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Ronald A. DiNicola

Scott Mendeloff

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*Ronald A. DiNicola**
*Scott Mendeloff***

I. INTRODUCTION

Sport is an integral part of American culture[1] and violence has become, over the years, a major element in many sports.[2] Commen-

* A.B., 1979, Harvard College; J.D., 1982, Georgetown University. The author is a law clerk to United States District Judge Gerald Weber.

** B.A., 1979, University of Wisconsin; J.D., 1983, M.S.F.S., 1983, Georgetown University.

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1. RESEARCH & FORECASTS, THE MILLER LITE REPORT ON AMERICAN ATTITUDES TOWARD SPORTS (1983). Nearly seventy percent of the 1300 people polled in this survey watched, discussed, or read about sports every day.

2. *See generally* Note, *The Sports Court: A Private System To Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399 (1982) [hereinafter *The Sports Court*]; Kirshenbaum, *It's Time To Stop the Hooliganism*, SPORTS ILLUSTRATED 9 (Mar. 9, 1981); 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 (1981); Williams, *Football Hooliganism: Offenses, Assists and Violence — A Critical Note*, 7 BRIT. J. L. & SOC. 104 (1980); Beumler, *Liability in Professional Sports: An Alternative to Violence?*, 22 ARIZ. L. REV. 919 (1980); Note, *Sports Violence: A Matter of Societal Concern*, 55 NOTRE DAME LAW. 796 (1980); Swift, *A Reminder of What We Can Be*, SPORTS ILLUSTRATED 30 (Dec. 22, 1980); 19 DUQ. L. REV. 191 (1980); D. ATYEO, BLOOD & GUTS: VIOLENCE IN SPORTS (1979); Comment, *Controlling Violence in Professional Sports*, 2 GLENDALE L. REV. 323 (1978); Note, *Torts in Sports — Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764 (1980); Note, *Consent in Criminal Law: Violence in Sports*,

tators have characterized the level of physical contact in some sports as brutal and unnecessary for the accomplishment of effective play.[3] The costs associated with violent play are borne by players, teams, and ultimately by ticket-purchasing fans themselves. It is believed that even a marginal reduction of unnecessarily violent play would eliminate a significant portion of sports related injuries and, hence, the costs associated with those injuries.

A profusion of commentary from a variety of disciplines has arisen over the question of the need to control players' behavior in the heat of competition.[4] In this, the age of the sports revolution, sociologists,[5] psychologists,[6] and lawyers[7] have conducted studies on the causes of sports violence and on the effect of that repetitive violence on the balance of society, and particularly on youthful aspirants.[8] Most agree that controls are necessary to deter violent conduct in sports, but few can agree on how best to shape them.

Federal legislators have considered proposals which include

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75 MICH. L. REV. 148 (1976); Note, *Tort Liability in Professional Sports: Battle in the Sports Arena*, 57 NEB. L. REV. 1128 (1978); 12 GA. L. REV. 380 (1978); Letourneau & Monganas, *Violence in Sports: Evidentiary Problems in Criminal Prosecutions*, 16 OSGOODE HALL L.J. 577 (1978); Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L. Q. 425 (1977); Comment, *The Consent Defense: Sports, Violence, and the Criminal Law*, 13 AM. CRIM. L. REV. 235 (1975); Note, *Criminal Law: Consent as a Defense to Criminal Battery — The Problem of Athletic Contests*, 28 OKLA. L. REV. 840 (1975); Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645 (1973); Note, *Violence in Professional Sports*, WIS. L. REV. 771 (1975); Kennedy, *Wanted: An End To Mayhem*, SPORTS ILLUSTRATED 17 (Nov. 17, 1975).

3. *See, e.g.*, R. HORROW, SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 1-2 (1980); Comment, *The Consent Defense: Sports, Violence, and the Criminal Law*, 13 AM. CRIM. L. REV. 235 (1975); J. UNDERWOOD, THE DEATH OF AN AMERICAN GAME: THE CRISIS IN FOOTBALL (1979).

4. Some commentators have considered, in the philosophical context, the relationship between the role of sports as a means of socialization and its subsidiary function as an outlet for aggression. *See* H. VANDERZWAAY, TOWARD A PHILOSOPHY OF SPORT 105-08 (1972).

5. Michael Smith, a sociologist at York University in Toronto, studied 3,000 issues of the Toronto Globe and Mail between 1963 and 1973 finding 100 incidents of sports violence reported, 27 of which involved spectators. Appleson, *Spectator Violence: What They See Is What They Do?*, 68 A.B.A. J. 404 (1982).

6. *See* L. BERKOWITZ, SPORT COMPETITION AND AGGRESSION IN SPORT PSYCHOLOGY & AN ANALYSIS OF ATHLETIC BEHAVIOR 135 (1978).

7. *See supra* note 2. *See also* R. HORROW, *supra* note 3; Comment, *Controlling Violence In Professional Sports*, 2 GLENDALE L. REV. 323 (1978); Lambert, *Tort Law and Participant Sports: The Line Between Vigor and Violence*, 4 J. CONTEMP. L. 211 (1978).

8. Several commentators have suggested the strong correlation in what young players see and what they do. Horrow suggests that "the *entire mentality* of hockey and football revolves around the notion that each young 'gifted athlete' is trained to believe that there is nothing 'illegal' about fighting (or even more malicious conduct) if it is done during the course of a game." R. HORROW, *supra* note 3, at 25-26. *See also* Hechter, *supra* note 2, at 427.

criminal sanctions for players who engage in excessive violence,[9] a notion as troublesome to apply as it is intrusive on play. Other legislation has suggested the use of a quasi-judicial arbitration system to resolve disputes arising from violent confrontations or other injury-creating contacts on the playing field.[10] The arbitration board known as the "Sports Court" would actually determine fault and award damages and thereby create a psychological and economic disincentive to violent conduct.[11] These two legislative measures were rejected by Congress; both failed to be reported out of the Committee on the Judiciary.[12]

Three factors are likely to be significant in the consideration of any proposal to control sports violence. First, lawmakers must be sufficiently convinced not only that violence is a problem in sports but that its incidence and severity will surely increase without legislatively mandated reform.[13] Indeed, any analysis of sports violence controls is premised on the belief that a problem exists, that violence occurs gratuitously and with frequency, and that high levels of injury are the result. Second, in order to be viable, a proposal must represent a less intrusive alternative to competing mechanisms which control violence at an unacceptable cost. The failure of the foregoing legislative efforts, along with the judicial

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9. H.R. 2263, 97th Cong., 1st Sess. 127 Cong. Rec. H760 (1981). The Act, introduced into the Congress by Representative Ronald Mottl (D. Ohio), called for criminal penalties for violent acts during games. *See infra* note 150.

10. H.R. 5079, 97th Cong., 1st Sess. 127 CONG. REC. H8759 (1981). The Act, introduced by Congressman Ronald Mottl (D. Ohio), envisions the creation of a Sports Court. The proposal was advocated in a Note which appeared in the SOUTHERN CALIFORNIA LAW REVIEW and was also promoted by Miami Attorney Richard Horrow. The Act would have essentially required that all major sports leagues establish an arbitration board which would be empowered to impose fines upon a club and players for unnecessarily violent conduct occurring during the course of play. Office of United States Congressman Mottl, Press Release (Nov. 20, 1981); *see infra* notes 156-76 and accompanying text.

11. *See infra* text accompanying notes 158-59.

12. Hearings had been anticipated on the "Sports Violence Arbitration Act of 1981" but never occurred. Representative Mottl was defeated in the Congressional elections of 1982.

13. The pattern of violent conduct in sports has demonstrated that the leagues are reluctant to assume the lead in exercising control. Commentators have suggested that league commissioners are unwilling to impose fines or suspensions with sufficient regularity to deter violent conduct. The Sports Court, *supra* note 2, at 404-05; Comment, *supra* note 7, at 324-25. The leagues possess broad power to control player conduct that derives largely from the consent of the players themselves. R. HORROW, *supra* note 3, at 66.

The failure of leagues to take the lead in controlling violence is evident in the words of former pro football star Alex Karras: "A defensive lineman can do just about anything. He can damn near haul an axe out of his jock and slash around with it before he'll be called for anything." D. ATYEO, *supra* note 2, at 228. *See also* Note, *Torts in Sports — Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764, 766-70 (1980).

deference accorded issues which arise in the context of professional sports,[14] make it abundantly clear that legislators will move cautiously in assuming any responsible role in the modern sports industry.[15] Third, any proposed mechanism of violence control must strike a balance between the need for violence control and the desire to have professional athletes compete in an atmosphere free of undue apprehension over the draconian imposition of monetary or criminal sanctions.[16]

With these considerations in mind, this article proposes a mechanism for violence control in professional athletics. After addressing the general problem of violence in sports, this article assesses the traditional legal mechanisms of conduct control — tort and criminal law — and their inability to control violent behavior in the altered state of athletic competition. An examination then fol-

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14. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (exemption of baseball from antitrust laws is an established aberration that can only be remedied by Congress); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (baseball is unique and has unique privileges one of which is exemption from normal federal law); Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922) (baseball exempt from regulation under the Sherman Antitrust Law). *But see* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); Radovich v. National Football League, 352 U.S. 445 (1957); Philadelphia World Hockey Club, Inc. v. Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

Some commentators submit that the long held belief that sports should be free of legal intervention is being replaced by the realization that meaningful reform will only be accomplished by "judicial intervention." 45 U. Mo. Kan. City L. Rev. 119 (1976).

15. One exception to legislative timidity in the area of sports legislation came on March 30, 1972, when Senator Marlow Cook of Kentucky proposed *The Federal Sports Act of 1972*. In his speech which introduced the bill, he stated:

> The sports world has been beset by a series of easily identifiable problems, all of which have resulted from the mass commercialization of sports. Until recently we have been reluctant to admit that sports is a business, as well as a national recreation form.
>
> Until recently, the world of sports was always different, always sacred. However, with the recent snowball of controversy in the sports world, the time has obviously arrived for a new perspective in the field of sports.

S. 3445, 92d Cong., 2d Sess., 118 Cong. Rec. 11,064 (1972). Cook's unsuccessful proposal sought to establish a Federal Sports Commission and a Sports Advisory Council to regulate the sports industry, promulgate rules, and impose sanctions or invoke injunctions against violators of Commission policy. *Id.* at 11,064-65.

Others have advocated a sports commission at the federal or state level. *See,* Hallowel & Meshbesher, *Sports Violence and the Criminal Law,* 13 Trial 27 (Jan. 1977).

16. By accepting sports, society has tacitly accepted a measure of violence which is inevitable in vigorous competition. Efforts to control violence, accordingly, must be tempered in such a way as to accord deference to society's abiding interest in aggressive play. The intimidation of players defeats the greater interest of society in the preservation of sports' essential qualities. In addition, players cannot, in all fairness, be held to the same standard of care in their actions on the playing field as is expected of them for action taken before or after the game.

lows of the major schemes to stem sports violence that Congress has considered. These proposals are assessed by reference to two essential factors. First, there is a study of the actual mechanism by which each proposal allocates responsibility for conduct deemed unacceptable. Second, the intrusiveness of those violence control mechanisms is gauged.

The proper identification of the varying degree of acceptable and unacceptable conduct is significant in any discussion of sports violence. In this article, an attempt is made to define and classify conduct as it relates to the goals of competition through use of a "Player Conduct Model." The model is also used to plot the relation between contemporary notions of effective play and currently codified rules of play. In turn, the Player Conduct Model is then employed to explore the operational deficiencies and impracticalities of a quasi-judicial system of arbitration to control sports violence.

Finally, this article makes the case for legislatively mandated rule reform. It demonstrates that real deterrence is achieved when the desired conduct is molded by the internal mechanisms of the several professional sports leagues. The argument is advanced that sanctions imposed for unacceptable conduct resulting in a competitive disadvantage are the most cost-effective and efficient means of obtaining real conduct reform. Only through the strict enforcement of codified rules are players certain to be effectively guided by a uniform identifiable standard of substantially less violent conduct. Accordingly, rule reform presents the least intrusive opportunity to regulate conduct on the playing field. By limiting the application of the defenses of consent and assumption of the risk, rule reform incidentally increases the effectiveness of traditional legal mechanisms as a sanction of especially egregious conduct.[17]

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17. This article addresses the problem of sports violence as it arises in the major American team sports. It will deal, at various times, with episodes of violence arising in basketball, baseball, football, and hockey. No effort will be made to address the prospect or need for controls in amateur or professional boxing. It might be noted, however, that in the disparity of injury rates noted among amateurs and professionals in both boxing and hockey, much can be said for the benefit of uncompromising sanctions, tight participant controls, and strict supervision. *See, The Sports Court, supra* note 2, at 439-40 (violence and fighting nearly non-existent in collegiate and international hockey).

Efforts have been made recently in professional boxing to reduce the danger of serious injury over the course of long championship bouts. The World Boxing Council has reduced championship fights from 15 to 12 rounds. The states of New Jersey, New York, and Nevada have instituted the standing eight count, a system long used in amateur boxing to diminish a fighter's apparent vulnerability from blows received and to allow a brief period of recuperation. Interview with Randy Gordon, Editor, RING MAGAZINE; Announcer, *USA Net-*

II. Violence in Sports

A. An Overview

Many athletes are conditioned from youth that violent conduct is an acceptable means of obtaining a competitive advantage.[18] Often they are convinced that the quality of their performance is directly proportionate to their willingness to accept and inflict punishment.[19] Coaches and managers shape the character and personalities of millions of young men and women; in this capacity they frequently teach the young athlete to appreciate the similarity between the playing field and the battle field.[20]

The fortunate athlete, who upon maturity is skilled enough to be paid for his performance, quickly grasps the relationship between

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work (Mar. 4, 1983).

In Pennsylvania legislation was recently introduced in the Senate to reduce injuries and the possibility of death in the boxing ring. The bill would provide ringside physicians greater authority to stop fights, require an ambulance and medical equipment at every bout, regulate the size of boxing gloves, and establish a state boxing register to tally injuries and invoke suspensions for seriously injured fighters. S.B. 632, 167th Pa. Gen. Assem., (1983 Sess.).

18. *See* R. Horrow, *supra* note 3, at 25-28. As will be seen, a distinction must be developed between that play which is inherently aggressive and often injurious but undertaken in the spirit of clean competition, and that play the design and effect of which is to create injuries or cause intimidation among opponents to facilitate an advantage.

19. Players willing to play in pain often serve as an example to teammates and such willingness is generally regarded as indicative of considerable courage. J. Underwood, *supra* note 3, at 78-80.

The athlete discovers that aggressive play can bring about certain desired results. Concern about personal injury can be a disadvantage in contact sports, and improved play results in two ways: "(1) A player may receive external rewards for behavior indicating he is unconcerned about the possibility of injury either to himself or others. (2) A player may learn that aggression can be strategically useful in the contest or game." J. Coakley, Sport in Society: Issues and Controversies 82 (1978).

20. The coach of the 1954 Little League World Championship team has stated:

> My experience in '51 and '52 formed my whole philosophy about winning in Little League tournaments: You have to be ruthless, because the other guys are ruthless . . . and you have to have kids on your team who are tough, fighters, rough and ready kids who aren't going to take any bullshit. I didn't start out thinking that way, but after two years in tournaments, that was my opinion.

M. Ralbovsky, Destiny's Darlings (1974). The following shows the number of college athletes per 100 participants in each sport injured significantly or who suffered a serious sports related illness during 1977-78.

intimidation and victory.[21] Studies reveal that teams have markedly improved their winning percentage through the use of intimidation and seemingly unrestrained hostility.[22] The threat of the

Sport	Males	Females
Wrestling	29.6	—
Football (Fall)	24.0	—
Ice Hockey	21.8	—
Volleyball	16.7	9.3
Basketball	16.7	13.5
Tennis	12.5	5.5
Soccer	12.2	—
Football (Spring)	10.5	—
Cross Country	9.7	13.6
Gymnastics	9.4	29.5
Lacrosse	9.1	4.1
Indoor Track & Field	8.9	9.4
Outdoor Track & Field	8.3	4.8
Baseball	6.8	—
Swimming & Diving	2.2	2.5
Squash	—	12.5
Softball	—	5.2
Field Hockey	—	4.1

Peterson & Smith, *Sports Injury Litigation: The Role of the Lawyer on the Playing Field*, 7 BARRISTER 10, 13 (Summer 1980).

21. The words of two men who were perhaps most responsible for the unrivaled success of the Green Bay Packers football team throughout the 1960's demonstrate the emphasis placed upon intimidation as the key determinant of winning in professional sports. The legendary Vince Lombardi, coach of the Packers, proclaimed that: "To play this game you must have that fire in you and there is nothing that stokes fire like hate." J. COAKLEY, *supra* note 19, at 63. Interestingly, these thoughts are echoed by Jerry Kramer, Lombardi's superstar offensive guard with the Packers, describing his pre-game feelings of aggression:

> I wish that *bad* feeling would go away. . . . I've started day dreaming about Merlin Olsen. I see myself breaking his leg or knocking him unconscious, and then I see myself knocking out some other guys, and then I see us scoring a touchdown and always. . . . I see myself the hero.

Id. at 82 (emphasis added). *See also*, Kennedy, *Wanted: An End to Mayhem*, SPORTS ILLUSTRATED 17, 18-19 (Nov. 17, 1975). *See generally* J. TATUM & W. KUSHNER, THEY CALL ME ASSASSIN (1979); D. SCHULTZ & S. FISCHLER, THE HAMMER: CONFESSIONS OF A HOCKEY ENFORCER (1981).

22. Violence can be used to gain an advantage by creating apprehension or fear in opponents during competition. Players make contact or threaten to make contact with one another in such a way as to inhibit another player's use of skill. It has been reported, for example, that members of the 1975 and 1976 champion Pittsburgh Steelers prided themselves on their ability to instill fear among opponents which intimidated them and detrimentally affected their play. J. COAKLEY, *supra* note 19, at 83.

Some hockey teams have been known to tactically use the provocation of fights as a way to remove opponents from the rink to the penalty box. Dave Schultz of the Philadelphia Flyers explained the logic in the following way: "It makes sense to try and take out a guy who's more important to his team than I am to mine." *Id.* Conn Smithe formerly of the Toronto Maple Leafs summed up the tactical use of violence when he stated: "If you can't beat them in the alley, you can't beat them on the ice." *Id.*

use of force, including unacceptable force, whether it is actually used is ever present in professional athletics. Occasionally, unacceptable force is used, sometimes with regularity, and sometimes with the knowledge and encouragement of team management.[23] Such tactics frequently result in serious injury, occasionally causing permanent injury and even death.[24] The general acceptance of extreme levels of violent play is indicative of an environment where the infliction of disabling injuries becomes as inextricably tied to winning as skill and agility.[25]

Players become conditioned to violent behavior but not without limits. Occasionally, a player's conduct will run so far afoul of what is considered allowable, even under normally aggressive standards, that the conduct invokes violent retaliation.[26] Fights are perhaps

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23. *See id. Cf.* J. UNDERWOOD, *supra* note 3, at 104-14, (discussing tendency of coaches to learn utility of intimidation from their more experienced superiors).

24. Eight football related deaths occurred in each 1977 and 1978 season. J. UNDERWOOD, *supra* note 3, at 99. Each year approximately 32 college and high school players become paraplegics as a result of football related injuries. *Id.* at 98. An estimated 5,100 injuries were suffered by players in the NFL between 1969-1974. From 1973 to 1974 serious injuries requiring the injured party to miss two or more games increased by 25% to a record 1,638. R. HORROW, *supra* note 3, at 5-11.

25. *The Sports Court*, *supra* note 2, at 403. The relationship between the use of skill and violence has been aptly stated:

> Ideally, professional athletes would engage only in conduct necessary for skillful play. If every athlete acted in this manner, injury costs would be low and player skill would determine the outcome of sports contests. Violent play upsets this equilibrium by allowing violent players and clubs to increase their chances of winning through injury and intimidation. Because a winning record generally leads to increased ticket sales and, hence, greater revenue, financial incentives exist to engage in violent conduct. Clubs that can win through violence will have larger profits and higher player salaries. In order to remain competitive, other clubs will also resort to violent conduct. Eventually a new equilibrium will be reached in which the teams engage in equally violent behavior and player skill again determines the outcome.

Id.

26. A recent Pittsburgh Press news story reported that in the wake of an $850,000 damage award by a Detroit jury to Red Wing forward Dennis Polonich in 1982, hockey players had not curbed their inclination to attack each other with their sticks. Polonich's nose had been broken by a stick wielded by Toronto Maple Leaf Will Paiement in 1978. The verdict was heralded by many as a sure sign that sticks would be abandoned when fights erupted. The article reported:

> In the six weeks of games (exhibitions included) since that verdict was handed down, there have been at least five stick attacks.
>
> Hartfords' Chris Kotsopoulos and Blaine Stoughton (both against Penguin Paul Baxter) and Edmonton's Ken Linseman were found guilty of pre-season lumberjacking, while Minnesota right wing Wills Plett blasted rookie Detroit Goalie Greg Stefan (though Stefan provoked Plett with some nasty stickwork of his own) and Los Angeles defenseman Jerry Korab sliced up the face of Quebec left wing Dale Hunter already during the regular season.

