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THE MANLY SPORTS: THE PROBLEMATIC USE OF CRIMINAL LAW TO REGULATE SPORTS VIOLENCE

With increasing frequency, the criminal law has been used to punish athletes who act with excessive violence while playing inherently violent sports. This development is problematic as none of the theories that courts employ to justify this intervention adequately take into account the expectations of participants and the interests of the ruling bodies of sports. This Essay proposes a standard for the interaction of violent sports and criminal law that attempts to reconcile the rules of violent sports with the aims of the criminal law.

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I. INTRODUCTION

When not on the playing field, an athlete stands in the same relation to the criminal law as does any other citizen.¹ The particular requirements of the athlete's sport, where that sport includes acts of a violent nature, do not supply the athlete a special defense of "diminished capacity."² Thus, an athlete has never successfully claimed that his particular conditioned-behavior characteristics of learned violence allow him, like a "battered spouse," wider latitude in justifying criminal conduct.³ The fact that no athlete has successfully articulated such a defense to off-field behavior is surprising, given the volume of sociological literature that supports the

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¹ See generally Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048 (1996) (noting that sports leagues may not wish to usurp government authority by enacting league-wide domestic violence sanctions).

² Nonetheless, some have argued that athletes have a greater propensity for certain crimes of violence, such as domestic abuse. See *id.* at 1050.

³ See 34 AM. JUR. 2D *Proof of Facts* § 1 (1983); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988).

claim that an athlete's conditioned behavior tends to produce violent conduct off of the playing field.⁴

Acts of violence that take place on the playing field are treated in an entirely different manner.⁵ Assaults and batteries that would render an athlete subject to criminal prosecution were they to occur away from the playing field are considered "part of the game" when they happen during the course of a violent sport.⁶ Typically, where such assaulting acts exceed certain perceived standards of appropriate play on the field, the worst result an athlete may expect is a league sanction in the form of a fine or brief suspension.⁷ Only in unusual, but not entirely rare, cases does the act of violence on the playing field subject the participant to a risk of criminal prosecution. These cases typically involve a rather egregious act of violent assault that gains public notoriety and that so far transgresses the stated and unstated norms of the game to render the public prosecution relatively unproblematic.⁸

The reason athletic participants may visit assaults and batteries upon each other revolves around the idea of "consent" that permeates the relevant decisions.⁹ In the context of sports, *consent* is a term that eludes easy definition. It refers to the issue of whether or not consent to a particular

⁴ See, e.g., ELAINE CASSEL & DOUGLAS A. BERNSTEIN, *CRIMINAL BEHAVIOR* 120-22 (2d ed., L. Erlbaum Associates 2007) (2000); Walter Kuhlman, Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 779.

⁵ See Christo Lassiter, *Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact Sport*, 22 ST. JOHN'S J. LEGAL COMMENT. 35, 60-68 (2007) (reviewing domestic statutes and English and American legal rules).

⁶ See, e.g., *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393 (Cal. 2006) (stating that pitches thrown at a batter's head are part of the game of baseball).

⁷ See, e.g., Tom Weir, *Haynesworth Suspended Five Games: Kicking Cowboy in Head Brings Longest Penalty for On-Field Action*, USA TODAY, Oct. 3, 2006, at 1C, available at http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm (commenting on a player who received a five-game suspension as a penalty for kicking off the helmet of another player, and subsequently stomping and scraping the unprotected head of that player); Lassiter, *supra* note 5, at 44 (explaining the Haynesworth incident in more detail).

⁸ See, e.g., *R. v. Green*, [1971] O.R. 591 (Can.) (slashing opponent's shoulder with hockey stick); *R. v. Maki*, [1970] O.R. 780 (Can.) (slashing opponent's face with hockey stick). During a 1969 exhibition hockey game in Canada, professional hockey player Ted Green hit Wayne Maki with his hockey stick. Maki retaliated by hitting Green with his hockey stick, fracturing Green's skull. Canadian authorities brought charges against both players.

⁹ See *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (holding that one party's license to another to beat him is not valid); *People v. Freer*, 381 N.Y.S.2d 976, 978 (Dist. Ct. 1976) (holding that athletic participant cannot consent to "overly violent" activity); *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1108 (Ct. Sessions 1895) (concluding that ability to consent hinges on whether activity consented to is a "dangerous activity"); *State v. Dunham*, 693 N.E.2d 1175, 1179 (Ohio 1997) (holding that consent to certain sports is ineffective).

sport, presumably given voluntarily, is nonetheless valid.¹⁰ Stated differently, even willing, factually consenting participants may not give valid consent to certain sporting activities, such as a sport that occasions excessive risk to life and limb.¹¹ In this sense, the law provides limitations on consent. This notion of consent can be captured by the term *legality*.¹² Consent can also, more commonly, refer to the automatic, “presumed consent” that a participant impliedly gives upon agreeing to play a particular sport. In these presumed-consent cases, consent is found even if, in fact, it is not given in an informed, volitional, affirmative manner.¹³ Finally, the term *consent* is used to refer to the factual provision of affirmative consent in the particular case. A participant in a sports contest, even an illegal one, may nonetheless defend his assaulting conduct on the grounds that the plaintiff consented to the assault through a demonstration of “volitional consent.”¹⁴

Despite the obstacles that consent poses to a criminal prosecution, U.S. history is dotted with criminal convictions for on-field behavior.¹⁵ Certainly, prosecutorial discretion has countenanced restraint in bringing indictments for conduct on the playing field.¹⁶ Indeed, there are several strong policy-based arguments against extending criminal liability to athletic endeavors.¹⁷ Nonetheless, egregious assaults have, with notable frequency, generated criminal prosecutions. What this approach has led to, at least in an abstract sense, is the result we have today: that criminal prosecutors and criminal juries, and not the governing bodies of a sport or

¹⁰ See, e.g., *Dunham*, 693 N.E.2d at 1178-79; *Collberg*, 119 Mass. at 351-53.

¹¹ See, e.g., *Fitzsimmons*, 34 N.Y.S. at 1108-09.

¹² See Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 250 (2001) (drawing on social norms in determining the legality of consent to violent sports contact).

¹³ See, e.g., *State v. Shelley*, 929 P.2d 489, 490 (Wash. Ct. App. 1997) (holding that participants in athletic contests are deemed to have consented to reasonably foreseeable hazards of joint participation in contests).

¹⁴ One other issue, common to the criminal law, becomes paramount in a prosecution for on-court activity: the matter of criminal intent. Ordinarily, the fact that a private citizen, for example, took a stick in his hands and approached the victim, striking him in the head, provides ample evidence of the requisite criminal intent. For a hockey player, however, whose legal job function requires him to take a stick in his hand and attempt a legal body check or other defensive screening action against an opponent, it is extraordinarily difficult to detect the presence of assaultive intent.

¹⁵ See Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL’Y 145, 156-60 (2002); Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148 (1976).

¹⁶ See RICHARD B. HORROW, *SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAW-MAKING AND THE CRIMINAL LAW* 13 (Carrollton Press 1980); Yates & Gillespie, *supra* note 15, at 167-68.

¹⁷ See *infra* note 143.

league, increasingly define the outer contours of permissible sporting activity.

