

# GOING TO THE BULLPEN: USING UNCLE SAM TO STRIKE OUT PROFESSIONAL SPORTS VIOLENCE

## INTRODUCTION

The prevalence of excessive violence in professional sports events presents a serious social problem in both the United States and Canada. It has long been debated whether traditional tort and criminal law should apply to professional athletes whose actions exceed an acceptable level of conduct during games.<sup>1</sup> However, distinguishing between genuine, intense contact and behavior that escalates into tortious, even criminal, activity is one of the most difficult issues facing contemporary sports.<sup>2</sup> Yet even when professional athletes have been brought into civil and criminal courts, history shows that the legal system has not been an effective method of diminishing excessive and unnecessary violence on ice rinks, basketball courts, and playing fields.<sup>3</sup> Many argue that sanctions by the respective professional sports leagues<sup>4</sup> are a more efficient way of curtailing sports violence.<sup>5</sup> However, while fines and suspensions by the National Hockey League ("NHL"), National Football League ("NFL"), National Basketball Association ("NBA"), and Major League Baseball ("MLB") are proper for common incidents of misconduct, the influence of a disinterested party is necessary to substantially decrease excessive violence.

A full examination of sports violence would encompass a wide range of belligerent activity, including, but not limited to, alterca-

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<sup>1</sup> See Bradley C. Nielsen, Note, *Controlling Sports Violence: Too Late for Carrots — Bring on the Big Stick*, 74 IOWA L. REV. 681, 711 (1989) ("Only through a strict 'get tough' policy of prosecutorial intervention will athletes reevaluate their attitudes and adjust their athletic activities to conform to socially acceptable forms of behavior.").

<sup>2</sup> See MICHAEL J. COZZILLO & MARK S. LEVINSTEIN, *SPORTS LAW* 879 (Carolina Academic Press 1997).

<sup>3</sup> 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 (1991) ("A well-drafted federal standard will provide consistent treatment of athletes and will mandate the prosecution of violent acts.").

<sup>4</sup> For the purposes of this Note, the term "leagues" will be used to connote the National Football League, the National Basketball Association, the National Hockey League, and Major League Baseball.

<sup>5</sup> See Jonathan H. Katz, Note, *From the Penalty Box to the Penitentiary — The People Versus Jesse Boulerice*, 31 RUTGERS L.J. 833, 835 (2000) ("[M]ore uniformly enforced control by the NHL is the most feasible and effective way to curb on-ice violence."); see also Linda S. Calvert Hanson & Craig Dornis, Article, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 164 (1996) ("[T]he one mechanism which reflects substantial change and has the potential to make an appreciable impact is the professional leagues' contributions.").

tions between players and fans,<sup>6</sup> confrontations between players and game officials,<sup>7</sup> and aggressive behavior by players off the field.<sup>8</sup> Moreover, a comprehensive study would also cover collegiate<sup>9</sup> and recreational violence.<sup>10</sup> However, the purpose of this Note is to suggest a remedy for excessive player-against-player violence on professional<sup>11</sup> ice rinks, courts, and fields. Past endeavors to decrease excessive sports violence have proved ineffective. In light of the key role that professional sports play in American culture,<sup>12</sup> the sports violence dilemma must be resolved.

Part I will examine the scope of violence during major professional sporting events, as well as its detrimental effect on American society. Part II will explain why the problem of such violence exists in professional sports, concentrating specifically on pressure from team management and financial incentives. Part III will analyze the various approaches used unsuccessfully to control violence in sports, including civil tort liability, the criminal justice system, legislation, and internal sports league control. Finally, Part IV will pro-

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<sup>6</sup> On May 16, 2000, a melee at Chicago's Wrigley Field began when a fan allegedly struck Los Angeles Dodger catcher Chad Kreuter in the back of the head and stole his hat while Kreuter sat in the bullpen. In response, Dodgers players and coaches climbed into the stands and fought with fans while being doused with beer. The incident resulted in a Major League Baseball record nineteen suspensions, as well as the arrest of three fans. See Teddy Greenstein, *The Not-So-Friendly Confines; Dodgers, Fans Fight in Stands*, CHI. TRIB., May 17, 2000, at 1; see also Clay Latimer, *Over the Line: Abusive Fans Turn Ballparks into Battle Zones*, DENVER ROCKY MOUNTAIN NEWS, May 31, 2000, at C8 ("[A]cross the nation, many fans are playing dangerous games with players and coaches, a trend that disturbs traditionalists who yearn for baseball's peaceful, pastoral past.").

<sup>7</sup> During a Continental Basketball Association game on March 30, 1990, Tulsa Fast Breakers guard Allan Leavell disagreed with a call by referee Peter Quinn, and struck the referee in the neck, sending him crumbling to the floor. See Mack Reed, *Battery Trial to Begin for Pro Basketball Player*, L.A. TIMES, May 11, 1990, at B1. The arrest and prosecution of Leavell was the first in professional sports for assaulting an official. See *id.*

<sup>8</sup> On January 19, 2001, former Carolina Panthers wide receiver Rae Carruth was convicted of conspiracy to murder his pregnant girlfriend. See Mike Freeman, *Conspiracy of Murder Conviction for Carruth*, N.Y. TIMES, Jan. 20, 2001, at D1.

<sup>9</sup> On April 23, 1999, Wichita State pitcher Ben Christensen threw a ball at Evansville's Anthony Molina while Molina was standing about thirty feet from home plate because he thought Molina was trying to time his pitches. The ball struck Molina in the left eye, breaking the socket in three places and resulting in twenty-three stitches. See Peter King, *College Beanball Shocker: A Purpose Pitch*, SPORTS ILLUSTRATED, May 17, 1999, at 23; see also Tom Verducci, *Chicago Fireballer*, SPORTS ILLUSTRATED, June 14, 1999, at 23 (noting that Christensen was selected by the Chicago Cubs in the first round of baseball's amateur draft. Meanwhile, Molina's vision may be permanently damaged.).

<sup>10</sup> See Melissa Cohen, Note, *Tort Law - Recreational Activity - Standard of Care - Co-Participants in Recreational Activities Owe Each Other a Duty Not to Act Recklessly* - Ritchie-Gamester v. City of Berkley, 597 N.W.2d 517 (Mich. 1999), 10 SETON HALL J. SPORT L. 187 (2000); see also *Youth Charged With Attacking Goalie*, FORT WORTH STAR-TELEGRAM, Feb. 15, 2001, Sports, at 2 (reporting that a 17-year-old player from Youngstown, Ohio was charged with felony assault for deliberately kicking a goalie in the face seconds after a game, leaving him unconscious and with a broken cheekbone).

<sup>11</sup> For the purposes of this Note, the professional sports at issue are hockey, baseball, basketball, and football.

<sup>12</sup> See *infra* Part I.

pose the establishment of a National Sports Policy Commission ("NSPC"), created through federal legislation, which will have secondary review of sports violence cases. After the sports league has evaluated the incident at hand, the NSPC may, if warranted, impose additional suspensions or fines as well as award financial compensation to injured players. As a last resort, the NSPC would refer extreme episodes of sports violence to the judicial system for criminal sanctions. Under this approach, the problem of professional sports violence will be remedied in an efficient and consistent manner.

### I. THE SCOPE OF THE SPORTS VIOLENCE PROBLEM

Violence has been a common theme in professional sports throughout the twentieth century.<sup>13</sup> Each of the four major American sports has demonstrated its own style of senseless violence.<sup>14</sup> One of baseball's first major incidents of violence took place in San Francisco's Candlestick Park in 1965.<sup>15</sup> San Francisco Giants pitcher Juan Marichal, who had nearly hit the Los Angeles Dodgers' Maury Wills in the head with a pitch earlier in the game, was at bat against Dodger Sandy Koufax.<sup>16</sup> After a pitch, Johnny Roseboro, the Dodger catcher, threw the ball back to the pitcher, and either nicked Marichal's ear or came very close to doing so.<sup>17</sup> An exchange of words ensued, after which Marichal struck Roseboro on the head with his bat, causing a two-inch wound.<sup>18</sup>

Perhaps the most famous episode of violence in basketball took place during a 1977 NBA game.<sup>19</sup> While the Houston Rockets' Rudy Tomjanovich was trying to break up a scuffle, Kermit Washington of the Los Angeles Lakers punched him in the face.<sup>20</sup> The punch was so hard that it fractured Tomjanovich's jaw, nose,

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<sup>13</sup> After witnessing the results of a 1905 game in which the Pennsylvania football team tried to win a game by reducing Swarthmore's star player to a bloody pulp, President Theodore Roosevelt threatened to ban football by executive order unless the game was made less violent. See Richard M. Markus, *Sport Safety: On the Offensive*, TRIAL, July/Aug. 1972, at 12.

<sup>14</sup> See, e.g., Nielsen, *supra* note 1, at 684.

<sup>15</sup> See 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 680 (2d ed., Praeger Publishers 1993).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* Consequently, Marichal was fined \$1,750 by the league, a record at that time, and suspended for eight games. See *id.* "Arthur Daily of the *New York Times* stated, 'It's a cinch though, that Marichal would have landed in jail if he had perpetrated his outrageous attack at the corner of Market and Powell Streets in San Francisco instead of in Candlestick Park.'" *Id.* Although Roseboro filed an \$110,000 damage suit against Marichal, the suit was settled out of court for only \$7,500 in 1970 after many legal delays. See *id.*

<sup>19</sup> See Hanson & Dernis, *supra* note 5, at 129.

<sup>20</sup> See *id.*

and skull, resulting in a concussion and leakage of spinal fluid from the brain cavity that ended his playing career.<sup>21</sup>

This type of brutality is not limited to regular season games. Excessive violence during a 1978 NFL pre-season game also resulted in tragedy. As New England Patriots wide receiver Darryl Stingley stretched out to reach a poorly thrown pass, Oakland Raiders safety Jack Tatum, running from the opposite direction, slammed into Stingley's head with his helmet and shoulder pads.<sup>22</sup> Although this vicious hit left Stingley paralyzed, Tatum later bragged about his ruthlessness on the football field in his 1996 book, *Final Confessions of NFL Assassin Jack Tatum*.<sup>23</sup>

A widely-publicized incident of hockey violence occurred during a 2000 NHL game in Vancouver, Canada. In the first period of the game, Boston Bruins defenseman Marty McSorley and Vancouver Canucks forward Donald Brashear squared-off in a fight, which Brashear won convincingly.<sup>24</sup> Seconds before the game was to end, McSorley skated up behind Brashear and swung his hockey stick baseball-style, hitting Brashear in the right temple.<sup>25</sup> Brashear was knocked unconscious, hit his head on the ice after collapsing, and had a seizure in front of thousands of horrified fans.<sup>26</sup> He was later diagnosed with one of the most serious types of concussions, a Grade III.<sup>27</sup>

#### A. *The Legal Issue*

The legal issue involved in sports violence, exemplified by the aforementioned incidents, is whether the resolution of such ag-

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<sup>21</sup> See *id.* As punishment for this vicious punch, the NBA suspended Washington for sixty days and fined him \$10,000. See Richard Lapchick, *When Sports Violence is a Criminal Act*, CHRISTIAN SCIENCE MONITOR, Feb. 28, 2000, USA, at 1.

<sup>22</sup> See David Dupree, *Hazardous Slant Brought Injury*, WASH. POST, Aug. 15, 1978, at D1.

<sup>23</sup> See JACK TATUM & BILL KUSHNER, *FINAL CONFESSIONS OF NFL ASSASSIN JACK TATUM* (Susan Smith ed., Quality Sports Publications 1996). In the book, Tatum said, "my best hits border on felonious assault . . ." *Id.* at 11.

<sup>24</sup> See Nancy Marrapese-Burrell, *Incident Will Stick With McSorley, Suspension Likely to End His Season*, BOSTON GLOBE, Feb. 23, 2000, at F1.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *Brashear's Staying Quiet on McSorley*, ST. PETERSBURG TIMES, Feb. 25, 2000, at 7C. Dr. Rui Avelar, the Canucks' team doctor, later testified that Brashear's injury likely came from McSorley's stick hit, not from the fall to the ice. See *Sports Briefs*, DUBUQUE TELEGRAPH HERALD, Sept. 27, 2000, at B2. According to the American Academy of Neurology, if there is any loss of consciousness, the injury is classified as a Grade III concussion. A Grade III concussion can be followed by postconcussive syndrome, which includes symptoms such as headache, dizziness, fatigue, irritability, and impaired memory and concentration. See David S. Kushner, M.D., *Concussion in Sports: Minimizing the Risk for Complications*, AM. FAMILY PHYSICIAN, Sept. 15, 2001, available at <http://www.aafp.org/afp/20010915/1007.html> (on file with author).

gression properly belongs in the judicial system.<sup>28</sup> If “violence on the playing field or in the arena escalates to an unacceptable level during the course of play,”<sup>29</sup> should such situations be adjudicated in the courtroom? When are actions by players during games not only fouls, but crimes?<sup>30</sup> Do athletes play by rules different from those that the rest of society must follow?<sup>31</sup>

To examine the above issue, “it is important to distinguish between normal aggressive conduct that can be contemplated from sports participants and . . . dangerously excessive violence”<sup>32</sup> that is not “part of the game.”<sup>33</sup> Most injuries result from contact that is an essential part of the sport, such as tackling in football or checking in hockey.<sup>34</sup> All professional athletes recognize the inherent risks and dangers of the respective sport in which they partake.<sup>35</sup> Thus, many claim that athletes assume the risk of injuries incurred while playing a certain sport.<sup>36</sup>

However, the applicability of the assumption of risk defense is contingent upon the nature and extent of the player’s consent.<sup>37</sup> “Many legal scholars agree that if the player’s conduct was within the bounds of what one would reasonably foresee as a hazard of the game, the violent act is authorized, and will not expose the perpetrator to criminal liability . . . .”<sup>38</sup> For example, bench-clearing brawls “serve an undeniable role in the often dysfunctional social milieu of baseball.”<sup>39</sup> “Fights are baseball’s way of enforcing perceived violations of [the sport’s] murky etiquette,” or unwritten rules.<sup>40</sup> Accordingly, since brawls are a foreseeable part of baseball, and players implicitly consent to certain intentional fouls dur-

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<sup>28</sup> See Bruce Lowitt et al., *Drawing Line Between Foul and Crime; Sports is Having a Tough Time Policing Itself*, COMMERCIAL APPEAL (Memphis), Feb. 27, 2000, at D1.