Pittsburgh Press, Oct. 26, 1982, C-4, col. 1.

the most notorious example of injury-creating violent conduct.[27]

As they are conditioned to accept violence, players are also conditioned to accept pain.[28] Indeed, pain received in the heat of competition engenders many of the notions of pride, commitment, and courage that society has historically reserved for those wounded in combat. Under such circumstances, the glorification of pain and suffering for the sake of victory tends to not only legitimize the use of violence, but to label those who refrain from such conduct as less capable performers.[29]

Events on the playing field directly affect what occurs in the stands.[30] Studies convincingly demonstrate that if violence is

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27. The list of notorious brawls is endless, but some of the most notable include: the January 1, 1980, fight between Dave Cowens, then of the Boston Celtics and Tree Rollins of the Atlanta Hawks; the December 9, 1977, attack by Kermit Washington of the Los Angeles Lakers on Rudy Tomjanovich of the Houston Rockets — Tomjanovich's injuries included a broken jaw and nose, and a fractured skull, *see infra* note 108 and accompanying text; the backhand wallop delivered by Charles "Booby" Clark of the Cincinnati Bengals on Dale Hackbart of the Denver Broncos on September 16, 1973, — Hackbart suffered broken vertabrae, muscular atrophy, and a loss of strength and reflex in his arm, *see infra* notes 118-19 and accompanying text; the October 28, 1979, forearm administered by Steve Luke of the Green Bay Packers on Norm Bulaich of the Miami Dolphins — the blow split Buliach's mandible (jawbone), splintered the bone around one of his eyes and ended his career; the fight between Dave Forbes of the Boston Bruins and Henry Boucha of the Minnesota North Stars on January 4, 1975, when Forbes used his stick and fists to fracture Boucha's eye socket and inflict facial cuts that required dozens of stitches to close; the lumberjack attack on September 21, 1969, by Wayne Maki of the St. Louis Blues on Ted Green of the Boston Bruins following a punch by Green — two brain operations have left Green only partially recovered; the fight between Juan Marichal of the San Francisco Giants and John Roseboro of the Los Angeles Dodgers — Marichal used a baseball bat in the fight with which he struck Roseboro in the head.

28. A strong argument to be made for adequate measures that would control the level of player violence in general is that such measures would, in turn, reduce the need for players to engage in the self-help which manifests itself in the form of brawls. In 1977, one high school football team in Indiana registered four broken legs and many torn ligaments and cartilages. Noting that fifteen lettermen required major surgery, the team coach said he had considered "moving practice to the hospital lawn." J. UNDERWOOD, *supra* note 3, at 94.

A report by the Consumer Product Safety Commission indicates that one out of every two amateur football players each year can expect to be sidelined by an injury that will require them to at least miss practice; one half of them will be out for a week or more. *Id.* at 98.

29. A player can be made to feel he has underperformed when he engages in a measure of self-preservation. He has demonstrated that victory, at least for him, is not the most critical feature of athletics, and in so conceding he is the benefactor of a low "peer-rating" by virtue of his desire to place his own welfare above that of his teammates.

30. Appleson, *supra* note 5. The article highlights an incident during a soccer game in Toronto in 1971 when 13,000 spectators invaded the playing field. The fans picked up flags, tried to strike players, and inflicted serious injuries mostly on other fans. The melee erupted after a goal keeper tripped his opponent. *See also,* L. BERKOWITZ, ROOTS OF AGGRESSION: A RE-EXAMINATION OF THE FRUSTRATION-AGGRESSION HYPOTHESIS (1969). Berkowitz suggests three elements that must be present to establish the relationship between spectator and

viewed as an acceptable response on the playing field, it will be viewed as such by many of the spectators.[31] Spectator violence is a significant part of the problem of violence in sport.[32] Often, violence on the playing field or in the rink literally spreads to the stands; less often, the opposite takes place.[33] Because it is beyond the scope of this article, the high correlation between society's exposure to steady doses of violence in professional athletics and the level of violence in society in general can only be noted as quite significant. Notwithstanding the related debate over whether sport is more likely the source or the outlet of man's aggressive tenden-

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player violence: "(1) There must be enough of an identification with one of the sides involved in the competition to provide the basis for frustration. (2) The emotional response must be one of anger. (3) Stimulus cues for aggressive behavior must be present."

31. Coakley suggests the relationship between player conduct and spectator response:

> [T]he same kinds of things that evoke the anger of the players evoke the anger of the spectators. When the response to such situations is aggressive, it is likely to serve as a stimulus cue for the spectators. . . . Occasionally, certain objects such as bottles, cans, rocks, ice cubes from soft drinks, and other objects are perceived as stimulus cues by angered fans and used as tools of aggressive behavior . . . . Usually the only feasible response to frustration for an angered fan is to become verbally abusive . . . . The exception, of course, is a clear-cut negative reaction by fans that would have an injurious psychological impact on a player, coach, or referee. One other consequence of extreme verbal aggression is that it may heighten the intensity of emotional arousal of the entire crowd.

Coakley, *supra* note 19, at 77. *See also* Goldstein & Arms, *Effects of Observing Athletic Contests on Hostility*, in PSYCHOLOGY OF SPORT 288 (A. Fisher ed. 1976).

32. The problem of violence among spectators is considered by many to be the most alarming of current sports related problems.

On June 4, 1974, in Cleveland, a crowd of 23,134 turned out for the first engagement between the Indians and the Texas Rangers since a fight in an earlier game between them had cleared both benches. By the seventh inning the Texas manager had to close down his bullpen for fear that one of his relief pitchers would be hit by flying beer cans and firecrackers. By the ninth inning only the intervention of Indian players prevented serious injury to the Ranger team when the batter's dugout was attacked by drunken fans.

The Governor of Ohio, on another occasion, referred to a Big Ten Minnesota-Ohio State Game that ended in a riot as "a public mugging. Gang warfare in an athletic arena."

A riot following the Pedco Soto-Mike Quarry fight in December, 1974, resulted in major destruction to the Felt Forum in New York. Following a title defense in Great Britain more recently, Middleweight Champion Marvin Hagler narrowly escaped serious injury from debris-throwing spectators.

A dispute at the Roosevelt Raceway on Long Island resulted in an estimated 23,000 fans attacking the tote board, "setting fire to a sulky in the home stretch, attacking a patrol judge inside his booth, destroying concession stands and overtuning cars in the parking lot." J. MICHENER, SPORTS IN AMERICA 427-30 (1976). *See also* Appleson, *supra* note 5.

33. *See* Comment, *Owner Liability for Intentional Torts Committed by Professional Athletes Against Spectators*, 30 BUFFALO L. REV. 565 (1981) (discussion of the Boston Bruin case where 4 spectators filed a $7 million lawsuit in federal court in New York following a Bruin-Ranger game where allegedly several members of the Boston team entered the stands and assaulted several members of the audience).

cies,[34] efforts to control conduct on the playing field may be a focused approach to a larger problem.[35]

B. Causes of Sports Violence

Violence continues in sports at unacceptable levels for two principal reasons.[36] First, the competitive advantages to be gained from violent play outweigh the costs proximately associated with such conduct.[37] Some commentators suggest, in fact, that the disadvantages associated with refraining from violent play would force teams to be violent to survive competitively. This factor — the balancing of the advantages and costs of violent play — involves an

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34. The issue of whether sports is the birthplace of aggressions or its outlet has been the subject of a long standing debate. *See* J. COAKLEY, *supra* note 19, at 63-93. Coakley has suggested the following dichotomy based on the contradictory interpretations:

Position A	Position B
Sports decreases the incidence of aggression in society	Sports increases the incidence of aggression in society
Statement 1a	Statement 1b
It provides safe and controlled opportunities to engage in the aggressive behavior patterns that are inherent in our genetic structure	It is structured in a way that suppresses individuals to a point that aggression becomes necessary to cope
Statement 2a	Statement 2b
It is a safe outlet for the aggressive impulses that are an inevitable part of human existence	It generates the frustration that ultimately seeks release in the form of aggressive behaviour
Statement 3a	Statement 3b
It teaches how to control aggressive behaviour when confronted with aversive stimuli	It provides models for behaviour in which aggression is positively valued and highly rewarded
Statement 4a	Statement 4b
It increases interpersonal awareness and sensitivity, which serves to promote friendly and meaningful relationships	It fosters the establishment of conflicting interpersonal and intergroup goals that then become more important than cooperative relationships

Id. at 64. *See also* H. VANDERZWAAY, *supra* note 4, at 180.

35. The prospect of controlling spectator violence through player conduct controls may be among the strongest arguments for the adoption of a meaningful solution to excessive violence on the playing field.

36. Dr. James Garrick, while a member of the University of Washington Sports Medicine Department alluded to the unacceptable extent of violence in sports: "If the United States ignored an annual epidemic striking a million and a half youngsters each autumn, Americans would revolt. . . . More high school kids get injured every Friday night than pros do in a year." J. UNDERWOOD, *supra* note 3, at 99.

37. *See supra* note 22.

assessment of both the costs of violent conduct to individual players and the benefits to be derived from such play by the individual, his team, and his league.[38] The second factor which contributes to the present level of violence is an elaborate array of "pressures" within the sports community which insure adherence to the prevalent mode of conduct.[39]

The cost of sports violence to the individual player includes the risk of personal injury and somewhat more remotely the risk of economic loss.[40] At times league fines or suspensions may be imposed on a player for violent conduct but such sanctions are presently assessed infrequently or otherwise so ineffectually that they more closely approximate mere inconveniences rather than true risks of, or deterrents to violent conduct.[41]

The risk of personal injury either to the player engaging in violent play or the victim of his assault has been widely documented.[42] A player's willingness to expose himself to the risk of injury creating conduct results not only from the prospect of gaining a competitive edge but also from the nature of the contractual relationship between the professional player and his team owners. The economics of associational relationships dictate that he who has sold his source of service has less incentive to protect his ser-

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38. The benefits to be derived from illegal play can involve calculated judgments. It has been said:

> [T]he coach, responds to the rules of his game as a business executive does to the Internal Revenue Code. He wins, not by obeying them, but by conveniently balancing the penalties risked by each violation against a strategic advantage which might be gained. In basketball, a deliberate foul might be committed so as to interrupt a scoring drive by the team in possession, thus giving that team a chance to lead by only one point instead of two and enabling the offending team to gain possession of the ball on more favorable terms.

Slusker, *Sport: A Philosophical Perspective*, 38 L. & CONTEMP. PROB. 129, 130 (1973).

39. *See* R. HORROW, *supra* note 3, at 30-38. Richard Horrow, a Miami attorney, conducted an exhaustive analysis of the problem by focusing on those factors which contribute to the uncontrollable nature of sports violence. Horrow contends that:

> Once the skills of violence are learned, players are pressured explicitly and implicitly by teammates, coaches, and management to continue their violent conduct. In modern hockey, for example, players are forced to fight when challenged or risk being branded as cowards. Violence and intimidation in excess of that permitted by the rules of the game are becoming integral parts of strategy. Players fight because it has become a condition of the job.

Id.

40. Actual injury and economic loss are not costs to the player who engages in violent conduct but is never injured or sued, the risk that he may be injured or may injure someone else is what the players consider in deciding whether to engage in violent conduct.

41. *See infra* notes 210-13.

42. *See supra* note 2; *see also* J. UNDERWOOD, *supra* note 3.

vices and less to lose by the abuse of his services.[43] Professional athletes frequently share cost of the loss of their future services, arising from injuries or league sanctions such as suspensions, with team owners.[44] This sharing reduces the financial cost to the athlete associated with violent conduct. The cost of violence borne by the individual athlete is the economic loss in the form of the value of those sources which survive beyond the term of injury payment available under a player contract.[45]

Other costs to players besides the risk of serious injury involves the more remote prospect of civil liability. As previously mentioned, and as discussed in part III, the prevailing view is that the traditional mechanisms to control conduct have lost a significant portion of their utility in the context of professional sports.[46]

Balanced against the meager costs presently associated with violent conduct are the advantages to be gained from effective use of intimidating and otherwise violent play.[47] Violent conduct often yields competitive success which in turn produces secondary professional advantages for players who develop a reputation for effective play in a brutal environment. To the extent that the use of violence and skill become extricably woven, a premium is placed on the player who makes use of the full range of his skills in an atmosphere of play where he is able to remain indifferent about personal safety.[48] Professional, economic, and competitive incentives to exploit violent conduct, in the absence of opposing forces, create an environment uniquely suited to the violent player.

This setting is reinforced by the pressures which insure adherence to violent conduct,[49] further diminishing the chances for prospective reform.[50] The "pressures" to maintain the presently ac-

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43. H. MANNE, THE ECONOMICS OF LEGAL RELATIONSHIPS: READINGS IN THE THEORY OF PROPERTY RIGHTS 572 (1975). "The labor owner can more cheaply monitor any abuse of himself than if somehow labor-services could be provided without the labor owner observing its mode of use or knowing what was happening. Also his incentive to abuse himself is increased if he does not own himself." *Id.* (footnote omitted).

44. Amateur athletes may also be affected either by simply following the lead of professional athletes in estimating the level of violence that should be employed to win, or more similarly, by becoming parties to lucrative college scholarship awards themselves which guarantee an education and subsistance over a fixed period of time.

45. *See* Lehn, *Property Rights, Risk Sharing, and Player Disability in Major League Baseball*, 25 J.L. & ECON. 343 (1982).

46. *See infra* text accompanying notes 67-147.

47. It might be argued that given the meager costs now exacted for the use of violence, the advantages need only be marginal to justify its use.

48. *See supra* note 2.

49. *See supra* note 39 and accompanying text.

50. R. HORROW, *supra* note 3, at 30-38.

cepted levels of violence are intimately tied to traditional notions of how professional sports are played effectively.[51]

Accordingly, the control of violence will require the imposition of greater costs for such conduct and a decisive adjustment of the balance away from the advantages of violence in the competitive setting. Such a re-adjustment will also remove the reinforcing factors which insure the continuation of current levels of violence.

C. Player Conduct: Limits of Control

1. Conduct Classification

The culpability associated with the conduct of a major league pitcher who throws at a batter can be distinguished from either the conduct of a hockey player who "lumber-jacks" his opponent with his stick during a brawl or the actions of a defensive safety who "sticks" a vulnerable offensive wide receiver head-on moments after the football has passed overhead. The effectiveness of sanctions to control sports violence will be measured by the appropriateness of their application to varying types of player conduct.

This article suggests the following model for the analysis of competitive conduct. Any attempt to describe "violent conduct" as those actions not required for "effective play"[52] is misleading since much "legal" play is violent and simply becomes more violent when undertaken improperly. This model, in an attempt to avoid such inaccuracies, breaks down playing field conduct into three categories: that which is not proscribed or is, in other words, acceptable competitive conduct; that which is proscribed or unacceptable competitive conduct; and that which is actionable (broken down in both the criminal or civil context subject to certain defenses) and might be considered unacceptable conduct.

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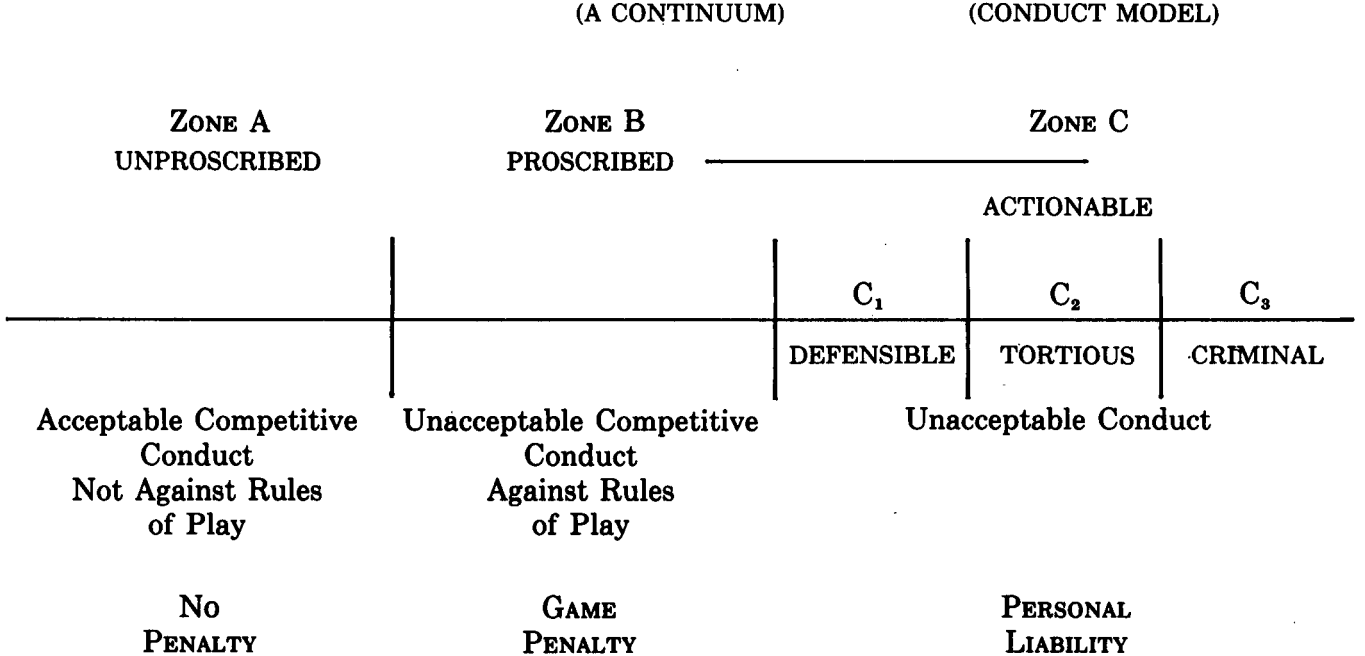
51. *See* Slusker, *supra* note 38, at 130.
52. *The Sports Court*, *supra* note 2, at 415 & n.67.

PLAYER CONDUCT MODEL[53]



53. The Player Conduct Model is as much a classification of the range of sanctions currently applied to player conduct as it is a framework by which to pinpoint the nature of the precise conduct sought to be controlled. In a sense, zone B represents the range of available sanctions. Zone C refers largely to the traditional sanctions which are external to competitive play. As will be demonstrated, some classes of player conduct may require the application of both internal and external sanctions. Accordingly, a portion of that conduct which falls within zone C may also be considered a zone B violation.

The proper classification of player conduct is demonstrated when the episodes referred to previously are examined.

When Dick McAuliffe, a second baseman for the 1968 pennant chasing Detroit Tigers, stepped into the batter's box to receive the next pitch from White Sox ace Tommy John, he was certain that John was throwing at him. This was dangerous business.[54] Only one season earlier, the baseball world witnessed Tony Conigliaro receive a life-threatening injury when he was struck in the face by a Jack Hamilton fast ball.[55] McAuliffe was hit by the next pitch. He proceeded down the baseline at the instruction of the umpire and it appeared as though he would disregard his inclination about John. However, McAuliffe stopped, pivoted, and lunged toward the center of the playing field. He picked John up at the legs, turned him over and dropped him on the grass as both benches emptied. The fight was quickly controlled but not before John sustained a serious injury that benched him for the remainder of the season. McAuliffe was fined and suspended at a time when his services were vital to the Tiger organization.

Applying the player conduct model to the McAuliffe-John incident, if John had accidentally hit McAuliffe with the pitch, his conduct falls in zone B. The penalty is controlled by the rules of the game because McAuliffe was awarded first base as a penalty for John's conduct. Ignoring problems of proof, if it were established that John intended to hit McAuliffe with the pitch, the conduct would fall in zone C. McAuliffe's response to what he considered an obvious attack by John falls initially within zone C3, subject to mitigating factors and certain less untenable defenses, which might shift the classification of the conduct to zone C1. Because McAuliffe's conduct is also a zone B violation (the sanctions are ejection, fine, and suspension), it is necessary to maintain a distinction between zones B and C, proscribed and actionable conduct, for rea-

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54. Baseball players have remarked on the danger of pitches thrown intentionally at the batter. Dave Cash of the Philadelphia Phillies stated, "It's dangerous every time you step into the batter's box. . . . Your life is on the line. You're subject to getting killed. I hate to put it that way, but how else can you put it?" Pitcher Stan Williams of the Dodgers felt "a certain ecstacy at the sight of a sprawled batter," and after hitting Henry Aaron on the head with a 3 and 0 pitch, Williams reportedly remarked, "As long as I'm gonna walk him, I might as well hit him." Don Drysdale regarded the intentional use of a pitch to hit a batter as an appropriate method of avenging the use of a beanball on a teammate. Kram, *Their Lives Are On The Line,* SPORTS ILLUSTRATED 35-37 (Aug. 18, 1975) (quoted in R. HORROW, *supra* note 3, at 10).

55. In fact, Conigliaro made a miraculous recovery and returned to the starting roster of the Red Sox.

sons which will be developed later.

