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A Proposed Legislative Solution to the Problem of Violent Acts by Participants during Professional Sporting Events: The Sports Violence Act of 1980

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A PROPOSED LEGISLATIVE SOLUTION TO THE PROBLEM OF VIOLENT ACTS BY PARTICIPANTS DURING PROFESSIONAL SPORTING EVENTS: THE SPORTS VIOLENCE ACT OF 1980.[1]

Over the past decade, the law's emergence into the professional sports arena has been increasing. Traditional criminal assault and battery charges have been levied against professional athletes for injuring other participants. Professional players have also been allowed to recover under tort law for injuries incurred as a result of the intentional and reckless conduct of their fellow players. Despite this increase in judicial activity, however, standards of conduct for professional sports participants are still not well defined and enforcement is haphazard and uneven. To alleviate these problems and also to satisfy the perceived increase in societal consciousness towards violent acts in general, Rep. Ronald M. Mottl of Ohio proposed H.R. 7903, The Sports Violence Act of 1980.[2]

The purpose of the Act is to "deter and punish, through criminal penalties, the episodes of excessive violence that are increasingly characterizing professional sports."[3] The bill would make it a federal crime for a player in a professional sporting event to knowingly use excessive physical force against one of his fellow participants.[4] Excessive physical force is defined generally as force which has no reasonable relationship to the competitive goals of the sport and which is not a foreseeable hazard of the athlete's involvment in the sport.[5] The maximum penalty for violating the statute would be a $5,000 fine and one year imprisonment.[6]

This Comment will first examine the various mechanisms that have been used to deal with acts of professional sports violence, namely internal league controls, tort law and state criminal assault and battery statutes. After an analysis of the advantages and disadvantages of these existing approaches, the Act will be evaluated to determine if its approach offers a substantial improvement over those methods of control

1. H.R. 7903, 96th Cong., 2nd Sess., 126 CONG. REC. E3711-12 (daily ed. July 31, 1980).
2. *See* 126 Cong. Rec. E3711-12 (daily ed. July 31, 1980).
3. 126 CONG. REC. E3711 (daily ed. July 31, 1980).
4. *Id.*
5. *Id.*
6. *Id.*

already available. It will be seen that although current enforcement procedures may be inadequate in most cases, the Act fails to offer any solutions to the problems suffered by these existing methods of control. Arguably, the Act even presents some new interpretative problems not presently encountered with existing approaches.

I. METHODS CURRENTLY EMPLOYED TO DEAL WITH EXCESSIVELY VIOLENT ACTS DURING PROFESSIONAL SPORTING EVENTS

A. Internal Controls

Fines and suspensions levied by the respective professional sports leagues have been the traditional mechanism for dealing with incidents of sports violence. The rules of each league provide a number of specific sanctions against overly violent acts.[7] In addition, each league

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7. Specific League Sanctions by Sport

a. Hockey

Under the rules of the National Hockey League, there are four penalties available for unnecessary acts of violence: (1) a two minute minor penalty; (2) a five minute major penalty; (3) a game misconduct penalty; and (4) a match penalty.

A two minute minor penalty is available for causing violent impact with the boards, high sticking, unnecessary roughness and unsportsmanlike conduct. OFFICIAL RULES OF THE NATIONAL HOCKEY LEAGUE, Rules 27(a), 45(a), 58(a), 84 and 42(n) (NHL Publications 1981). Under a two minute minor penalty, the player is simply removed from the game for two minutes, with no substitution allowed.

A five minute major penalty can be given for butt ending an opponent with a stick, or attempting to spear or actually spearing an opponent with a stick. *Id.* at rules 48(b) and 78(a). When a five minute major penalty is given, the player is ruled off the ice for five minutes and there is an automatic $50.00 fine if the foul causes injury to the face or head of an opponent by means of a stick. *Id.* at rule 28(a). There is also an automatic game suspension plus a $100.00 fine for three major penalties in the same game. *Id.* at rule 28(c).

A game misconduct penalty is also available for any of the above listed offenses, if the violation is committed in an exceptionally violent manner. When a game misconduct penalty is given, the player is removed from the game, fined $100.00 and the case is reported to the President of the league for investigation to see if any further disciplinary action is warranted. *Id.* at rule 29(c). After three game misconducts in one season, a player is automatically suspended for one game and his team fined $1000.00. *Id.* at rule 29(f).

A match penalty is available for deliberate attempts to injure and actual deliberate injury of opponents. *Id.* at rules 29(f), 30(a) and 44(a). The player is removed from the game, there is an automatic $200.00 fine and the case is referred to the President of the league for investigation to see if any further fines or suspensions are warranted. *Id.* at rule 30(a).

b. Football

In professional football, there are three major penalties available to officials to control excessive violence: unsportsmanlike conduct, roughing the passer and unnecessary roughness. OFFICIAL RULES FOR PROFESSIONAL FOOTBALL Rule 12, §2, Articles 4-11 and 14 (National Football League 1981). In addition, the league Commissioner is also empowered to make subsequent investigations of any incident and assess

has a general catch-all provision, the "best interests of the game clause", which grants the league President and/or Commissioner vast powers to deal with a wide variety of problems.[8]

Most professional sports executives feel that punishment meted out by the various sports leagues should be the sole mechanism for controlling overly violent acts in the sports arena.[9] Several arguments have been advanced in support of this position. First, sports administrators feel that they are experts in determining what conduct is unreasonable during the heat of the game, because of their constant involvment with

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any fines and suspensions he deems necessary. Constitution and By-Laws of the National Football League art. VIII, §8.13 (1980).

c. Basketball

The Commissioner of the National Basketball Association is vested with broad powers to impose severe penalties against any players who engage in violent conduct. Any player who is guilty of punching or fighting during an NBA game may, in addition to being automatically ejected from the game, be subject to a suspension and/or fine of up to $10,000 at the discretion of the Commissioner. *Official Rules of the National Basketball Association* 1980-81 Rule 12(A), Section VII, and Rule 12(B), Section VII published in 1980 NBA GUIDE (The Sporting News 1980).

d. Baseball

In baseball, the instance which most often causes problems is when a pitcher intentionally throws at a batter (a "beanball"). If within the judgment of the umpire, a pitch is intentionally thrown at a batter, the umpire shall warn the pitcher and his manager that another such pitch will mean the immediate expulsion of the pitcher. OFFICIAL RULES OF MAJOR LEAGUE BASEBALL, Rule 8.02(d) (The Sporting News 1981). At the same time, the umpire shall warn the opposing manager that such an act by his pitcher shall result in that pitcher's expulsion from the game. *Id.*

8. In addition to each league's specific penalties for violent conduct, all professional sports leagues have clauses similar to that of the NBA: "The player agrees (d) . . . to always conduct himself on and off the court according to the highest standards of honesty, morality, fair play and sportsmanship; and (e) not to do anything which is detrimental to the best interests of the Club or Association. NBA Uniform Player Contract, Clause 5 (1981). *See also* NFL CONSTITUTION art.VIII, § 8.13(D) (1980); NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, UNIFORM PLAYER'S CONTRACT, 3(a) (1980); NHL BY-LAWS §17(3); R. HORROW, SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 66-67 (1980) [hereinafter cited as HORROW].

