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VIOLENCE IN PROFESSIONAL SPORTS: IS IT PART OF THE GAME?

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Excessive violence in professional sports has received significant attention recently in the legal community and in American society at large.[1] This problem involves criminal acts which maim, even kill athletes during athletic competition, yet go wholly unpunished by the legal system. As one prosecutor in a sports violence case stated, "The mere act of putting on a uniform and entering the sports arena should not serve as a license to engage in behavior which would constitute a crime if committed elsewhere."[2] Yet the problem increases with each passing year. In the 1974 National Football League season, 1,638 players missed two or more games with "serious injuries" (approximately twelve injuries for every ten players,[3] a twenty-five per cent increase over the previous season) and studies have revealed that football is so physically debilitating that a professional football player's life span is significantly shorter than that of most males.[4] "Each year sports in America cause over 17 million injuries that require medical attention. Over one million high school football players . . . and 70,000 college football players . . . are injured annually." Furthermore, "from 1933 to 1976, organized football claimed the lives of 1,198 participants. . . ."[5] Basketball players throw elbows, baseball pitchers knock down batters and base-runners slide into bases with their spikes flailing. Excessive violence is an issue even in non-contact sports. As athletes become more competitive, and as the pressure to succeed becomes stronger, the possibility of violent conduct during the game increases.[6] One aspect of the problem concerns the relationship of the civil and criminal law to sports violence, as evidenced by an increasing number

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1. Seven sports articles are listed in the 1964-1967 INDEX TO LEGAL PERIODICALS, compared to fifty-one in the 1973-1976 INDEX, and seventy-five in the 1976-1979 INDEX.
2. Flakne and Caplan, *Sports Violence and the Prosecution*, 13 TRIAL 33, 35 (Jan., 1977). Mr. Flakne, County Attorney for Hennepin County, Minnesota, prosecuted one of the more famous sports violence cases, State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Jud. Dist., *judgment of mistrial entered*, Aug. 12, 1975).
3. Hofeld, *Athletes—Their Rights and Correlative Duties*, 19 TRIAL LAW. GUIDE 383, 402 (1975) [hereinafter cited as Hofeld].
4. *Id.* at 401.
5. Peterson & Scott, *The Role of the Lawyer on the Playing Field*, 7 BARRISTER 10 (Summer 1980).
6. R. HORROW, SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAW MAKING AND THE CRIMINAL LAW 2 (1980).

of sports violence cases reaching the courts. This article[7] examines the causes of excessive violence in sports, discusses the inability of the sports establishment to deal with the problem, analyzes the legal elements of battery and relevant defenses and explores proposals for judicial and legislative resolution of sports violence cases.

THE PROBLEM: EXCESSIVE VIOLENCE WILL CONTINUE TO INCREASE AS LONG AS THE PRESSURES AND INCENTIVES TO BE VIOLENT REMAIN

Most people in the sports establishment agree that some degree of violent contact is a necessary part of any contact sport. The issue becomes acute when these people view excessive violence as an appropriate, necessary, even encouraged part of the game. In hockey, excessive violence and intimidation are becoming integral parts of strategy.[8] Players fight because it has become a condition of the job. Noted sports attorney, Bob Woolf, explains: "The premium the National Hockey League puts on this aspect of the game was reestablished every time I talked with a team on behalf of a draft choice. Invariably, the interview would get around to how well my client could fight."[9] Former NHL President Clarence Campbell has admitted that pressure from teammates and fans forces many players to stand their ground and fight or risk being branded as cowards.[10]

The professional sports leagues have developed, in essence, its own "criminal common law." Violent conduct is tolerated by the league as part of the game. Excessive violence that exceeds the peculiar common law standards of the game is dealt with by the league, and an effort is made to keep it out of the court system.[11] The intense competition of professional sports encourages violent conduct. League officials and players accept the fact that some less talented players use violence to compensate for inferior ability.[12] Winning is the hallmark of success and the means used to achieve victory become less scrutinized. In football, competition against teammates for roster positions and against opponents for victory fosters a mentality of survival of the fittest. In testimony during the *Hackbart* case, former coaches John Ralston of the Denver Broncos and Paul Brown of the Cincinnati Bengals admitted that it was normal practice to "disregard the safety of opposing