An on-ice fight in a 1978 game between the Detroit Red Wings and the Toronto Maple Leafs resulted in a confrontation between Dennis Polonich of the Red Wings and Will Paiement of the Maple Leafs. Polonich "high-sticked" Paiement and Paiement countered by hitting Polonich across the face with his stick breaking Polonich's nose.[56]

Polonich's high-sticking and his participation in the brawl as well as Paiement's conduct can be classified within zone C. There can be little dispute that the actions of both Polonich and Paiement were unacceptable, and while such conduct contravenes the rules of play, only that which creates injury generally results in a resort to traditional sanctions.[57]

The unfortunate meeting of Jack Tatum and Darryl Stingley has been well documented. Stingley, a wide receiver for the New England Patriots, was recognized for his talent of making "circus catches," and catches made "in traffic," while virtually surrounded by opposing players.[58] Tatum was a former Ohio State All-American affectionately tagged "the assassin" for his aggressive play at the free safety position. A poorly thrown pass intended for Stingley sailed over his head. At that precise moment Stingley was throttled by the head-on diving impact of Tatum's body. Stingley was rushed to a nearby hospital where a spinal fusion was performed. His recovery was described by John Underwood in his incisive look at violence in football:

> By November, Stingley was "medically stable," and in residence at the rehabilitation center at Northwestern University in Chicago. He was "improving, slowly." He could sit in a chair at an eighty-degree angle for two or three hours a day. His right arm could function at the shoulder and at the elbow, and his left arm was "progressing." His legs were "aware of some spasms." He was able to listen to the Patriots' games by a speaker-telephone at his bedside. His teammates sent him tape-recorded messages.[59]

Tatum's conduct did not violate a single game rule. It was, in the parlance of pro football, "a clean hit." Tatum's conduct, accordingly, may be classified in zone A, acceptable competitive conduct

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56. *See* Pittsburgh Press, *supra* note 26. Don Lever, captain of the New Jersy Devils, characterized Polonich as a player who "lived by the sword." "He was one of the worst stickmen in the league, a tough little guy, a back stabber." *Id.*

57. This is explained by the reluctance of players to take legal action against one another except in the most serious instances. *See infra* text accompanying notes 140-41.

58. J. UNDERWOOD, *supra* note 3, at 45.

59. *Id.* at 46.

notwithstanding the general intent on the part of Tatum, which many commentators have suggested, to create the extreme risk of the harm that resulted.[60] However, even if it could be demonstrated that the harm suffered by Stingley was specifically intended by Tatum, the conduct would still be classified within zone A because by not violating the rules of play, Tatum is able to impose the defense of assumption of the risk. Stingley, in effect, could be said to assume the risk of that conduct not proscribed by the rules of play even though the conduct at issue might otherwise be considered tortious.[61]

2. *Intent-Based Acts*

In the interest of applying a realistic system of controls to sports violence, it is necessary to appreciate the limited range of player conduct subject to meaningful control. A violent act, for example, which might otherwise be labeled accidental, as in the McAuliffe-John incident, or the results of which might be labelled fortuitous, like Stingley's crippling injury, becomes reprehensible where a specific intent to commit the act actually exists. Because intent is difficult to prove and, sometimes, to identify in the effusive and permissive environment of sports, those acts which might be classified as involving a high degree of necessary intent are less susceptible to meaningful control.[62] The case of the pitcher who throws at an opposing batter provides the classic example. The presence of specific intent in this situation transforms an accidental wild-pitch into an instrument of criminal assault.[63] Problems of proof, and the possibility of concealment, would complicate efforts to control the vindictive pitcher, particularly for a tribunal unschooled in the affairs of the game.[64]

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60. Tatum describes his role in pro-football in a book co-authored by him entitled *They Call Me Assassin, supra* note 21.

61. An argument might be made that such conduct might be actionable as a criminal assault where it could be demonstrated that Tatum intended to specifically incapacitate Stingley and it could be further demonstrated that he both possessed the means and the knowhow to be substantially certain that such a result would occur. Ignoring the enormous problems of proof, the problem of reluctant prosecutors makes the likelihood of criminal charges quite remote. *See infra* III. A.

62. Specific intent to create the risk of harm that is substantially likely to result from a particular course of conduct is distinguished from those instances where the general intent to engage in violent conduct envisions nothing more than the carrying out of acts which while they might lead to foreseeably injurious results are not undertaken with that object in mind. *See also* 12 GA. L. REV. 380 (1978).

63. *See infra* text accompanying notes 70-71.

64. Notably, the proposal advocated later in this article, *see infra* notes 205-49 and

Notwithstanding the above delimiting points, the fact remains that much of the violence currently plaguing professional sports arises from players' efforts to *intimidate* their opponents — intent based acts. Efforts to contain this behavior, while perhaps lacking the potential for effectiveness of other rule reform initiatives, are necessary for the margin of deterrence they would exert on player conduct in general. Furthermore, the difficulties inherent in judicial or quasi-judicial determinations of intent may be largely avoided where the finding is made by a party possessing extensive expertise in and experience with the sport at issue and evidence permitting a thorough study of the particular incident.

3. *In The Nature of Sports*

Finally, certain assumptions must accompany any inquiry into sports violence. Perhaps foremost is the realization that in the heat of competition, one hundred games into a sizzling, tense, and virulent summer of baseball, the fight like the one between McAuliffe and John can happen, and little can be done to stop it without stopping baseball. Further, it must be recognized that while much of sports' appeal lies in the public's delight with basic running, jumping, hitting, skating, kicking, and throwing — all done with precision and grace — so too, much of sports appeal comes from its unrestrained qualities, the delight of its unpredictability, the exploitation of human error, and the thrill of its sheer physicalness.

Accordingly, in any attempt to control sports violence one must bear in mind that, in all certainty, sports violence can be eliminated with the elimination of sport. Even short of such draconian measures, certain measures aimed at merely controlling sports violence may serve to diminish the quality of competition by emasculating the very attributes of sports that society has decided it enjoys or even adores. Measures to control sports violence must be tempered not only to preserve the essence of that which is sought to be regulated, but also to avoid unjust or unfair punishment.

Society has condoned an enterprise that, by its very acceptance of violence as ordinary and proper, has created a climate which makes the identification and punishment of "unacceptable competitive conduct," or "unacceptable conduct," quite difficult, and at

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accompanying text, relies upon internal league officials, long involved in governance of their sports, to render determinations as to intent. While difficulties as to proof and concealment would continue to exist, these officials' extensive familiarity with and expertise in their games make them far more capable of precise assessments of intent.

times impossible. Even if unacceptable conduct can be identified, the nature of sports will require that sanctions imposed take into account the mitigating factors associated with heated competition. Even if a quasi-judiciary could effectively restrict unjust or unwarranted conduct by clearly identifying proscribed conduct, it is difficult to see how it would be justified in imposing the penalties on Wilf Paiement that would be imposed on him had he clubbed Dennis Polonich with a board on Woodward Avenue.

Finally, sports has often been contemplated as a microcosm of life's challenges and frustrations.[65] Like life itself, sport will never be free of occasional aberrant behavior. A successful tempered system of controls would render violent play in sports simply and truly aberrant. The sensible modification of player conduct allows those redeeming qualities of spirited competition to become more accessible to participants and aspirants alike. The ends and means of excellence in competitive sports must be self-control. The use of skill and agility in team sports must continue to be reinforced by the notion that individual sacrifices, discipline, and self-control will promote not only individual achievement but also collective successes.[66] A reduction in the level of violence necessarily increases the reliance placed upon skill, training and, where appropriate, team play. The reasons why sports benefit society, in effect, become the reasons why society should strive to rid sports of excessive and unnecessary violence.

III. Traditional Remedies to Redress Injury Due to Sports Violence

A. Criminal Law

The employment of the criminal law to control the conduct of athletes in competition has been undertaken only with the greatest reluctance.[67] Formal charges against athletes have been rare, and successful prosecutions in the context of professional sports are largely nonexistent.[68] The perceived harshness of the criminal

65. *See, e.g.*, Slusker, *supra* note 38.

66. *Id.*

67. *See generally* R. Horrow, *supra* note 3; Beumler, *supra* note 2; Hechter, *supra* note 2; Comment, *supra* note 3; Comment, *supra* note 7, at 328; Note, *Criminal Law: Consent as a Defense to Criminal Battery — The Problem of Athletic Contests*, 28 Okla L. Rev. 840 (1975).

68. *See, e.g.*, State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975) (dismissed after mistrial); Regina v. Green, 16 D.L.R. 3d 137 (1971) (acquittal); Regina v. Maki, 14 D.L.R. 3d 164 (1970); Regina v. Maloney, No. S-461-76 (Jud. Dist. of York, To-

sanction has been manifested in reluctant prosecutors, equivocating courts, and sympathetic juries.[69]

While it is the duty of prosecutors to seek enforcement of the criminal code which may, at times, require the prosecution of athletes, it is also the duty of prosecutors to make the most effective use of their limited resources. Public officials would be hard pressed to justify the expenditure of large sums to prosecute incidents of violence among consenting adults in an environment that has historically condoned violence and abusive conduct.[70] The very limited resources currently available for the prevention, detection, and prosecution of urban crime, and the paltry funds available for criminal correction and rehabilitation, strongly suggest that other mechanisms be employed to battle whatever criminal conduct arises in the context of sports.[71] There may be instances, however, when the wrong committed by an athlete in the form of an assault on another player is so egregious, and so violative of the public good, that a criminal prosecution is appropriate and necessary.

Prosecutors in Minnesota, New York, and Canada have sought convictions against athletes for allegedly illegal behavior during athletic contests.[72] All three prosecutions were based upon charges of assault and battery. The ineffectiveness of formal criminal charges in the control of sports violence is readily apparent from a review of these cases.

One successful prosecution of an athlete for his conduct on the playing field came in *People v. Freer*,[73] against a young New York amateur athlete. John Freer was punched in the throat during a tackle. After the play, he, in turn, punched the party he believed to be responsible for the earlier blow. The player Freer punched received serious injury to his eye requiring plastic surgery. Charges were lodged against Freer for assault and battery and he was found guilty by a court which concluded that Freer's actions were unwarranted and not in self-defense because he had no reason to fear

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ronto Crim. Ct., acquitted June 30, 1976). Horrow reports that between 1969-1980 close to 100 convictions had been secured on the amateur level. *See* R. HORROW, *supra* note 3, at 161-62.

69. *See, e.g.*, Beumler, *supra* note 2, at 926.

70. Of course, consent is generally no defense to a criminal charge, where what is sought to be redressed is a public wrong, except for those crimes where lack of consent is a necessary element.

71. *See generally* RAMSEY CLARK, CRIME IN AMERICA (1970). *See also infra* V. & VI.

72. *See supra* note 68; People v. Freer, 86 Misc. 2d 280, 381 N.Y.S.2d 976 (1976).

73. 86 Misc. 2d 280, 381 N.Y.S.2d 976 (1976).

any continued attack by the injured player.[74]

On January 4, 1975, during a hockey game in Bloomington, Minnesota, Henry Boucha of the Minnesota North Stars and Dave Forbes of the Boston Bruins were simultaneously released from their respective penalty boxes during a time out. Earlier, they had each been assessed seven minutes for fighting. Forbes immediately attacked Boucha with his fists and stick. After Boucha fell to the ice, Forbes proceeded to pummel him and pound his head into the surface until other players intervened.

A grand jury sitting in Hennepen County, Minnesota, indicted Forbes for aggravated assault. This was the first criminal prosecution in the United States of a professional athlete for culpable behavior as a participant in a professional athletic contest.[75] The jury in the case was unable to reach a verdict, and the case was not retried.[76]

A fight between Wayne Maki of the St. Louis Blues and Ted Green of the Boston Bruins in September, 1969, at Ottawa, Canada resulted in Canadian prosecutions against both combatants; neither prosecution resulted in a conviction.[77] The fight began with Green striking Maki in the face with a gloved hand and ended with Maki using his stick to fracture Green's skull.

The court which heard the evidence in *Regina v. Maki*,[78] determined that Maki may have reacted in self-defense to the original attack by Green and that the evidence did not demonstrate that Maki had used excessive force in defending himself. Maki was acquitted on the basis of self-defense; the court found the consent defense inapplicable. The court declared in dicta that "no athlete should be presumed to accept malicious, unprovoked, or overly violent attack."[79]

In *Regina v. Green*,[80] the court acquitted Green on a theory of implied consent. The court considered the act of striking with the gloved fist a normal occurrence in hockey which should not be considered an assault. The court also found elements of self-defense in

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74. When assault and battery are used in conjunction they generally refer to battery itself. W. LaFave & A. Scott, Handbook on Criminal Law § 80 at 603 (1972).

75. State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975).

76. The prosecutor apparently was satisfied that he had sent a message to the sports community that excessive violence could not be tolerated. Beumler, *supra* note 2, at 925.

77. Regina v. Green, 16 D.L.R. 3d 137 (1971); Regina v. Maki, 14 D.L.R. 3d 164 (1970).

78. 14 D.L.R. 3d 164 (1970).

79. Regina v. Maki, 14 D.L.R. 3d at 167.

80. 16 D.L.R. 3d 137 (1971).

some of Green's other actions.[81]

The *Maki* and *Green* cases indicated there was a limit to the level of violence a court would be willing to place within the ambit of the consent defense. The court in *Green* noted that convictions could result under the proper circumstances where the cloud of self-defense present in the foregoing cases was not present.[82]

Violence of comparable severity in the context of professional football has gone relatively unnoticed by prosecutors.[83]

Besides the problems of general reluctance in employing the criminal process to control player conduct, commentators have suggested constitutional barriers to such enforcement where the conduct allegedly considered criminal is vaguely defined so that proper notice to potential violators is lacking.[84]

B. Tort Law

In theory, violence of the type found in professional sports can be redressed through the use of traditional tort law remedies. The three basic elements necessary to form a cause of action in tort — an act, causation, and some degree of intent to act — are generally found in acts of violence which occur in professional sports.[85] Indeed, on first blush, tort recovery appears to be an effective means of controlling sports violence. By exacting a financial penalty on unacceptable conduct, tort law hits the professional athlete where it hurts the most: the paycheck.[86] The utility of the tort remedy and, specifically, its use as a deterrent to violence, is substantially limited, however, by the operation of a number of substantive defenses and of other procedural and practical factors. This article examines, in part 1 below, the availability of traditional tort remedies by reviewing the possible theories upon which a professional athlete might seek to redress injuries he incurs due to the excessively violent behavior of an opponent. Stressed in particular is the

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81. Beumler, *supra* note 3, at 924.

82. 16 D.L.R. 3d at 142-43 (1971).

83. *See* J. UNDERWOOD, *supra* note 3, at 43-44.

84. *See* Comment, *supra* note 7, at 329-31. This article discusses the vagueness doctrine and asserts that the due process protections of the 5th and 14th amendments require certainty in criminal sanctions and concludes that this may be unattainable when general criminal statutes are applied to the conduct of athletes.

85. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 9 (4th ed. 1971). *See also infra* notes 93-97 and accompanying text (discussing the particular importance of the intent element in the sports violence setting).

86. *See infra* text accompanying note 200 (discussion of importance of money as motivational factor for professional athletes).

manner in which the defenses of consent and assumption of the risk broadly delimit recovery. The article outlines, in part 2 other factors which further restrict recovery.

1. Tort Theories of Recovery

All forms of sports violence entail harmful contacts resulting from acts by one athlete against another.[87] The element which determines an act's degree of tortiousness is the mental state attending the behavior. Where one player inflicts intentional harm on another, i.e., by starting a fight, the injured player may sue for battery.[88] Distinct from the intentional tort of battery, recklessness involves a choice of a course of action with knowledge and appreciation that such behavior entails a risk that a reasonable man would avoid.[89] Unlike the battery situation, the reckless tortfeasor does not intend a specific harm to follow from his act.[90] Negligence, a course of conduct involving still lesser culpability, is not the type of volitional, focused action characterizing both battery and recklessness. Negligence consists of "mere inadvertence, lack of skillfulness or failure to take precautions,"[91] signifying the failure of an actor to conform to the standard of behavior necessary to protect others from unreasonable risks arising from the actor's conduct.[92]

This scheme indicates the importance of the intent component to a classification of tort remedies for injury-causing conduct. In the context of professional sports such a determination is profoundly complicated[93] because sports, by their nature, involve ag-

87. This assessment encompases direct injury, *see, e.g.*, Hackbart v. Cincinnati Bengals, 601 F.2d 516, 519 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979) (one football player used his forearm to strike opposing player in the back of the head in an action totally removed from the course of the game), as well as indirect injury in which the injury is caused by a force set in motion by the defendant, for example, where one football player shoves an opponent into a stationary object such as the goal post.

88. *See* W. PROSSER, *supra* note 85, at § 9; Lambert, *Tort Law and Participant Sports: The Line Between Vigor and Violence*, 4 J. CONTEMP. L. 211, 212 (1978).

89. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965), set forth *infra* text accompanying note 117. *See also* W. PROSSER, *supra* note 85, § 8 at 32.

90. *See generally* RESTATEMENT (SECOND) OF TORTS § 13 (1965); De Moth, *A Comparison of the Conduct Required in Trespass to Chattels and Negligence*, 33 ROCKY MTN. L. REV. 323 (1961).

91. *See* Hackbart v. Cincinnati Bengals, 601 F.2d 516, 524 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

92. *See* W. PROSSER, *supra* note 85, § 30 at 143-45 (outlining the elements necessary to make out a cause of action for negligence). *See also* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

93. *See infra* notes 114-24 and accompanying text (pointing to the difficulty of this intent determination as key reason why internal league rulemaking is a particularly appro-

gressive physical contact.[94] Thus, whereas a normal battery action protects one's interest in the integrity of one's person and things connected with it, a battery action for injuries arising in the professional sports milieu must account for touching permitted by the rules of the various games, a concept developed more fully in the forthcoming discussions of the consent and assumption of the risk defenses.[95] Under a normal tort analysis, some references to the nature of the act undertaken may well inform the factfinder as to the likely mental state of the actor.[96] The physically-intensive environment of professional sports makes similar deductions impossible and the mental state determination much more difficult.[97]

a. Battery: Recovery Under Intentional Tort Theories

Intentional wrongdoing presents perhaps the simplest problem under tort law.[98] A person acts in a way that causes a result which the person intended. Where that result consists of an invasion of the bodily integrity of another, an intentional tort, a battery, has occurred.[99] It should be stressed that intentional torts are acts which create or disclose dangers which have a *substantial certainty* of producing a specifically foreseeable harm.[100]

In the case of professional sports, the operation of the consent defense and the difficulty of the intent question substantially obstructs most avenues of recovery under intentional tort law theory. While the elements of a cause of action for battery may be estab-

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priate mechanism by which to regulate violence in professional sports; being occupationally employed as governors of their respective sports, the leagues have expertise and exposure enabling them to most ably determine mental attitude of players).

94. *Cf. infra* notes 125-27 and accompanying text (discussing effect of consent defense on tort analysis in the professional sports context).

95. *See infra* notes 125-32 and accompanying text.

96. This is not to suggest, however, that such an inquiry will be at all determinative. One may directly inflict very serious physical injury and still be liable only for negligence. *See, e.g.*, Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969) (doctor held liable for negligence for leaving sponge in plaintiff-patient's body for 23 years).

97. *See infra* notes 114-24 and accompanying text (proposal citing difficulty of this type of factual determination as a major reason to defer to the leagues for violence controls; leagues' expertise and regular exposure to their sports makes them much more able to capably resolve these questions and so to regulate violence in their sports).

98. Lambert, *supra* note 7, at 212.

99. *See* Note, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 774-75 (outlining requirements for intentional tort action); *see also*, W. PROSSER, *supra* note 85, at §§ 8-9.

100. *See* W. PROSSER, *supra* note 85, § 8 at 32 & § 9 at 35-36; Hackbart v. Cincinnati Bengals, 601 F.2d 516, 524-25 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979) (court analyzing civil case for excessive violence in professional football game, distinguishes intentional tort of battery from recklessness).

lished with relative ease,[101] the consent defense may often be successfully interposed, given the permissive nature surrounding a broad range of conduct in professional sports.[102]

The defense of consent blocks a tort action brought by a player who "manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by [a sport's] rules or usages."[103] This formula, adopted by courts in several cases,[104] is advanced in the commentary for Restatement (Second) of Torts section on the consent defense. Section 50, comment b provides:

> *Taking part in a game.* Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.[105]

The use of the phrase "rules or usages" suggests that the ambit of a player's consent extends beyond that touching permitted by the rules of play.[106] Reference to the remainder of the Restatement (Second) of Torts commentary to § 50 partially clarifies the word "usages" by asserting that participation in a game does not manifest consent to contacts prohibited by the game's *safety* rules as

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101. Again, the notion of intent will probably be as important here as it is in most other situations. *See supra* notes 93-97 and accompanying text (discussing difficulty of the intent determination).

102. The word "routine" is used here so as to encompass violent contact mandated by the rules of the various games as well as that touching which is customary and thus tacitly approved. The former category would involve contact such as blocking in football, checking in hockey and a base runner sliding into the second basemen who is trying to turn a double play in baseball. The latter group, on the other hand, would include the elbows and shoving typical to a professional basketball game. *See also* Lambert, *supra* note 7, at 212 (discussing shift to consent defense in tort analysis of professional sports violence).

