

Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact

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All opinions expressed are solely those of the author.

Abstract

It sometimes happens that athletes fall to injury rather than superior play. At what point should the criminal law come into play? In a first round National Football League playoff game last season, The Cincinnati Bengals' hopes ended on the second play of the game after the opening kick off, when Pittsburgh Steeler defensive tackle Kimo von Oelhoffen viciously tackled Cincinnati Bengal quarterback Carson Palmer by bending his leg left against the knee joint in such a way as to tear the anterior cruciate and medial collateral ligaments in Palmer's left knee. Palmer left the field on a stretcher. Should von Oelhoffen's hit on Palmer be regarded as an act of criminal misconduct?

It would seem undeniable that the promotion of legitimate vigorous competitive contact sport is a worthy goal that should brook no interference from the criminal law. It is equally certain however that criminal objectives intentionally or recklessly carried substantially to fruition should be punished in criminal law regardless of whether they masquerade as legitimate sport. Criminal violence used to accomplish a competitive advantage is not a legitimate part of sport, and this is so regardless of whether the criminal attack occurs on or off the field of play.

The criminal law applies to on-field misconduct. The English Rule looks to evaluate *mens rea* but allows a high presumption of innocence for players acting within the rules and custom of the game. Under the American Rule players consent to risks inherent in the rules and custom of the game and so long as the rules are reasonable, there is no criminal liability for accidents, and injury is excused. Neither legal tradition nor the rules of the games adequately address strategic acts of criminal thuggery masquerading as legitimate sport. This article examines contemporary incidents in American football to offer thoughts toward developing a criminal jurisprudence to address intentional or reckless actions causing grievous bodily injury on the playing field.

I. Introduction

A. The Kimo Van Oelhoffen Hit on Carson Palmer.

On January 8, 2006, in its first playoff game since 1991, the Cincinnati Bengals, American Football Conference North Division Champions, faced Division rivals, the Pittsburgh Steelers, a wild card team. The Cincinnati Bengals' hopes ended on the second play of the game after the opening kick off, when Pittsburgh Steeler defensive tackle Kimo von Oelhoffen viciously tackled Cincinnati Bengal quarterback Carson Palmer by bending his leg left against the knee joint in such a way as to tear the anterior cruciate and medial collateral ligaments in

Figure 1 Photographer Andy Lyons/Getty Images



Palmer's left knee.¹ Palmer left the field on a stretcher. No one cried foul. Game officials did not penalize von Oelhoffen during the game, nor did league officials fine von Oelhoffen after the game. The Bengals managed a 17-7 lead into the second quarter, but without Quarterback Palmer, the Steelers ultimately pulled ahead and won the game 31-17.²

Should von Oelhoffen's hit on Palmer be regarded as an act of criminal violence? The best start to answering this question is to review a photograph of the attack as it occurred.

The photograph shows that the ball had left Palmer's hand and that he stood completing his follow through. This is one of the most vulnerable poses in football.³ The NFL has long penalized 300 pound defensive lineman who

¹*The Hit: Bengals QB Palmer vows return doctor says injury 'complicated,'* THE CINCINNATI ENQUIRER, dated 1-10-06 at A1. Picture used with permission: Photographer Andy Lyons/Getty Images

²The Steelers went on to win the National Football League Championship by beating the Seattle Seahawks 21-10 in Super Bowl XL. Palmer endured reconstructive knee surgery and rehabilitation of his left knee in time for the start of the 2006 Football Season. Perseverance paid off as the Bengals beat the Steelers in their first regular season re-match on the Steelers' home turf 28-20 to share the lead for first place in the American Football Conference, and leaving the Steelers second to last in the AFC North Division after Week 5 of the NFL 2006 Season. THE CINCINNATI ENQUIRER (Sep 25, 2006) at A-1; www.espn.go.com/nfl/standings.

³Earlier in the 2005 season, Pittsburgh Quarterback Ben Rothlisberger suffered a hyperextended left knee

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come barreling in to level a quarterback in this position, especially where the tackler leads with his helmet. The photograph shows that von Oelhoffen did not come barreling in. The photograph shows that von Oelhoffen was not pushed nor did he fall out of control onto Palmer. The photograph entirely refutes the hypothesis of accident, out-of-control athletic exuberance or even misadventure. Instead, the photograph quite clearly shows von Oelhoffen in control and forcing Palmer's left knee to bend sideways against the joint. At the level of expertise necessary to become a professional athlete, von Oelhoffen's action in bending Palmer's knee out of joint may realistically be characterized as it appears in the photograph, namely a reckless act, or more likely, an intentional act, causing grievous bodily injury. Football is a contest of violent confrontations, but it simply cannot remain legal to execute tactics, which intend or recklessly risk grievous bodily injury regardless of the legitimacy of the sporting objective. The question is at what point, if any, does a controlled, intentional or reckless attack occurring during competitive contact sports contest cross the line to sanctionable criminal misconduct?

B. What, if Anything is Criminal in Competitive Contact Sports?

One of the most important facets of success in competitive contact sports such as football is the necessity to break an opponent's will to win. The will to win may be broken with hard physical contact. A hard hit may break the will to win momentarily, a harder hit may break the will to win for a longer moment, the hardest hit may break the will to win for the season, perhaps for a career. At what point does deliberate grievous bodily injury transcend sports to become criminal? Should the criminal law impose limits to defeating an opponent in competitive play?

when San Diego Chargers defensive end Luis Castillo hit him in Week 5. Kevin Kelly, *Roughing rules not easy on*

It would seem undeniable that the promotion of legitimate vigorous competitive contact sport is a worthy goal that should brook no interference from the criminal law. It is equally certain however that criminal objectives intentionally or recklessly carried substantially to fruition should be punished in criminal law regardless of whether they masquerade as legitimate sport.

Game penalties to include loss of yards, down or even player ejection assessed by game officials combined with fines levied by league officials reviewing game film provide adequate disincentives for unsportsmanlike conduct. Our concern here is to address criminal thuggery masquerading as sport under the high speed, violent competitive nature of a contact sport. Neither intentionally or recklessly bending knees against the joint nor play-interrupting brawls and postgame melees can be adequately addressed by game penalties or league fines, precisely because they are beyond the scope of the game. Intentionally or recklessly causing grievous bodily injury as well as play interrupting brawls and postgame melees is criminal conduct in any context except competitive contact sports. Such thuggery does not, and can not be permitted to, serve a legitimate objective in the game of American football.