7. Based on surveys sent to 1,490 professional athletes, coaches, owners and prosecuting attorneys.
8. Note, *Tort Liability for Players in Contact Sports*, 45 U. MO.-KAN. CITY L. REV. 119, 129 (1976).
9. B. WOOLF, BEHIND CLOSED DOORS 146 (1976), [hereinafter cited as WOOLF].
10. W. MCMURTRY, ONTARIO MINISTRY OF COMMUNITY AND SOCIAL SERVICES, INVESTIGATION AND INQUIRY INTO VIOLENCE IN AMATEUR HOCKEY 24 (1974).
11. Confidential player survey (received by the author, February 21, 1979).
12. Smith, *Social Determinants of Violence in Hockey: A Review*, 4 CANADIAN JOURNAL OF APPLIED SPORT SCIENCE 76, 79 (1979).

players."[13]

The perception that violence is tolerated and necessary is coupled with a catharsis justification: the speed, the body contact, and the very nature of the game creates aggressive impulses and frustrations that players must release. An occasional fight or late hit is actually healthy. Of course, this justification has little merit. It appears, however, that a majority of players believe it.[14]

Another contributing factor to the problem of sports violence is the realization that violence is taught to and accepted by participants at an early age.[15] As one commentator states,

> Intentional injuries will continue to occur as long as high school players feel that they must demonstrate ability to play a "hard-nosed game" in an effort to obtain a football scholarship to college; the same holds true for college players who, in desiring to make a career in athletics, emulate the professionals in hopes of being drafted.[16]

Once players learn the skills of violence, they are implicitly and explicitly pressured by teammates and coaches to continue their violent conduct.[17] Studies have shown that if a coach asks his team to play rough and aggressive, the players frequently translate the message into approval of taking out the opposition any way they can.[18] Another study concluded that fifty-two percent of the surveyed twenty-one year-old hockey players believed that their coaches highly approved of fighting.[19]

Media portrayal of violence in an attractive manner reinforces the assumption that violence in sports is not criminal.[20] The sports establishment and the media seem to believe that violence enhances the marketability of professional sports.[21] The sports establishment and the media are convinced the viewing public cannot appreciate the subtle skill and finesse of talented players, but they can readily grasp the concept of brawling.[22] For example, when professional hockey began national network broadcasts in the early 1970's, the media attempted to educate the public by demonstrating every conceivable type of foul delivered with great gusto and relish. A more constructive and educational approach would have been to show talented players exhibiting real hockey skills in a non-violent context.

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13. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 356 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).
14. Smith, *Towards an Explanation of Hockey Violence: A Reference Other Approach*, 4 CANADIAN JOURNAL OF SOCIOLOGY 105, 119 (1979).
15. McMurtry, *supra* note 10, at 26.
16. 7 AM. JUR. TRIALS 213, 237 (1964).
17. Comment, *Consent Defense: Sports, Violence, and the Criminal Law*, 13 AMERICAN CRIMINAL LAW REVIEW 235, 245 (1975).
18. Vaz, *What Price Victory? An Analysis of Minor Hockey League Players' Attitudes Towards Winning*, 9 INTERNATIONAL REVIEW OF SPORT SOCIOLOGY 33, 49 (1974).
19. Smith, *supra* note 12, at 78.
20. B. CONACHER, HOCKEY IN CANADA: THE WAY IT IS 119 (1970).
21. Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425, 428 (1977).
22. Conacher, *supra* note 20, at 119.

The above factors have nurtured the problem of excessive violence in professional sports. The problem, however, is not insoluble. The following arguments might convince the coaches and owners to reduce their zeal for violence.

First, if violence were productive at the gate, it must be measured against the money paid in compensation to injured players. During the 1973-74 NFL season, for example, injured players received an estimated $17,600,000 in compensation.[23] Second, it would appear that players would prefer less violence. Forty-five percent of the surveyed hockey players preferred "less fist fighting in the games."[24] William McMurtry, a Toronto attorney commissioned by the Canadian Ministry of Community and Social Services, discovered that without exception, Canadian players who had competed in games governed by less violent international rules indicated that those games were more rewarding experiences.[25] Third, if the hockey establishment continues to encourage violence and intimidation to the detriment of skill, it is likely that every other nation will surpass the United States and Canada in actual hockey skill. The 6-0 humiliation of Team NHL by the Soviet All-Stars in the final game of the 1979 Challenge Cup may have enforced this argument; and the realization that the same Soviet team could lose to a group of American Olympic amateurs using finesse rather than fisticuffs may have enforced it even further.

Sports attorney Bob Woolf and others agree, contrary to management perceptions, that violence is not crucial to the box office.[26] Over the years, one of the least provocative NHL teams has been the Montreal Canadiens. Yet they have endured as the best gate attraction in the game. Former San Diego Gulls General Manager Max McNab conducted a fan survey which revealed that fans listed skill and reflex action, not violence and brutality as the prime reason for returning to see a second game.

