THE PROBLEM OF SPORTS VIOLENCE AND THE CRIMINAL PROSECUTION SOLUTION

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INTRODUCTION

"As long as I'm gonna walk him, I might as well hit him."
— former Los Angeles Dodgers pitcher Stan Williams, after hitting Hank Aaron in the head with a fastball on a 3-0 pitch.[1]

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[1] Mark Kram, *Their Lives Are on the Line*, SPORTS ILLUSTRATED, Aug. 18, 1975, at 38.

"The game is legalized violence. . . . I can go into a game and just literally try to break somebody's neck . . . . It happens all the time."

— former Dallas Cowboys tight end Jean Fuggett.[2]

"I just don't see, no matter how wrong the act is, how anything that happens in an athletic contest can be criminal."

— former Boston Bruins player David Forbes.[3]

While the sentiments expressed above may be considered outrageous by most reasonable people, they perhaps crudely reflect the underlying and largely unexpressed sentiment of many athletes and sports spectators — that acts of violence occurring in the context of competitive sports are acceptable and should be exempt from criminal liability. The specter of sports violence as a threat to our society has received extensive literary review.[4] However, practical attempts to cure this problem have received little support from the public.[5] Violence has been associated with sports since the ancient Greeks and Romans engaged in combative rituals.[6] However, centuries later, society remains unable to find a way to effectively extricate unnecessary violence from the sports it enjoys so much.

Recent decades have witnessed the evolution of civil lawsuits between sports participants for tortious actions.[7] The success of civil lawsuits,[8] although somewhat limited, represents an encouraging sign that society is willing to hold sports participants accountable for their actions. Additionally, commentators have been quick to devise non-prosecution-oriented methods of curbing sports violence, including the implementation of self-regulation by sports leagues,[9] the creation of a sports arbitration court,[10] and the establishment of a federal professional sports

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2 William Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425, 437 n.63 (1976–77).

3 *See* Gary W. Flakne & Allan H. Caplan, *Sports Violence and the Prosecution*, 13 TRIAL MAG. 33, 34 (1977).

4 *See, e.g.*, Cameron Jay Rains, Note, *Sports Violence: A Matter of Societal Concern*, 55 NOTRE DAME L. REV. 796 (1980).

5 *See* Bradley C. Nielsen, Note, *Controlling Sports Violence: Too Late for the Carrots — Bring on the Big Stick*, 74 IOWA L. REV. 681, 694 (1989) (explaining that legislators did not want to spend federal funds to control sports violence).

6 *Id.* at 682.

7 *See* Gary Norman Jahn, Comment, *Civil Liability: An Alternative to Violence in Sporting Events*, 15 OHIO N.U. L. REV. 243, 244–49 (1988); Barbara Svoranos, Comment, *Fighting? It's All in a Day's Work on the Ice: Determining the Appropriate Standard of a Hockey Player's Liability to Another Player*, 7 SETON HALL J. SPORT L. 487, 496–99 (1997).

8 *See* Jahn, *supra* note 7, at 244–48.

9 *See* Don Eugene-Nolan Gibson, *Violence in Professional Sports: A Proposal for Self-Regulation*, 3 COMM/ENT L.J. 425, 447–53 (1980).

10 *See* Chris J. Carlsen & Matthew Shane Walker, Note, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399, 399 (1982).

violence commission.[11] While these proposals all have some merit and in fact might effectively deter sports violence, extended discussion of these proposals is beyond the scope of this article.

In this article, we examine the proposition that criminal prosecution of sports participants could provide an effective remedy to the problem of sports violence. Section I surveys the widespread violence that has permeated most major sports and explains how sports violence adversely affects the public interest. Section II considers the viability of criminal prosecutions in sports by discussing the foundations that have been laid for sports prosecutions, both in Canada and in the United States. Finally, Section III analyzes some of the defenses and obstacles that might arise in the prosecution of sports participants. We conclude that criminal prosecution provides a viable and appropriate method of dealing with the excessively violent actions that too often occur in the context of athletic competition.

I. THE PROBLEM

Often, a threat to the public interest is largely ignored if it does not have immediate and easily recognizable effects. Such is the current problem with sports violence. In this section, we endeavor to bring this problem to the fore by outlining the excessive violence pervasive in the sports community. While instances of excessive violence can be found in almost all sports, we focus here on those sports that are traditionally the most conspicuous for the violence problem and that tend to draw the most media attention. In the second part of this section, we argue that excessive violence in sports adversely affects the public interest.

A. SURVEY OF SPORTS VIOLENCE

The proposition that excessive violence is prevalent in sports is, to a large degree, self-evident. However, acts of excessive violence by players usually occur sporadically and are soon forgotten. Thus, although the public is momentarily outraged by the vicious conduct of a player, spectators are soon lulled into a sense of well-being by the passage of time. When the violent acts of athletes are considered in the aggregate, however, it becomes apparent that a significant problem exists.

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[11] *See* Ronald A. DiNicola & Scott Mendeloff, *Controlling Violence in Professional Sports: Rule Reform and the Federal Professional Sports Violence Commission*, 21 DUQ. L. REV. 843, 879–83 (1983); Kevin A. Fritz, Note, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L.J. 189, 222–28 (2002) (proposing a "National Sports Policy Commission" to handle cases between league self-regulation and the courts).

1. *Football*

During the early twentieth century, football almost became extinct as a result of its violent nature. In 1905 after a particularly violent football incident,[12] President Theodore Roosevelt threatened to abolish football by executive order unless the game could be made less violent.[13] Although football managed to persevere, it is conceivable that had Roosevelt witnessed the degree of violence in modern football, he would have carried out his threat.

One study indicates that between 1933 and 1976, organized football claimed the lives of 1,198 participants.[14] Incidents of extreme and unnecessary football violence certainly were not limited to football's infancy and persist well into the modern era.[15] In recent years, late hits on standout quarterbacks have led critics to charge that players make such hits in order to win by robbing opponents of their best offensive players.[16] Such incidents can cause extensive injuries and sometimes end careers.[17] Former Pittsburgh Steelers standout Lynn Swann, who suffered several concussions due to excessively violent play during the course of his career, at one time threatened to prematurely quit football, stating, "Extracurricular violence is increasing[,] and nothing is being done about it."[18] There is evidence that this type of violence has a "trickle down" effect on amateur and youth sports.[19]

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[12] *See* RICHARD B. HORROW, SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 6–7 (1980). Horrow recounts that in that 1905 college football game, the University of Pennsylvania's team attempted to win by reducing the Swarthmore team's star lineman to a bloody pulp. *Id.* Swarthmore won the game nonetheless.

[13] *Id.*

[14] Richard B. Horrow, *Violence in Professional Sports: Is It Part of the Game?*, 9 J. LEGIS. 1, 1 (1982) (citing Peterson & Scott, *The Role of the Lawyer on the Playing Field*, 7 BARRISTER 10 (1980)).

[15] John Keefe, *Violence in Sports Is on the Rise*, 67 A.B.A. J. 514, 514–15 (1981).

[16] *See* Bob Oates, *Defense in NFL a Dirty Game*, L.A. TIMES, Sept. 9, 2001, at D1.