1. Assaults: competition motivated attacks prior to competitive contact sports play.

The best way to begin the analysis in determining the point at which a controlled intentional or reckless attack crosses the line to criminal misconduct is with the most dramatic competitively motivated criminal attack in recent memory, namely the clubbing of U.S. Figure Skater Nancy Kerrigan's knee at the U.S. Olympic Trials.⁴ Kerrigan was the reigning U.S. Figure Skating Association [hereinafter USFSA] Champion and a favorite to win gold at the 1994 Winter Olympics.⁵ Jeff Gillooly, the ex-husband of U.S. Figure Skater Tonya Harding, Kerrigan's chief American rival, and his henchman admitted to the attack.⁶ Physically unable to perform due to her

defense, THE CINCINNATI ENQUIRER 10-18-06 at C1.

⁴[Http://www.washingtonpost.com/wp-srv/sports/long term/olympics1998/history/time line.](http://www.washingtonpost.com/wp-srv/sports/long%20term/olympics1998/history/time%20line)

⁵Christine Brennan, *Skater Attacked at Olympic Trials*, THE WASHINGTON POST, Jan. 7, 1994 at A1.

⁶Jeff Gillooly pled guilty to one count of racketeering in connection with the plot before a Portland, Oregon circuit court judge sitting in Multnomah County, Oregon and received a two year sentence and a \$100,000 fine.

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injured knee, Kerrigan withdrew from the U.S. Olympic trials, but was later added to the team anyway.⁷ At the 1994 Winter Olympics, Kerrigan won the silver medal; Harding placed eighth. Harding admitted that she was aware of the plot after it occurred,⁸ but the USFSA lacked administrative authority to exclude Harding from competing in the Olympics without a hearing to determine guilt.⁹ Months later, the USFSA conducted a hearing and found through circumstantial evidence that Harding did know of the plot before it occurred and stripped Harding of her title and banned her from USOC sanctioned events for life.¹⁰ Tonya Harding ultimately pled guilty to obstructing the grand jury investigation into the attack.¹¹

In the football analog to the Kerrigan hit, on September 13, 2006, local police in Evan, Colorado arrested Mitch Cozad, a back-up punter for the University of Northern Colorado for allegedly stabbing starting punter, Rafael Mendoza, in the leg as Mendoza was exiting his car on

Stephen Buckley, *Gillooly Pleads Guilty, Says Harding Approved Plot*, THE WASHINGTON POST, Feb. 2, 1994 at A1; Robert Facht, *Gillooly Gets Two Years in Prison, \$100,000 Fine*, THE WASHINGTON POST, Jul. 14, 1994 at D2.

⁷The USFSA is the non-governmental body which selects figure skaters to represent the United States on behalf of the United States Olympic Committee. USFSA rules allow the USFSA to select athletes who did not compete at qualifying trials. See Christine Brennan, *Kerrigan Picked to Join Harding for Olympics*, THE WASHINGTON POST, Jan. 9, 1994 at D1.

⁸Johnette Howard, *Skater Attacked at Olympic Trials*, THE WASHINGTON POST, Jan. 28, 1994 at A1.

⁹The United States Olympic Committee [hereinafter USOC] had no mechanism to bar Tonya Harding from competing in the Olympics because of procedural guarantees available in the United States Olympic and Amateur Sports Act. See Christine Brennan, *Group Begins Disciplinary Action Against Harding*, THE WASHINGTON POST, Feb. 6, 1994 at A1; Serge Kovaleske, *Harding Files 20M Lawsuit Against the USOC*, THE WASHINGTON POST, Feb. 10, 1994 at D1; Christine Brennan, *Deal Puts Harding in Olympics as Games Begin*, THE WASHINGTON POST, Feb. 13, 1994 at A1.

¹⁰Robert Weaver, Harding's attorney stated that Harding categorically denied allegations by her ex-husband and others and further denied Harding had prior knowledge or participated in the attack on Nancy Kerrigan. Weaver stated that Harding was disappointed, but not surprised that the USFSA found her guilty because she did not appear to defend herself. Christine Brennan, *Harding Stripped of Title; Banned for Life*, THE WASHINGTON POST, Jul. 1, 1994 at C1.

¹¹Harding's plea agreement required her to withdraw from the American team scheduled to compete at the 1994 figure skating world championships in Japan and resign from the U.S. Figure Skating Association. In addition, Tonya Harding agreed to pay a \$100,000 fine (the maximum then allowed under Oregon sentencing guidelines), set up a \$50,000 fund to benefit Special Olympics, reimburse Multnomah County prosecutors \$10,000 in costs, perform 500 hours of unspecified community service, and undergo psychiatric examination and participate in any treatment ordered by the court. Johnette Howard, *Skater Attacked at Olympic Trials*, THE WASHINGTON POST, Mar. 17, 1994 at A1.

the evening of September 11, 2006.¹² Police assigned competition for the starting punting job as motive for the stabbing.¹³ On October 19, 2006, Weld County, Colorado District Attorney's office filed an attempted first degree murder charge and one count of second degree assault against Cozad.¹⁴

Though criminal intent is more readily acceptably established in competitor motivated attacks occurring out of play, demonstrable criminal intent or recklessness should make criminal attacks during play equally out of bounds. If a competitively motivated, intentional attack on a fellow competitor's knee out of play clearly crosses the line to criminal misconduct, it should be equally clear that a competitively motivated, intentional or a reckless attack on a fellow competitor's knee during play also crosses the line of criminality.

2. Attacks: competition motivated attacks during competitive contact sports play.

In the folklore of the National Football League, former Oakland Raider safety Jack Tatum is widely regarded as a fierce competitor and the hardest hitting safety of all time. In one of the most celebrated images from Super Bowl XI in 1977, Tatum hit Minnesota Vikings' wide receiver Sammy White so hard that White's helmet came off.¹⁵ The most infamous example of Tatum's hitting ability was his hit on New England Patriots wide receiver Darryl Stingley as he was leaping for a pass leaving his body entirely exposed, in a single minded attempt to catch an overthrown ball. The ball had already left his fingertips at the time Tatum slammed into him

¹²See Pat Graham, *Back-up Punter May Have Stabbed Starter*, (The Associated Press), THE WASHINGTONPOST.COM, Sep 14, 2006. Based on his arrest, the University of Northern Colorado immediately dismissed Cozad from the team, the University, and on-campus housing.

¹³See www.usatoday.com/sports/college/football/2006-09-22-punter-charges-delayed_x.htm.

¹⁴*Punter may face up to 48 years in prison*, Associated Press, The Cincinnati Enquirer, Oct. 20, 2006 at B4.

¹⁵See http://en.wikipedia.org/wiki/Jack_Tatum.