If these arguments persuade the sports establishment to alter its violence-oriented mentality, significant changes can be effected. Initially, changes in safety oriented rules would be easier to make. Penalties for fighting could be increased by league officials, and an automatic suspension, as in Olympic hockey, could be introduced so that players could refuse to fight without losing face. Permitting players to participate in redrafting rules defining punishable conduct would increase their respect for the new rules. Former All-Pro linebacker Nick Buoniconti noted that "players don't like the idea of some cheap-shot artist shortening their careers."[27] The system should also increase its emphasis on skill development at younger age levels. Mandatory certification

23. Hofeld, *supra* note 3, at 401.
24. Smith, *supra* note 12, at 80.
25. McMurtry, *supra* note 10 at 26-27.
26. WOOLF, *supra* note 9, at 147-48.
27. Interview with Nick Buoniconti (January 3, 1979). Mr. Buoniconti, a former Notre Dame and Miami Dolphins star, now practices law in Miami, Florida.

of coaches and holding them responsible for player actions would expand the purpose of amateur sports beyond that of training professonals. Finally, the media should begin to educate the public and distinguish between subtle skills and overt illegal violence. Until the leagues adopt these recommendations, however, the courts must stand ready to intervene.

THE SPORTS ESTABLISHMENT CANNOT BE LEFT TO SUPERVISE ITSELF

When excessive violence goes beyond what the sports establishment will tolerate, the tendency of the sports establishment is to keep the courts out and deal with such conduct through league procedures.[28] Because league members condone, accept, and, in fact, encourage most of this conduct, internal regulation is questionable. Each league creates its own common law: an informal decision is made as to tolerable and intolerable conduct. The leagues enforce their peculiar common law by internal mechanisms of fines and suspensions. Members of the sports establishment maintain that internal disciplinary proceedings adequately control players' behavior during games. It is asserted that the leagues know their sports better than any court and if courts have the power to litigate the games, Pandora's box will be opened and the games will suffer.[29]

The players seem to have adopted a similar attitude.[30] The general consensus is that players will not seek judicial resolution of a sports violence case, in part, because the unwritten macho code prevents players from going to court to protect themselves.[31] While most players who were interviewed adamantly denied there was any conspiracy to prevent lawsuits, many players fear that court involvement "will hurt their chances of getting ahead."[32] The fear of being labelled as a "clubhouse lawyer" is very real.[33] Marginal players fear being cut or shipped to the minors—"terminated for lack of sufficient skill" according to the clause in the Standard Player Contract.[34] Because the aver-

28. Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771, 772 (1972) [hereinafter cited as *Discipline*].

29. HORROW, *supra* note 6, at 43-44.

30. Confidential players' survey (received by the author on February 12, 1979).

31. *Id.*

32. Telephone interview with Sheila Brooks, National Football League Players Association Staff Counsel, Washington, D.C. (November 11, 1978).

33. B. PARRISH, THEY CALL IT A GAME 172 (1974).

34. The Standard National Football League Player Contract, Provision Six, reads as follows:

> If in the opinion of the Head Coach the Player . . . fails at any time during the football seasons included in the term of this contract to demonstrate sufficient skill and capacity to play professional football of the caliber required by the League and by the Club, or if in the opinion of the Head Coach the Player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players, the Club shall have the right to terminate this contract. . . .

age professional athlete negotiates a new contract every 1.9 years,[35] a number of players who were interviewed stressed the need to "keep quiet around contract time."[36] Although most managements vehemently deny it, some players fear they will be blacklisted if they take a claim outside the family.[37] Whether or not these threats are actually used by owners, players perceive them as a possibility and will not risk alienating the sports establishment by proceeding through the courts. Finally, the intricacies and inconvenience of litigation act as disincentives to legal settlement of such cases.[38]

While the sports establishment attempts to keep disputes within the family, the family's "police force," the fine and suspension procedures, bear the ultimate burden of determining what is excessively violent conduct. In theory, each league has the power to mete out severe fines and suspensions for violent conduct. The results, however, are all too often inadequate. Small fines and short suspensions do not act as real deterrents to such conduct. Given the nature of the offense and the high income of the average professional athlete, the penalties are too lenient.[39] While a conviction in the outside world creates a harmful stigma that affects future employment, in the world of professional sports, a conviction by the league may bring a certain amount of outright respect.[40] Even if the fines were severe enough to deter violent conduct, some players responding to the survey maintained that the *team* paid the fine.[41] If this is true, it may be a breach of contract, because the Standard Player Contract requires the player to pay such fines.[42]

Excessive violence will continue so long as the pressure and motiva-

The National Hockey League Standard Contract allows "termintion . . . at any time . . . if the player materially breaches his contract" (Clause 7B), operationally defined as, among other things, "being unfit to play hockey" (Clause 5).