103. *See* RESTATEMENT (SECOND) OF TORTS § 50, comment b (1965).

104. *See, e.g.*, Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966); Dudley v. William Penn College, 219 N.W.2d 484 (Iowa 1974); Perkins v. Byrnes, 364 Mo. 849, 269 S.W.2d 52 (1954); Schamel v. St. Louis Arena Corp., 324 S.W.2d 375 (Mo. App. 1959); McGee v. Board of Education, 16 A.D.2d 99, 226 N.Y.S.2d 329 (1962); Gordon v. Deer Park School Dist. No. 414, 71 Wash. 2d 119, 426 P.2d 824 (1967).

105. Restatement (Second) of Torts § 50, comment b (1965).

106. *Cf.* Stewart v. D&R Welding Supply Co., 51 Ill. App. 3d 597, 366 N.E.2d 1107 (1977) (holding that participation in sport only manifested consent to foreseeable unproscribed touching). *But see* Nabozny v. Barnhill, 31 Ill. App. 2d 212, 334 N.E.2d 258 (1975) (in case of injury arising out of a high school soccer match, consent held to extend only to conduct within the rules of play).

distinguished from rules designed to enhance the *quality* of play.[107] What is not expressly addressed is whether the inverse implication of the comment is intended to hold sway: whether by his participation a player is to be understood as consenting to all infractions of non-safety-oriented rules. If this is the interpretation intended, even the most violent contacts would be shielded from legal liability so long as they: (1) result from actions which are sufficiently related to the game to be considered one of its "usages;" and (2) are not infractions of the game's safety rules. Under this analysis, the only clearly actionable conduct is that which is so extreme as to be totally unrelated to play, i.e., fighting.[108]

b. Recklessness

The conduct to which the intentional tort remedy applies, although common in professional athletics, is not the dominant behavior characterizing most sports violence.[109] While athletes tend to resort to violence as a means of gaining a competitive edge through competition, with a primary aim to gaining an edge over opponents via *intimidation*,[110] the absence of the specific intent to cause injury in most episodes of sports violence, precludes recovery in intentional tort.[111] The mental state attending the more common behavior, however, is far more deliberate than the carelessness characterizing negligence.[112] Consequently, courts deal with this sort of sports violence by applying a hybrid standard of liabil-

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107. *See supra* text accompanying note 105.

108. *See, e.g.*, Tomjanovich v. California Sports, Inc., No. H-78-243 (S.D. Tex. Aug. 17, 1979). In *Tomjanovich*, Rudy Tomjanovich, a star forward on the Houston Rockets basketball club, and his team received a $3.25 million judgment against California Sports, Inc., owner of the Los Angeles Lakers. The action arose out of an incident during a 1977 Rockets-Lakers game in which Kermit Washington of the Lakers punched Tomjanovich in the face. The blow caused severe fractures and soft tissue damage to the maxillofacial area, requiring extensive treatment and sidelining Tomjanovich for an extensive portion of the season.

109. Of particular note in this regard is professional hockey, where fighting has become commonplace. And, in the relatively contact free world of professional baseball, fighting is also of some concern. Occurring with far lesser frequency than in hockey, fighting in the baseball context often involves whole teams squaring off against one another in tremendous melees. Because baseball players, unlike their hockey and football counterparts, wear little protective gear, the probability of injury in these brawls is probably far greater than in fights in other sports.

110. *See infra* notes 213-18, 231-39 and accompanying text (discussing the need for role reform to redress the tendency of professional athletes to try to gain an advantage in sports contests by violent intimidation of opponents).

111. *See supra* notes 98-100 and accompanying text.

112. *See supra* note 90 and accompanying text.

ity: willful and wanton misconduct or recklessness.[113]

In describing the mental state of "quasi intent"[114] involved in recklessness, Dean Prosser asserts that while one who acts recklessly does not actually intend to do harm, his is "so far from a proper state of mind that it is treated in many respects as if it were so intended."[115] Prosser adds that the reckless tortfeasor is one who has "proceeded in disregard of a high degree of danger, either known to him or apparent to a reasonable man in his position."[116] Closely tracking Prosser's assessment of recklessness, the Restatement (Second) of Torts expresses the recklessness concept from the perspective of one's duty to an innocent third party:

> Reckless Disregard of Safety Defined
>
> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[117]

The Tenth Circuit, in *Hackbart v. Cincinnati Bengals, Inc.*,[118] reversed a district court decision and held that tort law principles were not inapplicable merely because an injury took place during a game.

In a 1973 contest with the Denver Broncos, the Cincinnati Bengals had possession of the ball in Bronco territory and were driving toward the goal line. The drive stalled, however, when a Bengal pass toward the right side of the Bronco end zone was intercepted by a Bronco linebacker, Billy Thompson, who returned the ball to mid-field. The intended receiver on the play, a Bengal running back named Charles "Booby" Clark, had been covered by a Bronco free safety, Dale Hackbart. As a consequence of the interception, the roles of Clark and Hackbart suddenly switched; Hackbart be-

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113. *See* W. PROSSER, *supra* note 85, § 34 at 184; Hackbart v. Cincinnati Bengals, 601 F.2d 516, 524 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979) (recklessness standard applied to professional football injury). It is noteworthy that some courts have applied this standard to other sports related injuries, where amateurs' overzealousness has led to excessive violence. *See, e.g.*, Nabozny v. Barnhill, 31 Ill. App. 3d at 212, 334 N.E.2d at 258 (1975) (recklessness applied standard to schoolyard soccer injury).

114. *See* Eliott, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 143 (1932).

115. W. PROSSER, *supra* note 85, § 34 at 184.

116. *Id.* at 185. *See* Brittan v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970).

117. RESTATEMENT (SECOND) OF TORTS, § 500 (1965).

118. 435 F. Supp. at 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

came an offensive player and Clark a defender. In his new capacity, Hackbart threw his body before Clark's in an effort to block him. Thereafter, Hackbart remained on the ground, watching the remainder of the play on one knee. The trial court found that Clark, "[a]cting out of anger and frustration, but *without a 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."[119] Because the officials failed to view this incident, they failed to call a penalty.

The district court determined that the plaintiff had assumed the risk of such an injury.[120] The appellate court reversed and held that, as a general proposition, the assumption of the risk doctrine does not necessarily extend to professional football players seeking redress for allegedly reckless behavior of opposing players and that the plaintiff's complaint stated a cause of action under Colorado law.[121] To reach this decision, the court applied § 500 of the Restatement and concluded that "recklessness exists where a person knows that the act is harmful but fails to realize that it will produce the extreme harm which it did [sic] produce. It is in this respect that recklessness and intentional conduct differ in degree."[122]

On first analysis, the use of a recklessness standard to judge liability for violence in professional athletics is intuitively appealing. The deliberate, yet unfocused aggression characterizing most athletic violence lacks the specificity required by intentional torts but is more volitional than negligent behavior. Recklessness, however, aptly blends an intent to act with an absence of intent to cause a particular harm where there is a strong likelihood of harm. But further review evinces weaknesses with even this standard. Liability for recklessness, for example, does little to redress sports violence not proscribed by a game's safety rules. Conduct permitted by the structure of the rules of play invariably leads to the imposi-

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119. 435 F. Supp. at 353 (emphasis added).

120. 435 F. Supp. at 358.

121. 601 F.2d at 524.

122. *Id.* It should be pointed out that this juxtaposition of recklessness to intentional and negligent tortious conduct differs from that forwarded by Prosser. Prosser maintains that recklessness is an "aggravated form of negligence differing in quality . . . from ordinary lack of care. . . . [Recklessness is] conduct which is still merely negligent, rather than actually intended to do harm. . . ." W. PROSSER, *supra* note 85, § 34 at 184. Whatever the precise location of recklessness on the negligence — intentional tort continuum, the recklessness standard certainly appears a more appropriate gauge of liability for violence in the professional athletic sphere than the standards at the two extremes.

tion of the consent defense to thwart recovery. This anamoly reinforces the position that the sports violence problem requires internal adjustments[123] rather than judicial intervention.[124]

The operation of the consent defense may be traced to the Restatement (Second) of Torts § 50, comment b which applies the consent defense to sports. As noted earlier with respect to consent in intentional torts cases, the commentary limits the defense to contacts not prohibited by the game's safety provisions.[125] This notwithstanding, the Restatement provision does assert without qualification that a sports participant consents to physical touching permitted by the game's "usages."[126] Consequently, the defense may well forestall any action for recklessness which is not grossly inconsistent with normal play. This begs the question of who is to deal with the excessive violence inherent in "normal play."[127]

The doctrine of assumption of the risk is generally recognized to have a narrower scope than the consent defense; one will be taken to have assumed only those risks which are obvious and foresee-

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123. This term refers to the established institutions whose single expressed purpose is to govern and shape the several professional sports, i.e., the leagues.

124. *See* Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. at 357-58 (court opts for self-regulation and legislation, rather than tort laws, as solution to problem of excessive violence in pro football); Lambert, *supra* note 7, at 216-17 (commentator opts for strict enforcement rules and legislation as more promising violence control mechanisms than tort law).

125. *See supra* notes 103-08 and accompanying text (discussing application of consent defense in intentional tort cases).

126. RESTATEMENT (SECOND) OF TORTS § 50, comment b (1965).

127. One tragic example of just this sort of permitted behavior is the case of Darryl Stingley. In a National Football League game between Stingley's New England Patriots and the Oakland Raiders, Stingley, a wide receiver, was being covered by Jack Tatum, a defensive back with the Raiders. Although the pass to Stingley was overthrown and clearly incomplete, Tatum hit Stingley with a devastating head-on blow. Apparently Tatum's objective was to intimidate his opponent. The result, however, far exceeded mere psychological trepidation of the Patriot receiver — Tatum's unnecessary brutality rendered Stingley a quadriplegic.

Most noteworthy perhaps is the fact that Tatum's behavior was not even penalized nor was a civil action brought. Indeed, the hit was arguably a normal incident of play — a "usage" — by NFL defensive backs. In many instances, players in the defensive secondary are not able to tell whether a receiver will catch a pass and are "forced," therefore, to hit even those receivers who do not make receptions. The difference between this situation and the Stingley-Tatum incident is that in the latter, the ball was clearly out of Stingley's grasp, obviating the necessity for the contact. A penalty was not called because the response by Tatum was similar to that seen in normal competitive play. It is *essential* to add that this does not mean that Tatum's aggression was justifiable or undeterrable. The incident raises the need for these problems to be dealt with by the league itself, for it is the body in the best position to assess the occurrence, and most especially the probable mental state with which Tatum executed his deed. To the extent it involved any form of intimidation, it should be strictly outlawed.

able.[128] Thus, to assume a risk, a participant in a given game must have been able to point to a particular danger that he chose to accept.[129] There exists substantial division among courts and commentators, however, as to whether sports participants can assume the risk of reckless conduct, for such conduct is rarely foreseeable.[130] Indeed, for this reason a number of jurisdictions have eliminated the assumption of the risk doctrine in all but those cases where the plaintiff expressly agrees to assume a given risk.[131] Where implied risk assumption has been abolished, the limits of liability are those set by the consent defense — i.e., conduct permitted by the rules and usages of the game.[132]

c. Negligence

According to the authors of the Restatement, negligence consists of a failure to use ordinary care to avoid injury to others and involve a mental state characterized by mere inadvertence, lack of

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128. *See* Note, *Injuries Resulting from Nonintentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete*, 12 IND. L. REV. 687, 696 (1979); W. PROSSER, *supra* note 85, § 68 at 447-50 (detailed discussion of "knowledge of the risk" element of assumption of the risk). Dean Prosser proclaims that "[k]nowledge of the risk is the watchword of assumption of the risk." Elaborating, Prosser writes that the plaintiff must comprehend and appreciate the particular danger and that although the injury is theoretically a subjective one, a plaintiff will not be heard to say that he did not comprehend a risk which must have been clear and obvious to him." *Id.* at 447-48.

129. *Cf.* McGee v. Board of Education, 16 A.D.2d 99, 226 N.Y.S.2d 329 (1962) (player in amateur sporting event held to have assumed risks of injury normally associated with the sport); Bourque v. Duplechin, 331 So. 2d 40 (La. App. 1976) (amateur athletic contestant held not to assume risks caused by recklessness of others). *But cf.* Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352 (D. Colo. 1977) 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979) (level of violence typical to N.F.L. led court to hold as a matter of law that player assumed risk of injury from blow delivered emotionally but without specific intent to injure).

130. *Id. See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS, 1162-92 (1956); James, *Assumption of the Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); Chamption & Swygert, *Nonprofessional Sport-Related Injuries and Assumption of Risk in Pennsylvania: Is There Life After Rutler?*, 54 PA. BAR A.Q. 34 (1983).

131. *See, e.g.*, Parker v. Redden, 421 S.W.2d 586 (Ky. 1967); Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963) (assumption of risk no longer recognized as a distinct doctrine). *Cf.* Barret v. Fritz, 42 Ill. 2d 555, 248 N.E.2d 111 (1969) (court all but eviscerated assumption of risk doctrine under Illinois law). *See* W. PROSSER, *supra* note 85, § 68 at 454-57 (general discussion of trend towards abolition of risk assumption defense).

132. *See* Lambert, *supra* note 7, at 216; RESTATEMENT (SECOND) OF TORTS § 50, comment b (1965); *supra* notes 125-27 and accompanying text (limits of liability for recklessness in light of consent defense).

skillfulness or failure to take precautions.[133] There is disagreement among the courts as to the applicability of mere negligence in the sports setting. Some courts have ruled that an action for negligence would lie where a sports participant shirks ordinary care for the safety of others on the playing field.[134] Other tribunals, however, have required greater negligence.[135]

While there appears to be little reason to limit liability to more aggravated forms of negligence, the dispute over the availability of a negligence remedy for allegedly tortious behavior in the sports setting is of little consequence to this article. By definition, merely negligent acts involve a careless inadvertence devoid of the deliberate, volitional behavior which give rise to actions for recklessness and intentional tort. The upshot of this is that negligent behavior is far less deterrable, and thus less troublesome. The main regard of this article is the conscious, concerted regimen of brutality found in many of America's most popular sports.

2. *Additional Factors Which Further Restrict Recovery*

a. *Other Plausible Defenses*

The defenses of consent and assumption of the risk are not the only defenses which operate to limit recovery in tort. Self-defense,[136] provocation,[137] mutual combat,[138] privilege, mistake and

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133. *See generally* RESTATEMENT (SECOND) OF TORTS § 282 (1965).

134. *See, e.g.*, Niemczyk v. Burleson, 538 S.W.2d 737, 741-42 (Mo. 1976) (held base runner in amateur baseball game negligent for colliding with shortstop as runner attempted to run from first base to second). *Cf.* Mann v. Nutrulite, Inc., 136 Cal. 2d 729, 289 P.2d 282 (1955) (ball which hit plaintiff in head during girl's softball game held not negligently thrown, although court recognized in dicta possibility of negligence in different situation); Page v. Unterreiner, 106 S.W.2d 528 (Mo. 1937) (court held hooked golf drive not negligent but failed to rule out possibility of negligence under other circumstances).

135. Nabozny v. Barnhill, 31 Ill. App. 3d 212, 234 N.E.2d 258 (1975) (under vaguely termed standard, court imposes liability under what appears to be a recklessness standard, where amateur baseball runner attempted to break up double play by galloping full speed into second baseman stationed at least four feet wide of second); Bourque v. Duplechin, 331 So. 2d 40 (La. App. 1976) (court required showing of recklessness for injury in schoolyard soccer match).

136. The defense was successfully employed in a criminal prosecution arising out of the 1970 N.H.L. stick swinging incident between Wayne Maki and Ted Green. *Cf.* Haeussler v. De Loretto, 109 Cal. App. 2d 363, 240 P.2d 654 (1952) (successful use of self-defense for civil battery case rising in non-sports context).

137. *See, e.g.*, Chapman v. Lamp, 189 Iowa 771, 179 N.W. 50 (1920) (though no bar to recovery, provocation may mitigate remedy). Because provocation may operate to mitigate a remedy, it is of particular utility in the intentional tort area where remedies may include punitive damages. *See* W. PROSSER, *supra* note 85, § 9 at 35.

138. In situations of mutual combat, both parties are held liable for public policy rea-

defense of others are all available, some having actually been successfully raised. The limits on self-defense demonstrate the difficulties with these, however. Self-defense requires the defendant to restrict his retaliation to a level roughly equal to the force confronting him. Most states add some form of retreat requirement to this defense, often making the defense available only where retreat is unreasonable.[139]

b. Reluctant Plaintiffs

The foregoing analysis reveals the constraints on recovery inherent in the tort system and thus the limited utility of that system as a deterrent to professional sports violence. The greatest obstacle to the civil suit, however, is a factor which represents an aversion to, rather than an out-growth of, the legal process. Professional athletes in all sports are reluctant to resort to civil litigation.[140] Human and business interrelationships produce great pressure on players to eschew remedies beyond those set-up by the leagues.[141] In bringing suit, athletes risk ostracism and, particularly with contact sports, physical retaliation by opponents and teammates as well. Perhaps more importantly, players initiating suit face the possibility of unpleasant attempts by management — e.g., wage manipulation and threats of being traded — to discourage such dispute resolution. Unlike most litigants, professional athletes and their teams operate in closed, highly interdependent societies; after a tort suit is litigated to judgment, the plaintiff-athlete must return to that world (unless of course he had retired in the interim).

c. Multiple Jurisdictions

The usefulness of the common-law based tort law to deter sports violence is also undermined by the lack of notice players have as to standards by which their behavior is to be judged. Because professional athletes perform in many different jurisdictions, their play

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sons. *See* Annot., 6 A.L.R. 388 (1920). Often mutual combat is deemed by statute a public breach of the peace, and hence unlawful. *See, e.g.*, CAL. PENAL CODE § 415 (West 1970 & Supp. 1982).

139. *See* W. PROSSER, *supra* note 85, § 19.

140. *See, e.g.*, Schmidt, *In Football, It's Arbitration*, TRIAL, June 1978, at 38 (NFL administrator estimates that prior to 1978 only 10 civil suits where professional football players sued their own teams to redress injuries).

141. For example, the NFL has a player's union arbitration procedure for injury grievance. *Id. See also* R. HORROW, *supra* note 3, at 46-58. Comment, *Controlling Violence in Professional Sports*, 2 GLENDALE L. REV. 323, 327 (1978).

has to conform to the varying legal standards of care of those jurisdictions. To the extent the athlete is prevented from referring to a single clear standard, he is less likely to conform consciously to any single norm.

d. The Essential Inadequacy of the Tort-Based Deterrent in the Professional Sports Milieu

The fundamental problem underlying the phenomenon of violence in professional athletics is the trend in many sports toward adoption of excessive violence as an accepted "usage" of the several games.[142] Tort suits represent post hoc relief and as such will not quell the excess violence of pro sports. The tort law provides a remedy for invasions ranging from the most negligible touching, warranting only nominal damages, to wrongful death. When applied to a milieu where hard contact is permitted and often required, however, it is only extreme contact, distinguishable from the surrounding "consensual" touching, which gives rise to litigation. But even among this actionable behavior, assuming the problem of "reluctant plaintiffs" did not exist,[143] relatively few tort cases would be brought. Tort relief is generally sought for more serious infringements manifesting some sort of injury. This tendency exists in pro sports in a magnified form, for in that arena the hard contact is the norm, and invincibility often the image. Thus, prospective plaintiffs consider civil litigation only when playing field contacts result in very serious physical injury. For example, in the Hackbart case, had the blow delivered by "Booby" Clark resulted in only minor injury, it is highly improbable that Dale Hackbart would have ever even considered suit.[144]

Every NFL season is characterized by frequent incidents of violence, many of which are unnecessary for effective football play and are clearly avoidable.[145] Because few of these contacts result in

142. *See* Note, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 776 (quoting former NHL referee, Jack Mehlenbacher who asserted "[t]he bigwheels of the NHL figure they have to have blood to fill the arenas."). *See also* The Milwaukee Journal, Feb. 20, 1975, at 10, cd. 3.

143. *See supra* notes 140-41 and accompanying text (discussing the reluctant plaintiff phenomenon).

144. *See* 435 F. Supp. at 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979). Indeed, the trial record reveals that following the tortious blow by Clark, Hackbart got up and returned to his team's sidelines without registering a complaint either to Clark or the officials.

145. *See supra* note 127 (containing a factual account of the Stingley-Tatum incident).

truly serious sudden injury akin to that visited upon Darryl Stingley,[146] most of these blows go unchallenged and unremedied. This, combined with the relatively brutal contact that is actually permitted by the game's rules, has led pro football gradually to envelop such behavior as customary or part of its "usages." Evidence suggests that even if the needless and avoidable hits suddenly began to be challenged, many would continue as consensual "usages."[147]

Because the tort remedy would redress only sports' most serious and tragic injuries, it does little to temper the brutal environment out of which such injuries arise. The responsibility for the control of this frequent use of violence, as will be discussed, must be resolved by mechanisms short of civil tort remedies. The tort suit is, by its very nature, an inappropriate and impractical deterrent to excessive violence in professional sports.

