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The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation

Wayne R. Cohen

COMMENT

THE RELATIONSHIP BETWEEN CRIMINAL LIABILITY AND SPORTS: A JURISPRUDENTIAL INVESTIGATION*

Sports violence in major American sports increased dramatically throughout the twentieth century,[1] with excessively violent conduct occurring in basketball, football, hockey, and baseball. Perhaps the most disturbing incident in basketball took place in 1977, when Kermit Washington of the Los Angeles Lakers punched Rudy Tomjanovich of the Houston Rockets in a fight during a game.[2] Tomjanovich, who had been acting as a peacemaker in another scuffle,[3] suffered a concussion, nose, jaw, and skull fractures, facial lacerations, loss of blood, and leakage of spinal fluid from the brain cavity.[4]

Football evidences the most abundant and serious examples of sports violence. Every player in the National Football League suffers at least one injury,[5] causing some to estimate that a professional player trades twenty years of his life for playing in the

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* This Essay was most inspired by R. HORROW, SPORTS VIOLENCE—THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW (1980) and Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). Other contributing sources include W. LAFAVE & A. SCOTT, CRIMINAL LAW (2d ed. 1986); J. OATES, ON BOXING (1987); S. STAFFORD, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE (1977).

1. *See* R. HORROW, SPORTS VIOLENCE—THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 9 (1980). In 1905, President Theodore Roosevelt was so distraught after watching a football game in which the University of Pennsylvania team attempted to reduce a "Swarthmore star lineman to a bloody pulp," that he threatened to outlaw football by Executive Order. Markus, *Sports Safety: On the Offensive*, 1972 TRIAL 12.

2. *See* Tomjanovich v. California Sports, Inc., No. H-78-243 (S.D. Tex. Oct. 10, 1979); *see also* 23 ATLA L. REP. 107 (1980) (reporting Tomjanovich-Washington case).

3. *Tomjanovich*, No. H-78-243.

4. *Id.*

5. J. UNDERWOOD, THE DEATH OF AN AMERICAN GAME: THE CRISIS IN FOOTBALL 27 (1979).

NFL.[6] In 1973, Charles "Booby" Clark of the Cincinnati Bengals hit Dale Hackbart of the Denver Broncos in the back.[7] Hackbart was left with broken vertebrae, muscular atrophy, and loss of strength and reflexes in his arm.[8] In 1978, Darryl Stingley of the New England Patriots was thrown an un-catchable pass. Nonetheless, Jack Tatum of the then Oakland Raiders hit Stingley head on, causing Stingley permanent paralysis.[9] In 1979, Steve Luke of the Green Bay Packers thrust his forearm into the face of Norm Bulaich of the Miami Dolphins. Bulaich sustained a split jawbone and a splintered bone around his eye. A final example transpired in 1986, when noseguard Charles Martin of the Green Bay Packers slammed quarterback Jim McMahon of the Chicago Bears to the ground.[10] It was later discovered that Martin placed a "hit list" of players' numbers, including McMahon's, on his towel.[11]

While football occasions an abundance of injuries, hockey lives up to its reputation as the most vicious professional sport.[12] The most infamous hockey incident took place in 1969.[13] Ted Green of the Boston Bruins struck Wayne Maki of the St. Louis Blues with a gloved hand;[14] Maki retaliated by smashing Green with a hockey stick, fracturing Green's skull and causing massive hemorrhaging.[15] After two brain operations, Green only partially recovered.[16] A more recent example occurred in 1984 in a game between the Quebec Nordiques and Montreal Canadiens. Referees ejected ten players and assessed 257 minutes in penalties for two bench clearing brawls.[17] Of the fourteen separate fights, one stands out as particularly shocking. Louis Sleigher hit Jean Hamel in the head, leaving

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6. Hofeld, *Athletes—Their Rights and Correlative Duties*, 19 TRIAL LAW GUIDE 383, 401 (1975).

7. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir.), *cert. denied* 444 U.S. 931 (1979).