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leading with his helmet. The hit badly damaged Stingley's spinal cord and left him paralyzed from the chest down. Although the rules were later changed, at the time, the hit was legal under NFL rules. There was no penalty. No fine. No prosecution, criminal or civil. And, no apology from Tatum. Instead, Tatum boasted: "I like to believe that my best hits border on felonious assault."¹⁶ Tatum remains a celebrated and honored athlete.¹⁷

Tatum played college ball at The Ohio State University where current head coach Jim Tressel, instituted the "Jack Tatum Hit of the Week Award."¹⁸ In light of Tatum's self-professed belief that he "like to believe that [his] best hits bordered on felonious assault," perhaps a better remembrance of Jack Tatum is to coin hard hitting tackles like his that recklessly or intentionally cause grievous bodily harm "attackles." This new term combines the words attack and tackle to call attention to competitive contact hits which border on felonious assault, and indeed, may very well cross the line of criminality.

The most recent hit most worthy of consideration as an "attackle" occurred on October 1, 2006 in a National Football League game. Early in the third quarter, just after a five yard touchdown run by Dallas' Julius Jones in the Cowboys 45-14 victory, Tennessee Titan defensive lineman, Albert Haynesworth kicked off the helmet of Dallas offensive lineman Andre Gurode's helmet then stomped and scraped his cleats across Gurode's face and forehead. Gurode required

¹⁶*Id.*

¹⁷Jack Tatum, *THEY CALL ME ASSASSIN* (1980). Tatum, who received the nicknamed, Assassin, when he signed with the Oakland Raiders, wrote three books, entitled, *THEY CALL ME ASSASSIN* (1980), *THEY STILL CALL ME ASSASSIN* (1989), and *FINAL CONFESSIONS OF NFL ASSASSIN JACK TATUM* (1996). Jack Tatum was a 2005 inductee into the College Hall of Fame and in a 2006 Sports Illustrated poll to name the best defensive back of all time, he garnered eight percent of the vote.*Id.*

¹⁸*See* http://en.wikipedia.org/wiki/Jack_Tatum.

30 stitches and missed the next two games.¹⁹ Game officials immediately called a personal foul for flagrant unnecessary roughness against Haynesworth. When he saw the penalty flag, Haynesworth took off his helmet and tossed it, drawing a second personal foul and ejection---for the unsportsmanlike protest, not for stomping on an opponent's face.²⁰

After the game, Haynesworth appeared contrite and remorseful.²¹ League officials suspended Haynesworth for five games for the face stomping incident, the longest by the NFL for on-field actions.²² The five game suspension will cost Haynesworth \$190,000 of his \$646,251 annual salary in forfeited salary, and possibly a portion of signing bonuses.²³ Nashville's Metro Police Department and the Davidson County District Attorney's office issued a joint statement saying they were "ready to assist Gurode in criminally prosecuting

¹⁹[Http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm](http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm).

²⁰*Id.*

²¹Albert Haynesworth has an extensive history of violence including a road rage incident (May 2006) post-game confrontations (November 2005), punched a teammate during practice (December 2003), (kicking a teammate in the chest during practice (August 2003), fought with two teammates on consecutive during June minicamp (June 2002) and during a college practice, after an altercation with a teammate, he left practice and returned with a pole (November 2000). See www.dallasmorningnews.com/sharedcontent/apstories/stories/D8KGQHL82.html

²²*Id.* Previously, the longest suspension for on-field behavior was two games for Green Bay defensive lineman Charles Martin for throwing Chicago quarterback Jim Mahon to the ground during a game on November 23, 1986. *Id.*

²³[Http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm](http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm). The Haynesworth suspension is the first NFL suspension of a player since Rodney Harrison, then with San Diego, received a one game suspension for hitting Oakland's Jerry Rice with his helmet. Earlier that season, Denver's

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Haynesworth if Gurode so chooses,” but Gurode did not so choose.²⁴ Kicking off a helmet and stomping on the head of another with a cleated foot is a matter of public interest and requires public vindication regardless of the personal code or perhaps personal financial motive of the victim not to press for charges.

The stomping, shown repeatedly in television replays, has brought nearly unanimous condemnation.²⁵ These actions go beyond unsportsmanlike conduct and cannot possibly be considered an inherent risk. There should be no question that such thuggery should be subject to criminal sanction in law even if masquerading as a legitimate competitive sporting contact regardless of whether the attack occurs on or off the field of play.²⁶ If competition motivated criminal attacks occurring out of play are the proper domain of the criminal sanction, then so too must criminal intent be more readily acceptably established in competitor motivated attacks occurring out of play. Demonstrable criminal intent should make criminal attacks during play equally out of bounds as off-field attacks.

3. Play disruptive fights.

In addition to intentional or reckless injury causing “attacks,” another area that readily suggests the need for criminal sanctions is play interrupting brawls or postgame melees. On

Kenoy Kennedy also received a one game suspension for a helmet-to-helmet hit on Chris Chambers of Miami.

²⁴*Id.*

²⁵<http://sports.espn.go.com/nfl/news/story?id=2610577>.

²⁶The National Hockey League provides two modern precedents for successful application of the criminal sanction for competitive sporting contact occurring at the conclusion of legitimate play. In the National Hockey League, Todd Bertuzzi pleaded guilty to causing bodily harm and missed 20 games for a blindside punch that left Colorado forward Steve Moore with broken bones in his neck on March 8, 2004. http://en.wikipedia.org/wiki/Todd_Beruzzi. The attack was in retaliation for a hit by Steve Moore that injured the Vancouver Canucks Captain on February 16, 2004. *Id.* Vancouver authorities also convicted Boston Bruin player Marty McSorley of assault with a weapon for slashing Vancouver’s Donald Brasher in the head with his stick on February 21, 2000. http://en.wikipedia.org/wiki/Marty_McSorley. McSorley was one of the fourth most penalized

Saturday, October 15, 2006, established college football power, the University of Miami Hurricanes played little known cross town rivals, the Florida International University Golden Panthers. Miami's James Bryant caught a 5-yard touchdown pass with about nine minutes left in the third quarter to give the Hurricanes a 13-0 lead. He pointed at the FIU bench and bowed to the crowd, incurring a 15-yard penalty for taunting. On the extra point that made it 14-0, FIU's Chris Smith knocked down holder Matt Perelli and appeared to punch him. More than 100 players from both teams joined the fracas that immediately ensued.²⁷ Video replay shows Miami safety Anthony Reddick raced off the side lines with helmet held high and swinging it like a weapon against the back of an FIU player.²⁸ Numerous Miami players are seen stomping on FIU players on the ground. The video also shows an injured FIU player on crutches hobbled off the opposing side line and swung a crutch like a weapon.²⁹ Miami police were required to restore order. However, there were no arrests and none are intended.³⁰ The Miami-FIU brawl was the second of that day as earlier, an on-field fight between football teams representing Dartmouth and Holy Cross fought after Holy Cross players celebrated an overtime victory by stomping of

player in the league (3,381 minutes in the penalty box) and in his prime was one of the nest fighters. *Id.*

²⁷Dan Cruz, a Miami season ticketholder did not attend the game, but recorded it on TV and posted a clip on YouTube.com. On Monday, October 16th, 2006, it became the most watched video. Cruz says he did it to show the entirety of the brawl, which he believes proves FIU was more at fault. http://www.usatoday.com/sports/college/football/acc/2006-10-16-miami-cover_x.htm.