IV. Contemporary Proposals to Control Sports Violence

Authority to make decisions relating to the control of player conduct has traditionally been left to those in the best position to observe, and with the most expertise to judge, that conduct to be controlled — namely referees, umpires, and officials in general. In effect, society has stayed its hand except in those instances where the conduct has been so reprehensible as to warrant civil sanctions.

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146. Demonstrative of the extremes of NFL official reaction to such gratuitous blows are two events which occurred late last season. In each case, John Jefferson, an all-pro wide receiver with the Green Bay Packers, was the recipient of a vicious, avoidable blow from an opposing ballplayer. The first incident occurred on November 28 in a game between Jefferson's Packers and the New York Jets. During that contest a Jet linebacker, George Blinka, struck Jefferson in such a brutal and unnecessary manner that the Jets team was penalized for Blinka's unnecessary roughness. After the game, in a rather rare move, the NFL suspended Blinka from the following week's play. (Notably, this is precisely the type of official response which, as will be seen, the proposal forwarded by this article desires to institutionalize).

Ironically, only one month later, on December 26, Jefferson was again the object of a clearly avoidable, vicious hit quite similar in its gratuitousness to the blow visited upon Jefferson by Blinka. The Packers were now playing the Atlanta Falcons and this time the hit was delivered by Falcons defensive back Bobby Butler. In this second instance, however, none of the game officials issued a penalty and there was no league response following the contest.

Due largely to good fortune, Jefferson escaped serious injury in both of the incidents. What is condemned is the fact that there exists little within professional sports rules to deter attacks such as these which needlessly risk serious injury or worse; little that is, beyond fortuitousness.

147. *See supra* notes 125-27 and accompanying text; Restatement (Second) of Torts § 50, comment b, (extending consent to the "usages" or customs of the game); *see also supra* text accompanying note 105 (quotation of Restatement (Second) of Torts § 50, comment b).

The crippling injuries sustained by Darryl Stingley seemed destined to produce change as commentators called for a crackdown on sports violence and suggested a legislative response to fill the gaps left by tort and criminal law.[148] To be sure, the lesser standard of care of the recklessness standard of tort law, and the general reluctance to employ the criminal law to punish participants, had resulted in a broad range of player activity that continued unpunished, and more importantly, undeterred, despite its inherently violent nature. The legislative response initially proposed criminal sanctions and later advanced establishment of a quasi-judicial "Sports Court."

A. H.R. 2263 — Criminal Sanctions[149]

On March 3, 1981, H.R. 2263, known as the "Sports Violence Act of 1981" was introduced in the Congress by Representative Ronald Mottl of Ohio.[150] The bill sought to amend chapter 7 of title 18 of the United States Code. With respect to the control of player conduct, the bill provided in relevant part:

> 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, or both.[151]

This portion of the bill is identical to provisions contained in an earlier bill, H.R. 7903, which attracted swift and outspoken comment from league officials, owners, and players.[152]

The imposition of criminal sanctions in the manner suggested by

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148. *See* J. UNDERWOOD, *supra* note 3, at 45-47.

149. *See supra* notes 67-84 and accompanying text.

150. H.R. 2263, 97th Cong., 1st Sess. 127 Cong. Rec. H760 (1981). *See* H.R. 7903, 96th Cong., 2d Sess. § 2, 96th CONG. REC. 6946 (1980) (the predecessor to H.R. 2263).

151. H.R. 2263 § 115, *supra* note 150.

152. The commissioner of the National Football League, Pete Rozelle stated: "We have reservations about the bill, although we appreciate what they're trying to do. It seems to me that sports are occupying too much of the courts' time now." Tuite, *Sports Violence: Target of Federal Bill*, N.Y. Times, Sept. 25, 1980, Sports, at D 21, col. 1. Gil Stein of the National Hockey League considered the legislation "unnecessary and redundant, inasmuch as it . . . cover[s] areas that are already covered by local laws." *Id.* And Bowie Kuhn stated: "I really think baseball does a good job of controlling violence. I don't think that Federal legislation would help." *Id.* Others within the sports world supported such legislation. Lloyd Pettit of the Milwaukee Admirals of the International Hockey League, after forfeiting playoff games because of outbreaks of violence, stated: "Hockey doesn't need this, [violence] and someone has to say this is enough . . . . I'm not going to wait around for someone to be killed in this game." *Id.*

H.R. 2263 was problematic in two respects. First, there continued a general reluctance among both legislators and members of the sports community to countenance the rather harsh penalty of criminal sanctions for actions taken on the playing field, notwithstanding the hue and cry in the wake of the Tatum-Stingley incident.[153] And second, the imposition of sanctions under the Act was triggered by the use of "excessive violence," and such a label was not subject to precise definition or easy identification. To the extent "excessive violence" presumed an intent component, similar problems were evident as exist in the control of intentional acts in general.[154] The bill spoke of "knowingly" excessive violence but was unclear as to how such conduct was to be identified by federal prosecutors.[155]

B. The Sports Violence Arbitration Act of 1981

On November 20, 1981, the "Sports Violence Arbitration Act of 1981" was introduced in the Congress also by Representative Mottl.[156] The legislation was based on a highly regarded student note emanating from the University of Southern California Law School,[157] and on the research efforts of Miami attorney Richard Horrow.[158] In addition to establishing a uniform mechanism for the imposition of fines and other sanctions upon players and clubs who resort to excessive violence, the act also incorporated the provisions of H.R. 2263 and made explicit the availability of criminal penalties.

1. The Prototype Sports Court

The widely applauded Sports Court was the central feature of what might be referred to here as the Southern California proposal.[159] The Sports Court would function to "impose fines upon clubs and hold them financially liable for any damage caused by the violent conduct of their players . . . [and] . . . the court would

153. Even Darryl Stingley commented on the need to "be careful of drastic changes." *Id.*

154. *See supra* text accompanying notes 98-108.

155. *Id.*

156. H.R. 5079, 97th Cong., 1st Sess., 127 CONG. REC. H8759 (1981).

157. Office of United States Congressman Mottl, Press Release (Nov. 20, 1981).

158. *The Sports Court, supra* note 2. The note was authored by Chris J. Carlsen and Matthew S. Walker and received the Norma Zarky Memorial Writing Award for a note or comment in the field of entertainment law.

159. *The Sports Court, supra* note 2.

impose fines and suspensions without pay upon players who engage in violent conduct."[160] Such a system was to create financial disincentives to resort to violent conduct.

The Sports Court relied primarily for its corpus juris on what is described as the "player conduct policy."[161] The policy would define the class of conduct subject to review and evaluation for the potential imposition of pecuniary sanctions by the court. The court was to be comprised of a three member tribunal, "familiar with the rules and practices of the sports they regulate."[162]

The operative procedures for the Sports Court were to parallel many of the procedures found in dispute resolution before the American Arbitration Association. The process was to be initiated by the filing of a grievance, presumably containing an allegation by a player or his representative that certain conduct injuring him violated the "player conduct policy." The note describes the resulting process as follows:

> The Sports Court would hear the grievance and determine if the injuring player's conduct was violent. If the conduct was violent, and it caused the injured player harm, the Court would relieve the injured player's club of compensatory and medical obligations owed to him and impose these obligations on the injuring player's club.[163]

Evidentiary rules were to be structured to accommodate relevant evidence on the issue of the violation, as well as the conduct's violation of rules of play. The court was also to hear testimony about the prior record of accused parties and their pattern of resorting to violent conduct.

In keeping with the binding nature of arbitration procedures, under the proposal no appeal could be taken from the decision of the Sports Court absent a showing of "fraud, corruption, or other

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160. *Id.* at 414.

161. *Id.* at 415.

162. *Id.* at 427.

163. *Id.* Under a legal theory analogized by the authors to the tort doctrine of respondeat superior, the Sports Court would have authority to impose various penalties on clubs relating to the consequences of the injury-creating conduct:

> 1. Pay the salary of the injured player during the period in which the player is physically unable, because of injuries suffered, to perform the services required of him under contract;
>
> 2. Pay all medical expenses incurred in the treatment of the injury;
>
> 3. Pay damages to the injured player if the injury prevents the player from participating in league play in later seasons;
>
> 4. Pay damages, or relinquish a draft choice, to the injured player's club for the loss of services suffered because of its player's injury.

Id. at 415-16.

misconduct."[164] The proponents anticipated that judicial confidence with the binding nature of other arbitration procedures would carry over to the enforcement of Sports Court decisions.[165] The Sports Court was to maintain authority to enforce its decision and enforce compliance with its proceedings.

A principal concern of the Sports Court authors was the method to be used to implement the court.[166] They suggested the use of either legislation or collective bargaining; under the "Sports Violence Arbitration Act of 1981," they got both.

2. *The Proposed Arbitration Board*

The central feature of the "Sports Violence Arbitration Act of 1981" was an arbitration board modeled after Southern California's proposed Sports Court. Both mechanisms were a response to the sporadic use of league sanctions to curb violence,[167] and the perceived need to provide some efficient quasi-judicial relief to injured players.

The purpose of the board, as defined by the terms of the Act, was to provide "for the settlement of grievances resulting from the use of excessive force during professional sports events. . . ."[168] The intent of the legislators was "to reduce the number and costs

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164. *Id.* at 431. The authors considered traditional non-appealability as necessary to facilitate "speedy and economically efficient dispute resolution." Under the "Sports Violence Arbitration Act", appeals were to be available as a matter of right to the United States court of appeals for the circuit where the petitioner resides. *See infra* text accompanying notes 167-75.

165. *The Sports Court*, supra note 2, at 431-32.

166. *Id.* at 418-22.

167. *See supra* notes 148-50. The power of league officials to control violent conduct is found in their authority to impose fines, suspensions, or consider grievances:

Sport	Final Decision by Highest Executive
1. American and National Baseball Leagues	Fines and suspensions for conduct on the field, or conduct that involves the integrity of the game.
2. National Football League	All non-injury grievances.
3. National Basketball Association	Fines and suspensions for conduct on the court, or conduct that involves the integrity of the game.
4. National Hockey League	All general grievances.

Id. at n.132. Commissioners actually have sole discretion over the imposition of suspensions and fines to the exclusion of owners. *See* National Football League Players Assoc. v. NLRB, 503 F.2d 12 (8th Cir. 1974).

168. H.R. 5079 § 3101, *supra* note 156.

of injuries associated with such events."[169]

The language of the Act did not refer to the Sports Court explicitly, but like it, called upon management and player representatives to establish an arbitration panel consisting of three members. The procedure for selecting arbitrators as well as the criteria to govern the grievance process was itself to be resolved as a matter of collective bargaining.[170]

The legislation did not refer specifically to a "player conduct policy" but spoke of "excessive physical force" as:

> [P]hysical force employed during a professional sports event which —
> (A) has no reasonable relationship to the competitive goals of the sport involved;
> (B) is unreasonably violent; and
> (C) could not be reasonably foreseen, or was not consented to, by the injured individual, as a normal hazard associated with participation as a player in such professional sports events . . . .[171]

The jurisdiction of the arbitration board would have extended to all matters arising from the use of excessive physical force in the sports context.[172] It would have been empowered to award compensation to aggrieved parties for violent conduct as well as impose disciplinary actions against players and clubs who use or promote the use of excessive physical force.[173] In addition, all orders of the board were to be appealable to the United States court of appeals.[174] And, finally, a grievance brought before the arbitration

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169. *Id.* Mr. Mottl, in a press release, indicated that the primary purpose of the bill was "to deter and punish the episodes of excessive violence that are characterizing professional sports." Mottl stated that such legislation would ensure that the professional sport leagues take the lead in protecting their players. Office of United States Congressman Mottl, Press Release (Nov. 20, 1981).

170. In addition, section 3106 of the Act provided that the National Labor Relations Board was to recommend policies, rules, and procedures applicable to the arbitration proceedings. *See* H.R. 5079 § 3016, *supra* note 156.

171. *See* H.R. 5079 § 3101, *supra* note 156.

172. *Id.* at § 3103.

173. *Id.* The Act provided some guidance on what was to inform the board's discretion when it considered the severity of sanctions to be imposed:

> (1) the extent of any injuries sustained by the aggrieved player involved;
> (2) the duration of any period during which such player is unable to participate in professional sports events as a result of such injuries;
> (3) the amount of salary paid to such player by the aggrieved professional sports club involved during such period; and
> (4) the amount of any medical benefits or other compensation paid to or in on behalf of such player by such professional sports club as a result of such injuries.

Id.

174. Section 3104 of the Act provided:

Review of arbitration orders

board was not to be a bar to a separate civil action; all compensation awarded by the board was to be reduced by the amount of any monetary award arising from a civil action.[175]

V. The Case Against Independent Arbitration To Control Violence

A. Confusing Conduct Standards

The foregoing legislation and the Southern California proposal each suggest an arbitration mechanism which would proscribe particular conduct, as defined by the several plans, which involves the use of 'excessive physical force.'[176] The operative effect of the imposition of independent quasi-judicial sanctions based on such a standard is the creation of a second standard to guide player conduct on the playing field. Proponents of the Southern California proposal presumed as much when they argued that the current standard of conduct, which is defined by rules of play and other internal penalty systems, did not sufficiently deter violent conduct.[177] The result — as indicated below — would have been to create a system that would have allowed unproscribed conduct

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(a) Not later than sixty days after the issuance of an order by an arbitration board under section 3103 of this title, any person adversely affected by such order may file a petition, with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such order.

(b) Upon the filing of a petition under subsection (a) of this section, the court shall have jurisdiction to review the order issued by the arbitration board in accordance with chapter 7 of title 5. The court shall have authority to grant appropriate relief as provided in such chapter.

(c) For purposes of this section, an arbitration board shall be considered to be an agency within the meaning of section 701(b)(1) of title 5.

H.R. 5079 § 3104, *supra* note 156.

175. Section 3105 of the Act provided:

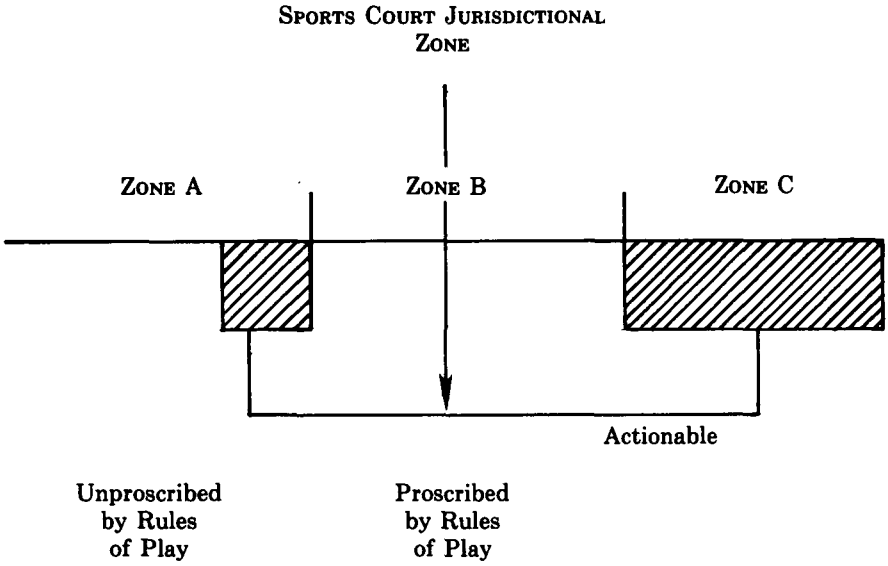
Any player or professional sports club bringing an action before an arbitration board under section 3103(a) of this title shall not, by reason of such action, be barred from instituting a civil action in any court of competent jurisdiction based upon the occurrence which is the subject of the action brought before the arbitration board, except that any compensation awarded by the arbitration board under section 3103(b)(1) of this title shall be reduced by an amount equal to the amount of any monetary settlement or award in any such civil action.

Id.

176. H.R. 5079 § 3101, *supra* note 156. Representative Mottl, in his press release spoke of the difference between natural physical conduct and vicious, dangerous conduct. *See* Office of United States Congressman Mottl, Press Release (Nov. 20, 1981). H.R. 5079 was unspecific as to what was to guide league officials in formulating an 'excessive physical force' standard to distinguish vicious from the acceptably competitive conduct.

177. *The Sports Court*, *supra* note 2, at 404-05.

(those actions not violative of the rules of play) to become actionable. The only way to make Jack Tatum responsive to acceptable levels of competitive conduct, for example, would have been to bring him before an arbitration board or Sports Court even though his actions violated no game rule.



The zone of conduct actionable under a system which incorporates an external standard would have been measurably broadened to include a class of conduct not proscribed by the rules of play. The jurisdictional zone thus established by an arbitration board or Sports Court might be, for ease of discussion, aptly described as a "twilight zone." The "twilight zone" label appropriately describes the jurisdiction of the arbitration-based system where players are informed by two separate standards, the more severe of which has no basis in the rules of play.[178]

178. Dual standards do not arise in the context of actionable conduct redressed by resort to traditional civil sanctions where such conduct by its nature violates the rules of play. In the civil context, only when conduct violates the rules of play is a plaintiff likely to avoid the defenses of assumption of the risk and consent. The defense of consent, for example, was rejected in Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975), where the court determined that a player could not have consented to conduct not within the range of acceptable play. In *Nabozny*, the goalie-plaintiff was crouched in the penalty area with a soccer ball, the rules prohibiting contact with the goal keeper while he remained in this position. The defendant proceeded to run in the direction of the plaintiff and then kick him in the side of the head. The court reversed a directed verdict in favor of the defendant, refusing to grant him immunity from a tort action arising from his conduct in an amateur athletic contest. The court held that a player should be liable for the injuries he causes

The practical difficulties of expecting players to respond to a "player conduct policy" centers around the athlete's capacity to make a split second determination about the legality of his conduct, in addition to the more immediate and tangible decision of whether his conduct will violate a game rule. The court established this question in *Regina v. Green*,[179] where the issue before the court was whether the relevant conduct was an assault:

> It is very difficult, in my opinion, for a player who is playing hockey with all the force, vigor, and strength at his command, who is engaged in the rough and tumble of the game, very often in a corner of the rink to stop and say, 'I must not do that. I must not follow this up because maybe it is an assault . . . [or a violation of the 'player conduct policy'].[180]

The potential effect of a bifurcated system of conduct controls is to stifle the competitive play of athletes who, in the heat of competition, would be forced to make a quasi-judicial determinaton of what the likely ruling of the arbitration board or Sports Court would be, or suffer the pecuniary-professional consequences of their actions. And because liability would most often turn on the peculiar facts attending various incidents of violence, predictions of potential liability could be speculative and uninformed, particularly where such liability is not keyed to an accepted set of rules.[181]

Even though the definition of 'excessive physical force' contained in the Act does not correlate, in any way, to the rules of play, Representative Mottl in the press release indicated that the arbitration board "could suspend without pay and impose fines on the player who flagrantly violated *the rules* protecting players in competition."[182] It is at least ambiguous whether the Congressman invoked his meaning of the words 'excessive physical force' only

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when his conduct is either deliberate, wilful or with a reckless disregard for the safety of the other player. The court also rejected the defendant's allegations that the plaintiff has been contributorily negligent. The court's holding, interpreting Prosser, and the RESTATEMENT (SECOND) OF TORTS § 50, comment b, removed consent as a viable defense to an action when the rules have been violated. *Id.* at 213, 334 N.E.2d at 260-61.

179. 16 D.L.R.3d 137 (1970).

180. *Id.* at 141.

181. An argument might be made that the class of conduct actionable before an arbitration board created in accordance with the proposed act and not violative of game rules, is limited to unusual circumstances like the Tatum-Stingley incident and that the availability of such sanctions, in fact, fills a void left by the limited scope of rules and effective civil remedies. The instances where players would be subject to dual standards would be limited. This interpretation is paradoxical, however, since the proposed act was itself an emotive response to the Tatum-Stingley incident. This article takes the position that players must be guided at all times by a single set of conduct controls tied to the rules of play.

182. *See* Office of United States Congressman Mottl, Press Release (Nov. 20, 1981).

when the rules of play have been violated. Accordingly, it is arguable that the intent of the legislation's sponsors was that rule-breaking conduct *would be* required to invoke the jurisdiction of the arbitration board. Furthermore, while the proposed legislation itself was silent on the issue, § 3101(2)(C) of the Act called for punishment of "excessive physical force" that could not be reasonably foreseen or had not been consented to. A lack of consent in this context, as has been shown, generally implies rule-breaking conduct where the defense of consent is unavailable.[183]

If sponsors intended that rule-breaking conduct be required to invoke the jurisdiction of the arbitration board, the legislation would have been problematic in two respects. First, it would have provided no deterrent or sanction to control the conduct which first gave fuel to the legislative initiative — namely, the type of unproscribed conduct which gives rise to unacceptable injury as in the Stingley-Tatum incident. Second, such a proposal would have served to de-legitimize traditional mechanisms of relief already available for injuries sustained by rule-breaking conduct by promoting access to a quasi-judicial arbitration board. The failure of leagues to act to sanction violent conduct more vigorously when rules are broken under the existing system suggests that they are not likely to act aggressively in negotiating, implementing, and supervising an arbitration system focusing on the same conduct.

