

Winning Isn't Everything, It's the Only Thing. Violence in Professional Sports: The Need for Federal Regulation and Criminal Sanctions

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INTRODUCTION

The National Hockey League (NHL) calls it high-sticking, but if Wayne Maki of the St. Louis Blues had acted as he did toward Ted Green of the Boston Bruins anywhere except on the ice, it would have been called battery. During a September 21, 1969 hockey game, Maki struck Green in the face with his hockey stick. As a result of this attack, Green sustained a serious concussion and massive hemorrhaging and underwent two brain operations that were only partially successful.¹

This is merely one example of the many cases of egregious and excessive violence that take place in professional sports arenas.² Violence has become the rule and no longer the exception in professional sports.³ Of course, some degree of violent contact is necessary in sports, but violence to the degree described above far exceeds this necessary level. Acts that are clearly criminal on the streets seem to be licensed if they take place within the context of a professional sporting event.⁴

The purpose of this Article is to show that the level of violence currently existing in professional sports is intolerable and must be

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1. Maki hit Green with his stick in a manner closely resembling a "logger splitting a stump." Green only regained partial sensation and "has never recovered 100 percent." Comment, *It's Not How You Play The Game, It's Whether You Win Or Lose: The Need For Criminal Sanctions To Curb Violence In Professional Sports*, 12 *HAMLIN L. REV.* 71, 71 n.1 (1988) [hereinafter Comment, *How You Play The Game*]. See also R. HARROW, *SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW* 19 (1980) (citing *You Hear Green's Name, You Recall That Night*, *Boston Globe*, Jan. 24, 1979, at 19).

2. See Comment, *How You Play The Game*, *supra* note 1, at 71. See also Note, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 *IOWA L. REV.* 681 (1989) [hereinafter Note, *Controlling Sports Violence*]; Note, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 *DUKE L.J.* 1030 [hereinafter Note, *Criminal Assault*].

3. Comment, *How You Play The Game*, *supra* note 1, at 72.

4. 2 R. BERRY & G. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 420 (1986) [hereinafter BERRY].

curtailed. Part I explains the societal need for ridding professional sports of needless violence. Part II describes the four major sports leagues' attempts to rid their respective sports of excessive violence. Part III discusses the practical problems and hurdles a prosecutor faces when bringing criminal charges against a professional athlete for an act of on-the-field violence. Part IV describes the federal government's unsuccessful attempts at regulating sports violence through legislation. Finally, Part V proposes a federal statute that will adequately remedy the serious problem of sports violence.

I. THE SOCIETAL NEED FOR RIDDING PROFESSIONAL SPORTS OF VIOLENCE

Psychologists and sociologists recognize the problem of sports violence and its negative impact on society.⁵ This destructive societal effect and the effect violence has on the players are the reasons violence must be prohibited.

A. Professional Athletes as a Role Model for Children

Athletes serve as role models for our nation's children.⁶ Professional sports have become so pervasive in our society that nearly everywhere one looks, one can expect to see some reference to professional sports.⁷ The "sports star" has been created as a result of this widespread exposure.⁸ Children attempt to emulate those stars who excel in their particular sport.⁹ If the emulated sports stars incorporate violence into their game, a child may display similar violence while playing Little League or while on the playground.¹⁰ A prominent NHL defenseman of the 1970s, Bobby Orr, has even written an instructional book that teaches children that the most effective way to win a hockey game is to fight.¹¹ Professional sports' ambivalent approach toward violence encourages children to adopt the same disinterested attitude.

5. Note, *Controlling Sports Violence*, *supra* note 2, at 686.

6. *Id.* at 688.

7. See Bryant & Zillmann, *Sports Violence and the Media*, in *SPORTS VIOLENCE* 195, 206-07 (J. Goldstein ed. 1983).

8. Note, *Controlling Sports Violence*, *supra* note 2, at 689.

9. Silva, *Factors Related to the Acquisition and Exhibition of Aggressive Sport Behavior*, in *PSYCHOLOGICAL FOUNDATIONS OF SPORT* 261, 269 (J. Silva III & R. Weinberg eds. 1984).

10. Note, *Controlling Sports Violence*, *supra* note 2, at 689 n.74. See Smith, *Significant Others' Influence on the Assimilative Behavior of Young Hockey Players*, 3 *INT'L REV. OF SPORT SOC.* 45, 54 (1974).

11. B. ORR, *MY GAME* (1974). See Note, *Controlling Sports Violence*, *supra* note 2, at 689 n.78.

B. *Injury to the General Public*

Two principal justifications of our nation's criminal law are that it protects the public and supports notions of morality and ethics.¹² Some argue that criminal law should not apply to acts of on-the-field violence because these acts do not threaten the public in the same way as violence that occurs on the streets.¹³ Thus, criminal law's dual justifications will not be furthered by prosecuting the athletes involved.