II. THE LEGALITY OF VIOLENCE

Regardless of the willingness of the participants, the laws of most states have always placed limits on the legality of certain sporting ventures.¹⁸ The doctrine of consent as a defense to sports violence is available only in a contest that constitutes a legal sporting event.¹⁹ Thus, the court properly rejected application of this doctrine in a prosecution involving a felonious assault arising out of an illegal street fight.²⁰

Similarly, bare-knuckle boxing,²¹ cock fighting,²² dog fighting,²³ and other so-called manly or blood sports have been the subject of long-standing prohibitions. Courts and legislatures feared for the safety of the participants. For instance, hours-long battles that at times resulted in severe injury were not unknown to the sport of bare-knuckle fighting.²⁴ Lawmakers also feared that certain blood sports had unusual potential to

¹⁸ For an interesting history of bare-knuckle prize fighting and its recurring issues with legality, see ELLIOTT J. GORN, *THE MANLY ART: BARE-KNUCKLE PRIZE FIGHTING IN AMERICA* (1986).

¹⁹ See, e.g., *Commonwealth v. Collberg*, 119 Mass. 350, 352-53 (1876) (contrasting consent in legal sports, such as wrestling, and those which are illegal, such as prize-fighting).

²⁰ *State v. Dunham*, 693 N.E.2d. 1175 (Ohio 1997).

²¹ See GORN, *supra* note 18.

²² Cock fighting is illegal in every state, with Louisiana being the last to have enacted a ban in 2007. Thirty-three states have made this crime a felony, and in forty states it is illegal to spectate at a cockfight. See Ed Anderson, *Louisiana's Ban on Cockfighting Takes Effect Friday*, *TIMES-PICAYUNE*, Aug. 12, 2008, at 1.

²³ Dog fighting is illegal in all U.S. states, but retains a significant underground following. See Humane Soc. of the U.S., *Dogfighting Fact Sheet*, http://www.hsus.org/hsus_field/animal_fighting_the_final_round/dogfighting_fact_sheet/ (last visited June 3, 2009).

²⁴ GORN, *supra* note 18, at 75-76. The author recounts, from contemporary newspaper articles, the famous bare-knuckle contest between fighters Lilly and McCoy:

Round 70th—McCoy was now indeed a most unseemly object: both eyes were black—the left one nearly closed, and indeed that whole cheek presented a shocking appearance. His very forehead was black and blue; his lips were swollen to an incredible size, and the blood streamed profusely down his chest. My heart sickened at the sorry sight. When he came up he appeared very weak, and almost gasping for breath, and endeavored, while squaring away, to eject the clotting fluid from his throat.

Id.

Despite the obvious, McCoy's seconds, all with large wagers on their man, refused to concede the fight, as did McCoy. McCoy was knocked down eighty times in total and fought 118 times. At the end of the last round, McCoy collapsed and died, having drowned in his own blood. The fight lasted for two hours and forty-one minutes. This fatality, reportedly the first in America from the new sport, drew public outrage, even as the public demanded more fights. *Id.*

disrupt the public peace, inciting riotous or assaulting behavior on the part of spectators.²⁵ Finally, and significantly, courts in particular eviscerated the common law justification for manly sports by subjecting them to a utilitarian test: whether or not the sports developed a “socially useful” skill or trait in the participants,²⁶ much like horse racing, for example, has long been justified as a means to improve horse breeding and training practices.²⁷ Few blood sports survived this social utilitarian review unchanged.

One case in particular illustrates this novel approach by the courts. A license (a permission) granted by one boxer to subject himself to the potential of a beating at the hand of his opponent was held void.²⁸ The 1876 Massachusetts decision in *Commonwealth v. Collberg*²⁹ is typical of the period. Two boxers, by mutual agreement, met in a non-public place to fight before an audience of fifty to one hundred spectators.³⁰ At that time in history, these boxers probably fought under Broughton’s Boxing Rules of 1743,³¹ under which the boxing match proceeded until submission or a

²⁵ *Id.* at 77; see also *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876).

²⁶ See, e.g., *Collberg*, 119 Mass. at 353.

²⁷ See Katherine Simpson Allen, *A Horse Is a Horse (Of Course): Equine Collateral*, BUS. L. TODAY, Sept.-Oct. 2008, at 17, 17 (noting the value of a racehorse as propagator of the species).

²⁸ *Collberg*, 119 Mass. at 353.

²⁹ *Id.*

³⁰ *Id.* at 352.

³¹ Rules were devised by the famous bare-knuckle fighter Jack Broughton, who had bragged (until a defeat late in his life) that he had a lifetime’s unbeaten record. Prior to these rules, it was not uncommon for fighters to continue until the death of one of the combatants. Broughton established seven rules, the fourth of which essentially permitted the fighter to lose by submission or a refusal to continue.

1. That a square of a yard be chalked in the middle of the stage, and on every fresh set-to after a fall, or being parted from the rails, each Second is to bring his Man to the side of the square, and place him opposite to the other, and till they are fairly set-to at the Lines, it shall not be lawful for one to strike at the other.

2. That, in order to prevent any Disputes, the time a Man lies after a fall, if the Second does not bring his Man to the side of the square, within the space of half a minute, he shall be deemed a beaten Man.

3. That in every main Battle, no person whatever shall be upon the Stage, except the Principals and their Seconds, the same rule to be observed in bye-battles, except that in the latter, Mr. Broughton is allowed to be upon the Stage to keep decorum, and to assist Gentlemen in getting to their places, provided always he does not interfere in the Battle; and whoever pretends to infringe these Rules to be turned immediately out of the house. Every body is to quit the Stage as soon as the Champions are stripped, before the set-to.

4. That no Champion be deemed beaten, unless he fails coming up to the line in the limited time, or that his own Second declares him beaten. No Second is to be allowed to ask his man’s Adversary any questions, or advise him to give out.

5. That in bye-battles, the winning man to have two-thirds of the Money given, which shall be publicly divided upon the Stage, notwithstanding any private agreements to the contrary.

refusal to continue.³² Thus, the fight possessed many attributes of a modern, legal prize boxing match. The court reported that both participants were bruised in the contest, which continued until one fighter capitulated.³³ The opinion conceded that “certain manly sports calculated to give bodily strength, skill and activity and ‘to fit people for defence . . . in time of need’” were not necessarily unlawful under the common law.³⁴ Examples of such useful manly sports included those involving cudgels (clubs), foils (swords), and wrestling. Boxing, however, “serve[d] no useful purpose” and “tend[ed] to [produce] breaches of the peace.”³⁵ Consequently, the court concluded that boxing matches were “unlawful even when entered into by agreement and without anger or mutual ill will.”³⁶ Thus, evidence of consent was irrelevant, as consent of the parties did not make valid an unlawful act.³⁷

6. That to prevent Disputes, in every main Battle the Principals shall, on coming on the Stage, choose from among the gentlemen present two Umpires, who shall absolutely decide all Disputes that may arise about the Battle; and if the two Umpires cannot agree, the said Umpires to choose a third, who is to determine it.

7. That no person is to hit his Adversary when he is down, or seize him by the ham, the breeches, or any part below the waist. A man on his knees to be reckoned down.

As agreed by several Gentlemen at Broughton’s Ampitheatre, Tottenham Court Road, August 16, 1743. M.C. (Mike) Southorn, *Broughtons Rules*, EAST SIDE BOXING, Oct. 19, 2005, <http://www.eastsideboxing.com/news.php?p=4966&more=1>.

³² The great bare-knuckle fighter John L. Sullivan and U.S. President Theodore Roosevelt both contributed to the gradual replacement of the rugged Broughton Rules with the more modern Queensbury rules. GORN, *supra* note 18, at 205-25. The Queensbury rules featured timed rounds, gloved hands, and prohibited the clinches and wrestling-like moves that enabled superior bare-knuckle fighters to deliver dangerous blows. *Id.* at 179-247.