[17] *See* Nielsen, *supra* note 5, at 685. In 1987, the Green Bay Packers' Charles "Too Mean" Martin slammed the Chicago Bears' Jim McMahon to the ground long after the play had ended, tearing McMahon's rotator cuff. The only punishment imposed on Martin was a two-game suspension. McMahon never regained his prior form and continued to be hampered by related shoulder injuries for the rest of his career. *Id.*

[18] Recent Decision, *A Professional Football Player Assumes the Risk of Receiving a Blow, Delivered Out of Anger and Frustration but Without Specific Intent to Injure*, 12 GA. L. REV. 380, 390 n.51 (1978). After being seriously injured by a blow to the head administered by another player, Swann said, "I almost retired. It wasn't the intimidation, it was the unnecessary brutality. I couldn't see playing a game and risking my life." Gibson, *supra* note 9, at 431 nn.55 & 56.

[19] C. Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1166 (2000). Particularly telling is a letter from a youth football player to Jack Lambert, a former linebacker for the Pittsburgh Steelers, remarking, "I hit some kid the other day and broke his arm, and when I did I thought of you." JOHN UNDERWOOD, DEATH OF AN AMERICAN GAME: THE CRISES IN FOOTBALL 70 (1979).

2. *Basketball*

Basketball experiences more incidents of violence than might be expected, given that it is generally considered to be a non-contact sport.[20] Probably the most well-known act of violence in basketball occurred in 1977, when Rudy Tomjanovitch of the Houston Rockets attempted to act as peacemaker in a fight between the Los Angeles Lakers' Kermit Washington and Houston's Kevin Kunnert.[21] As Tomjanovitch approached to break up the fight, Washington turned around and landed what Lakers assistant coach Jack McCloskey called "the hardest punch in the history of mankind."[22] Tomjanovitch suffered a fractured jaw, broken nose, skull fracture, facial lacerations, brain concussion and spinal fluid leakage from the brain cavity.[23] He sued the Lakers, and the jury awarded Tomjanovitch more than $3 million in actual and punitive damages (Tomjanovitch had asked for only $2.6 million).[24]

3. *Baseball*

Although baseball involves even less contact than basketball, it does have what has been called "the most dangerous weapon in sports," the beanball.[25] Its deadly nature is clear from the fact that in 1920, the Cleveland Indians' Ray Chapman was killed by a pitch from the New York Yankees' Carl Mays.[26] Pitchers often feel obligated to hit opposing players in revenge after their teammates have been hit.[27] Former Dodgers pitcher Don Drysdale has explained it this way: "[I]t was two

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20 These incidents include a notorious slugging match between the Boston Celtics' Dave Cowens and the Atlanta Hawks' Tree Rollins in 1977, DiNicola & Mendeloff, *supra* note 11, at 851; and a bench-clearing brawl involving the Miami Heat and the New York Knicks during the 1997 playoffs, JOHN MCGRAN, WORLD'S GREATEST SPORTS BRAWLS 33 (1998).

21 Rains, *supra* note 4, at 803. For an in-depth discussion of the incident, see JOHN FEINSTEIN, THE PUNCH: ONE NIGHT, TWO LIVES, AND THE FIGHT THAT CHANGED BASKETBALL FOREVER (2002).

22 Rains, *supra* note 4, at 803; *see also* Mary Carroll, *It's Not How You Play the Game, It's Whether You Win or Lose: The Need for Criminal Sanctions to Curb Violence in Professional Sports*, 12 HAMLINE L. REV. 71, 71 (1988) (explaining that the force of Washington's blow knocked Tomjanovitch backward onto the court, where he lay motionless and bleeding for several minutes). The surgeon who operated on Tomjanovitch described rebuilding his face as if it were a "jigsaw puzzle." The doctor added that "it was like trying to put a cracked egg back together with Scotch tape." *Id.*

23 Carroll, *supra* note 22, at 71 n.3.

24 Rains, *supra* note 4, at 803. The parties settled for $2 million before the case was heard on appeal. *See also* John Feinstein, *The Punch*, SPORTS ILLUSTRATED, Oct. 21, 2002, at 75. In addition, the NBA suspended Washington for sixty days and fined him $10,000. Fritz, *supra* note 11, at 192 n.21.

25 Gibson, *supra* note 9, at 432 (quoting Kram, *supra* note 1, at 32). A beanball is a pitch intentionally thrown at the batter's head for revenge, to intimidate, or out of frustration. *See* Nielsen, *supra* note 5, at 684.

26 Hechter, *supra* note 2, at 440. Chapman's death remains major league baseball's only beanball fatality.

27 *Id.*

for one. One of our guys, two of theirs."[28] This sort of retribution, dubbed "beanball wars," often leads to bench-clearing brawls.[29]

4. *Hockey*

Hockey's reputation as the most violent of all team sports is well deserved. Former National Hockey League president Clarence Campbell has openly admitted that players are under pressure to fight.[30] Sports attorney and agent Bob Woolf agrees that players are pressured to fight:

> The premium the NHL puts on fighting was reestablished every time I talked to a team on behalf of a draft choice. Invariably, the interview would get around to how well my client could fight . . . . To my endless amazement, the clubs — if they got the impression that the boy wasn't tough enough — frequently offered to enroll him in boxing classes.[31]

Not surprisingly, some players — called "enforcers" — are kept on teams primarily for their fighting ability and to intimidate opponents.[32]

B. SOCIETAL EFFECTS

It is evident from the accounts of violent play detailed above that excessive violence has had a pervasive influence on the world of sports. However, sports violence does not operate in a vacuum.[33] The proposition that sports violence has a detrimental effect on society is well documented in psychological and sociological studies.[34] Professional and amateur sports have become an integral part of our culture and national identity. Sports can be seen in one form or another at any time of day or night, and athletes are among the most publicized individuals in the

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28 Kram, *supra* note 1, at 37. During the 2000 World Series, New York Yankees pitcher Roger Clemens picked up the jagged barrel of the New York Mets' Mike Piazza's broken bat and threw it at Piazza. Clemens was later fined $50,000 for throwing the bat, but no criminal charges were filed. Murray Chass, *Yankees' Clemens Is Fined $50,000*, N.Y. TIMES, Oct. 25, 2000, at D6 (quoting Frank Robinson, the baseball official who imposed the penalty, as describing Clemens's action as "reckless"). During a 1999 college game, a pitcher beaned a batter standing in the on-deck circle, later claiming that the victim had been timing the pitcher's warmups. The victim, who was struck in the eye, suffered severe retinal damage and some permanent vision loss. The Sedgwick County, Kansas, district attorney considered prosecuting but declined to bring charges. Steve Zipay, *Questionable Decision: McSorley Ruling Renews Debate on How to Handle Violence in Sports*, NEWSDAY, Oct. 8, 2000, at C10.

29 *See* Nielsen, *supra* note 5, at 684–85.

30 Hechter, *supra* note 2, at 428. Campbell has also maintained that the NHL's main purpose is to sell tickets: "We must put on a spectacle that will attract people." *Id.*

31 BOB WOOLF, BEHIND CLOSED DOORS 146–47 (1976).

32 Gibson, *supra* note 9, at 430.

33 Nielsen, *supra* note 5, at 687.

34 *See, e.g.*, Brenda Jo Bredemeier, *Athletic Aggression: A Moral Concern*, *in* SPORTS VIOLENCE 49 (Jeffrey H. Goldstein ed., 1983).

world. In short, athletes' words and actions have become a prominent component of public discourse and cultural notions of acceptable conduct.