This argument, however, fails to address both of the criminal law's justifications. Although the general public is not physically harmed by viewing sports violence, spectators are nevertheless injured by having to view senseless violence—violence that is in direct contravention to the teachings of educational and religious institutions in this country.¹⁴ That the violence occurred within the confines of a playing field or ice rink does not diminish the fact that violence has occurred and that the public has been subjected to viewing it. Accordingly, unless society's notions of morality and ethics endorse violence, these notions have been violated. The argument that sports violence does not implicate the justifications of our nation's criminal law is therefore misleading. Moreover, spectator violence is almost the exclusive result of on-the-field violence.¹⁵ When spectators see their sports heroes act violently on the field, some fans seek to emulate those players.¹⁶

II. LEAGUE ATTEMPTS TO DEAL WITH SPORTS VIOLENCE

A. *League Disciplinary Rules*

All professional sports leagues have established internal rules, systems, and procedures for dealing with violence in their respective sport.¹⁷ These rules exist to avoid the entanglements of civil and criminal proceedings for violent acts that occur during a sporting event.¹⁸ The leagues, however, fail to use their available controls effectively. The

12. BERRY, *supra* note 4, at 420; Note, *Controlling Sports Violence*, *supra* note 2, at 687.

13. BERRY, *supra* note 4, at 420; Note, *Controlling Sports Violence*, *supra* note 2, at 687.

14. Note, *Controlling Sports Violence*, *supra* note 2, at 687.

15. *Id.* See Engler, *Violence in Sport*, in *SPORTS IN LAW: CONTEMPORARY ISSUES* 180, 181 (H. Appenzeller ed. 1985).

16. Note, *Controlling Sports Violence*, *supra* note 2, at 687-88.

17. BERRY, *supra* note 4, at 433.

18. *Id.*

existing rules do not adequately redress the violence problem, and the leagues have resisted imposing significant rule changes to deal with their current rules' inadequacies.¹⁹

The instruments of league control are players' standard contracts or collective bargaining agreements.²⁰ These agreements frequently contain a clause stating that the player agrees to be bound by the league's disciplinary rules.²¹ Unfortunately, many professional sports contracts and collective bargaining agreements contain nebulous language that authorizes the league commissioner to discipline a player for acting in a manner contrary to the "best interests of the game."²² As a result,

19. See Comment, *How You Play The Game*, *supra* note 1, at 72.

20. BERRY, *supra* note 4, at 433.

21. *Id.*

22. The following are examples of this ambiguous language:

- a. National Football League's Standard Player Contract, clause 15: *Integrity of the Game*.

Player recognizes the detriment to the league and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he . . . is [found] guilty of any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League of professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount, to suspend Player for a period certain or indefinitely; and/or to terminate this contract.

Id. at 433 n.1.

- b. The Collective Bargaining Agreement between the National Hockey League and the National Hockey League Players Association, art. 15.01, "Intentional Injury," states:

The Clubs shall promulgate on an experimental basis a rule requiring immediate suspension of any hockey player who receives a match penalty for intentionally injuring any other hockey player. Such suspension shall remain in effect until a determination with respect to the match penalty has been made by the President of the National Hockey League.

Id. at 434 n.3.

- c. *National Basketball Association's Administrative Manual*, sec. 330 at 2-3: *Position of NBA and Its Teams Regarding Violence on the Basketball Court*:

Violence has no place in the game of basketball and violent behavior cannot be tolerated under any circumstances.

You are highly skilled and highly trained athletes. Your physical well-being is of paramount importance to you, your team, and the NBA. Violence can and often does result in serious physical injury. Such injury could seriously impair your future as an athlete as well as others who may be involved in such violent conduct.

The NBA and all of its teams abhor violence and condemn its existence in our sport. As a player in the NBA, you are hereby advised that violent conduct will not be tolerated under any circumstances. Nothing which occurs

these contracts and agreements fail to take any real or substantial steps toward curbing sports violence.

B. One League's Argument for Its Inactive Stance Toward Violence

The NHL argues that ending hockey violence will cause the league to lose the attendance of those fans who hunger for fights.²³ The league claims that its fans want to see fighting. Moreover, the NHL claims that fighting is simply part of the game, and a rule prohibiting it would be unenforceable.²⁴

Both of these arguments lack merit, however. One of the reasons hockey is marketed to a narrow cross-section of the public is that many people do not care to see fighting or to have their children view it.²⁵ Even the president of the NHL, John Ziegler, does not believe that sports fans attend games merely to see fights.²⁶ It is not surprising that our country's most violent major league sport has no national network television contract. If fighting and excessive violence are removed from hockey, its appeal may actually broaden.²⁷ Nevertheless, the NHL, for whatever reason, refuses to take a more active stance toward the violence occurring in its league.