³³ *Collberg*, 119 Mass at 352.

³⁴ *Id.* at 353.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Boulter v. Clark*, in FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 16 (5th ed., London 1790) (1768) (holding that where fighting was unlawful, a defense that the plaintiff consented would be no bar to the action); *Bell v. Hansley*, 48 N.C. 131 (3 Jones) (1855) (“One may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace [is] void . . .”); *Stout v. Wren*, 8 N.C. 420, 420 (1 Hawks) (1821) (“A man shall not recover a recompense for an injury received by his own consent, provided the act from which the injury is received be lawful: but where two fight by consent, and one is beaten, he may recover damages for the injury, because fighting is an unlawful act.”); *Matthew v. Ollerton*, [1693] 90 Eng. Rep. 438 (K.B.) (holding that a man may not license another to beat him as that amounts to a breach of the peace); see also *Logan v. Austin*, 1 Stew. 476, 476 (Ala. 1828) (“Public policy will not authorize one man to beat another, although he consent to it, as it is against morality, and might lead to a violation of the public peace . . .”); *Adams v. Waggoner*, 33 Ind. 531 (1870) (holding that consent may mitigate damages); *R. v. Lewis*, [1844] 174 Eng. Rep. 874 (Q.B.), 875 (“[N]o one is justified in striking another, except it be in self-defence; and it ought to be known, that, whenever two persons go out to strike each

The *Collberg* opinion and others³⁸ that revised the common law evidenced a decidedly utilitarian perspective on sports. Certain sports were prohibited by these courts not on account of moral considerations, such as abhorrence of violent fighting or blood, but rather because the particular violence or bloodshed served no useful purpose in conditioning men or preparing them for some other (presumably legal) battle, as in time of war.³⁹ Certain sporting contests, notably prize fights, were viewed skeptically on an additional utilitarian ground, their tendency to incite viewing fans into acts of violence or other breaches of the peace.⁴⁰ Thus, sporting contests in this era had to be justified by reference to some purpose or goal other than, and greater than, the enjoyment of the sport for its own sake. The fact that the participants had mutually consented to engage in the sport, with its attendant and obvious risks, was immaterial to the legality of the activity.⁴¹

Gradually, this inflexible view softened. In the 1895 manslaughter prosecution of a prize fighter for the unintentional killing of his opponent, *People v. Fitzsimmons*,⁴² the jury acquitted the defendant despite a state statute that made prize fighting a criminal misdemeanor.⁴³ The court's lengthy and discursive jury instructions on the issue of consent stated that although one could not consent to an illegal act, whether or not a particular consent is permissible depends on whether or not the victim had consented to a "dangerous" activity.⁴⁴ If the activity were not a dangerous one and thus the participants had, according to the trial judge, consented to a game in which the rules and practices were reasonable, then the consent itself was reasonable, and an accidental, non-intentional homicide constituted an excusable homicide.⁴⁵ In effect, the judge's instructions turned the

other, and do so, each is guilty of an assault," and it is immaterial who struck the first blow.). *But see* *Champer v. State*, 14 Ohio St. 437, 437 (1863) ("[A]n indictment against A. for an assault and battery upon B., is not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them."); *State v. Beck*, 19 S.C.L. 363, 363 (1 Hill) (S.C. Ct. App. 1833) (holding that a whipping intended to save the victim from prosecution for theft was not an assault and battery where the whipping was at the victim's "earnest request").

³⁸ See *supra* note 37.

³⁹ See *Collberg*, 119 Mass. at 353.

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² 34 N.Y.S. 1102 (Ct. Sessions 1895).

⁴³ The statute in question read: "A person who, within this state, engages in, instigates, aids, encourages, or does any act to further a contention or fight, without weapons, between two or more persons, or a fight commonly called a ring or prize fight, either within or without the state [and then follows in regard to sending a challenge], is guilty of a misdemeanor." *Id.* at 1102, 1106-07.

⁴⁴ *Id.* at 1108.

⁴⁵ *Id.* at 1109.

legislature's prohibition on its head by permitting the defense of consent as long as the sporting contest was reasonable and not dangerous.

The traditional illegality of certain blood or manly sports continues in modern jurisprudence.⁴⁶ For sports that are deemed "non-dangerous" or "reasonable," however, consent remains a viable defense.⁴⁷ In these later decisions, only those acts of assault that were "overly violent" lay outside of the consent defense. Thus, in the 1976 opinion in *People v. Freer*,⁴⁸ the court held that an athletic participant could not legally consent to an "overly violent" activity.⁴⁹ The conviction stemmed from a football game in which the victim, a defensive player, punched the ball carrier while tackling him.⁵⁰ This initial punch, the court ruled, was properly consented to, since using a punching motion while tackling in the game of football is part of the game.⁵¹ After the rough tackle, as the play drew to a close, the ball carrier punched the tackler back.⁵² This second punch gave rise to the criminal prosecution, where the court denied the defendant the opportunity to present evidence of consent as a defense.⁵³ Instead, the court ruled, as a matter of law, that the participants could not consent to an "overly violent" attack of this kind:

Initially it may be assumed that the very first punch thrown by the complainant in the course of the tackle was consented to by defendant. The act of tackling an opponent in the course of a football game may often involve 'contact' that could easily be interpreted to be a 'punch'. Defendant's response after the pileup to complainant's initial act of 'aggression' cannot be mistaken. Clearly, defendant intended to punch complainant. This was not a consented to act.⁵⁴

Indeed, this decision is factually supportable. The court reasoned that "any attack which the defendant may have believed was being made upon him was terminated by the pileup which ensued after the initial contact between the [victim] and the defendant at the time of the tackle."⁵⁵ After

⁴⁶ See *Am. Boxing and Athletic Ass'n v. Chemung County Y.M.C.A.*, 787 N.Y.S.2d 413, 416 (App. Div. 2004) (explaining public safety interest in regulation of wrestling and boxing events, noting criminal penalties for noncompliance).

⁴⁷ See *Lassiter*, *supra* note 5, at 65 ("[I]f the rules and practices of the game are reasonable, consented to by all engaged, and are not likely to induce grievous bodily injury or death, then injuries . . . on the field of play are excused.").

⁴⁸ 381 N.Y.S.2d 976 (Dist. Ct. 1976).

⁴⁹ *Id.* at 978 ("There is a limit to the magnitude and dangerousness of a blow to which another is deemed to consent.").

⁵⁰ *Id.* at 977.

⁵¹ *Id.* at 978.

⁵² *Id.* at 977.

⁵³ *Id.* at 979.

⁵⁴ *Id.* at 978.

⁵⁵ *Id.* at 979.

the other players got off of the defendant, the defendant got up on one knee while the victim was lying on the ground and forcibly struck the victim with his fist.⁵⁶ According to the court, the defendant's claim that he was under attack and struck in self-defense was belied by the time passed and intervening acts between the two punches.⁵⁷ Thus, the *Freer* decision suggests that there is a limit to the type of blow to which a party will be deemed to have consented, even in a violent sports contest in which the consent to participate is otherwise valid or legal.