9. *See The Sports Violence Act of 1980: Hearings on H.R. 7903 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 96th Cong., 2nd Sess. (1980) (statement by John A. Ziegler Jr., President National Hockey League); *The Sports Violence Act of 1980: Hearings on H.R. 7903 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 96th Cong., 2d Sess. (1980) (statement by Bowie K. Kuhn, Commissioner of Major League Baseball); *The Sports Violence Act of 1980: Hearings on H.R. 7903 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 96th Cong., 2nd Sess. (1980) (statement by Philip A. Woosnam, Commissioner of North American Soccer League); *The Sports Violence Act of 1980: Hearings on H.R. 7903 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 96th Cong., 2nd Sess. (1980) (statement by Lawrence F. O'Brien, Commissioner of the National Basketball Association).

the game and the players.[10] They argue that they should be allowed to use this expertise to determine which acts are unnecessarily violent and the appropriate punishment for such acts.[11] Second, proponents of internal controls contend that internal controls promote a policy of consistent enforcement against violent acts in that league rules are the same regardless of where the game is played.[12] Thus a varying standard of player conduct for each game because of differing state law would be avoided.[13] Finally, those in favor of exclusive internal controls argue that most proscribed acts that occur during a professional sporting event do not require more than a simple penalty exacted by a game official.[14] They argue that in those rare instances where a more severe sanction is warranted, penalties, fines and suspensions levied by the respective league would be quicker and more certain punishment than any provided by the external court system.[15]

Those opposed to allowing the sport leagues to police their own incidents of violent conduct argue that the legislature, not some private organization, decides what conduct shall be prohibited.[16] One pair of commentators has suggested that allowing the governing body of a particular sport to determine sanctions for acts of sports violence would be "tantamount to granting the board of directors of General Motors jurisdiction over the determination of guilt or innocence and the appropriate punishment for one of their employees who, while on the job, killed his foreman."[17] A second argument against internal controls is that the game actually profits from acts of violence in that some observers feel many people attend sporting events solely to watch any fights that may occur.[18] These opponents of internal controls believe that sports management will never take steps to curtail acts of

10. *See* note 9 *supra*. *See also* Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 784 (1975).

11. *See* Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 784 (1975).

12. *See* Note, *Torts in Sports-Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764, 791 (1980). *See also* text accompanying note 63 *infra*.

13. *See* note 12 *supra*.

14. HORROW, *supra* note 8, at 137; Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 786 (1975).

15. Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 175 (1976).

16. *See* Flakne & Caplan, *Sports Violence and the Prosecution*, TRIAL, Jan. 1977, at 33 [hereinafter cited as Flakne & Caplan].

17. *Id.* at 33-34.

18. HORROW, *supra* note 8, at 41; W. HECHTER, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425, 432 (1976); Note, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 785 (1975).

violence because such measures might reduce attendance, which would result in a corresponding reduction in profit.[19] Finally, many of those opposed to the internal control system have contended that the penalties imposed by the leagues are simply not severe enough to successfully deter future violent conduct.[20] They argue that stronger controls administered by an external agency are needed to curb such excessively violent acts.[21]

B. Tort Law

In applying tort law to sports violence actions, courts have recognized the theories of tortious assault and battery,[22] reckless misconduct,[23] and ordinary negligence,[24] to hold a participant liable for injuries he has inflicted upon an opposing player. Further, team owners have been held vicariously liable for the violent conduct of their players under the theories of respondeat superior and negligent supervision.[25]

1. ASSAULT AND BATTERY[26]

In the context of sports, it is usually said that the athlete impliedly consents to all contacts incident to a game by his very participation in

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19. *See* note 18 *supra*.

20. HORROW, *supra* note 8, at 74; Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 786 (1975).

21. *See* note 20 *supra*.

22. Technically, there are no cases involving professional athletes where tortious assault and battery was recognized as a theory of liability. Presumably, such a theory would have been raised in the case of Hackbart v. Cincinnati Bengals, 435 F. Supp. 352, (1977), *rev'd* 601 F.2d 516 (10th Cir. 1979), *cert. denied* 444 U.S. 931 (1979), but the claim was barred by the one year Colorado statute of limitations on intentional torts. *See* notes 33-50 *infra*, and accompanying text. There are, however, some cases involving amateur athletes where tortious assault and battery was recognized as a theory of liability. *See, e.g.*, Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955); Thomas v. Barlow, 5 N.J. Misc. 764, 138 A. 208 (1927).

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

24. *Id.* There are also a number of cases on the amateur level where negligence was a theory of liability proposed by an injured player for injuries he suffered at the hands of one of his fellow players. *See, e.g.*, Bourque v. Duplechin, 331 So.2d 40 (La. Ct. of App. 1976); Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

25. *See* Tomjanovich v. California Sports Inc., No. H-78-243 (S.D. Tex. filed Aug. 17, 1979), *appeal docketed*, No. 79-3889 (5th Cir. 1979) [the case was subsequently settled before the appeal was ever heard; *see* note 53 *infra*.]