<sup>29</sup> 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, 1153 (2000).

<sup>30</sup> See Lowitt, *supra* note 28, at D1.

<sup>31</sup> See Hanson & Dernis, *supra* note 5, at 134.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 135.

<sup>34</sup> See *id.*

<sup>35</sup> “The inherent risks are those that are a normal, integral part of the activity – risks that cannot normally be eliminated without changing the nature of the activity itself.” DOYCE J. COTTEN & T. JESSE WILDE, *SPORT LAW FOR SPORT MANAGERS* §2.21, at 49 (Kendall/Hunt Publishing Co. 1997).

<sup>36</sup> “The assumption of risk defense states that one may not recover from an injury to which one consents. In other words, when one voluntarily exposes oneself to known and appreciated risks, that person cannot recover for injuries resulting from those risks.” *Id.* at 48; see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §68, at 480-98 (5th ed. 1984) (explaining the assumption of risk theory).

<sup>37</sup> See COTTEN & WILDE, *supra* note 35, at 48.

<sup>38</sup> Clarke, *supra* note 29, at 1168.

<sup>39</sup> Larry Stone, *The Art of Basebrawl*, ARK. DEMOCRAT-GAZETTE, May 23, 1999, at C7.

<sup>40</sup> *Id.*

ing such fights, participants in the altercation should not be subject to liability.

Conversely, players do not consent to injuries caused by intentional acts that are not “part of the game.”<sup>41</sup> An unwritten honor code, for instance, is inherent in baseball fights and understood by players: no blind blows from behind or other cheap shots.<sup>42</sup> “Therefore, a distinct difference exists between aggressive conduct within the rules and improper violence involving the intentional use of force outside the rules of the sport to incapacitate an opponent.”<sup>43</sup> This Note will address how excessive violence that falls outside both the written and unwritten rules of the sport can be reduced.

### B. *Effects of Sports Violence on Society*

For many decades, sociologists and psychologists have studied the negative influence on society that flows from sports violence.<sup>44</sup> As sports violence is increasingly embedded in American culture, the problem is becoming more difficult to remedy.<sup>45</sup> In light of America’s obsession for sports, this harmful effect must be constrained.<sup>46</sup>

#### 1. Injury to General Society

Two important goals of criminal law are to prevent injury to the public and to maintain society’s notions of morality.<sup>47</sup> Some argue that sports violence in arenas and stadiums does not harm the public in the same manner that street violence does.<sup>48</sup> For in-

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<sup>41</sup> Hanson & Dernis, *supra* note 5, at 135; see Rob Parker, *McSorley Got Off Easy; Sports is not an Excuse for Violence*, DETROIT NEWS, Oct. 8, 2000, Sports, at 1 (arguing that a hockey player “expect[s] to get cross-checked or hooked. Maybe even slashed. No one, though, expects to get crowned over the head.”); see also Tyler Kepner, *Piazza Approves of Beanball Memo to Umpires*, N.Y. TIMES, Feb. 18, 2001, at B6 (New York Mets catcher Mike Piazza, who had a shattered bat thrown in his direction by New York Yankees pitcher Roger Clemens during the 2000 World Series, is quoted, “Sports is violent at times in just the physical play of it, but there shouldn’t be intent to harm.”).

<sup>42</sup> See Stone, *supra* note 39, at C7. In 1998, after sucker-punching Anaheim Angels infielder Frank Bolick, Kansas City Royals rookie Felix Rodriguez was immediately demoted to the minor leagues. See *id.*

<sup>43</sup> Hanson & Dernis, *supra* note 5, at 135.

<sup>44</sup> See Nielsen, *supra* note 1, at 686.

<sup>45</sup> See *id.* at 687.

<sup>46</sup> See *id.* at 686; see also Douglas E. Abrams, *Pro Athletes Create a Culture of Violence in Sports*, ST. LOUIS POST-DISPATCH, Feb. 27, 2000, at B3 (arguing that society can no longer allow professional athletes to commit assaults merely because “it’s part of the game”); Eugene Schmidt, *Sports Culture Fosters Violence in Society; National Obsession: Tolerance of Athletes’ Misdeeds Sends a Clear Message to Children*, DUBUQUE TELEGRAPH HERALD, July 27, 2000, at A4 (“[O]ur sports culture continues to foster . . . violence . . .”).

<sup>47</sup> See BERRY & WONG, *supra* note 15, at 681.

<sup>48</sup> See *id.*

stance, attending a sporting event or watching one on television does not injure the public.<sup>49</sup> Thus, the argument insists, since the goals of criminal law are not furthered by prosecuting sports violence, it should be treated differently from other types of violence that fall under the auspices of criminal prosecution.<sup>50</sup>

However, this argument fails to address both aims of criminal law.<sup>51</sup> First, contending that sports violence does not physically harm the public ignores the fact that athletes, despite their fame and fortune, are also members of the public. As such, athletes are entitled to the same protection of the criminal laws as the general public. Second, while the general public is not physically harmed by watching sports violence, "the existence in sporting events of socially unacceptable conduct that is treated with impunity conflicts with society's overall concept of good and bad conduct that has been long espoused by educational and religious institutions."<sup>52</sup> Thus, the contention that deterring sports violence fails to further the justifications of criminal law is erroneous.<sup>53</sup> Overlooking professional athletes' excessive conduct and assuming an inactive role in its prevention is contrary to criminal law's goals—preventing injury to the public and supporting our society's notions of ethical conduct.

## 2. Athletes as Role Models for Children

Undoubtedly, today's professional athletes act as role models for American children.<sup>54</sup> The growth of the sports industry is exemplified by the increased exposure that athletes receive from newspapers, magazines, the Internet, and twenty-four hour sports television channels.<sup>55</sup> A desire to achieve the fame and fortune of athletes has led children to emulate players who thrive in their respective sports.<sup>56</sup> If excessive violence is prevalent in professional sports, a child may think that it is acceptable to utilize similar ag-

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<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *Id.*; *see also* Karon, *supra* note 3, at 149 (stating that even though the violence was restricted to a playing field or ice rink, this does not eliminate the fact that the violence took place and that the general public has been subjected to witnessing it).

<sup>53</sup> *See* Karon, *supra* note 3, at 149.

<sup>54</sup> *See* RICHARD B. HORROW, *SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAW-MAKING AND THE CRIMINAL LAW* 114 (Carrollton Press 1980); *see also* Mike Mooneyham, *Bad Behavior Teaches Kids Wrong Lesson*, CHARLESTON POST AND COURIER, Aug. 24, 2000, at 1 (noting that misbehaving athletes have become heroes to youths).

<sup>55</sup> *See* Nielsen, *supra* note 1, at 688. For example, sports-hungry cable viewers can now tune into the Entertainment and Sports Television Network (ESPN), ESPN2, ESPN News, ESPN Classic, CNN SI, and Fox Sports Net for round-the-clock sports coverage.

<sup>56</sup> *See id.* at 689.

gression while participating in Little League Baseball or Pee Wee Football.<sup>57</sup> On a routine basis, America's youth suffer serious injuries caused by adolescent opponents imitating the tactics of professional athletes.<sup>58</sup> If this trend among our nation's youth is to be curtailed, society must first decrease the violence present in the professional leagues.<sup>59</sup>

## II. CAUSES OF SPORTS VIOLENCE

### A. *Pressure from Team Management*

Most commentators agree that one major cause of sports violence is pressure from team management.<sup>60</sup> Coaches encourage their players to intimidate opposing teams,<sup>61</sup> which, in itself, is a legitimate and effective tool for winning.<sup>62</sup> However, some athletes find it difficult to control their adrenaline and energy, which often results in the use of excessive violence that injures opposing players.<sup>63</sup> Yet, the sports violence problem escalates when coaches specifically order or insinuate that their "enforcers"<sup>64</sup> should try to injure other players.<sup>65</sup> Many players engage in violent conduct when expected to do so because they fear being labeled a coward by coaches and players.<sup>66</sup> Players who refuse or hesitate to respond

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<sup>57</sup> See *id.*; see also Mooneyham, *supra* note 54, at 1 ("[S]hould we be surprised that children . . . act in . . . [a violent] manner when their professional sports heroes exhibit the same traits on a much grander scale?").

<sup>58</sup> See Abrams, *supra* note 46, at B3 (recounting a high school hockey game where a 15-year-old skated from behind and checked an opponent headlong into the boards seconds before the final buzzer, causing the opponent to be paralyzed from the chest down). In an instructional book for young hockey players, Bobby Orr, a NHL Hall of Fame defenseman, teaches children the best method to win a hockey fight. See BOBBY ORR, *MY GAME* 224 (Little, Brown, & Co. 1974).

<sup>59</sup> See Nielsen, *supra* note 1, at 690; see also Abrams, *supra* note 46, at B3.

<sup>60</sup> See, e.g., HORROW, *supra* note 54, at 32-36.

<sup>61</sup> See Hanson & Dernis, *supra* note 5, at 137.

<sup>62</sup> Bill Laimbeer, head enforcer of the "Bad Boys" Detroit Pistons of the late-1980s and early-1990s, said, "A big part of the game, any game you play, is mental intimidation, . . ." Peter Vecsey, *Mahorn: Penalties Lack Punch*, USA TODAY, Apr. 13, 1993, at 8C. "As long as you don't slam people through the floor and injure them, mental intimidation is all-important. It's an edge a team has to try to maintain over the opponent. Once you have it, he is beaten." *Id.*

<sup>63</sup> See Hanson & Dernis, *supra* note 5, at 137; see also Katz, *supra* note 5, at 837 ("The problem occurs when these athletes become so aggressive that they engage in violent acts that would unquestionably be criminal outside the playing field.").

<sup>64</sup> "Enforcers" are players whose main role on the team is to intimidate and injure the opposition. See Hanson & Dernis, *supra* note 5, at 137.

<sup>65</sup> See, e.g., HORROW, *supra* note 54, at 32-34. Philadelphia Flyers general manager Bob Clarke stated, "[m]ost fights are caused by coaches. If a team is getting beat, the response is, 'Let's have a fight.' The coaches don't have to tell the players. The players aren't dumb." Michael Farber, *The Worst Job in Sports; While Some NHL Enforcers Like to Brawl, Many Members of the Fraternity of Fighters Find it Dangerous and Demeaning, An Ugly Way to Earn a Handsome Living*, SPORTS ILLUSTRATED, Mar. 24, 1997, at 66.

<sup>66</sup> See, e.g., HORROW, *supra* note 54, at 30.



to a coach's demand are often benched or reprimanded in another fashion.<sup>67</sup>

A team that abstains from using excessive violence is at a competitive disadvantage.<sup>68</sup> Surviving a season without major injuries to key players is a vital element of winning a championship.<sup>69</sup> Thus, when one team utilizes overly aggressive tactics, the other teams must do so as well to increase their chances of winning.<sup>70</sup>

### B. *Financial Incentives*

Even if overly aggressive behavior does not lead to a winning season, no one can doubt that violence sells.<sup>71</sup> For example, many hockey fans purchase tickets expecting a bloody brawl to occur.<sup>72</sup> As a result, NHL executives allow fighting during games because prohibiting it would alienate a large constituency of hockey fans that enjoy such violence.<sup>73</sup> An increase in ticket sales and television viewers also means more profits for team owners and leagues.<sup>74</sup> The expansion of revenue trickles down to the players in the form of larger salaries. If more violence leads to more money, there is little incentive for players to refrain from acting in a violent manner.

## III. ATTEMPTS TO CONTROL SPORTS VIOLENCE

### A. *Civil Liability*

In the past few decades, athletes injured by excessive violence have sought monetary damages in civil court.<sup>75</sup> Depending on the intent of the defendant, the plaintiff can base a tort action on three theories of recovery: (1) intentional tort (assault and bat-

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<sup>67</sup> See Farber, *supra* note 65, at 66. On January 24, 1982, the Los Angeles Kings' Paul Mulvey initially failed to respond to coach Don Perry's instructions to start a fight with an opposing roughhouser. As a result, Mulvey was demoted to the minor leagues and never played in the NHL again. "There was no doubt in my mind I was blackballed," Mulvey said. "I was marked." *Id.* For an in-depth discussion of on-the-field assaults and respondeat superior, the legal doctrine that holds an employer liable for torts committed by an employee, see Steven I. Rubin, Article, *The Vicarious Liability of Professional Sports Teams for On-The-Field Assaults Committed by Their Players*, 1 VA. J. SPORTS & L. 266 (1999).

<sup>68</sup> See Hanson & Dernis, *supra* note 5, at 138.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See Lapchick, *supra* note 21, at 1.

<sup>74</sup> One hockey team owner joked, "We're gonna have to do something about all this violence, or people are gonna keep buying tickets." Jay Darby, *Injuries Can Be a Pain*, BOSTON HERALD, Oct. 16, 1994, at B9.

<sup>75</sup> See BERRY & WONG, *supra* note 15, at 397.

tery), (2) recklessness, or (3) negligence.<sup>76</sup> To determine the likelihood of a plaintiff athlete's success in civil court, an examination of each tort theory, as well as a discussion of the difficulties that plaintiffs face, is necessary.