III. BRINGING CRIMINAL CHARGES AGAINST ATHLETES

A. Prosecutors' Unique Perspective on Sports Violence

When violence and criminal behavior occur on the sports field, prosecutors view this behavior differently than if it had occurred on the street. Understanding the basis of criminal law makes it easier to understand why this is the case. Recall that one of the criminal law's

during a game can justify an act of willful violence.

The NBA and your team will take immediate and appropriate action against any player who engages in such conduct and all personnel are advised that violence must be avoided at all times. There will be no variance from this express statement of policy.

This avoidance of violence is to your benefit, as well as to the benefit of all players and teams in the NBA. You must comply.

Id. at 434 n.4 (emphasis in original).

23. *End Hockey Violence Now*, Christian Science Monitor, Apr. 16, 1986, at 14, col. 3 (opinion).

24. *Id.*

25. *Id.*

26. *Hockey and Fighting: Uneasy Coexistence*, Washington Post, Jan. 26, 1989, § C, at 1, col. 2.

27. *Id.*

dual justifications is that it protects the public.²⁸ When an incident of sports violence occurs, the harm is confined to the game's participants.²⁹ These participants know and assume the risks of the game.³⁰ Furthermore, the public is not subjected to any risk of harm because spectators are either in the stands or at home watching the sports event on television.³¹ Sports participants know what they are "getting themselves into," and only they will be physically harmed by other players' behavior. Therefore, prosecutors are reluctant to view sports violence as behavior worthy of their attention.

B. Defenses Raised When a Prosecution for Sports Violence is Brought

1. Defining Criminal Conduct.—When a prosecutor brings criminal charges against an athlete for behaving violently on the field, the charge is typically battery.³² Criminal battery can be defined briefly as "the unlawful application of force to the person of another."³³ The requirement that a criminal battery be "unlawful" is the key to understanding why sports violence is often treated as noncriminal.³⁴ Society and prosecutors seem to treat sports violence as "lawful" behavior.³⁵ Consequently, an act that is criminal on the streets becomes legal on the field because the "unlawful" requirement is negated.³⁶ Sometimes, however, on-the-field behavior is so heinous that it exceeds the level of contact that is considered lawful within the rules of a game.³⁷ The problem is drawing the line between "lawful" conduct, that is within the rules of a particular game (including accidental contact), and conduct that is criminal.³⁸

2. Consent.—A common defense raised by athletes is that the victim consented to the violent contact.³⁹ Normally, consent is not a defense to criminal battery because a criminal offense is a wrong that affects the general public, at least indirectly.⁴⁰ Consequently, the actor cannot

28. BERRY, *supra* note 4, at 420.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 422.

33. W. LAFAVE & A. SCOTT, CRIMINAL LAW 685 (1986) [hereinafter LAFAVE].

34. BERRY, *supra* note 4, at 422.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Regina v. Ciccarelli, No. 2388 (Ontario Dist. Ct.-York Jud'l Dist., Dec. 21, 1989) (unpublished decision) (on file in the office of the Indiana Law Review).

40. BERRY, *supra* note 4, at 423; LAFAVE, *supra* note 33, at 477; J. WEISTART & C. LOWELL, THE LAW OF SPORTS 185 (1979) [hereinafter WEISTART].

be licensed by the person directly harmed.⁴¹ Put another way, the public interest may not be frustrated by private license.⁴² With respect to sports violence, however, consent is a valid defense. The Model Penal Code states that consent may be a defense to criminal charges of battery arising from conduct in a sports event.⁴³

An athlete is understood to impliedly consent to a certain amount of physical contact on the field or rink.⁴⁴ The problem is measuring the level of violence to which a player impliedly consents.⁴⁵ The Model Penal Code states that an athlete consents to a "reasonably foreseeable" amount of hazard or violence in sport.⁴⁶ With respect to the Model Penal Code, the difficult issue is distinguishing between reasonably foreseeable hazards that are consented to as part of the sport and hazards for which there is no consent.⁴⁷

One approach to distinguishing between behavior that is consented to and behavior for which there is no consent concerns conduct that is customarily part of a particular sport.⁴⁸ Under this approach, a player will be deemed to consent to conduct that is normally associated with the particular sport in which the player participates.⁴⁹ This approach, however, is too broad.⁵⁰ Fisticuffs and stick fighting, for example, are customary activities in professional hockey. Under this approach, a player will be understood to consent to these violent activities.⁵¹