8. *Id.*

9. LAW OF PROFESSIONAL AND AMATEUR SPORTS § 16.02, at 16-4 n.13 (G. Uberstine ed. 1990).

10. Lennard, *For the Record*, SPORTS ILLUSTRATED, Oct. 5, 1987, at 96.

11. *Id.*

12. Note, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681 (1989).

13. Regina v. Green, 16 D.L.R.3d 137 (Ont. Prov. Civ. 1970); Regina v. Maki, 3 O.R. 780 (1970).

14. Regina v. Maki, 3 O.R. 780, 780 (1970).

15. *Id.* at 781.

16. Regina v. Green, 16 D.L.R.3d 137 (Ont. Prov. Civ. 1970); Regina v. Maki, 3 O.R. 780 (1970).

17. LAW OF PROFESSIONAL AND AMATEUR SPORTS § 16.02, at 16-5 n.14 (G. Uberstine ed. 1990).

Hamel motionless on the ice for several minutes.[18] Hamel was later removed from the ice, spitting up blood and with his right arm hanging limp.[19]

Baseball, usually considered the sport least conducive to violence, uses two of the most dangerous weapons in professional sports—a bat and a ball.[20] A pitch may be thrown at speeds in excess of 100 miles per hour, allowing only four-tenths of a second for the batter to respond.[21] The increasing ability of batters to hit home runs causes pitchers to respond with revenge pitches.[22] During a game in 1987, Eric Show, a pitcher for the San Diego Padres, hit Andre Dawson, the Chicago Cubs all-star outfielder, in the left cheek with a pitch.[23] The incident occurred just two innings after Dawson hit a home run off Show. Dawson's cheek required twenty-four stitches.[24]

One consequential aspect of the increasing violence in sports is its relationship to criminal law. Legal scholars, judges, and law practitioners generally agree that if a player's conduct is within the bounds of what one would reasonably foresee as a hazard of the game, the violent act is authorized.[25] If the act is authorized, it does not expose the perpetrator to criminal liability, even if serious injury or death to another athlete results.[26] Some even argue that criminal sanctions should not apply to violent acts that occur in the sports arena because sports violence does not threaten the public in the same way as off-the-field violence.[27]

This is not to suggest that athletes, simply because they don athletic uniforms, enjoy formal exemption from the criminal justice system.[28] Theoretically, shoulder pads and a helmet should not shield athletes from liability for their actions on the field. Practically, however, this may be the case because prosecutors rarely file criminal charges.[29] Furthermore, courts have difficulty in defining

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18. *Id.*
19. *Id.*
20. R. HORROW, *supra* note 1, at 10.
21. Hersch, *It's War Out There*, SPORTS ILLUSTRATED, July 20, 1987, at 14-16.
22. *Id.*
23. *Id.*
24. *Id.*
25. G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 281 (1986) [hereinafter G. SCHUBERT].
26. *Id.* at 281-282.
27. *See* 2 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 420 (1986).
28. G. SCHUBERT, *supra* note 25, at 282.
29. *See* R. HORROW, SPORTS VIOLENCE—THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 69-74 (1980); Beumler, *Liability in Professional Sports: An Al-*

the elements of a crime as related to sports violence,[30] and juries tend to be sympathetic toward athletes.[31]

In an attempt to standardize what constitutes criminal behavior in sports, and to "deter and punish, through criminal penalties, the episodes of excessive violence that are increasingly characterizing professional sports,"[32] Representative Ronald M. Mottl introduced to Congress the Sports Violence Act of 1980.[33] The bill provided:

> 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 . . . shall be fined not more than $5000 or imprisoned not more than one year. . . .
> 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.[34]

The proposed Act, which ultimately failed,[35] attempted to differentiate the normal physical contact of sports from the contact a civilized society deems criminal under any circumstances. Whether that is possible is questionable.

A decision not to prosecute professional athletes is objectionable on the grounds that society maintains a duty to prosecute any

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ternative to Violence?, 22 ARIZ. L. REV. 919 (1980).

30. LAW OF PROFESSIONAL AND AMATEUR SPORTS § 16.04[1][b], at 16-13 (G. Uberstine ed. 1990). The judge in the *Green* case commented: "I do not think that any of the actions that would normally be considered assaults in ordinary walks of life can possibly be, within the context that I am considering, considered assaults at all." 16 D.L.R.3d 137 (1970).

31. *See* Beumler, *supra* note 29, at 926.