## 1. Standard of Care

### a. Intentional Tort

If a person intends bodily contact with another person and an offensive result, he/she has committed an intentional tort.<sup>77</sup> The intentional, unprivileged,<sup>78</sup> harmful or offensive contact by the defendant with another person constitutes the intentional tort of battery.<sup>79</sup> A defendant is liable for assault when he, without privilege, intentionally places the plaintiff in apprehension of an immediate harmful or offensive touching.<sup>80</sup>

While it may seem that assaults and batteries frequently occur in athletic events, if the plaintiff has consented to the defendant's conduct,<sup>81</sup> there is no cause of action for an intentional tort.<sup>82</sup> In sports-related cases, the defense of consent, and more specifically, to what level of physical contact the plaintiff consented, is often a major issue.<sup>83</sup> Although the *Restatement of Torts* notes that participating in a game does not constitute consent to conduct prohibited by the game's rules or usages,<sup>84</sup> "essentially no jurisdiction has recognized batteries stemming from fairly typical rule violations . . . ."<sup>85</sup> Instead, an intentional tort is committed when players "step outside their role as fellow competitors"<sup>86</sup> and purposely in-

<sup>76</sup> See Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants Be Required to Be Reasonable?*, 5 SETON HALL J. SPORT L. 253, 255 (1995).

<sup>77</sup> See RESTATEMENT (SECOND) OF TORTS § 19 (1965) ("A bodily contact is offensive if it offends a reasonable sense of personal dignity.")

<sup>78</sup> According to section 10 of the *Restatement of Torts*:

(1) The word "privilege" is used throughout the Restatement of this Subject to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability.

(2) A privilege may be based upon

(a) the consent of the other affected by the actor's conduct . . . .

*Id.* § 10.

<sup>79</sup> See *id.* § 13.

<sup>80</sup> See *id.* § 21.

<sup>81</sup> Consent can be either actual (communicated) or apparent (inferred from one's participation in the event). See *id.* § 892. Actual consent is rarely an issue in sports injury cases. See Heidi C. Doerhoff, Note, *Penalty Box or Jury Box: Deciding Where Professional Tough Guys Should Go*, 64 MO. L. REV. 739, 743 n.40 (1999).

<sup>82</sup> See Yasser, *supra* note 76, at 255.

<sup>83</sup> See *id.*

<sup>84</sup> See RESTATEMENT (SECOND) OF TORTS § 50 cmt. b (1965)

<sup>85</sup> Doerhoff, *supra* note 81, at 744.

<sup>86</sup> Barbara Svoranos, Comment, *Fighting? It's All in a Day's Work on the Ice: Determining the*

jure opponents. Thus, the prevailing view is that an intentional act during a sporting event that results in injury, and is unforeseeable, is valid grounds for an assault and battery suit.<sup>87</sup>

#### b. Recklessness

If a person performs an act while knowing or has reason to know that such conduct creates an unreasonable risk of harm to another person, then that person has acted recklessly.<sup>88</sup> Recklessness differs from an intentional tort in that a reckless person does not intend to cause the harm that results from the conduct.<sup>89</sup> In the 1975 case of *Nabozny v. Barnhill*,<sup>90</sup> the Appellate Court of Illinois employed the recklessness standard of care in the sports context. In reversing the trial court's verdict for the defendant, the *Nabozny* court held that "a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player . . ."<sup>91</sup> In other words, the plaintiff could not recover by proving ordinary negligence.<sup>92</sup> The court created a middle standard between traditional negligence and "the court's customary refusal to punish sports-related negligence,"<sup>93</sup> which protects players against unreasonable risk of injury while maintaining the vigorous nature of athletic competition.<sup>94</sup>

In *Hackbart v. Cincinnati Bengals, Inc.* ("*Hackbart II*"),<sup>95</sup> the

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*Appropriate Standard of a Hockey Player's Liability to Another Player*, 7 SETON HALL J. SPORT L. 487, 501 (1997) (quoting Geoffrey M. Moore, Note & Comment, *Has Hockey Been "Checked From Behind" North of the Border? Unruh, Zapf, and Canada's Participant Liability Standard*, 18 LOY. L.A. INT'L & COMP. L. REV. 641, 643 (1996)).

<sup>87</sup> See Yasser, *supra* note 76, at 255. See generally *Tomjanovich v. California Sports, Inc.*, No. CIV.A.H-78-243, 1979 U.S. Dist. LEXIS 9282 (S.D. Tex. Oct. 10, 1979) (awarding the plaintiff, who was intentionally punched in the face during a basketball game, over \$3,000,000 in damages). For details of the Tomjanovich situation, see *supra* notes 19-21 and accompanying text.

<sup>88</sup> See RESTATEMENT (SECOND) OF TORTS § 500 (1965).

<sup>89</sup> See *id.* at cmt. f.

<sup>90</sup> 334 N.E.2d 258 (Ill. App. Ct. 1975). During an amateur soccer game, the defendant Barnhill, a forward, ran into the opposing team's penalty area and kicked the plaintiff Nabozny, the goalie, in the head when Nabozny knelled over to pick up the ball. See *id.* at 259-60. Barnhill's conduct was in violation of a well-known soccer rule that prohibits contact with the goalie when the goalie has control of the ball in the penalty area. See *id.* at 260. As a result of the kick, Nabozny suffered permanent skull and brain damage, and sued Barnhill for negligence. See *id.*

<sup>91</sup> *Id.* at 261.

<sup>92</sup> See *id.*; see also *infra* notes 102-108 and accompanying text.

<sup>93</sup> MICHAEL JONES, SPORTS LAW 99 (Prentice-Hall, Inc. 1999).

<sup>94</sup> See Hanson & Dernis, *supra* note 5, at 145-46.

<sup>95</sup> 601 F.2d 516 (10th Cir. 1979) [hereinafter *Hackbart II*]. The Tenth Circuit Court summarized that facts of the case as follows:

The injury occurred in the course of a [NFL] game between the Denver Broncos and the Cincinnati Bengals, which game was being played in Denver in 1973. The Broncos' defensive back, Dale Hackbart, was the recipient of the

reckless standard was applied to professional sports by a federal appeals court.<sup>96</sup> At trial, the judge reasoned that tort liability was not applicable to professional football since it was inherently dangerous, and courts were ill-suited to decide conflicts that occur on an NFL “battlefield.”<sup>97</sup> In reversing the trial court, the Tenth Circuit found that “there are no principles of law which allow a court to rule out certain tortuous conduct by reason of general toughness of the game or difficulty in administering it.”<sup>98</sup> Moreover, the court doubted whether a player could consent to conduct that violated either the NFL rules or the unwritten rules established by the general customs of the game.<sup>99</sup> After concluding that recklessness was the appropriate standard, the Tenth Circuit remanded the case for a district court to determine whether the defendant acted in reckless disregard of the plaintiff’s safety.<sup>100</sup> As *Hackbart II* demonstrates, the current perception is that recklessness is an appropriate cause of action.<sup>101</sup>

### c. Negligence

The third theory of tort recovery, negligence, is generally seen

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injury and the Bengals’ offensive back, Charles “Booby” Clark, inflicted the blow which produced it.

... The pass was intercepted by Billy Thompson, a Denver free safety, who returned it to mid-field. The subject injury occurred as an aftermath of the pass play.

As a consequence of the interception, the roles of Hackbart and Clark suddenly changed. Acting as an offensive player, Hackbart attempted to block Clark by throwing his body in front of him. He thereafter remained on the ground. He turned, and with one knee on the ground, watched the play following the interception.

The trial court’s finding that Charles Clark, ‘acting out of anger and frustration, but without specific intent to injure . . . stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff’s head and neck with sufficient force to cause both players to fall forward to the ground.’

... [Weeks later] it was discovered by the [Broncos’] physician that [the plaintiff] had a serious neck fracture injury.

*Id.* at 518-19.

<sup>96</sup> See Doerhoff, *supra* note 81, at 750.

<sup>97</sup> See *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352, 357-58 (D. Colo. 1977) (holding that intentional injuries incurred in football games were outside the framework of the law) [hereinafter *Hackbart I*].

<sup>98</sup> *Hackbart II*, 601 F.2d at 520.

<sup>99</sup> See *id.* at 520-21; see also *McKichan v. St. Louis Hockey Club*, 967 S.W.2d 209 (Mo. Ct. App. 1998) (holding that conduct that is “part of the game” of professional hockey, such as body checks after play has stopped, is “not outside the realm of reasonable anticipation” even if it violates rules of the game and causes injury, and therefore is not actionable). See generally Doerhoff, *supra* note 81, for a thorough analysis of *McKichan*.

<sup>100</sup> See *Hackbart II*, 601 F.2d at 524-25 (discussing the differences between intentional torts, reckless misconduct, and negligence).

<sup>101</sup> See Yasser, *supra* note 76, at 256.

as an insufficient basis for an athlete to recover damages.<sup>102</sup> According to the *Restatement*, negligence is “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”<sup>103</sup> A negligent person creates the unreasonable risk of harm through inadvertence, while a reckless actor does so with awareness of the danger.<sup>104</sup> For a player to be negligent in the sports context, a standard of conduct under which all players abide by, or ordinary care, must be breached.<sup>105</sup> Since negligent conduct is intrinsic in professional sports, courts normally disregard claims based on this standard of liability.<sup>106</sup> For instance, the *Hackbart II* court noted that “subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent.”<sup>107</sup> Although a small number of states have applied the negligence standard in player injury suits, the majority view is that for the plaintiff to have a cause of action, there must be evidence that the defendant engaged in either reckless or intentional conduct.<sup>108</sup>

## 2. Difficulties in Civil Suits

### a. An Affirmative Defense

The defense of assumption of risk is a legal roadblock to play-

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<sup>102</sup> See *id.* at 257; see also *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986) (holding that the duty of care owed to a professional sports participant was a duty to avoid reckless or intentional conduct, not negligence). But see *Babych v. McRae*, 567 A.2d 1269 (Conn. Super. Ct. 1989) (holding that a negligent violation of a NHL safety rule was a valid cause of action).

<sup>103</sup> RESTATEMENT (SECOND) OF TORTS § 282 (1965).

<sup>104</sup> See *id.* at cmt. g.

<sup>105</sup> See Nielsen, *supra* note 1, at 699-700.

<sup>106</sup> See *id.*

<sup>107</sup> *Hackbart II*, 601 F.2d 516, 520 (10th Cir. 1979).

<sup>108</sup> See *id.* at 524 (rejecting claim for negligence and allowing recklessness claim in professional football game); *Oswald v. Township High School Dist. No. 214*, 406 N.E.2d 157, 159-60 (Ill. App. Ct. 1980) (applying *Nabozny* “deliberate, willful or reckless disregard” standard to injury in high school gym class basketball game); *Nabozny v. Barnhill*, 334 N.E.2d 259, 261 (Ill. App. Ct. 1975); *Picou v. Hartford Ins. Co.*, 558 So.2d 787, 790 (La. Ct. App. 1990) (applying reckless standard to injury in softball game); *Gauvin v. Clark*, 537 N.E.2d 94, 97 (Mass. 1989) (applying reckless disregard of safety standard to injury arising in college hockey game); *Ross v. Clouser*, 637 S.W.2d 11, 13-14 (Mo. 1982) (applying recklessness standard to injury arising from church picnic softball game); *Dotzler v. Tuttle*, 449 N.W.2d 774, 777 (Neb. 1990) (applying willful or reckless disregard of safety standard to injury arising in a “pick-up” basketball game); *Kabella v. Bouschelle*, 672 P.2d 290, 294 (N.M. Ct. App. 1983) (disallowing claim for negligence in injury in recreational football game); *Marchetti v. Kalish*, 559 N.E.2d 699, 703-04 (Ohio 1990) (applying reckless standard to injury arising in “kick the can” game); *Connell v. Payne*, 814 S.W.2d 486, 489 (Tex. App. 1991) (applying reckless standard to injury in polo match); see also Yasser, *supra* note 76, at 253; JONES, *supra* note 93, at 99. But see *Crawn v. Campo*, 630 A.2d 368, 375 (N.J. Super. Ct. App. Div. 1993) (holding that participants in “pick-up” softball game were not immune from negligence liability), *aff'd*, 643 A.2d 600 (N.J. 1994).

ers successfully recovering for injuries in civil court.<sup>109</sup> The assumption of risk defense states that “a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.”<sup>110</sup> While some jurisdictions have abandoned the assumption of risk defense, others hold that it can be a complete bar to a plaintiff’s recovery.<sup>111</sup> The majority of states that allow the defense have held that one only assumes those risks that are foreseeable.<sup>112</sup> Yet, in some instances, reckless conduct in sports can be foreseeable. As a result, the tort system often hinders some athlete plaintiffs’ ability to recover for injuries inflicted by another player’s excessive violence.<sup>113</sup>

### b. Reluctant Plaintiffs

In addition to the legal barriers to a successful civil suit, another disadvantage of the tort system is that players are usually hesitant about suing other players.<sup>114</sup> This is true for a number of reasons. First, filing a civil suit against another player may lead to ostracism and retaliation by fellow players.<sup>115</sup> Many players feel it is an unwritten rule of sports for injured players to settle matters on the playing field rather than the courts.<sup>116</sup> One who breaks this understanding of resolving disputes “within the family”<sup>117</sup> might receive both extra physical abuse on the field and “cold shoulders” off the field.

Second, players do not want to jeopardize their sports careers by being labeled as a troublemaker by coaches and team management, who determine an athlete’s compensation and, in large part, success.<sup>118</sup> For example, a player contemplating filing suit may feel the threat of being traded, demoted to a minor league, released from the team, or denied reasonable salary increases.<sup>119</sup> Many

<sup>109</sup> See Hanson & Dernis, *supra* note 5, at 148. For a discussion of the defense of consent in the sports context, see *supra* notes 81-85 and accompanying text.

