBC.COM, Sept. 24, 2007, <http://www.msnbc.msn.com/id/20956036>.

37. DOJ STRATEGIC PLAN, *supra* note 20, at 1 (listing combating violent crime as number two priority after prevention of terrorism).

38. See, e.g., Scot J. Paltrow, *Justice Delayed: Budget Crunch Hits U.S. Attorneys' Offices*, WALL ST. J., Aug. 31, 2007, at A1.

39. Dan Eggen & John Solomon, *Justice Dept.'s Focus Has Shifted: Terror, Immigration are Current Priorities*, WASH. POST, Oct. 17, 2007, at A1.

millions of dogs are still euthanized each year,⁴⁰ even the torture and execution of dozens of dogs does not necessarily translate into a substantial federal interest and an urgent federal prosecutorial priority, regardless of whether the state prosecutors are willing to pursue state charges.⁴¹ Moreover, there was no overriding need for the federal government to vindicate Virginia's interests in prosecuting Virginia gambling offenses, the actual state law felony anchor of "unlawful activity" that made up the Travel Act conspiracy in Vick's indictment. By all available accounts, there had been no recent public outcry that Virginia authorities had been extraordinarily lax in prosecuting these types of cases to the point where federal intervention was deemed necessary.

As for the federal interstate dogfighting charges, Congress recently elevated these charges to felonies (after the operative dates in the Vick case) because federal prosecutors were understandably reluctant to pursue such relatively insignificant misdemeanors.⁴² That may mean that future interstate dogfighting allegations will be viewed more seriously—a supposition not clearly borne out by recent federal court caseload statistics,⁴³—but the

40. Recent reliable studies estimate that approximately 1.6 million dogs, more than half of them pit bulls, are euthanized each year. Moreover, approximately 25% of all shelter dogs were relinquished by their owner, and many are relinquished for ridiculous reasons. Thus, hundreds of thousands of dogs are condemned to death each year by owners who suffer no legal consequences for, in effect, causing their death. Jennifer Copley, *Cat and Dog Adoption and Euthanasia Statistics*, SUITE101.COM, Dec. 13, 2009, <http://www.suite101.com/content/cat-and-dog-adoption-and-euthanasia-statistics-a179507>; see also 2009 U.S. Shelter Data: Pit Bulls Account for 58% of Dogs Euthanized, DOGSBITE.ORG, Aug. 24, 2009, <http://blog.dogsbite.org/2009/08/2009-us-shelter-data-shows-that-pit-html>.

41. Again, this assertion recognizes that the state's lack of willingness to prosecute is a factor in determining whether federal prosecution is appropriate. U.S.A.M. § 9-27.240 A(2) (2007). Additionally, the possibility of effective non-criminal prosecution alternatives should have been more carefully considered. Federal prosecutorial guidelines counsel that federal prosecutors should determine whether "there exists an adequate non-criminal alternative to prosecution" in determining whether a federal prosecution should be declined. U.S.A.M. § 9-27.250(A). The companion comment notes that "resort to the criminal process is not necessarily the only appropriate response to *serious forms of antisocial activity*." *Id.* § (B) (emphasis added). This option therefore is not intended to be limited to only minor violations. The NFL changed its disciplinary policy in 2007 to sanction discipline even in the absence of a criminal conviction. Thus, the NFL could have imposed substantial monetary fines (including provisions to pay for the rehabilitation of the dogs), mental health treatment, and suspension. See discussion at Part IV, *infra*. Although some of Vick's conduct straddled the 2007 effective date of the new policy, a severe NFL discipline case could likely have been established that would have vindicated virtually all legitimate interests without having to resort to the draconian hammer of federal prosecution.

42. See H.R. Res. 137, 110th Cong. (2007); *Hearing on H.R. Res. 137, Hearing Before the Comm. On the Judiciary Subcomm. On Crime, Terrorism, and Homeland Security*, 110th Cong. 27 (2007) (statement of Humane Society).

43. The most recent federal judicial caseload statistics for 2005-09 specifically identify the number of Migratory Bird prosecutions but contain no recognizable category for federal dogfighting

elevation of dogfighting to a federal felony still does not transform dogfighting into a *substantial* federal priority—nor should it.

Lastly, dogfighting often occurs in a criminal environment intertwined with drug dealing, illegal gun possession, and other serious federal felonious conduct. Accordingly, virtually all of the most recent federal dogfighting misdemeanor prosecutions, prior to the time Congress raised the crime to a felony, were part of larger indictments that included a multitude of other serious federal felonies, thus making federal prosecution appropriate.⁴⁴ However, Vick's case, with its lone charge exclusively based on dogfighting, did not fit that model either.

1. The Indictment

The choice of the lone federal charge in Vick's indictment offers a window into the mosaic-like "art" of federal prosecutorial decision making, particularly when federal prosecutors are determined to bring a felony indictment against a particular defendant. Vick's indictment contained one count: a multi-object conspiracy to violate the Travel Act⁴⁵ (Conspiracy to Travel in Interstate Commerce in Aid of Unlawful Activities; to wit, various Virginia antigambling and dog fight wagering statutes) and to Sponsor a Dog in an Animal Fighting Venture that moved in interstate commerce. The alleged conspiracy spanned the time period from early 2001 to April 25, 2007. As part of the "means of the conspiracy," the indictment detailed several gruesome execution techniques to kill underperforming dogs. However, those allegations were not necessary to establish either the interstate transportation of dogs or the Virginia gambling prongs of the charged conspiracy. The animal cruelty allegations against Vick were arguably irrelevant with respect to the actual federal charges for which he was indicted.⁴⁶

The felony conspiracy charge carried a maximum sentence of five years.

charges. As best as can be ascertained, those charges are subsumed in a "general crime" category that reflects no substantial change over last three years. *See* Federal Court Caseload Statistics 2005-2009, Table D-2 (no listed category for federal dog fighting charges).

44. *See, e.g.* News Release, U.S. Dept. of Justice, "Operation Bite Back" *Results in Federal Drug, Gun, Other Charges Against Nine Involved in Dog-Fighting Ring*, S.D. Ohio (Mar. 27, 2007) (forty-six-count indictment where "[dog-fighting] served as breeding ground for illegal drug and gun activity that reaches across state lines").

45. 18 U.S.C. § 1952 (2011).

46. There is always a question whether ancillary allegations in a conspiracy indictment can transform otherwise arguably inadmissible evidence into admissible evidence. An interesting argument could be made that, had Vick's federal case gone to trial, all of the animal cruelty evidence concerning the execution of the dogs should have been excluded as either irrelevant or unfairly prejudicial. Presumably, that evidence would have been properly considered at sentencing in the event of a conviction.

As noted above, the charged conspiracy had two objects: (1) the pursuit of minor state law misdemeanor and felony gambling charges relating to wagering on dog fights,⁴⁷ dressed up as a maximum five year federal felony by virtue of the Travel Act⁴⁸ and (2) the commission of federal misdemeanors concerning the interstate transport of dogs to engage in an illegal dogfighting venture.⁴⁹ As noted above, Congress raised the offense of dogfighting with an interstate aspect to a felony for all acts committed *after* May 2007, so this amendment had no effect on Vick's case, which alleged conspiratorial conduct as far back as 2001.

The Travel Act, the federal felony hammer utilized to prosecute Vick, has a colorful, if not fully understood, history. The statute is a 1960s era creation of then Attorney General Robert F. Kennedy, who sought more effective tools to prosecute Jimmy Hoffa and other organized crime "hoodlums" and "racketeers" in federal court. Kennedy even had a close group of Justice Department lawyers dubbed the "Get Hoffa" group, who advised Kennedy on fresh approaches to combat labor racketeering, which included the drafting of the Travel Act.⁵⁰ Kennedy himself testified before Congress in support of the proposed Travel Act legislation, which he and his loyalists had devised.⁵¹

The Travel Act was also the first federal statute to wholly incorporate definitions of state crimes as elements of a federal criminal statute. The Travel Act's definitional structure of "unlawful activity" meant that federal prosecutors could, by prosecutorial sleight of hand, reconfigure minor state law offenses, such as gambling and wagering on dog fights, and indict them as federal felonies subject to five years imprisonment.⁵²

That is precisely what happened here. Because of the potential for

47. VA. CODE ANN. §§ 3.1-796.124(A)(2) (repealed 2010), 18.2-326, 328 (2011).

48. 18 U.S.C. § 1952. A substantive Travel Act violation can be based on federal or state law misdemeanors if the conduct qualifies as "unlawful activity" as defined by the Travel Act. Barry Breen, *The Travel Act (18 U.S.C. § 1952): Prosecution of Interstate Acts in Aid of Racketeering*, 24 AM. CRIM. L. REV. 125, 162-63 (1986). The federal dogfighting misdemeanor does not constitute the requisite "unlawful activity." The Travel Act has no conspiracy provision. Thus, a Travel Act conspiracy charge must be based on the general federal conspiracy statute, which is a five-year offense if based on a felony but only a one-year maximum offense if the object of the conspiracy is a misdemeanor. See *Conspiracy to Commit Offense or Defraud United States*, 18 U.S.C. § 371 (2011). Thus, the federal prosecutors in Vick's case had to rely on state law felonies to produce an indictable federal offense that carried a five-year maximum sentence.

49. 7 U.S.C. §§ 2156(a)(1)(b) (2010).

50. See generally RONALD GOLDFARB, *PERFECT VILLAINS, IMPERFECT HEROES: ROBERT F. KENNEDY'S WAR AGAINST ORGANIZED CRIME* 54-55 (1995).

51. See *Legislation Relating to Organized Crime, Hearings Before Subcomm. No. 5 of the Comm. On the Judiciary H. of Reps.*, 87th Cong. 16. at 18-20 (1961) (statement of then Attorney General Robert F. Kennedy).

52. Breen, *supra* note 48, at 163. See also 18 U.S.C. § 1952.

prosecutorial abuse, the Department of Justice has long cautioned prosecutors to consult the Principles of Federal Prosecutions to ensure the presence of a substantial federal interest, so as to prevent what are, in essence, minor state charges from being bootstrapped into federal felonies as a matter of course.⁵³ However, despite a plethora of federal prosecutorial guidelines, discussed above, which generally should have counseled against bringing this prosecution, Vick's federal felony prosecution went forward.

C. A Strange—and Strained—Plea Agreement

How Vick came to plead guilty so quickly to the lone federal conspiracy charge returned by the grand jury is, at the same time, both mundane and complex. The end result of the plea agreement was that Vick was left surprisingly vulnerable far beyond what otherwise would have been expected.

After Vick's three co-defendants quickly worked out plea agreements, which included their obligation to testify against Vick—thereby overcoming the supposed key prosecutorial obstacle that had stymied the local prosecutor,—Vick and his lawyers apparently saw the proverbial writing on the wall, and he pled guilty to the lone conspiracy charge rather than wait for a second superseding indictment that was certain to include additional substantive charges. By pleading guilty to the conspiracy charge, Vick faced a federal maximum of five years imprisonment. By pursuing this course, Vick followed the path taken by approximately ninety percent of all federal defendants who eventually plead guilty.⁵⁴

In that respect, the resolution of the Vick case is unremarkable. Vick pled guilty to the one count in the indictment, apparently one step ahead of a probable superseding indictment that would have contained additional charges and posed a larger theoretical maximum possible sentence. Vick also understood that the case against him was now buttressed by the cooperation of the three co-defendants who had already pled guilty.

These were, to be sure, damaging developments from Vick's perspective. Nonetheless, why would Vick rush to plead guilty where prison time was assured, where the prospect of additional state charges and possible additional consecutive prison time remained unresolved, and where Vick's statement in

53. See generally Breen, *supra* note 48, at 127 n.18 (recognizing potential breadth of Travel Act and cautioning that it, generally, should not be used to combat minor illegal acts). The Supreme Court has also long cautioned that indiscriminate application of the Travel Act could as “a matter of happenstance . . . transform relatively minor state offenses into federal felonies.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

54. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, MODE OF CONVICTION FOR U.S. DISTRICT COURTS, FISCAL YEAR 2009, tbl. 5.34.2009 (over 90% of federal defendants plead guilty).

his plea colloquy and agreed to statement of facts could be used against him without limitation at a subsequent state trial?⁵⁵ What other federal charges against Vick would have been included in a superseding indictment that so convinced—or panicked—Vick that entering into a plea agreement barely a month after the indictment with the unusual concession to an upward departure (discussed below) that both guaranteed jail time *and* waived his right to appeal was seen as his best option?

A defendant agreeing to such a substantial upward departure is quite unusual to say the least. Even the United States Attorney prosecuting Vick could not restrain from gloating about it in the official press release following Vick's guilty plea.⁵⁶

A superseding indictment likely would have included a number of substantive animal fighting misdemeanor counts. So what? Routine application of the Federal Sentencing Guidelines calculations, perhaps, would have raised the theoretical maximum sentence by one year for each additional misdemeanor count, but it is unlikely such a prosecutorial sleight of hand would have substantially altered the basic guidelines calculation. The United States Attorney acknowledged as much in his press release, commenting, “Although we could have asked the Grand Jury to consider additional substantive charges . . . the essence of the case . . . would have remained about the same and the actual sentence [as opposed to the statutory maximum sentence] likely would have also remained about the same.”⁵⁷

The federal prosecutors could have larded a superseding indictment with a multitude of substantive Travel Act felonies, but those counts would have been largely predicated on Virginia gambling offenses. The most significant threat to increase Vick's statutory maximum sentence would have been the inclusion of a Racketeer Influenced and Corrupt Organizations (RICO) charge,

55. Although the state had apparently determined it had insufficient evidence to go forward at the outset, a plethora of new admissible information would be available as a result of the federal prosecution and plea agreement that would make any subsequent state prosecution a virtual certainty for conviction. This is precisely what occurred. The most obvious example is Vick's factual basis to support the plea, which constituted an evidentiary admission against Vick that would be admissible in any subsequent state trial. *See* discussion at note 63 and accompanying text, *infra*.