32. H.R. 7903, 96th Cong., 2d Sess., 126 CONG. REC. 20,890 (1980).

33. *Id.* A second legislative attempt was made to control violence in sports. In 1983, Representative Thomas A. Daschle of South Dakota introduced the Sports Violence Arbitration Act. H.R. 4495, 98th Cong., 1st Sess., 129 CONG. REC. H10,579 (daily ed. Dec. 14, 1983). The bill differed from the Sports Violence Act of 1980 in that it would have imposed civil rather than criminal penalties. *Id.* An arbitration board was proposed to settle grievances between players resulting from the use of excessive violence. *Id.*

34. H.R. 7903, 96th Cong., 2d Sess., 126 CONG. REC. 20,890 (1980).

35. Some claim that all federal legislative attempts failed because sports violence lacks widespread concern. Consequently, legislators expressed reservation over utilizing federal resources to control a problem that could best be handled at the local level. *See* Sprotzer, *Violence in Professional Sports: A Need for Federal Regulation*, 86 CASE & COMMENT 3 (May/June 1981).

conduct constituting criminal behavior, irrespective of whether the potential defendant wears an athletic uniform. Arguably, however, as a unique and beneficial societal institution, sports and its participants deserve special treatment and, in some situations, immunity from the criminal law.

Albeit unconventional, this Comment analyzes these issues through a jurisprudential lens not typically found in sports-related topics. The Comment is written as three fictional, modern-day judicial opinions from the Court of Final Appeals of the Republic of Amercarth—a hypothetical jurisdiction. In most circumstances traditional law review style footnotes have been omitted. Notwithstanding the narrative means employed, accuracy and detail of substantive considerations, policy arguments, and other particulars have been strictly preserved. The fictional opinions address boxing, perhaps today's most controversial sport. Unlike baseball, basketball, football and hockey, fighting is boxing's sole purpose: the fight is the sport. Analyzing the relationship between criminal liability and sports in the context of boxing forces the contemplation of marginal issues. The reader should note at the outset that, as with most judicial opinions, Justices Jillian, Todan, and Hindan leave many questions unanswered and sometimes expound readily assailable arguments. *Therein, however, lies the methodology of this essay.* By evaluating the strengths and weaknesses of the fictional opinions, the reader comes to understand the difficulty underlying the issue of whether to impose criminal liability on professional athletes for behavior that could be construed as nothing more than "part of the game."

REPUBLIC v. JORDAR
THE COURT OF FINAL APPEALS

The defendant, having been indicted for the crime of criminal homicide, was found guilty by a jury of his peers sitting in the Court of Initial Trials. The defendant brings a petition of error before this Court claiming, *inter alia*, that the trial judge's charge to the jury on the issue of intent constitutes reversible error. This Court of Final Appeals accepts petitioner's claim and REVERSES the lower court's decision.

OPINION OF THE COURT

JILLIAN, J.F., CHIEF JUSTICE.

This is a criminal action brought by the Republic States of Amercarth (the Republic) against Myles Jordar (Jordar), a professional boxer, for the unlawful death of his opponent during a boxing match. A jury found Jordar guilty of criminal homicide in violation of Section 3.91 of the Republic of Amercarth General Statutes. The defendant appeals. On behalf of a plurality of the Court, I offer the following opinion.

The facts are not disputed. Jordar, the defendant below and appellant here, began his professional boxing career eleven years prior to the fateful match in question. Fighting as a heavyweight, his record was twenty-seven wins (eighteen by knockout), two losses, and one draw.

Martin Singer (Singer), the deceased, boxed for nine years, accruing a record of nineteen wins and one loss. He held the Global Boxing Association (G.B.A.) heavyweight championship belt at the time he met Jordar in the ring. In accordance with G.B.A. policy, both boxers underwent physical examinations prior to the match. The G.B.A. found the boxers to be in excellent condition and issued permits to the boxers to engage in the title fight. The bout commenced at 8:00 p.m. and was scheduled for twelve, three-minute rounds. Safety regulations required referees and a physician to monitor the match. An ambulance equipped with life support apparatus remained on location.