²⁸The University of Miami and Athletic Conference Commissioners suspended him indefinitely and stated that additional disciplinary measures will be taken to include community service and other action. http://www.usatoday.com/sports/college/football/acc/2006-10-16-miami-cover_x.htm.

²⁹Florida International University dismissed Chris Smith and Marshall McDuffie Jr. from the team and suspended 16 others indefinitely. The University also required all 18 players to complete 10 hours of anger management counseling and to fulfill 50 hours of community service "intended to educate South Florida youth on appropriate behavior at athletic competitions." *Id.*

³⁰*Id.*

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the Dartmouth “D” logo conveniently set at midfield.³¹

The culture of football is such that not only are arrests not made for such on-field melees, there is a strong undercurrent of support for such passion. Lamar Thomas, an announcer with Comcast Sports SouthEast, watched as the brawl raged out of control and stated on the air:

Now, that’s what I’m talking about. You come into our house, you should get your behind kicked. You don’t come into the OB [Orange Bowl] playing that stuff...You can’t come over to our place talking noise like that. You’ll get your butt beat. I was about to get down the elevator to get in that thing.

As the fight slowed, Thomas’ comments continued:

I say, why don’t they just meet outside in the tunnel after the ballgame and get it on some more? You don’t come into the OB baby.”

Lamar Thomas, is a former wide receiver for the University of Miami, and now alas, also a former announcer for Comcast Sports, which dismissed him for his comments, which they also deleted from their video records of the brawl.³²

C. The Propriety of Applying Criminal Law to Regulate Play in Contact Sports.

In a competitive contact sport, it not infrequently happens that athletes fall to intentional or reckless injury causing tackles rather than superior play. But why such reticence in bringing the criminal law into play to sanction thuggish conduct causing grievous bodily harm? There is clarity in applying the criminal law to deliberate injurious conduct between athletes off the field

³¹[Http://sportsillustrated.cnn.com/2006/ncaa/10/19/dartmouth.apology.ap/index.html?eref=si_topstories](http://sportsillustrated.cnn.com/2006/ncaa/10/19/dartmouth.apology.ap/index.html?eref=si_topstories)

³²The University of Miami has won five national championships since 1983 and has a history where fisticuffs and football intersect. The team engaged in a postgame fight after suffering a 40-3 loss to Louisiana State University in the Peach Bowl in December 2005, and nearly came to blows on September 16, 2006, with the University of Louisville after stomping on the Louisville logo at midfield. During the 1990s the Hurricanes rivalry with the University of Notre Dame was lampooned as “Catholics vs. Convicts.” In the days before the 1987 Fiesta Bowl for the National Championship, Penn State players wore coats and ties while Miami players wore fatigues. *Id.*

of play. But there is no clarity in applying criminal law to deliberate, injurious misconduct between athletes on the field of play. There are several reasons for the lack of clarity in evaluating criminal misconduct in on-field play. Chief among these reasons is that the promotion of legitimate, vigorous competitive contact sport is an exceedingly worthy goal in a free society.³³ A second, is the conviction borne of historical origins that competitive contact sports are vicious by nature, and violence, if anything enhances its entertainment value.³⁴ And, third, it may be argued that self-policing through creating and enforcing the rules of the game adequately safeguard players from deliberate, injurious conduct.³⁵

1. **Are the rules of the game adequate safeguards of player safety?**

The rules and cultures of the game are set at the highest level of competition where highly skilled athletes are experienced and well trained to play in very hazardous activity and are extremely well compensated to accept the risks inherent in such hazardous activity. However the same rules and culture which are set at the highest level of competition apply at every level of competition with only slight modification to accommodate lesser size and ability. This is not to say that the criminal law should be any less concerned to protect highly trained, top professional athletes who are paid extravagant sums to play. It is merely a necessary observation that the rules and culture at the top of any activity, sporting, or otherwise, sets the paradigm for all levels of play and for all manner and quality of competitors. Thus the criminal law is appropriate to

³³Although his phrasing was inexact, legendary football coach Vince Lombardi, is credited with the principle that “Winning is not everything; it is the only thing.” *See e.g.*, <http://encyclopedia.thefreedictionary.com/vince%20lombardi>.

³⁴Sports originated in part as preparation and training for hand-to-hand combat and other low technologically based military conflict and as diversion from monotonous physical labor.

³⁵A prominent example of such rules include rules concerning protection of the passer. Rule 4 in this category specifically states: “Officials are to blow the play dead as soon as the quarterback is clearly in the grasp

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address the criminal element in competitive contact sports and the validity of implied consent as a defense to tackles becomes less palatable at lower levels of play.³⁶

Game penalties and league fines address naturally occurring misadventure owing to the culture of violence, speed, and competitive nature of football. Their goal is to ensure a competitive environment. They are ill conceived and too erratically applied to ensure against reckless or intentional misconduct.³⁷ Criminal misconduct is beyond the scope of the rules.

The rules and custom of the game can not be completely relied upon to ensure a safe playing environment because administrators, coaches, and referees who establish the rules and practices of the game are primarily concerned with sport. Criminal law is a broader public interest, and by way of contrast, a government, which is representative of the body politic at large, is positioned to take a larger, societal view not only with safety at the highest levels of competition, but also at the lowest levels as well. The line between criminal contact and

and control of any tackler, and his safety is in jeopardy.” See Official NFL Rules at www.nfl.com/fans/rules.

³⁶Leesburg, Virginia cancelled youth football last year when accusations surfaced that a Youth Football Coach created a hit list that may have led to an 11 year old boy having his wrist shattered when he was intentionally tripped by another boy after scoring a touchdown. <http://www.local6.com/news/5072386/detail.html>.