An alternative approach is the "rules-of-the-game" test.⁵² Under this test, a player will not be deemed to consent to acts that are illegal under the rules of the sport.⁵³ This approach is too narrow in scope.⁵⁴

41. LAFAVE, *supra* note 33, at 477.

42. WEISTART, *supra* note 40, at 185.

43. The Model Penal Code, § 2.11(2) (Proposed Official Draft 1962) provides: [W]hen conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if: . . . (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

44. Regina v. Ciccarelli, No. 2388 (Ontario Dist. Ct.-York Jud'l Dist., Dec. 21, 1989) (unpublished decision) (on file in the office of the Indiana Law Review); Note, *Criminal Assault*, *supra* note 2, at 1038.

45. Regina v. Ciccarelli, No. 2388 (Ontario Dist. Ct.-York Jud'l Dist., Dec. 21, 1989) (unpublished decision) (on file in the office of the Indiana Law Review).

46. MODEL PENAL CODE § 2.11(2) (Proposed Official Draft 1962).

47. BERRY, *supra* note 4, at 427.

48. *Id.*; WEISTART, *supra* note 40, at 186.

49. BERRY, *supra* note 4, at 427.

50. WEISTART, *supra* note 40, at 186.

51. *Id.*

52. BERRY, *supra* note 4, at 427.

53. *Id.*

54. WEISTART, *supra* note 40, at 186.

This test considers all technical violations of a sport to be conduct to which the player did not consent. For example, intentional fouls in basketball, committed for strategic purposes, will be considered conduct to which there is no consent and criminal liability could result.⁵⁵

A third approach looks to the seriousness of the injury.⁵⁶ Under this approach, a victim is deemed not to have consented to behavior that causes grave injury.⁵⁷ The problem with this final approach is that a player does not know beforehand whether contact with the victim will result in serious injury. The most innocent hit, if the recipient lands poorly, for example, could result in grave injury. Consequently, this test does not establish an adequate means by which a player can gauge his conduct.

No useful American authority exists that clarifies the consent issue. Canadian cases, however, provide some guidance,⁵⁸ and when coupled with the Model Penal Code's "reasonably foreseeable" approach, one can derive the following standard: "An athlete will not be deemed to have consented to intentional or reckless acts that are not reasonably related to the conduct of the sport in question."⁵⁹ This standard, however, raises the amorphous issue of "reasonableness" and from whose standpoint it is to be considered.

Consent then, is an evasive concept with respect to the prosecution of a professional athlete. This concept's unstable character, however, does not mean that consent is not readily used as a defense. Consent is a valid and occasionally successful defense for an athlete.

3. *Self-Defense*.—A second defense that may be asserted by an athlete is self-defense. One description of self-defense is:

One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.⁶⁰

In sports, however, this defense may not be available for a number of reasons.⁶¹

First, the athlete must show that he used only reasonable force in repelling an attack.⁶² This issue will usually arise in cases of escalating

55. *Id.*

56. BERRY, *supra* note 4, at 427.

57. *Id.*

58. Regina v. Bradshaw, 14 Cox Crim. Cas. 83 (Leicester Spring Assizes 1878).

59. WEISTART, *supra* note 40, at 188.

60. LAFAYE, *supra* note 33, at 454.

61. BERRY, *supra* note 4, at 427.

62. *Id.* at 454.

violence, as when one hockey player punches an opponent and the opponent strikes back with his stick.⁶³ In this situation, the opponent (now on trial) may have difficulty establishing that he used only reasonable force (*i.e.*, no greater than the force used against him) in repelling the aggressor's attack.⁶⁴

Next, the defendant must have honestly believed that the danger of immediate, serious bodily injury was imminent.⁶⁵ Often, the defendant does not have this honest belief because he provoked the attack.⁶⁶ Thus, this element of the defense is negated.⁶⁷

Finally, this defense is limited to those cases in which the defendant had no reasonable means of retreat and cases in which force was necessary to avoid danger.⁶⁸ If a player could have stopped the confrontation by retreating, he cannot plead self-defense. Often, a player can end the engagement by simply stepping back, skating across the ice, or allowing a referee or umpire to intervene. Self-defense, therefore, is not a useful theory because many times one or all of its elements are defeated by the defendant's actions.

C. *Prosecutorial Hesitancy to Bring Criminal Charges Against Athletes*

Although prosecutors may, in their discretion, bring criminal charges against professional athletes, they are rarely motivated to bring these charges. Moreover, if charges are brought, a prosecutor may have difficulty obtaining a guilty verdict.