<sup>110</sup> RESTATEMENT (SECOND) OF TORTS § 496A (1965).

<sup>111</sup> See Doerhoff, *supra* note 81, at 753.

<sup>112</sup> See KEETON, *supra* note 36, at 485.

<sup>113</sup> See Doerhoff, *supra* note 81, at 753; see also McKichan v. St. Louis Hockey Club, 967 S.W.2d 209, 213 (Mo. Ct. App. 1998) (noting that professional hockey players have knowledge of hockey’s rules and customs, including the violence of the sport).

<sup>114</sup> See, e.g., HORROW, *supra* note 54, at 43.

<sup>115</sup> See *id.* at 46.

<sup>116</sup> See *id.* at 46-47.

<sup>117</sup> *Id.* at 45.

<sup>118</sup> See *id.* at 49. “One NHL player responding to [a] survey replied that ‘the fear of being labeled’ is ‘the *only* reason that players don’t go to court.’” *Id.* at 51.

<sup>119</sup> See *id.* at 52; see also Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771, 793 (1972) [hereinafter *Discipline in Professional Sports*] (stating that athletes are reluctant “to appeal to the courts for fear of being informally excluded from his sport or ‘black-listed’ as a troublemaker or clubhouse lawyer.”).

coaches and management personnel, often worried about their own job security, are mindful that team owners disfavor the publicity of player suits. Therefore, team staff is willing to discipline such potential litigants accordingly.<sup>120</sup>

Third, league officials encourage players to handle disputes internally, not through the judicial system.<sup>121</sup> For instance, in June 1988, the NHL enacted a by-law that fines teams \$1,000,000 for failing to utilize the league's internal justice system before resorting to the civil court system.<sup>122</sup> The sports leagues fear that civil suits will hinder the level of play, as well as create negative publicity that will decrease profits. Thus, players are pressured into letting the league office handle matters that are arguably outside the scope of the game.

Both legal roadblocks and peer pressure have led to the small number of tort suits brought by professional athletes. Hence, it is apparent that the civil court system is not an adequate option for plaintiff athletes. In turn, the threat of civil liability is not a sufficient deterrent to those whose conduct causes excessive sports violence.

### B. *Criminal Prosecution*

There is a large contingency of people who believe that criminal conduct is criminal whether it occurs on Madison Avenue or in Madison Square Garden, and favor using the criminal justice system to deter sports violence.<sup>123</sup> However, the criminal courts have been used infrequently for this purpose, and have been largely unsuccessful when charges are indeed brought by prosecutors.<sup>124</sup> To convict someone for assault, the state must prove that an athlete "purposely, knowingly or recklessly cause[d] bodily injury to another."<sup>125</sup>

Nonetheless, prosecutors have struggled to prove the necessary intent of the defendant in sports violence cases.<sup>126</sup> Not only does the prosecution have to prove that the player committed the act, such as assault and battery, but also that the player consciously

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<sup>120</sup> See HORROW, *supra* note 54, at 43.

<sup>121</sup> See Hanson & Dernis, *supra* note 5, at 149.

<sup>122</sup> See Austin Murphy, *North Star on Ice*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 34.

<sup>123</sup> See BERRY & WONG, *supra* note 15, at 679; see also Parker, *supra* note 40, at 1 ("Putting [Marty] McSorley in jail for . . . six months or so would have been one of the best things to happen in pro sports . . . . Playing in a hockey game shouldn't allow you to do something you wouldn't do anywhere else in society.").

<sup>124</sup> See Nielsen, *supra* note 1, at 701; see also Hanson & Dernis, *supra* note 5, at 139.

<sup>125</sup> MODEL PENAL CODE § 211.1(a) (1962).

<sup>126</sup> See Hanson & Dernis, *supra* note 5, at 140.

intended to do so.<sup>127</sup> "Proving the criminal mindset, or mens rea, is more difficult when players are involved in fast-pace physical activities, involving quick decision-making and contact as an integral part of the normal game."<sup>128</sup> Since aggressive contact without an intent to injure routinely occurs between players in football, ice hockey, and basketball, proving the mens rea "beyond a reasonable doubt" is appropriately a tough hurdle for prosecutors to overcome.<sup>129</sup> An examination of prior attempts to prosecute professional athletes for in-game excessive violence in both Canada and the United States is illustrative of the challenge facing criminal law in this context.

### 1. Attempts at Criminal Prosecution

Two Canadian cases arose from an incident during an NHL exhibition game in Ottawa between the St. Louis Blues and the Boston Bruins. After the Blues' Wayne Maki and the Bruins' Ted Green collided in the corner of the rink while trying to obtain control of the puck, Green pushed or punched Maki in the face with his glove.<sup>130</sup> The two players separated, but then met again in front of the Boston net, this time both swinging their sticks.<sup>131</sup> Green swung at Maki first, striking him on the neck or shoulder.<sup>132</sup> In response, Maki made a vertical swing, as opposed to a baseball-type swing, at Green; Maki's stick first hit Green's raised stick, and then Green's head, causing severe injuries.<sup>133</sup> As a result, Maki was charged with assault causing bodily harm,<sup>134</sup> and Green was charged with common assault.<sup>135</sup>

In *Regina v. Maki*,<sup>136</sup> the court found Maki's claim of self-defense to be a valid one.<sup>137</sup> Under Canadian law, a defendant must be acquitted on a charge of assault causing bodily harm if self-defense cannot be ruled out beyond all doubt.<sup>138</sup> Since the court found Green as the aggressor and Maki's action as a legitimate use of self-defense, the charge against Maki was dismissed.<sup>139</sup> In his

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<sup>127</sup> See MODEL PENAL CODE § 2.02(1) (outlining the general requirements for culpability).

<sup>128</sup> Hanson & Dernis, *supra* note 5, at 140.

<sup>129</sup> See *id.*

<sup>130</sup> See *Regina v. Maki*, [1970] 14 D.L.R.3d 164 (Ont. Prov. Ct.).

<sup>131</sup> See *id.* at 165.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* at 164.

<sup>135</sup> See *Regina v. Green*, [1970] 2 C.C.C.2d 442 (Ont. Prov. Ct.).

<sup>136</sup> 14 D.L.R.3d 164.

<sup>137</sup> See *id.* at 166.

<sup>138</sup> See BERRY & WONG, *supra* note 15, at 686.

<sup>139</sup> See *Maki*, 14 D.L.R.3d at 166-67.



opinion, Judge Carter stated that there was no proof that Maki intended to injure Green, that Maki's fear of bodily harm was unreasonable, or that Maki used excessive force while defending himself.<sup>140</sup>

In *Regina v. Green*,<sup>141</sup> the court relied on the implied consent doctrine<sup>142</sup> to find that no assault was committed, and acquitted Green.<sup>143</sup> Every NHL player, the judge emphasized, consents to a great number of "assaults" that are inherent in the game due to the force and rigor with which hockey is played.<sup>144</sup> In fact, the judge pointed out that Maki had been hit in the face hundreds of times in his career, and "this is an extremely ordinary happening in a hockey game and the players really think nothing of it."<sup>145</sup> Further, the court concluded that Green's conduct was an instinctive action of protection and warning, and not done with intent to commit an assault on Maki.<sup>146</sup>

Despite the acquittals, the courts in both *Maki* and *Green* mentioned that athlete defendants could be guilty of assault under different circumstances, which laid the foundation for later convictions of minor league hockey players.<sup>147</sup> For example, the *Maki* court noted, "[n]o sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution."<sup>148</sup> While all players assume certain risks and hazards inherent in the sport, the

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<sup>140</sup> See *id.* at 166.

<sup>141</sup> 2 C.C.C.2d 442.

<sup>142</sup> Section 230 of the Canadian Criminal Code states, "A person commits an assault when, *without the consent* of another person . . . (a) he applies force intentionally to the person of the other, directly or indirectly." *Id.* at 445 (emphasis added).

<sup>143</sup> See *id.* at 442.

<sup>144</sup> See *id.*

<sup>145</sup> *Id.* at 446.

<sup>146</sup> See *id.* at 448.

<sup>147</sup> See, e.g., *Nielsen*, *supra* note 1, at 703. In *Regina v. Henderson*, the defendant, on his way to the penalty box for fighting with another player, knocked down the victim, who did not take part in the fight, rendering him unconscious. See [1976] 5 W.W.R. 119, 121 (B.C. Co. Ct.). Although the judge said, "I have no doubt whatsoever that fighting is part of the game of hockey," the court found Henderson guilty of assault. *Id.* at 123. In *Regina v. Gray*, after play had stopped due to other players fighting, John Ogenchuck and a teammate "waltzed around" an opposing player. [1981] 6 W.W.R. 654, 656 (Sask. Prov. Ct.). When the other two players began to fight, Ogenchuck skated away and stood by himself. See *id.* The defendant, who had been sitting on the opposing team's bench, jumped over the boards onto the ice, skated full-speed towards Ogenchuck, and "straight-armed" him in the face, knocking him unconscious. See *id.* Since his action "was such a deviation from the normal conduct of hockey players . . .," the court concluded that Gray was guilty of assault causing bodily harm. *Id.* at 661. But see *Regina v. Watson*, [1975] 26 C.C.C.2d 150 (Ont. Prov. Ct.) (holding that is not contrary to the public interest to grant a discharge to defendant hockey player found guilty of assault causing bodily harm for choking a opposing player until he lost consciousness).

<sup>148</sup> 14 D.L.R.3d at 167.

court said, no athlete consents to malicious, unprovoked or overly violent attacks.<sup>149</sup> Similarly, the *Green* court stated that while common assault was difficult to establish in an NHL game, an unprovoked savage attack that results in serious injury could lead to a successful charge of assault causing bodily harm.<sup>150</sup>

The first criminal trial in the United States against an athlete for his conduct during a professional game was *State v. Forbes*.<sup>151</sup> Dave Forbes of the Boston Bruins was indicted for aggravated assault after attacking the Minnesota North Stars' Henry Boucha during a NHL game in Minneapolis on January 4, 1975.<sup>152</sup> As a result of a confrontation on the ice, Forbes and Boucha were sent to the penalty box, where they exchanged threatening remarks.<sup>153</sup> When they returned to the ice, Boucha skated towards his team's bench, but Forbes took a swing at him with his hand that held his stick.<sup>154</sup> Although the punch missed, Forbes' stick struck Boucha right above his right eye.<sup>155</sup> After Boucha slumped to the ice in pain, Forbes pounced on top of him and pounded his head repeatedly into the ice, fracturing Boucha's right eye socket.<sup>156</sup>

At trial, the prosecution contended that an assault was a crime regardless of whether it was done in public or in a sporting event.<sup>157</sup> "The defense argued a variation on the temporary insanity defense, basing its argument on the theory that from the age of four years, hockey players are taught not to let other players intimidate them."<sup>158</sup> By a vote of nine to three in favor of a conviction, the jury was split and unable to reach a unanimous verdict.<sup>159</sup> The judge declared a mistrial and the prosecutor chose not to retry the case due to the deep split in public opinion that made the necessary unanimous verdict unlikely.<sup>160</sup>

In 1988, the Minnesota North Stars' Dino Ciccarelli became the first NHL player to be incarcerated for on-ice violence when the Provincial Court of Ontario convicted him for assaulting the Toronto Maple Leafs' Luke Richardson during a game at the Ma-

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<sup>149</sup> *See id.*

<sup>150</sup> *See* 2 C.C.C.2d at 448.

<sup>151</sup> No. 63280 (Dist. Ct. Minn. July 19, 1975).

<sup>152</sup> *See* BERRY & WONG, *supra* note 15, at 687 (discussing *State v. Forbes*).

<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

ple Leaf Gardens in Toronto.<sup>161</sup> After a one-day non-jury trial, Judge Sidney Harris found Ciccarelli guilty of assault.<sup>162</sup> “Citing the need to convey a message to the NHL that ‘violence in a hockey game or in any other circumstance is not acceptable in our society,’ Harris sent the North Star right wing to jail for a day and fined him \$1,000.”<sup>163</sup>

More recently, in late 2000, Marty McSorley was prosecuted in the Provincial Court of British Columbia for bashing Donald Brashear over the head with his stick during an NHL game between the Boston Bruins and the Vancouver Canucks.<sup>164</sup> At the non-jury trial, McSorley testified that he did not intend to hit Brashear in the head, only on the shoulder.<sup>165</sup> Yet, Judge William Kitchen concluded that McSorley “slashed for the head. A child, swinging at a tee-ball, would not miss. A housekeeper swinging a carpet-beater would not miss. An NHL player would never, ever miss. Brashear was struck as intended.”<sup>166</sup> Consequently, Kitchen found McSorley guilty of assault with a weapon; however, Kitchen did not impose any jail time.<sup>167</sup> Instead, he granted a conditional discharge, and ordered McSorley not to play against Brashear for eighteen months.<sup>168</sup>

## 2. Difficulties in Criminal Prosecution

### a. Prosecutorial Hesitancy

Given the enormous time and financial limitations resulting from crowded criminal dockets, “[l]ocal prosecutors have virtually plenary power when deciding whether to prosecute a given of-

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<sup>161</sup> See Murphy, *supra* note 122, at 34.

<sup>162</sup> See *id.* On appeal, Judge Corbett of the Ontario District Court quoted Judge Harris’s finding of fact:

The incident began when Ciccarelli, who was carrying the puck, was offside as he crossed the blue line. The whistle blew. Richardson had been skating to take Ciccarelli out of the play and was unable to stop at the whistle. He cross-checked and boarded Ciccarelli, at which time Richardson’s stick cracked. There was a fracas, during which Ciccarelli raised his stick and with it struck Richardson in the head three times. This all took about four seconds from the time the whistle blew.