56. *See* Press Release, U.S. Dept. of Justice, U.S. Attorney's Office, N.D.Va., *Statement of United States Attorney Chuck Rosenberg Regarding United States v. Peace, Phillips, Taylor, and Vick* (Aug. 27, 2007) (Rosenberg noting that “while plea agreements in the federal system are common, it is highly unusual for a defendant to agree to recommend a sentence above the advisory guideline range.”).

57. *Id.* Department of Justice guidelines generally discourage adding additional charges that do not, in any meaningful way, affect appropriate sentencing parameters. *See, e.g.*, U.S.A.M. § 9-27.320 (B)(2) (2009) (counseling that additional charges should be brought only where necessary to provide for appropriate sentence and that, in order to achieve that result, it is usually not necessary to charge a defendant with every offense for which he/she may technically be liable).

the nuclear bomb of the federal arsenal,⁵⁸ which really could have jacked up the sentencing guidelines calculation. However, dogfighting is not a RICO predicate, and the manipulation of Travel Act predicates based on minor state law gambling charges is generally disfavored by the relevant RICO guidelines.⁵⁹ These extreme steps do not appear to have been seriously contemplated.

Equally troubling, the plea agreement did not seek to eliminate the possibility of additional state charges and did not appear to provide *any* procedural protection to minimize, to whatever extent possible, the full effect of any subsequent state prosecution, which, at the time Vick pled, had become a likely possibility.⁶⁰ Although Vick and the federal government lacked the authority to eliminate the possibility of state prosecution outright, some steps could have been taken to better protect Vick in a variety of important ways.

Because of the dual sovereignty doctrine, the federal government and Vick could not unilaterally bind the state prosecutors so as to bar a subsequent state prosecution. However, the State of Virginia could have been a voluntary party to the agreement. The Department of Justice press release notes that several state and local agencies participated in the investigation.⁶¹ Under these circumstances, a global settlement that voluntarily bound all prosecutorial entities would not have been unprecedented.⁶² This would seem particularly apposite here, in that Vick agreed to prison time largely because of the animal cruelty dimension that was essentially a state law interest that could not be reached directly by federal law. In light of the fact that Vick's federal admission as part of his plea effectively "made" the state case against him, how much effort would have been necessary to have had the local prosecutor share the "glory" of the resolution of the federal case—and agree not to bring additional state charges?

58. See Ortiz, *supra* note 3, at 52 (discussing manipulation of certain RICO predicates and potential characterization of dog fighting ring to constitute RICO enterprise that could support RICO charge).

59. See U.S.A.M. §§ 9-110.200; 9-110-310(6)-(7) (2009).

60. The substantial amount of negative press received by the part-time local Surry County, Virginia prosecutor for his initial decision not to pursue charges effectively guaranteed that he would pursue "fish in a barrel" state charges after the resolution of the federal case. Thus, the possibility of resolving all possible criminal charges, state and federal—at the same time—should have been seriously considered because resolution of the federal case was not going to resolve all potential criminal charges.

61. Press Release, U.S. Dept. of Justice, *supra* note 56.

62. For a discussion of global settlement issues where federal and state charges are resolved at the same time via voluntary agreement of the parties, see ADAM H. KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 315 (2001).

The speed in which the federal plea was consummated appeared to rule out time for substantial negotiation with the state prosecutor—a part-time official of a small rural county who seemed overwhelmed by the federal onslaught. If Vick’s counsel felt confident that any subsequent state charges were barred by Virginia law, an issue discussed below, regardless of a lack of agreement with state prosecutors, such confidence was misplaced.

With state prosecution still an open possibility, Vick’s admissions, required by the terms of his federal plea agreement, were tantamount to admissions to a variety of state crimes. These under oath statements could be used against Vick at his state court trial without limitation.⁶³ A *nolo contendere* plea, the plea of choice for many celebrities in state court prosecutions, apparently was not a realistic option because the federal government, consistent with Department of Justice policy, would have voiced emphatic opposition to such a disposition.⁶⁴

However, did Vick consider an *Alford* plea? An *Alford* plea, where the defendant concedes there is sufficient evidence to support the charges but does not expressly admit guilt,⁶⁵ may have interfered with Vick’s quest to qualify for acceptance of responsibility.⁶⁶ Nonetheless, the required factual basis for the plea could have been established without Vick’s direct admission of guilt, although such a move might have resulted in the district court rejecting the

63. See *id.* at 318-20 (discussing use of plea statements and other testimony at subsequent criminal trial).

64. FED. R. CRIM. P. 11(a)(3) (explaining that, in federal prosecutions, before the court may accept a *nolo contendere* plea, it must consider the government’s views concerning the public interest and the interests of justice). Most federal judges will not accept such a plea over government objection. A *nolo* plea, if accepted, is designed to prohibit its use against the defendant in any subsequent trial. See FED. R. EVID. 410 (2)(3).

65. See *North Carolina v. Alford*, 400 U.S. 25, 27 (1970). Professional athletes have resolved criminal case with *Alford* pleas. For example, former baseball pitcher Steve Howe, who had a long history of serial recreational drug violations, resolved cocaine possession charges via an *Alford* plea. Howe’s case and subsequent MLB punishment is discussed in Janine Young Kim & Matthew Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. OF CRIM. LAW & CRIMIN. 573, 580-581 (2009).

Because *Alford* pleas raise public perception concerns about the fair administration of justice, particularly where the defendant attempts to project a public image of innocence, the Department of Justice instructs federal prosecutors to oppose such pleas, except in the most unusual circumstances. U.S.A.M. §§ 9-16.015, 27.440(B) (2007). However, government approval is not required. In addition, federal rules governing guilty pleas do not require that the requisite factual basis for the plea be provided only by the defendant, see, e.g., *United States v. Navedo*, 516 F.2d 293, 296-98 & n.10 (2d Cir. 1975), and at least one court has held that it is an abuse of discretion to refuse to accept a guilty plea “solely because the defendant does not admit the alleged facts of the crime.” *United States v. Gaskins*, 485 F.2d 1046, 1048 (D.C. Cir. 1973).

66. See note 101 and accompanying text, *infra* (discussion of “lack of candor” may influence qualification for “acceptance of responsibility”).

plea for want of a sufficient factual basis for the plea.⁶⁷ Additionally, had an *Alford* plea been accepted, such a tactic may have sufficiently clouded the evidentiary record so that any attempted use of Vick's federal plea statements would have run a better chance of being excluded on probative value or unfair prejudice grounds at any subsequent state trial.⁶⁸

All told, given that the State kept open its option to pursue additional criminal charges that could result in substantial additional prison time, Vick had little to gain by pleading guilty so quickly. He may have been better off forgoing acceptance of responsibility and pursuing a strategy that more effectively limited the use of his statements made as part of the federal plea colloquy at any subsequent state trial. Was this strategy even considered?

Moreover, given that a subsequent state prosecution was likely and no steps were taken to limit the evidentiary impact of Vick's admissions, Vick should have tried to maximize his chances of receiving concurrent sentences. A number of options were available, but none seem to have been taken.

For example, the plea agreement could have included a provision whereby the parties agreed to defer federal sentencing until the conclusion of any state case—at which time the parties would agree to concurrent sentence. Apparently, Vick's quick entry into the federal prison system was deemed of paramount importance, so this option was not pursued. Federal penal institutions, minimum security facilities in particular, provide relatively better surroundings than do most state correctional facilities. In addition, once an inmate is in the federal system, any additional state time is likely—but not guaranteed—to be concurrent. Also, by having the federal time start as quickly as possible, Vick, a world-class athlete with a finite window of opportunity in which to pursue a lucrative professional career, faced an urgency to start serving his sentence as quickly as possible, the better to complete it and to hasten his projected return to the NFL.

However, under Virginia law, the decision to impose concurrent or

67. See *supra* note 65.

68. With an *Alford* plea, the factual basis for the plea would not be an unambiguous evidentiary admission against the defendant. Any prosecutorial attempt to admit the plea in a subsequent case would have to confront a litany of arguments that the statement was obtuse, ambiguous, and confusing, and thus ripe for exclusion under the type of probative value or unfair prejudice-confusion of the issues balancing test that exists in every jurisdiction. See, e.g. FED. R. EVID. 403; *Lafon v. Commonwealth*, 438 S.E.2d 279, 283-84 (Va. Ct. App. 1993) (explicating state common law probative value or unfair prejudice evidentiary rule). Of course, precisely because of confusion and unfair prejudice grounded in concerns that “the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail,” federal prosecutors object to the use in the first place. See U.S.A.M. § 9-27.440 (B) (citing *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971)).

consecutive time is within the sole discretion of the state judge.⁶⁹ Thus, angling to get Vick into the federal system as soon as possible, with the hopes of having him eligible to play in the 2009 football season, was a gamble because the agreement did not protect him in any way from additional consecutive state time that could have delayed his opportunity to return to the NFL for several more years. Such an outcome could have effectively ended his professional career.

Moreover, Vick's return to the NFL at the earliest possible time would also be facilitated if he could serve out the last few months of his sentence in a federal half-way house, an option available to most federal prisoners.⁷⁰ However, this option is not available if an inmate has unresolved pending charges.⁷¹ Vick's lawyers apparently overlooked this issue when working out his speedy federal plea that sent him into the federal system without resolution of possible additional subsequent state charges.⁷² When the issue surfaced as Vick became otherwise eligible for consideration as he neared completion of his federal sentence, it led to frantic efforts to quickly resolve the state charges, even if it meant forgoing meritorious arguments that the state charges were legally invalid.

The agreed to statement of facts in the federal plea agreement fell just short of Vick admitting his *direct* involvement in killing any dogs and, specifically, did not include any admission of Vick gambling. This was clearly done with an eye toward public relations and a desire to not directly admit to state law animal abuse charges or to gambling involvement—which would have likely meant an automatic and perhaps lifetime suspension from the NFL.⁷³

69. VA. CODE ANN. § 19.2-308 (2011).

70. See ALAN ELLIS & J. MICHAEL HENDERSON, FEDERAL PRISON GUIDEBOOK 64 (2010-2012 ed.) (finding most federal offenders will receive benefit of some residential re-entry center placement).

71. See Bureau of Prisons Halfway House Rules, 28 C.F.R. § 571.10 (stating inmates in the following categories shall not ordinarily participate in Community Corrections Center Programs—inmates with unresolved pending charges which will likely lead to conviction or confinement).

72. This created a problem that likely contributed to Vick's decision not to contest the validity of the state felony charges, which led to his state felony guilty plea. See discussion at notes 104, 144-45 and accompanying text, *infra*.

73. Vick's sidestepping of any direct admission of gambling was almost farcical, and he paid a heavy price. Not only did this stance suggest a lack of candor to the court, but animal rights groups exploited this incredulous position at the federal sentencing, arguing in their amicus brief that if Vick bankrolled the dogfighting operation without sharing in any of the gambling proceeds:

[t]he only remaining inference to be drawn is that with no financial stake in the outcome of these dogfights, Vick organized, funded and operated this grisly enterprise for the sheer joy of watching two dogs tear each other apart and for the sadistic pleasure of torturing

The legal nicety of trying to avoid directly admitting to dog killing had no salutary effect on public opinion. Almost overnight, Vick chew toys for dogs hit the market.⁷⁴ Animal rights groups still filed documents with the federal court seeking a near maximum term of almost five years, arguing that the canine victims should be treated the same as human victims. Other anti-Vick protesters held “Neuter Vick” signs at the courthouse,⁷⁵ endorsing a castration message usually reserved for the most vile serial child rapists.

Vick, having failed to achieve any measurable public relations advantage, gained little in the form of legal advantage. Under basic doctrines of complicity and accessorial liability, Vick’s refusal to directly admit to killing any particular dog provided no legal mitigation. And, as noted above, the structure and terms of the federal plea itself in no way offered any protection from subsequent state prosecution.

Next, Vick’s federal plea agreement contained the almost unheard of agreement to an upward departure for an offense that might otherwise not appear to require jail time, along with an ironclad agreement that Vick agree that incarceration was appropriate. Vick also waived his right to appeal the sentence.⁷⁶

Again, Vick might have been better off just pleading straight up to the one count indictment, recognizing that he faced a potential maximum of five years imprisonment. At some point prior to the return of a superseding indictment, a small window of opportunity to accomplish this existed, without any government agreement as to sentence recommendation, and Vick could have taken his chances at sentencing.

In a sense, Vick was no better off—and likely worse off—with the “benefit” of the plea agreement. First, without an agreement, Vick would have retained his right to appeal a prison sentence. Any sentence of incarceration would have required an upward departure, which, in turn, could have been challenged on appeal. In the post-*Booker* world, that would have been a difficult, but not insurmountable, issue to win on appeal.⁷⁷

and slaughtering those which did not meet his expectations.

Brief for Amici Curiae, *United States v. Vick*, 3:07-CR-274, at 18 (E.D. Va. Filed Sept. 6, 2007). For a brief historical overview of gambling as triggering severe sanctions in professional sports, *see* note 153, *infra*.

74. *See, e.g., Official Vick’s Dog Chew Toy; Raising Awareness Towards Animal Abuse*, OFFICIALVICK’SDOGCHEWTOY.COM, <http://officialvickdogchewtoy.com/> (last visited Sept. 11, 2010).

75. Kulick, *supra* note 24.

76. Plea Agreement, *United States v. Vick*, Criminal No. 3:07CR274, para. 16 (E.D. Va. filed Aug. 24, 2007) [hereinafter *Vick Plea Agreement*].

77. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(1) (2009) (stating that, under the

Next, if done in a timely fashion, the government would have been hard-pressed not to accept his straight up plea—perhaps even an *Alford* plea—to the entire one count indictment against him.⁷⁸ As noted above, the impending second superseding indictment would not have added charges that would have substantially altered the sentencing calculation. In addition, in order to avoid the perception of vindictiveness, the federal government rarely returns a superseding indictment after the defendant has pled straight up to all of the counts in the original indictment.

Vick's plea effectively guaranteed Vick a substantial period of incarceration in return for the government agreeing not to argue for more than twelve months, the low end of the "agreed to" guideline range. Vick likely thought the situation so dire that his best chance to limit prison time was to agree with the government that a twelve-month sentence was appropriate and to get "credit" for acceptance of responsibility, given that the downside was a maximum five years. This was a risky strategic gamble that was both legally flawed and doomed to fail.

The timing of the guilty plea increased Vick's chances but did not guarantee that he would get some credit for acceptance of responsibility. However, if he tried to plead guilty to the original indictment, without a plea agreement, prior to the issuance of a superseding indictment, Vick still would have been eligible to receive a sentence reduction for acceptance of responsibility.⁷⁹ So, on that score, the guilty plea provided nothing.

In addition, the district court might not have been inclined to impose a sentence greater than the twelve to eighteen month agreed upon range, no matter how gruesome the evidence of dog killing. As discussed below, based on the calculation in the plea agreement, it took an agreed to nine level upward departure to get into the twelve to eighteen month range. That is a huge increase. To put this increase in perspective, at most points on the sentencing table, a nine level increase more than doubles both the low end and high end of the sentencing range. Absent an agreement between the parties, such a substantial increase would be unlikely, even with intense public opinion and

federal sentencing guidelines, a defendant may appeal his sentence under certain circumstances); *United States v. Booker*, 543 U.S. 220, 245 (2005). Post-*Booker*, the above guideline sentences are routinely challenged on appeal, with some success. *See, e.g.*, *United States v. Weisser*, 417 F.3d 336, 346 (2d Cir. 2005) (reversing sentence that contained thirteen level increase in offense level and three level criminal history increase).

78. The United States Attorneys Manual notes that federal prosecutors "can and should discourage *Alford* pleas by refusing to terminate prosecutions where an *Alford* plea is proffered to fewer than all of the charges pending." U.S.A.M. § 9-27.440 (B) (2007). However, in Vick's case, he was charged with one count only and was thus willing to plead to the entirety of the indictment.

79. *See generally* *United States v. Wade*, 458 F.3d 1273, 1279 (11th Cir. 2006), *cert. denied*, 550 U.S. 905 (2007).

animal rights groups filing amicus briefs exhorting that Vick receive a substantial prison sentence calculated, in part, by treating canine victims the same as if they were human victims.⁸⁰

On the other hand, under the plea agreement, the district court was still free to ignore the plea agreement and sentence Vick up to five years. If the evidence of dog killing was so extreme that the parties agreed that a nine point upward departure was appropriate, the district court conceivably could have been so outraged by that conduct so as to ignore the sentencing recommendation altogether and sentence Vick up to five years. This was, in essence, the position of the animal rights groups that filed briefs arguing for a sentence near the five-year maximum. The trial court's decision to ignore the sentencing recommendation, reject a proposed reduction for "acceptance of responsibility," and impose a twenty-three-month sentence sufficiently proves the point.

All told, the court declined to follow the sentencing recommendation, and Vick then faced an even harsher sentence and was still bound by his waiver of his right to appeal his sentence. In addition, the prospect of additional state felony charges loomed. Under the circumstances, pleading straight up and retaining the right to appeal does not seem so bad.

However, under the plea agreement Vick could not appeal his sentence under any circumstances. Had Vick simply pled straight up, without the government agreeing to advocate for no more than twelve to eighteen months, Vick would have preserved his right to appeal any sentence of incarceration, and he would have had the benefit of a relatively favorable standard of review on appeal because the sentence would have been an above-the-guidelines sentence and subject to an "unreasonableness" challenge on appeal. This would not be the first time that a defendant ultimately recognized, too late, that most of the benefits in the plea agreement were illusory.⁸¹

In addition, the Sentencing Guidelines calculation set forth in the plea agreement requires closer scrutiny. The calculation, such as it was, was unduly harsh and probably legally incorrect. Nonetheless, it served as the springboard for the district court to impose an even harsher sentence. Had the calculation of the correct adjusted offense level been litigated, the end result could have been more favorable to Vick—making imposition of a lengthy prison term more difficult to support.

Travel Act prosecutions based on obscure state gambling statutes and

80. See Brief of Amici Curiae, *supra* note 73, at 20-22.

81. See generally 1 PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES § 7.02[D][2] at 7-25 (Bamberger & Gotlieb 4th ed. 2001) (cautioning against seemingly favorable sentencing deals that prove illusory).

federal misdemeanors are so uncommon that the parties were not even sure of how to calculate the base offense level and sentence under the plea agreement. The nine-page plea agreement, detailed in so many respects, stopped short of identifying the precise base offense level. The government press release echoed this uncertainty with the tepid assertion that the “Guidelines *appear* to advise a sentencing range of zero to six months.”⁸² This was highly unusual for plea agreements, which almost always identify a definite base offense level as a starting point, even if other possible adjustments are left unresolved.

Reading between the lines, the parties apparently jointly concluded the base offense level for this Travel Act conspiracy was “apparently” Level 6.⁸³ Vick had no prior criminal record, so a base offense Level 6 yields a guidelines sentence of zero to six months, where probation is a likely possibility. The government press release similarly noted that the Guidelines would have yielded no more than six months imprisonment, further supporting the unexpressed conclusion that the parties determined that base Level 6 was the appropriate base offense level.⁸⁴

As noted above, absent a term in the plea agreement agreeing to a nine level increase, had the district court on its own increased Vick’s sentence by a nine level upward departure, such a finding would have been considered aberrational in the extreme and would have certainly been appealed. Under the plea agreement, however, (where no appeal of the sentence was permitted) the parties agreed that Level 13 was appropriate (twelve to eighteen months) after taking into account a two-point reduction for acceptance of responsibility. This means that the parties, in effect, agreed to a whopping nine point upward departure to reach Level 15 before subtracting two points for acceptance of responsibility.

That is astounding. Guideline section 5K2.8 provides the purported legal basis for the upward departure on the stated ground that the parties agreed that “the underlying facts relating to the victimization and killing of pit bulls creat[ed] an aggravating circumstances not adequately taken into account by the Sentencing Commission.”⁸⁵ Who can remember another instance where a defendant agreed to a nine level increase for conduct not adequately considered by the guidelines?⁸⁶

82. See Press Release, U.S. Dept. of Justice, *supra* note 56 (emphasis added).

83. U.S. SENTENCING GUIDELINES MANUAL § 2E1.2(a)(1) (2006).

84. Press Release, U.S. Dept. of Justice, *supra* note 56.

85. Vick Plea Agreement, *supra* note 76, at 2.

86. As noted above, the U.S. Attorney gloated in a press release, albeit, understatedly, that it is “highly unusual for a defendant to agree to recommend a sentence above the advisory guideline range.”

Vick and his lawyers appear to have been caught up in the hysteria over the animal abuse allegations and simply assumed incarceration could not be avoided.⁸⁷ In any event, Vick's lawyers did not fight the issue, agreeing to the appropriateness of, and thus ensuring, incarceration. This was curious, to say the least. Post-*Booker*, defense lawyers almost always zealously argue for creative non-incarceration sentencing alternatives except, perhaps, for the most violent and recidivist offenders. And defense lawyers routinely, and often successfully, oppose government attempts to invoke section 5K2 to increase sentences under far weaker circumstances than Vick faced.⁸⁸

In fact, a plausible argument can be made that no upward departure was justified. At the outset, the pertinent Guidelines commentary cautions that "inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded . . . aggravating circumstances specified in the guidelines, it is expected that [such departures for factors not adequately taken into consideration] will occur rarely and only in exceptional cases."⁸⁹ Surely, arguments against an upward departure could have been made here.

The government press release indicated that Vick's upward departure was based exclusively on the particularly "heinous, cruel and inhumane" killing of dogs.⁹⁰ This reads like an alleged aggravating factor in a death penalty case. Serial killers and axe murderers rarely make such a concession.

Numerous arguments can be made that this situation was contemplated by the Guidelines and that the sentencing commission made a conscientious decision that an increase for "heinous and cruel" conduct applies only to *human* victims. In other words, Vick's case arguably did not present an unexpected, exceptional situation where an upward departure was warranted. However, by agreeing to the multilevel increase for "heinous" conduct, Vick could not object in principle or otherwise refute the legal arguments of the animal rights groups that the dogs be treated like human victims. This means that the legal predicate to increase his sentence far above twelve months had

87. Not to make light of the significant animal cruelty present in this case, it is still worth noting that animal rights groups reacted with their expected extreme passion. Sometimes, that results in overreaction and loss of perspective. Criminal justice interests are usually best served when momentary passions subside. An illustrative example of overreaction by animal rights groups can be seen when President Obama swatted a fly during a television interview. PETA condemned the action as an "execution." D.L. Stewart, *The Swat Heard Round the World*, FLORIDA TODAY, July 7, 2009, at 2D; *PETA Miffed at President Obama's Fly 'Execution,'* REUTERS.COM, June 18, 2009, <http://www.reuters.com/article/2009/06/18/us-politico-peta-idUSTRE55H4Z220090618>.

88. See, e.g., *United States v. Zapete-Garcia*, 447 F.3d 57 (1st Cir. 2006) (reversing sentence that enhanced by eight times maximum Guidelines sentence).

89. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, cmt. n.3(B)(i) (2010).

90. News Release, U.S. Dept. of Justice, *supra* note 44.

been effectively conceded, and many of the following defense arguments were effectively foreclosed.

Yet, there could have been much to argue. First, as unseemly and politically incorrect as it sounds,⁹¹ the “heinous” dog torture involved in Vick’s case was not unusual. Undercover dogfighting investigations reveal that dogfighters often brutally “execute” underperforming dogs because they feel some sort of personal betrayal.⁹² Thus, the animal cruelty allegations in Vick’s case were not outside of the “heartland” of similar cases.

Second, Guideline provisions sections 5K2.1 and 2 permit an upward departure for death or serious physical injury. However, those provisions have been carefully crafted to apply to human victims only. Although the dogs are certainly “victims” in an ordinary sense, they arguably do not qualify as victims for the purposes of the federal Sentencing Guidelines.

This point is further amplified by comparison to other key Guidelines, which contain essentially a default provision where “society” is considered the victim in situations where there are no human victims. For example, in applying the critical Guidelines mechanism for “grouping” closely related counts, “‘victim’ is not intended to include indirect or secondary victims . . . [and in circumstances where] there is no identifiable [human] victim[], the ‘victim’ . . . is the societal interest that is harmed.”⁹³ Thus, in Vick’s case, the relevant societal interest harmed for Guidelines purposes would be the harm that flows from illegal gambling and dogfighting enterprises—which, after all, were the underlying offenses in the conspiracy charge for which Vick was convicted. Vick could have presented a forceful argument that the Sentencing Commission considered all situations and that there was no room to argue that cruelty to canines was a separate unaddressed harm that could warrant an upward departure. Again, given that Vick was not prosecuted for federal animal cruelty, this conclusion is neither surprising nor unreasonable.

Analysis of other pertinent Guidelines further supports that conclusion. For example, the applicable Guidelines section 2E1.2 provides that a Travel Act violation base offense level is the greater of base offense level six *or* the

91. See, e.g., Alan Dershowitz, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) (“[a] zealous defense attorney has professional a obligation to take every legal and ethically permissible step that will serve the client’s best interest—even if the attorney finds the step personally distasteful”); A.B.A. CRIM. JUST. STANDARDS, DEFENSE FUNCTION § 4-1.6(b) (2006) (“All such qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant”).

92. See Paul Duggan, *A Blood Sport Exposed: Vick’s Case Puts Dogfighting Culture in the Spotlight*, WASH. POST, Aug. 22, 2007, at A1.

93. U.S. SENTENCING GUIDELINES MANUAL § 3D1.2, cmt. n.2 (2010).

base offense level for the underlying unlawful activity.⁹⁴ In other words, the Commission took into account the myriad of ways a Travel Act violation could occur and set forth a procedure that required the selection of the highest possible base offense level—thus, making it even less likely that any circumstance not adequately considered that would support an even greater increase in the offense level would be found to exist.

Lastly, the Commission authorized increases for damage to property where it saw fit. For example, arson, a common Travel Act predicate, includes a graduated sentencing structure that contemplates various offense level increases for destruction of property and substantial risk of death.⁹⁵ However, for the Travel Act predicate applicable to this case, as discussed below, the Commission chose not to add increases for destruction of property or other cruel or violent acts. As crass and unpopular as it sounds, Vick destroyed his own property.⁹⁶

What was the appropriate underlying activity to establish Vick's proper base offense level? The Guidelines direct the use of the most analogous state law guideline where, as here, the unlawful activity that constitutes the Travel Act violation is a state crime.⁹⁷ The state law gambling prong of the charged Travel Act conspiracy should have been used because it is a felony and the other prong of the charged conspiracy was grounded on a federal misdemeanor. Thus, the applicable Guideline to establish the base offense level was not section 2E1.2 (level six), as apparently contemplated by the plea agreement, but section 2E3.1(1).

Gambling offenses are base level six for "simple" gambling offenses. It is base level twelve where the conduct was engaging in a gambling business or

94. *Id.* at § 2E1.2(a)(1)-(2).