The National Basketball Association clause allows termination if "in the sole opinion of the Club's management [the Player does not] exhibit sufficient skill or competitive ability to qualify to continue as a member of the Club's team" [Clause 20(b)(2)]. HORROW, *supra* note 6, at 54, n.240.

35. HORROW, *supra* note 6, at 54.

36. Confidential player surveys (received by the author on February 15, 1979 and February 21, 1979).

37. Bernard Parrish, former defensive star with the Cleveland Browns, suggests in his book, *They Call It A Game*, that he was blacklisted because of his activities with the NFL Player's Association and was shunned by fellow players for being a "clubhouse lawyer." B. PARRISH, *supra* note 33, at 172.

38. HORROW, *supra* note 6, at 59-60.

39. Note, *A Professional Football Player Assumes the Risk of Receiving a Blow, Delivered Out of Anger and Frustration But Without Specific Intent to Injure During a Game*, 12 GA. L. REV. 380, 390 (1978). [hereinafter cited as Note]

40. Confidential player survey (received by the author on February 22, 1979).

41. Confidential player survey (received by the author on February 15, 1979).

42. National Hockey League Standard Player Contract, Clause 18: "The Club and the Player further agree that all fines imposed upon the Player under the Playing Rules or under the provisions of the League By-Laws, shall be deducted from the salary of the player and be remitted by the Club to the NHL Players Emergency Fund." "In basketball, the NBA Uniform Players Contract, Clause 15, requires the player to promise to pay the fine directly, with the Club deducting it from his salary only if he fails to so pay." HORROW, *supra* note 6, at 76, n.326.

tion to be violent remains. The sports establishment will not adequately police itself until it is sufficiently motivated by outside forces. As such, the burden of dealing with sports violence rests upon the court system.

THE COURTS CANNOT RESOLVE THE PROBLEM UNTIL THEY CLEARLY DRAW THE LINE SEPARATING LEGITIMATE, AGGRESSIVE PLAY FROM EXCESSIVE, ILLEGAL CONDUCT

Despite efforts to keep sports violence cases out of the court system, an increasing number of cases are being litigated. Laws prohibiting battery provide the civil and criminal justice systems with the power to deal with excessive sports violence. Because the law in this area is ambiguous and divergent, any sports violence case has significant precedential value. To aid judicial resolution of egregious sports violence cases, it is important to explore the elements of both the action and the defenses.

Battery and the Problem of Establishing Intent

The common law defines battery as an act by a defendant with the intent to inflict harmful or offensive touching, and a harmful or offensive contact results.[43] As the definition suggests, plaintiff must prove the defendant either intended the act or intended the bodily harm. In either case, intent is not only the most decisive element, but, for several reasons, it is also the most difficult element to prove in a sports-related context. First, the objective indications available to evaluate the mental state of the defendant participant are limited.[44] Second, the assaulting athlete may not possess the requisite mens rea. Third, because prospective jurors often view physical intimidation as just part of the game,[45] it is difficult to prove the athlete in fact intended to harm his opponent. These obstacles are not insurmountable, they merely suggest that only in exceptionally severe incidents is it wise to pursue a judicial resolution.

The Assumption of the Risk Defense

Assumption of the risk means the plaintiff has consented in advance to relieve the defendant of an obligation toward him. The plaintiff further consents to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.[46] Thus an athlete assumes the inherent dangers of the game and is precluded from recov-

43. RESTATEMENT (SECOND) OF TORTS, § 13 (1965). *See also* PROSSER, HANDBOOK OF THE LAW OF TORTS § 9 (4th ed. 1971).
44. Note, *Tort Liability in Professional Sports: Battle in the Sports Arena*, 57 NEB. L. REV. 1128, 1134 (1978), [hereinafter cited as *Tort Liability*].
45. Smith, *supra* note 12, at 76.
46. PROSSER, *supra* note 43, at § 68, p. 440.

ery for game-related injuries. An athlete does not, however, assume the extraordinary risks of the game unless he knows of them and voluntarily assents to them.[47] Thus courts are forced to adopt a case-by-case approach in deciding what risks are foreseeable or inherent in that particular sport.