³⁷On NFL Sunday, October 8, 2006, Kansas City Chiefs’ running back Larry Johnson caught a short pass and turned it into a 78-yard gain to the Arizona 9 with 2:31 left in the game. Johnson would have scored if Arizona Cardinal cornerback Antrel Rolle had not grabbed him by the facemask and twist his head backward. Rolle did not even let go of the facemask as the two players tumbled out of bounds. The Cardinals lost the game 23-20. The league fined Rolle \$12,500. It is his second fine for an excessive hit. www.sportinglife.com/nfl/news/story_get.cgi?STORY_NAME=international_feed/06/10/13/GRIDIRON_USA-Arizona_Rolle.html The very next week on October 15, 2006, the Pittsburgh Steelers beat the Kansas City Chiefs 45-7. In that game, Johnson ran down safety Troy Polamalu on an interception and tackling him by his long hair streaming out the back of Palamalu’s helmet. Game officials penalized Johnson not for his hair-only-tackle (which is not an infraction of the rules), but for yanking Polamalu down out of bounds to touch off a brief skirmish. Johnson said: “I made the tackle, tried to get up and my hand was full of his hair. I hope I got penalized for hitting Ike Taylor in the face twice and not for pulling Troy’s hair.” Polamalu did not complain: “It doesn’t matter to me if he tackles me by my hair or my ankles.” [Http://www.kansascity.com/mld/kansascity/news/local/15769337.htm](http://www.kansascity.com/mld/kansascity/news/local/15769337.htm). NFL Director of Officiating Mike Pereira has ruled that pulling hair was like pulling a shirt. Robert Dvorchak, *Long locks expose hairy dilemma--tackling by hair within NFL rules*, THE CINCINNATI POST, Oct. 18, 2006 at 4B. The difference is that unlike pulling a shirt, a vicious jerk of the head by grabbing long hair is just as likely to cause a neck injury as grabbing a facemask. NFL rules permit the former, but penalize the latter. *Id.*

legitimate sports contact must necessarily be drawn by the body politic from which citizens of sport emerge and to which they repair.

2. Sporting violence as entertainment.

There are mixed incentives motivating violence in the National Football League. The knee injuries suffered by Palmer and to a lesser extent, Rothlisberger in 2005, begat a new NFL rule which bars a defensive player from hitting a quarterback at or below the knees when the quarterback has one or both feet on the ground.³⁸ Concerns for maintaining a viable entertainment product motivated this change as much as player safety. Atlanta Falcons General Manager, and NFL Competition Committee Co-Chairman Rich McKay explained:

The quarterback position is a defenseless position when his feet are on the ground and he's throwing the football. We have to find ways to protect him...We know how important it is to the franchises and the stability of the franchisees and what quarterback injuries have done to certain teams over the years.³⁹

The "big hit" is entertainment and plays to base instincts. During the 2006 NFL Season, a regular piece on an ESPN Toyota Half Time show features re-plays of exceptionally violent

³⁸Kevin Kelly, *Roughing rules not easy on defense*, THE CINCINNATI ENQUIRER 10-18-06 at C1.

³⁹Oddly, perhaps no team has been more stung by the new rule than the Cincinnati Bengals who lost to the Tampa Bay Buccaneers in Week 5 2006 due in part to a controversial roughing the passer call against Bengal defensive end Justin Palmer. Instead of a second and 18 quarterback sack at the 40, the penalty gave the Buccaneers a first and 10 from the Bengal's 25 yard line. The Buccaneers scored the game winning touchdown five plays later with 35 seconds remaining. *Id.* Bengals Head Coach Marvin Lewis, also a member of the NFL Competition Committee observed: "We didn't recklessly throw anyone to the ground nor do anything like that. That's what I think the rule was intended for, that we don't be reckless that way. (The) same goes for the rule with the unprotected receiver. Right now we have [referees] that are making things a little too complicated for the defense." It is possible that NFL referees may be overcompensating for a jarring hit by Cincinnati Bengal defensive end Robert Gathers knocked out Kansas City Chiefs quarterback Trent Green during Week 1 of the 2006 season. Game and league officials reviewed the hit, but found nothing to penalize or fine. Kevin Kelly, *Roughing rules not easy on*

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hits. At each resounding hit, the announcers colorfully exclaimed: "He got jacked up!" So too WWLT TV, the National Broadcast Company affiliate in Cincinnati features a Carstar Collision of the week which routinely features athletes inflicting vicious on-field hits.

3. When might vigorous competition become illegitimate?

There can be no fear that a limited and precise introduction of the criminal sanction to on-field play in competitive contact sports goes too far. As with landmark interest in curbing domestic violence, a culture of sports violence should not go unnoticed by the criminal law. To say that criminal behavior occurring in competitive contact sports is beyond the reach of criminal law is to say too little by way of deterrence in criminal law and too much for competitive contact sports by way of integrating criminal harms from illegitimate play into the context of the game. The conceptual barrier to criminal sports batteries should fall for the same reason that barriers to criminalizing domestic batteries fell, and that is an excess of criminal like injuries occurring in competitive contact sports. Implied consent is misguided here. The law of rape and sexual assault protects sex professionals even though their consensual activity places them at certain risk of criminal violence and so too then should the law of homicides and aggravated battery protect athletes even though athletes engage in competitive contact sport which places them at certain risk from criminal violence. No player assumes the risk of, or consents to, criminal conduct simply by engaging in an activity where excessive harm is a possibility. No sport or business should immunize criminal thuggery from prosecution because to do so violates public interest.

America is a litigious society and there is a fear that given the choice between legal and

non-legal remedies, disputants might all too quickly opt for the legal remedy. However, legal process is intrusive on all parties and cumbersome. Legal forums are expensive, unwieldy, and too costly prohibitive for all but the most compelling cases. At the early stages, an over-reliance on legal solutions is not necessarily a bad thing as the formality of law and the expertise of lawyers provides for the most compelling way to change behavioral modification and has the widest effect in educating the general population as well as inculcating new values into a sports culture. The right mix of criminal and administrative sanctions will be found fairly quickly.

II. Relevance of the Rules and Cultures of the Game

Obedience to the rules is an integral part of playing any sport. Only when all participants agree to be bound by the constitutive rules of the game can a contest take place. The first problem is that a uniform system of rules and a penalty scheme for their infraction is inadequate to address intentional rule violations. The second problem is that the rules are only reactively designed and enforced to ensure a safe environment for play. Adjustments are made only after the incidence of grievous bodily injury clearly becomes profound, and even then usually in the off-season.⁴⁰ The third problem is that concrete rules, no matter how comprehensive, cannot completely describe the permissible universe of acceptable play and risks involved in the game. What must be added to the mix is sports practices or culture. Competitive contact sports are played not just according to the written rules, but also to a practice or culture of the sport, which regardless of experience and familiarity with the game, cannot be sufficiently described to clarify the true risks involved in the game.