In *Seasons of Shame: The New Violence in Sports*, Robert Yeager describes a study conducted regarding the impact of sports violence on children: "Three physicians . . . singled out television sports for its strong tendency to foster an 'Evel Knievel' syndrome in kids. 'Televised violence,' they noted, 'especially during sporting events and news reporting,' is increasingly implicated in imitative and aggressive behavior by children."[35]

A similar study focusing on young hockey players yielded equally disconcerting results, concluding that "[v]iewing aggressive media models in hockey, and perhaps sports in general, does appear to have a systematic long-term impact on the behaviour of amateur players of different ages."[36] The pernicious effect of sports violence on the human psyche is not limited to children. A sociological nexus also exists between violence among sports participants and violence among spectators.[37] This point is tragically illustrated in the recent conviction of parent Thomas Junta, who beat Michael Costin to death in front of both men's children after a disagreement between the two about violent play in their sons' youth hockey game.[38]

Players will not refrain from using excessive violence as a weapon until incentives are provided for them to do so.[39] Given the social impact

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35 ROBERT C. YEAGER, SEASONS OF SHAME: THE NEW VIOLENCE IN SPORTS 207 (1976). Yeager cites another survey of teenagers that concluded "an internal vicarious reinforcement occurs as a result of viewing aggressive sports models. If a player acts in an aggressive manner, gets away with it, and is rewarded for his actions, the viewer has learned that aggression pays." *Id.* at 208–09 (emphasis omitted). *See also* Jeffrey H. Goldstein & Robert K. Arms, *Effects of Observing Athletic Contests on Hostility*, *in* PSYCHOLOGY OF SPORT: ISSUES AND INSIGHTS 288–96 (A. Craig Fisher ed., 1976) (noting correlation between viewing of sports violence and hostile behavior).

36 MICHAEL D. SMITH, VIOLENCE AND SPORT 117–18 (1983). The concept of athletes as role models is embedded in our society. Thus, when an athlete sanctions the use of excessive violence in sports, he adversely influences youth players. For example, premier hockey player Bobby Orr produced a book for young hockey players in which he instructed youngsters on the most effective way to win a hockey fight. *See* Clarke, *supra* note 19, at 1166 (citing BOBBY ORR & MARK MULVOY, BOBBY: MY GAME 224 (1974)).

37 *See* Gail Appleson, *Spectator Violence: What They See Is What They Do?*, 68 A.B.A. J. 404, 404 (1982). Appleson writes, "Although psychologists once thought that spectators could release their own aggressive urges simply by watching contact sports, some research shows just the opposite. . . . As people become experienced with violence, the need grows for more extreme violence to satisfy the wish for violent stimulation." *Id.* This statement suggests that current problems associated with fan violence will not decrease or stagnate but rather will worsen over time.

38 *See* Michael Kurtz, *Junta Gets 6 to 10 Years: Judge Doubles Guidelines in Rink Beating Death*, BOSTON GLOBE, Jan. 26, 2002, at A1.

39 Carlsen & Walker, *supra* note 10, at 403–04 (arguing that if one player or team decided to refrain from excessive violence, it would lose a competitive edge).

noted above, it is apparent that the detrimental effects of sports violence will remain (and probably worsen) under the status quo. Thus, government is faced with the social imperative of implementing effective deterrents to sports violence. Criminal prosecution is one such available deterrent. When the Ontario attorney general's office began prosecuting hockey players for excessive violence, the decision to prosecute was based on a comprehensive report that had been commissioned on hockey violence.[40] The report concluded that "[s]port, and particularly hockey, need not be a symptom of a sick society. Hockey can be an effective instrument to improve the social condition . . . [r]ather than a divisive force, fueled by calculated animosities."[41]

II. THE VIABILITY OF CRIMINAL PROSECUTIONS FOR SPORTS VIOLENCE

The primary rationale for invoking criminal prosecutions in response to sports violence emanates from the principle that no particular segment of society can be licensed to commit crime with impunity.[42] Opponents of this rationale often contend that internal league sanctions are the most appropriate course of action.[43] However, league sanctions have for the most part proven ineffectual.[44] As critics of league sanctions have argued:

> [T]o suggest that the governing body of a particular sport determine appropriate sanctions for a quasi-criminal or a criminal act would be tantamount to granting the board of directors of General Motors jurisdiction over the determination of guilt or innocence and the appropriate punishment for one of their employees who, while on the job, killed his foreman. It would seem that if violence in sports is to be curtailed, the only effective remedy lies with the state, where the capability of meting out effective deterrent sanctions exists.[45]

Thus, if a criminal justice system determines that sports violence should be criminally prosecuted, the next step is to determine the viabil-

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40 *See* Hechter, *supra* note 2, at 427.

41 WILLIAM R. MCMURTRY, ONT. MINISTRY OF CMTY. & SOC. SERVS., INVESTIGATION AND INQUIRY INTO VIOLENCE IN AMATEUR HOCKEY 45–46 (1974).

42 *See* Flakne & Caplan, *supra* note 3, at 33 (citing Regina v. Bradshaw, [1878] Cox Crim. Cas. 83, a criminal prosecution for a death in a soccer game). For a comprehensive discussion of the jurisprudential justifications for imposing criminal sanctions on excessively violent sports participants, see HORROW, *supra* note 12, at 110–60.

43 *See generally, e.g.*, Gibson, *supra* note 9.

44 *See* Hechter, *supra* note 2, at 426.

45 Flakne & Caplan, *supra* note 3, at 33–34. *See also* Carroll, *supra* note 22, at 80–81 (asserting that self-regulation appears effective on paper but works poorly in real life).

ity of sports prosecutions. This section examines the development of Canadian law and analyzes American foundations for criminal liability in sports to illustrate how criminal sanctions could provide a practicable method of curbing sports violence.

A. CANADIAN FOUNDATIONS

While American judicial systems have, for the most part, been reluctant to levy criminal sanctions on excessively violent sports participants, Canadians have demonstrated a decided effort to prosecute sports participants who commit excessively violent acts.[46] In 1974, in response to a particularly violent hockey game that included five seriously injured players and hundreds of rioting fans, the Ontario attorney general's office commissioned a report on sports violence and ultimately ordered both police and prosecutors to more rigorously pursue breaches of the criminal code in hockey.[47] Since 1970, there have been well over 100 successful criminal convictions by Canadian prosecutors, accompanied by more than seventeen reported cases that demonstrate doctrinal development in the field of criminal sports violence.[48]

Most of the Canadian sports violence decisions have been issued by trial courts and delivered orally, lacking the detail, precision, and organization of a written appellate decision.[49] Consequently, the courts cite precedent sparingly and often look to the seminal Canadian sports violence cases of *Regina v. Green*[50] and *Regina v. Maki*.[51] *Green* and *Maki* both resulted from a fight between Ted Green of the Boston Bruins and Wayne Maki of the St. Louis Blues in 1969. Maki, who seriously injured Green, was charged with assault causing bodily harm but was acquitted on a successful claim of self-defense.[52] Green, who started the fight but caused little harm to Maki,[53] was charged with common assault.[54] He was acquitted on an "instinctive action" defense.[55] Although both cases

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46 *See* Diane V. White, Note, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J., 1030, 1033–34.

47 *See* Hechter, *supra* note 2, at 427–28.

48 *See* White, *supra* note 46, at 1034. This estimate is based on the analysis reported in White's 1986 article and our own Westlaw searches of reported cases since 1985. As White points out, this estimate of doctrinal development is conservative because the Canadian courts typically draw upon a broader range of cases than just participant-on-participant violence (e.g., player-on-official violence) in their judicial analysis, which were not considered in this calculation. *Id.* at 1034 n.15.