26. A defendant is liable for a battery if he acts with intent to cause a harmful or offensive contact and such contact occurs. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 38 (4th ed. 1971) [hereinafter cited as PROSSER]. He is liable for an assault if, with the same intent, the plaintiff is put in imminent apprehension of a battery. *Id.* In-

the game.[27] Thus, liability for most of the technical assaults and batteries that occur on every play in sports such as hockey and football is avoided. The problem arises in determining the scope of the actor's privilege, *i.e.* which acts are permissible as an inherent part of the game and are thus "privileged" batteries and which acts exceed the scope of the player's implied consent and are thus "unprivileged" batteries. One standard that has been suggested to determine the scope of consent is the rules of the game test.[28]

The general formulation of the rules of the game test is as follows:

> Taking part in a game manifests a willingness to submit to such bodily contact 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 its rules or usages of the game, if such rules 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.[29]

Thus under the rules of the game test, a participant in a contact sport, by the fact of his participation, would be held to have consented to those contacts which are inherent in the game itself, but would not consent to an intentional violation of a rule designed to protect his safety.

Some commentators have suggested that the rules of the game test should be the absolute definitive standard of conduct to which a player consents.[30] From the opposite perspective, one commentator states that in games with considerable contact such as football, "the consent by players to the use of moderate force is clearly valid, and the players

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tent is not limited to those consequences desired, however, but also to those which are substantially certain to follow. *Id.* at 31.

The principal defense to a claim of assault and battery is that of consent. Thus when one party manifests a willingness for certain conduct to occur, he may not later hold the actor liable for harm which befell him arising out of that conduct. *Id.* at 101-02. Consent may be express, or it may be implied from a party's conduct, from the circumstances surrounding the act, or from custom and usage associated with the act. *Id.* at 101. The actor's privilege, however, is limited to that conduct to which the other party consented, or to acts of a substantially similar nature. *Id.* at 102.

27. Nabozny v. Barnhill, 31 Ill. App. 2d 212, 334 N.E.2d 258 (1975); RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

28. HARROW, *supra* note 8, at 171; Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 157-59 (1976).

29. RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

30. Beale, *Consent in Criminal Law*, 8 HARV. L. REV. 317, 323 (1895); *See also* Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 775 n. 27 (1975); Flakne & Caplan, *supra* note 15, at 35.

are even deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game."[31] The case law in this area has been insufficient, however, for the courts to have developed a definitive interpretation.

2. NEGLIGENCE AND RECKLESS MISCONDUCT[32]

The only litigated case to date which has addressed the issue of the tort liability of a professional player for injuries he has caused an opposing player is *Hackbart v. Cincinnati Bengals.*[33] *Hackbart* arose out a 1973

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31. Williams, *Consent and Public Policy*, 1962 CRIM. L. REV. 74, 81 (1962).

32. For a cause of action to exist under negligence, there must be: (1) a duty recognized by law requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a failure on his part to conform to the standard required; (3) a reasonably close causal connection between the conduct and the resulting injury; and (4) actual loss or damage. PROSSER, *supra* note 26, at 143. The focus in negligence is not on intent but on whether a reasonable man should have appreciated the risks which his conduct presented and guarded against them. *Id.* at 145.

The usual meaning assigned to recklessness is that the actor has intentionally done an act of an unreasonable character, in disregard of a risk so obvious that he must have been aware of it and so great as to make it highly probable that harm would follow. PROSSER, *supra* note 26, at 185. Although its definition includes intent, as a practical matter the fact finder will focus on whether the defendant's conduct was such an extreme departure from ordinary care as to constitute recklessness. *Id.*

The primary defense to a negligence claim is assumption of the risk. If a party knows and appreciates the risk of certain conduct and voluntarily assents to it, he may not later complain when he is injured by that conduct. *Id.* at 440. As with consent, assumption of risk may be express or implied. Where a plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against the risk, he may then be regarded as tacitly or impliedly consenting to the negligence and agreeing to take his own chances. *Id.* With reference to sports, the view is that a participant in a game assumes the dangers inherent in the game, but he does not assume any extraordinary risks unless he knows and voluntarily assents to them. RESTATEMENT (SECOND) OF TORTS § 496C (1965).

33. 435 F.Supp. 352 (D.Colo. 1977), *rev'd.* 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979). Note that in *Tomjanovich*, (discussed *infra* at note 53 and accompanying text) the offending player was not a party to the suit. Also note that several tort actions have been brought by professional athletes for injuries caused to them by opposing players, but all have been settled before coming to trial. One such incident occurred between two professional baseball players, Juan Marichal of the San Francisco Giants and John Roseboro of the Los Angeles Dodgers. During a weekend series between the Dodgers and Giants, harsh words passed between Roseboro, the Dodger catcher, and several members of the Giants. In Sunday's game, Roseboro threw the ball back to Sandy Koufax, the Dodger pitcher, and the throw nicked Marichal, the batter, on the ear. Marichal attacked Roseboro, striking him over the head with his bat, causing him considerable injury. N.Y. Times, Aug. 24, 1965, at 20, col. 1. The National League subsequently fined Marichal $1750 and suspended him for 8 playing dates. Roseboro also filed suit against Marichal and the Giants for $110,000. N.Y.

National Football League game between the Cincinnati Bengals and the Denver Broncos. Dale Hackbart, a defensive back for the Broncos attempted to block Charles "Booby" Clark of the Bengals to set up a return of an intercepted pass.[34] After the block, Hackbart was resting on one knee in the end zone, watching the play upfield. Clark then hit him from behind with a forearm blow to the neck. No penalty was called because the game officials did not see the play.[35] The incident, however, clearly showed up in the game films. Hackbart subsequently suffered some pain but continued playing for two more weeks, after which time he was released by the Broncos. He eventually sought medical attention and his injury was diagnosed as a fractured neck.[36] Hackbart then filed suit in federal district court, naming both Clark and his employer, the Cincinnati Bengals, as defendants. His claim was based on three major theories: (1) Clark's foul was so far outside of the rules of play and accepted practices of professional football as to constitute reckless misconduct within the principles of Section 500 of the Restatement of Torts (Second);[37] (2) alternatively, his injury was at least the result of defendant's negligence;[38] and (3) the defendant Cincinnati Bengals were liable under the theory of respondeat superior for failing to instruct and control Clark.[39]

The district judge found that:

> The level of violence and frequency of emotional outbursts in NFL games are such that Dale Hackbart must have recognized and accepted

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Times, Sept. 2, 1965, at 24, col. 1. Ultimately, the case was settled out of court for $7500. N.Y. Times, Feb. 6, 1970, at 45, col. 7.