95. *See id.* at § 2K1.4.

96. Some jurisdictions have tried to elevate the status of pets. For example, West Hollywood, California and Boulder, Colorado recently have passed ordinances that characterize pet owners as "guardians." *See* Wendy Underhill, *Coming To Terms: Animal Ordinance Sparks a Doggone Debate*, BOULDER MAGAZINE, Fall 2000, at 29. These ordinances are generally seen as efforts to inspire better treatment of animals. *See* Ambuja Rosen, *Dogs in Chains: If We Stop Calling Dogs Our Property, Will They Become More Liberated?*, DOGS TODAY, Aug. 2000, at 39 (suggesting use of more loving personal terms will inspire better treatment of pets). However, the essential nature of the pet remains a species of personal property. *See* Ortiz, *supra* note 3, at 28. A recent Oregon lawsuit is illustrative. A man ran over a dog as part of a dispute between neighbors. The aggrieved dog owner sued for 1.6 million dollars, alleging loss of companionship. The case was thrown out when the judge ruled that "nothing in Oregon law would allow the [plaintiff] to ask the jury to treat [the dog] as anything other than property." Jessica Golden, *Judge Says Pet is Property, Not Companion*, ABCNEWS.COM, May 25, 2006, <http://abcnews.go.com/US/story?id=2005581&page=1>. For a discussion on various recent efforts by animal protection attorneys to "push[] the law to treat animals more like humans," *see* Anna Stolley Persky, *Their Day in Court*, 96 A.B.A. J. 54 (Sept. 2010).

97. U.S. SENTENCING GUIDELINES MANUAL § 2X5.1 (2010).

part of a commercial gambling operation.⁹⁸ That squarely fits this case. The indictment, plea agreement, and statement of facts specifically detail the defendant's involvement in a "business enterprise involving gambling," thus qualifying for the level twelve designation.

This could have created problems at the sentencing that redounded to Vick's detriment. If the court determined on its own (as it was free to do) that the appropriate base offense level was twelve, all bets could have been off. If the court then "followed" the recommendation of the plea agreement in part and increased by nine levels for "heinous" conduct, Vick's offense level would have ballooned to level twenty-one, a thirty-seven to forty-six month sentence, without even taking into account the more extreme positions advocated by the animal rights groups to raise the offense level through upward departure mechanisms.

However, this analysis actually lends further support that no increase for heinous conduct was warranted and that Vick should not have agreed to a nine-level upward adjustment. As noted above, at base offense level twelve, the Commission chose not to increase gambling offenses for any related violence or property destruction that might accompany the operation of a gambling enterprise.

Lastly, at the time of Vick's offense, Congress had made the depiction of animal cruelty a federal felony if such depiction was intended to be placed in interstate commerce.⁹⁹ There was no specific Guideline for this offense, thus requiring resort to the "most analogous" Guideline. Arguably, the most analogous Guideline may well have been trafficking in obscene matter, which includes an upward adjustment "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence . . ." ¹⁰⁰ Again, this illustrates that the Commission acted clearly when it deemed it appropriate to consider possible increases for violent conduct. Its silence with respect to the Guidelines applicable to Vick's offense was no oversight.

This may seem like a cold-hearted analysis. However, sentencing issues have been analyzed in this manner since the inception of the Guidelines. Applying long-recognized interpretive techniques is routinely and emphatically used by defense lawyers to argue that a particular circumstance was adequately considered by the Guidelines—such arguments were present here—and militated against any upward departure.

All told, the nine-point increase was legally unwarranted. Vick should

98. *Id.* at § 2E3.1(a)(1).

99. *See* 18 U.S.C.S. § 48 (1999). The statute was recently held unconstitutional on First Amendment grounds. *See generally* United States v. Stevens, 130 S. Ct. 1577 (2010).

100. U.S. SENTENCING GUIDELINES MANUAL § 2G3.1(b)(4).

have been a base offense level twelve, derived from the illegal gambling offense and should have received a two-point reduction for acceptance of responsibility.¹⁰¹ That would have placed him as offense level ten, in Zone B, where prison would not be mandatory, and if all of his appellate rights had been preserved, any increase in offense level that resulted in a sentence of incarceration could have been challenged on appeal.

Thus, from Vick's standpoint, he gained nothing from his unusual concession that a nine-point increase was appropriate. The district court was free to, and did, ignore the joint-sentence recommendation of just twelve to eighteen months. Vick received a twenty-three-month federal sentence—almost double the low end of the sentence recommendation as per the plea agreement, and the judge also ordered that Vick foot the bill for almost \$900,000 to be used to attempt to rehabilitate the pit bull terriers.¹⁰² This was an extraordinarily harsh monetary penalty and prison term. Of course, Vick also missed the entire 2007 and 2008 football seasons, lost millions of dollars in salary and endorsements, and was still subject to state prosecution. By most objective measurements, Vick's legal strategy failed miserably.¹⁰³

III. ARE WE DONE YET? LEGAL AND POLICY CONSIDERATIONS OF A SUCCESSIVE STATE PROSECUTION

Vick's travails with the legal system were not over. Vick was subsequently indicted on additional related state felony dogfighting and animal cruelty charges. These charges could have resulted in additional state prison time and created additional obstacles when Vick sought to enter a federal halfway house near the completion of his federal sentence.

Vick eventually pled guilty to one felony charge of illegally promoting a dogfight and received a concurrent sentence.¹⁰⁴ But that outcome was not a foregone conclusion, and he faced significant additional legal peril. As noted above, the Virginia trial court had discretion to impose either a consecutive or

101. The candor evident by accepting this level twelve offense for a gambling offense may have had other positive spillover benefits, as Vick may have avoided his subsequent conduct that the court relied on to find lack of candor and thus no acceptance of responsibility.

102. This restitution term was also part of the plea agreement where Vick agreed to "make restitution for the full amount of the costs associated with the disposition . . . [and long term care] of [the subject] dogs . . ." Vick Plea Agreement, *supra* note 76, at 4.

103. It came as no surprise that, shortly after the resolution of the federal case, Vick fired one of his lawyers. *Vick Sheds One of His Lawyers in Dogfighting Case*, ESPN.COM, Nov. 9, 2007, <http://sports.espn.go.com/nfl/news/story?id=3102721>.

104. *Plea to State Dogfighting Charges Makes Vick Eligible for Halfway House*, ESPN.COM, Nov. 25, 2008, <http://sports.espn.go.com/nfl/news/story?id=3725060> [hereinafter *Plea to State Dogfighting Charges*].

concurrent state sentence.¹⁰⁵ In addition, the state conviction was not consequence-free. Vick was saddled with an additional year of probation supervision and was now a federal and state felon. Finally, in the frantic activity to have Vick serve the last few months of his federal sentence in a halfway house (necessary to facilitate his opportunity to play professional football in 2009), Vick apparently belatedly learned that federal prison regulations prohibited a defendant with unresolved pending charges from entering a federal halfway house. This meant that Vick could not challenge the validity of the state charges if he wanted prompt entry into the halfway house. As discussed below, challenging the legal validity of the subsequent state charges would be time consuming and would have prevented prompt entry into the federal “Community Corrections Center” halfway house program, which was necessary if Vick had any realistic chance of being reinstated and playing in the 2009 NFL season.

As noted above, the Double Jeopardy Clause of the United States Constitution provides no protection to bar the state prosecution. The Supreme Court has long held that, under the dual sovereignty doctrine, federal and state charges, even if based on the same underlying conduct, do not constitute the “same offense.”¹⁰⁶

In addition, as also noted above, only an ironic twist of circumstances created the predicament of additional state charges. First, had Vick been prosecuted by state authorities at the outset, no federal prosecution likely would have ever commenced. If Vick was going to plead guilty, he should have promptly worked out an agreement with state authorities. Such a resolution, which probably could have been attained with a large fine and minimal, if any, incarceration, would almost certainly have been sufficient to ward off federal prosecution. This is how the case should have been resolved. Of course, Vick’s lack of candor, his arrogance, and his initial reluctance to plead guilty derailed and sidetracked initial state prosecution and made the most appropriate outcome problematic.¹⁰⁷

105. VA. CODE ANN. § 19.2-308.1 (2010).

106. See KURLAND, *supra* note 62, at 54 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

107. In an interview for the CBS television program *60 Minutes*, conducted while Vick was in prison, Vick belatedly acknowledged that lying to the police, the team owner, and the NFL Commissioner was a monumental mistake:

I was scared. I knew my career was in jeopardy. I knew I had an endorsement with Nike and --and I knew it was going to be a big letdown. I felt the guilt and I knew I was guilty, and I knew what I had done. And not knowing at the time that, you know, actually telling the truth may have been better than, you know, not being honest. And it backfired on me tremendously.

Second, even with the reality of the federal prosecution, after such prosecution results in a conviction, especially one that results in a substantial prison sentence relative to the offense, the state usually forgoes prosecution for the same general conduct as a matter of discretion. If the offender is already going to federal prison, state officials usually determine not to unnecessarily expend additional finite state resources that, in essence, duplicate the same result.¹⁰⁸

However, the normal rules did not operate here. Based largely on perceived public outrage and perception concerns of how foolish the local prosecutor looked in the public eye, state charges were brought against Vick even after he pled guilty in federal court. This was highly unusual, though not unprecedented and not necessarily legally improper.

To what degree “public outrage” and how it is measured should influence the policy decision whether to bring additional state charges poses an interesting question, particularly where the federal charges were brought largely because the State was initially unwilling to prosecute in the first instance. The local prosecutor’s pronouncements that the state charges “focused on different crimes” only begged the question and were specious in any event, particularly in light of his candid acknowledgement that “[m]ost of the matters that I’m presenting [to the local grand jury] have already been admitted in sworn statements authored by the defendants in the federal proceedings.”¹⁰⁹

There is more than a whiff of unfairness here. As noted above, the federal government prosecuted Vick largely because the State was, in the first instance, unwilling to do so. And, as explained above, as a practical matter, the almost exclusive predicate for Vick’s federal prison time was animal cruelty, which is not, strictly speaking, a federal offense. Given this situation, it seems particularly unfair that the State chose to pursue additional dogfighting and animal cruelty state charges based on the same conduct, even

Interview by James Brown with Michael Vick on *60 Minutes*, (aired Aug. 16, 2009), available at <http://www.ajc.com/sports/michael-vicks-60-minutes-116871.html>. In a BET interview, Vick also commented that he thought, at first, his fame and fortune would buy him out of any significant trouble. The above comments also raise additional issues concerning what, if any, legal counsel he received in the critical formative moments when the facts first started to emerge.

108. The state prosecutor was concerned about the financial cost of the state prosecution and, at one point, stated that he was determined to wait until Vick had served his entire federal sentence before commencing the state trial in order to save the money that would be required to transfer Vick from federal custody in Leavenworth, Kansas to stand trial in Surry County, Virginia. *Prosecutor: Vick’s Virginia Dogfighting Trial Can Wait Until Release From Prison*, ESPN.COM, June 11, 2008, <http://sports.espn.go.com/nfl/news/story?id=3434547>.

109. Hank Kurz Jr., *Prosecutor Says He’ll Seek Indictments in Case at Vick Property*, ASSOCIATED PRESS FIN. WIRE, Sept. 25, 2007, at Bus. News.

after Vick was sentenced to prison on the federal charges. Surely Vick's federal sentence adequately vindicated any conceivable state prosecutorial interest. However, those are policy, not legal, questions. Did Vick have any legal options available?

Had the State prosecuted first, the United States Department of Justice internal "Petite Policy" would have been consulted to determine whether additional federal charges were appropriate.¹¹⁰ That determination would have turned on whether the resolution of the state case—be it acquittal, conviction, or minimal sentence—would have left substantial federal interests *demonstrably* unvindicated.¹¹¹

The Petite Policy wisely provides a rebuttable presumption that the fair and competent prosecution of similar charges in state court adequately vindicates the federal interest regardless of result. A strong argument could be made that, even had Vick received a lenient state sentence, even straight probation, no substantial federal interest would have been left demonstrably unvindicated, and hence, no federal prosecution would have been warranted. Given that Vick's federal dogfighting charges were, when stripped of their Travel Act conspiracy veneer, misdemeanors where probation is a common outcome, no substantial federal interest existed in using a federal prosecution to, in effect, enforce and vindicate Virginia gambling laws. Moreover, no legally recognized substantial federal interest in local animal cruelty required vindication by an *additional* federal prosecution. Accordingly, had the State prosecution commenced first (as it should have), it would have been a waste of finite federal prosecutorial resources to undertake a successive federal prosecution.

Unfortunately for Vick, the State of Virginia has no analogous Petite Policy, and the local prosecutor possessed unbridled discretion—subject to the applicable state laws discussed below—whether to pursue state charges, even after having first passed on an initial opportunity to prosecute.¹¹² The reality that Vick faced substantial federal incarceration because of animal cruelty—the most significant state interest at issue—should have informed the judgment of a rational and fair-minded prosecutor not to bring additional state charges,

110. See generally U.S. ATTORNEYS' MANUAL § 9-2.031 (2009). For a discussion of the Petite Policy, see KURLAND, *supra* note 62, at 3–18.