49 *Id.* at 1037.

50 [1971] 1 O.R. 591 (Ont. Prov. Ct. 1970).

51 [1970] 3 O.R. 780 (Ont. Prov. Ct.).

52 *See id.* at 780–82.

53 *Green*, [1971] 1 O.R. at 592.

54 *Id.* at 591.

55 *Id.* at 597.

resulted in acquittals, their dicta laid the foundation for successful subsequent prosecutions.[56]

One such successful prosecution was the 1988 conviction of Dino Ciccarelli of the Minnesota North Stars.[57] The conviction was the result of an assault in which Ciccarelli hit the Toronto Maple Leafs' Luke Richardson twice in the head with his stick and then punched him in the mouth.[58] Ciccarelli was sentenced to one day in jail and fined $1,000.[59] This case marked the first jail sentence ever imposed on a professional athlete for an act of during-the-game violence.[60] The judge who imposed the sentence proclaimed that "[i]t is time now that a message go out from the courts that violence in a hockey game or any other circumstances is not acceptable in our society . . . [for it] spills over from the arena into the streets."[61]

More recently, the Boston Bruins' Marty McSorley was convicted of assaulting the Vancouver Canucks' Donald Brashear in 2000. The two had fought earlier during play, and in the waning seconds of the game and with his team losing 5-2, McSorley slashed Brashear in the head with his stick, knocking him unconscious to the ice.[62] Brashear suffered a grand mal seizure before regaining consciousness, was diagnosed with a grade-three concussion, and could not engage in physical activity for a month.[63] During the bench trial, McSorley claimed that the blow had not landed as intended and had been directed instead to Brashear's shoulder. However, the trial judge disagreed, stating that "[a]n NHL player would never, ever miss. Brashear was struck as intended."[64] McSorley was found guilty of assault and placed on probation for eighteen months.[65]

The success of Canadian prosecutions for sports violence presents encouraging evidence that such prosecutions are viable, even for actions committed by professional athletes. Certainly, the development of crimi-

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56 Nielsen, *supra* note 5, at 703.

57 Carroll, *supra* note 22, at 80 (citing MINNEAPOLIS STAR TRIBUNE, Aug. 25, 1988, at 1C). Ciccarelli subsequently appealed his conviction and lost. Regina v. Ciccarelli, [1990] 54 C.C.C.3d 121 (Ont. Dist. Ct. 1989).

58 Carroll, *supra* note 22, at 80.

59 *Id.* The NHL also suspended Ciccarelli for ten days, costing him $25,000 in salary.

60 Nielsen, *supra* note 5, at 703.

61 *Id.* (citing Tom Callahan, *Spilling Over into the Streets*, TIME, Sept. 5, 1988, at 47).

62 Regina v. McSorley, 2000 BCPC 116, at para. 7 (B.C. Prov. Ct.) (reasons for judgment).

63 *Id.* at para. 59.

64 *Id.* at para. 108. In dictum, the court suggested that it likely would not have accepted the consent defense even if it had found that McSorley intended to hit Brashear in the shoulder rather than the head. *Id.* at para. 75.

65 Regina v. McSorley, 2000 BCPC 117, at para. 21 (B.C. Prov. Ct.) (reasons on sentence). McSorley's conditional discharge carried the additional requirement that he not engage in any sporting event in which Donald Brashear played on the opposing team. *Id.*

nal prosecutions in an arena of human interaction previously largely unscrutinized does not come without some doctrinal rough spots to be worked out. Although the Canadian courts have not attained a united doctrine for sports assault, they have reached majority positions and established helpful lines of judicial analysis.[66]

B. AMERICAN FOUNDATIONS

In 1980, U.S. Rep. Ronald Mottl of Ohio, a former professional baseball player, introduced the Sports Violence Act of 1980.[67] The bill proposed criminal penalties to deter and punish acts of "excessive physical force" in sports.[68] Mottl argued that "a line can be drawn to serve notice on the professional sports world that extreme acts of excessive violence on the field are as repugnant as street-corner muggings."[69] He added, "When a hockey player slams his stick over the head of an opponent or a basketball player smashes the face of an opponent with his fist, it is not sport."[70] Despite Mottl's laudatory goals, the bill failed.[71] Legislators expressed the opinion that the problem of sports violence could best be handled at the local prosecutorial level.[72] Prosecutors and law

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66 *See* White, *supra* note 46, at 1053; Svoranos, *supra* note 7, at 507. See *infra* Section III.A.3 for a discussion of the development of the Canadian doctrine of consent, upon which many cases ultimately turn.

67 H.R. 7903, 96th Cong. (1980). *See* Scott Slonim, *Goal of Crime Bill to Curb Sports Violence*, 66 A.B.A. J. 1188, 1188 (1980). An earlier federal legislative effort, the Federal Sports Act, S. 3445, 92d Cong. (1972), had been proposed but failed in 1972. Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 150 & n.124 (1996).

68 *See* Slonim, *supra* note 67, at 1188.

69 *Id.* at 1188–89.

70 *Id.* at 1189.

71 *See* Nielsen, *supra* note 5, at 694. Overly vague language was a major reason for the bill's failure. *Id.* at 691. One critic also noted that the bill used circular definitions and created confusion about traditional professional-amateur distinctions. *See* Daniel R. Karon, *Winning Isn't Everything, It's the Only Thing. Violence in Professional Sports: The Need for Federal Regulation and Criminal Sanctions*, 25 IND. L. REV. 147, 161–62 (1991).

72 *See* Nielsen, *supra* note 5, at 694. Subsequent bills concerning sports violence, promoted by Mottl in 1981 and Tom Daschle of South Dakota in 1983, also failed. Hanson & Dernis, *supra* note 67, at 150. Similar proposals have also failed in several states, including Washington and Massachusetts. *See* Tom Farrey, *Violence in Sports — Jason Shelley's Unusual Case*, SEATTLE TIMES, Oct. 17, 1993, at C1; Hanson & Dernis, *supra* note 67, at 150–51. Iowa has adopted a standard for sports assault similar to the Model Penal Code's standard (see *infra* Section III.A.2). The Iowa law holds athletes criminally liable for acts that are not reasonably foreseeable consequences of voluntary participation and that create unreasonable risks of injury or breach of the peace. IOWA CODE § 708.1 (2002). Legislative proposals seeking to protect sports officials have been more successful. *See, e.g.*, Carol J. Wallace, *The Men in Black and Blue: A Comment on Violence Against Sports Officials and State Legislative Action*, 6 SETON HALL J. SPORT L. 341, 355 (1996); Troy Cross, *Special Report: Assaults on Sports Officials*, 8 MARQ. SPORTS L.J. 429, 433 (1998).

enforcement personnel tend to agree that local prosecution under existing assault and battery doctrines is the most appropriate answer.[73]

The Canadian experience with sports prosecutions gives American jurisdictions valuable guidelines for imposing criminal sanctions on violent sports participants. Furthermore, foundations for American prosecutions, although limited, do exist. Research of reported cases reveals at least a handful of opinions on prosecutions for player-on-player violence.