1. *Prosecutorial Restraint.*—Prosecutors are generally reluctant to bring criminal charges against sports figures. The injured player often does not want to file criminal charges.⁶⁹ As a result, the prosecutor does not have a complainant. Moreover, the prosecutor has a "poor" witness if there is a witness at all.⁷⁰ Players are often reluctant to testify because they either subscribe to the "code" of the particular sport, or they are ambivalent toward violence.⁷¹

Furthermore, prosecutors are concerned about the fairness of a sports figure's trial because of juries' tendencies to support the home-

63. *Id.*

64. *Id.*

65. *Id.*; LAFAVE, *supra* note 33, at 454.

66. BERRY, *supra* note 4, at 427; Comment, *How You Play the Game*, *supra* note 1, at 85.

67. BERRY, *supra* note 4, at 427.

68. *Id.*; LAFAVE, *supra* note 33, at 454.

69. *Violence in Sports: Specialists See Obstacles to Bringing Athletic Fights to Court*, Boston Globe, Jan. 13, 1987, at 1, col. 3.

70. *Id.*

71. *Id.* at 3.

town team.⁷² For example, some speculate that anyone who fights with Larry Bird during an NBA game in Boston will be convicted by a Boston jury. On the other hand, some predict that Bird would most likely be acquitted by this same jury if he was involved in the altercation.⁷³

Next, prosecutors rarely bring charges because of their own beliefs that league rules and sanctions are sufficient to curb sports violence.⁷⁴ Prosecutors are sports fans, and it is not surprising that they too subscribe to the erroneous notion that leagues can adequately police themselves. Prosecutors also believe that the prosecution of athletes will be too time consuming. If prosecutors decided to bring charges against athletes, police would have to arrest these players immediately.⁷⁵ Consequently, police would be assigned to every sporting event.⁷⁶ Prosecutors believe that "criminal prosecution has little or no role in controlling [sports] violence when it is confined to game time."⁷⁷ Prosecutors assert that they have "enough straight line criminal violence to keep [themselves] busy without entering a new media game."⁷⁸

Professor Wayne R. LaFave believes prosecutors are reluctant to bring criminal charges against athletes for two reasons. The first is the "community subgroup rationale."⁷⁹ According to this rationale, if certain illegal activity is pervasive in a particular subgroup of society, this activity should be tolerated.⁸⁰ LaFave's second rationale concerns the crime's setting and whether the purposes of criminal law will be furthered by prosecuting the actor. He argues that because law in the area of sports violence is basically ineffective and inefficient, prosecutors simply choose not to enforce it.⁸¹

A final reason that the prosecution of athletes may be disfavored by prosecutors is the "continuing relationship" theory.⁸² This theory

72. *Id.*

73. *Id.*

74. Sprotzer, *Violence in Professional Sports: A Need for Federal Regulation*, 86 CASE & COM. 3, 6 (1981).

75. *Political Penalty Box*, Boston Globe, Jan. 8, 1987, at 12, col. 1.

76. *Id.*

77. R. HARROW, *supra* note 1, at 114.

78. *Id.*

79. W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 110 (1965).

80. *Id.*

81. *Id.*

82. Comment, *Assumption of Risk and Vicarious Liability in Personal Injury Actions Brought by Professional Athletes*, 1980 DUKE L.J. 742, 753 [hereinafter Comment, *Assumption of Risk*].

posits that because only athletes are physically injured by sports violence, the law may be more tolerant of this violence.⁸³

2. *Difficulty in Obtaining a Guilty Verdict.*—If a prosecutor decides to bring criminal charges against an athlete, resistance from the jury may be encountered. Juries are reluctant to convict athletes for on-the-field violence.⁸⁴ For example, on January 4, 1974, during an NHL game in Minnesota, the Boston Bruins' Dave Forbes permanently injured Henry Boucha of the Minnesota North Stars.⁸⁵ Forbes punched Boucha in the face with the hand that held his hockey stick. The butt end of the stick struck Boucha in the right eye.⁸⁶ Boucha fell to the ice, and Forbes pounced on him and pummeled his head into the ice.⁸⁷

Forbes was indicted by a Minneapolis grand jury and charged with aggravated assault by use of a dangerous weapon.⁸⁸ Unfortunately, a week and a half of trial testimony resulted in a hung jury.⁸⁹ Interviews with the twelve jurors revealed a nine to three split in favor of conviction.⁹⁰ The three jurors who voted for acquittal believed that the hockey community accepted fighting as part of the game.⁹¹ One of these three jurors commented that he did not believe it was proper to make Forbes the "scapegoat" for the problems of the entire sport.⁹²

IV. ATTEMPTS AT FEDERAL REGULATION

A. *The Sports Violence Act of 1980*

In 1980, Ohio Representative Ronald M. Mottl introduced the Sports Violence Act (1980 Act) into the House of Representatives.⁹³ Proponents

83. *Id.*

84. *State v. Forbes*, No. 63,280 (Hennepin Cty. Minn. Dist. Ct.) (dismissed Aug. 12, 1975). See Flakne & Caplan, *Sports Violence and the Prosecution*, 13 TRIAL 33, 34 (1977) (written by two prosecutors involved in the *Forbes* case); Note, *Controlling Sports Violence*, *supra* note 2, at 701.