111. KURLAND, *supra* note 62, at 11–15.

112. Some state judges have lamented the general lack of analogous statewide "Petite" policies to bind all state's attorneys within a state. See, e.g., Booth v. State, 436 So. 2d 36, 38 (Fla. 1983) (Erlich, J., concurring) (recommending that the Florida legislature consider the possible adoption of its own Petite Policy because Florida's scheme of government has no agency analogous to the federal Department of Justice, with power to formulate prosecutorial policy binding on all states attorneys); see also KURLAND, *supra* note 62, at 127.

even if technically permissible. Again, by all reasonable measures, the state's interest in the prevention of animal cruelty had been more than vindicated by the federal prosecution and sentence.¹¹³

The questionable decision to prosecute can also be seen in the choice of charges and the curious, if not disingenuous, manner in which the state charges were drafted. The charges were carefully tailored to minimize the possibility of legal challenge under what may be characterized as state law dual sovereignty limitation principles but with little regard to whether they were necessary to vindicate legitimate, unvindicated prosecutorial interests.

The State presented ten charges to the local six-person grand jury, and the grand jury returned a true bill of indictment on two of the charges. The grand jury returned an indictment on the charge of engaging or promoting a dogfight, in violation of the Virginia Code, section 3.1-796.124(A)(1), (4), and (5), a class six felony, on April 23, 2007.¹¹⁴ This charge covered essentially the same conduct alleged in the federal indictment and admitted to as part of the plea. Despite the local prosecutor's statements that the state indictment represented separate charges not addressed in the federal indictment, the state charges were carefully crafted with an eye toward the federal indictment, as well as the pertinent state statutes discussed below. This suggests general prosecutorial unease concerning the validity of the state charges.

Most notably, the state charge conspicuously omitted reference to Virginia Code section 3.1-796.124(A)(2), which includes "wagering" on dogfights. Interestingly, Vick's federal indictment specified but one subsection of Virginia Code 3.1-796.124—the subsection (2) "wagering" provision—necessary for the Travel Act charge because of the Travel Act's statutory requirement that the state law "unlawful activity" constitute a gambling offense.¹¹⁵ Despite this conscientious effort that the state indictment not duplicate citation to any of the specific sections of the Virginia criminal code set forth in the federal indictment, the state charges indisputably overlapped

113. The local prosecutor essentially conceded this point when he ultimately accepted Vick's guilty plea to one felony count of dogfighting without requiring any additional prison time with the comment that "I feel that what I did today is approved by more than a majority of Surry County, and that's the constituency that I'm concerned about." *Plea to State Dogfighting Charges*, *supra* note 104. Of course, whether this odd resort to plebiscite and public opinion is appropriate guidance for prosecutorial decision-making raises an entirely different issue beyond the scope of this article. Lastly, it is instructive that Vick pled to a state dogfighting count. The animal cruelty count was dropped. The only conceivable justification for a state prosecution would be to hold Vick accountable for actual animal cruelty. However, Vick's resolution of the state charges did not even accomplish that goal. *See* discussion notes 116–17 and accompanying text, *infra*.

114. Indictment, *Virginia v. Vick*, No. 10 (Surry County, Va., Sept. 25, 2007) [hereinafter *State Indictment*].

115. VA. CODE ANN. § 3.2-6571(B)(3) (2008) (formerly § 3.1-796.124 (A)(2) (2007)).

with the identical conduct alleged in the federal indictment, even though the federal charge was drafted as a conspiracy charge.

Vick was also indicted by the state grand jury on one count of cruelty to animals by “killing or causing . . . dogs to fight” in violation of Virginia Code section 3.1-796.122(H).¹¹⁶ This count did not allege one discrete act of animal abuse. Instead, although not denominated a conspiracy charge, it alleged that the criminal conduct took place in a conspiracy-like duration between 2001 and April 24, 2007.¹¹⁷

Moreover, this count did not allege the killing of any specifically identified dog and appeared to be pled in the alternative to support a conviction exclusively on proof that the defendants caused dogs to fight, as opposed to having to prove the actual killing of a dog. However, the cited statutory subsection (H) itself includes the independent required element that the dogs die as a direct result of the conduct. Thus, as indicted, all of the dog torture, promoting dogfighting, and causing the death of various dogs allegations were encompassed in one omnibus state law charge—a class six felony.

The time span for this charge mirrored the time span in the federal conspiracy charge, whose federal indictment included an allegation that related to the identical dogfighting and killing allegations.¹¹⁸ The federal Travel Act conspiracy charge did not reference this state statute because animal cruelty itself does not constitute the requisite “unlawful activity” as defined by the Travel Act.¹¹⁹

The local prosecutor also presented eight additional dog-killing charges under identical section 3.1-796.122(H) to the county grand jury.¹²⁰ Each charge alleged the killing of a specific dog on April 23, 2007 and, like the omnibus section 796.122(H) charge noted above, mirrored the killings of the same dogs during the same time period identified in the federal indictment. The alleged dates of the killings were within the time period set forth in the other state charge, and thus, these counts wholly overlapped with the identical conduct as charged in the other omnibus count.

Often, a grand jury acts as a rubber stamp and returns indictments for

116. State Indictment, *supra* note 114, at No. 9.

117. *Id.*

118. Compare federal indictment para. one, alleging acts from “early 2001 and continuing through on or about April 25, 2007,” a six-year span that differs by one day with the state charge. See Federal Indictment, *supra* note 22.

119. As noted *infra*, the Travel Act charges referenced state law gambling offenses to meet the requisite federal statutory definition of unlawful activity.

120. State Indictment, *supra* note 114, at No. 11, Counts I–VIII.

every charge presented by the prosecutor.¹²¹ Here, the local grand jury actually preformed its historic role as a bulwark against government oppression and declined to indict on eight proposed charges concerning the killings of particular dogs. These charges were not barred by the federal Double Jeopardy Clause because of the dual sovereignty doctrine.¹²² Yet, the grand jury exercised a type of fundamental fairness veto, not to mention a rare act of true independence, in refusing to authorize additional charges that reeked of unnecessary duplication—or, to use an apt football term, “piling on.”

The grand jury’s refusal to indict on the eight specific dog-killing charges had nothing to do with preventing oppression from the duplication of the federal prosecution. In all likelihood, that legal concept was not even addressed at the grand jury. Rather, the grand jury prevented oppression by refusing to authorize duplicative state charges, which alleged the very same acts charged under the same state statute but alleged in multiple counts.

Vick’s counsel could not take credit for this favorable outcome. Under Virginia law, defense counsel plays no role in how evidence and proposed charges are presented before the county grand jury, and defense counsel is not permitted to be present during the proceedings.¹²³

The validity of the two state charges returned by the local grand jury raised substantial legal questions given the manner in which the state charges closely mirrored the federal charges and the possible applicability of an unusual Virginia “double jeopardy” statute. After the federal prosecution, could any additional state charges be brought under Virginia law based on the same acts or conduct? Vick’s lawyers surely must have considered this legal question before entering into the federal plea, although they expressed some surprise and “disappointment” when the state charges were first announced.¹²⁴ Shortly thereafter, to great fanfare, they exclaimed that they would “aggressively protect [Vick’s] rights to ensure that he is not held accountable

121. For a general discussion of the contemporary grand jury as merely a “rubber stamp” for the prosecutor, see, e.g., LARRY GAINES & ROGER MILLER, *CRIMINAL JUSTICE IN ACTION* 292 (5th ed. 2008).

122. See *United States v. Lanza*, 260 U.S. 377, 382 (1922).

123. See 9A MICHIE’S JURISPRUDENCE OF VA. AND W. VA § 23 (2010) (“The grand jury is a one-sided proceeding, and before it the accused has no right to appear or to send witnesses It is only the state bringing a prosecution . . . and the grand jury has only to say whether, upon the state’s showing, the accusation is well made and proper to be tried by the jury.”); *id.* at § 23 n.1764 (“putative defendant and his counsel have no constitutional right to be present at and participate in [state criminal] grand jury proceedings”).

124. Jerry Markon & Mark Maske, *Vick is Indicted on State Charges*, WASH. POST, Sept. 26, 2007, at E1, 9.

for the same conduct twice.”¹²⁵ Unfortunately, Vick’s lawyers ultimately chose not to fight this legal battle.

Analysis of whether a particular state charge is legally barred under Virginia law can take place only after particular state charges have been brought and compared to the relevant federal charges. However, the general scope of the Virginia statutory prohibition could have been assessed prior to the actual filing of any particular state charges. Vick should have been informed prior to entering a guilty plea in federal court that the State would likely be able to draft various state charges that would not automatically be barred under Virginia law.¹²⁶

As noted above, Vick started off at a significant legal disadvantage. His factual statement to support the federal plea could be used as evidence in any subsequent state prosecution, assuming a state prosecution was valid.¹²⁷ Thus, if the state charges were legally valid, any on-the-merits defense would be futile, as the state prosecutor recognized when he commented that “[m]ost of the matters that I’m presenting have already been admitted in sworn statements authored by the defendants in the federal proceedings.”¹²⁸

In addition, as noted above, the Double Jeopardy Clause of the United States Constitution provides no protection to bar the state prosecution. The Supreme Court has long held that, under the dual sovereignty doctrine, federal and state charges, even if based on the same underlying conduct, do not constitute the “same offense.”

As such, whether Vick’s state dogfighting and animal cruelty charges were legally valid raised an intriguing question under Virginia law. Even though the federal Constitution provides no double jeopardy protection in this regard, state law could provide additional protection. This is a discrete state-by-state inquiry—and Virginia has enacted a statute that provides a defendant

125. *Id.* Even before Vick pled guilty to the federal indictment, the press widely reported that additional state charges were likely. Jerry Markon, *Vick Likely Will Face More Charges in Va.*, WASH. POST, Aug. 23, 2007, at E7.

126. The blogosphere was not particularly kind to Vick’s lawyers on this point. For example, several bloggers on a Wall Street Journal cite criticized Vick’s lawyers’ seemingly inexplicable oversight in not resolving any potential state charges before entering into the federal plea agreement. Posting of Peter Lattman to *Michael Vick & the “Dual Sovereignty” Doctrine*, <http://blogs.wsj.com/law/2007/09/25/michael-vick-the-dual-sovereignty-doctrine/> (Sept. 25, 2007, 16:59 EST). One representative post stated, “Vick’s lawyers screwed up . . . [T]ruly experienced criminal defense lawyers know . . . if you don’t get sign off from the State, you are at risk when making a federal plea deal.” Posting of Shoddy Work to *Michael Vick & the “Dual Sovereignty” Doctrine*, <http://blogs.wsj.com/law/2007/09/25/michael-vick-the-dual-sovereignty-doctrine/> (Sept. 25, 2007, 18:15 EST).

127. See KURLAND, *supra* note 62, at 318–19.

128. Kurz, *supra* note 109.

with some protection from some “successive” prosecutions based on the same acts at issue in a prior federal prosecution.

First, the Virginia Constitution contains a clause similar to the Double Jeopardy Clause of the United States Constitution.¹²⁹ Most state courts interpret “analogous” state constitutional provisions in an identical manner as their United States Constitution counterparts as a matter of course, and thus, most states categorically provide no double jeopardy protection as a result of the dual sovereignty doctrine.¹³⁰

However, Virginia courts have not endorsed the dual sovereignty principle in this manner. Instead, Virginia courts have held that the particular statutes involved must be analyzed to determine whether the federal and state statutes contain identical statutory elements.¹³¹ Presumably, if the statutes are identical, the Virginia double jeopardy clause might bar the subsequent prosecution as a matter of Virginia law.

However, because Vick’s federal conspiracy charge necessarily included different statutory elements than the substantive Virginia dogfighting and animal cruelty charges, and vice versa, the Virginia double jeopardy clause in the state constitution, even if interpreted to provide more protection than the federal Double Jeopardy Clause, would not bar these particular charges (although it might bar, for example, a state conspiracy prosecution).

However, the legal inquiry is not over. Virginia Code section 19.2-294 provides in relevant part that “if the same act be a violation of . . . a state and a federal statute, a prosecution under the federal statute shall be a bar to a prosecution under the state statute.”¹³² In contrast to the double jeopardy

129. VA. CONST. art. I, § 8 provides, in relevant part, that “[a person may] not be put twice in jeopardy for the same offense.”

130. See, e.g., *Booth v. State*, 436 So. 2d 36 (Fla. 1983). The doctrine is in a state of flux in the state courts. The Michigan Supreme Court recently overruled prior precedent where it had previously interpreted the state constitutional double jeopardy clause more broadly than its identical federal counterpart to bar some state prosecutions and adopted the majority view holding the two provisions should be interpreted in an identical manner. *People v. Davis*, 695 N.W.2d 45 (Mich. 2005). The case is discussed in detail at Nicholas P. Grippo, *Double Jeopardy Clause—The Michigan Supreme Court Holds that Successive Prosecutions for the Same Criminal Acts Does Not Violate the State’s Double Jeopardy Clause*. *People v. Davis*, 695 N.W.2d 45 (Mich. 2005), 37 RUTGERS L.J. 1301 (2006). For a complete state-by-state analysis, see KURLAND, *supra* note 62, at 89-209.

131. See, e.g., *Epps v. Virginia*, 216 S.E.2d 64, 67-68 (Va. 1975).

132. The full statute provides

If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a state and a federal statute, a prosecution under the federal statute shall be a bar to a prosecution under the state statute. The provisions of this section shall not apply to any offense involving an act of

clause of the Virginia Constitution, which focuses on whether the two charges constitute the “same offense,” this statute is, by its express terms, broader and focused on whether the “same act” violates both state and federal law. This, in turn, requires a legal analysis of what exactly is meant by the term “same act.”