B. Problems of Implementation

1. Tacit Resistance of League and Player Representatives

The Sports Violence Arbitration Act of 1981, as proposed, was dependent for its effectiveness on the cooperation of management and player representatives in the drafting of the terms and requirements relating to the establishment of each arbitration system.[184] The terms of the Act mandated the inclusion of this subject in the collective bargaining argument applicable to the league of professional sports clubs involved.[185] The effectiveness of declaring

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183. H.R. 5079 § 3101, *supra* note 156.

184. The legislation called for the establishment of an arbitration system for each league of professional sports as defined by the terms of the act to include the sports of baseball, basketball, football, hockey or soccer.

185. *See* H.R. 5079 § 3102(a), (b), *supra* note 156.

The Southern California proposal, which suggested either collective bargaining or federal legislation for the implementation of the Sports Court, articulated three assumptions in its discussion of the former:

(1) Collective bargaining is already established in most professional leagues, (2) The

a subject a mandatory bargaining issue generally presumes that at least one party sufficiently identifies its position with one side of an issue to encourage productive bargaining. When neither side feels compelled to discuss the issue, productive negotiations are likely to be concentrated on other matters of more immediate concern. Notwithstanding the legislative mandate, nothing in the Act would appear to prevent foot-dragging on the part of player and management representatives. The reluctance of leagues, players, and clubs to enforce a stricter pattern of conduct control suggests that it is unlikely they would be willing to take seriously their responsibility in shaping the operative framework of an arbitration board or Sports Court. The undesirability of exposing themselves to potential liability and of relinquishing traditional authority over player conduct to an autonomous tribunal is apparent.[186]

The Southern California proposal anticipated reluctant league and player representatives and suggested federal legislation to provide minimum standards to guide the participants in collective bargaining.[187] In mandating the formation of an arbitration board, however, the proposed act offered little guidance in assuring minimum standards. It is unclear how reluctant representatives are to be persuaded to bargain in earnest, where the object of negotiations — to control and provide redress for the use of "excessive physical force" — was mandated in conclusory fashion and in vague terms. All operative provisions dealing with the award of compensation and the imposition of disciplinary actions were defined in terms of prohibiting "excessive physical force."[188] Defining the practical scope of what constitutes "excessive physical force," in effect, was left exclusively to league and player representatives. Accordingly, it was they alone who would dictate the operation of the Sports Violence Arbitration Act of 1981 with unbridled discre-

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National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1976 & Supp. II 1978), is applicable to each league's management and players' association. . . . (3) The role of labor arbitration is closely intertwined with federal labor policy.

The Sports Court, *supra* note 2, at 418 n.79.

186. The Southern California proposal noted this problem in suggesting that federal legislation might be needed to assure adoption of the Sports Court:

The Sports Court would become a third power with a good deal of control and influence over the powers that created it. A conservative league management and players' association may not want to relinquish any of their own disciplinary powers; thus, both entities may refuse to bargain on the subject of the Sports Court. Therefore, it may be necessary to establish the Sports Court through federal legislation.

The Sports Court, *supra* note 2, at 420.

187. *Id.* at 421.

188. H.R. 5079 § 3103, *supra* note 156.

tion over the adjustment of any minimum standard.[189]

2. *Problems of Procedure*

The Sports Violence Arbitration Act of 1981 contained two provisions which addressed the need to provide procedural safeguards to those litigations before the proposed arbitration board.[190] Section 3102 stated in relevant part:

> (b) The terms and requirements relating to each arbitration system established under sub-section (a) of this section shall be included in the collective bargaining agreement applicable to the league of professional sports clubs involved. Such terms and requirements shall include —
>
> . . . .
>
> (5) *procedures for the adjudication of grievances* (subject to the requirements of section 3103 of title).[191]

Section 3106 which called upon the National Labor Relations Board to "recommend policies, rules, and procedures applicable to arbitration proceedings under this chapter," contained a paragraph which specifically called for "procedural protections for parties participating in such proceedings."[192] The section also contained a proviso which made it clear that the recommendations of the Board would not be binding in any arbitration proceeding under the Act.[193]

For the most part, therefore, responsibility and actual authority over the promulgation and enforcement of procedural safeguards was left to league and player representatives subject to the nonbinding recommendations of the National Labor Relations Board. There was no assurance under the terms of the act that when representatives met in collective bargaining to shape the contours of the arbitration system, they would consider minimal due process requirements.[194]

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189. *See supra* text accompanying notes 161-70.

190. H.R. 5079 §§ 3102(b)(5), 3106(a)(1), *supra* note 156.

191. *Id.* § 3102(b)(5) (emphasis added).

192. *Id.* § 3106(a)(1).

193. *Id.* at § 3106(b).

194. The Southern California proposal suggested a number of procedural guidelines to protect the due process rights of parties which extended to the examination of witnesses, the admissibility of various types of evidence, and the availability of counsel. *The Sports Court*, supra note 2, at 429-30. None of these considerations were addressed in the proposed Act.

Due Process safeguards may have become particularly significant in the procedures before an arbitration board where the findings of the board would have the effect of attaching a stigma to the reputation of a player who has been adjudged "guilty" of using 'excessive

3. *"Excessive Physical Force" — A Vague Standard*

The proposed legislation sought to eliminate "excessive physical force" or that conduct it defined as having no reasonable relationship to the competitive goals of a sport.[195] League and player representatives were accorded complete authority to determine what conduct constituted excessive physical force. Defining the class of conduct falling within the ambit of such a definition could have provided league and player representatives unbounded discretion in the formulation of standards of acceptable conduct.[196]

In addition, the legislation, as drafted, placed no significance on the practical necessity of informing players how and when their conduct would involve the use of "excessive physical force." The legislation presupposed a system that would somehow result in the codification of acceptable conduct through the decisional law of the arbitration board but proposed no practical means by which this was to be accomplished. To that extent, such a proposal provides little in the way of deterrence and amounts to nothing more than a system for the redistribution of wealth based upon fault and injury.

C. *Limited Application — Limited Deterrence*

The "Sports Violence Arbitration Act of 1981" focused primarily on the control of injury-creating conduct. It succumbed to the alluring tendency to define the problem of violence in sports almost exclusively in terms of the problem of needless injury in sports. The rationale behind the proposal was that pecuniary responsibility for unacceptable conduct which resulted in injury would encourage a reduction in the use of such conduct. The proposed Act defined the sanctions available before the arbitration board almost exclusively in terms of monetary damages.[197] The imposition of

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physical force.' *See* Paul v. Davis, 424 U.S. 693, 712 (1976); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980); Rodriquez de Quinonez v. Perez, 596 F.2d 486, 489 (1st Cir. 1979); McKnight v. Southeastern Pa. Transp. Auth. 583 F.2d 1229, 1235 (3d Cir. 1978). A private association's failure to provide procedural safeguards may, in some circumstances, also give rise to a private damage action without consideration of whether the private association had a substantive basis for its actions. *See* Silver v. New York Stock Exch., 373 U.S. 341, 365 n.18 (1963); *Developments in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1026-37 (1963).

195. *See* H.R. 5079 § 3101, *supra* note 156.

196. It is not inconceivable that if league and player representatives sought to liberalize sanctions now in place for violent conduct that the legislation, as drafted, would have had the effect of attaching federal approval to such an agreement.

197. *See* H.R. 5079 § 3103, *supra* note 156. It should be noted that damages are ex-

such sanction was triggered when a party had been "aggrieved" by the use of "excessive physical force."[198] Such a grievance was likely to occur only in the context of injury-creating episodes of violence.

Legislation which is preoccupied with the creation of a system which endeavors to provide the injured player a chance to become whole, is distinct from a mechanism of conduct control which exacts a penalty, swift and sure, in the interest of deterring violent conduct across the board.[199] In effect, efforts to control violence, to be effective, cannot be limited by the fortuity that a violent act may result in serious injury. A broad range of the violent conduct in professional sports does not create recognizable personal injury.

Those violent acts most likely to result in serious injury include those acts where the resultant injury is actually intended. Intentional acts are most likely to be meaningfully deterred under an arbitration system yet they comprise but a fraction of the total picture of violence in sports. To the extent that non-injury-creating violent conduct goes unredressed, the competitive atmosphere becomes conditioned to the use of violence and is readied for the inevitable occasion of excessive violence which causes monstrous personal injury. Accordingly, to focus on injury-creating conduct in the hopes of reducing violence in sports is to recognize only the tip of the iceberg.[200]

D. Towards a Proposal for Violence Control

1. Elimination of the Twilight Zone

The principal objection with any system of conduct control that creates a "twilight zone," as did the Sports Violence Arbitration Act of 1981, is that players are simply not informed in their action by a single reliable standard. Any effort seeking to establish more

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acted from the sports club rather than the individual perpetrator. It is conceivable that a player could conclude that his need to resort to violent play outweighs the potential cost to be borne by his team.

198. *Id.*

199. The former is not unlike the prospect of recovery in the civil context where the relief sought is in effect post hoc and as such will do little to control overall levels of violence. *See supra* notes 85-147 and accompanying text (broad discussion of the civil law remedy).

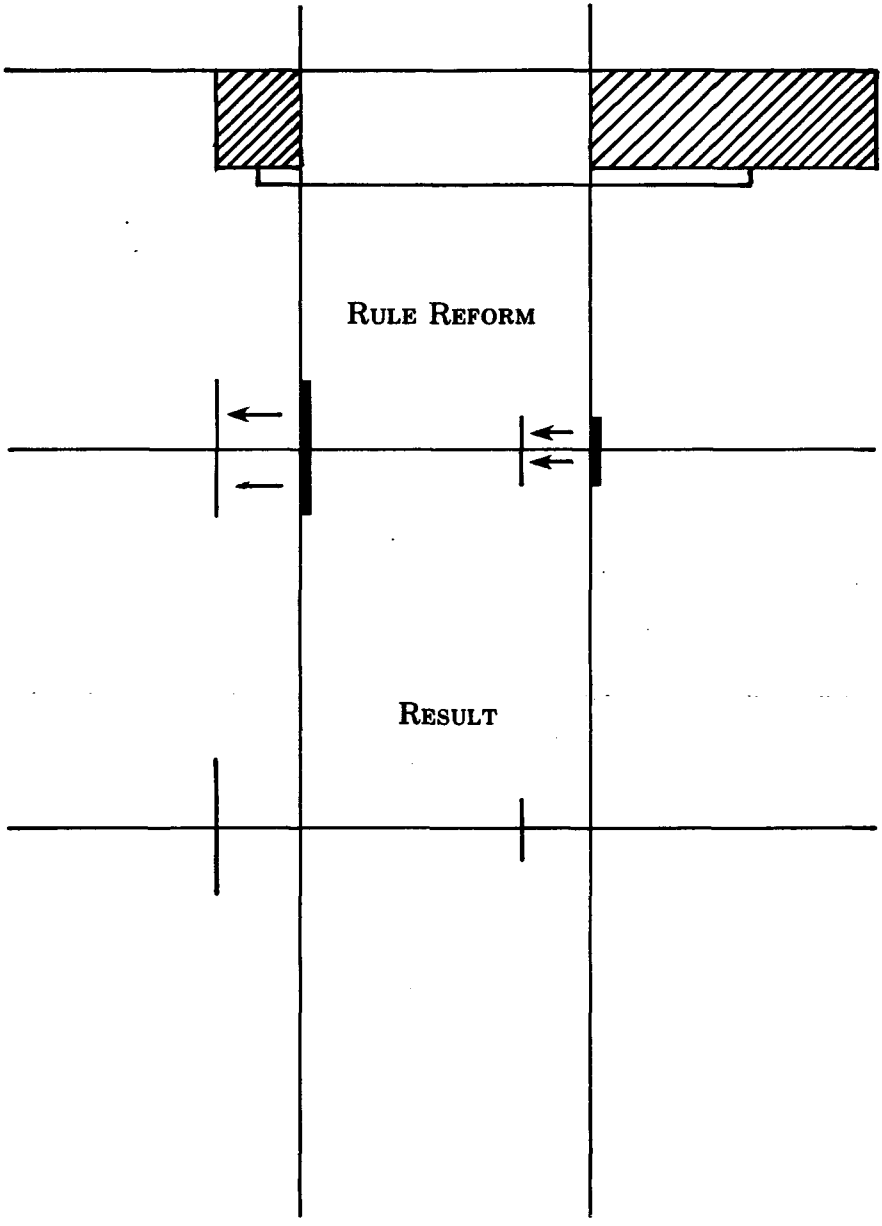
200. The Southern California proposal properly focused on the necessity to control non-injury creating violent conduct. The proposal recognized that such conduct could lead to future injuries. The proposal suggested the use of a "Penalty Grievance" to sanction individuals and clubs who engage in violent conduct. *See The Sports Court, supra* note 2, at 417. This aspect of the Southern California proposal was not incorporated in the proposed Act. *Id.* at 435, n.182.

stringent standards in an attempt to modify behavior must, above all, be internally consistent with the rules of play of the various sports. If certain conduct is to be regarded generally as unacceptable, it must be sanctioned, as well, by the rules of play where penalties are exacted on the spot, and where players are guided in their actions by a set of rules inextricably woven to the notion of how each sport is effectively played. The decisions of the arbitraton board proposed under the Act may have succeeded as a means of retribution but would have failed as a working guide to team and player conduct. Moreover, to hold someone monetarily responsible for conduct which does not violate the rules of the game offends basic notions of fair play.

Efforts and conduct modification, therefore, if they are to be successful must be based on rules of play reform. The conduct model demonstrates the appropriate adjustment which would result in the elimination of the "twilight zone."

ZONE A | ZONE B | ZONE C

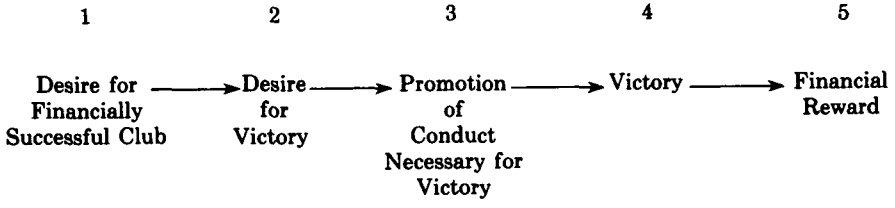
TWILIGHT ZONE



2. Identifying Player Incentives To Achieve Deterrence

The Southern California proposal contrasts the clean play of the American Hockey Team in Montreal with the violence and fighting of the NHL and notes that the difference can be traced to the stringent sanctions of Olympic rules.[201] The proposal, like the legislation, nonetheless argued that any effort at violence control must be of a pecuniary design, since financial incentive is the primary motivating factor of professional athletes. To achieve real deterrence, it is necessary to look beneath the economic justification theory of violence. The use of financial disincentives to control violence presumes the following chain:

CLUB (TEAM) INCENTIVE[202] MODEL

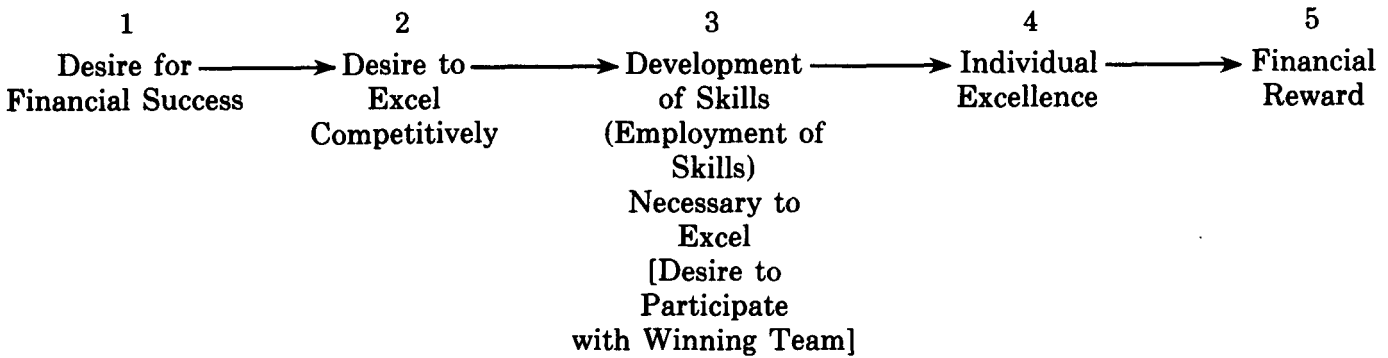


The Sports Violence Arbitration Act of 1981 ignored the crucial role of winning in team and individual motivations, and, moreover, ignored the relationship of winning to financial reward. The actions of an arbitration board or Sports Court would focus completely on the fifth factor of the foregoing and succeeding model. Both systems would ignore factors 2-4.

201. "[P]layers are immediately ejected and cannot play in the following game." *See The Sports Court, supra* note 2, at 440 (citing L.A. Times, Mar. 24, 1981 § 3, at 6, col. 1).

202. This incentive model, arguably, might be less applicable to professional football since earnings are divided among the clubs in practically equal shares. This may give such teams only a limited financial incentive to win.

INDIVIDUAL INCENTIVE MODEL



Steps 2-4 are ignored by the proposed legislation and the arbitration board which was designed to focus on financial punishment. The violation of game rules is punishable by individual and team penalties relating to both victory, and more significantly, to the capacity for individual distinction. Accordingly, rule reform cuts right to the heart of the incentives found in steps 2 through 4. And where incentives for individual participants are tied even more closely to their desire for skillful and effective play, rule reforms will encourage aggressive adherence to rules as a means of excelling.

It is clear, therefore, that in order to be financially successful, an individual must excel and he cannot excel if he is guilty of chronic rule breaking that could exclude his participation from any contest. Similarly, a team must be victorious to achieve financial rewards, and it cannot do so by condoning the chronic violation of rules by its players. Clearly, it would neither behoove Jack Tatum nor his team to be penalized yards, playing time, and/or standing in the interest of intimidating a pass receiver like Darryl Stingley.

If rulemaking in sports has achieved dubious results, it is due to a failure to bind the incentives alluded to above with the enforcement of strict, principled, and uncompromising rules. Hockey players, simply put, would fight less if they were forced to play less and pay dearly as a result. Clearly, two minutes in the penalty box does not compromise their ability to exploit these incentives, clearly two years off the ice would, and perhaps two days would be sufficient.

A recent Stanford Research Institute study indicates that only 1.3% of game injuries involve rule-violating conduct; this factor is acknowledged by proponents of the Southern California proposal.[203] Rather than acknowledge the need for rule reform, commentators often focus on the use of the consent defense in situations of violence involving unprosecuted conduct (i.e., conduct not prohibited by rules is consented to). This defense, they argue, destroys the effectiveness of tort measures to reduce violence and legitimizes the creation of an arbitration board. This reasoning is self-defeating. If rules were reformed to cover the presently unpros-

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203. *See* J. UNDERWOOD, *supra* note 3, at 177.

> Those in the blood bond who excuse the violence consider this proof that players are basically rules-abiding fellows and ought to be left alone. There is another way to look at that percentage. If "illegal acts" are not responsible for the outrageous number of injuries, then the fault lies *within* the rules, in things that are happening that *ought* to be illegal.

Id. (emphasis in original).

cribed violent conduct, the traditional reliance on tort recovery would be revitalized since resort to the consent defense would be ineffective. This argument is crucial to any notion of rule reform.

To the extent reliance on traditional mechanisms can be effective, equity and cost considerations dictate that such reliance be encouraged. Rule reform instituted to cover the conduct that is to be eliminated, furthermore, brings the effort at sports violence control in line with firmly established tort principles.[204]

Another major feature of rule reform would be the spin-off regulation of non-injury creating conduct that does not manifest itself in any pecunious fashion but is nonetheless violent. Rule reform would encourage a system of playing regulations that would sanction such conduct and, therefore, would provide the most effective means of obtaining the most comprehensive conduct reform measures.

3. *Deciding Who Decides*

Quasi-judicial and legislative bodies are simply without the expertise to fashion major efforts in the area of rule reform. Rule reform must come from responsible officials familiar with the fine nuances of effective play within each sport. The impetus, however, for major improvement can come from legislative initiatives; indeed, this is surely the less restrictive alternative when compared with the breadth of the legislative enactment of a quasi-judicial organ such as an arbitration board.

VI. The Proposal: Legislatively Mandated Rule Reform

A. The Incentive Model Revisited

Because many professional sports have essentially institutionalized excessive violence, measures to reform this conduct must be woven into the very play of those sports.[205] The complexion of sports must be altered to the extent necessary to excise that violence which has supplanted athletic skill as the key determinant of success.[206] Harkening back to the individual incentive model,[207]

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204. *See supra* text accompanying note 105.

205. *See supra* notes 92-97 and accompanying text (suggesting need for internal controls to redress institutionalized sports violence); *supra* notes 47-48 and accompanying text (discussing key role of excessive violence as inextricably tied to winning).