Another incident occurred between two professional hockey players, Henry Boucha of the Minnesota North Stars and Dave Forbes of the Boston Bruins. *See* notes 77-84 *infra* and accompanying text. Boucha filed a suit against Forbes, the Bruins and the National Hockey League for injuries Forbes had inflicted during a game between their respective teams in 1975. Boucha subsequently agreed to drop his suit in a secret settlement for between one and two million dollars. Nat'l L.J. Feb. 9, 1981, at 1, col. 1.

34. 435 F.Supp. at 353.

35. *Id.*

36. *Id.* at 354.

37. *Id.* RESTATEMENT (SECOND) OF TORTS § 500 (1965) reads as follows:

§ 500 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 harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

38. 435 F.Supp. at 355. Hackbart could not raise a claim for assault and battery because the Colorado one year statute of limitations for intentional torts had run. *Id.*

39. *Id.* at 355-57.

> the risk that he would be injured by such an act as that committed by Clark. . . . Therefore, even if defendant breached a duty which he owed to plaintiff, there can be no recovery because of assumption of the risk.[40]

The issue of the Bengals' liability as employers of Clark was never reached since Clark was found innocent of any wrongdoing.[41] The court stated in dicta that it was limiting its opinion to the case before it.[42] It stated that football is a dangerous occupation in which the "restraints of civilization have been left on the sidelines."[43] The court went on to say that severe problems would result if the courts undertook the allocation of fault for injuries that occurred during a professional football game, because of the non-existence of any code of conduct for NFL players.[44] It concluded that if there is to be any governmental involvment in the football industry, it should be by the legislative branch.[45]

On appeal, the Tenth Circuit Court of Appeals reversed and remanded the case of a new trial.[46] The court found that the general customs of football do not approve of the intentional punching or striking of others.[47] Therefore, Hackbart did not impliedly assume the risk of injury in this manner by his participation in the game. The appeals court also addressed the trial court's holding that the federal courts should not assume jurisdiction over cases arising out of professional football games. It stated that a federal court does not have the discretion to refuse to take jurisdition simply because the matter to be decided is difficult.[48] Therefore, it found the district court's statement on this point to be in error.[49]

Certiorari was subsequently denied by the Supreme Court.[50] Although the ordered new trial has not occured as of this date, it appears that, at least in the Tenth Circuit, a federal court cannot refuse to hear cases arising out of professional football games.

3. TORT LIABILITY OF OWNERS AND COACHES FOR THEIR PLAYERS' VIOLENT ACTS: THE THEORIES OF RESPONDEAT SUPERIOR AND NEGLIGENT SUPERVISION

In addition to holding the injuring player liable, team management

40. *Id.* at 356.
41. *Id.* at 357.
42. *Id.* at 358.
43. *Id.*
44. *Id.*
45. *Id.*
46. 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).
47. *Id.* at 521.
48. *Id.* at 522.
49. *Id.*
50. 444 U.S. 932 (1979).

can also be held liable under the theories of respondeat superior[51] and negligent supervision.[52] The only litigated case which has reached the issue of a professional team's liability for its players' violent acts is *Tomjanovich v. California Sports Inc.*[53]

The incident occurred during a National Basketball Association game in 1977 between the Houston Rockets and the Los Angeles Lakers. Rudy Tomjanovich of the Rockets rushed to break up a fight between teammate Kevin Kunnert and Kermit Washington of the Lakers. Washington hit Tomjanovich with what has been characterized as the "hardest punch in the history of mankind."[54] Tomjanovich suffered multiple fractures of the face and skull, severe lacerations around the mouth and a cerebral concussion.[55]

Tomjanovich chose to bring suit against only California Sports Inc., the owner of the Lakers. He based his claim on the theories of respondeat superior and negligent supervision.[56] His respondeat superior claim was predicated on California's statutory statement of the

51. Under the theory of respondeat superior, a master can be held liable for the torts of his servant, though the master played no part in the tort or even if he did all that he could to prevent it. PROSSER, *supra* note 26, at 458. To hold an employer liable for the torts of his employees, a plaintiff must prove two things. First, plaintiff must prove that a master-servant relationship existed between the two. RESTATEMENT (SECOND) OF AGENCY § 219 (1958). A master servant relationship exists when the employer has control or the right of control over the employee's performance of his duties. *Id.* at § 220. Factors used in determining control include the extent of control which the employer may exercise over the details of the work, whether or not the employee is engaged in a distinct occupation from that of the employer and the manner of payment (whether by the job or the hour). *Id.* Second, plaintiff must prove that the employee was acting within the scope of his employment when the injury occurred. *Id.* at § 219. To be within the scope of the employment, conduct must be of the same general nature or incidental to the conduct authorized. *Id.*

52. Under the theory of negligent supervision, an employer can be held directly liable to an injured third party for harm resulting from his employee's conduct if he is negligent or reckless: (1) in giving improper or ambiguous instructions or in failing to make proper regulations; or (2) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or (3) in supervision of the activities of the employee. *Id.* at § 213. *See also* RESTATEMENT (SECOND) OF TORTS § 317 (1965); Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT. L. REV. 717 (1977).

53. No. H-78-243 (S.D. Tex. filed Aug. 17, 1979), *appeal docketed*, no. 79-3889 (5th Cir. Dec. 1, 1979). Tomjanovich subsequently settled for an undisclosed sum before the appeal was heard. N.Y. Times, April 21, 1981, at B18, col. 6. Remember that ths issues of respondeat superior and negligent supervision were never reached in *Hackbart*. *See* text accompanying note 41 *supra*.

54. Kirkpatrick, *Shattered and Shaken*, SPORTS ILLUSTRATED, Jan. 2, 1978, at 46 (quoting Laker Assistant Coach Jack McCloskey).

55. *Id.*

56. Brief for Plaintiff at 6.

doctrine and case law.[57] His negligent supervision claim charged that the Lakers had impliedly authorized their player's conduct by failing to control him despite their knowledge that Washington had been involved in "on the court" violence several times in the past, and also by their actions in forcing Washington to participate in a nationally publicized article on "enforcers" in basketball.[58] Tomanovich also alleged that the Lakers had ratified and condoned Washington's conduct by their failure to reprimand or take any disciplinary action against their player, and by their payment of a league fine which had been levied against Washington.[59] The jury found that the defendant, California Sports Inc., was liable under all aspects of plaintiff's negligent supervision claim and awarded Tomjanovich $3,246,376.[60]

Although *Tomjanovich* is a landmark decision in the area of sports law, its usefulness as precedent for holding team management vicariously liable for their player's violent acts may be fairly limited. Since California is the only state that construes the scope of employment re-

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57. *Id.* California's statutory formulation of negligent supervision reads as follows: CAL. CIVIL CODE § 2338 (West 1969)

> Responsibility for Agent's Negligence or Omission Principal's Responsibility for Agent's Negligence or Omission
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> Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willfull omission to fulfill the obligations of the principal.