The gong of the opening bell sparked the boxers into action. Each boxer pounced upon the other with lightening-fast jabs and rock-hard crosses. Rounds one and two were evenly fought. Singer, however, dominated the third where, with a string of flurries to Jordar's body followed by a devastating right hook to the ear, Singer knocked Jordar to the canvas. Jordar rose by the count of four and was given the mandatory "standing eight" count. After Jordar indicated that he had recovered from the knockdown, the referee signaled for the boxers to continue. Singer attacked with an assault of blows to the mid-section which propelled Jordar to the ropes, causing him to hunch over in a defensive position. The fight doctor entered the ring between rounds three and four to examine Jordar. The doctor observed the dilation of Jordar's pupils and questioned him on his name, address, and other simple questions. Concluding that Jordar was capable of continuing, the physician notified the referee and the judges.

The physician's decision to allow the fight to continue provided Jordar with renewed hope of success. Jordar had been losing the match up to this point, and he responded positively by winning four of the next eight rounds. With the opening bell of the eleventh round, Jordar confidently danced quickly across the ring flicking jabs into Singer's face. Fearing that he might lose his title, Singer flung himself at Jordar, and the two battled head-to-head in the corner of the ring. Jordar retaliated with a left-right combination to Singer's ribs. The attack forced Singer to lower his hands, leaving his head vulnerable. Capitalizing on his opponent's mistake, Jordar connected with two devastating hooks that caused Singer to collapse through the ropes and slam his head on the concrete floor outside of the ring.

The ring doctor realized that Singer was hurt and rushed to his side. Singer stated that he had no feeling in the left side of his body. The doctor hypothesized that Singer had suffered neurological damage. A medical stretcher was summoned, and an ambulance transported Singer to a nearby hospital. Despite vigorous medical and surgical treatment, Singer died two days later of a subdural hematoma—in lay terms, a brain clot.

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The Republic charged Jordar with violating Section 3.91 of the Republic of Amercarth General Statutes. Section 3.91 provides that "[a]ny person who wilfully causes the death of another shall be guilty of murder and punished by life imprisonment." In construing this section, our courts consistently apply a stringent three-pronged test to determine culpability: (i) the defendant must have committed an *actus reus*; (ii) the defendant's act must legally cause the death of a human being; and (iii) the defendant must have an accompanying state of mind, often referred to as *mens rea*. The petitioner alleges no error as to issues one and two, and we agree that the record fully supports the jury's findings that Jordar fashioned an affirmative act or conduct sufficient to satisfy the *actus reus* requirement. Jordar struck several blows to Singer's head, one of which knocked him to the floor; his punches were the legal and proximate cause of Singer's death. The only issue before this Court concerns intent.

For Jordar to be found criminally liable, the jury must have found that he possessed the necessary *mens rea* of criminal homicide. The seminal case, Republic v. Gerald, 222 R.C.A. 1022, establishes that the "*mens rea* requirement will be satisfied if the de-

fendant intended to kill the victim, or if the defendant had knowledge that the act was substantially likely to result in the victim's death, or if the defendant intended to do serious bodily harm short of death but actually succeeded in a killing." Upon recommendation of the trial judge, counsel for the Republic and counsel for Jordar submitted potential jury instructions. The judge charged the jury with the following instruction:

> Ladies and gentlemen, in order to find Jordar, the defendant, guilty of criminal homicide you must decide that he intended to kill Singer, or that he had intended serious bodily harm, or that he had knowledge that a killing was substantially likely to occur. In reaching a decision, it is necessary for you to distinguish the intent of engaging in a boxing match from the intent of criminal homicide. In fact, for our purposes here, forget entirely that these men were boxing. Put that out of your minds. Just ask yourselves whether Jordar had the requisite criminal intent to find him guilty.

This instruction was erroneous and constitutes reversible error. This Court recently abandoned the distinction between "general" and "specific" intent, and employs instead the comprehensive term "criminal intent." To embrace the notion that the intent necessary for boxing differs from the criminal intent necessary for criminal homicide creates an unfounded and dangerous distinction which this Court refuses to adopt.