Hackbart v. Cincinnati Bengals[48] is the leading assumption of the risk case in football. It arose from a 1973 incident in which Cincinnati Bengal fullback Charles "Booby" Clark struck Denver Bronco safety Dale Hackbart in the back of the head five seconds after an interception was whistled dead. Hackbart's professional career was effectively ended. The blow resulted in three broken vertebrae, muscular atrophy in Hackbart's arm, shoulder, and back, and a loss of strength and reflex in his arm. The trial court ruled that Hackbart had assumed the risk of such a blow. On appeal the Tenth Circuit Court of Appeals ruled that Hackbart indeed could sue for damages and that the Cincinnati Bengals football team could be held accountable. In reversing and remanding the case, Judge Doyle emphasized that Clark's hit had been intentional and was specifically prohibited by NFL rules. As such, it could not have been an inherent part of the game and Hackbart could not have assumed the risk.

In baseball the leading assumption of the risk case is *Bourque v. Duplechin*[49] which involved an adult-league amateur softball game. The plaintiff, a second baseman, sued for negligence when a member of the opposing team, while running from first to second base, ran outside the baseline to hit the plaintiff. The Louisiana Court of Appeals found that the defendant "was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players."[50] The defendant breached this duty; his "behavior was, according to the evidence, substandard and negligent."[51] The court stated that the second baseman may have assumed the risk of being spiked while standing near the base, but did not assume the risk of contact so far away from the base as to be violative of the duty to play the game in the ordinary manner.[52] Dicta in the case appears applicable to all professional sports:

> A participant in a game or sport assumes all of the risks incidental to that particular activity which are obvious and forseeable. A participant does *not* assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating (emphasis added).[53]

47. *Id.*
48. 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F. 2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).
49. Bourque v. Duplechin, 331 So. 2d 40 (La. App. 1976).
50. *Id.* at 42.
51. *Id.*
52. *Id.*
53. *Id.*

The Consent Defense

A defendant's most productive defense is "athletes willingly consent to all contact incident to the game." The case law in this area is extremely unclear because the elements of consent vary among jurisdictions. The defense was first recognized in a criminal assault case, *Rex v. Donovan*.[54] The Court of King's Bench stated that sports was one of the well established exceptions to the general rule that an act likely to cause or intended to cause bodily harm is an unlawful act.[55] While some jurisdictions have attempted to deal with such incidents on a case-by-case basis, others have attempted to develop rational tests for the application of the consent defense to sports violence cases.

Scope-of-consent test. This test implies that although players consent to participation in the game, they do not consent to conduct that exceeds a certain level of violence. Dean Prosser states that "[t]he defendant's privilege is limited to the conduct to which the plaintiff consents, or at least to acts of a substantially similar nature."[56] Players consent to physical contact that is generally and appropriately incident to the game. Thus, defendant must show that the allegedly improper conduct occurred during the normal flow of the game. In deciding this issue, the trier of fact should consider whether the sport was contact and whether the action was of a type reasonably expected to occur during the course of the game.[57] Under this test, if athletes do not engage in intentional conduct that is markedly different from that which the plaintiff apparently consented to, they will not be liable in battery for resultant accidental injuries.

Rules-of-the-game test. Section 50 of the Second Restatement of Torts provides the best definition of this test.[58] Taking part in a game manifests a willingness to submit to such bodily contacts as the rules permit. Participating, however, does not manifest consent to contacts which are prohibited by such rules if those rules were designed to protect the participants. The leading American case adopting a strict interpretation of the rules-of-the-game test is *Nabozny v. Barnhill*.[59] During the course of a soccer game, the defendant, a forward, kicked the plaintiff goalkeeper in the head while he was in the penalty area. The goalkeeper sustained serious head injuries. The game's organizational rules prohibited contact with a goalkeeper in the penalty area. In attempting to enunciate a principle applicable to all sports violence cases, the Illinois Court of Appeals stated that:

54. 2 K.B. 498 (1934).
55. *Id.* at 508.
56. PROSSER, *supra* note 43, at § 18, p. 103.
57. Note, *Criminal Law: Consent as a Defense to Criminal Battery—the Problem of Athletic Contests*, 28 OKLA. L. REV. 840, 845 (1978).
58. RESTATEMENT (SECOND) OF TORTS § 50, Comment 6 (1965).
59. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

> when athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule.[60]