85. *State v. Forbes*, No. 63,280 (Hennepin Cty. Minn. Dist. Ct.) (dismissed Aug. 12, 1975); Note, *Controlling Sports Violence*, *supra* note 2, at 701.

86. Note, *Controlling Sports Violence*, *supra* note 2, at 701.

87. *Id.*

88. *Id.* at 701-02.

89. *Id.* at 702.

90. *Id.*

91. *Id.*

92. *Id.* This juror stated, "Just like if I had committed some crime because of my job then my employer should suffer or should answer [for] it—not me." Hallowell & Meshbesh, *Sports Violence and the Criminal Law*, 13 TRIAL 27, 28 (1977) (the authors of this article were Forbes' defense attorneys).

93. H.R. 7903, 96th Cong., 2d Sess., 126 CONG. REC. 20,890 (1980) (this bill was reintroduced by Jack Kemp (R. N.Y.), former quarterback for the Buffalo Bills, in 1981 as H.R. 2263); Sprotzer, *supra* note 74, at 4 (the 1980 bill was co-authored by Richard B. Morrow, a Harvard Law School graduate).

of the 1980 Act claimed that federal regulation is necessary because existing league mechanisms fail to curb violence effectively.⁹⁴ They also argued that league self-regulation does not deter athletes from participating in violent behavior, and state and local criminal laws are not enforced.⁹⁵ The bill never made it onto the floor of the House.⁹⁶

The bill's early death was not a tragedy because it would have created more problems than it would have solved.⁹⁷ The bill would have imposed criminal liability on players who use "excessive physical force."⁹⁸ "Excessive physical force" was defined in subsection (b) of the bill as physical force that "(A) ha[d] no reasonable relationship to the competitive goals of the sport; (B) was unreasonably violent; and (C) could not be reasonably foreseen, or was not consented to, by the injured person, as a normal hazard of such person's involvement in such sports event."⁹⁹ For behavior to be sanctionable, it would have to meet the three criteria set out in this subsection.

This bill's primary problem was that subsection (b) was vague.¹⁰⁰ In defining "excessive violence," subsection (A) referred to the "competitive goals of the sport."¹⁰¹ This subsection, however, did not specifically define the competitive goals of any sport.¹⁰² Arguably, the parties involved in any sport have varying goals.¹⁰³ For players, the goal is winning.¹⁰⁴ The goal of team owners is profit, which is directly related to a team's success.¹⁰⁵ Finally, league officials are concerned with the entertainment value of their sport.¹⁰⁶ Clearly, the competitive goal to which subsection (A) referred had to be defined before it could be determined that contact constituted "excessive physical force" under the Act.¹⁰⁷

In addition to its vagueness, this subsection did not further the goals of the proposed enactment. For example, if one could show that exhibitions of brutal force furthered the various goals outlined above

94. Comment, *Assumption of Risk*, *supra* note 82, at 1032.

95. *Id.* at 1032-33.

96. See Comment, *How You Play The Game*, *supra* note 1, at 79.

97. Note, *Controlling Sports Violence*, *supra* note 2, at 691.

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

99. *Id.*

100. Note, *Controlling Sports Violence*, *supra* note 2, at 691.

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

102. Note, *Controlling Sports Violence*, *supra* note 2, at 691.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 692.

107. *Id.*

(for example, the "rougher" a team is, the more likely it will win a game), this team behavior could be considered not "excessively violent." Obviously, this was not the intended result of the bill.

Subsection (B) defined "excessive physical force" as force that is "unreasonably violent."¹⁰⁸ This is a circular definition.¹⁰⁹ Determining whether conduct is "unreasonably violent" does not help to determine whether it is excessively violent.¹¹⁰ Moreover, the bill failed to define the term "unreasonable" as applied to a professional athlete's behavior.¹¹¹ Whether the reasonableness of an athlete's conduct should be compared to that of an average person or an average player is unclear.¹¹² Assuming this standard relates to the average sports player and the average player commonly engages in violent behavior, an athlete prosecuted under the 1980 Act would have been acting reasonably if he too had acted violently. Again, this could not have been the intended result, yet subsection (B) could lead to this conclusion.