In *People v. Jones*, decided in Illinois in 1976, the defendant was convicted for violent acts that occurred in the context of a high school touch football game.[74] The defendant had roughed up the victim throughout the game, often violating the touch football rules.[75] The victim testified that at the end of the game, he placed his hand on the defendant's shoulder and was preparing to tell the defendant not to pick on him any more when the defendant whirled around and punched the victim in the face, breaking his nose.[76] The defendant unsuccessfully claimed self-defense, testifying that he anticipated that the victim was going to hit him first.[77] The jury determined that the defendant did not reasonably believe he needed to defend himself, and the appellate court affirmed.[78] Although the court did not analyze public policy issues regarding sports violence, it made a significant inroad into the doctrine of self-defense in sports: The court held that evidence that the defendant "roughed up" the victim in violation of the game rules justified jury instructions that a defendant's use of force is unjustified when the defendant provokes attack on himself with intent to use it as an excuse to inflict bodily harm.[79]

In *People v. Freer*, a 1976 New York case, the defendant was convicted of third-degree assault after an incident during a game of tackle football.[80] While the victim was making a legal tackle of the defendant, the victim punched the defendant in the throat.[81] After the tackle, there was a pileup, and after the other players got up, the defendant punched the victim in the eye, causing extensive injury.[82] The *Freer* court began its analysis by recognizing that sports violence is a "gray" area in the law

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73 Nielsen, *supra* note 5, at 694 & n.85.

74 People v. Jones, 346 N.E.2d 389, 390 (Ill. App. Ct. 1976).

75 *Id.* at 391.

76 *Id.* at 390.

77 *Id.*

78 *Id.* at 392. The court affirmed the jury's finding that the defendant's self-defense claim was unreliable because the defendant's witnesses' testimony was inconsistent with his own as to the victim's actions. *Id.*

79 *Id.* at 391.

80 People v. Freer, 381 N.Y.S.2d 976 (Suffolk County Dist. Ct. 1976).

81 *Id.* at 977.

82 *Id.*

and that many questions remain unanswered.[83] In reaching its decision, the court relied on both the *Green* and *Maki* Canadian decisions in assessing the issues of consent and self-defense.[84] The court held that the original punch to the throat by the victim was consented to by the defendant as part of the game, since the act of tackling in a football game may often involve legitimate contact that could easily be interpreted as a punch.[85] However, the court held, the defendant's punch to the eye was an unmistakable act of intentional aggression and therefore could not have been consented to.[86] On the issue of self-defense, the court found that the defendant had not reasonably believed that he was vulnerable to further attack.[87] The court based this finding on evidence showing that when the defendant struck the victim, the defendant was up on one knee over the victim, who was lying flat on his back.[88] This case provides a valuable example of what acts a sports participant consents to when he steps onto the field.

More than a decade passed before the next reported American cases concerning criminal liability for participant-on-participant sports violence. In *State v. Floyd*[89] and *State v. Shelley*,[90] acts of criminal violence occurred during recreational basketball games. In *Floyd*, the game had been extremely rough, and one player had already been ejected for violent play.[91] After a fracas erupted on the court over a foul (and during a timeout), the defendant, who was standing on the sideline, assaulted two players from the opposing team who were also on the sideline and then went onto the court and assaulted a third player.[92] Two of the assaulted players suffered extensive injuries.[93] The defendant was convicted of assault and appealed, arguing that he fell within Iowa's exception from assault for voluntary participants in sporting events.[94] The court held that because the incidents occurred during a timeout, and because the defendant and two of his victims had been on the sidelines, not playing at the time, they were not "voluntary participants in a sport" at the time of

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83 *Id.*

84 *Id.* at 978.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 979.

89 466 N.W.2d 919 (Iowa Ct. App. 1990).

90 929 P.2d 489 (Wash. Ct. App. 1997).

91 *Floyd*, 466 N.W.2d at 920.

92 *Id.* at 920–21.

93 *Id.* at 921.

94 *Id.* The Iowa consent-to-assault exception provides in relevant part "that where the person doing any of the above enumerated acts [assaults], and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of peace, the act shall not be an assault." IOWA CODE § 708(1) (2002).

the incident, and therefore the exception was inapplicable.[95] The court reasoned that there was simply "no nexus between the defendant's acts and playing the game of basketball."[96] While the court rested its decision on this determination, it added in dicta that the defendant's actions were furthermore not a reasonably foreseeable incident of the sport and created an unreasonable risk of serious injury or breach of the peace.[97]

In *Shelley*, the defendant was playing in a pickup basketball game and had been fouled by the victim throughout the game.[98] As the two players were running down the court side by side, the defendant punched the victim in the face, later claiming that the victim had made a waving motion toward him with his hand.[99] The victim's jaw was broken in three places and had to be wired shut for about six weeks.[100] The trial court rejected the defendant's request to use jury instructions incorporating a "reasonably foreseeable hazard" standard for consent to assault by sports participants.[101] The trial judge ruled that the defendant could not claim consent because his conduct "exceeded what is considered within the rules of that particular sport."[102] The appellate court affirmed the decision not to allow the defendant to claim consent but disagreed with the rules-based standard that the trial court employed.[103] The appellate court rejected that standard as too limiting and instead appeared to side with the defendant by adopting the Model Penal Code's standard that the defendant's conduct must be a "reasonably foreseeable hazard" of the game.[104] However, applying the standard to the facts of the case, the court found that even taking the defendant's version of the events as true, the assault was not reasonably foreseeable and therefore violated the standard.[105] The court reasoned that "[t]here is nothing in the game of basketball, or even rugby or hockey, that would permit consent as a defense to such conduct."[106]

The only modern American prosecution of a professional[107] sports figure for participant-on-participant violence during a game occurred in

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95 *Floyd*, 466 N.W.2d at 922.

96 *Id.*

97 *Id.* at 923.

98 State v. Shelley, 929 P.2d 489, 490 (Wash. Ct. App. 1997).

99 *Id.*

100 *Id.*

101 *Id.* at 491.

102 *Id.*

103 *Id.* at 491–92.

104 *Id.*

105 *Id.* at 493.

106 *Id.*

107 In using the term "professional," we refer to the primary professional leagues of the sports examined in Section I, namely the National Football League, the National Basketball Association, Major League Baseball, and the National Hockey League. We also consider only prosecutions through trial (or plea agreement), rather than merely prosecutorial consideration

the case of *State v. Forbes*.[108] During a 1975 NHL game between the Boston Bruins and the Minnesota North Stars, David Forbes assaulted Henry Boucha, causing permanent injury.[109] Forbes was indicted by a Minnesota grand jury, which charged him with aggravated assault by use of a dangerous weapon — his hockey stick.[110] At trial, the jurors heard more than a week and a half of testimony,[111] including one witness who testified that he heard Forbes say to his victim, "I'll get you, but it won't be with this [his glove]. It'll be with my stick; I'll shove it down your throat."[112] The defense was denied an instruction on the doctrine of assumption of risk; the court ruled that the doctrine applied solely to civil cases.[113] The prosecution was granted an instruction that with respect to the crime of aggravated assault, a person cannot consent either expressly or by implication to be a victim of a crime.[114] After eighteen hours of deliberation, the jury was split, nine in favor of conviction and three opposed, and a mistrial was declared.[115] The jurors who favored conviction reported that they considered the severity of Boucha's injury as dispositive.[116] Those favoring acquittal remarked that the violence and fighting

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or investigation of a case. There have been a number of successful American prosecutions of minor-league professional players and college players. *See, e.g.*, Jonathan H. Katz, Note, *From the Penalty Box to the Penitentiary — The People Versus Jesse Boulerice*, 31 RUTGERS L.J. 833, 840–48 (2000); *see also Violence in Sports*, ST. PETERSBURG TIMES (St. Petersburg, Fla.), Feb. 24, 2000, at 10C.