The relevant legislative history suggests the Virginia statute was based upon policy considerations that sought to prohibit a successive state prosecution broadly based on the same conduct that was at issue in the prior federal prosecution.¹³³ The statute is unusual among state law dual sovereignty limitation statutes because, by its express terms, it seeks to limit state prosecutions only after a federal prosecution—it has no application to a Virginia prosecution that follows a prosecution by another state. “Whether a Virginia prosecution is barred is determined by a two-part inquiry. First, the federal prosecution must be *commenced* prior to the Virginia prosecution Second, the court must determine whether the prosecutions are violations of the ‘same act.’”¹³⁴

At least one Virginia court has set forth a test that could be read to prohibit Vick’s state prosecution. In *Hall v. Commonwealth*,¹³⁵ the Virginia Court of Appeals, in interpreting the relevant “same act” statutory language, stated the following: “In determining whether the conduct underlying the convictions is based upon the ‘same act,’ the particular criminal transaction must be examined to determine whether the acts are the same in terms of time, situs, victim, and the nature of the act itself.”¹³⁶ Equally as important, the relevant legislative history unmistakably indicates that the statute was meant to codify the expansive, pro-defendant, protective principles subsequently articulated in *Grady v. Corbin*,¹³⁷ a short-lived United States Supreme Court case that potentially radically recast and expanded the protections of the federal Double Jeopardy Clause.

In its brief life, *Grady v. Corbin* was hailed by the defense bar as a great

terrorism as defined in § 18.2-46.4.

For the purposes of this section, a prosecution under a federal statute shall be deemed to be commenced once jeopardy has attached.

VA. CODE ANN. § 19.2-294 (2010) (amended 2003) (emphasis added).

133. See generally KURLAND, *supra* note 62, at 268–71 (describing Virginia cases that discuss legislative history).

134. *Id.* at 268–69.

135. *Hall v. Commonwealth*, 421 S.E.2d 455 (Va. Ct. App. 1992).

136. *Id.* at 459.

137. *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993).

triumph in the annals of criminal justice.¹³⁸ Thus, the statute embodies a broader concept than a technical “same elements” analysis, which sensibly sets forth an application that avoids an interpretation of the statute that would be superfluous with the state constitutional provision and, thus, renders the statute nugatory and without independent force.

As applied to Vick’s case, the key legal question is whether overt acts in furtherance of a conspiracy admitted to as part of the federal plea agreement—although not essential to establish a necessary element of the offense¹³⁹—constitute the “same act” as those virtually identical overt acts charged as state substantive offenses.¹⁴⁰ If so—and that is a logical reading of the statute and its legislative history—this would seem to operate in Vick’s favor and should have barred any subsequent state prosecution for dogfighting and specific acts of animal cruelty based on the killing of dogs that were overt acts and in some manner part of the “means of the conspiracy” in the federal prosecution. Significantly, Virginia courts do not summarily reject the proposition that a conspiracy charge and a substantive charge can qualify as the “same act” under the statute.

138. See, e.g., Jeffrey J. Buckels, *The Double Jeopardy Clause: “There Shall Not Rise Up a Double Affliction”*, THE CHAMPION, Nov. 1991, at 22, 25 (*Grady* [dramatically] established that, “as a matter of constitutional law, the accused now enjoys the greatest degree of protection from multiple trials for the same conduct ever accorded”); George C. Thomas III, *A Blameworthy Act Approach to Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1039 (1995) (describing the *Grady* test as fine-grained and highly practical).

139. Often, in determining whether two charges constitute the same offense, a conspiracy charge is summarily deemed a different act than a substantive offense, which is the object of the conspiracy based on cursory application of the hornbook legal principle that the gravamen of the conspiracy is the “agreement,” not the completed offense. See generally, WAYNE LAFAVE, CRIMINAL LAW 621–22 (4th ed. 2003) (“agreement itself is the requisite act”). However, the federal conspiracy statute, 18 U.S.C. §371 requires the commission of an overt act as an additional statutory element, so the instant legal inquiry must go farther, and the legal status and consequences of alleging particular overt acts must be considered. 18 U.S.C. § 371 (2011).

140. Here, the similarity between the federal conspiracy charge and the state offenses is peculiarly overwhelming. First, the abused dogs described in the federal indictment are identical to the victim dogs identified in the state charges. Second, the scope of the federal conspiracy ran from 2001 to April 25, 2007. The state animal cruelty charges, which normally would have identified one discrete act that occurred on or about a particular day, were drafted with a conspiracy-like duration spanning 2001 to April 24, 2007—a technical trivial difference of one day that was solely intended to avoid the statutory bar. This type of disingenuous charge drafting should not escape the “non-rigid” common sense application of the statute endorsed by most Virginia courts. Other reported cases arguably favorable to the government are not controlling. See e.g., *Bolton v. Commonwealth*, 451 S.E. 2d 687, 689–91 (Va. Ct. App. 1994) (court again emphasized that specific factors are not rigidly applied, dismissed two conspiracy counts, but permitted one conspiracy charge to stand, emphasizing the presence of different co-conspirators and different time frame by two years); *Billington v. Commonwealth*, 412 S.E.2d 461, 463–64 (Va. Ct. App. 1991) (upholding validity of successive prosecution even with presence of overlapping overt acts, relying in large part on presence of different victims).

The existence of this statute explains why state prosecutors, out of an abundance of caution, steered clear of indicting Vick on any state gambling charges in light of the fact that the relevant Virginia gambling statutes were specifically referenced in the federal indictment as the requisite “unlawful activity” to support the Travel Act charge. Had the local prosecutors done so, Vick’s chances of invoking the Virginia statute to void the state charges would have been greatly enhanced.

However, even acknowledging that the state charges were carefully drafted to avoid the most blatant violation of the statutory “double jeopardy” protections, a fair reading of the statute would appear to give broader preclusive application as well. The preclusive effect of the statute is geared toward defining, in a common sense, “non-rigid” application, the totality of the transaction in determining whether the state charge encompasses the same criminal act or transaction. As noted above, the state animal abuse charge was drafted to mirror the federal conspiracy charge in duration and scope, even down to the torture and killing of the identical dogs as referenced in both the federal and state indictments. The state charge need not have been drawn in such a “conspiracy-like” manner. Additionally, the state dogfighting promotion charge similarly mirrored the interstate sponsoring of dogfighting prong of the federal charge.

Not surprisingly, Virginia courts have historically been stingy in interpreting the statute in the defendant’s favor.¹⁴¹ The courts also sometimes resort to pro-prosecution procedural machinations, where some decisions favorable to the defense are designated as “not for official citation,” although they can be located in computerized databases.¹⁴² Thus, Vick prevailing on a state law challenge was far from a certainty. Nevertheless, the Virginia Supreme Court has not rendered a definitive interpretation of the statute. As applied to Vick’s case, the most reasonable interpretation of the statute would hold that the charged federal conspiracy constituted the “same act” as the charged state law substantive offenses, thus barring the state prosecution in its entirety.

As noted above, this interpretation also squares with a reasonable understanding of the relevant legislative history, which indicates the statute was designed to provide a defendant with more protection than the limited protection available from a narrow *Blockburger* “same elements” test, which appears to be the state constitutional standard. In such circumstances, the

141. See e.g., *Bolton*, 451 S.E.2d at 689–91; *Billington*, 412 S.E.2d at 463–64.

142. See, e.g., *Slade v. Commonwealth*, No. 2664-98-3, 2000 Va. App. LEXIS 514 (Va. Ct. App. July 18, 2000) (unlawful discharge of firearm charge deemed “same act” as subsequent prosecution for animal cruelty and thus barred under statute).

statutory enactment should be interpreted in a manner so as not to make it merely superfluous with the state constitutional provision.¹⁴³

Unfortunately, as noted above, Vick chose not to challenge the state charges on this ground despite the well-publicized initial bravado by counsel that they would do so. Thus, with the decision not to contest the charges on this ground and Vick's admissions as part of the federal plea, his guilt on the state charges—and the possibility of additional consecutive time—was a foregone conclusion.

Vick was also fortunate, if not downright lucky. Having taken no proactive steps to protect himself from a subsequent state prosecution and quickly entering federal prison in the hopes of speedily serving his sentence so he could be eligible to play in 2009, Vick seemingly was unaware that pending unresolved state charges would prohibit his entry into the halfway house program.¹⁴⁴ Thus, when the state charges were filed, Vick ultimately had to forgo meritorious legal challenges because litigating those issues would take up a considerable amount of time—and the state charges would have remained pending and unresolved.¹⁴⁵

In this procedural posture, the State had Vick over the proverbial barrel. Vick had to resolve the state charges from a position of considerable weakness and desperation. Luckily, the state prosecutor was willing to resolve the charges without requiring additional jail time. The state prosecutor agreed to accept a plea where Vick would plead guilty to the dogfighting charge and the animal cruelty charge would be dismissed.¹⁴⁶

Vick pled guilty to the one state felony and received a suspended sentence that added one additional year of probation.¹⁴⁷ This is a “great” result only if one ignores the fact that the twenty-three-month sentence was oppressive and

143. Most of the reported Virginia lower court decisions that rule against the defendant seem to interpret the statute unduly narrow and embody a technical “*Blockburger*” same elements test. *See, e.g.,* *Londono v. Commonwealth*, 579 S.E.2d 641,649 (Va. Ct. App. 2003) (federal possession and drug conspiracy conviction do not bar subsequent state prosecution for transporting same drugs into state because acts that made up federal charge occurred within the state, while Virginia charge occurred the moment illegal drugs penetrated the borders of the Commonwealth); *see also Bolton*, 451 S.E.2d at 689–91; *Billington*, 412 S.E.2d at 463–64.

144. *See* discussion *supra* notes 70-72 and accompanying text.

145. As noted above, the state prosecutor had indicated a preference to wait until Vick completed his entire federal sentence before commencing with the state prosecution because of the financial impact to the county. *See Prosecutor: Vick's Virginia Dogfighting Trial*, *supra* note 108.

146. *See* Mark Maske, *Vick Pleads Guilty to State Charge*, WASHINGTONPOST.COM, Nov. 25, 2008, <http://views.washingtonpost.com/theleague/nflnewsfeed2008/11> (describing Vick's guilty plea to state dogfighting charge, dropping of animal cruelty charge, and imposition of three-year suspended sentence).

147. *Id.*

should have never been imposed in the first place and also ignores the fact that the state prosecution should have been prevented in its entirety.

In any event, the prosecutorial decision to permit the case to be resolved on these terms exposes the absurdity of the entire prosecution. The prosecutor was so intent on bringing additional state charges but was willing to resolve them without insisting on any additional prison time. Even more perplexing, the State agreed to drop the animal cruelty charge as part of the plea agreement. Yet, the only conceivable justification for the state prosecution was to hold Vick criminally accountable for an actual animal cruelty offense—a result that the federal prosecution did not, and could not, accomplish. However, the State case spectacularly failed to accomplish this objective. By permitting Vick to plead to a single state dogfighting charge, the state prosecution needlessly duplicated the federal prosecution and vindicated no distinct state interest. Any objective analysis must conclude that the entire state case was misguided, wasteful, pointless, and unfair.

In any event, this action cleared the way for Vick's entry into a federal halfway house to complete the last few months of his sentence. All that awaited was his reinstatement in the NFL and for a team to sign him.

Vick, for his part, quickly took the predictable first step in his long road to rehabilitation in the immediate aftermath of his federal plea. Much like "Alex," the central character in Stanley Kubrick's cinematic masterpiece, "*A Clockwork Orange*," who underwent brief but intense aversion therapy to ostensibly rid himself of a lifelong attraction to extreme violence,¹⁴⁸ Vick claimed to have been immediately transformed. Despite a lifetime affinity for and substantial cultural immersion in all things dogfighting, Vick intoned that "[d]ogfighting . . . is a terrible thing."¹⁴⁹ Pundits and celebrities alike attested to Vick's sincerity and immediate rehabilitation. NFL Commissioner Goodell reinstated Vick for the 2009 season, subject to a six-week suspension at the

148. See *A Clockwork Orange, Plot Overview*, SPARKNOTES.COM, <http://www.sparknotes.com/lit/clockworkorange/summary.html> (last visited Sept. 10, 2010).

One day, after fighting with and killing a cellmate, Alex is selected as the first candidate for an experimental treatment called Ludovico's Technique, a form of brainwashing that incorporates associative learning. After being injected with a substance that makes him dreadfully sick, the doctors force Alex to watch exceedingly violent movies. In this way, Alex comes to associate violence with the nausea and headaches he experiences from the shot. The process takes two weeks to complete, after which the mere thought of violence has the power to make Alex ill. *Id.*

149. Jerry Markon & Jonathan Mummolo, *Vick Pleads Guilty, Calls Dogfighting a Terrible Thing*, WASH. POST, Aug. 28, 2007, at A1.

outset of the season, which was subsequently reduced to two games.¹⁵⁰

This was hailed as a victory in some quarters. However, as noted above, his lengthy incarceration cost him the 2007 and 2008 seasons and virtually all of his considerable fortune. This seems excessive and the product of odd, indeed questionable, legal representation, as well as questionable prosecutorial discretion on all fronts.¹⁵¹ If nothing else, Vick's case stands as an important objective lesson in the perils and pitfalls of successive prosecutions. The case may offer some other important, albeit less apparent, lessons as well.

IV. LEAGUE DISCIPLINE: EMERGING EVIDENTIARY LESSONS FROM VICK'S PROSECUTIONS

Although Vick's case may not leave a lasting mark on federal dogfighting prosecutions or substantially change how society values canine life (although early, largely anecdotal evidence seems to be slightly tipping in a positive direction), it may emerge as a harbinger concerning the modern professional athlete's dilemma over how to navigate the often competing strategies and goals concerning preparation of a sound criminal defense and "cooperation with a commissioner" inquiry to determine whether particular conduct should result in a league suspension. The present contours of the issue are relatively new and just beginning to emerge, at least as far as professional football is concerned, because the NFL substantially altered key procedural aspects of its Personal Conduct Policy in 2007.