⁴⁰See *e.g.*, ns 16-18. Jack Tatum's hit on Daryl Stingley in which he led with his helmet, or spearing became barred by NFL rules only after Stingley's injury.

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A. The English Rule

The English Rule presumes that no rules or culture or practice of any game can make that lawful which is unlawful by law of the land; and the law says you shall not cause death or grievous bodily injury of another. Thus under the English Rule, an injury-causing challenge will be criminal if the requisite mens rea is present.⁴¹ This rule is found in *Regina v. Bradshaw* a case decided in 1878, involving a soccer match in which the defendant charged the deceased after the ball had been played, catching him hard in his stomach with his knees and rupturing his intestines. The deceased died the next day from a rupture of the intestines.⁴² Lord Justice Bramwell in summing up the case to the jury said:

The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death and the question is whether the act was unlawful. *No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law says that you shall not do that which is likely to cause the death of another.* For instance, no persons can by agreement go out and fight with deadly weapons, doing by agreement what the law says shall not be done and thus shelter themselves from the consequences of their acts. Therefore in one way you need not concern yourselves with the rules of football [soccer]. But on the other hand if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention and that he is not acting in a manner which he knows will be likely to productive of death or injury. But independent of the rules, if the prisoner intended to cause serious hurt to the deceased or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either

⁴¹*Regina v. Bradshaw* 14 Cox Crim. Cas 83 (Leicester Spring Assizes 1878) per Bramwell LJ.

⁴²In a American football analog, on October 5, 2006 in Tampa Bay quarterback Chris Simms play through violent hits to his midesction in a losing effort against the Carolina Panthers (24-22) and required emergency surgery to remove a split spleen immediately after the game. [Http://sports.espn.go.com/nfl/news/story?id=26015555](http://sports.espn.go.com/nfl/news/story?id=26015555). Simms is out for the 2006 season.

case he would be guilty of a criminal act and you must find him guilty; if you are of the contrary opinion, you will acquit him.

[Lord Justice Bramwell] carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country, all of which were no doubt attended with more or less danger.⁴³

The verdict was not guilty.⁴⁴ Under, the English Rule, the rules of the game are not dispositive for or against criminal guilt, rather they provide evidentiary significance as to the mental state of the defendant. Lord Judge Bramwell's opinion in *Bradshaw* suggests that a rebuttable, but obviously high presumption of innocent intent flows from play within the rules pursuing a legitimate sporting objective. Because the verdict of acquittal was not criticized even in a case involving a sports death, it is to be expected that the presumption of innocence would be very difficult for the prosecution to rebut. The absence of this presumption where there is a flagrant breach of the rules would increase the likelihood of the fact finder to infer a degree of culpability.

B. The American Rule.

The American rule is stated in *People v. Fitzsimmons* (1895) 34 N.Y.S. 1102. That case involved an exhibition boxing match in which a punch killed the opponent and led to a charge of homicide. In charging the jury, the Judge stated:

If the rules of the game and the practices of the game are

⁴³*Id.*

⁴⁴*Id.*

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reasonable, are consented to by all engaged, are not likely to induce serious injury, or to end life, if then, as a result of the game, an accident happens, it is excusable homicide. Depending on reasonableness of the sport, if the defendant was playing according to the rules and practices and there is consent

Finding the punch to have been thrown within the rules of boxing, and that the rules themselves were reasonable, the jury returned a verdict of not guilty. *Id.*

In contrast to the strictly *mens rea* approach under English law, the American approach focuses on the reasonableness of the rules of the game and whether the defendant was playing within rules in pursuit of a legitimate sport objective. The implication under the American rule is that doctrines of consent would negate criminal liability provided that injury occurred within the rules and practices of the game, or playing culture, of the sport involved so long as the rules and practices themselves are reasonable.

C. Application of the English and American Rules Yields Similar Results.

In application, the English and the American rules would not likely yield different results. Since, under English law, following the rules of sport raises a rebuttable, but fairly high presumption of innocence, and, under American law, adherence to the rules and pursuit of a legitimate sporting objective substantiate grounds for acquittal, playing within the rules and practice of the game under American law is reflected in the high presumption of innocence under the English Rule. This result seems apparent in *Regina v. Green*, which involved prosecution for

an on-ice fight, which interrupted a National Hockey League exhibition game.⁴⁵ Applying the English Rule, the *Green* Court gave much deference to the game environment as defined by its culture as well as its rules in evaluating the charged misconduct for criminal liability.

We must remember that we are dealing with a hockey game. We are dealing with two competent hockey players at the peak of their form. We are not now dealing with the ordinary facts of life, the ordinary going and coming. We must remember that when we discuss the action of these men we are examining it within that forum and we are discussing it within the context in which the game is played, at a high speed and obviously with people keenly on edge. In these circumstances I find as a fact that Mr. Green's action that night was instinctive and that all he was doing in effect was warning Mr. Maki not to do what he had done again.⁴⁶

It is apparent here that, a court may indulge a defendant who plays within the rules and culture of the game, and as such would achieve the same result under the American Rule, which exempts otherwise criminal conduct in the same way so long as the rules themselves are reasonable and consented to by all engaged. Under the American Rule, violation of the rules of the game could be construed to show negligence, but not enough negligence to justify a criminal sanction. Likewise, adherence to the rules should not necessarily shield an athlete from criminal liability, if the rules themselves are objectively inadequate to rule maintain a reasonably safe playing area.

III. Traditional Criminal Law: Common Law Offenses and Defenses

The primary basis for criminal liability in competitive sports argued for here is intentional or reckless criminal conduct. The primary legal bar to criminal liability is implied

⁴⁵ Both participants were tried separately. *Regina v. Maki*, 14 D.L.R. 3d 164 (1970) and *Regina v. Green*, 16 D.L.R. 3d 137 (1970). These cases are discussed in Defenses at 23-27.

⁴⁶*Regina v. Green*, 16 D.L.R. 3d 137 (1970).

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consent or assumption of risk. Thus there are really two questions we seek to answer. First, given that exerting brute force is a permissible intent in competitive contact sports, when is the line crossed to a criminal intent or recklessness. Second, given the doctrines of implied consent and assumption of risk, what, if any, risks are not inherent risks of the game or what, if any, acts are different in kind from those for which consent is implied?