The intent required for boxing is necessarily indistinguishable from the intent required to assert criminal liability. Unlike any other sport, boxing participants excel by injuring their opponents. Winning occurs in one of three ways. First, the boxer who lands the most punches in a match wins by "points." Second, the boxer who beats his opponent until the opponent has no possibility of prevailing (even though the opponent may still be standing) wins by "technical knockout," commonly referred to as a "T.K.O." Last, the boxer who fells his opponent, causing the opponent to remain on the mat for at least ten seconds, wins by "knockout." In either of the three settings—points, T.K.O, or knockout—the boxer prevails by battering his opponent. To differentiate between the intent required to box and the intent required to commit criminal homicide is to invent a non-existent distinction. Accordingly, this Court finds error with the instruction given by the learned trial judge.

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It is my opinion that in the future, the prosecutor need not seek an indictment for a professional athlete's actions during a competition. The courts of the Republic should not be forced to entertain these types of cases. Pursuant to the Prosecutorial Standards of the Republic, "the prosecutor may in some circumstances, and for good cause consistent with the public interest, decline to prosecute a case, notwithstanding that evidence may exist which would support a conviction." That boxing is a good cause consistent with the public interest is well known. As with other sports, boxing deserves credit for bettering the lives of many impoverished and destitute youths by providing a respectable outlet to vent their anger and bitterness toward society. Boxing youths are often first attracted to the boxing ring to perfect their already existing skills of wounding others. As they enter the brotherhood of the gym, these street-hardened children undergo a dramatic transformation. The new peer group—other boxers—evaluates new members by their boxing capabilities. The newcomer soon learns that self-discipline is the key to achieving success and status in the gym. Rigorous training, strict dieting, and total overall discipline combine to re-focus anger and bitterness towards concentration on pugilism. Moreover, boxing provides Amercarth citizens with enjoyable entertainment. As with other sports, professional and amateur boxing give spectators a reason to unite: "cheer" for the popular boxer; "boo" the hated boxer. One author comments on the magical space of the boxing ring:

> There as in no other public arena does the individual as a unique physical being assert himself; there, for a dramatic if fleeting period of time, the great world with its moral and political complexities, its terrifying impersonality, ceases to exist. Men fighting one another with only their fists and their cunning are all contemporaries, all brothers, belonging to no historical time. The crowd, borne along with them, belongs to no historical time. . . . In the brightly lit ring, man is *in extremis*, performing an atavistic rite or *agon* for the mysterious solace of those who can participate vicariously in such drama: the drama of life in the flesh. Boxing has become [the] tragic theater.[36]

A second reason why the prosecutor need not seek an indictment of a professional athlete is that limited resources necessarily restrict the prosecutor's labors to the prosecution of society's most

36. J. OATES, ON BOXING 80 (1986).

offensive criminals, a class of which the professional athlete as player is not a part. This is not to suggest that full and impartial enforcement of the law is not theoretically encouraged. Rather, pragmatic concerns mandate the prosecution of heinous criminals such as rapists, murderers, and drug dealers before the prosecution of professional athletes for conduct engaged in during the course of an event.

Assume that a "typical" urban prosecutor oversees an average of one hundred and fifty prosecutions per year. Assume further that in any given year the prosecutor has over five hundred cases from which to select potential criminal defendants. Among those five hundred cases presented, four hundred and fifty involve heinous criminals; the remaining fifty involve persons acting in socially acceptable contexts (*e.g.*, professional athletes.) Thus, as members of society fearing for our well-being and relying on the criminal law for protection, we demand that prosecutors focus their time and energy on society's most repugnant criminals.

The Republic should refuse to prosecute cases such as the one at bar because criminal sanctions serve as an inappropriate means by which to control violent behavior in sports. Retribution and deterrence are the two primary justifications for the imposition of penal sanctions; neither, however, is effective in or applicable to the context of sports.

The broad premise upon which the theory of retribution rests is that an irresponsible decision, one which contravenes societal norms, warrants punishment because the offender must "pay for the crime." Put another way, when one commits a crime, retributive theory contends that it is important for the criminal to receive a commensurate punishment in order to restore societal "peace of mind." Sir James Fitzjames Stephen, a 19th century English judge and historian of the criminal law, noted:

> [T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense. . . . The criminal law thus proceeds upon the principle that it is morally right to hate the criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.[37]

But where did Jordar err? Where did he contravene societal norms? This unfortunate event occurred during the heated battle of a boxing match. As with all boxers, Jordar was trained by

37. 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883).

coaches to attack until the opponent drops or the referee intervenes. Jordar was simply "playing the game." There was no antisocial behavior. Retribution here fails to provide a workable justification for imposing criminal liability upon an athlete.