Although not decisions from United States courts, two Canadian prosecutions are instructive in trying to define the limits of permissible assault within a sports contest. In 1969, during a National Hockey League hockey contest, an altercation on the ice resulted in the prosecution of the two participants. The fight between Edward "Ted" Green and Wayne Maki started when Green struck Maki in the face with his gloved hand.⁵⁸ Maki retaliated by striking Green in the lower abdomen with his hockey stick.⁵⁹ The two players then squared off in a stick fight. Green first struck Maki with his stick near Maki's shoulder.⁶⁰ Maki countered with a stick blow that left Green seriously injured.⁶¹ After the fight, Maki was charged with assault causing bodily harm.⁶² Green was charged with simple assault.⁶³ Although both players were eventually acquitted, each of the decisions in the Ottawa-Carleton Provincial Court discussed the consent defense.⁶⁴ The *Maki* court concluded that the consent defense could not apply to the facts

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *R. v. Maki*, [1970] 3 O.R. 780 (Can.).

⁵⁹ *R. v. Green*, [1971] 1 O.R. 591, 593 (Can.).

⁶⁰ *Maki*, 3 O.R. at 781.

⁶¹ *Id.*

⁶² *Id.* at 780.

⁶³ *Green*, 1 O.R. at 591.

⁶⁴ In the *Green* decision, the judge commented on Green's consent defense to the simple assault charge:

There is no doubt that the players who enter the hockey arena consent to a great number of assaults on their person, because the game of hockey as it is played in the National Hockey League, which is the league I am dealing with, could not possibly be played at the speed at which it is played and with the force and vigour with which it is played, and with the competition that enters into it, unless there were a great number of what would in normal circumstances be called assaults, but which are not heard of. No hockey player enters on to the ice of the National Hockey League without consenting to and without knowledge of the possibility that he is going to be hit in one of many ways once he is on that ice.

Green, 1 O.R. at 594.

The judge in the *Maki* case saw the consent issue differently: "[T]here is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack." *Maki*, 1 O.R. at 782.

of this case, reasoning that “no athlete should be presumed to accept malicious, unprovoked or overly violent attack.”⁶⁵ The court’s theory of the consent defense was that in sporting contests, participants consent to certain acts of violence given the very nature of the sport.⁶⁶ In *Green*’s prosecution, the court determined that the victim (*Maki*) had in fact consented to being struck in the face by a gloved hand, because this activity constituted a common practice in hockey games and was unlikely to cause serious injury.⁶⁷

The distinction between permissible and impermissible consent is difficult both to articulate and to discern in practice.⁶⁸ An Iowa case from 1990⁶⁹ considered the state’s assault statute that specifically excepted from its ambit the acts of any person who was a voluntary participant in a sport, social, or other activity, not in itself criminal, where the assaultive act was “a reasonably foreseeable incident of such sport or activity, and [did] not create an unreasonable risk of serious injury or breach of peace.”⁷⁰ The prosecution in that case arose out of a fight occurring in the midst of a basketball game. One of the players delivered a particularly hard foul and subsequent blow to the face of an opposing player.⁷¹ The perpetrator of this hard foul, ultimately the criminal defendant, was not ejected, although his teammate was.⁷² Later, another hard foul from a player on the opposing team led to a brawl that involved numerous players from both teams.⁷³ The court had little trouble in concluding that the defendant’s conduct in participating in the brawl did not fall within the statutory exception, rejecting “defendant’s suggestion that he is protected from prosecution for acts committed by him while he is on a playing surface until the final buzzer, gun, whistle, goal, or out.”⁷⁴ Instead, the court held that the

⁶⁵ *Maki*, 3 O.R. at 782.

⁶⁶ *Id.*

⁶⁷ *Green*, 1 O.R. at 594.

⁶⁸ See, e.g., Gregory Schiller, *Are Athletes Above the Law? From a Two-Minute Minor to a Twenty-Year Sentence*: Regina v. Marty McSorley, 10 SPORTS LAW. J. 241, 253 (2003) (noting that in *Maki* and *Green*, the same court that dismissed charges against one player also found his opponent’s actions to be instinctive and thus not inculpatory; thus, both the instigator and the retaliator were acquitted, even though the retaliator’s blow was life-threatening).

⁶⁹ *State v. Floyd*, 466 N.W.2d 919 (Iowa Ct. App. 1990).

⁷⁰ *Id.* at 921.

⁷¹ *Id.* at 920.

⁷² *Id.* at 920-21.

⁷³ *Id.*

⁷⁴ *Id.* at 922.

statutory exception was aimed to protect a player who “commits acts during the course of play,”⁷⁵ and acts in “furtherance of the object of the sport.”⁷⁶

Even assuming that the defendant and the other fighters were “participants” in a sport when they engaged in fisticuffs, the court held that the defendant’s acts were not a reasonably foreseeable part of the game of basketball.⁷⁷ Basketball might include a reasonable amount of pushing, shoving, and the occasional elbow and slap.⁷⁸ According to the court, however, it strained credibility to conclude that the brutal assault at issue in the case was reasonably foreseeable.⁷⁹ Further, even were the assault reasonably foreseeable, consent was not a valid defense because the defendant’s conduct created an unreasonable risk of serious injury or breach of the peace.⁸⁰ The average, reasonable basketball player is unprotected and unprepared for fist fights.⁸¹ The court reasoned that the halt in play prior to the fistfight lent further weight to the conclusion that the fight was not an incident of basketball.⁸²

Other decisions have similarly attempted to define the outer contours of consensual sports. In *Commonwealth v. Sostilio*,⁸³ a driver in an automobile race passed an opponent by traveling along the apron, or the inside of the racing track.⁸⁴ The defendant’s conduct caused an accident in which the opponent was killed. Although consent was not raised as a defense, the opinion did discuss the issue of whether or not a sport’s participant could be guilty of a crime, here manslaughter, by simply engaging in conduct inherent to the sport.⁸⁵ The court stated that physical contact between race cars is not an essential part of racing automobiles.⁸⁶

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 923.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* Many commentators have urged criminal prosecutors to use criminal sanctions to regulate on-court sports’ violence. See Daniel R. Karon, *Winning Isn’t Everything, It’s the Only Thing. Violence in Professional Sports: The Need for Federal Regulation and Criminal Sanctions*, 25 IND. L. REV. 147 (1991); Mary Carroll, 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 HAMLINE L. REV. 71 (1988); Comment, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148 (1976); Bradley C. Nielsen, Note, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681 (1989).

⁸³ 89 N.E.2d 510 (Mass. 1949).

⁸⁴ *Id.* at 511.

⁸⁵ *Id.*

⁸⁶ *Id.* at 512.

Thus, the defendant's attempt to drive past those ahead of him where there was not room to do so rendered a collision almost inevitable, supporting the conviction for manslaughter.⁸⁷

III. RULES AS RESTRAINTS ON VIOLENCE

Participants in an athletic contest are deemed to have consented to assaults and batteries when both the injury and the conduct that caused it are "reasonably foreseeable hazards of joint participation in an athletic contest."⁸⁸ Thus, the fact that certain conduct may constitute a "foul" or "penalty" under the particular rules of the sport does not necessarily render the conduct beyond justification under the consent defense. In *State v. Shelley*, the defendant was playing a basketball game when he was the victim of a hard foul that resulted in a scratch to his face.⁸⁹ The defendant subsequently returned to the game and hit the victim (the perpetrator of the initial hard foul) in the face, breaking the victim's jaw in three places.⁹⁰ The defendant argued that the blow to the face was not intentional, but rather happened in the course of play as a reactive, unthinking response.⁹¹ The defendant argued that, because of the previous hard foul by the victim, the defendant expected another, and thus reacted to a perceived imminent hard foul.⁹² The defendant also raised the defense of consent, arguing that the victim was injured in the course of normal, if violent, basketball play.⁹³

The trial court stated that as a matter of law, the defense of consent was not available because the defendant's conduct in striking another player with a blow to the face exceeded what is considered to be permissible within the rules of the sport of basketball: "[C]onsent is to contact that is contemplated within the rules of the game and that is incidental to the furtherance of the goals of that particular game."⁹⁴ The appellate court disagreed.⁹⁵ It reasoned that the consent defense is necessary to an assault action arising out of a sports contest.⁹⁶ If a consent defense was not available to a sports-related assault, then most athletic contests would need

⁸⁷ *Id.*

⁸⁸ *State v. Shelley*, 929 P.2d 489, 490 (Wash. Ct. App. 1997).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 491.