In 1998, Jesse Boulerice, after a skirmish with Andrew Long during an Ontario Hockey League game, "swung his hockey stick, in a baseball-style swing, at Long," according to the police report. Katz, *supra*, at 841. Long was knocked unconscious and suffered a brain contusion, broken bones in his face, and a grade-three concussion. *Id.* The league suspended Boulerice for one year. *Id.* at 842. Prosecutors in Michigan charged Boulerice with assault to do great bodily harm less than murder, a felony. *Id.* at 843. In 1999, Boulerice pleaded no contest to a reduced charge of aggravated assault, received three months' probation, and had the conviction expunged from his record. *Sports*, GRAND RAPIDS PRESS (Grand Rapids, Mich.), Aug. 10, 1999, at C8. (In 2002, the American Hockey League suspended Boulerice for eight games for instigating a fight. *Activity*, GLOBE & MAIL (Toronto), Mar. 21, 2002, at S4.)

In 1998, Jason MacIntyre pleaded guilty to third-degree assault for slashing an opponent in the face between periods of a West Coast Hockey League game. Katz, *supra*, at 847. MacIntyre was placed on probation for two years, fined $500, and ordered to complete an anger-management course. The league also banned him for life. *Id.* at 848.

108 No. 63,280 (Hennepin County, Minn., Dist. Ct. Aug. 12, 1975) (entering judgment of mistrial).

109 *See* David Ranii, *Sports Violence Lawsuits Erupt: Criminal Law Next?*, NAT'L L.J., Feb. 9, 1981, at 1.

110 *See* Nielsen, *supra* note 5, at 701–02.

111 *Id.* at 702.

112 Gilles Létourneau & Antoine Manganas, *Violence in Sports: Evidentiary Problems in Criminal Prosecutions*, 16 OSGOODE HALL L.J. 577, 580 (1978) (citing Walter Kuhlmann, *Violence in Professional Sports*, 1976 WIS. L. REV. 771, 773 n.14).

113 *See* Flakne & Caplan, *supra* note 3, at 34.

114 *Id.*

115 *Id.*

116 *See* Nielsen, *supra* note 5, at 702.

in hockey made the attack just part of the game.[117] State officials decided not to retry the case because they felt they had made it clear that excessive sports violence would not be tolerated in Minnesota and because there was a likelihood of another deadlocked jury.[118]

These reported American cases demonstrate that sports violence convictions are feasible and provide valuable doctrinal guidelines. *Forbes'* 9-3 split in favor of conviction shows that jurors are willing to hold professional sports figures accountable for their actions in the athletic arena. Moreover, the professional sports community has shown it is ready to accept criminal prosecutions for excessive violence. Former NHL president John Zeigler reacted to Dino Ciccarelli's conviction by stating that "[a]lthough we are disappointed with the outcome of this case, it has long been our belief that sports are not above the law."[119]

III. SPORTS PROSECUTIONS: POTENTIAL DEFENSES AND IMPEDIMENTS

The prospect of imposing criminal sanctions for acts of excessive violence in sports does not come without obstacles. Several stumbling blocks stand in the way of a successful sports prosecution. First and foremost of these impediments is the doctrine of consent, which operates as a full defense to the crime of assault and battery.[120] Other defenses invoked by athlete defendants include self-defense, involuntary reflex, and provocation. This section evaluates various interpretations of the doctrine of consent and reviews the other defenses and extra-legal hindrances to effective criminal prosecution that might be encountered by prosecutors.

A. THE CONSENT DOCTRINE

If sports prosecutions for battery are to prosper, then courts must fashion rules to govern the applicability of the consent defense to acts of violence occurring in the context of sporting events. Courts and commentators have attempted to promulgate a definitive interpretation of

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117 *Id.* One of the jurors who voted for acquittal remarked, "Three of us . . . did not feel [Forbes] intended to inflict any bodily harm." This conclusion obviously runs counter to evidence presented at trial showing that Forbes repeatedly slammed Boucha's head into the ice. *Id.*

118 *See* Flakne & Caplan, *supra* note 3, at 34.

119 Carroll, *supra* note 22, at 86.

120 *See* Rains, *supra* note 4, at 804 (summarizing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 81 (1972)). LaFave explains that the terms "assault" and "assault and battery" are often used in the law to denote what battery means. Technically, battery requires injury or touching whereas assault needs (and affirmatively requires) no physical contact. Hence, battery produces a specified harmful result, while assault requires merely mental apprehension of such by the victim (for example, an intentional frightening or attempted battery). *See* WAYNE R. LAFAVE, CRIMINAL LAW 736–37 (3d ed. 2000).

consent as it applies to athletic contests and have yielded three general principles.[121] First, sports serve a social utility, and this utility should play into the doctrine of consent.[122] It is this component of consent's application to sports that courts often cite in not allowing defendants to invoke the defense of consent in non-sports-related assaults.[123] Second, although battery can be consented to by an individual in a civil case, criminal battery cannot be consented to by the victim, because the state has a general interest in the well-being of its citizens; therefore, consent is implied generally rather than explicitly granted and typically turns on objective criteria surrounding the incident rather than on a determination of the subjective willingness of the victim.[124] Third, courts are typically much more willing to allow the defense of consent in situations in which the battery occurred during official play rather than at the end of play or during a timeout.[125] Several notable interpretations of the doctrine of criminal consent in sports contests are described below.

1. *Violation-of-the-Game-Rules Theory of Consent*

Under this theory, a participant in an athletic contest manifests a willingness to submit to such bodily contacts as permitted by its rules.[126] The participant does not consent to contacts prohibited by the rules of the game, if the rules are designed to protect the participants and not merely to secure a better-played game.[127] The *Regina v. Green* court likely would disagree with this theory, maintaining that contact in violation of the rules is consented to by participants, at least where it is common and does not create a high risk of injury.[128] As the court in *Shelley* reasoned,

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121 *See, e.g.*, John J. Love, *Criminal Law: Consent as a Defense to Criminal Battery — The Problem of Athletic Contests*, 28 OKLA. L. REV. 840, 843–44 (1975); Karon, *supra* note 71, at 161–62.

122 *See* HORROW, *supra* note 12, at 206–11.

123 *See, e.g.*, *Helton v. State*, 624 N.E.2d 499, 506, 514 (Ind. Ct. App. 1993) (gang initiation beating); *People v. Lenti*, 253 N.Y.S.2d 9, 14–15 (Nassau County Ct. 1964) (school hazing); *State v. Hiott*, 987 P.2d 135, 135–37 (Wash. Ct. App. 1999) (game in which youths shot each other with BB guns). *See also* Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 250–54 (2001) (analyzing the application of sports consent doctrine to sadomasochistic activity).

124 *See* Love, *supra* note 121, at 842 (citing J.H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 324–25 (1895), who maintains: "Homicide, mayhem, and battery may be committed, though the individual consented to the injury. The reason for this is clear: the public has an interest in the personal safety of its citizens, and is injured where the safety of any individual is threatened, whether by himself or another.")

125 *See* White, *supra* note 46, at 1048–51. *But cf.* Regina v. Leyte, [1973] 13 C.C.C.2d 458, 459 (Ont. Prov. Ct.) (leaving open the possibility that players might consent to violence after termination of play, in certain situations).

126 *See* HORROW, *supra* note 12, at 171–76.