A. Offenses.

1. Assault and batteries.

The traditional offenses at Anglo-American common law that might arguably apply to competitive contact sports include: simple assault, battery, aggravated battery, mayhem, intentional infliction of grievous bodily harm, homicide, and attempts and conspiracies of same. Competitive contact sports are designed to involve physical contact. Therefore if misdemeanor level assaults and battery applied to competitive contact sports, all that would be left to determine is whether the threatened touching or actual touching is without consent or justification. Given the acceptable level of high speed violence in competitive contact sports as well as the very imprecise assessment of risk, play within the rules and cultures of the game generally provide a safe harbor against minor injuries suffered from simple assaults and batteries.⁴⁷

2. The law of homicides.

The law of homicides describes the causal killing of another. The various levels of

⁴⁷See e.g., *Regina v. Green*, 16 D.L.R. 3d 137 (1970), Judge Fitzpatrick, Provincial Court of Ottawa, Canada upon acquitting a hockey player for battery stemming from a routine hockey fight in a National Hockey League exhibition game stated: "It is quite probable that in other circumstances and given other sets of facts a charge of common assault might very well stand. However,...given the permissiveness of the game and the risks that the players willingly undertake, I find it difficult to envision a circumstance where an offence of common assault as opposed to assault causing actual bodily harm could readily stand on facts produced from incidents occurring in the course of a hockey game played at that level."

homicide are separated only by the *mens rea* or state of mind behind the *actus reus* or criminal act. Proof of first degree murder requires: 1) An intent-to-kill with malice aforethought homicide plus, 2) deliberation: *i.e.*, a cool mind that is capable of reflection and 3) premeditation: *i.e.*, that the cool mind did in fact reflect, at least for a short period of time before the act of killing.

Voluntary manslaughter is an intentional killing under provocation or extreme emotional distress. Thus voluntary manslaughter includes all intentional homicides which are committed with a person-endangering-state-of-mind and are not justified or excused but are perpetrated under circumstances of recognized mitigation. The mental state required to prove voluntary manslaughter might have validity for grievous bodily injury intentionally caused off the field, but as with murder, it would be difficult to prove death as an intended result.

Involuntary manslaughter at common law consisted of an unintentional killing which results from the negligent performance of a lawful act *or* the violation of acts *mala in se*. Criminal negligence (careless disregard of information needed to act safely under the circumstances) is a lesser mental state than criminal recklessness (careless disregard of a known risk) and certainly a much lessr state than criminal intent (knowing or purposely causing a harm). Although involuntary manslaughter is premised on a negligence mental state, it is likely that the acceptable level of high speed violence in competitive contact sports, a conviction for involuntary manslaughter would not be returned except for proof of reckless or even intentional grievous bodily injury causing conduct.

B. Defenses.

1. The defense of self defense.

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The *Maki* case involved a hockey player who hit an opposing player in the head with his stick during the course of a hockey fight which interrupted play.⁴⁸ Maki defended on the basis of self-defense, which was codified under Section 34 of the Ottawa Criminal Code. This statute requires a Court to consider 1) whether the accused was acting in self-defense, 2) the reasonableness of the force used under the circumstances, and 3) the state of mind of the accused. The Court acquitted Maki finding that although he failed to measure with nicety the degree of force necessary to ward off the attack and inflicted serious injury thereby, nevertheless, the force used was not disproportionate. The Maki acquittal on the defense of self-defense came using a subjective analysis which is becoming increasingly common in most state courts. Traditionally, self-defense was only available to those who were objectively right in their actions.

2. The defense of implied consent.

The doctrine of implied consent holds that one who knowingly and voluntarily engages in risky social intercourse consents to the risks inherent in the activity to which he has joined. The law places limits as to what may be tolerated by either actual or implicit consent. The general rule in Anglo-American law is that one can not give consent to having grievous bodily harm or death inducing harm inflicted on his or her person. Thus consent is only a defense to simple assault, not to aggravated assaults leading to grievous bodily injury or death. The law is somewhat restrained where it is in the public interest to allow a greater degree of harm to be inflicted consensually. An established sports organization with proper equipment and rules promoting

⁴⁸*Regina v. Maki*, 14 D.L.R. 3d 164, (1970).

safety provides serves just such a public interest in sanctioning competitive contact sports. Implied consent is problematic for competitive contact sports however because of the ambiguity involving the rules and culture of the game.⁴⁹

There are three problems with positing the doctrine of implied consent as the death knell for criminal liability in competitive contact sport. First, in an athletic contest, consent is not expressly given and implied consent is imprecise. Second, even if consent were expressly given in some binding contractual way, the scope of the consent can not be determined since some aspects of play are implicit. Third, there is no real definitive way for an athlete to limit implied consent or opt out other than by restricting play or giving up the game entirely.

In his *Maki* opinion Judge Carter, opined that had not the defense of self defense been available, the defense of consent would have failed. Judge Carter stated:

Although no criminal charges have been laid in the past pertaining to athletic events in this country, I can see no reason why they could not be in the future where the circumstances warrant and the relevant authorities deem it advisable to do so. No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution

In support of this position, Judge Carter quoted Judge Stephens in *Regina v. Coney, et. al.* (1882), 8 Q.B.D. 534 at 549, who said:

In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defense to a charge of assault, even when considerable force is used, as for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question of whether

⁴⁹The doctrine of implied consent in criminal law closely equates to the doctrine of assumption of risk in the law of torts only the mental state required for a crime requires a much greater degree of culpability as measured by the risk and gravity of potential harm.

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consent does or does not take from the application or force to another illegal character, is a question of degree depending upon circumstances.

[T]here is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack. But a little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of implied consent.⁵⁰

What seemed clear to Judge Carter in *Maki* seemed just the opposite to Judge Fitzpatrick in the *Green* case. Green defended on grounds of consent. Section 230 of the Criminal Code as then written stated that: "A person commits an assault when, without the consent of another person...(a) he applies force intentionally to the person of the other, directly or indirectly."

Judge Fitzpatrick essentially took judicial notice that:

[T]he 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...could not possibly be played at the speed at which it is played and with the force and vigor with which it is played, and with the competition that enters into it, unless there was 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

⁵⁰*Regina v. Maki*, 14 D.L.R. 3d 164, (1970).

ice.

So where do you draw the line? Judge Fitzpatrick gave players wide latitude reasoning that:

It is very difficult....for a player who is playing hockey with all the force, vigor and strength at his command, who is engaged in the rough and tumble of the game, very often in a rough situation in the corner of the rink, suddenly to stop and say, "I must not do that. I must follow up on this because maybe it is an assault; maybe I am committing an assault."⁵¹

Judge Fitzpatrick found credible Green's assertion that the fracas started when Maki grabbed his sweater. He further found that Green retaliated against Maki only after Maki speared him in the groin area. Judge Fitzpatrick stated that Maki did not remember spearing Green, but did testify that if he had speared Green he would expect that Green would immediately retaliate. Judge Carter found Green to be the initial aggressor in acquitting Maki, Judge Fitzpatrick found Maki to be the aggressor in acquitting Green.