California courts have interpreted this provision very liberally, finding that "in and as a part of the transaction" to mean any act arising out of the employment. *See* Carr v. W.C. Cromwell Co., 28 Cal. 2d 652, 654, 171 P.2d 5, 7 (1946) (Traynor); Clark Equipment Co. v. Wheat, 92 Cal. App. 3d 503, 154 Cal. Rptr. 874 (1979). All other states have retained the much narrower common law "scope of the employment test," in which the employee's negligent act must have been found to have been within the scope of employment for his employer to be susceptible to vicarious liability. Note, *Respondeat Superior and Intentional Tort: A Short Discourse on How to Make Assault and Battery a Part of the Job*, 45 U. CIN. L. REV. 235, 248 (1976).

58. Brief for Plaintiff at 6. The article was PAPANEK, *The Enforcers*, SPORTS ILLUSTRATED, Oct. 31, 1977, at 43. An enforcer is a player who protects his teammates from being subjected to unnecessary physical intimidation by opposing players. *Id.*

59. Brief for Plaintiff at 6. Washington was fined $10,000 and suspended for 60 days by League Commissioner O'Brien. N.Y. Times, Dec. 14, 1977, at B19, col. 3.

60. Nat'l. L.J., Sept. 3, 1979, at 13, col. 3. The damage breakdown was as follows: $21,376 for past medical expenses, $100,000 for past physical pain, $200,000 for past mental anguish, $75,000 for future mental anguish, $150,000 for loss of earnings, $850,000 for loss of future earnings capacity, $50,000 for wife's loss of comfort and $1,500,000 in punitive damages. The total award exceeded by $600,000 the amount sought by Tomjanovich. *Id.* Tomjanovich subsequencly remitted $125,000 of the award for future medical expenses. Note, *Torts in Sports-Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764, 765 n.10 (1980).

quirement so broadly,[61] it may be that one player's violent acts against another would be considered outside of the scope of employment in every state but California. Therefore, California may be the only state where team management can be held vicariously liable. If this is so, it would seem to strengthen the argument that using tort law to control sports violence would result in inconsistent enforcement.[62]

Those who believe that tort law should be used to control sports violence have advanced several arguments in support of their position. First, tort law would be ideally suited for compensating participants injured by the unnecessarily violent conduct of their fellow players, since the purpose of tort law is to afford compensation for injuries sustained as a result of the unreasonable conduct of another.[63] Second, since the employer, who many believe is the real culprit in sports violence cases, could be held either jointly or severally liable with the assaulting player, tort law could act as an economic deterrent to future violent conduct by forcing teams to control their players' violent tendencies, or pay out tremendous sums in compensatory or punitive damages.[64] A collateral advantage would be that deterrence could be accomplished without stigmatizing a player with a criminal conviction.[65]

Those opposed to employing tort law as a control method also make several convincing arguments. First, they contend that uneven enforcement will result if tort law is used, because tort law differs from jurisdiction to jurisdiction.[66] Second, some commentators feel that sanctions for acts of sports violence should be left to the various sports leagues, because of the extreme difficulty in determining an appropriate standard of conduct for participants in professional athletics.[67] Finally, it is argued that if negligence were the standard, many players would be afraid to exert maximum effort during a game for fear of being held liable for millions of dollars in compensatory damages. This would lower the overall quality of play.[68] As with internal controls, there has been insufficient litigation in this area to allow the courts to develop a definite approach.

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61. *See* note 57 *supra*.
62. *See* text accompanying notes 10-13 *supra*.
63. PROSSER, *supra* note 26, at 6.
64. Note, *Torts in Sports-Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764, 790-92 (1980).
65. *Id.* at 790.
66. *See id.* at 791.
67. *Id.* at 791-92.
68. *See* Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 176 (1976).

C. *State Criminal Assault and Battery Statutes*

Another method that can be used to deal with acts of sports violence is to apply state criminal assault and battery law. Today, assault and battery exist as statutory crimes in all American jurisdictions and are punishable as misdemeanors.[69] Most jurisdictions have also created the crime of aggravated assault and battery which is punishable as a felony.[70] The injuring player can raise the usual defenses to an assault and battery claim, namely consent,[71] self defense[72] and provocation.[73] In addition, there exists a defense unique to sports violence actions, the "involuntary reflex" defense.[74]

69. W. LAFAVE AND A. SCOTT JR., HANDBOOK ON CRIMINAL LAW 603 (1972) [hereinafter cited as LAFAVE AND SCOTT]. Under the common law, assault and battery are two distinct crimes. *Id.* They differ from each other in that battery requires physical contact of some sort (bodily injury or offensive touching) whereas assault is committed without physical contact. *Id.*

Criminal battery consists of three basic elements: an injury or offensive touching, some wrongful conduct by the defendant that caused the injury and the requisite intent. *Id.* at 604.

The intent requirement may be satisfied if any one of three mental states exist: (1) the defendant acts with an intent to injure; (2) the defendant acts with criminal negligence but with no intent to injure; or (3) the defendant's conduct is unlawful and causes the injury, but is not sufficient to constitute criminal negligence. *Id.*

70. Such crimes as assault with intent to kill, or do great bodily injury, and assault with a deadly weapon are usually considered aggravated assaults. *Id.* at 607-08. For an assault to be aggravated, it is not enough for such a crime to merely create a high risk of great bodily harm; there must be some intent to cause the specific result required by statute. *Id.*

71. The consent defense under criminal law is much the same as it is under tort law. Some jurisdictions recognize that if a victim has consented, the defendant is not guilty of a battery. *Id.* at 408. Most jurisdictions, however, do not allow consent as a defense to criminal assault and battery. *Id.* Their rationale is that a crime is really an offense against the state, not against the individual. Therefore, consent by the individual should have no effect on the state's right to prosecute. *Id.*