The theory of deterrence also plays little part in controlling violent behavior during sporting events. The concept of deterrence is typically divided into "special" deterrence and "general" deterrence. Special deterrence, sometimes called deterrence by intimidation, refers to steps taken to dissuade the particular offender from repeating a crime by bringing the consequences of further criminal behavior to the offender's attention, thereby inducing the offender to refrain from such conduct in the future. By contrast, general deterrence refers to the impact a sentence and conviction has on others because, in theory, people will refrain from criminal behavior when they see that the criminal justice system punishes those who commit crimes.

For the athlete, both special and general deterrence present a confusing dilemma. Professional sports provides society with a cause to unite. Most Amercarth citizens advocate sports participation. Cutting across all socio-economic classifications, a sports team gives reason for an entire city or town to unite in furtherance of a mutual cause, namely the team's success. For example, fans at any given football or basketball game come from all backgrounds: black and white, rich and poor. This helps explains why, even from a young age, participation in sports is strongly encouraged to provide discipline, exercise, and stress relief. As these child athletes become adult athletes and enter the professional level, monetary compensation and fame induce continued participation in sports. How is it that society welcomes participation and promotes aggressive and competitive play, yet punishes certain conduct necessary to and inherent in the game?

Finally, to assert criminal liability over a defendant requires that the defendant be on notice that the behavior is criminal. Often reduced to the maxim *nulla poena sine lege*, the principle of legality forbids the retroactive definition of crime. That is, a defendant should not be punished for a crime that has not already been proscribed by the legislature as criminal. No such statutes in our Republic have been enacted that deal with violence during a sporting event. Nor have any existing statutes been applied successfully to sports related violence. How, then, was Jordar to be put on notice that Section 3.91, which reads that "[a]ny person who wilfully causes the death of another shall be guilty of murder. . . ." applied to a boxing match? Sports is a unique institu-

tion. If the legislature intended sports violence to be criminally actionable, our Congressional Representatives would have propounded such legislation.

The decision not to prosecute does not mean that a professional athlete acting violently during a game goes without punishment. Various alternative dispute resolution methods, including civil mechanisms, game officiating, league fines and suspensions, control violent behavior in sports more effectively than the imposition of criminal liability. Tort remedies, for example, compensate the injured sports victim who brings an action, whether for assault, battery, or negligence, against a tortfeasor and recovers both compensatory and punitive damages.

Second, game officials maintain sufficient control over violent behavior during sporting events. The officials' authority to impose penalties imputes significant administrative capability. For example, by assessing a football player a fifteen yard penalty for a personal foul, the game official deters wrongful conduct, especially in light of peer pressure from other players and coaches.[38]

League disciplinary action also provides effective behavioral control devices. Although monetary sanctions are questionable as a deterrent, excessively violent behavior calls for fines and suspensions by the governing body of the appropriate sport. Most professional athletes take great pride in their competitive ability and, notwithstanding the financial benefits, enjoy playing their game—indeed, winning is *not* the "only thing." A league suspension prevents a player from partaking in the sport, and therefore constitutes an effective deterrent.

Finally, assembling cases presents many proof problems for the prosecution. Owners, coaches, referees, and players have a vested interest in the outcome of a given trial, namely, their jobs. As a result, few are willing to testify in any way adversely to their sport. Discovery becomes a formidable process, and these witnesses, because of their biases, serve better for the defense.

In conclusion, on behalf of a plurality of the Bench, I REVERSE.

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38. One quarterback commented about a player in a football game:
A personal foul call ruined everything. We ran twelve plays, covering seventy-five yards and were about to score when my offensive lineman got into a fight. The fifteen yard penalty assessed by the referee forced us to kick a field goal instead of trying for a touchdown. Sure enough, we missed the kick. The coaches chewed him out like I'd never seen and, for the rest of the quarter, that lineman was the "black sheep" of the huddle. Maybe it was good in a way, because he never even got a holding call the rest of the season.

TODAN, D.T., Concurring.