Regina v. Ciccarelli, [1989] 54 C.C.C.3d 121, 122. *But see* Murphy, *supra* note 122, at 34 (“After twice clubbing Richardson in the head with his stick, Ciccarelli realized the futility of this exercise—thanks to his helmet, Richardson emerged unscathed—and proceeded to punch his adversary in the mouth.”).

<sup>163</sup> Murphy, *supra* note 122, at 34. In actuality, Ciccarelli spent less than two hours in jail and passed the time by signing autographs. See *id.*

<sup>164</sup> See Kostya Kennedy, *Up Against It*, SPORTS ILLUSTRATED, Nov. 20, 2000, at 58; see also *supra* notes 24-27 and accompanying text for details of the incident.

<sup>165</sup> See Tom Spousta, *McSorley Found Guilty; No Jail Time*, N.Y. TIMES, Oct. 7, 2000, at D7.

<sup>166</sup> *Id.*

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

fense, and these powers do not stop at the entrance to a sports stadium."<sup>169</sup> Using this wide discretion, prosecutors correctly hesitate to devote much of their time to investigating sports violence and hardly ever find the motivation to bring charges against an athlete.<sup>170</sup> This is caused by several factors, all of which contribute to professional sports violence being kept out of the criminal courts.<sup>171</sup>

First, there are inherent difficulties in obtaining a guilty verdict when prosecuting professional athletes.<sup>172</sup> The most obvious problem is proving "beyond a reasonable doubt" that the defendant had "the requisite intent" to commit criminal assault.<sup>173</sup> Furthermore, in light of the unique settings in which sports violence occurs, it is not easy to define the line that divides legal, aggressive behavior from criminal conduct and then convince jurors that such a line was crossed.<sup>174</sup> "Not only is the legal standard unclear, but there also appears to be a propensity for juries, particularly those composed of fans, to accept the notion that violence and assault are part of the game."<sup>175</sup>

In addition, there are many defensive roadblocks that decrease the likelihood of a guilty verdict; two of the more common mechanisms are self-defense and consent.<sup>176</sup> Self-defense can be

<sup>169</sup> Nielsen, *supra* note 1, at 683.

<sup>170</sup> See Katz, *supra* note 5, at 854-55.

<sup>171</sup> See generally HORROW, *supra* note 54, at 110-60 for a comprehensive discussion regarding the factors that influence a prosecutor's decision to adjudicate professional sports violence. In his book, *Sports Violence*, Richard Horrow examines the results of his 1978 survey of thirty-four prosecutors, who were solicited about the relative legal inaction against athletes. See *id.*

<sup>172</sup> See *id.* at 152.

<sup>173</sup> *Id.* (quoting Survey Response from Bernard Carey, State's Attorney of Cook County (Chicago), Illinois (Dec. 20, 1978)).

<sup>174</sup> See *id.* In *Regina v. Green*, Judge Fitzpatrick elaborated on this problem:

[W]here do you draw the line? It is very difficult in my opinion for a player who is playing hockey with all the force, vigour [sic] and strength at his command, who is engaged in the rough and tumble of the game, very often in a rough situation in the corner of the rink, suddenly to stop and say, "I must not do that. I must not follow up on this because maybe it is an assault; maybe I am committing an assault." I do not think that any of the actions that would be considered assaults in ordinary walks of life can possibly be, within the context that I am considering, considered assaults at all.

*Green*, 2 C.C.C.2d at 446. For a discussion of this case, see *supra* notes 130-135, 141-146 and accompanying text.

<sup>175</sup> HORROW, *supra* note 54, at 154. An example of this is the *State v. Forbes* hung jury, where some jurors considered the episode "part of the game." See BERRY & WONG, *supra* note 15, at 687; see also Katz, *supra* note 5, at 855. A related jury concern is the impartiality of a sports figure's trial because of juries' tendencies to support hometown athletes. See Karon, *supra* note 3, at 155.

<sup>176</sup> See HORROW, *supra* note 54, at 163. Along with self-defense and consent, other defenses analyzed by Horrow include: (1) assumption of risk; (2) provocation; and (3) involuntary reflex. See generally *id.* at 163-209.

defined as:

[a person] who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes: (a) that he is in immediate danger of unlawful bodily harm from his adversary, and (b) that the use of such force is necessary to avoid this danger.<sup>177</sup>

In *Regina v. Maki*,<sup>178</sup> the defendant successfully convinced the court that his adversary's actions warranted use of force in self-defense.<sup>179</sup> On the same note, in *Regina v. Green*,<sup>180</sup> Judge Fitzpatrick wrote, "the blow struck by Mr. Green was struck almost immediately after the blow—the much more serious blow in my opinion, the spearing—which had been struck at him by Mr. Maki. I do not think that Mr. Green was doing anything more in the circumstances than protecting himself."<sup>181</sup>

According to the Model Penal Code, consent is a valid defense to certain criminal charges arising from actions in a sporting event.<sup>182</sup> While there is general agreement that an athlete implicitly consents to a reasonably foreseeable amount of physical contact on the playing surface, the complicated issue is determining which acts of violence are reasonably foreseeable.<sup>183</sup> Perhaps the best method of distinguishing between behavior that is reasonably foreseeable, and that which is not, is to determine whether the conduct is a customary aspect of the game.<sup>184</sup> "Under this approach, a player will be deemed to consent to conduct that is normally associated with the particular sport in which the player participates."<sup>185</sup>

Second, since prosecutors face a plethora of "real criminals" on a daily basis, some simply feel that litigating sports violence is

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<sup>177</sup> WAYNE R. LAFAYE & AUSTIN W. SCOTT, *CRIMINAL LAW* 454 (2d ed. 1986). However, in a number of instances, a defendant cannot utilize the self-defense argument. First, the defendant's use of force may not exceed a level that was reasonably necessary to repel an attack. Second, the defendant generally cannot use the defense if he provokes the incident. Third, self-defense may be used only if retreating or avoiding the danger is unreasonable. See HORROW, *supra* note 54, at 204-05.

<sup>178</sup> [1970] 14 D.L.R.3d 164 (Ont. Prov. Ct.).

<sup>179</sup> *See id.* at 166.

<sup>180</sup> [1970] 2 C.C.C.2d 442 (Ont. Prov. Ct.).

<sup>181</sup> *Id.* at 447.

<sup>182</sup> *See* Karon, *supra* note 3, at 153. The Model Penal Code states:

[W]hen 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 the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

MODEL PENAL CODE § 211(2)(1962).

<sup>183</sup> *See* Karon, *supra* note 3, at 153.

<sup>184</sup> *See id.* See generally HORROW, *supra* note 54, at 167-85, for an in-depth look at several tests utilized to determine which acts of violence are reasonably foreseeable.

<sup>185</sup> Karon, *supra* note 3, at 153.

not worth their valuable time and effort.<sup>186</sup> As one District Attorney explained, “[w]e have enough straight line criminal violence to keep us busy—without entering a new media game.”<sup>187</sup> Even if prosecutors had time to file charges, the belief that physicality and aggression is part of the game deters some of them from seeking criminal sanctions against a sports figure.<sup>188</sup> In the words of one St. Louis Circuit Attorney, “[c]riminal prosecution has little or no role in controlling this kind of [sports] violence when it is confined to game time . . . .”<sup>189</sup>

Third, the recipient of an athlete’s excessive violence usually does not want to file criminal charges against a fellow player, which leaves the prosecution without a complainant.<sup>190</sup> Since many players abide by the “code” of the particular sport and perceive violent acts as “part of the game,” injured players are reluctant to testify in a criminal trial.<sup>191</sup> While the absence of, or ineffective testimony of, the injured player does not necessarily render the chances of a conviction an impossibility or even improbable (there are usually thousands of other witnesses to acts that take place in arenas and stadiums), it does not further the prosecution’s likelihood of success. For this reason, prosecutors are hesitant to initiate criminal proceedings without an athlete filing a complaint.

#### b. Potential Change in Level of Play

Many commentators contend that the nature of sports will be significantly altered if excessive violence is prosecuted in the criminal courts.<sup>192</sup> Criminal laws on assault and battery, the argument goes, should not pertain to athletes in the same manner as it does to the rest of society since sports involve a high level of emotion and aggression.<sup>193</sup> People favoring this view draw an analogy between contact sports and law enforcement as both being professions in which force is required and anticipated.<sup>194</sup> If the laws of assault and battery are applied to police and athletes, then these

<sup>186</sup> See, e.g., HORROW, *supra* note 54, at 114.

<sup>187</sup> *Id.* (quoting Survey Response from D. Lowell Johnson, District Attorney, Alameda County (Oakland), California (Dec. 6, 1978)).

<sup>188</sup> See Svoranos, *supra* note 86, at 510.

<sup>189</sup> HORROW, *supra* note 54, at 114 (quoting Survey Response from George A. Peach, Circuit Attorney, St. Louis, Missouri (Dec. 4, 1978)).

<sup>190</sup> See Bella English, *Violence in Sports: Specialists See Obstacles to Bringing Athletic Fights to Court*, BOSTON GLOBE, Jan. 13, 1987, at 1.

<sup>191</sup> See *id.* at 3.

<sup>192</sup> See, e.g., Hanson & Dernis, *supra* note 5, at 141; Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 176 n.111 (1976); Comment, *The Consent Defense: Sports, Violence, and the Criminal Law*, 13 AM. CRIM. L. REV. 235, 244-45 (1975).

<sup>193</sup> See Hanson & Dernis, *supra* note 5, at 142.

<sup>194</sup> See *id.*

occupations would be seriously harmed.<sup>195</sup> “Players fearing criminal prosecution would become tentative and ease up on their intensity level, thereby decreasing their effectiveness as athletes. It is feared that the game will become more tame, less competitive, and less appealing, and desirable conduct necessary for the popularity of the game will be eliminated.”<sup>196</sup>

The belief that sports would be changed drastically, however, is misguided. Those predicting a decrease in the competitive level of play erroneously assume that prosecutors will indict every violent act, rather than only the most heinous attacks.<sup>197</sup> “If only the most brutish incidents are pursued, then ideally some of the gray area between [intentional] injury-causing or career-ending violence and minor incidental violence would be tempered.”<sup>198</sup> Prosecutors can surely balance between the vigorous prosecution of excessive violence and the restraint essential to the preservation of professional sports competition.<sup>199</sup>

The Canadian courts have led the way in developing standards for imposing criminal liability in the context of sports violence.<sup>200</sup> As one can see, Canadian cases provide a rough sense of which actions a player consents to by stepping onto the field or ice.<sup>201</sup> In general, courts will examine the relationship between the alleged misconduct and the actions that are necessarily involved in playing the game.<sup>202</sup> By and large, the courts will not hold a player criminally responsible for conduct that is “incidental to the sport,” “inherent in and reasonably incidental to the normal playing of the game,” or “closely related to the play.”<sup>203</sup>

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<sup>195</sup> See *id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Nielsen, *supra* note 1, at 707. The prosecutor in *State v. Forbes*, Gary Flakne of Hennepin County, Minnesota, remarked:

Obviously, with respect to any sport involving bodily contact, technical assaults amongst the participants are occurring throughout the entire contest. Therefore, those who oppose the entry of the criminal justice system into the sporting arena argue that by the criminal prosecution of every technical violation of the law, the prosecutor will quickly bring about the demise of sporting events. As a practical matter, however, the likelihood of prosecutions for technical violations of the law on the part of a sports participant is virtually non-existent. In the first place, it is unlikely that any jury would be willing to convict under those circumstances and, secondly, the prosecutor would not derive any support from the law.

Gary W. Flakne & Allen H. Caplan, *Sports Violence and the Prosecution*, 13 TRIAL 33, 35 (Jan. 1977); see also *State v. Forbes*, No. 63280 (Dist. Ct. Minn. July 19, 1975).

<sup>198</sup> Nielsen, *supra* note 1, at 707.

<sup>199</sup> See *id.*

<sup>200</sup> See generally Diane V. White, Note, *Sports Violence as Criminal Assault: Development of the Doctrine by the Canadian Courts*, 1986 DUKE L.J. 1030.

<sup>201</sup> See *id.* at 1053.

<sup>202</sup> See *id.* at 1039.

<sup>203</sup> *Id.*

Nevertheless, the Canadian legal system has an important advantage over its American counterpart since the Canadian Criminal Code utilizes a single definition of the offenses at issue in sports violence cases for the whole country.<sup>204</sup> As a result, players competing in different jurisdictions do not have to worry about abiding by varying standards.<sup>205</sup> In the United States, however, each state has its own criminal law and definitions. Given the fact that players can compete in up to four states in a week, it is obvious that a single, federal standard is needed.

### C. *Legislation*

#### 1. The Sports Violence Act of 1980

In 1980, Ohio Representative Ronald M. Mottl introduced the Sports Violence Act ("1980 Act") to the United States House of Representatives.<sup>206</sup> By amending Title 18 of the United States Code, the 1980 Act would have provided for criminal sanctions on players using "excessive violence" during professional sports events.<sup>207</sup> Proponents of the 1980 Act contended that federal regulation was vital due to the leagues' failure to effectively reduce sports violence.<sup>208</sup> Moreover, supporters of the 1980 Act claimed that league self-regulation did not deter the players' excessive behavior, and that state and local laws were not being enforced.<sup>209</sup> The bill provided in relevant part:

Section 115. Excessive violence during professional sports events

(a) Whoever, as a player in a professional sports event, 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 \$5,000 or imprisoned not more than one year . . . .<sup>210</sup>

Mottl's goal was to "deter and punish, through criminal penalties, the episodes of excessive violence that are increasingly characterizing professional sports."<sup>211</sup> The 1980 Act endeavored to distinguish the normal physical contact of a sport from the conduct that society deems criminal in any situation, on or off the

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<sup>204</sup> See *id.* at 1054.