72. Under self defense, one who is unlawfully attacked by another and who has no opportunity to resort to the law is justified in using a reasonable amount of force when he reasonably believes he is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger. *Id.* at 391. The amount of force one may justifiably use must be reasonably related to the harm to be avoided. *Id.* at 392. Thus one may not use deadly force if the potential risk of injury to him by another is slight. In most states, however, he need not retreat from the fray, even if he can do so safely. The majority of American jurisdictions hold that the defender need not retreat before using even deadly force upon an assailant whom he believes will do him serious bodily harm. *Id.* at 393. Self defense, however, does not cover the case where two persons willingly engage in illegal mutual combat. There, each participant may be prosecuted criminally for the assault and battery committed upon the other. *Id.*

73. In most jurisdictions, one may not be guilty of criminal battery if he was subjected to adequate provocation. *Id.* at 574. Words alone, however, or even words accompanied by a light blow are generally not considered adequate provocation. *Id.* Ordinarily, it takes a painful and violent blow with a fist or weapon. *Id.*

74. This defense was successfully used in *Forbes*. Its basis is that since athletes are

The first criminal prosecution of professional athletes for acts of sports violence arose out of a stick swinging incident between two National Hockey League players in a 1969 exhibition game played in Ottawa, Canada.[75] Since that time, there have been no further prosecutions of professional athletes in Canada, but close to 100 convictions have been secured on the amateur level.[76]

In the United States, the only litigated criminal case involving an act of sports violence is *State v. Forbes*.[77] *Forbes* arose out of a National Hockey League game on January 4, 1975 between the Minnesota North Stars and the Boston Bruins.[78] In the first period, Dave Forbes of the Bruins elbowed Henry Boucha, of the North Stars while attempting to check him and Boucha retaliated by punching Forbes.[79] Each player was assessed seven minutes in penalties.[80] When they returned to the ice, Forbes allegedly said something to Boucha and then took a swing at him with his stick hand, striking Boucha in the face with the butt end of his stick.[81] Boucha fell to the ice and Forbes jumped on him and started punching him.[82] Before the fight was broken up, Boucha had received a cut over his right eye and what was

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trained "from age four" that violence is a part of the game, such violence is the product of an instinctive reflex action. Therefore, there can be no battery since the necessary *mens rea* for a battery does not exist. *See* Flakne & Caplan, *supra* note 16, at 34; HORROW, *supra* note 8, at 201.

75. In a National Hockey League exhibition game between the Boston Bruins and the St. Louis Blues on Sept. 21, 1969, Wayne Maki of the Blues checked Ted Green of the Boston Bruins. Green then came off the boards and cuffed Maki with the back of his glove. Maki then retaliated with his stick, "coming straight overhead like a logger splitting a stump." Green sustained a serious concussion and massive hemhorraging. After two brain operations, he regained only partial sensation in his right side and never fully recovered. N.Y. Times, Sept. 23, 1969, at 54, col. 4. Green and Maki were each given match misconduct penalties (*see* note 7 *supra*), and fined $300. Both players were also charged with criminal assault under Canadian law and both were acquitted in separate prosecutions. Regina v. Green, 16 D.L.R.3d 137 (Ont. Prov. Ct. 1970); Regina v. Maki, 14 D.L.R.3d 164 (Ont. Prov. Ct. 1970). The trial judge in *Green* found that Green was merely acting in self defense and also found that Maki had impliedly consented to being struck by Green because such conduct was commonplace in hockey. 16 D.L.R.3d at 141-42. The trial judge in *Maki* found that Green initiated the stick fight and Maki simply retaliated in self defense. 14 D.L.R.3d at 165-66.

76. HORROW, *supra* note 8, at 161.

77. No. 63280 (Minn. Dist. Ct. dismissed Aug. 12, 1975).

78. Comment, *Violence in Professional Sports*, 1975 WIS L. REV. 771 (1975).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

later diagnosed as a fractured right eye socket.[83] He also suffered from double vision.[84]

Forbes was prosecuted under Minnesota law for aggravated assault.[85] Forbes countered with the involuntary reflex defense.[86] The result was a hung jury.[87] The state decided against seeking a reindictment.[88]

Several reasons have been asserted for this inability to obtain successful prosecutions in this area. First, there is the problem of proving intent. Though not an issue in *Forbes*,[89] intent is "not only the most decisive element [in sports violence cases], but is also the most difficult to prove."[90] There are three major reasons for this. First, since subjective mental states are evaluated by objective evidence, it is difficult to prove the requisite intent, since impermissible conduct resembles permissible conduct in many cases.[91] Second, one commentator has stated that courts have adopted a presumption that people participate in athletics out of love for the game and not to intentionally injure others.[92] Such a presumption would make it very difficult to show beyond a reasonable doubt that the assaulting athlete possessed a malicious desire to harm an opponent.[93] Third, since physical intimidation

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83. Mulvoy, *Hockey is Courting Disaster*, SPORTS ILLUSTRATED, Jan. 27, 1975, at 17.

84. *Id.*

85. *See* Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 772 n.9 (1975). Forbes was prosecuted under MINN. STAT. ANNOT. § 609.225. Note that this section was subsequently repealed. *See* MINN. STAT. ANNOT., Cumulative Annual Pocket Part to Volume 40 for 1981, at 100.

> Subdivision 1 Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 10 years or to payment of a fine of not more than $10,000 or both.
>
> Subdivision 2 Whoever assaults another with a dangerous weapon but without intent to inflict great bodily harm may be sentenced to imprisonment for not more than 5 years or to payment of a fine not more than $5,000 or both.

86. HORROW, *supra* note 8, at 201.

87. Flakne & Caplan, *supra* note 16, at 34.

88. *Id.*

89. Intent was not an issue because Forbes' conduct was found to constitute criminal negligence, which is sufficient to satisfy the state of mind requirement in Minnesota. *See* State v. Peters, 274 Minn. 309, 143 N.W.2d 832 (1966). *See also* note 69 *supra*.

90. HORROW, *supra* note 8, at 165.

91. *Id.* at 166. For example, how does one tell when a pitcher is throwing at a batter or merely has a pitch slip?

92. Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 172 (1976).