127 *Id.*

128 Regina v. Green, [1971] 1 O.R. 591, 594 (Ont. Prov. Ct. 1970).

this standard is very limiting and unduly impinges on game play.[129] Certainly, some actions in violation of game safety rules (such as clipping in football) are part and parcel of the game and are not necessarily indicative of a player's intent to injure an opponent. Indeed, it seems highly unlikely that a jury would convict a player for violation of a game safety rule where no serious injury had been suffered by the victim.

2. *The Model Penal Code Standard*

The Model Penal Code sets its standard for consent in sports in the following manner:

> *Consent to Bodily Injury.* When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if: . . . (b) the conduct and injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.[130]

Under this standard, if a player should have reasonably foreseen that an act of violence could happen, then he consents to that act of violence. Critics argue that the Model Penal Code's position on consent is too broad.[131] Although an athlete should reasonably foresee that an opponent might injure him, it does not necessarily follow that the athlete consents to being injured in such a manner.[132] By analogy, a person who walks through Central Park late at night should reasonably foresee that he could very well be mugged. However, it is difficult to imagine that he consented to a mugging, despite the fact that he voluntarily took the walk and realized he might be attacked.[133] Undoubtedly, the determination of exactly what behavior a player can reasonably expect in a game is difficult. The *Shelley* court explained that this determination might be made by presenting evidence to the jury concerning the nature and location of the game, along with game rules and the players' own expectations.[134] Given the court's ruling in *Shelley*, it is likely that the fact that an action (e.g., a purposeful punch to the jaw) might occur occasionally in a game does not necessarily mean that a court employing the Model Penal Code's standard would find it to be a reasonably foreseeable hazard of

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129 State v. Shelley, 929 P.2d 489, 492 (Wash. Ct. App. 1997).

130 MODEL PENAL CODE § 2.11(2)(b) (1995).

131 *See, e.g.*, Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 159 (1976); Karon, *supra* note 71, at 153.

132 Karon, *supra* note 71, at 153.

133 *Id.* at 154.

134 *Shelley*, 929 P.2d at 493.

the game.[135] Some have also argued that the Model Penal Code's exception for sports contradicts the logic of statutes prohibiting dueling and suicide pacts, under which a survivor is held criminally liable.[136]

3. *The Canadian Majority View*

A traditional standard that Canadian courts have used to define the limits on a player's consent was originally articulated in 1965 in the civil case of *Agar v. Canning*.[137] *Agar* held that "injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent."[138] This test quite reasonably presupposes that the mission of athletic contests is to demonstrate athletic skill, not harm opponents (with the possible exception of boxing). This standard was cited with approval by the Ontario court in the seminal *Maki*[139] case, among others.[140] Although *Agar*'s holding is laudable in that it focuses on the manifested intentions of the players, it has been criticized as being underinclusive[141] and may be difficult for jurors to apply in cases in which the actions occur rapidly and within a broader interaction (such as a bench-clearing brawl).

Over time, the Canadian courts have refined their analysis of consent in sports, and although no specific overarching test prevails, generalized approaches and precedential norms have emerged. In *Regina v. Cey*,[142] the Saskatchewan Court of Appeal set forth important doctrinal guidance for Canadian courts in the area of sports consent. The *Cey* court explained that subjective consent is unworkable and inappropriate in the team sport context and that implied consent must be uniform and determined by specified objective criteria.[143] *Cey* and its progeny have

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135 *But cf.* Karon, *supra* note 71, at 153 (arguing that the Model Penal Code's approach would allow consent for the violent fisticuffs and stick fighting customarily associated with hockey).

136 *See* Note, *supra* note 131, at 159 n.39. The author explains that when dueling was legal, a challenged gentleman usually did not want to duel but was compelled because of existing social conceptions of honor. By convicting a few men for dueling, the state was able to make clear that dueling was not an honorable or acceptable practice. It is important to bear in mind that sports are generally considered to involve a degree of social utility, while most would agree that dueling does not. However, the author aptly notes that success in criminal prosecutions for socially undesirable behavior (such as dueling) could be applied to sports such as hockey, in which players are compelled to fight out of sports-based conceptions of honor. *Id.*

137 [1965] 54 W.W.R. 302 (Man. Q.B.), *aff'd*, [1966] 55 W.W.R. 384 (Man. Ct. App.).

138 *Agar*, [1965] 54 W.W.R. at 304.

139 Regina v. Maki, [1970] 3 O.R. 780, 783 (Ont. Prov. Ct.).

140 White, *supra* note 46, at 1041.

141 *Id. See also* Regina v. Leclerc, [1991] 4 O.R.3d 788 (Ont. Ct. App.) (finding that the *Agar* standard does not hold some conduct accountable that should yield criminal liability).

142 [1989] 75 Sask. R. 53 (Sask. Ct. App.).

143 *Id.* at para. 19.

developed the following noninclusive guidelines for determining whether implied consent applies in a given situation:

a. The conditions under which the game in question is played;[144]
b. The nature of the act;[145]
c. The extent of the force;[146]
d. The degree of risk of injury and the probabilities of serious harm;[147]
e. The state of mind of the accused;[148]
f. Whether the rules of the game contemplate contact;[149]
g. Whether the action was an instinctive reflex reaction;[150]
h. Whether the action was closely related to play;[151] and
i. Whether the action fell within the customary norms and rules of the game.[152]

While these criteria do not furnish a bright-line rule, they provide a common basis for courts to analyze sports violence and to establish the parameters of implied consent.[153]

4. *The German Approach*

A final noteworthy attempt at integrating the consent doctrine with sports contests is the principle advanced by German scholars termed *sozialadaquanz.*[154] This axiom holds that individuals should not be forced to tolerate the infliction of harm by others merely because they have "consented" in the sense of demonstrating a willingness to risk such harm.[155] However, this rule is tempered by the corollary precept that individuals must tolerate certain harms so that socially beneficial actions

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144 *Id.* at para. 23.

145 *Id.*

146 *Id.*

147 *Id.*

148 *See id.* at para. 24. The *Cey* court did not specifically note the state of mind of the accused in its listing of criteria, although it notes it as a relevant factor on the issue of consent. Other courts have listed state of mind along with the other criteria. *See, e.g.*, Regina v. Ciccarelli, [1989] 54 C.C.C.3d 121, 126 (Ont. Dist. Ct.); Regina v. Anderson, [2000] 48 W.C.B.2d 193 (B.C. Sup. Ct.).

149 Regina v. Leclerc, [1991] 4 O.R.3d 788, para. 22 (Ont. Ct. App.)

150 Regina v. Krzysztofik, [1992] 16 W.C.B.2d 7, para. 11 (Man. Q.B.).

151 *Id.* at para. 12.

152 *Id.* at para. 13.

153 *See* Regina v. Jobidon, [1991] 2 S.C.R. 714 (Can.) (distinguishing fistfights from sports and finding no implied consent to the former, an activity lacking sports' significant social value).

154 *See* Note, *supra* note 131, at 155. The concept can be translated roughly as "social adequacy."