⁹⁵ The appellate court corrected the reasoning of the trial court and stated that consent is a defense to an assault that occurs during an athletic event when both the conduct and the injury are reasonably foreseeable hazards of joint participation in an athletic event. *Id.*

⁹⁶ *Id.*

to be banned because many sports involve invasions of physical integrity. The court reasoned that “society has chosen to foster sports competitions,”⁹⁷ and therefore players must, by necessity, be able to consent to physical contact with each other when playing the game.⁹⁸

The appellate court rejected a reliance on the rules of the game by themselves to limit the athlete’s scope of consent.⁹⁹ Citing the Model Penal Code (MPC),¹⁰⁰ the court determined that a reliance on the rules of the game to form the limit of consent would be too constricting to athletic play, as “[c]ertain excesses and inconveniences are to be expected beyond the formal rules of the game. It may be ordinary and expected conduct for minor assaults to occur.”¹⁰¹ Instead, the court held that the limits of consent are formed by the reasonably foreseeable hazards of joint participation in a lawful athletic contest or other competitive sport not forbidden by law.¹⁰²

Despite these conclusions of law, in the final analysis, the appellate court held that the magnitude and dangerousness of the defendant’s conduct were beyond the limits of permissible consent. The appellate court found that there was no question that the defendant intended to hit the victim and explained that “[t]here is nothing in the game of basketball, or even rugby or hockey, that would permit consent as a defense” to the defendant’s lashing out at the victim with sufficient force to land a substantial blow to the jaw.¹⁰³

The court’s reasoning raises two substantial issues. First, if a court, following the MPC,¹⁰⁴ holds that the limits of consent are not formed by the rules of the respective sport or game, but rather by the “reasonably foreseeable hazards” of joint athletic participation,¹⁰⁵ then the ruling bodies of sports would theoretically be unable to utilize their control over the rules

⁹⁷ *Id.* at 492.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ As the court noted, the commentaries to the Model Penal Code provide:

There are, however, situations in which consent to bodily injury should be recognized as a defense to crime. . . . There is . . . the obvious case of participation in an athletic contest or competitive sport where the nature of the enterprise often involves risk of serious injury. Here, the social judgment that permits the contest to flourish necessarily involves the companion judgment that reasonably foreseeable hazards can be consented to by virtue of participation.

Id. (quoting MODEL PENAL CODE AND COMMENTARIES § 2.11 cmt. 2 at 396 (Official Draft and Revised Comments 1985)).

¹⁰¹ *Id.* (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 154 (3d ed. 1982)).

¹⁰² *Id.*

¹⁰³ *Id.* at 493.

¹⁰⁴ MODEL PENAL CODE § 2.11 (Proposed Official Draft 1962).

¹⁰⁵ *Id.* § 2.11(2)(b).

of a sport to modify the conduct of players. For example, assume the National Hockey League (NHL) wished to make illegal stick checks no longer “part of the game.” To further this desire, assume the NHL passed a stringent rule against all illegal contact with hockey sticks and added severe penalties for infractions. At this point, illegal stick checks would clearly be prohibited by the rules of the game. Yet under the MPC approach, criminal prosecutions for assault of players who committed an illegal stick check and severely injured an opponent would be subject to an absolute defense of consent; despite their strict prohibition under hockey’s rules, stick checks are now and would remain a reasonably foreseeable hazard of joint participation in a NHL hockey game. If the rule makers and governing authorities of a sport are unable to alter the nature of their game, at least as far as criminal liability is concerned, then it is unclear how exactly a sport could go about altering the nature of its contest. This result is problematic, for sports are simply games, lacking any inherent qualities or necessary attributes.¹⁰⁶ Thus, if an organizer of a game wants to create a contest involving ice skating, sticks, and pucks, but without stick checks or body checks, and call the sport *X*, no tribunal or legislature should have cause to gainsay that creation. But a legal standard, such as that reflected in the *Shelley* decision,¹⁰⁷ that divorces the scope of participant consent from the rules of the contest, fails to recognize and respond to the only written representation as to what risks the participant, had he or she read the rules, actually agreed to undertake.

The second problem with the court’s reasoning in *Shelley*, which declines to use the rules of a sport to define the scope of conduct to which a player consents,¹⁰⁸ is that the “reasonably foreseeable hazard” standard creates a difficult matter of factual interpretation, both for the player in playing the game and for the tribunal in assessing the player’s conduct after the fact. For instance, the defendant in *Shelley* argued that his blow to the victim’s face was unplanned and an immediate reaction to what he perceived to be a threatened hard foul.¹⁰⁹ Moreover, the defendant’s blow came during the play of the sport and from the “weak side,” or the side away from the ball, and happened while the two players were looking at the

¹⁰⁶ The U.S. Supreme Court suggested the opposite in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). The Court in this decision implied that the sport of golf has an existence and nature apart from its rules. In *Martin*, a golfer who was unable to walk the golf course due to a disability sued to be permitted to use a golf cart. The rules of the PGA expressly required all competitors to walk the course. In holding for Martin, the Court ruled that the game of golf involves only striking a ball into a hole, and that walking was not part of the game, despite the PGA rule stating that it is. *Id.* at 683-85.

¹⁰⁷ *Shelley*, 929 P.2d at 492.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 490.

ball.¹¹⁰ It is not at all obvious to the player that such a blow to the face of an opponent would subject him to criminal liability.¹¹¹ Ignoring this possibility, the appellate court declared that “there is no question” but that the defendant intended to hit the victim,¹¹² a strong conclusion that not only seems unsupportable in light of the court’s recitation of the facts of the case,¹¹³ but also raises an issue under the rule of lenity traditionally applied in criminal cases.¹¹⁴ The court’s mention of the sport of hockey, albeit in dicta, suggests the ambiguity of the court’s standard. In hockey, blows to the head and other parts of the opponent’s body with a gloved hand are not uncommon, yet can result in severe injuries,¹¹⁵ thus suggesting the need for flexibility in the application of criminal law.

Another modern American prosecution of a professional sports athlete for violence on the field of play against a fellow competitor involved a hockey player, Dave Forbes of the Boston Bruins.¹¹⁶ During a 1975 NHL game, Forbes used a hockey stick to commit what was alleged to be aggravated assault.¹¹⁷ The prosecution was granted an instruction that, regarding the crime of aggravated assault, a person cannot consent either expressly or by implication to be a victim of a crime.¹¹⁸ Upon deliberation,

¹¹⁰ *Id.* at 493.