206. It should be understood that the violence referred to here is *not* that violence that is a necessary concomitant of the games as traditionally conceived. Rather, this statement addresses that needless violence that has grown to plague American sports. This layer

reference to the various factors constituting the model provides an excellent guide by which to analyze proposed conduct reform measures. Again, the model's five factors represent the several elements motivating the professional athlete; to address these is to address the gears that make pro sports tick.

The Individual Incentive Model primarily stresses the myriad nature of an individual athlete's motives for competition and thereby the varied factors which must be addressed by any proposal which seeks to alter his behavior. To recap, factors 2-4 of the Model relate in general to the actual playing of the game — either the quality of individual play or the collective ends of individual superiority, team success, or winning. Factor 5 of the Model, financial reward, is a step removed from the coliseum but it is the ultimate aim of the professional athlete.[208] A proposal which, like an arbitration board, affects *only* this latter factor will be unable to affect the broad manner in which sports are played for two reasons. First, the financial reward, while significant, is but one of the motives behind an athlete's participation in his sport; a remedy addressing only this factor may well be overborne by contravening motivations arising from the other elements of individual incentive (2-4).[209] Second, and perhaps more importantly, reliance on factor

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of violence, excessive violence, has been imported into the games to facilitate success. *See* Note, *Violence in Professional Sports*, WIS. L. REV. 771, 777 n.33 (1975) (coach quoted as lauding brutality of the Philadelphia Flyers because it has brought great success). Violence of this sort has, to varying degrees, contributed to winning to the exclusion of superior athletic ability.

207. *See supra* notes 202-03 and accompanying text.

208. Although the pride in team success and in the quality of individual play is no doubt important to the professional athlete, the monetary reward that drove the athlete to turn professional is ultimately the central aim. Witness, for example, the case of former Georgia running back and Heisman Trophy winner Herschel Walker. For two seasons the phenomenal Walker rejected the temptation to forego his college eligibility and turn pro. Throughout, Walker maintained that the quality of play of his team and a winning spirit was far more important to him than money. *See* "20 Questions: Herschel Walker," 30 PLAYBOY 196, 236 (1983). This notwithstanding, Walker turned pro in February 1983, when he accepted a multimillion dollar offer by the New Jersey Generals of the upstart United States Football League. In so doing, Walker forewent a year of college eligibility, and chose to begin his new career in a league predominated by players whose quality is arguably inferior to that in the more established NFL. Clearly, the pull of the financial reward overcame the interest in quality of play.

209. Although financial penalties could theoretically be fashioned in such a way as to make the financial consideration effectively the sole determinant of behavior, such huge penalties could be, as a practical matter, of little utility to regulate play where the behavior sought to be deterred is relatively common. *Cf.* Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) (advocating use of graduated fines, instead of imprisonment, to punish white collar criminals).

5 is reliance on a factor external to the game itself and thus most probably insufficient to change the way in which the game is played.

Within the Individual Incentive scheme, internalized league directed reform represents an approach that is more effective and cost efficient in violence deterrence terms than one like the arbitration board, which relies exclusively on manipulation of finances. Unlike the unidimensional board, league rule reform would operate variously on any or all of the different planes of motivation represented by Factors 2-5. For example, as the severity of game penalties increase, rule infractions have an increasing impact on the ability of a team to win, factor 4. Also, the individual player's conduct can be substantially affected by more frequent use of penalties aimed at a single individual rather than a team. To this end, the current tendency among the several leagues is to rely heavily on the use of fines.[210] Penalties of this sort, limited as they are to relatively small sums,[211] fail to effect the type of conduct modification for individual players that would be attainable through alternative means. If the leagues were to increase the use of player suspension, broad conduct reform would be likely.[212] Unlike mere fines, which at best impact solely on factor 5, player suspension affects factors 2, 3 *and* 5, for the player is prevented from playing and thus from reaping the personal gratification of competition and refinement of his play. Moreover, the player's salary for the suspended period is withheld. For professional athletes earning upwards of $1,000,000 per year, loss of pay for even a single game can supercede the league penalty ceiling.[213] The use against indi-

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210. *See, e.g.*, NATIONAL BASKETBALL ASS'N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION 1982-1983. Demonstrative of the great reliance placed on fines in the NBA, the primary penalty for such egregious fouls as fighting and the class of "flagrant" fouls, characterized by the rules as "attempting to hurt an opponent [through] violent or savage contact," is a mere fine. *See* Rule 12A, § VIII & comments § C. Suspension is available at the sole discretion of the Commissioner.

211. The penalty ceiling for the "flagrant" foul in the NBA is $10,000. Considering that the sort of behavior encompassed in this class of fouls may well be life threatening and that many players in the league earn in excess of several hundred thousand dollars per year, the utility of such a penalty is questionable.

212. *But cf.* Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771 (discussing need to protect pro athletes from deprivation of right to work because of disciplinary measures, *e.g.*, betting penalties).

213. For example, a player in the NBA earning $1,000,000 per year is paid approximately $12,900 per game. The penalty ceiling for flagrant fouls is $10,000. While it is readily granted that few players actually earn such exorbitant salaries, the point remains that suspension without play for a series of games, can prove far more financially burdensome than a mere fine.

viduals of the penalty suspension without pay combined with the assessment against teams of game penalties or fouls thus afford a scheme of behavior control substantially more comprehensive, certain and direct than an external arbitration board. And, because the process is an internal one, broad social economic efficiencies are gained by foregoing the costs of litigation.

B. A Predicate to the Proposal: Classification of Unacceptably Violent Conduct

The excessive violence addressed throughout this article can be divided into two basic types: Purposeful and Non-Purposeful.[214] The two groups into which this classification separates aggressive athletic behavior facilitates an understanding of the proposal which follows. To clarify the explanation of the points made in the following analysis, and therefore in the proposal, key concepts are often illustrated by reference to pro football.

1. Purposeful Violence

"Purposeful Violence" are those specific acts which, though not essential to skillful play, do have some utility for effective participation as traditionally conceived. This behavior takes the form of discrete, identifiable acts which are often more violent or dangerous variations of well-accepted incidents of the games. In the pro football context, while the often brutal physical contact called "blocking" is an accepted and vital portion of the game, certain forms of blocking have developed over time which are extremely dangerous. The "crackback" block and blocking below the waist on a kick both arose as useful forms of the blocking convention; both practices, however, frequently resulted in injury. Recently, therefore, the NFL chose to outlaw this type of conduct and made either type of block punishable by a game penalty.[215]

Violence of this sort, tied as it is to the successful execution of a particular play in a given game, can be effectively redressed by rule

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214. The classification of violent conduct is distinguished from the general classification of player conduct. As will be seen purposeful violence approximates proscribed conduct, as non-purposeful violence approximates actionable conduct. As will be seen under this proposal, violence is deterred where more purposeful conduct becomes proscribed and more non-purposeful conduct becomes actionable. *Compare supra* text accompanying notes 52-61 and *infra* text accompanying notes 247-48.

215. *See* NATIONAL FOOTBALL LEAGUE, OFFICIAL RULES FOR PROFESSIONAL FOOTBALL 1982, [hereinafter cited as OFFICIAL RULES], Rule 12, § 1, art. 6 (outlawing blocking below waist on kick); *id.* § 2, art. 10 (outlawing crackback block).

changes making it illegal and assessing game penalties. Within the limited span of a single play, a player's aim is almost exclusively the success of that play, factors 2-4 on the Individual Incentive Model; in fashioning his actions, the player will avoid discrete acts, like a crackback block, which are clear rule violations, especially where other similar acts, like a normal block, might possibly be effective. In this way, rule reform at the game level effects a partial catharsis of sports by rooting out one portion of the excess violence.

2. *Non-Purposeful Violence*

"Non-Purposeful Violence" is excessively aggressive behavior which bears very little relation to conventional play. While several aims can be articulated for this brutality,[216] the most basic and overriding goal is injury or intimidation.[217] It is to be stressed, in this vein, that the end of injury or intimidation means that the contact would likely be among the most savage in sports — its very purpose is to inflict pain. Unlike Purposeful Violence, this activity is of little utility as a concomitant to skilled conventional play. Moreover, because it both lacks the discrete, definable quality of its Purposeful counterpart and often seeks to affect opponents' play in the broad context of the game rather than during a given play,[218] this violence is perhaps less effectively deterred by game penalties.[219] Notably, behavior of this sort is pervasive throughout American sports, evidenced with particular ferocity in sports like hockey and football which, even in their purest forms, assume a substantial level of physical contact.[220]

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216. One major reason for this activity is fan appeal, a factor keenly present in professional hockey. *See* Note, *Violence in Professional Sports*, *supra* note 2, at 776. This notwithstanding, the aim of fan appeal is probably an explanation for why the behavior is permitted by the management, rather than explanatory of the aims of the athletes. To the extent management feeds this trend, an argument can indeed be made for the need to deter such tendencies by fines for teams as well as players in appropriate instances. *Cf.* Comment, *supra* note 33 (discussing the application of respondeat superior doctrine in sports context).

217. *See supra* note 127 (discussing intimidation element inherent in play of defensive backs in football).

218. *See id.* (solid hit by a defensive back on one play is designed to make receivers hesitant to reach for difficult catches on a later play, where to do so it leaves the receiver open for another blow).

219. *See supra* notes 52-53 and accompanying text (game penalties are most effective when the aim of a player's activity is success on a discrete play, instance, or period of time in a contest).

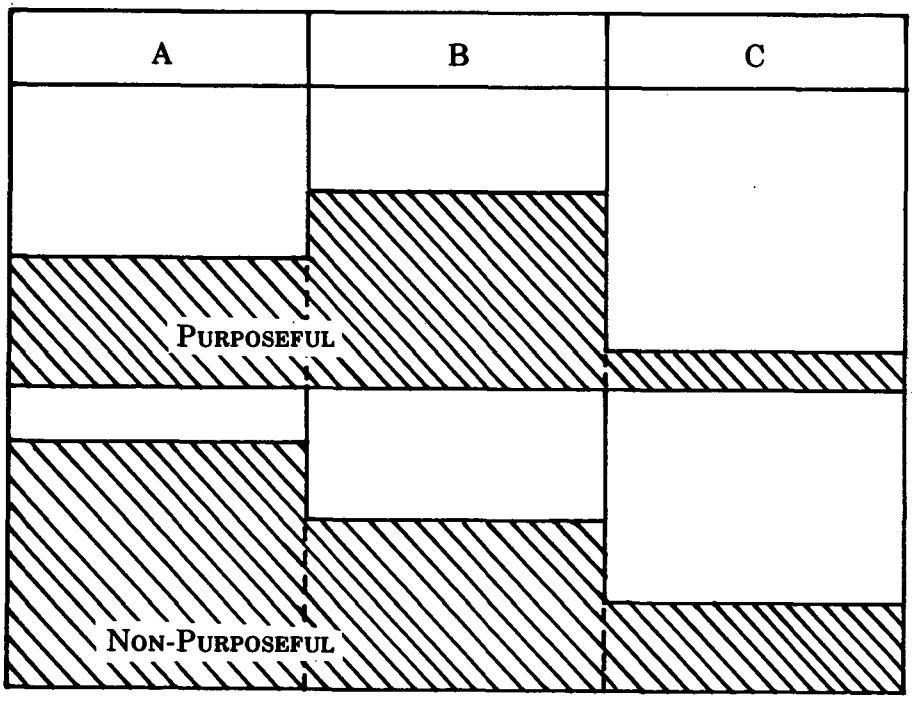
220. Intimidation is not limited to the crushing hits of football defensive backs, noted above. In baseball, pitchers frequently throw "brush back" pitches to particularly dangerous

3. The Player Conduct Model and Violence Associated With Purposeful and Non-Purposeful Conduct

Purposeful/Non-Purposeful Violence is plotted onto the Player Conduct Model below prior to implementation of the proposed rule reform measures. Effective analysis of the graph requires focused examination of each of its subsections. With respect to Purposeful Violence, the upper half of the graph, the portion of Purposeful Violence lying in the A-area represents that Purposeful behavior in the aggregate which is currently permitted. Theoretically, this area could be reduced by additional safety measures.

GRAPH 1

PLAYER CONDUCT MODEL



PRE-PROPOSAL—ANALYSIS OF EXISTING RULES

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hitters; normally, the aim of this is solely to intimidate and not actually to hit the batter. Regardless, a baseball thrown at speeds up to and exceeding 100 miles per hour can easily maim or kill. And, in basketball, generally perceived to be a relatively contact-free game, the vigorous contact has driven some basketball players like Kareem Abdul-Jabbar to don protective eye glasses.

The B-area describes the converse of the A-area: the Purposeful behavior lying within B is that conduct which has been proscribed by rules of play. Finally, within the C-area, the marginal element of Purposeful behavior represents acts which directly contravene express safety measures. Because Purposeful Violence is, by definition, a usage of the game, one would surmise that such behavior would be covered by the consent defense and thus be non-actionable. However, Restatement (Second) of Torts § 50 comment b[221] states a narrow exception to the consent defense for safety measures, thus making only these actionable. Notably, the precise delineation of each of these areas will turn on the degree of effort expended by a given sport to outlaw Purposeful Violence.

With respect to Non-Purposeful Violence, the lower half of the graph, the portion of that violence lying in the shaded A-area represents behavior of that type which is currently deemed acceptable conduct. The B-area indicates that conduct presently proscribed by game rules. It should be emphasized that while a substantial portion of Non-Purposeful Violence is covered by the existing rules, the effectiveness of those sanctions, admittedly not reflected in these graphs, is generally de minimus. Indeed, as revealed in the C-area the amount of the proscribed conduct which is actionable is notably scanty.

C. The Proposal — Rule Reform and the Federal Professional Sports Violence Commission

To purify professional sports of the taint of excessive violence, it is necessary to apply the optimal sanctions in a sufficiently focused manner to redress the two particular classes of violence discussed above. The following proposal requires a bi-level approach:

> Level 1: continuous review and revision of rules of play to redress Purposeful Violence at the game level;
> Level 2: the establishment of:
>
> (a) rules absolutely outlawing Non-Purposeful Violence;
> (b) comprehensive penalties in the form of suspension without pay for violation of these rules; and
> (c) an effective and truly functional review mechanism by which each league will regularly review game films to determine appropriate instances to assess these penalties.

This article urges the adoption of comprehensive legislation to deal specifically, for the first time, with rules of play reform in pro-

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221. RESTATEMENT (SECOND) OF TORTS § 50, comment b (1965).

fessional sports. The goals of such legislation are to reduce current levels of violence and injury. Accordingly, the proposal addresses the classes of violent conduct discussed above and the nature of rule reform measures which will serve to reduce violent acts associated with both Purposeful and Non-Purposeful conduct.

1. Rule Reform in the Context of Purposeful Conduct

Rules which regulate violent conduct associated with otherwise purposeful, high-utility play are currently in effect to some degree in the major sports. Rule reform, to be effective, must both expand the range of conduct to be governed by such rules and strengthen the impact of those rules presently in place.

An example from current rules which addresses the likelihood of violent injury associated with otherwise purposeful conduct is found in Rule 12, section 2, article 10 of the Official Rules for Professional Football 1982, dealing with the crackback block:

> At the snap, an offensive player who is aligned in a position more than two yards laterally outside of an offensive tackle or a player who is in a backfield position and subsequently takes a position more than two yards outside a tackle, may not clip an opponent anywhere, nor may he contact an opponent below the waist if the blocker is moving in toward the position of the ball either at the snap or after it is made and the contact occurs within an area five yards on either side of the line of scrimmage.[222]

Similarly, the general rules governing blocking exemplify current rules which in regulating purposeful conduct also regulate injuries and violence:

> (1) Run Blocking is an aggressive action by a blocker to obstruct an opponent from the ball carrier.
> (2) During a legal block, contact can be made with the head, shoulders, hands, and/or outer surface of the forearm, or any other part of the body. Hands, with extended arms, cannot be used to contact an opponent either inside or outside the opponent's frame (or his frame).
> (3) Blocker cannot use his hands, arms, or legs to grasp, trip, hang onto, or encircle an opponent to gain an advantage.
> (4) As the play develops, a blocker is permitted to work for and maintain position of an opponent as long as he does not push from behind or clip (*outside legal clip zone*). A blocker lined up more than 2 yards outside the tackle is subject, also, to the crackback rule.[223]

Both of the above rules concern a form of hitting and both place

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222. OFFICIAL RULES, *supra* note 215, at Rule 12, § 2, art. 10. This block known as the illegal crackback block carries a penalty of fifteen yards.

223. *Id.* Rule 3, § 4 (emphasis in original).

a limit on the character of the "aggressive play" that will accompany a legal block.[224]

a. Rule Expansion

Legislation to control violence through rule reform must call for a measurable expansion of the playing conduct to which rules may be applied. In short, there must be an across-the-board increase in the rules which govern player contacts. These rules must articulate with specificity the conduct to be proscribed. Further, they must be geared to the prevention of injuries identified by a compilation and interpretation of injury statistics that can be mandated by the legislation itself.

A notorious example of injury creating conduct in professional football involves those blocks and tackles undertaken when a player's helmet is brought into alignment with his body to create a veritable battering ram on contact. Injuries resulting from the crushing impact of such blows are matched, in turn, by the head,

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224. An example of purposeful conduct whose regulation also reduces injury creating violent conduct is clipping which is regulated by Rule 3, § 6: "Clipping is throwing the body across the back of the leg of an opponent or charging or falling back into the back of an opponent below the waist after approaching him from behind, provided the opponent is not a *runner* or it is not *close line play*." *Id.* (emphasis in original). This section must be read with Rule 12, § 2, art. 9: "There shall be no clipping from behind below the waist . . . This does not apply to close line play or a runner." *Id.*

Other examples include the limitations placed on the use of hands, arms, and body in Rule 12, § 1:

> Article 1 No offensive player may:
>
> (a) assist the runner except by individually blocking opponents for him.
>
> (b) use interlocking interference. Interlocked interference means the grasping of one another by encircling the body to any degree with the hands or arms; or
>
> (c) push the runner or lift him to his feet.
>
> Article 2 A runner may ward off opponents with his hands and arms, but no other offensive player may use them to obstruct an opponent, by grasping with hands or using them to push, or encircling with arm in any degree any part of body, during a block. . . .
>
> Article 3 No player on offense may push or throw his body against a teammate either:
>
> (a) in such a way as to cause him to assist runner, or
>
> (b) to aid him in an attempt to obstruct an opponent or to recover a loose ball, or
>
> (c) to trip an opponent, or
>
> (d) in charging, falling, or using hands on the body into the back from behind above the waist of an opponent.

Id. See also, Rule 12, § 1, art. 4 (legal, illegal contact); *id* § 1, art. 5 (legal and illegal block); *id.* § 1, art. 6 (blocking below waist on kick); *id.* § 2, art. 1 Personal Fouls (striking, kicking, or kneeing); *id.* § 2, art. 2-3 (illegal, legal contact); *id.* § 2, art. 4 (striking); *id.* § 2, art. 5 (grasping face mask); *id.* § 2, art. 6 (running into kicker); *id.* § 2, art. 7 (piling on); *id.* § 2, art. 11 (roughing passes).

neck, and spinal injuries incurred by those who hit in such a manner.[225] These injuries are multiplied when this conduct is undertaken by younger athletes who lack the massive neck and shoulder strength to sustain the force of such impact.[226]

Accordingly, expanded rules could address the purposeful conduct of blocking and tackling and the associated violence created by the use of the helmet as a weapon. John Underwood first called for the prohibition of all *deliberate* helmet hits.[227] Expanded rule coverage could insure that "if the helmet makes initial contact in blocking or tackling," the player would be penalized.[228] Underwood has suggested other rule changes, many of which are associated with purposeful, high-utility play, and which could be articulated after enabling legislation mandated an expansion of current rule coverage; they include the following:

2. Outlaw blocking below the waist on all downfield plays, or outside the

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225. By 1978, helmet manufacturers in the United States faced lawsuits totalling close to $150 million. Sustained litigation is regarded as the downfall of several manufacturers. J. UNDERWOOD, *supra* note 3, at 101-102.

226. Particularly among amateur players, the shiny helmet has come to represent a symbol of power and invincibility in American football. Underwood offers the following apt commentary:

> Today, plastered with decals like the fuselage of a World War II fighter plane, it is a stylish-looking engineering marvel in two parts: a three-pound-plus artillery piece of polycarbonate, styrene, and leather, honeycombed with pods of rubber, water, antifreeze, or foam, and costing up to $100. A player could stand on it. He could grow tomatoes in it and it wouldn't leak. If he wanted to, he could drop it off a tall building and fracture the skulls of passersby.

Id. at 103.

Dr. Donald Cooper, medical consultant of the NCAA Rules Committee describes the helmet as "the damnest, meanest tool on the face of the earth." And Underwood considers the helmet " — a focal point of coaches' intransigence in teaching dangerous techniques; — the piece of equipment with which players are most likely to do damage (to themselves and their opponents) — and cause 80 percent of the games' fatalities." *Id.* at 100.

227. *Id.* at 178. In the days of leather, maskless helmets "you had to slip blows like a boxer slips punches," said Dave Nelson of the NCAA Rules Committee. "You blocked with your shoulder, you tackled with your shoulder. You didn't put your head in places they do now." *Id.* at 103.