155 *Id.*

(such as sports contests) may occur.[156] Thus, the German approach does not endeavor to determine whether the victim actually consented but instead focuses on what inconveniences society will require individuals to tolerate.[157] The legal standard that *sozialadaquanz* promulgates can be summarized as follows:

> a. A player consents only to that conduct that is part of the game.
> b. "Part of the game" includes only conduct that either:
> i. is consonant with the ideal of the game; or
> ii. is an unavoidable concomitant of playing the game with an attitude that is consistent with the ideal of the game.
> c. Conduct that is inconsistent with society's standards as to how the game is played is not "part of the game."[158]

Of course, societal conceptions of how the game should be played are typically undefined, so the standard is somewhat ambiguous. However, the premise that society can mandate how a game will be played is not without precedent. As mentioned previously, football almost met its demise at the turn of the twentieth century due to its violent play. President Roosevelt's threat to abolish football caused colleges to revise the standards of play, and the game was made much safer. This experience shows how a standard based on society's view of the "ideal of the game" can be used to distinguish effective from ineffective consent and permissible from impermissible conduct.[159]

B. OTHER DEFENSES TO BATTERY

Although consent continues to be the most used defense to criminal battery in sports, other defenses are available and have been used successfully by athlete defendants. Some of the defenses to battery that can be used in sports violence cases are self-defense, involuntary reflex, and provocation. Certainly, the applicability and success of any of these defenses depends largely on the specific facts of a given sports violence case, and some defenses have generally proven to be more successful than others. In this section we outline these defenses and their limitations.

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156 *Id.* at 160 (explaining that "the athlete is a member of a smaller society or 'the game' and he is expected to suffer certain inconveniences (injuries) so that the game may be played. The game, however, is a part of the larger society, and it must necessarily conform to the standards of that society").

157 *Id.* at 155.

158 *Id.* at 160.

159 *Id.* at 177.

1. *Self-Defense*

An athlete who acts in self-defense against an unlawful attack has a successful defense against battery.[160] An athlete may also use force to defend another.[161] However, several restrictions apply to this defense. First, an athlete may meet force with force only so long as an apparent danger is still present.[162] Second, self-defense is not proper if the blow is unnecessarily severe and vindictive rather than preventive.[163] Third, the athlete may use force only when it is unreasonable to retreat or otherwise avoid the danger.[164] Although this defense is not often effective due to its limitations, it was successfully employed in *Regina v. Maki.* In finding the defendant's self-defense viable, the court stated:

> [O]n a charge of this sort there must be an acquittal if the Court is left in any doubt as to whether the accused was acting in self-defence, that is, where self-defence is raised as a defence. The Court must also consider the reasonableness of the force used under the circumstances and the state of mind of the accused at the time in question.[165]

Maki represents a situation in which the actions of the parties occurrs quickly and furiously and in which it is hard to determine who was the initial aggressor. Although the *Maki* court resolved to scrutinize the fight and find self-defense, one commentator has noted that mutual fighting essentially nullifies self-defense.[166]

2. *Involuntary Reflex*

When a defendant strikes a blow that is the product of an involuntary reflex and lacks the requisite *mens rea*, he will not be guilty of battery.[167] In *Regina v. Green*, the court held that Green's stick chop to Maki's shoulder was not an assault, reasoning that it was essentially an "instinctive" reaction to a prior blow from Maki.[168] This defense was

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160 Horrow, *supra* note 14, at 11.

161 Hechter, *supra* note 2, at 452 (adding that an athlete's right to defend another is no greater than his right to defend himself).

162 *Id.* at 451.

163 Horrow, *supra* note 14, at 11.

164 *Id.* at 12.

165 Regina v. Maki, [1970] 3 O.R. 780, 783 (Ont. Prov. Ct.).

166 *See* Hechter, *supra* note 2, at 450 (arguing that "[m]utual fight and self-defense are not synonymous, and generally speaking, self-defense does not avail in cases of mutual combat as each party is guilty of a separate assault and battery upon the other").

167 Horrow, *supra* note 14, at 11.

168 Regina v. Green, [1971] 1 O.R. 591, 597 (Ont. Prov. Ct.); *see also* Regina v. Leclerc, [1991] 4 O.R.3d 788, 798 (Ont. Ct. App.) (finding that defendant's cross-check in a non-contact game was not an assault but rather an "instinctive reflex action").

raised in the *Forbes* trial, in which it was argued that violence in sports starts at an early age and that the emotional nature of sports often induces players to lose control.[169] Sports attorney Bob Woolf criticizes the involuntary reflex defense, arguing that "*heat of the game* has always been a kind of moral defense in sports to excuse bad manners and irrational acts."[170]

3. *Provocation*

The defense of provocation requires that the defendant be provoked into retaliation.[171] This defense is seldom used in sports cases, because many jurisdictions do not recognize it as a defense to battery in any context.[172] The common-law basis for rejecting this defense is the policy that peace and order are adversely affected when individuals take the law into their own hands to right wrongs.[173] However, courts may be inclined to consider provocation in determining a just punishment for those convicted of battery.[174]

C. EXTRA-LEGAL OBSTACLES

Finally, there are less tangible, extra-legal obstacles that may cause prosecutors to think twice before bringing a sports violence prosecution. First, player victims and witnesses may be reluctant to testify or cooperate due to existing player "codes" that consider violence part of the game and not appropriate for outside legal intervention.[175] Furthermore, a prosecutor may be concerned that prosecutions for sports violence may not reflect the sentiments and priorities of the public he serves.[176] Finally, given the heavy load of regular cases that many prosecutors experience and the legal stumbling blocks to getting a conviction outlined above, sports violence cases may represent a heavy expenditure of time

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169 State v. Forbes, No. 63,280 (Hennepin County, Minn., Dist. Ct. Aug. 12, 1975) (entering judgment of mistrial).

170 WOOLF, *supra* note 31, at 141.

171 HORROW, *supra* note 12, at 200.

172 *Id.*

173 Hechter, *supra* note 2, at 453.

174 *Id.*

175 Katz, *supra* note 107, at 855–56.

176 This nonlegal concern may nonetheless be a veritable one for a prosecutor facing reelection. This might hold especially true if a case involved the prosecution of a local sports celebrity. Similarly, there may be concerns about conducting a fair trial in a case in which an opposing player was prosecuted for assaulting a local favorite. Karon also maintains that some prosecutors might be reluctant to bring sports violence cases because of the "community subgroup rationale," which posits that illegal activity pervasive within a particular subgroup of society should be tolerated. Karon, *supra* note 71, at 155–57 (citing WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 110 (Frank J. Remington ed., 1965)).

and resources for a prosecutor with a highly uncertain return on the investment.

CONCLUSION

The threat that violence in sports poses to our society through its long-term influence on youths and spectators is unmistakable. Consequently, it is imperative that some responsible entity take measures to abate the unnecessary violence that has pervaded the world of sports. When internal league regulation ceases to adequately curb the problem, other methods are needed. Criminal prosecutions can be an effective means by which to send the message that society will not tolerate acts of unnecessary violence by sports participants. Critics of sports prosecutions contend that criminal sanctions for sports violence will bring about the downfall of sports, as participants will feel constrained from playing with vigor due to the threat of prosecution.[177] This criticism, however, relies on the assumption that the state will prosecute every technical sports battery rather than only the most egregious attacks.[178] The key to solving the problem of excessive sports violence through criminal prosecutions is in symbolic prosecution. Certainly, no social benefit is attained through the excessive acts of violence displayed by Marty McSorley and Kermit Washington. It is these types of brutal acts that are suitable for criminal prosecution. In the end, it is the proper discretion of the local prosecutor that is tantamount in order to attain a successful balance between allowing sports to be played with intensity and vigor and protecting society and players from unnecessary violence.

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177 *See, e.g.*, Richard L. Binder, Comment, *The Consent Defense: Sports, Violence, and the Criminal Law*, 13 AM. CRIM. L. REV. 235, 244–45 (1975).

178 *See* Nielsen, *supra* note 5, at 707.