¹¹¹ The defendant also claimed that the statute in question was vague as applied to sports’ altercations because it failed to provide either adequate notice of proscribed conduct or standards to prevent arbitrary enforcement as to athletes who believe they can be rough because they are accustomed to unprosecuted rough play. *Id.* In response, the appellate court stated that “an ordinary person should understand that intentionally punching a person in an athletic competition may result in prosecution.” *Id.* at 494. Once again, the evidence from the trial court did not make clear that the defendant had punched the complainant with a closed fist, nor that he necessarily did so with intention.

¹¹² *Id.* at 493.

¹¹³ The only pertinent fact available in the trial record cited by the appellate court was the defendant’s insistence that the blow was not intentional.

¹¹⁴ See *Bell v. United States*, 349 U.S. 81, 83 (1955). See generally Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 393-94 (1988) (arguing the need for flexibility during liability assessment similar to the discretion exercised during sentencing).

¹¹⁵ See *People v. Schacker*, 670 N.Y.S.2d 308, 309 (Dist. Ct. 1998) (“If cross checking, tripping and punching were criminal acts, the game of hockey could not continue in its present form.”).

¹¹⁶ See HORROW, *supra* note 16, at 162 (citing *State v. Forbes*, No. 63280 (Minn. Dist. Ct. 1975) (mistrial)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

the jury divided and a mistrial was declared.¹¹⁹ Seldom has on-ice hockey violence resulted in a criminal conviction.¹²⁰

IV. PERMISSIVE VIOLENCE

A New York court followed a different approach to the problem of defining the limits of consent to assaultive behavior in a sports contest in *People v. Schacker*.¹²¹ After the whistle was blown during a hockey game, the defendant skated up behind the complainant, who was standing near the goal.¹²² According to the testimony at trial, the defendant came up behind the complainant and struck the complainant with his hand on the back of the neck, causing the complainant to strike his head on the crossbar of the goal.¹²³ The complainant sustained a concussion, and suffered headaches and other minor injuries as a result.¹²⁴ In response to the argument that the plaintiff "assumed the risk" of injury,¹²⁵ the court reasoned that a player in a sport accepts the dangers that inhere in the sport insofar as they are obvious and necessary.¹²⁶ The sport of hockey, according to the court, includes intentional conduct that has the appearance of criminal acts:

[I]n order to allege a criminal act which occurred in a hockey game, the factual portion of the information must allege acts that show that the intent was to inflict physical injury which was unrelated to the athletic competition. Although play may have terminated, the information herein does not show that the physical contact had no connection with the competition.¹²⁷

This standard, requiring that the alleged criminal activity be "unrelated" to the sport in order to warrant prosecution, seems to present wider latitude for violent conduct than does the standard articulated in the MPC.¹²⁸ In *Schacker*, the whistle had blown and play had stopped.¹²⁹ No

¹¹⁹ *Id.*

¹²⁰ Dino Ciccarelli was the first NHL player to be imprisoned for an on-ice incident. He was convicted in a Toronto court and spent a single day in jail. Austin Murphy, "North Star On Ice," *SPORTS ILLUSTRATED*, Sept. 5, 1988, at 34. For another example, see *R. v. McSorley*, [2000] B.C.P.C. 0116 (British Colom.), available at http://www.provincialcourt.bc.ca/judgments/pc/2000/01/p00_0116.htm (finding defendant guilty of assault for apparently vicious slash to head of opponent).

¹²¹ *People v. Schacker*, 670 N.Y.S.2d 308 (Dist. Ct. 1998).

¹²² *Id.* at 309.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929)).

¹²⁷ *Id.* at 309-10.

¹²⁸ See *State v. Shelley*, 929 P.2d 489, 490 (Wash. 1997).

¹²⁹ *Schacker*, 670 N.Y.S.2d at 309.

evidence was presented that the defendant and the complainant had engaged in some prior interaction during the hockey contest that led to the assault. The only evidence that linked the assault to the hockey game was that the players were still on the ice and the hockey game, although the whistle had temporarily stopped play, was an ongoing event.¹³⁰ Despite this slim connection with the sport, the defendant's assault was excused as assumed risk.¹³¹ The court did not explain why this particular assault was more "in connection" or "related" to the sport of hockey than any other crime perpetrated on the ice in the midst of a sporting contest would be.

Instead of relying on a factual distinction to justify its conclusion, the *Schacker* court instead referred to two considerations it found paramount.¹³² First, the nature of the injury suffered by the complainant was relatively minor. Criminal liability, according to the opinion, requires that "the injuries must be so severe as to be unacceptable in normal competition, requiring a change in the nature of the game. That type of injury is not present in this case."¹³³ The second justification was grounded in policy: "The idea that a hockey player should be prosecuted runs afoul of the policy to encourage free and fierce competition in athletic events."¹³⁴

The court's concern about encouraging "fierce competition" may have been at odds with the intent of the contest's organizers and participants. In fact, the game in which the complainant was injured took place in a non-checking hockey league.¹³⁵ Nonetheless, reasoned the court, the doctrine of consent should not be limited by the rules of the particular game:

While the rules of the league may prohibit certain conduct, thereby reducing the potential injuries, nevertheless, the participant continues to assume the risk of a strenuous and competitive athletic endeavor. The normal conduct in a hockey game cannot be the standard for criminal activity under the Penal Law, nor can the Penal Law be imposed on a hockey game without running afoul of the policy of encouraging athletic competition.¹³⁶

Although *Schacker*'s "in-connection" standard permits even greater scope for the consent defense than does the "reasonably foreseeable hazard" standard adopted in *Shelley*,¹³⁷ the decision of the court in *Schacker* is subject to the same critique as that in *Shelley*. The fact that the league was a non-checking league should have mattered in the decision. Presumably,

¹³⁰ *Id.* at 310.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *State v. Shelley*, 929 P.2d 489, 492 (Wash. Ct. App. 1997).

the founders of that league, by their decision to eliminate checking from the game, sought to alter the “reasonable hazards” to which hockey players might ordinarily be presumed to consent. The fact that the court found that the participants impliedly consented to the “normal” level of violence attendant to a checking hockey game,¹³⁸ and not a non-checking game, suggests that the leagues are comparatively powerless to change the nature of their contests, at least for the purposes of criminal prosecutions. This is an important criticism. The ability of leagues to alter the expectations and implied consent of players to make certain contests more safe than “normal” is vital to offer a range of sporting activities, and attendant sporting risks, and to provide a product that might attract participants who prefer a slightly different game. In other words, certain players might wish to participate in safer leagues in order to change exactly those “reasonable hazards” that are commonly known to attend a hockey contest. These participants may reasonably expect to enjoy the protection of the criminal law along with other liability standards to ensure that the game in which they are participating delivers on its implied promise of heightened safety.