93. *Id.*

is seen by those who serve on juries as just part of the game, it would be very difficult to prove the athlete intended to harm his opponent, rather than just aggressively playing the game.[94] Finally, there may be a problem of prosecutorial indifference. Federal prosecutors may simply have no desire to add sports violence cases to their already crowded schedule.[95]

Two major reasons have been advanced to support the Government's prosecution of sports violence cases. First, it has been argued that the state has a duty to control sports violence because of the effect it has on young children. Since professional athletes present role models of increasing importance in today's sports oriented society, effective prosecution is necessary to instill into young children a regard for law and order.[96] Second, general spectator violence may be reinforced if overly violent acts in the arena are not prosecuted.[97] Many fans feel that their payment of the price of admission entitles them to manifest any type of behavior they please.[98] Allowing excessively violent acts to go unprosecuted could have a tendency to reinforce this attitude.[99]

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94. HORROW, *supra* note 8, at 166.

95. *Id.* at 130-31. See a statement by a St. Louis prosecutor to the effect that "[t]he United States should have no role in policing pro sports. It should be out fighting inflation." N.Y. Times, Sept. 25, 1980, at D26, col. 1. *See also The Sports Violence Act of 1980: Hearings on H.R. 7903 Before the Committee on the Judiciary Subcommittee on Crime*, 96th Cong., 2nd Sess. (1980) (statement of James S. Reynolds, Deputy Chief, General Litigation and Legal Advice Section, Criminal Division, United States Department of Justice).

96. HORROW, *supra* note 8, at 114-15.

97. *Id.* at 115-16.

98. *Id.* at 116.

99. *Id.* This rationale would not explain, however, the attacks by fans on players in very low violence sports such as baseball. For instance, in a recent Pittsburgh Pirates' home game, fans threw a transistor radio battery and assorted nuts and bolts out of the right field stands at Pirate outfielder Dave Parker. N.Y. Times July 23, 1980, at B8, col. 3.

Comiskey Park in Chicago was also the scene of one of the most raucous displays in recent years when the Chicago White Sox staged a "Disco Demolition" promotion, offering reduced price tickets to spectators who brought disco records to be carted away and burned. Instead, the fans hurled the records on the field and burned them, surged onto the grass between games of a doubleheader, and tore up the field so badly that the second game had to be cancelled. When questioned about the incident, White Sox owner Bill Veeck had this to say: "Why should people be less violent in the ballpark when they're more violent in the streets. As a result of the 60's and early 70's, there is less respect for law, for people in authority. Do your own thing is the quote, I believe." N.Y. Times, July 27, 1980, at S6, col. 5.

Another such incident occurred in 1974 during a Cleveland Indians home game. Drunken fams threw both full and empty beer cans onto the field causing such a

There are equally compelling reasons for not allowing criminal intervention. First, since many players do not perceive their conduct as criminal, but as merely part of the game, criminal penalties would have little deterrent value.[100] Since the goal of enforcement is to achieve that degree of compliance with proscribed behavior society believes it can afford, it would be inefficient to enforce a sanction that achieves such a low degree of compliance.[101] Second, "[a]n announcement that certain conduct will subsequently make a player subject to criminal prosecution might not only eliminate or reduce the frequency of the undesirable conduct, but will also eliminate some desirable conduct necessary to the continued vigor and popularity of the game."[102] Players who know that certain conduct will subject them to criminal prosecution are likely to avoid doing anything that even remotely resembles the conduct.[103] Finally, one commentator has stated that if the player is merely following the standard of conduct accepted by the sports community, and such conduct is objectionable to society, it is the sport, not the individual, who should be put on trial.[104]

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disturbance that the Indians were forced to forfeit the game. N.Y. Times, June 5, 1974, at 35, col. 8.

One theory to explain these outbursts, advanced by Ronald Kamm, a New Jersey psychologist with a special interest in sports psychology, is that most of the disruptive behavior is instigated by "disenfranchised people feeling the most impotent in terms of inflation, who enjoy seeing the effect of their destruction on television. They're lonely, isolated people trying to make a dent." N.Y. Times, July 27, 1980, at S6, col. 6.

Many commentators suggest that the sale of liquor at sporting events is really at the root of the spectator problem. One commentator, writing about the "change in ambiance of the [Madison Square] Garden on hockey nights from G to X rated," suggested that several changes must be considered if the "polluted atmosphere at NHL games is to be disinfected." The two most important are: (1) sale of beer and liquor must be eliminated and (2) smoking must be forbidden; obviously to eliminate pot smoking, which is an even more serious problem at games than liquor. N.Y. Times, Mar. 2, 1980, at S2, col. 2. Also note a statement by Ralph Snyder, Dir. of Operations for Detroit Tiger Stadium: "ninety-five percent of our problems can be attributed to people who come here and get too much to drink." N.Y. Times, Aug. 7, 1978, at C5, col. 1. There seems to be some merit in this suggestion, for in Toronto, the only major league city where local ordinance prohibits the sale of alchoholic beverages at sporting events, the fans are unusually well behaved. N.Y. Times, July 27, 1980, at S6, col. 2.

100. HORROW, *supra* note 8, at 119-21.

101. *Id.* Horrow argues, however, that low deterrent value should not mean that prosecution should be attempted infrequently or not at all. Symbolic prosecution is required to let players know that they are not absolutely immune from the criminal law. *Id.* This view, however, would seem to promote a policy of arbitrary and capricious enforcement, which could make it unconstitutional.

102. Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 176 n.111 (1976).

103. *Id.*

104. Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 778-79 (1975).

II. PROPOSED FEDERAL CRIMINAL LEGISLATION FOR DEALING WITH EXCESSIVELY VIOLENT ACTS DURING PROFESSIONAL SPORTING EVENTS: THE SPORTS VIOLENCE ACT OF 1980.

On July 31, 1980, the Honorable Ronald M. Mottl of Ohio proposed H.R. 7903, The Sports Violence Act of 1980.[105] The Act would be an addition to Section 2, Chapter 7, Title 18 of the U.S. Code and would read as follows:

> §115 Excessive Violence During Professional Sporting 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.
>
> (b) As used in this section, the term—
>
> (1) excessive physical force means physical force that—
>
> (A) has no reasonable relationship to the competitive goals of the sport;
>
> (B) is unreasonably violent; and
>
> (C) could not be reasonably forseen or was not consented to by the injured person as a normal hazard of such person's involvment in such sports event; and
>
> (2) professional sports events means a paid admission contest, in or affecting interstate or foreign commerce, of players paid for their participation.[106]

The purpose of the Act is to "deter and punish, through criminal penalties the episodes of excessive violence that are increasingly characterizing professional sport."[107] The bill is "not directed at . . . the kinds of natural physical contact that are a normal part of rugged physical sports"[108] but rather "towards the kind of dangerous contact that a civilized society should brand as criminal whether it occurs inside or outside the sports arena."[109] The criminal sanctions in the Act would apply to players in any professional sport.[110] Such sanctions, however, would not supersede the application of state assault and bat-

105. H.R. 7903, 96th Cong., 2nd Sess., (1980). Note that although Mottl proposed this bill, it was actually drafted by Horrow (*supra* note 8) using his book as a basis. 126 CONG. REC. E3711 (daily ed. July 1980).