<sup>205</sup> See *id.*

<sup>206</sup> See H.R. 7903, 96th Cong. (1980). The bill was reintroduced in 1981. See H.R. 2263, 97th Cong. (1981).

<sup>207</sup> *Id.*

<sup>208</sup> See Karon, *supra* note 3, at 157-58.

<sup>209</sup> See *id.* at 158.

<sup>210</sup> H.R. 7903.

<sup>211</sup> *Id.*



field.<sup>212</sup> Further, the law would have applied to all professional sports, and, instead of preempting state assault and battery laws, the bill would have complemented existing state statutes.<sup>213</sup>

However, the language of the 1980 Act, especially the definitional sections, was uncomfortably vague, which led to the downfall of the bill.<sup>214</sup> The main problem was section (b), which defined “excessive physical force”:

- (1) Excessive physical force means physical force that—
  - (A) has no reasonable relationship to the competitive goals of the sport;
  - (B) is unreasonably violent; and
  - (C) could not be reasonably foreseen, or was not consented to, by the injured person, as a normal hazard of such person’s involvement in such sports event.<sup>215</sup>

Under the bill, an action would have had to meet all three criteria in section (b) to be punishable.<sup>216</sup> During deliberations on the bill before the House Judiciary Subcommittee on Crime, the Justice Department noted that all three subsections of section (b) were so ambiguous that a court could rule that the law was invalid for vagueness.<sup>217</sup>

First, subsection (A) mentions the “competitive goals of the sport” without providing a definition of the competitive goals of each sport.<sup>218</sup> It is very conceivable that the various groups of people involved in professional sports have different goals. For players, the primary goal in competition is winning.<sup>219</sup> On the other hand, team owners and some players regard profits as the final objective,<sup>220</sup> which often can be achieved without a successful season.<sup>221</sup> Finally, league executives consider a high entertainment value, which leads to the sport’s profitability, as the competitive

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<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See, e.g., Karon, *supra* note 3, at 158. See generally Comment, *A Proposed Legislative Solution to the Problem of Violent Acts by Participants During Professional Sporting Events: The Sports Violence Act of 1980*, 7 U. DAYTON L. REV. 91, 110 (1981) (asserting that vague and ambiguous wording of law could lead to invalidation).

<sup>215</sup> H.R. 7903.

<sup>216</sup> See Karon, *supra* note 3, at 158.

<sup>217</sup> See Nielsen, *supra* note 1, at 691.

<sup>218</sup> *Id.*

<sup>219</sup> See *id.*

<sup>220</sup> See *id.* at 691-92.

<sup>221</sup> For example, despite the fact that the New York Rangers finished the 1999-2000 season with a dismal 29-41-12 record, and were not one of sixteen NHL teams to qualify for the playoffs, their home arena, Madison Square Garden, was sold out for every game. See *Pro Sports Tracker*, SPORTS BUSINESS JOURNAL, Feb. 12-18, 2001, at 26.

goal.<sup>222</sup> Thus, it is obvious that subsection (A)'s reference to the "competitive goals of the sport" had to be defined before determining that certain physical force is excessive under the 1980 Act.<sup>223</sup> Not only was this subsection vague, but it was also contrary to the purpose of the bill.<sup>224</sup> "For example, if one could show that exhibitions of brutal force furthered the various goals outlined above (for [instance], the 'rougher' a team is, the more likely it will win a game), this team behavior could be considered not 'excessively violent.'"<sup>225</sup> Clearly, this was not the anticipated outcome of the bill.<sup>226</sup>

The second requirement for deciding whether an act is excessively violent, subsection (B), contains a circular definition.<sup>227</sup> Excessive physical force is defined as that which is "unreasonably violent."<sup>228</sup> "It is unclear how determining whether an act is unreasonably violent will clarify whether something is excessively violent."<sup>229</sup> In addition, subsection (B) does not include a standard of reasonableness by which to evaluate a player's behavior.<sup>230</sup> The average person, average fan, and average player may have varying standards as to the reasonableness of a player's behavior.<sup>231</sup> If there are different standards of reasonableness, then there will be different classes of acceptable conduct.<sup>232</sup>

The third requirement, outlined in subsection (C), is also ambiguous.<sup>233</sup> Subsection (C) relates to lack of reasonable foreseeability and consent, but does not specify from whose perspective these terms were to be determined.<sup>234</sup> For instance, an NFL running back may reasonably foresee and consent to excessive violence on the field, but a smaller player, such as the punter, might not expect or consent to similar conduct. Furthermore, the "normal hazard" element of subsection (C) only aggravates the problem.<sup>235</sup> According to this part of the subsection, if an act is not reasonably foreseen or consented to as a "normal hazard" of the

<sup>222</sup> See Nielsen, *supra* note 1, at 692.

<sup>223</sup> See *id.*

<sup>224</sup> See Karon, *supra* note 3, at 158.

<sup>225</sup> *Id.* at 158-59.

<sup>226</sup> See *id.* at 159.

<sup>227</sup> See Nielsen, *supra* note 1, at 692.

<sup>228</sup> H.R. 7903, 96th Cong. (1980).

<sup>229</sup> Nielsen, *supra* note 1, at 692.

<sup>230</sup> See *id.*

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*

<sup>233</sup> See *id.* at 693.

<sup>234</sup> See *id.*

<sup>235</sup> See Karon, *supra* note 3, at 159.

sports event, it is considered excessive physical force.<sup>236</sup> The current practice of the sport establishes whether certain conduct is a normal hazard.<sup>237</sup> "Because all normal hazards of a sport are, by nature of their normality, 'reasonably foreseeable' by-products of that sport, frequently occurring violent acts would be permissible under subsection (C)."<sup>238</sup>

Along with the substantive problems of the 1980 Act, executives of the professional sports leagues strongly opposed the bill, contending that the most effective way of eradicating sports violence was through internal league regulation, not laws.<sup>239</sup> Also, some Congressmen felt that passing the 1980 Act would be frivolous in light of more urgent legislative needs, and that federal intervention was unnecessary since the matter could be handled by the states.<sup>240</sup> The bill failed in committee and never reached the House floor.<sup>241</sup>

## 2. The Sports Violence Arbitration Act of 1983

In 1983, Representative Thomas A. Daschle of South Dakota proposed legislative action on the sports violence problem with the introduction of the Sports Violence Arbitration Act of 1983 ("1983 Act").<sup>242</sup> While the 1983 Act was similar to the 1980 Act in many respects, the former imposed civil instead of criminal penalties on players. The 1983 Act proposed the formation of an arbitration board, or "sports court," to settle grievances produced by "conduct found to be inconsistent with the competitive goals of the sport."<sup>243</sup> Under the bill, players and management would have set up the arbitration board and initiated its procedures via collective bargaining.<sup>244</sup>

Nonetheless, like the 1980 Act, the sports court proposal was problematic. First, since the bill placed much of the responsibility

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<sup>236</sup> See H.R. 7903, 96th Cong. (1980).

<sup>237</sup> See Karon, *supra* note 3, at 159.

<sup>238</sup> *Id.*

<sup>239</sup> See *The Sports Violence Act of 1980: Hearings on H.R. 7903 Before Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) (providing statements by John A. Ziegler, Jr., President of the NHL; Bowie W. Kuhn, Commissioner of Major League Baseball; Phillip A. Woosnam, Commissioner of the North American Soccer League; Lawrence O'Brien, Commissioner of the NBA).

<sup>240</sup> See White, *supra* note 200, at 1033.

<sup>241</sup> See Karon, *supra* note 3, at 158.

<sup>242</sup> See H.R. 4495, 98th Cong. (1983). The Sports Violence Arbitration Act of 1983 was modeled after a student Note in the *Southern California Law Review*. See generally 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 (1982). The bill was reintroduced in 1985. See H.R. 2151, 99th Cong. (1985).

<sup>243</sup> H.R. 4495 § 3(2)(A).

<sup>244</sup> See *id.* § 4(b)(2)-(3).

on the players and management, it was doubtful that the sports court would ever have been created.<sup>245</sup> The professional sports leagues believe that matters are best handled internally and strongly oppose outside regulation.<sup>246</sup> Additionally, most players are reluctant to file grievances against other players, and feel that revenge is the correct method to deal with excessive violence.<sup>247</sup> In other words, athletes desire to settle a situation "on the court, not in the court."<sup>248</sup> Second, the 1983 Act was applicable solely to injury-producing behavior and only granted monetary remedies.<sup>249</sup> Hence, outlandish conduct that did not result in injury, but was excessively violent, would not have been punishable.<sup>250</sup> Consequently, "there would be uncertainty as to the magnitude and occurrence of the penalties imposed by the arbitration board."<sup>251</sup> Similar to its 1980 predecessor, the Sports Violence Arbitration Act of 1983 proved unsuccessful.

As demonstrated by the Sports Violence Act of 1980 and the Sports Violence Arbitration Act of 1983, previous federal legislative efforts at controlling sports violence have failed. Most state legislatures have ignored the problem or rejected proposals on the issue. For instance, in 1991, Massachusetts unsuccessfully attempted to enact a sports violence bill that would have created penalties for assault and battery committed by athletes in professional sporting events.<sup>252</sup> In the past two decades, Congress has not tried to pass legislation aimed at reducing players' violence in sports.

#### D. *Internal League Sanctions*

The professional sports leagues maintain in-house procedures and sanctions to penalize players for excessive violence.<sup>253</sup> The rules exist, in large part, to prevent players from being hauled into court for actions committed during games and to handle the incident internally.<sup>254</sup> For the most part, the commissioners of the leagues have broad powers and wide discretion that they may implement in the best interests of the game, including the authority to suspend and fine players who violate league rules.<sup>255</sup>

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<sup>245</sup> See Nielsen, *supra* note 1, at 693-94.

<sup>246</sup> See *infra* Part III.D.

<sup>247</sup> See *supra* notes 114-117 and accompanying text.

<sup>248</sup> Katz, *supra* note 5, at 869.

<sup>249</sup> See H.R. 4495 § 5(c)(1).

<sup>250</sup> See Nielsen, *supra* note 1, at 694.

<sup>251</sup> *Id.*

<sup>252</sup> See S. 194, 173rd Leg., Reg. Sess. (Mass. 1991).

<sup>253</sup> See BERRY & WONG, *supra* note 15, at 433.

<sup>254</sup> See *id.*

<sup>255</sup> See HORROW, *supra* note 54, at 64-73. See generally Jan Stiglitz, *Player Discipline in Team*

### 1. Specific Disciplinary Power of Each League

The Official Rules of the NHL has several regulations providing for the fine or suspension of its hockey players who engage in various kinds of misconduct, although not all of them need to be examined here.<sup>256</sup> For example, under Rule 33(a):

In addition to the automatic fines and suspensions imposed under these Rules, the Commissioner may, at his discretion, investigate any incident that occurs in connection with any Pre-season, Exhibition, League or Playoff game and may assess additional fines and/or suspensions for any offense committed during the course of a game or any aftermath thereof by a player . . . , whether or not such offense has been penalized by the Referee.<sup>257</sup>

According to NHL Rule 43(a), “[a] match penalty shall be imposed on any player who deliberately attempts to injure an opponent and the circumstances shall be reported to the Commissioner for further action.”<sup>258</sup> Rule 43 also notes, “[t]he Commissioner, upon preliminary investigation indicating the probable imposition of supplementary disciplinary action, *may order the immediate suspension of a player* who has incurred a match penalty under this Rule, pending the final determination of such supplementary disciplinary action.”<sup>259</sup> In addition, the collective bargaining agreement between the league and the NHL Players’ Association<sup>260</sup> includes terms that allow the NHL Commissioner to impose disciplinary action against players behaving contrary to the “best interests of the game.”<sup>261</sup>

Similarly, there is almost no limit on the authority of the Com-

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*Sports*, 5 MARQ. SPORTS L.J. 167 (1995) (outlining the issues involved in disciplining professional baseball, hockey, basketball, and football players).

<sup>256</sup> See National Hockey League Official Rules 2000-2001 (NHL Enterprises, L.P. 2000), available at <http://nhl.com/hockey/rulebook/index.html?clk=001> (last visited July 7, 2001) [hereinafter NHL Rules].

<sup>257</sup> *Id.* at Rule 33(a).

<sup>258</sup> *Id.* at Rule 43(a).

<sup>259</sup> *Id.* at Rule 43 (emphasis added). *But see* NHL Rules at Rule 52, which states:

a) A match penalty shall be imposed on a player who deliberately injures an opponent in any manner.

b) In addition to the match penalty, *the player shall be automatically suspended* from further competition until the Commissioner has ruled on the issue (emphasis added).

<sup>260</sup> Athletes in the four major professional sports are unionized and represented by organizations called “players’ associations.” The players’ associations for hockey, baseball, football, and basketball are the National Hockey League Players’ Association, the Major League Baseball Players’ Association, the National Football League Players’ Association, and the National Basketball Players’ Association, respectively.