In addition, the court’s decision to divorce its estimation of consent from the actual rules of the game is further problematic, given the court’s adoption of a seemingly broad and theoretically limitless standard of “in connection” to the game.¹³⁹ In theory, the court’s standard would justify nearly any simple assault as long as it took place on the ice in the midst of an athletic contest. The fact that the complainant did not suffer severe trauma¹⁴⁰ should not be dispositive in assessing the legality of the defendant’s behavior. Nevertheless, the court’s policy concern is genuine, as severe criminal sanctions for on-court conduct that is or may be a somewhat ordinary part of a contest would tend to deter the willingness of athletes to play physical sports with verve and aggressiveness.¹⁴¹

V. SUSTAINING THE MANLY SPORTS

The most obvious issue in specifying the limits of consent to sports violence is the desire that games be played aggressively and with maximum effort.¹⁴² Should ordinary aggressive sports play be transmogrified into criminal assault, then participants would, at the margin, decline to play

¹³⁸ *Schacker*, 670 N.Y.S.2d at 310.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Limon v. Texas*, No. 04-00-00276-CR, 2001 WL 356247 (Tex. App. Apr. 11, 2001). Limon accepted a plea bargain on a charge of aggravated assault with serious bodily injury. Limon was sentenced to five years in prison for elbowing an opponent in the face during a basketball game. *Id.*

¹⁴² See *Schacker*, 670 N.Y.S.2d at 310.

sports in a manner that might give rise to liability. Indeed, the stigma of a criminal conviction and the severity of a criminal sanction, including its profound collateral consequences in terms of social and employment relations, might even lead athletes to refuse to engage in conduct that, although lawful, could approach the line of illegality, for fear of misinterpretation.¹⁴³

A thoughtful discussion of the doctrine of consent with regard to violence in sports contests appears in the decision of *State v. Gudugli*.¹⁴⁴ This discussion arose in the context of an appellate opinion on the alleged deficiency of trial counsel for his failure to raise the issue of implied consent as a defense.¹⁴⁵ The defendant had been convicted of misdemeanor assault for punching an opponent in the eye.¹⁴⁶ The altercation arose in the midst of a heated argument during an intramural basketball contest.¹⁴⁷ The opinion cited several reasons why the doctrine of consent should be applied liberally in the sports context.

First, most sports contests, including the intramural game at issue, are already subject to some regulation of player behavior, if only through the calls of the game officials, sanctions of the league, or university oversight.¹⁴⁸ The fact that such immediate and internal sanctions are available and are commonly used is a reason for prosecutors and criminal courts to refrain from exercising jurisdiction over on-field violence.¹⁴⁹

Second, the opinion notes the learned aggressiveness of athletes—especially American athletes playing certain competitive, physical sports—which often includes modest levels of violence, retaliation, and intimidation.¹⁵⁰ Third, competitive sports are expected to produce a certain number of non-severe injuries stemming from illegal contact; the fact that the complainant in this case was mildly injured should counsel restraint in applying the severe sanctions of the criminal law to this conduct.¹⁵¹

¹⁴³ See Yates & Gillespie, *supra* note 15, at 160-61 (arguing that courts must take into account implied consent in assessing the legality of sports violence); Charles Harary, Comment, *Aggressive Play or Criminal Assault? An In-Depth Look at Sports Violence and Criminal Liability*, 25 COLUM. J.L. & ARTS 197, 204-05 (2002) (discussing the need for courts to give latitude to consent doctrine for fear of deterring sports behavior).

¹⁴⁴ 811 N.E.2d 567 (Ohio Ct. App. 2004).

¹⁴⁵ *Id.* at 576.

¹⁴⁶ *Id.* at 570.

¹⁴⁷ *Id.* at 569.

¹⁴⁸ See *id.* at 575.

¹⁴⁹ *Id.* (citation omitted).

¹⁵⁰ *Id.* at 574 (citation omitted).

¹⁵¹ See *id.* at 575.

A significant number of academic commentators similarly counsel restraint in the application of criminal law to sports violence.¹⁵² Given the reluctance of courts, as a general matter, to uphold indictments of athletes for violent activities on the playing field, several legislative proposals have been offered to address the situation.¹⁵³ To date, none have passed into law.¹⁵⁴

None of the current approaches to the problem of on-court player-to-player violence is satisfactory.¹⁵⁵ On the one hand, adopting the broad in-connection standard of consent,¹⁵⁶ as did the court in *Shelley*,¹⁵⁷ where consent includes any act of violence done in relation or in connection to a game,¹⁵⁸ grants too much permission for undue, intentional violence. The fact that one has suited up for a sports contest should not enable one to commit nearly any act that is plausibly connected to the game and defend one's conduct against criminal prosecution, no matter how grievous the harm caused, on account of implied consent on the part of the victim. No person would knowingly offer such consent to criminal conduct where serious harm is the intended result.

On the other hand, a jurisprudential approach that does not recognize the defense of implied consent and give that doctrine adequate scope would unnecessarily subject athletes to criminal liability for what often can be immediate, reflexive, unthinking physical responses to perceived threats or

¹⁵² See Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149 (2000); Harary, *supra* note 143. But see Lassiter, *supra* note 5.

¹⁵³ See Sports Violence Act, H.R. 7903, 96th Cong. (1980); Federal Sports Act, S. 3445, 92nd Cong. (1972).

¹⁵⁴ The Sports Violence Act would create a new federal criminal offense of "[e]xcessive violence during professional sporting events." H.R. 7903 § 115. It would proscribe a player's using "excessive physical force" causing a "risk of significant bodily injury to another person." *Id.* § 115(a). The bill defined excessive force as physical force which "(A) has no reasonable relationship to the competitive goals of the sport; (B) is unreasonably violent; and (C) could not be reasonably foreseen, or was not consented to, by the injured person, as a normal hazard." *Id.* § 115(b)(1).

¹⁵⁵ Along with the proposed statutes, *supra* note 153, other proposals to define the role of criminal law have been offered. See Ronald A. DiNicola & Scott Mendeloff, *Controlling Violence in Professional Sports: Rule Reform and the Federal Professional Sports Violence Commission*, 21 DUQ. L. REV. 843 (1983); Chris J. Carlsen & Matthew Shane Walker, Note, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399 (1982); Clete Samson, Comment, *No Time Like the Present: Why Recent Events Should Spur Congress to Enact a Sports Violence Act*, 37 ARIZ. ST. L.J. 949 (2005).

¹⁵⁶ *State v. Shelley*, 929 P.2d 489, 492-93 (Wash. Ct. App. 1997).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

slights, or other aggressive conduct.¹⁵⁹ Vigorous intervention of criminal prosecution in the world of professional and amateur sports could theoretically do too much to dampen American competitive enthusiasm and learned aggressiveness that is requisite to many sporting endeavors.¹⁶⁰ Many sports are best played with controlled aggression, to the enjoyment of both the fans and the participants. Thus, neither of the polar opposite positions appears to present a satisfactory resolution of the problem.

The intermediate approach of the MPC seems similarly flawed as applied to sports contests.¹⁶¹ The more fluid MPC standard appears to solve none of the problems of violence in sports and, indeed, appears to create some problems of its own. The MPC would allow participants to defend their conduct to the extent that their behavior constituted a reasonably foreseeable hazard of the joint athletic competition.¹⁶² This test, borrowed from tort law,¹⁶³ renders the rules of the sport of secondary significance in assessing the limitations of a player's consent.¹⁶⁴ Yet the actual rules of the game comprise the only written "contract" to which the participants might have agreed. Instructing the finder-of-fact to look for conduct that is a "reasonably foreseeable hazard[] of joint participation in a lawful athletic contest or competitive sport"¹⁶⁵ provides little guidance to the finder-of-fact or, more importantly, to the athletic participant. In fact, the decisions applying this standard are irreconcilable and hinge on matters of degree.¹⁶⁶

¹⁵⁹ See, e.g., *id.* at 490 (referring to defendant's argument that his conduct, in the wake of a previous hard foul by the victim, was a reaction to a perceived imminent hard foul).

¹⁶⁰ See Clarke, *supra* note 152, at 1158 (noting that aggressiveness and competitive spirit inherent in sports are learned and taught).