106. 126 CONG. REC. E3711 (daily ed. July 31, 1980).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

tery law.[111] Rather, the intent is that the Act would merely compliment the existing state law.[112]

The bill seeks to remedy the major problem plaguing the law in this area: where to draw the line between permissible and impermissible contacts.[113] It draws the line at "knowing use of excessive physical force."[114] Excessive physical force is defined as "physical force (A) that has no reasonable relationship to the competitive goals of sport; (B) that is unreasonably violent or (C) could not be reasonably foreseen or was not consented to by the injured person as a normal hazard of such person's involvment in sports."[115]

An examination of the statutory language of the bill reveals that it falls far short of its purported goal of clarifying the law in this area. The bill actually creates a number of new questions which it fails to answer.

The core of the bill is section (b)(1), which contains the definition of excessive physical force. This section creates numerous questions which it fails to answer. First, in subsection (A), what are the competitive goals of sport? Arguably, winning is the goal of any sports activity, particularly at the professional level. Some franchise owners might argue that their goal is to turn a profit. Others might contend that its goal is similar to that of the theater-to provide entertainment for the public.[116] Some social scientists argue that "the main function of sport today lies in the cathartic discharge of aggressive urge."[117] Other goals could be to train individuals to sacrifice themselves for the good of the group,[118] to promote the physical fitness of the general citizenry by inspiring people to exercise[119] and as a valuable unifying force for the melting pot of American society.[120]

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111. *Id.* The Act's refusal to supersede state law, however, would seem to increase the present inconsistency of enforcement, rather than decrease it. Under the Act, enforcement would be left not only to the discretion of the state prosecutor but to the discretion of the federal prosecutor as well. This additional tier of discretion would most probably result in more uneven enforcement.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Sports law cases are classified under Theater and Entertainment in West's General Digest.

117. K. LORENZ, ON AGGRESSION 271 (1967).

118. Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 174 (1976).

119. *Id.*

120. *Id.*

If one could choose one or several of the aforementioned as the appropriate competitive goal(s) of sport, then a further problem arises in deciding if the conduct bears a reasonable relationship to that goal. If winning is the goal, then any act would seem to be reasonably related to the accomplishment of that goal. If cathartic discharge of aggression for players and spectators is the goal, the more violent the conduct, the better. According to some commentators, this violence would also promote the franchise holders' goal of turning a profit.[121]

The second requirement for an act to be excessively violent is that it be "unreasonably violent". Defining "excessively violent" in terms of "unreasonably violent" seems to beg the question. What standard of reasonableness is to be used? Many acts that seem totally reasonable to the average player would seem to be totally unreasonable to some outsiders. Confusion would also develop if "unreasonably violent to the average fan" is used, since some commentators contend that many people attend sporting events solely to watch any fights that may occur.[122]

The third requirement is contained in the mysterious subsection (C): "could not be reasonably foreseen or was not consented to by the injured person, as a normal hazard of such person's involvment in sports." The plain meaning of this section would seem to indicate that only those acts which are both unforeseeable and unconsented to will constitute excessive physical force. Yet one could say that many hockey players foresee the possibility of being assaulted with a hockey stick, and although the average person would probably view this conduct as excessive force, it is persumably not so under the Act. In addition, the wording "normal hazard" leads to another difficult line-drawing question in determining the difference between normal and abnormal hazards.

The vague and ambiguous wording of this bill could also lead to another problem: the statute could be declared void for vagueness.[123] This very point was raised by the Justice Department in their statement on the bill before the House Judiciary Subcommittee on Crime.[124]

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121. *See* notes 17 and 18 and accompanying text *supra*.

122. *See* text accompanying note 18 *supra*.

123. A criminal statute is required to be declared void for vagueness when it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, 306 U.S. 451, 459 (1939).

124. *The Sports Violence Act of 1980: Hearings on H.R. 7903 Before the Committee of the Judiciary Subcommittee on Crime*, 96th Cong., 2nd Sess. (1980) (statement of James S. Reynolds, Deputy Chief, General Litigation and Legal Advice Section, Criminal Division, United States Dept. of Justice).

III. CONCLUSION

Each of the methods currently available for controlling acts of excessive violence during professional sporting events has distinct advantages and disadvantages. Internal league controls would seem to result in more consistent enforcement, since league rules are the same regardless of the location of the game. Many argue, however, that the penalties exacted by the leagues are simply not stringent enough to deter future violent conduct. The sanctions available under tort law would be more severe, because team management could be held vicariously liable in addition to the injuring player. But tort law varies from state to state, making it very difficult to establish a uniform standard of participant conduct. State criminal assault and battery law offers sufficiently severe penalties, but criminal law also varies from jurisdiction to jurisdiction. In addition, criminal penalties for acts of sports violence could lower the overall level of play, because athletes might be afraid to exert maximum effort for fear of receiving a term in prison.

The Act, however, fails to offer any solutions to the problems suffered by these existing enforcement procedures. It does offer a criminal penalty for committing an excessively violent act, but such a penalty is already available under state criminal assault and batter law. The Act fails to cure the problem of inconsistent enforcement, since prosecution is left not only to the discretion of the local state prosecutor but also to the discretion of the local federal prosecutor. In addition, the Act fails to develop a workable uniform standard for player conduct. To the contrary, its vague and confusing language could lead to a number of interpretive difficulties not presently encountered with existing approaches. For these reasons, the bill should not be enacted into law.

The Act may, however, have one useful side effect. It may encourage the enactment of stricter controls on sports violence by the professional sports leagues. The levying of stricter penalties by the legues may be the ultimate answer, in that it would allow the league administrators to use their familiarity with the game to determine equitable penalties, while silencing those critics who claim that the sanctions exacted by the leagues are not severe enough to deter future violent acts.

Mark E. Langevin