Magnitude-of-the-act test. This test implies that athletes consent to reasonable actions of other players, regardless of whether the action was within the scope of the rules. The Provincial Court of Ottawa, Ontario, adopted the reasonableness standard in *Regina v. Maki*.[61] The judge maintained that a player does not consent to being maliciously attacked with a hockey stick. The commission of such an act is not part of the game.[62]

Magnitude-of-the-harm test. This test suggests that athletes consent only to those acts that are "reasonably foreseeable" when they enter the game. The goal of this standard is to "specifically provide a defense to criminal prosecution whenever the injury inflicted or risked is a 'reasonably foreseeable hazard' of a sports competition."[63] This test, however, is not the definitive solution to the problem. Because of the pressures previously described, an athlete may enter a game with knowledge of potential harm, but be powerless to do anything about it. Surely he cannot be deemed to consent to exceptional violence merely because he can foresee it.

Effectiveness-of-consent test. Some case law suggests that a victim's consent may not be effective because he is powerless to waive interests that the state has in controlling serious crime.[64] In *State v. Fransua*[65] the Court of Appeals of New Mexico stated that:

> Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts such as these. We hold that consent is not a defense to the crime of aggravated battery, . . . irrespective of whether the victim invites the act and consents to the battery.[66]

The Provocation Defense

Because so few jurisdictions recognize this defense, the fact that the

60. *Id.* at 260-61.
61. 14 Dom. L. R. 3d 164 (1970). It is only dictum because Maki was acquitted not as a result of his consent defense but because his act was considered to be in self-defense.
62. *Id.* at 167.
63. U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, 851 (1970).
64. For a discussion of this area, see Hechter, *supra* note 21 at 442-50.
65. 85 N.M. 173, 510 P.2d 106 (Ct. App. 1973).
66. *Id.* at 107.

defendant was provoked into retaliation may not be important in the sports violence context. In *Agar v. Canning*[67] the Manitoba Court of Queen's Bench held that "[i]njuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even where there is provocation," should give rise to liability.[68] Furthermore, in jurisdictions that do recognize this defense, provocation is only considered in the issue of mitigation, not in resolving guilt or innocence.[69]

The Involuntary Reflex Defense

This defense was successfully employed in *State v. Forbes*.[70] In *Forbes*, a criminal case, it was argued that such violence is the product of an involuntary reflex action and lacked the requisite mens rea. There are a number of reasons for the success of this defense. Initially, intent is a difficult element to prove, even without the reflex argument as a complicating factor.[71] Next, sports violence is taught and accepted by its participants as non-criminal from an early age.[72] Finally, given the high pressured, emotional nature of professional sports, the atmosphere is conducive to a player losing control.[73] Sports attorney Bob Woolf, however, notes that the "*heat of the game* has always been a kind of moral defense in sports to excuse bad manners and irrational acts."[74]

Self-defense

An athlete who acts in self-defense against an unlawful attack is not guilty of battery. Courts have fashioned the rule that a person who finds himself assaulted may answer force with force in order to protect a victim from injury as long as the apparent danger is present.[75] For a number of reasons, an athlete cannot rely upon self-defense in most cases. First, the defendant is limited to force roughly equal to that used against him. Self-defense is not a proper defense if the blow was unnecessarily severe and vindicative rather than preventive.[76] The use of excessive force may constitute an assault if it goes beyond that which is necessary to repel the attacker.[77] Thus, where the response is more severe than the initial contact, self-defense does not apply.

Another reason for the limited use of self-defense is that the rule requires the absence of provocation on the part of the plaintiff. Also,

67. 54 W.W.R. 302 (Q.B.Man. 1965), *aff'd*, 55 W.W.R. 384 (C.A. 1966).
68. *Id.* at 304.
69. Fraser v. Berkley, 7 Car & P. 621, 173 E.R. 272 (1836).
70. No. 63280 (Minn. Dist. Ct., 4th Jud. Dist., *judgment of mistrial entered*, Aug. 12, 1975).
71. TORT LIABILITY, *supra* note 44, at 1134.
72. HORROW, *supra* note 6, at 25.
73. Note, *supra* note 39, at 387-88.
74. WOOLF, *supra* note 9, at 141.
75. Hechter, *supra* note 21, at 450.
76. Rex v. Kinman, 16 B.C. 148, 18 Canadian Crim. Cases 139 (C.A. 1911); *Nykolyn v. the King* 94 Canadian Crim. Cases 145, 8 Crim. Reports 7 (1949).
77. Hechter, *supra* note 21, at 451.

the plaintiff must have had reasonable grounds to have an actual and honest belief that he was about to be placed in immediate danger of great bodily harm.[78] Finally, the athlete may use force only when retreating or avoiding the danger is unreasonable. Hence, when a player has the option of walking away from a fight, self-defense will not excuse him if he chooses to stay and fight the opponent.