¹⁶¹ The MPC provides:

Consent to Bodily Injury. When 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:

- (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or
- (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
- (c) the consent establishes a justification for the conduct under Article 3 of the Code.

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

¹⁶² See *id.*

¹⁶³ See, e.g., *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) ("One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . .").

¹⁶⁴ See *supra* note 161 and accompanying text.

¹⁶⁵ MODEL PENAL CODE § 2.11(2).

¹⁶⁶ See, e.g., *Iowa v. Floyd*, 466 N.W.2d 919, 923 (Iowa Ct. App. 1991) (finding on-court brawl during stoppage of play is not a reasonably foreseeable incident of basketball and, even if it were, any consent would be invalid given the unreasonable risk of serious injury or breach of the peace); *People v. Freer*, 381 N.Y.S.2d 976, 978 (Dist. Ct. 1976) (finding that

More importantly, by ignoring the sport's definition of consent, the MPC approach precludes sports leagues or other contest organizers from explicitly amending the "reasonably foreseeable hazards" through the rules and sanctions of the sport.¹⁶⁷ By instructing the finder-of-fact to look for reasonable hazards without regard to the actual rules of the game, the MPC approach contemplates a game apart from the rules that create that game.¹⁶⁸ Thus, the MPC approach portends a platonic ideal of a sport that exists only in the world of jurisprudence.

Similarly, if the limits of consent and, thereby, criminal liability were defined by literal application of the rules of the game, the result would also be flawed. Under a rules-of-the-game approach, every transgression of a rule could potentially subject the perpetrator to a criminal prosecution, and the deterrent effect of a penalty or foul would be grossly amplified. For example, a baseball pitcher who pitches inside, misses the target, strikes the batter, and whose conduct is ruled an intentional "beanball" could be liable for criminal assault.¹⁶⁹ Similarly, a basketball player instructed by his coach to commit an intentional foul in order to stop the clock in a late-game situation might refuse to do so for fear that his conduct, although in pursuit of and well within the boundaries of the sporting contest, would constitute an intentional transgression of the rules and therefore fall outside of the defense of consent.

VI. USING CRIMINAL LAW TO REGULATE SPORTS

The solution to the vexing problem of the use of criminal regulation in sports contests lies within a jurisprudential approach not yet taken in any of the decided cases, either within the United States or within Canada or Germany—other countries with substantial jurisprudence on this issue.¹⁷⁰ This solution would look to the only clear line of demarcation that presents

complainant did not consent to defendant's punch when the punch took place after a tackle and pile-up); *State v. Shelley*, 929 P.2d 489, 490 (Wash. Ct. App. 1997) (holding that "consent . . . is not limited to conduct within the rules of games," but extends to "conduct and harm that are the reasonably foreseeable hazards of joint participation in an athletic contest").

¹⁶⁷ See *supra* note 165 and accompanying text.

¹⁶⁸ See MODEL PENAL CODE §2.11(2)(b).

¹⁶⁹ See, e.g., *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393 (Cal. 2006) (finding that being hit by a pitch intentionally thrown at the batter's head is a fundamental and inherent risk of baseball).

¹⁷⁰ See *Yates & Gillespie*, *supra* note 15, at 168 ("Criminal prosecutions can be an effective means by which to send the message that society will not tolerate acts of unnecessary violence by sports participants."); Diane V. White, Note, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1034-38, 1048-54. But see *Clarke*, *supra* note 152, at 1192 ("Applying criminal liability to intentional fouls during sporting events is ill-advised.").

a plausible approach to regulating both the sport and the potential criminal conduct of sports participants. This approach limits implied consent to the violent acts permitted by the rules of the contest, but also includes conduct explicitly not permitted, but instead otherwise anticipated, by those rules. Rather, the doctrine of consent would apply to all conduct “covered” by or contemplated by those rules. For example, fighting in hockey is specifically prohibited by the National Hockey League (NHL) official rules of hockey.¹⁷¹ Nonetheless, fighting appears to be an important part of the game.¹⁷² Fighting is so ingrained in the game that the NHL has a specific rule addressing fighting and a specific penalty established for it.¹⁷³ Thus, the NHL rules anticipate and account for hockey fights, even as they prohibit that conduct. On the other hand, if a hockey player purposefully uses his stick to maim another player, in such a way that his use of the stick did not constitute one of the stipulated stick-related penalties such as cross-checking or slashing, then that player would be appropriately subject to criminal prosecution.¹⁷⁴ This approach would require a finder-of-fact to distinguish from a normal cross-check or slash, and one done with the intent to injure.

Similarly, the official rules of Major League Baseball (MLB) specifically prohibit the act of throwing a beanball and provide penalties for possible ejection for players who violate this rule.¹⁷⁵ Nevertheless, courts have held that the beanball is a “part of the game” of baseball.¹⁷⁶ Under the proposed approach, an intentional beanball would not ordinarily subject the pitcher to criminal liability because, if the player is prosecuted, consent would provide a complete defense. However, if a batter were to take a baseball bat and attack another player,¹⁷⁷ an act not covered by or contemplated by the rules of baseball, then the batter would appropriately be subject to criminal prosecution without access to the consent defense.

¹⁷¹ NAT’L HOCKEY LEAGUE, OFFICIAL RULES 2008-2009 § 6, R. 47 (2008), *available at* <http://www.nhl.com/rules/index.html>.

¹⁷² See White, *supra* note 170, at 1039 (“I have no doubt whatsoever that fighting is part of the game of hockey.” (quoting R. v. Henderson, [1976] 5 W.W.R. 119, 123 (Can.))).

¹⁷³ See NAT’L HOCKEY LEAGUE, *supra* note 171.

¹⁷⁴ For a further comment on the *Maki* and *Green* cases, see Barbara Svoranos, Comment, *Fighting? It’s All in a Day’s Work on the Ice: Determining the Appropriate Standard of a Hockey Player’s Liability to Another Player*, 7 SETON HALL J. SPORT L. 487, 504-05 (1997).

¹⁷⁵ PLAYING RULES COMM., MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES R. 8.02(d) (2008), *available at* http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp.

¹⁷⁶ See *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393 (Cal. 2006).

¹⁷⁷ Former major league player, Jose Offerman, is currently under indictment for such an attack in a minor league game. See *Offerman Pleads Not Guilty in Bat Attack*, NBC SPORTS, Sept. 24, 2007, <http://nbcsports.msnbc.com/id/20272598/site/21683474/>.

The proposed approach restores the control and definition of consent to the game's players, participants, and officials. For example, the NHL could decide to make hockey a non-physical sport for marketing or participation purposes. In that scenario, the NHL could rely on the possibility of criminal prosecution to police game players. If the rules of a non-contact hockey contest were written to preclude all body checks and the like, then a player who accidentally or intentionally commits a body check on another player would be subject to a game penalty, but would not, under the proposed approach, be without the defense of consent in a criminal prosecution. On the other hand, a player who transgresses that limited qualified consent by engaging in conduct that goes well beyond the body check (for example, fisticuffs or post-whistle violence) would fall outside of the conduct anticipated by the rules. That player would be without the defense of consent to any criminal prosecution.

The threat of a criminal prosecution has a place in regulating contemporary sports contests. However, criminal prosecution should be limited to situations where players violate not only the range of permissible conduct, as provided by the relevant rules of the sport, but also the range of conduct specifically prohibited by those same rules. Only conduct that is far outside the rule makers' and the game participants' contemplation should subject athletes to criminal prosecution without access to the defense of consent.