The third requirement for "excessive physical force" was contained in subsection (C). This subsection concerned lack of reasonable foreseeability and consent.¹¹³ Again, the 1980 Act failed to adequately state from whose perspective these terms were to be determined.¹¹⁴ For example, an NHL "enforcer"¹¹⁵ may reasonably foresee or consent to violent treatment on the ice, but a less physical player, like Wayne Gretzky, might not expect or consent to brutal behavior.

Subsection (C)'s reference to contact exceeding a game's "normal hazards" only exacerbated this problem.¹¹⁶ According to this portion of the subsection, if contact is not reasonably foreseen or consented to as a "normal hazard" of a game, it is excessively violent. Determining whether an activity is a normal hazard, however, depends on the current practices within a sport. If a certain game sanctions an unusual amount of violence (for example, hockey's endorsement of fighting), this violence may be considered a normal hazard of the game.¹¹⁷ Because all normal hazards of a sport are, by nature of their normality, "reasonably foreseeable" by-products of that sport, frequently occurring violent acts would be permissible under subsection (C).

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

109. Note, *Controlling Sports Violence*, *supra* note 2, at 692.

110. *Id.*

111. *Id.*

112. *Id.*

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

114. Note, *Controlling Sports Violence*, *supra* note 2, at 693.

115. An "enforcer" is a player whose job is to protect the team's star player from overzealous opposing players.

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

117. Note, *Controlling Sports Violence*, *supra* note 2, at 693.

Finally, the 1980 Act was too narrow in scope.¹¹⁸ The Act defined a "professional sports event"¹¹⁹ as a "paid-admission contest."¹²⁰ This definition is ambiguous because it does not clarify whether free collegiate events are included in the Act's regulation.¹²¹ Moreover, whether the Act would have conferred professional status on collegiate sporting events that charge admission (such as NCAA basketball and football contests) is unclear.¹²²

B. *The Sports Violence Arbitration Act of 1983*

The Sports Violence Act of 1980 was fraught with problems and would have been unworkable. In 1983, South Dakota Representative Thomas A. Daschle sought to introduce another bill into the House of Representatives that addressed the problem of sports violence.¹²³ Unlike the 1980 Act, the Sports Violence Arbitration Act of 1983 (1983 Act) would have imposed civil, rather than criminal liability on athletes.¹²⁴ This bill also failed.¹²⁵

The 1983 Act proposed the creation of an arbitration board to assist players in settling grievances resulting from "conduct found to be inconsistent with the competitive goals of [the] sport."¹²⁶ The bill called for management and players to create a board and to establish procedures through collective bargaining.¹²⁷

The 1983 Act, however, like its 1980 predecessor, had inherent problems. The bill failed to recognize the leagues' internal resistance to outside attempts at forced self-regulation.¹²⁸ Players and leagues probably would not have taken the initiative required to establish and implement the necessary arbitration boards.¹²⁹ Moreover, players would have been disinclined to bring grievances because of their belief that revenge is the most effective and satisfying way to deal with on-the-field attacks.¹³⁰

118. Sprotzer, *supra* note 74, at 8.

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

120. *Id.*

121. Sprotzer, *supra* note 74, at 10.

122. Note, *Controlling Sports Violence*, *supra* note 2, at 693.

123. H.R. 4495, 98th Cong., 1st Sess., 129 CONG. REC. H10,579 (1983). This act was modeled after Note, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399 (1982).

124. H.R. 4495, 98th Cong., 1st Sess., 129 CONG. REC. H10,579 (1983).

125. BERRY, *supra* note 4, at 435; Comment, *How You Play The Game*, *supra* note 1, at 79.

126. H.R. 4495, 98th Cong., 1st Sess., 129 CONG. REC. H10,579, § 3(2)(A) (1983).

127. *Id.*

128. Note, *Controlling Sports Violence*, *supra* note 2, at 693.

129. *Id.* at 694.

130. *Id.*

V. A WORKABLE FEDERAL STANDARD

A. *Restatement of the Problem*

A workable federal standard that provides criminal sanctions for egregious acts of sports violence is needed. State and local laws are not remedying the sports violence problem because of prosecutorial hesitancy, and federal attempts have failed to solve the problem. A well-drafted federal standard will provide consistent treatment of athletes and will mandate the prosecution of violent acts. With a specific federal statute, prosecutors will not hesitate to bring charges against athletes.

The problem previous legislators had in drafting an adequate statute was their inability to articulate the idea that intentionally inflicted, excessive force exhibited by an athlete should be punished. In attempting to articulate this idea, the legislators used terminology that caused conceptual difficulties. The key issue is to adequately address and define the type and level of violence that will give rise to criminal liability.