<sup>261</sup> See National Hockey League – National Hockey League Players’ Association Collective Bargaining Agreement (Jan. 13, 1995) [hereinafter NHL CBA].

missioner of Major League Baseball to issue punitive measures on overly aggressive players. According to section 9.05 of the Official Rules, “[w]hen any . . . player is disqualified for a flagrant offense . . . upon a [ ] . . . player . . . , *the league president shall impose such penalty as he deems justified . . .*”<sup>262</sup> Further, the collective bargaining agreement between MLB and the MLB Players’ Association (MLBPA) also gives the Commissioner a wide range of authority. If, for conduct on the playing field, the MLB Commissioner imposes a fine over five hundred dollars or a suspension exceeding ten days, the sanctioned player can appeal the decision.<sup>263</sup> Yet while other types of grievances are settled through arbitration with an independent party,<sup>264</sup> when on-the-field conduct is concerned, “the Commissioner’s decision [following a hearing] shall constitute full, final and complete disposition of such complaint, and shall have the same effect as a [g]rievance decision of the Arbitration Panel.”<sup>265</sup>

The collective bargaining agreement between the NFL and the NFL Players’ Association (NFLPA) merely stipulates that the league must consult with the players’ union before appointing the individual responsible for imposing fines and suspensions upon players for unnecessary roughness or unsportsmanlike conduct.<sup>266</sup> Nonetheless, the Commissioner has the final word on the severity of the punishment.<sup>267</sup> Moreover, the Commissioner seems to have unlimited power to discipline players pursuant to the NFL Player Contract’s “Integrity of the Game” clause, which states:

Player . . . acknowledges his awareness that if he . . . is guilty of any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be repre-

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<sup>262</sup> Official Rules of Major League Baseball § 9.05 (Major League Baseball Properties, Inc. 1998), available at [http://www.mlb.com/NASApp/mlb/mlb/baseball\\_basics/mlb\\_basics\\_forward.jsp](http://www.mlb.com/NASApp/mlb/mlb/baseball_basics/mlb_basics_forward.jsp) (last visited Sept. 24, 2001) [hereinafter MLB Rules] (emphasis added).

<sup>263</sup> See Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players’ Association, art. XI §§ C(2), A(1)(b) (Jan. 1, 1997) [hereinafter MLB CBA].

<sup>264</sup> See *id.* art. XI §§ A, B. For a thorough discussion of the relationship between player discipline and independent arbitrators in professional sports, see Matthew McKelvey, Note, *Separating Sports and Real Life: How Professional Sports Leagues’ Collective Bargaining Agreements Keep Athletes Out of the Criminal Justice System*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 91 (2001).

<sup>265</sup> MLB CBA, art. XI § A(1)(b).

<sup>266</sup> See National Football League Management Council – National Football League Players’ Association Collective Bargaining Agreement, art. XI § 1(b), available at <http://www.nflpa.org/media/main.asp> (Feb. 25, 1998) [hereinafter NFL CBA].

<sup>267</sup> See *id.* § 1(c).

sented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.<sup>268</sup>

In the NBA, there is a maximum fine that can be levied by the league, but no ceiling on the length of suspensions.<sup>269</sup> Under Rule 12A, section VIII, “[a] fine not exceeding \$35,000 and/or suspension may be imposed upon [fighting] person(s) by the Commissioner at his sole discretion.”<sup>270</sup> The same guidelines apply for those basketball players who commit flagrant foul penalties, which are unnecessary and excessive contacts committed by a player against an opponent.<sup>271</sup>

## 2. Advantages

For a number of reasons, many consider internal league sanction to be the most appropriate mechanism to penalize players and eliminate in-game violence.<sup>272</sup> The first argument in support of internal league sanctions is that the league and its officials understand the rules and customs of their respective sport better than anyone else.<sup>273</sup> Lawyers, judges, and juries are not as knowledgeable as league officials when it comes to determining whether a violent act “crosses the line” and exceeds the norm.<sup>274</sup> Furthermore, league executives are more familiar with the types of risks that their players assume.<sup>275</sup>

A second advantage cited by proponents of internal league control is that the judgments of the league “can be swift, certain and severe.”<sup>276</sup> Decisions by league officials are made in a relatively quick fashion and are better suited to ensuring consistent and predictable sanctions.<sup>277</sup> Moreover, if fines and suspensions are administered with ample frequency and severity, then unwanted

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<sup>268</sup> *Id.* app. C, para. 15.

<sup>269</sup> See Official Rules of the National Basketball Association, Rule 12A § VIII (NBA Properties, Inc. 2000), available at [http://www.nba.com/analysis/rules\\_index.html](http://www.nba.com/analysis/rules_index.html) (last visited July 7, 2001) [hereinafter NBA Rules].

<sup>270</sup> *Id.*

<sup>271</sup> See *id.* at pt. II., *Fouls: Flagrant – Unsportsmanlike*.

<sup>272</sup> See, e.g., Hanson & Dernis, *supra* note 5, at 164; Katz, *supra* note 5, at 871. One commentator wrote, “[I]f possible, can we work at keeping sports judgments out of real court? . . . If the word is to come from a geek with a gavel, let it be some commissioner. . . . No need for Superior Court. . . . [Marty] McSorley should have wound up in [NHL Commissioner Gary] Bettman’s court.” Hubert Mizell, *Bigger Crime Needed to Put Sports in Courts*, ST. PETERSBURG TIMES, Oct. 12, 2000, at C1.

<sup>273</sup> See Hanson & Dernis, *supra* note 5, at 151.

<sup>274</sup> See Katz, *supra* note 5, at 870.

<sup>275</sup> See *id.*

<sup>276</sup> Hanson & Dernis, *supra* note 5, at 151.

<sup>277</sup> See *id.*

conduct could arguably be deterred.<sup>278</sup> Since imposing fines and suspensions would “deprive players of their livelihoods,” athletes will be financially motivated to abstain from acting violently on the playing field.<sup>279</sup>

### 3. Disadvantages

However, there are many downsides that lead to the general ineffectiveness of internal league sanctions and procedures with respect to excessive violence. First, the fines meted out by the leagues often pale in comparison to the salaries of most athletes.<sup>280</sup> For example, the average baseball salary is over two million dollars, highlighted by the richest contract ever for an athlete, a \$252 million, ten-year deal for shortstop Alex Rodriguez.<sup>281</sup> If a player recognizes that the benefits of employing violence outweigh the costs of a fine or suspension,<sup>282</sup> there is no incentive for him to cease engaging in overly aggressive behavior.<sup>283</sup> In fact, some have suggested that team owners secretly pay the fines of their players since violence increases revenue.<sup>284</sup> Thus, the average fine and suspension have a restricted deterrent value on the majority of professional athletes.

Second, there are no strong incentives for league officials or team owners to support harsh penalties for excessive violence. Given that some fans desire to see overly aggressive behavior in sporting events, league officials are inclined to ignore excessive sports violence rather than reduce the bottom line.<sup>285</sup> An increase in fan interest directly leads to more revenue in the form of huge television contracts and the sale of officially licensed league products. In addition, since the best players attract the most fans, the length of suspension will arguably be influenced by the excessively violent player’s popularity and skill. While Marty McSorley received a one-year suspension from NHL Commissioner Gary Bettman,<sup>286</sup> it is doubtful that the length of the suspension would

<sup>278</sup> See *id.* at 152.

<sup>279</sup> *Id.*

<sup>280</sup> See Richard B. Horrow, *Legislating Against Violence in Sports*, in *SPORTS AND LAW: CONTEMPORARY ISSUES* 56 (H. Appenzeller ed., 1985) [hereinafter Horrow, *Legislating*].

<sup>281</sup> See Jody Goldstein, *The Effects of Expansion; Major League Baseball; ‘Haves’ Devouring ‘Have-nots’ in Major Way*, *HOUS. CHRON.*, Mar. 4, 2001, Sports, at 19.

<sup>282</sup> See *supra* notes 68-74 and accompanying text.

<sup>283</sup> See Hanson & Dernis, *supra* note 5, at 152.

<sup>284</sup> See HORROW, *supra* note 54, at 75.

<sup>285</sup> See Horrow, *Violence in Professional Sports: Is it Part of the Game?*, 9 *J. LEGIS.* 1, 3 (1982) (noting that the sports industry believes violence increases the marketability of sports) [hereinafter Horrow, *Violence*].

<sup>286</sup> See Kevin Paul Dupont, *McSorley’s Verdict: One Year*, *BOSTON GLOBE*, Nov. 8, 2000, at E4.



be equivalent if superstar Mario Lemieux had clubbed Donald Brashear. Certain fans attend NHL games primarily to watch the best players score goals. If a fan knows that a certain superstar is suspended, he might choose to stay home rather than pay for a ticket to the game. Therefore, by suspending a great player for a long period of time, the league is extending the amount of time that certain fans choose not to purchase tickets.

Further, sports commissioners, regardless of their authority to discipline players, enjoy no concrete power over the owners who choose them.<sup>287</sup> Hence, team owners are indirectly dictating rulemaking policy.<sup>288</sup> Heavier penalties, of course, conflict with the team owners' interests, which are to sell more tickets, and in turn, make more profits.<sup>289</sup> Therefore, both league management and team owners have little inducement to eliminate excessive violence.

Third, the leagues do not adequately compensate players injured during the scope of employment. Provisions in player contracts and collective bargaining agreements often limit a player's access to compensation for work-related injuries.<sup>290</sup> For instance, the uniform player contract of each major professional sports league restricts the teams' salary responsibilities after one of their players has been injured. While a team must pay a player his salary for the season in which he sustained his injury, it is not obligated to make salary payments for any period thereafter if the player is unable to perform.<sup>291</sup> In addition, NBA, NHL, and NFL teams will cover medical expenses provided that the hospital and doctor are selected by the team,<sup>292</sup> approved by the team,<sup>293</sup> or deemed necessary by the team physician,<sup>294</sup> respectively. Furthermore, payments by NFL, NBA, and MLB teams are reduced by the amount of work-

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<sup>287</sup> See Aline H. Lotter, Note, *Keeping the Illusion Alive: The Public Interest in Professional Sports*, 12 SUFFOLK U. L. REV. 48, 81 (1978).

<sup>288</sup> See Nielsen, *supra* note 1, at 695.

<sup>289</sup> See *id.*

<sup>290</sup> For an in-depth discussion regarding workers' compensation and professional athletes, see Rachael Schaffer, *Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623 (2000); Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95 (1994/1995).

<sup>291</sup> See NHL CBA, *supra* note 261, at art. XI, exh. 1, para. 5(d); MLB CBA, *supra* note 263, at art. IX(E); NFL CBA, *supra* note 266, at app. C, para. 9; National Basketball Association - National Basketball Players' Association Collective Bargaining Agreement, art. II, exh. A, para. 7(c), available at <http://www.nbpa.com/cba/cba.html> (Jan. 20, 1999) [hereinafter NBA CBA].

<sup>292</sup> See NBA CBA, *supra* note 280, at art. II, exh. A, para. 7(c).

<sup>293</sup> See NHL CBA, *supra* note 261, at art. XI, exh. 1, para. 5(c).

<sup>294</sup> See NFL CBA, *supra* note 266, at app. C, para. 9.

ers' compensation benefits a player receives under state law.<sup>295</sup> As a result of these contractual restrictions, the money collected by fines for excessive conduct is not allocated to compensate injured players.

Unfortunately, the commissioners' power to levy fines and suspensions has not sufficiently deterred sports violence. Undoubtedly, it is appropriate for the sports leagues to impose fines and suspensions for normal incidents of unsportsmanlike conduct and unnecessary roughness. However, in terms of excessive sports violence, it is apparent that the leagues' efficacy is limited, and some other authority is needed to effectively control and punish cases of extreme misconduct.

#### IV. PROPOSED REMEDY: A NATIONAL SPORTS POLICY COMMISSION

Excessive player violence "challenge[s] the basic 'integrity' of sports; [its] continued existence demonstrates the need for stronger control than the present system provides – control capable of enforcing policies in the public interest."<sup>296</sup> Various proposals for a governmental sports agency, each different in form and scope, have been suggested but never implemented.<sup>297</sup> "Sports presents a novel problem for governmental resolution because the ultimate goal of the public sports policy should be the preservation of the intangible values of sports."<sup>298</sup> The establishment of a National Sports Policy Commission ("NSPC"), created through federal legislation, can proficiently solve the problem of professional sports violence while simultaneously maintaining the independence of the sports industry.

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<sup>295</sup> See *id.* at para. 10; NBA CBA, *supra* note 280, at art. II, exh. A, para. 7(c); MLB CBA, *supra* note 263, at art. IX(E).

<sup>296</sup> Lotter, *supra* note 287, at 81.

<sup>297</sup> See *id.* at 83 (recommending a commission that hears all league-wide disputes, allocates franchises and players, and acts as a forum for complaints from the sports public); Lyle Hollowell & Ronald I. Meshbesher, *Sports Violence and the Criminal Law*, TRIAL, Jan. 1977, at 27 (advocating a federal sports commission, a state sports commission, or both, that has primary review of sports-related matters and refers extreme incidents of sports violence to the criminal system only as a last resort); Patricia Schuett, Note, *Tort Liability in Professional Sports: Battle in the Sports Arena*, 75 NEB. L. REV. 1128, 1139 (1978) (noting that a sports commission "would be worth investigating as a type of intermediary ground"); *Discipline in Professional Sports*, *supra* note 119, at 798 (proposing that a federal agency is needed to prevent the arbitrary or unreasonable disciplinary actions by pro sports organizations if player unions fail to deal with such problems); John Solomon, *Clinton Still Can Hit One Out of the Park*, USA TODAY, Oct. 24, 2000, at A17 (recommending the creation of a special national sports advisory commission to study the aspects of sports policy, including anti-trust exemption, public financing of sports facilities, etc.).

<sup>298</sup> See Lotter, *supra* note 287, at 82.