Respondeat Superior: Vicarious Liability and Agency Liability

Owners and coaches may be liable under respondeat superior, vicarious liability or a theory of principal and agent. If one recognizes the pressures used to encourage conformity to the generally accepted standards of violent behavior, liability under one of these theories is plausible. Indeed, in *Tomjanovich v. California Sports, Inc.*[79] this is precisely what happened. The suit arose out of an incident in which Los Angeles Laker forward Kermit Washington hit Houston Rocket forward Rudy Tomjanovich in the face after an on-court scuffle between Washington and Houston player Kevin Kunnert. Tomjanovich alleged that Washington's punch was unnecessary and absolutely inexcusable. Citing everything from fractures of the nose, jaw and skull to "impairment of earning capacity and loss of business opportunities by way of promotional fees and commercial endorsements," Tomjanovich asked for $2.6 million in total damages. On August 17, 1979, after two weeks of testimony, the jury awarded Tomjanovich $1.8 million in actual damages and $1.5 million in punitive damages for a total of $3.3 million, $600,000 more than Tomjanovich asked for in his complaint.

The jury found basically that Washington committed a battery and acted with "reckless disregard for the safety of others." The blow "was not accidental or unintentional, but was an intentional act." The jury also found the Los Angeles Lakers organization negligent for failing "to adequately train and supervise" Washington after it became apparent "that he had a tendency for violence while playing basketball."[80] Almost as important is what the jury did *not* find: Washington did not act in self-defense and "the blow struck by Washington was far beyond any type of conduct permitted by the rules and customs of the game. Tomjanovich did not consent to such conduct." After the jury decision, the Houston Rockets' suit against the Los Angeles Lakers for lost business and franchise value due to Tomjanovich's absence was settled out of court.

78. *Id.*
79. Tomjanovich v. California Sports, Inc., No. CA H-78-243 (S.D. Tex. Aug. 17, 1979); *see* 2 SPORTS L. RPTR. No. 4, 1 (1979).
80. *Id.*; 4 SPORTS L. RPTR. No. 2, 6 (1981).

LEGISLATIVE ATTEMPTS TO DEAL WITH THE PROBLEM OF SPORTS VIOLENCE

The ambiguities and line-drawing in sports violence cases point up the inadequacies of the civil and criminal justice system in these cases. As case law indicates, a football player may be liable for something he does on the field, yet a hockey player may not be liable for the same act in the rink. A baseball player may be liable in Louisiana, but may not be liable in Illinois. Much of the confusion stems from judges and juries interpreting laws which legislators did not write to cover cases of sports violence.

State and local assault and battery laws have traditionally had little usefulness in the area of professional sports violence. These laws, and the judicial cases interpreting them, have focused on ordinary street crime, and have proven almost irrelevant to the special circumstances of mayhem on the field. A federal statute would have a deterrent effect, making professional sports safer for all participants, and would also help players know the outer limits of acceptable conduct while reducing peer and management pressure to use excessive violence to injure or intimidate opposing players. Because of the inconsistent application of these laws to professional sports, and because of the interstate nature of modern professional sports, a federal criminal statute would be complementary to existing state and local laws.[81]

On July 31, 1980, Representative Ronald M. Mottl (D-Ohio)[82] introduced H.R. 7903, the Sports Violence Act of 1980.[83] The bill would have amended Chapter 7 of Title 18 of the United States Code and would have made excessive violence by a player a criminal offense by providing that:

> [a] player in a professional sports event who knowingly uses excessive physical force and thereby causes a risk of significant bodily injury to another person involved in that event shall be fined not more than $5000 or imprisoned not more than one year or both.

Excessive physical force is defined as "physical force that has no reasonable relationship to the competitive goals of the sport; is unreasonably violent; and could not be reasonably foreseen or was not consented to by the injured person." The Act thus would have established a uniform national floor defining illegal conduct, and yet would have allowed states to draft stricter legislation. Unfortunately, due to the extensive lobbying efforts of the sports establishment, the bill did not pass.

The bill was re-introduced in the Ninety-seventh Congress as H.R. 2263 with the support of former Buffalo Bills quarterback Jack Kemp

81. 126 CONG. REC. E3711 (daily ed. July 31, 1980) (prepared remarks of Rep. Mottl). [hereinafter cited as Mottl].