B. *A Proposed Federal Statute*

The following act is a workable way to rid all sports of intolerable violence: "Athletes will be held in violation of this Act, and will be subject to criminal penalties thereunder, for intentionally inflicting contact meant to cause physical injury to an opposing player, as opposed to contact intended to further the goals of the particular competition."

1. *"Athlete."*—Under the proposed act, the term "athlete" will mean any athlete, whether professional or amateur, engaged in any sporting event or competition. This definition eliminates the problems of scope and answers any questions regarding to whom or to what events the act applies.

2. *The First "Intent" Requirement.*—The act contains an intent requirement regarding contact. If the contact is accidental, no criminal liability arises. At this point, the reader will be referred to examples of intentional contact that illustrate exactly what contact is being implicated. For example, with respect to hockey, intentional contact is striking an opposing player with one's stick or engaging in fisticuffs. Turning to football, an example of intentional contact is forceful contact with a player that is unrelated to the intended play or that occurs after the play has ended, unless it is accidental. (Accidental contact is contact that is the result of a player's inability to stop his own momentum that forces him into the contacted player). Another example is slamming a player to the ground, as opposed to merely tackling him. With respect to baseball, examples of intentional conduct are

“brushback” pitches or “beanballs” when a pitcher is ordered to pitch them. The particular circumstances existing in a game (*e.g.*, the pitcher’s team is trailing by a wide margin or the hitter has already hit a home run off the pitcher) should be considered in determining the requisite level of intent. These few examples are not intended to constitute an exhaustive list of the types of intentional contact that can take place in a sporting event. They are merely intended to assist in distinguishing intentional contact from accidental, incidental, or inadvertent contact.

3. *The Second “Intent” Requirement.*—The contact must be further intended to specifically cause physical injury to the opposing player. Without this additional, or secondary, intent requirement, all contact that was intended will be punishable even if it was within the rules of a particular sport or was used for intimidation or strategic purposes. Although any intentional contact may be criminal outside the sports field or rink, this Act’s secondary intent requirement recognizes the inherent nature of contact in sports. The enactment does not, however, recognize this necessary contact to the extent that intentional contact, if meant to injure, will go unpunished. This intent element, along with the first intent element, will be determined by a jury according to the facts and the witnesses’ respective credibilities.

4. *Defining “Goals of the Competition.”*—The final part of the proposed act relates to contact that is intended to further the goals of the competition and is intended to distinguish punishable contact from permissible contact. Under the act, the term “goals of the competition” is defined from the players’ perspective as winning the game. This last clause helps one further understand that contact that is intended to help a team win is permissible if it is not the type outlined above. Examples will again be given at this point. Permissible contact will include tackling, checking, blocking, and “jockeying” for position. Again, this list is not intended to be exclusive or exhaustive, but merely illustrative.

5. *Avoidance of Ambiguities.*—The proposed act stays clear of the ambiguities and vague references that doomed the 1980 proposal. Illustrations and examples will be furnished to guide the reader in understanding the intended meaning of the act. These illustrations will prevent the reader from straying into uncertain and obscure analyses with respect to the purpose of the statute. Furthermore, the act does not mention the terms “violent,” “excessive,” “foreseeable,” “consent,” or “reasonable.” These are words that led to harsh criticism of the 1980 Act.¹³¹

131. For criticism of the 1980 Act, see Sprotzer, *supra* note 74, at 8-10; Note, *Controlling Sports Violence*, *supra* note 2, at 693.

VI. CONCLUSION

League self-regulation has not deterred violent acts in the sports arena, and relevant state and local laws are not being enforced. Our nation's criminal laws must finally be applied uniformly to sports conduct. Nothing inherent in the nature of sport allows it to remain insulated from the criminal sanctions applicable to the remainder of society.¹³² The sports arena should not be a sanctuary for unbridled violence to which the criminal laws of our nation do not apply.¹³³ A federal statute of the type proposed will preserve the vitality of sports while serving notice to players that they no longer have license to commit unwarranted batteries on fellow players.¹³⁴ With an effective federal statute, the public will no longer be forced to view acts of unnecessary and senseless violence, and athletes will finally learn the meaning of sportsmanship.

132. WEISTART, *supra* note 40, at 185.

133. Regina v. Ciccarelli, No. 2547 (Ontario Prov. Ct.-Crim. Div., Aug. 24, 1988), *aff'd*, No. 2388 (Ontario Dist. Ct.-York Jud'l Dist., Dec. 21, 1989) (unpublished decision) (on file in the office of the Indiana Law Review).

134. Sprotzer, *supra* note 74, at 10.