228. *Id.* at 178. It is likely that some inadvertent helmet hits would be inevitable. The rules currently in effect include prohibitions and sanctions which distinguish conduct which might be deliberate from that which is inadvertent. The "face-mask" rule found in Rule 12, § 2, art. 5, for example, distinguishes between tackles where the grasping of the mask is incidental and where it is deliberate:

> No player shall grasp the face mask of an opponent.
> Penalty: Incidental grasping of the mask — five yards. Not a personal foul (if by the defense there is no automatic first down). Twisting, turning, or pulling the mask — 15 yards. A personal foul. The player must be disqualified if the action is judged by the official(s) to be of a vicious or flagrant nature.

OFFICIAL RULES, *supra* note 215, at 78.

"legal clipping" zone. Ban the "chop block" and its relatives at the line of scrimmage.

. . . .

4. Institute a "grab" rule for defensive players tackling quarterbacks in the act of passing, in which only the arms and hands would be used if "momentum" has caused the tackler to hit the quarterback after he passes. If this proves unworkable, give the quarterback the same protection the punter is given.

5. Institute a no-hit rule on receivers (until they catch the ball) and on tailbacks in the option play. An offensive player without the ball should not be fair game.

6. When it is evident that quarterbacks are being hit on certain types of plays simply as a form of intimidation, warn the coach of the team responsible. If the practice persists, call personal fouls.

. . . .

8. Outlaw all forms of "clubbing" or forearm blows on ball carriers and receivers; outlaw all lead tackles save in interior line play.[229]

b. Rule Strengthening

Part and parcel of meaningful rule reform is the bolstering of existent rules that, by lax enforcement or weak sanctions, have become ineffectual as deterrents to violent conduct. Players must be informed that their violent conduct will draw a penalty that will create competitive disadvantages for themselves and for their teams.

An example of existing rule penalties, some of which were referred to in the foregoing section, include the following:

Rule 12, Section 2, Article 10 (Crackback block) — loss of 15 yards.[230]
Rule 12, Section 1, Articles 1-3 (Use of hands, arms, or body) — for holding, illegal use of hands, arms or body of offense: loss of 10 yards.[231]
Rule 12, Section 2, Article 9 (Clipping) — loss of 15 yards.[232]

Many penalties provide for disqualification when the violation of specific rules are flagrant.

Any effort at rule reform must increase the penalties to be alotted under existing rules and under those rules enacted as a result of expanded coverage. Underwood suggested that penalties be increased for "flagrant fouls and unsportsmanlike acts to twenty yards (minimum) or thirty yards."[233] Penalties under rules which involve a safety component or whose violation is likely to lead to

229. J. UNDERWOOD, *supra* note 3, at 178-79.
230. OFFICIAL RULES, *supra* note 215, at 80.
231. *Id.* at 75.
232. *Id.* at 79.
233. J. UNDERWOOD, *supra* note 3, at 179.

injuries should provide officials with discretion to impose 'greater yardage' penalties and disqualification where appropriate.

c. Enhanced Enforcement

Finally, to be effective rule reform must be accompanied by specific measures that will assure that greater efforts will be made to enforce the broader range of existing rules. The instructions to officials will focus on increased vigilance and particular attention to contacts which yield high rates of injury.

Underwood, again, has suggested examples:

> 3. Instruct officials to enforce more stringently the rulings on late, redundant, or unnecessary hits, be they on ballcarriers, receivers, or quarterbacks. The criterion at its most rudimentary (sic) would be to make tacklers responsible for knowing when a player is stopped, helpless, or already going down.
>
> . . . .
>
> 4. Crack-down on all "momentum" tackles involving out-of-bounds plays and forward progress. A player on offense knows where the boundary lines are; the defensive players should, too.[234]

d. Overview

Legislation would be effective which called for the mandatory expansion and strengthening of existing rules as per the specific recommendations of a joint committee of Federal Sports Commission members and league officials. Compilation of injury statistics, and a "central registry" of injuries should be dictated by the terms of the legislation.[235] In addition, periodic review of increased enforcement procedures should be required by the legislation. The general nature of the legislation would assure its application to all sports and facilitate its specific tailoring to each sport by directing that specific measures be drafted and adopted by the commission members and league officials working in earnest at implementing the legislative goals.

2. Rule Reform in the Context of Non-Purposeful Conduct

The second level of rule reform advanced by the proposal calls upon all professional sports leagues to establish strict new rules outlawing acts of violence executed with the intent to intimidate or injure. The penalties associated with these new rules would be

234. *Id.* at 178-79.

235. *See, e.g., id.* at 179.

comprehensive in nature: suspension without pay, implicating factors 2-5. Unlike the level 1 on-the-field conduct controls, however, level 2 reforms would be assessed primarily after post hoc review of game films by officials specially designated by the several leagues. The aim of purging pro sports of all Non-Purposeful Violence requires the assessment of penalties for *all* incidents of such behavior, regardless of whether the game officials notice the infraction.

a. Existing (Roughness) Rule Expansion

The new rules and penalty proposed in level 2 would not yield a dual standard of conduct to which athletes would have to abide; the penalty would constitute off-the-field enforcement of rules proscribing flagrant fouls or unnecessary roughness which currently exist in all sports.[236] Thus, the rule reform of level 2 would include expansion of the existing violence delimiting rules — flagrant foul and roughness — to include hits made with the intent to injure or intimidate.

For example, the existing "Unnecessary Roughness" rule in the National Football League states:

> There shall be no unnecessary roughness. This shall include, *but will not be limited to:*
>
> . . . .
>
> (e) running or diving into, or throwing the body against or on a player obviously out of the play, before or after the ball is dead;
>
> . . . .
>
> (h) any player who uses the crown or top of his helmet against a passer, a receiver in the act of catching a pass, or a runner who is in the grasp of a tackler.[237]

The proposed rules outlawing violence to intimidate or injure would effectively extrapolate from these rules to institute, among other things, a no hit rule on receivers (until they touch the ball) and on running backs on the option play.[238] And, a player would be penalized under the new rules if, in the act of hitting an opponent, the player intentionally uses force exceeding that necessary to achieve his task. Again, the determination of intent would devolve to the post hoc league oversight mechanism.

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236. *See, e.g.*, OFFICIAL RULES, *supra* note 215, at Rule 12, § 2, art. 8 (unnecessary roughness), *id.* art. 6 (roughing the kicker), *id.* art. 11 (roughing the passer); NATIONAL BASKETBALL ASS'N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION 1982-83, Rule 12 comments § C (flagrant foul).

237. OFFICIAL RULES, *supra* note 215, at Rule 12, § 2, art. 8 (emphasis added).

238. *See* J. UNDERWOOD, *supra* note 3, at 178.

The necessity of the level 2 measures which extend beyond the level 1-type rules with on-the-field penalties stems from the inherent limits of on-the-field penalties. Typically, on-the-field penalties have an uncertain impact upon the game's outcome.[239] Thus, the Individual Incentive factors 2-4 are scarcely affected in any direct manner. Furthermore, financial ramifications from these penalties are presently rare, and when they do occur, usually in the form of a fine, the assessment is often de minimus.[240]

b. Existing (Roughness) Rule Strengthening

In addition to expanding the scope of roughness rules thereby promoting heightened diligence by game referees,[241] level 2 calls for new rules which would strengthen penalties thereby providing the greatest possible deterrent. As examined above,[242] the type of penalty that would be imposed by the league for incidents of violence with the intent to injure or intimidate significantly affects factors 2-5 on the Individual Incentive Model. The strength of this penalty is evinced when one considers that game penalties affect primarily factors 2-4 and that the impact on factors 2-4 may well be only marginal. The stiff level 2 penalties thus lend a broad and lasting deterrent effect to its rules.

c. Enhanced Enforcement

As a function of and complement to its strict penalty provisions, level 2 provides that determinations of rule infractions are to be made by officials, designated by each league, in a post hoc review of game films. Such an approach is necessitated by the severe nature of the penalties meted out. The harsh punishment at stake requires that the determination of culpability be made with the utmost care, arguing potently for giving deference to review of game films.[243]

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239. For example, in football a rule infraction affects only the play in which it occurs and only directly impacts on the game's outcome if the play happens to be a crucial one.

240. *See supra* note 211.

241. *Cf. Official Rules, supra* note 215, at Rule 12, § 2, art. 11, supp. note (i) (rules indicate broad policy of protecting passer and implement policy partially by "Quick Whistle" provision).

242. *See supra* notes 211-13, and accompanying text (detailing effect of suspension without pay in terms of Individual Incentive Model).

243. As the determination of culpability will turn on intent, stringent measures including official review of the best available evidence will be required. Expert review of films constitutes just such a measure.

Post hoc review of game films also works to heighten deterrence even beyond the level attained through strict penalties by allowing for absolutely comprehensive enforcement of the new level 2 rules. The on-the-field enforcement of most existing rules leaves a large margin for human error — referees can not see all the activity that occurs and thus occasionally miss rule infractions. Game film review obviates this problem and in so doing makes enforcement more certain and the strict penalties associated therewith more real.

3. The Federal Professional Sports Violence Commission

It is highly likely that federal legislation merely proclaiming a plan so unconventional as the proposal advanced in this article would, in all probability, fail for noncompliance. Success of the concept, therefore, requires federal execution of the plan through a federal overseeing body: the Federal Professional Sports Violence Commission. The purpose and function of this Commission would extend *solely* to macro-level enforcement of the legislative mandate: the Commission would police the several professional sports leagues to insure adequate progress toward the legislative mandate at both levels 1 and 2. The Commission would be without jurisdiction to invade upon any league's resolution of an individual case or incident, and would be solely concerned with the institutionalization of violence control mechanisms in professional sports. If the problem of official non-compliance proves to be an ephemeral one, the Commission would be unnecessary beyond the medium term. To this end, federal enabling legislation should include a sunset provision mandating Congressional review of the necessity of the continued existence of the Commission after five years of operation.[244]

a. Composition of the Commission

The Commission could consist of five commissioners each of whom have distinguished themselves in sport, sport-related activities, or government, and will be headed by a chief commissioner. The commissioners will be aided by a support staff of a size and composition as is necessary to aid in the effective execution of the oversight function. At a minimum, such a staff will include a legal

244. This review may well determine that the FPSVC should be preserved as a watchdog but, due to broad institutionalization of the rules mandated by the Commission's enabling legislation, need not continue in its expanded form.

staff headed by a general counsel and a staff of sports experts with extensive exposure in one or another of each of the professional sports to be affected by the legislative mandate.

b. Function of the Commission

The primary function of the Commission would be to ensure the fulfillment of the legislative mandate embodying levels 1 and 2 of the proposal. As such, the Commission would oversee the establishment of rules and penalties in an effort to control violence in every professional sports league. The Commission would also work with the several leagues to establish mechanisms for continuous review and revision of rules of play to redress Purposeful Violence at the game level. In this capacity, the National Football League has made an effort to review, develop and revise its safety rules.[245] While the Commission would be available to interested leagues as a reference tool to help develop programs which comply with the legislative mandate, such collaboration would not be mandatory. As detailed hereafter, a central aim of this proposal is to effect the broad, thorough change sought with the least possible intrusion. To this end, many of the decisions and mechanisms associated with this plan are to be implemented in a decentralized fashion with as much discretion as possible afforded to the leagues. The aim is to direct a catharsis of the American game, rather than a metamorphosis.

With respect to both levels of rule reform, the Commission's key duty would be to shepherd professional sports toward institutionalization of the mandated reforms. Though made earlier, the point must be stressed that the Commission would operate *solely* on the macro-level and would absolutely avoid involvement with affairs of an individual nature. In the interest of non-intrusiveness, league resolution of individual incidents would be considered only as it relates to the question of progress towards institutionalization of mechanisms to fulfill the legislative mandate.

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245. For example, in only the past few years, the NFL has altered its rules to: (1) provide greater protection for the quarterback, Rule 12, § 2, art. 11; outlaw the "crackback" block, *id.* at art. 10; outlaw blocking below the waist on a kick, *id.* at art. 6; outlaw contact by a defensive player of an opponent above the shoulders, except to ward him off at the line, Rule 12, § 2, art. 2; vary and expand facemasking rules, Rule 12, § 2, art. 5.

4. Implementation and Enforcement

a. Federal Legislation

The only way to assure effective implementation and conscientious administration of the two level plan is through a federally imposed legislative mandate. While it is indeed true that some sports are progressing in the area of level 1 on-the-field reforms[246] many have done little to regularize review of their safety measures. Moreover, in the realm of Non-Purposeful violence, the brutality persists, becoming increasingly entrenched, and has yet to be systematically addressed. As has been explained, league directed controls are necessary to deal effectively with the issues of professional sports violence without infringing to an unacceptable degree on the character of the American game.[247] As the leagues are businesses national in scope, the most practical manner of affecting the desired action by the leagues appears to be federal legislation.

D. Highlights of the Proposal

1. The Confluence of the Models

To illustrate the effect of the Proposal, a second visit to the graph of Purposeful/Non-Purposeful Violence onto the Player Conduct Model indicates that the substantially heightened constraints cover a far greater portion of the excessively violent behavior and, moreover, leave little or none of this behavior unproscribed. Continuing rule reform efforts through level 1 of the proposal effectively proscribe a gradually increasing portion of Purposeful Violence. The portion of this violence lying in the C-area grows less quickly due primarily to the continued existence of the pragmatic restraints on civil actions, outlined in section III. B. In the area of Non-Purposeful behavior, a dramatic increase in the amount of such conduct which is proscribed — B-area — and a corresponding decrease in that conduct remaining permissible — A-area — reflects the comprehensive rules and enforcement mechanisms of level 2. The significant, though less striking increase in the C-area reflects the fact that, with the greater amount of proscribed conduct and the clear cut policy opposing such behavior, the consent defense will be of limited use and the restraints on player civil actions will be decreased somewhat. Nonetheless, the

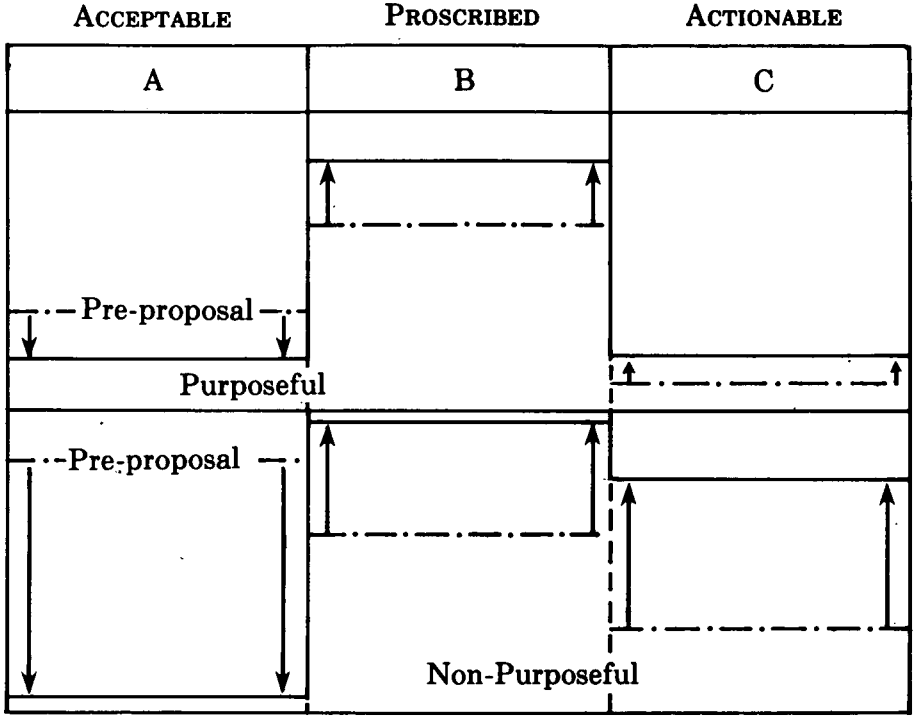
246. *See, e.g., id.*

247. *See supra* text accompanying notes 8-9 and *infra* text accompanying note 248 (discussing the issue of intrusiveness in the context of professional sports conduct reform).

less substantial gains in this area are largely due to the persistence, be it in a less virulent form, of many of the pragmatic forces which constrain tort suits in the professional sports context.

GRAPH 2

PLAYER CONDUCT MODEL



POST-PROPOSAL—ANALYSIS OF RULE CHANGES

As noted earlier, Graphs 1 and 2 fail to account for the deterrent effectiveness of the rule schemes they analyze. It is in this regard that we concentrate upon the Individual Incentive Model analysis of penalties. Rules like those encompassed in the Purposeful conduct reform measures of level 1 typically affect Individual Incentive Factors 2-4 and are focused upon limited portions of a single game. The Individual Incentive Model indicates that the penalties imposed under the Non-Purposeful rule reform — level 2 — are particularly effective because they incorporate the factors motivating individual conduct in a comprehensive and substantial manner.

Level 2 reforms may well be challenged as difficult to administer. The argument would run that, particularly with respect to sports incorporating physical contact, league officials could not possibly

determine which one of many dozen violent acts was executed with an intent to intimidate. It would be added that the severe penalty at stake would only worsen the task by placing a great cost on an incorrect decision; the utility of the penalty would thus be diminished by officials' reluctance to use it.

The determination of intent to intimidate differs little from judicial determinations of intent in a civil or criminal setting. Just as members of society *writ large* must abide by such determinations of its governing body, so would pro athletes be required to abide by similar decisions of the governors of its occupational safety. Moreover, league officials, unlike judges, would possess excellent evidence (game films) and finely honed eyes for acceptable, conventional behavior, making conclusions as to subjective intent far more precise and fair. Many such determinations are made in the existing course of play in areas such as unnecessary roughness and palpably unfair acts.

2. *Enforcement — Injunctive Relief*

In the event of professional sports leagues' non-compliance with the legislative mandate, the Commission would engage its staff to compile documentation of the breach and, with Justice Department aid where required, institute action in federal court to seek injunctive relief. Injunctions would be enforced against the disobedient league's commissioner, the league's central governing body and its several teams.[248] The availability of injunctive relief and

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248. A possible stumbling block for federal oversight of the several professional sports leagues lies in the international nature of some of those leagues, especially hockey (the NHL has eight Canadian teams) and Major League Baseball (there are two Canadian teams in the American League and one in the National League). There is no assurance that Canadian teams would abide by measures dictated by the U.S. Congress.

There exist at least two quite feasible solutions to this problem. One would arise out of principles of comity, the hallmark of international law. In an effort to help facilitate a goal sought by the United States and Canada alike, limiting sports violence, it is possible that international channels can be employed to prompt the Canadian authorities to promulgate a law substantially identical to the American one — delegating administrative control to the United States Professional Sports Violence Commission. If the United States offers to shoulder the complete costs of this body, it is possible that the Canadians would welcome the effort; they would receive the benefits of the program —more civilized, safe professional sports — without the financial costs of administration.

A second possible solution to the international issue would arise from the centralized structure of the proposal: because the leagues institute the violence control mechanisms, no problem of international law would arise once league compliance was attained. The single difficulty with this approach results from the fact that the league offices of the NHL are based in Canada. This notwithstanding, the fact that the clear majority of NHL teams are American argues persuasively for the likelihood of obedience of the NHL officials.

the possibility of bringing to a halt enterprises grossing hundreds of millions of dollars annually suggests the effectiveness of enforcement mechanisms which would encourage the leagues to proceed in earnest to eliminate unnecessary violence.

3. *Intrusiveness*

A central aim of this proposal has been to eliminate extreme levels of sports violence in the most unintrusive fashion. Complicating this process is the key role violence has come to play in many sports. The decentralized mechanism for rulemaking pervading this proposal represents an effort to effect change with the least possible intrusiveness.

In practical terms, the several leagues are likely to be far less adverse to the proposed sort of quasi-self-governance than other measures which would lay the leagues entirely at the mercy of an extraneous governing body. The lack of success met by legislative efforts to curb sports violence may indeed stem largely from this factor.

VII. Conclusion

The current interest in sports violence, manifested in legislative proposals introduced in the Congress, is premised on the belief that unnecessary violence in sports continues at unacceptable levels. The Congressional interest and the steady commentary directed at the problem of sports violence suggests that diverse proposals will re-emerge and that Congress will not for long stay its hand. Those who might otherwise look reluctantly on the prospect of a governmental presence in sport must recognize the incipiency of a major crackdown on sports violence. Accordingly, cost-effective and minimally intrusive measures to control sports violence must be examined as alternatives to those which might control sports violence only at an unacceptable cost.

Strident efforts to control violence which might subject athletes to harsh judicial sanctions must be met with careful scrutiny — lest we find ourselves making a demand of the galloping horse that it swallow the bit for its grain. Rule reform provides the most direct and efficient method of conduct modification in professional sports. When the conduct expected of players is tied to the rules of play, athletes are guided by a single standard and meaningful deterrence is possible. Any system of violence control must, in any

event, concede the inevitability of violence in sports, and efforts at reform must be undertaken with this in mind.