### A. *Establishment*

#### 1. Congressional Action

Under Article I, section 8 of the United States Constitution, Congress has the power “[t]o regulate [c]ommerce with foreign [n]ations, and among the several [s]tates . . . .”<sup>299</sup> In *Flood v. Kuhn*,<sup>300</sup> the Supreme Court of the United States noted that “[p]rofessional baseball is a business and it is engaged in interstate commerce” and “other professional sports operat[e] interstate – football, . . . basketball, and . . . hockey . . . .”<sup>301</sup> Moreover, the Commerce Clause has been construed as providing Congress with broad power to implement social policy.<sup>302</sup> Since professional sports is considered interstate commerce, and Congress historically uses its commerce power to remedy social ills, federal legislation regarding sports violence is constitutional. Thus, by passing a law on Capitol Hill, Congress could create the NSPC as a federal independent establishment.<sup>303</sup> “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 the nature of sports as a business enterprise.”<sup>304</sup>

#### 2. Application to NHL, NBA, NFL, & MLB Games Played Outside the United States

If a federal law were adopted, an incident of excessive violence taking place in an American arena or stadium would obviously be subject to the jurisdiction of the United States government. Yet what if an American-based league plays a game outside the country, such as in a Canadian facility, and a similar episode occurs? One issue that surfaces is whether a United States court can exercise its subject matter jurisdiction, or power to hear and decide a certain dispute, based on the statute.<sup>305</sup> At first glance, professional sports violence during an NBA game in Toronto, for example, would be

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<sup>299</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>300</sup> 407 U.S. 258 (1972) (holding that Congressional inaction implies an unwillingness to subject baseball to federal antitrust laws).

<sup>301</sup> *Id.* at 282-83

<sup>302</sup> *See, e.g.,* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (stating that Congress has power to prevent the moral problem of racial discrimination that burdens interstate commerce).

<sup>303</sup> Examples of federal independent establishments include the Environmental Protection Agency (EPA), the Securities and Exchange Commission (SEC), the National Labor Relations Board (NLRB), and the Federal Trade Commission (FTC).

<sup>304</sup> Hallowell & Meshbesh, *supra* note 297, at 32.

<sup>305</sup> *See* DAVID EPSTEIN & JEFFREY L. SNYDER, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY, § 5.04[2] (2d ed. 1996).

outside the NSPC's jurisdiction.<sup>306</sup>

When confronted with a similar issue in *EEOC v. Arabian American Oil Co. (Aramco)*,<sup>307</sup> the United States Supreme Court noted, "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."<sup>308</sup> Nonetheless, the Court relied on a doctrine known as the presumption against extraterritoriality,<sup>309</sup> and stated, "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"<sup>310</sup> Additionally, in *Environmental Defense Fund v. Massey*,<sup>311</sup> the D.C. Circuit asserted that the presumption against extraterritorial application of statutes is inapplicable where Congress clearly expresses its affirmative intention to enlarge the reach of a law to actions occurring within foreign countries. Further, the *Massey* court stated that the presumption is generally not applied where a lack of extraterritoriality will produce adverse effects within the United States.<sup>312</sup> "Under these principles, the Sherman Anti-Trust Act,<sup>313</sup> the Lanham Trade-Mark Act,<sup>314</sup> and the Securities and Exchange Act<sup>315</sup> have been applied extraterritorially."<sup>316</sup> Indeed, under international law, a country's judicial system may consider a specific dispute if one of the recognized bases of national jurisdiction is present.<sup>317</sup> According to the *Restatement of Foreign Relations Law of the United States*, section 402, a nation "has jurisdiction to prescribe law with respect to (1) . . . (c) conduct outside its territory that has . . . substantial effects within its territory."<sup>318</sup> However, even if one of the bases for jurisdiction under section 402 is pre-

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<sup>306</sup> In general, 100% of NFL, 96.67% of MLB, 96.56% of NBA, and 90% of NHL regular-season games are played in the United States.

<sup>307</sup> 499 U.S. 244 (1991).

<sup>308</sup> *Id.* at 248.

<sup>309</sup> "Extraterritoriality is essentially . . . a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders." *Envtl. Def. Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993).

<sup>310</sup> *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Folardo*, 336 U.S. 281, 285 (1949)).

<sup>311</sup> 986 F.2d at 531.

<sup>312</sup> *See id.* The Ninth Circuit emphasized that the *Massey* court "did not state that extraterritoriality would be *demand*ed in such circumstances," simply that "the presumption is *generally* not *applied* . . ." *Subafilms, Ltd. v. MGM-Pathe Comm. Co.*, 24 F.3d 1088, 1096 (9th Cir. 1994).

<sup>313</sup> *See United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

<sup>314</sup> *See Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

<sup>315</sup> *See Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968).

<sup>316</sup> EPSTEIN & SNYDER, *supra* note 305, at § 5.04[2].

<sup>317</sup> *See id.* at § 5.02.

<sup>318</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). For a discussion on the detrimental effects of professional sports violence, see *supra* Part I.B.

sent, a country may not exercise jurisdiction if doing so would be unreasonable.<sup>319</sup> Moreover, when the prescriptions of two foreign entities would conflict, a country should defer to the other country if the latter's interest in exercising jurisdiction is greater.<sup>320</sup>

Since "the ultimate touchstone of extraterritoriality consist[s] of an ascertainment of congressional intent,"<sup>321</sup> the NSPC's enacting legislation should expressly state that, subject to the conflict of laws, actions occurring during games of American-based professional sports leagues, played in the United States or elsewhere, are within the NSPC's realm of authority. If the language of the statute specifically indicates Congress' intention to extend its coverage beyond American soil, then the power of the NSPC to police professional sports violence outside the United States boundary cannot be doubted.

### B. *Form and Structure of the NSPC*

The National Sports Policy Commission would be composed of five members, appointed by the President of the United States, subject to confirmation by the Senate. Each commissioner would have an extensive background in the sports industry and the legal issues that surround it. To foster political independence, the tenures of the commissioners would be six years. "Once the technical qualifications of a candidate have been established and found acceptable, he should be examined for possible bias towards players and for conflicts of interest that might impair his . . . independence of judgment."<sup>322</sup>

### C. *Powers and Duties of the NSPC*

Through the enacting legislation, Congress would empower the NSPC to have secondary review of sports violence cases. Primary review would be left in the hands of the professional sports leagues. After the sports league has internally dealt with the sports violence episode at issue, the NSPC could levy additional suspensions or fines if warranted. Further, the NSPC would have the authority to award financial compensation to players injured by excessively violent conduct. The sum of money awarded to such players would be based on the severity of their injury and amount of lost earnings, if any. Moreover, when confronted with extreme

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<sup>319</sup> See *id.* at § 403(1). For a list of factors used to determine if jurisdiction is unreasonable, see *id.* at § 403(2).

<sup>320</sup> See *id.* at § 403(3).

<sup>321</sup> *Subafilms, Ltd. v. MGM-Pathe Comm. Co.*, 24 F.3d 1088, 1096 (9th Cir. 1994).

<sup>322</sup> *Lotter, supra* note 287, at 83.

incidents of sports violence, the NSPC could refer such matters to the judicial system for criminal adjudication only as a last resort.

By authorizing the NSPC to have secondary review, Congress accomplishes two important goals. First, it acknowledges that the leagues themselves have the potential to deter excessively violent behavior. If internal fines and suspensions are severe enough, the leagues will find that they have power to make a significant impact on the way their respective games are played. Second, giving secondary review to the NSPC recognizes that the leagues have interests that conflict with strict fines and suspensions for violent conduct. If the leagues fail to make an appreciable impact on over-aggressive behavior, then Uncle Sam should relieve society of the harmful effects of excessive sports violence by punishing culprits appropriately. Under this type of arrangement, the federal government "will preserve the vitality of sports while serving notice to players that they no longer have license to commit unwarranted batteries on fellow players."<sup>323</sup>

#### D. *Advantages*

The NSPC would have several advantages over the other alternatives to controlling sports violence.<sup>324</sup> First, while the problem of distinguishing individual liability from sports liability would still exist, the difference would be clearer when the NSPC, through its regulatory procedures, either reprimands or tolerates certain conduct.<sup>325</sup> Second, since the NSPC would include knowledgeable ambassadors of the major professional sports and sports-related fields, the complicated task of defining appropriate conduct would not be as daunting.<sup>326</sup> A sports commission such as the NSPC "could acquire greater expertise in the problems of professional sports than could the courts, for the sole function of the [commission] would be the regulation of such sports."<sup>327</sup> NSPC regulatory procedures would not only protect players by clarifying the difference between legal, aggressive behavior and illegal conduct, but would also serve as a preliminary investigation in the rare event that criminal charges are brought. By referring only extreme incidents of sports violence to the criminal justice system, the NSPC would serve as a prescreening mechanism for prosecutorial offices. Third, a federal commission would impose uniform national regulation, eliminat-

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<sup>323</sup> Karon, *supra* note 3, at 163.

<sup>324</sup> See *supra* Part III.

<sup>325</sup> See Hallowell & Meshbesh, *supra* note 297, at 32.

<sup>326</sup> See *id.*

<sup>327</sup> *Discipline in Professional Sports*, *supra* note 119, at 795.

ing the possibility of inconsistencies intrinsic in judicial proceedings.<sup>328</sup> “By replacing sporadic and haphazard intervention of criminal [and civil] law with an institutionalized process, disciplinary continuity could lead to deterrence and predictability. This . . . would alleviate the cynic’s observation that several different assault laws apply to hockey—depending on the site of the contest.”<sup>329</sup> Fourth, by levying fines on players and awarding money to injured recipients of violent conduct, the NSPC eliminates the need for a player to initiate a civil proceeding against a fellow player, thus reducing the threat of “blacklisting.”<sup>330</sup>

### E. *Disadvantages*

In spite of the aforementioned advantages of the NSPC, it is apparent that Congress has been reluctant to form a governmental sports commission.<sup>331</sup> The regulation of professional sports has received laissez-faire, or “hands off,” treatment from federal legislators, as evidenced by the Congressional record.<sup>332</sup> For instance, in 1958, Congress turned down a proposal that would have created an agency to regulate baseball, although its reasons for doing so were not overly convincing.<sup>333</sup> One reason cited by Congress was the expense of launching another governmental office and of coercing baseball to abide by new administrative procedures.<sup>334</sup> In addition, many legislators believed that sports should be left to resolve their own problems without governmental intervention.<sup>335</sup>

However, “[i]n view of the traditional importance of professional sports,<sup>336</sup> and the extent of their business operations, it is clear that the expense of adjusting administrative procedures

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<sup>328</sup> *See id.*

<sup>329</sup> Hallowell & Meshbesh, *supra* note 297, at 32.

<sup>330</sup> *See Discipline in Professional Sports, supra* note 119, at 795. For a discussion on player hesitancy to file civil suits, see *supra* Part III.A(2)(b).

<sup>331</sup> *See HORROW, supra* note 54, at 245.

<sup>332</sup> *See id.*

<sup>333</sup> *See Discipline in Professional Sports, supra* note 119, at 796.

<sup>334</sup> *See id.*

<sup>335</sup> *See id.*

<sup>336</sup> In *Flood v. Kuhn*, 309 F. Supp. 793 (S.D.N.Y. 1970), Judge Cooper asserted:

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.

Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business.

*Id.* at 797.

could easily be borne."<sup>337</sup> Moreover, the expense of establishing a government agency would be justified by the benefit gained by the American public,<sup>338</sup> namely a reduction in the sports violence that negatively influences our society.<sup>339</sup> The second justification offered by Congress, that sports should be free to work out their own troubles, has some merit. On the one hand, as this Note argues, sports leagues should be able to discipline players who engage in excessively violent conduct. On the other hand, when league sanctions fail to act as a deterrent to such behavior, some other actor is needed to impose adequate fines and suspensions. Similarly, in very extreme cases of violence, where league punishment cannot fit the literal crime, a disinterested government body could determine whether judicial proceedings are justified.

#### CONCLUSION

The occurrence of excessive violence in professional sports is a significant problem that must be remedied. Not only does conduct that violates the unwritten rules of the game seriously injure professional athletes, it also has a detrimental effect on society, specifically adolescents participating in sports. Although there are many causes of sports violence, the two major factors that lead to episodes of excessive behavior are pressure from team management and financial incentives.

Unfortunately, though various mechanisms have attempted to control sports violence, none have effectively been able to do so. While proving a tortious act is easier for plaintiffs now that courts recognize the reckless standard of care to evaluate player conduct, both legal roadblocks and peer pressure have led to the small number of civil suits brought by injured athletes. In addition, the criminal justice system has been an inappropriate forum for a host of reasons: the inherent difficulty in prosecuting professional athletes, the notion that prosecutors should spend their time dealing with "real criminals," and the perception that the nature of sports will be negatively affected by the criminal prosecution of athletes. Furthermore, two congressional proposals designed to reduce sports violence, the Sports Violence Act of 1980 and the Sports Violence Arbitration Act of 1983, contained several problems and were rejected by federal legislators.

The sports leagues have the ability to make an appreciable im-

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<sup>337</sup> *Discipline in Professional Sports*, *supra* note 119, at 796.

<sup>338</sup> *See id.*

<sup>339</sup> *See supra* Part I.B.



pact on the manner in which their respective sports are played. To decrease the level of unacceptable conduct, the leagues must take affirmative steps to police their games, such as imposing stricter penalties and suspensions. However, it is apparent that the sports leagues' internal disciplinary systems have thus far failed to adequately protect the interests of both players and the public. In the past, Congress has developed federal agencies to regulate areas of public concern. The establishment of the National Sports Policy Commission is necessary to efficiently control the excessive violence plaguing professional sports and impairing societal values. The extent to which the NSPC intervenes in professional sports will depend, in part, on the ability of the leagues to regulate their own games. By imposing additional fines or suspensions when warranted, and referring extreme situations to the criminal justice system only as a last resort, the NSPC offers the advantages of legal intervention while simultaneously preserving the independence that professional sports require. The federal regulation of professional sports violence, delegated to an objective commission of sports law practitioners, will successfully remedy the excessive behavior taking place on America's ice rinks, basketball courts, and playing fields.

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This Note is dedicated to the author's parents, Dr. Melvin and Marjorie Fritz, for their endless guidance and encouragement.