Although I agree with the result reached by the Chief Justice, I feel that certain theoretical arguments complement her opinion. If this Court declares that under our law Jordar has committed a crime, then our law itself violates all notions of common sense. At the outset, I admit that my justification for acquitting this defendant may incite opposition until examined genuinely. Nonetheless, I probe onward and offer the following concurring opinion.

Conventional notions of positivism play no part in this case. A positivist system grants to the State the sole power to promulgate positive laws, thereby determining the liberty of that State's citizens. Mere positivism must be rejected, however, when it results in an unjust deprivation of a person's natural rights. The enacted laws of the Republic of Amercarth, including all statutes and common law precedents enacted thereunder, did not apply to Jordar and Singer when they boxed in their match.

Rather, the laws of the state of Nature governed on that evening. From antiquity, theorists recognized that the most fundamental principles of law or government originated from the notion of contract or agreement. Philosophers of the seventeenth and eighteenth centuries, including Locke, Rousseau, and Hobbes, first established the concept and based government itself on a social compact entered into by the free accord of society's members. Prior to organized society, humankind existed in a chaotic and frenzied state of Nature, devoid of all laws and order. To escape the inconvenience and disarray of the state of Nature, humankind chose to co-exist and form a social contract, thereby establishing the entity of government.

It is my view that while engaged in the art of pugilism, men such as Jordar and Singer regress temporarily to the state of Nature. As they battled each other on the fateful night, it was instinct, not reason, that governed their efforts. There was no coexistence; rather, there was only survival. Societal laws and decrees, including Section 3.91, no longer held any importance.

It is axiomatic that positivism rests upon the possibility of man's co-existence in society. When circumstances arise in which co-existence is impossible, a condition that underlies all our precedents and statutes ceases to exist, as does the force of our positive law. As the boxing match ends—or other sporting events for that matter—and the boxers hug each other with mutual admiration and respect, co-existence and the workings of positivism start anew.

A natural response to my argument is that I am being unfaithful to the law. Where do we draw the line as to when our laws apply to a given situation, and when they do not? Can we choose not to apply the law at free will?

As with all the courts of the Republic, this Court frequently decides a case by instrumentally reasoning from the result backwards, manipulating legal principles along the way. This is creative lawyering. Even in this concurring opinion I am guilty of this outcome-oriented analysis. Perhaps I could have reached the same conclusion with traditional legal logic. To do so, however, would be to shun all sense of realism. Jordar broke the letter of the law, and to this end the majority opinion fails to display well-reasoned analysis. It is my opinion, however, that as participants in a very unique and beneficial institution in our society, athletes deserve preferential treatment and, in some cases, immunity from the law. By judicial fiat, consequently, I would acquit Jordar and REVERSE the decision of the lower court.

HINDAN, R.H., Dissenting.

I vehemently disagree with the Chief Justice's uncommitted analysis. The legislature enacted Section 3.91 to punish "[a]ny person who willfully causes the death of another . . . ." As evidenced by the jury's findings, Jordar violated this statute. On that fateful night Jordar and Singer met in the ring, Jordar, with calculated reason, threw a barrage of punches that killed Singer. That the incident occurred during a boxing match merely clouds the issue; it does *not* negate the reach of the criminal law.

Boxing is a sport. Unlike Roman gladiatorial combat, boxing is not a fight to the death. Boxing as we know it in Amercarth derives solely from the bare knuckle fighting of 18th century England. This type of fight, in which maiming and death were not the goal, was known as a Prize Fight, and was a voluntary contest between two men, usually a challenger and a champion. Spectators placed bets on which man would knock the other down or draw first blood. Known as the "gentlemen's sport," these matches were seldom monitored by referees, and the crowd actively discouraged foul play.

Against this backdrop, we understand that after seeing his opponent was hurt, Jordar had time to stop his attack before the final blow. Instead, he persevered without mercy. Jordar was a professional boxer with twenty professional fights and fifty-five amateur fights. He was an expert on when a boxer was ready to

fall. Had Jordar stopped his onslaught only for a moment, thereby giving the referee a split-second to observe Singer, the match would have been stopped and Jordar awarded a technical knockout. The death could have been prevented.

Regarding the Chief Justice's plea for prosecutors not to pursue these types of cases, it is my opinion that our system already contains the mandatory correction devices. The legal doctrines of consent and involuntary reflex, for example, allow extenuating circumstances to be taken into account without the judiciary sitting as a super-legislature dictating to the Republic the methodology for choosing its cases.