To some extent, the challenges of balancing competing interests of criminal defendants are not entirely new. Defense counsel representing politicians have long had to deal with clients who insisted that their political viability be factored into decisions concerning their criminal defense, often interfering with otherwise sound criminal defense strategy.¹⁵²

150. Vick recently completed a phenomenal 2010 season where he led the Philadelphia Eagles to a division championship and received a Pro Bowl selection based on a league wide vote of players, coaches, and fans. See Gregory, *supra* note 12.

151. The length of the prison term seems excessive for the reasons noted above, a legal view not diminished by Vick's post-release comments that prison was "the best thing . . . that ever happened to me." Posting of Mike Florio to *Pro Football Talk: Vick Calls Prison "The Best Thing That Ever Happened to Me"*, <http://profootballtalk.nbcsports.com/2010/10/03/vick-calls-prison-the-best-thing-that-ever-happened-to-me/> (Oct. 3, 2010, 11:18 EDT). Moreover, Vick, upon later reflection, subsequently amplified his earlier comment and suggested that six months incarceration likely would have been sufficient. Peter King, *Back to Prison With Michael Vick*, SPORTS ILLUSTRATED, Mar. 28, 2011 at 18.

152. A common problem concerns a defendant politician wishing to testify to maintain electoral viability even if sound defense strategy indicates otherwise. See, e.g., Boris Kostelanetz, *White Collar Crime: The Defendant's Side*, in THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 1048, 1056 (2d ed. 1989) (arguing that generally a white collar defendant should not testify). For

Vick's lack of candor at the outset of the criminal investigation put him in poor graces with the prosecutors, who unsurprisingly viewed his lack of candor as lying, if not outright obstruction. This hampered Vick's opportunity for a lenient resolution from the criminal justice system and effectively eliminated the possibility that the matter could be resolved utilizing noncriminal prosecution alternatives. Vick also hurt his case with the Commissioner by similarly lying about his involvement in dogfighting. As noted above, Vick appeared to have been primarily concerned that his involvement with dogfighting would expose a tie to gambling, long considered the most serious transgression for a professional athlete because of its substantial undermining effect on the integrity of the game.¹⁵³ Thus, at the

example, the late former Alaska Senator Ted Stevens was indicted on corruption charges. He pressed for a quick trial in the hopes of obtaining an acquittal prior to the 2008 general election and eschewed the long-standing conventional wisdom concerning whether to testify. He testified at his criminal trial, looked foolish, and was convicted. His conviction was later vacated on unrelated prosecutorial misconduct grounds, although, in fairness, the haste in which the prosecutors were forced to present the case may have contributed to their ethical lapses that ultimately doomed the prosecution. For an overview of the prosecutorial missteps in the Stevens case, see Anna Stolley Perskey, *A Cautionary Tale: The Ted Stevens Prosecution*, WASH. LAWYER, Oct. 2009, at 18. On the other hand, egomaniacal former Illinois Governor Rod Blagojevich publicly professed his innocence after his indictment on corruption and related charges concerning, inter alia, an alleged scheme to sell President Obama's former senate seat. He appeared as a contestant on "Celebrity Apprentice," and during his opening statement of his federal public corruption trial, his counsel "guaranteed" he would testify. However, with his electoral career seemingly over in any event, sound defense strategy prevailed, and the defense rested without calling any witnesses. Defense counsel said they were "divided on the wisdom of their client testifying." Peter Slevin, *After Vowing to Testify, Blagojevich Chooses Silence*, WASH. POST, July 22, 2010, at A4. After seven weeks of testimony and two weeks of deliberations, Blagojevich was convicted on one lone count, and the jury was deadlocked on the other twenty-three counts. See Jerry Markon & Carol D. Leonnig, *Blagojevich is Convicted on Just 1 of Count of 24*, WASH. POST, Aug. 18, 2010, at A1. Keeping in character, Blagojevich celebrated the verdict, asserted his innocence, and did not rule out future runs for political office. *Blagojevich Won't Rule Out Return to Politics*, NPR.ORG, Aug. 22, 2010, <http://www.npr.org/templates/story/story.php?storyId=129361520>.

A somewhat similar issue also arises in so-called "Upjohn" corporate settings, where an employee is called in to discuss matters with corporate counsel and the employee is advised that if he does not cooperate he will be fired and, if he does cooperate, his statements may be disclosed to law enforcement. See David M. Brodsky et al., *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 95 n.67 (2009). Of course, in the context of a personal conduct investigation, the focus is not some generalized omnibus corporate inquiry where there is no suspicion of a particular employee; the athlete is the specific target or object of identifiable alleged misconduct that is the sole focus of the investigation.

153. The focus on gambling as detrimental to the best interests of the sport goes back at least to the "Black Sox" scandal during the 1919 World Series, where gamblers allegedly bribed players to throw the World Series. The scandal, in turn, led to the creation of the modern office of the baseball commissioner. See generally Janine Young Kim & Matthew J. Parlow, *Off Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 575 (2009). Other notorious cases abound. Baseball's all-time hit leader, Pete Rose, was banned from baseball for life for gambling on baseball games while he was a manager, which has spawned substantial controversy

outset, Vick feared far more serious punishment from the football commissioner for involvement in gambling than he did from the legal system for dogfighting.¹⁵⁴ This adversely affected his strategic decisions.

The severe punishments meted out by the commissioners of the major sports to athletes for violations of the respective “personal conduct” policies represent a relatively new and vitally important development in the representation of professional athletes in trouble with the law. Professors Janine Young Kim and Matthew Parlow note

[i]n 2007, the NFL implemented its new Personal Conduct Policy [The policy]requires that “[a]ll persons associated with the NFL,” including the players, “avoid ‘conduct detrimental to the integrity of and public confidence in the National Football League.’” An athlete can be punished for such detrimental conduct, *even if his actions do not result in a criminal conviction*. This approach is in stark contrast to the NFL’s previous conduct policy, which required the NFL . . . to withhold punishment of an athlete unless there was a conviction or some form of plea by the athlete.¹⁵⁵

In Major League Baseball, as illustrated by the recent Barry Bonds perjury

and kept Rose out of the Hall of Fame. In football, stars Alex Karras and Paul Hornung were suspended for the 1963 season for gambling on NFL games. See Jeff Merron, *Top 10 Suspensions of All-Time*, ESPN.COM, <http://espn.go.com/page2/s/list/suspensions.html> (last visited Apr. 13, 2011). Joe Namath was forced to briefly retire in 1969 when NFL Commissioner Pete Rozelle demanded that Namath divest himself of an interest in Bachelors III Nightclub in New York, which was thought to be an establishment frequented by known gamblers and underworld figures. Gary Ronberg, *To Be a Good Joe, It Takes a Hard Sell*, SPORTS ILLUSTRATED, June 28, 1969, at 18–19. The present NFL policy on gambling is part of the current NFL Collective Bargaining Agreement. NAT’L FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, app. C, sec. 15 (2006). (“Integrity of Game” provision, which gives commissioner authority to suspend a player who “knowingly associates with gamblers or gambling activity”).

154. Vick was not alone in making that assessment. For example, during the early part of the 2009–10 season, National Basketball Association (NBA) star Gilbert Arenas brought weapons into the team locker room in Washington, DC, in violation of both NBA rules and local firearms laws. At first, Arenas did not seem particularly concerned about criminal prosecution and mocked the process by pretending to shoot his teammates with his fingers in a pre-game warm-up. A color picture on the front page of the Washington Post sports section captured a smiling Arenas “shooting” his laughing teammates. See Michael Lee, *Personal Foul; Arenas Pretends to Shoot Teammates Before 104-97 Win Over 76ers*, WASH. POST, Jan. 6, 2010, at D1. Arenas indicated he felt no remorse because he did nothing wrong, and in response to a direct question about whether he feared the NBA Commissioner David Stern more than the law, he noted that “Stern is mean” and suggested that Stern would succumb to pressure and punish him before the legal process played out, effectively indicating he feared Stern more than the judicial process. *Id.*

155. Kim & Parlow, *supra* note 153, at 577–78 (emphasis added).

case, the Bay Area Laboratory Co-operative (BALCO) steroids investigation,¹⁵⁶ and the Mitchell Report, which was compiled under the auspices of the commissioner, it is well settled that information obtained by or provided to the commissioner's office is subject to criminal subpoena or search warrant and, thus, may be used in subsequent criminal investigations and prosecutions.¹⁵⁷ In professional football, NFL Commissioner Goodell seems to generally prefer to wait until criminal charges are "resolved" prior to seeking a meeting with a player or imposing punishment pursuant to the new Personal Conduct Policy (although nothing in the policy requires this).¹⁵⁸ This creates an interesting situation concerning the legal avenues available to a prosecutor to obtain information from the NFL commissioner.

These "meetings" with the Commissioner are problematic—and are certainly more risky than previously considered. These meetings may be deemed "private," "closed door," or even "confidential" in the colloquial sense, but they are not privileged under federal evidence law. In personal conduct investigations, the commissioner expects full cooperation, which generally means full disclosure. An athlete who declines to talk out of self-

156. For a thorough account of the steroids scandal in Major League Baseball, see MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS* (2007).

157. In the BALCO case, which led to Bonds federal perjury indictment, the government seized, pursuant to a search warrant, various drug test results that were, according to an agreement between baseball and the players union, supposed to remain anonymous and should have been destroyed prior to the time the government executed a criminal search warrant. The Ninth Circuit ultimately ruled the government's seizure of the information was lawful. *United States v. Comprehensive Drug Testing, Inc.* 473 F.3d 915, 920–24 (9th Cir. 2006). A subsequent en banc opinion limited the government's use of some of the evidence but left undisturbed the ruling concerning the lawfulness of the search for test results for which probable cause had been established. *See generally* *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (en banc).

As a result of the steroids fiasco in baseball, the commissioner authorized former Senator George Mitchell to investigate and issue a REPORT TO THE COMMISSIONER OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (2007) [hereinafter MITCHELL REPORT]. In a memorandum attachment, MLB Player Association leader Donald Fehr cautioned players that any information gathered by Mitchell was not legally privileged and Mitchell's pledge to honor confidentiality in the report was not to be confused with the legal reality that Mitchell would not, and could not, pledge the information will actually remain confidential. *Id.*, app. at C-9-10. In particular, the information would be subject to disclosure pursuant to a valid criminal subpoena. *Id.* Not surprisingly, several players refused to cooperate, often citing as reason for their refusal the possibility of a criminal investigation. *See id.* at 121.

158. Goodell suspended Vick immediately after the terms of the federal plea agreement containing his admissions were disclosed but well before state charges were filed. Goodell arranged a meeting with Pittsburgh Steelers quarterback Ben Roethlisberger one day after the local Georgia district attorney determined there was insufficient evidence to press sexual assault charges. Interestingly, Roethlisberger declined to be interviewed by Georgia authorities as part of the criminal investigation.

incrimination concerns can expect the commissioner to deem such actions uncooperative, rendering the possibility that any suspension imposed would be subsequently reduced unlikely.¹⁵⁹

The professional sports leagues are private entities. As such, constitutional due process protections are not applicable to their conduct, although the athletes may receive some procedural protections as a result of the collective bargaining process.¹⁶⁰ Uniform procedures are often lacking. The leagues possess internal security personnel to investigate matters relating to on-field issues but generally do not have formal private investigative forces to investigate off-field incidents such as sexual assault, domestic violence, or DUI allegations as a matter of course.¹⁶¹ Thus, the leagues are heavily dependent on the media, Internet postings, and public records to provide the factual impetus to trigger the scrutiny of the league to determine whether a “personal conduct” violation has occurred.¹⁶²

159. Suspension reductions are common when the commissioner deems the player has sufficiently cooperated and acted responsibly. This is the overriding motivation for the player to provide full cooperation. Notably, both Vick and Ben Roethlisberger had their six-game suspensions ultimately reduced to two and four games, respectively. In the context of a sixteen-game season, every game is crucial.

The Brett Favre-Jenn Sterger controversy is also noteworthy. Favre faced a league investigation based on allegedly sending inappropriate text messages and photographs of a sexual nature. Although he did not appear to be under criminal investigation in any jurisdiction, he faced potential civil liability. Favre apparently recognized that “cooperation” with the commissioner could result in serious adverse legal consequences and, thus, declined to fully cooperate. Favre was ultimately fined \$50,000 for “lack of candor and failure to cooperate with a league investigation.” See Judy Battista, *Favre Fined \$50,000 But Avoids Suspension*, N.Y. TIMES, Dec. 30, 2010, at B10.

160. For a scathing critique on the NFLPA’s acquiescence to the 2007 Personal Conduct Policy, see Adam Marks, Note, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1581 (2008). In any event, collective bargaining protections may not be as helpful as they once were. For example, MLB long ignored the steroid problem by telling Congress and the public that it could not unilaterally adopt a tougher enforcement policy because of the terms of the collective bargaining agreement. Congress held high profile public hearings, essentially telling baseball to clean up its act or Congress would enact legislation on the subject. See MITCHELL REPORT, *supra* note 157, at 56 (quoting Sen. John McCain at a 2004 hearing threatening congressional action).

161. Perhaps this is for good reason. For example, in 1990, the late New York Yankees owner George Steinbrenner was banned from baseball for life when he hired a gambler to obtain damaging information on Yankees star Dave Winfield. When Steinbrenner was reinstated in the spring of 1993, he appeared on the cover of Sports Illustrated posing as Napoleon. *George II: George Steinbrenner Rides Back Into Baseball*, SPORTS ILLUSTRATED (cover photo), March 1, 1993.