82. Congressman Mottl starred as a pitcher on the University of Notre Dame baseball team and also played for the Philadelphia Phillies minor league farm club.

83. 126 CONG. REC. E3711 (daily ed. July 31, 1980) (prepared remarks of Rep. Mottl).

(R-N.Y.). H.R. 2263 is identical to its predecessor H.R. 7903. It is now being considered by the House Judiciary Subcommittee on Crime, which recently completed hearings on the Bill with testimony from athletes and officials from the four major professional sports leagues, sociologists, legislators and attorneys specializing in sports law.

Representative Mottl also recently introduced H.R. 5079, the Sports Violence Arbitration Act of 1981, which would require all major sports leagues to establish an arbitration board that would create financial incentives for clubs and players to refrain from encouraging or engaging in unnecessarily violent conduct. The board could impose fines upon a club and hold the club financially liable for any unnecessarily violent conduct of its players. The financial liability of a club would include paying the salary of an injured player during the period of an injury, paying the injured player's medical expenses, paying damages to the injured player if he is prevented from playing in subsequent seasons, and possibly paying damages or awarding a draft choice to the injured player's club for failure to supervise excessively violent players.

The board could suspend without pay and impose fines on the player who flagrantly violated the rules protecting players in competition, thereby risking injury in a manner that is unrelated to the competitive goals of the sport. A grievance procedure, complete with an evidentiary hearing, would be the vehicle of imposing punishment on clubs and players. Thus, H.R. 5079 would impose civil penalties, complementing the criminal penalties of H.R. 2263.

Federal statutes such as these would preserve the vitality of professional sports, while serving notice on athletes that they have no license to commit unwarranted acts of assault and battery.[84] This statute would draw the line between legitimate, aggressive behavior and excessive, illegal conduct. The sincere threat of criminal prosecution, by deterring the most extreme acts of sports violence, would make sports safer for the participants.[85] Only those players who violate the law would be prosecuted, those who obey the law need not worry about prosecution.[86] Third, such legislation would "symbolically confirm that fundamental law and order do not stop at the ticket gate."[87] Finally, punishment of excessive violence would "set an example for young people who look to professional athletes as role models for their own behavior."[88]

PROPOSAL FOR FEDERAL SPORTS AGENCY

Another solution to this and other sports problems would be the

84. Sprotzer, *Violence in Professional Sports: A Need for Federal Regulation*, 33 CASE AND COMMENT 3, 6, 8 (May-June 1981).
85. 126 CONG. REC. E3711 (daily ed. July 31, 1980) (prepared remarks of Rep. Mottl).
86. Sprotzer, *supra* note 84, at 10.
87. *Id.*
88. *Id.*

creation of a governmental sports agency that would have the power to oversee and regulate all aspects of sports. Though the mechanics of such an agency may be debated, the advantages are worth noting. First, the problem of distinguishing individual liability from sports liability would be less important when the sports institution, through regulatory guidance, ceases to promote or tolerate questionable activity.[89] Second, the difficulties of defining appropriate conduct would be reduced by forming a regulatory board composed of knowledgeable representatives of the sport itself and other sports-related fields.[90] Third, an agency could impose uniform national regulation and avoid judicial inconsistency.[91] Fourth, even if civil or criminal sanctions would suffice under normal circumstances, the agency could provide additional deterrent effect by imposing further sanctions on the team for its player's violation.[92] Fifth, the public policy issues and current ambiguities could be confronted more effectively and justly through legislative and administrative action.[93]

Furthermore, there are additional spin-off advantages that flow from administrative regulation in this context. Such an approach would be similar to the situation long established for other occupations, most notably the professions, and would be a long overdue recognition of sports as a business enterprise.[94] Additionally, establishment of a federal agency would reduce the pressures on athletes to keep sports violence cases out of litigation by eliminating the need for the athlete to initiate court action.[95]

CONCLUSION

Realistically, there are a number of significant problems in litigating sports violence cases. But the courts must stand ready to intervene despite the problems, when an act of violence is excessively brutal or when the league's fine or suspension is not severe enough to deter further incidents. The Sports Violence Act would provide a uniform national standard for judicial resolution of sports violence cases, and a federal sports agency would provide the needed enforcement mechanism. However we ultimately decide to control the problem of sports violence, something must be done as rapidly as possible, or we risk further deterioration of the sports so valued by American society.

89. *Id.*
90. Hallowell and Meshbesher, *Sports Violence and the Criminal Law*, 13 TRIAL 27, 32 (Jan 1977).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Discipline, supra* note 28, at 795.