That athletes consent to all conduct incident to a game is the traditional defense used by an athlete defendant facing punishment. The fundamental proposition underlying the defense is that an athlete cannot be held criminally liable because the victim consented to the conduct by participating in the sport. A defendant's privilege is limited to the conduct to which the victim consents. In choosing to partake in a boxing match, Singer consented only to being punched and, perhaps, knocked out; he did not consent to being murdered. Even if Singer actually consented to the infliction of harm, this consent would not be effective because he does not have the authority to waive the State's interest in controlling crime. That is, although Singer may be able to consent to conduct by another, Singer had no authority to waive criminal liability for Jordar.

Under the involuntary reflex doctrine, a defendant athlete typically argues that because professional athletes are customarily trained for a specific sport from childhood, and that violence is part of most contact sports, violence by the professional athlete is the product of an instinctive reflexive action. Jordar contends that coaches of all sports teach young athletes to intimidate an opponent and to precipitate physical altercations rather than to avoid them. I disagree. Coaches and managers discourage, not encourage, violence in boxing. As the Chief Justice hints, boxing's proponents refer to the sport as a "craft" in which skill, not brute strength, prevails. Prior to a match, the skilled boxer views films of the opponent and plans a strategy. Dancing and "rope-a-dope" may be the tactic for the smaller boxer fighting the larger. By comparison, for the larger and more powerful boxer, maintaining control of the ring and stalking the opponent may prove more effective. I cannot accept the argument that a professional boxer such as Jordar had no control over his actions and no chance of stopping his attack.

Finally, the Chief Justice implies that a successful prosecution

in this case opens the door to an already unmanageable case load and advises that, in addition to resource restrictions, prosecutors face complex problems in assembling a case. In defense of their sport and ultimately their jobs, league officials, coaches, and players are tentative in their cooperation. Accordingly, the Chief Justice contends that amassing the necessary witnesses and evidence presents insurmountable obstacles. I disagree with that view. As technology develops and recording expenses decrease, television cameras document most professional events. As demonstrative evidence, these recordings provide a cost-effective means for the prosecutor to amass and plan a case, notwithstanding the biases and testimony of key witnesses.

In her tempered opinion, the Chief Justice ignores the issue of criminal immunity for professional athletes. Society relies on the criminal law to protect its citizens from antisocial conduct; only with this security can contemporary civilization function. Weak or ineffective penal laws jeopardize basic human interests. Nothing is more important for the maintenance of tranquility of the community or for the preservation of the individual than the government's ability to secure absolute, non-discriminating enforcement of the law. By creating an exception for athletes, either by judicial fiat, executive action, or legislative enactment, we necessarily grant immunity to anyone clothed in an athletic uniform. Hence, whenever the boxer puts on boxing gloves, or a football player football pads, society allows freedom to disregard all positive laws of the Republic. I cannot support that view.

Other alternatives for a defendant professional athlete to evade punishment also exist. For example, this case seems well-suited for an act of executive clemency. The legal systems of most civilized countries recognize the need for the right of appeal to an authority other than legislative or judicial law. Clemency provides a means of modifying, in particular circumstances, the application of rigid, uniform laws. Often defined as an act of leniency or a disposition to be merciful, the word clemency includes a pardon, commutation of sentence, reprieve, or remission of fines and forfeiture. Unlike this Court, the Chief Executive, as head-of-state, retains the authority to alter Jordar's conviction without impairing or offending the Legislature. Clemency allows consideration of special or extenuating circumstances that cannot be tolerated during the normal judicial process. Although Jordar clearly violated the literal wording of Section 3.91, his moral character is exemplary. An act of clemency would commute his sentence—here, life imprisonment—and erase any existence of moral guilt or blame that accom-

panies his conviction for criminal homicide. It should be noted that executive clemency would relate only to Jordar's criminal liability, and does not preclude civil action by discharging the offender's liability to make restitution for damages. Thus the civil action by Singer's estate against Jordar for damages would not be barred.

It is for these reasons that I offer this dissenting opinion.

*Wayne R. Cohen**

* B.B.A., 1988, University of Michigan; J.D. Candidate, 1991, University of Miami School of Law.