162. In Vick’s case, Commissioner Goodell simply had to review the public documents and Vick’s admissions in the plea agreement. For Roethlisberger, a sexual assault suspect involving college coeds, the first time a suspension was imposed without a criminal conviction, Goodell issued a public statement indicating he had reviewed “extensive volume of material released by [law enforcement authorities]; public comments by . . . [the prosecutor]; . . . a personal interview with

The athlete cannot invoke the privilege against self-incrimination without consequence.¹⁶³ As with baseball, any statements made to the commissioner, or any other evidence in the possession of the commissioner, can be obtained by the government with a search warrant or otherwise be compelled to be divulged via grand jury subpoena and, thus, may be used against the athlete in a subsequent criminal prosecution.¹⁶⁴ This now poses an increased concern because a prosecutorial decision not to pursue criminal charges—which would normally precede any personal conduct investigation based on conduct that did not result in a conviction—is rarely, if ever, an irrevocable legal decision.

The pre-2007 state of affairs may have been far too lax in that the NFL did not act until the criminal process was complete and resulted in a conviction and then often imposed little, if any, serious punishment, fine, suspension, or other form of discipline.¹⁶⁵ However, from a criminal justice fairness standpoint, this inadequate simplicity had a virtue. Because the criminal

Roethlisberger . . . ; and information learned by the NFL office in the course of examining the . . . matter.” *Ben Roethlisberger Suspension: Suspended Six Games*, http://www.huffingtonpost.com/2010/04/21/ben-roethlisberger-suspen_n_546097.html (Apr. 21, 2010, 11:32 EST, updated June 21, 2010, 5:12 EST).

163. In other words, an athlete can refuse to answer the commissioner’s questions or can refuse to attend a meeting altogether, but both actions may be used by the commissioner as negative evidence against the athlete, and lack of full cooperation itself may be grounds for disciplinary action. Several baseball players declined to cooperate with the Mitchell Report, citing the ongoing federal criminal investigation and related self-incrimination concerns. See MITCHELL REPORT, *supra* note 157, at 127. However, the Mitchell Report was focused on determining the extent of drug use in baseball; it was not focused on the actions of particular players in the context of a disciplinary investigation. Accordingly, baseball took no adverse action against those players who declined to cooperate because of self-incrimination concerns. The situation is, of course, markedly different if a player who is the subject of a personal conduct investigation declines to fully cooperate with the commissioner.

164. See discussion *supra* pp. 509-10 and note 157. In the criminal prosecutions as part of the BALCO investigations and illegal steroid distribution, despite these “private confidentiality clauses” between the players and MLB, the test results were not destroyed as agreed to and were ultimately obtained by federal prosecutors as a result of a search warrant. In the same vein, the NFL commissioner would be legally compelled to testify concerning any statement made by him to an athlete as part of a league’s good conduct inquiry, whether he wanted to or not and whether or not the athlete consented to such disclosure.

As this article goes to press, Roger Clemens’ federal perjury case is moving toward trial. Clemens’ counsel has indicated he will seek to subpoena various information gathered as part of the Mitchell Report. *Already Eager to Defend Himself in Court, Clemens Speaks Out*, WASH. POST, Mar. 31, 2011, at D8.

165. Former NFL player Leonard Little was convicted of involuntary manslaughter arising out of a 1998 incident when he killed a woman when he ran a red light while driving while intoxicated. He received a lenient criminal sentence and was permitted to resume his football career after serving an eight-game suspension. Josie Karp, *Deadly Reminder: Rams Linebacker Little Coping With Fatal Past*, CNN.COM., Jan. 28, 2000, http://sportsillustrated.cnn.com/thenetwork/news/2000/01/27/cnncomprofile_little/.

prosecution phase was complete and had resulted in conviction,¹⁶⁶ the athlete did not have to fear being whipsawed into cooperating with the commissioner and incriminating himself in an effort to provide “full cooperation” to facilitate an eventual reduction of any suspension where a prosecutor would then be able to obtain the incriminating information for subsequent use in a criminal prosecution. This possibility now exists.

As noted above, although the new NFL policy does not require a prior conviction, a favorable criminal law “resolution” in the form of a decision by the prosecutor not to pursue charges is virtually never, legally, a final decision. That decision—like the state prosecutor’s initial decision in Vick’s case not to pursue a state case—can almost always be revisited, thus making the player’s statements obtained by the commissioner available for use in a criminal prosecution if the prosecutor decides to revisit the issue and bring charges even after having initially decided not to do so.

The possibility that this scenario may occur must be recognized, particularly because the prosecutor now might be able to mine a new potential treasure trove of evidence—the suspect’s direct statements gathered by the commissioner.¹⁶⁷ To a publicity-hungry prosecutor, the temptation to mine

166. Countless athletes have faced criminal prosecution for narcotics offenses. See MITCHELL REPORT, *supra* note 157, at SR-14-15. Drug and weapons charges are disturbingly common occurrences for professional athletes. See NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, PERSONAL CONDUCT POLICY 1 (2008), available at http://www.prostaronline.com/personal_conduct_policy.pdf (noting that discipline may be imposed for, inter alia, unlawful possession of a gun and offenses relating to prohibited substances and substances of abuse). These offenses are also subject to prosecution under both state and federal law. Thus, even before the advent of the new policy, similar timing access to commissioner information issues, could have arisen but never did. There was little need to rely on commissioner-obtained information when there was already a public record of conviction. Equally as significant, no athlete prior to Vick faced both state and federal prosecution for the same underlying conduct. This further underscores the unfair treatment of Vick.

167. Significantly, this is often crucial evidence, particularly in investigations where the suspect’s intent is the central issue in the case, and the type most often lacking as part of a criminal investigation where the suspect invokes his Fifth Amendment rights or otherwise declines to cooperate with law enforcement. This is why law enforcement places such a premium on obtaining a confession and, conversely, why many investigations ultimately do not result in criminal charges. The point is well understood in the related trial context where guilt must be established beyond a reasonable doubt. See Glanville Williams, *The “Right of Silence” and the Mental Element*, 1988 CRIM. L. REV. 97, 102 (“by not testifying and yet denying the mental element, the defendant can often present the tribunal . . . with an insoluble problem”). Therefore, prosecutors and criminal investigators who initially had to forgo prosecution because the suspect would not talk or otherwise provide any information will be naturally quite interested in reviewing any subsequent statements made by the suspect that might be of sufficient significance to reverse the original declination decision. See generally Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 6 (1986) (noting the Supreme Court’s position that “[a]dmissions of guilt are more than merely ‘desirable,’ . . . they are essential to society’s compelling interest” in fair and effective law enforcement) (citations omitted).

this potentially powerful dispositive evidence may be irresistible. Thus, it is only a matter of time before a prosecutor who previously decided not to pursue charges changes his mind and seeks evidence from the commissioner through the criminal process.

This undoubtedly would constitute an unintended consequence. The NFL commissioner, acting unilaterally in devising the new, supposedly enlightened, policy to cover conduct that did not necessarily result in a prior criminal conviction, almost certainly did not envision this scenario whereby he could become a critical conduit in providing the key information to resurrect a criminal prosecution that had previously been declined. The first time a criminal subpoena arrives at the league offices, the NFL will have to consider whether to revisit or otherwise “tweak” this policy.

At present, the current state of affairs remains problematic. While the contours of the future are beginning to take shape, the form is quite hazy. Clearly, focusing solely on how best to defend the criminal charges is not sufficient, but no new coherent model has emerged. This creates a difficult situation when other considerations must now be factored into the equation as to how to most effectively defend criminal charges, possible civil claims, deal with a commissioner’s personal conduct investigation, or all of them. Proceeding case-by-case under a trial-and-error method yields many casualties. A difficult road lies ahead.¹⁶⁸

168. For a discussion of other potential problems with the NFL Personal Conduct Policy, see Bethany Withers, Note, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 174–76 (2010) (noting examples where players have been disciplined by the league and subsequently been found not guilty of criminal charges).

Lastly, Vick’s case also exposes another unavoidable risk in these situations. Perhaps there was an earlier time when powerful defendants could expect loyalty and silence from underlings who would not testify against them under any circumstances. The old Mafia code of “omerta” was in play. See LETIZIA PAOLI, *MAFIA BROTHERHOODS: ORGANIZED CRIME, ITALIAN STYLE* 109 (2003) (“omerta” is described as popular southern Italian code of silence that implies “the categorical prohibition of cooperation with state authorities”). “Omerta” is graphically illustrated in one of the opening scenes in *Goodfellas* when a young Henry Hill is “pinched” for the first time, is sent to reform school, and, upon his release, is the guest of honor at a Mafia party celebrating his adherence to the cardinal rule of not “ratting out” anyone. *GOODFELLAS* (Warner Bros. 1990). It is also more ominously on display in *Godfather II* when Frank Pentangeli ultimately refuses to testify against Michael Corleone at a Senate Investigating Committee and thereafter commits suicide after getting assurances regarding the safety and well-being of his family. *GODFATHER II* (Paramount Pictures 1974).

Vick, by lying about his involvement in dogfighting and related gambling, even after some of his criminal companions had already been arrested, obviously thought that “home boy” superstar loyalty would protect him and that his confederates would not implicate him. Vick was wrong, and his lack of candor—once exposed—contributed to an even harsher sentence.

The code of “omerta” no longer protects Mafia dons and, except perhaps for Barry Bonds, *see supra* note 27 and accompanying text, should not be expected to protect star athletes. Federal

CONCLUSION

Michael Vick's depraved conduct was deserving of punishment. However, the actual criminal prosecutions he faced were collectively excessive and questionable exercises of prosecutorial discretion. Vick should have been prosecuted solely by state authorities. Vick's own conduct, which made this most appropriate outcome problematic, does not eliminate the importance of critically evaluating the manner in which these prosecutions unfolded.

The avalanche of publicity generated by these prosecutions has not translated into any significant change concerning how society values dogs. Moreover, Vick's high-profile dogfighting federal prosecution does not appear to have elevated dogfighting as a substantial federal prosecutorial priority. The prosecution has served as an impetus for several states to strengthen and increase the severity of punishment for local dogfighting offenses as well as increase the number of local prosecutions. These legal developments are for the good and reflect a reasonable and responsible allocation of law enforcement responsibility in our federalism system.

Other aspects of Vick's case remain troubling and perplexing. Both state and federal prosecutors exercised questionable, if not abusive, discretion. Vick received an unduly harsh federal sentence, a result likely facilitated, at least in part, by weird, if not bad, legal advice. No steps were taken to protect Vick from an avoidable and likely improper subsequent state prosecution that resulted in an additional felony conviction and an extra year of probation supervision.

It could have been much worse. Vick was fortunate to gain admission into a halfway house near the end of his sentence by removing the obstacle of unresolved pending charges without an increase in actual prison time. However, viewed in its entirety, he did not avoid the lurking pitfalls of successive prosecutions and paid quite a heavy price for his failure to do so.

One ignores these lessons at considerable peril. It is of little consequence that successive prosecutions are relatively uncommon. As Congress continues to enact more and more federal criminal statutes, which overlap with existing state criminal statutes, successive prosecutions will inevitably occur with greater frequency. Therefore

criminal law has too many powerful inducements—law enforcement has long used plea bargains, lenient sentencing recommendations, and federal witness protection to obtain the testimony of underlings or lesser lights to implicate the higher-ups in organized criminal activity. In evaluating the new calculus of potential criminal prosecution and discipline from the commissioners' offices, only in the rarest of circumstances should a professional athlete expect that others will keep silent and risk punishment themselves in order to protect a superstar.

[i]t is important to understand that the significance of the prospect of a successive or dual prosecution far exceeds the mere number of such prosecutions. The federal government authorizes approximately 150 successive prosecutions each year. The number of successive prosecutions undertaken by the various states clearly far exceeds that number, but relative to all state prosecutions, is still quite small. The legal possibility that these prosecutions may be brought hangs over the head of every defendant. Consequently, the possibility of a successive prosecution based on the same conduct influences plea bargains, cooperation agreements, immunity agreements, and other related issues concerning the disposition of a case.¹⁶⁹

Again, Vick navigated this difficult legal landscape and did not come out unscathed.

Lastly, Vick's case foreshadows a new dimension as well—the quagmire that athletes now face concerning the possible use of evidence obtained by the commissioner for use in a subsequent criminal or civil investigation—and reveals the contours of an uncertain future that is only beginning to take shape. Professional athletes can no longer rely on a predictable order of investigations as they try to run the gauntlet between criminal prosecution and possible league discipline. The new NFL Personal Conduct Policy permits league discipline without a prior adjudication of criminal guilt. Grandstanding prosecutors, who were evident in Vick's case, may be tempted to revisit earlier non-binding prosecution declination decisions and could seek to obtain information from the league investigation that was generated after the initial declination decision.

Only time will tell how often prosecutors will seek to mine this heretofore unavailable source of potentially incriminating information. Many might find the temptation irresistible. This may eventually eclipse the dogfighting angle and emerge as the most important legal legacy of this case. In all likelihood, the NFL did not adopt its new policy with this scenario in mind. If this becomes a recurring issue, the league may have to revisit this policy.

Meanwhile, the larger policy debate concerning the appropriate

169. KURLAND, *supra* note 62, at xxiv–xxv. A leading federal criminal law text makes a similar observation that 150 such prosecutions annually may seem a “rare” occurrence when compared to the approximately 65,000 federal prosecutions each year, but “rarity” is a relative notion. In an absolute sense, 150 policy exceptions still could be considered “frequent.” See NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 106–07 (5th ed. 2010).

relationship between state and federal law enforcement continues in fits and starts. And the lurking pitfalls of successive prosecutions, now further amplified by a third pillar—the possibility of investigation and punishment from the league commissioner—will continue to vex the fair administration of criminal justice. Vick’s case has begun to reshape this criminal law landscape. Future cases, where different decisions are made when athletes are confronted with similar concerns, will further define this uncertain legal terrain.