3. Involuntary Reflex.

The only reported case testing the involuntary reflex as a defense is *State v. Firbes*, 63280 (Minn. Dist Ct. 12-9-75). This case involved two ice hockey players. Game officials penalized both players. After coming out of the penalty box, Firbes beat an opponent until he suffered a fractured eye socket and required 25 stitches to close facial cuts. Local police charged Firbes with aggravated assault by use of a dangerous weapon. At trial, Firbes raised the defense

⁵¹*Id.*

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of involuntary reflex. The basis of this defense was that as an ice hockey players are trained from a very early age to use violence as part of the game strategy, such violence when used is an instinctive reflex lacking the necessary means rea for a criminal assault. The jury hung 9-3 to convict. The court declared a mistrial. The prosecutor did not re-try the case.

Involuntary reflex is a defense because it is a non-act. It occurs in the absence of cognitive thought and hence is not a willed movements, and therefore cannot evidence intentional misconduct. But there is a difference between a reflex and "instinctive behavior." The distinction is important since in the case of instinct, the mind has grasped the situation and intentionally dictated a course of action, whereas neural stimulants causing reflexive behavior provide no basis for criminal intent.⁵² Once the defense is properly understood, it is highly questionable whether training to create a "learned response" might satisfy this requirement of involuntary action as a defense.

IV. Fashioning a Sports Battery

Although the Restatement of Torts states that assault and battery is the most likely civil claim arising out of sports,⁵³ only Wisconsin, has a statute which specifically addresses the liability of contact sports participants in recreational activities in tort.⁵⁴ As civil battery differs from criminal battery only by the requisite state of mind in which the battering act occurs, the Wisconsin statute provides a useful starting point for analysis.

Liability of contact sports participants. (a) A participant in a recreational activity that includes physical contact between persons

⁵²1 W. LaFave & A. Scott, CRIMINAL LAW 4TH ED., § 3.2 at 199 (and cases cited therein). Thus tort liability, concerned primarily with cost burdens, could be imposed on the basis of mere reflex, but not criminal liability. RESTATEMENT (SECOND) OF TORTS §2 (1965).

⁵³See Restatement (Second) of Torts § 18, 21 (1965)..

⁵⁴WIS. STAT. §895.525: Sports Law: Liability of Contact Sports Participants.

in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury. (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.⁵⁵

As recognized in the statute's deference to a professional league that establishes a policy with a different standard, a call for a criminal law of sports must be heard by the federal government given the interstate commercial character of sports leagues.

Substituting criminal reckless or intentional mental states for their civil analogs, the Wisconsin statute works for criminal purposes. It seems far less likely that well trained, highly skilled, professional athletes would be easily confused about which types of hits risk major injury as opposed to winning a play or even establishing athletic intimidation through aggressive physical play. As Cincinnati Bengal rookie cornerback Jonathan Joseph stated:

There are some rules that you just automatically know you can't (break). But the other knick-knack rules, you just can't think about those, because it will slow you down. And that's all within a second or two of getting a sack."⁵⁶

The gravamen of such a sports battery offense is protection of athletic autonomy to play the game regardless of competitive sport intensity.⁵⁷ Reckless conduct occurs when evaluated from

⁵⁵*Id.*, at Paragraph 4m.

⁵⁶Kevin Kelly, *Roughing rules not easy on defense*, THE CINCINNATI ENQUIRER 10-18-06 at C1.

⁵⁷Allison Schlesinger (Associated press), *Cops: T-ball coach paid player to hurt another*, THE CINCINNATI ENQUIRER, 9-16-05 at A4. Not wanting to play a boy with a disability, the coach is alleged to have offered to pay a player to hit the boy in the head with a baseball.

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the perspective of an objectively reasonable athlete, experience dictates that the tactics employed are likely to cause grievous bodily injury. In the alternative, absent sufficient developmental skill, out-of-control tactics might also be considered reckless. Intentional conduct certainly occurs when players enter the field with the primary purpose to cause harm to others.⁵⁸ There must be an awareness that it is possible to mask criminal thuggery under the guise of a legitimate sports objective. In such an instance a competitive motive establishes the requisite criminal mindset of intentional injury causing misconduct.

In the final analysis, the introduction is overdue of a federal sports battery statute precisely limited to situations in which reckless or intentional misconduct during play leads to grievous bodily injury or death. Whether the criminal misconduct occurs during play or out of play should not be a conceptual barrier as long as a prosecutor can demonstrate a criminal mind.

V. Conclusion

Competitive contact sport injuries can be, and often are, serious, but at the end of the day, athletes generally expect to walk away from the field of sport though major injuries are inevitable due to excessive risk inherent in competitive contact sports. Intentional or reckless strategic acts to cause grievous bodily injury for a competitive advantage is a different matter.

⁵⁸During the Athletic 10 Conference Basketball Tournament Play in February 2005, NCAA Men's Basketball Hall of Fame Coach John Chaney, while coaching at Temple University, put in seldom used 6-foot-8, 250 pound Nehemiah Ingraham, a self-described, "goon" to "send a message" by delivering hard fouls against Saint Joseph's University, which resulted in breaking the arm of an opposing player. *Chaney sent player in to foul*, <http://sports.espn.go.com/ncb/news/story> Feb. 28, 2005 Chaney was angry at what he thought were illegal screens by the opposition team. *Id.* Chaney accepted a self-imposed suspension for the remainder of the tournament season. Ingraham received no punishment. Indeed, Ingraham did not leave the game until receiving a fifth foul, which mandated his departure. In 1984, Chaney grabbed George Washington Coach Gerry Gimelstob by the shoulders at halftime. In 1994, following a game against the University of Massachusetts in he threatened to kill Coach John Calipari. Dan Gelston, *Hall of Fame coach John Chaney retiring*, www.philly.com/mld/philly/sports/14088193.htm; http://sportsillustrated.cnn.com/2005/writers/phil_taylor/03/02/chaney/index.html.

Surely the criminal law applies to on-field misconduct the same as off-field misconduct. The English Rule looks to evaluate *mens rea* but allows a high presumption of innocence for players acting within the rules and custom of the game. Under the American Rule players consent to risks inherent in the rules and custom of the game and so long as the rules are reasonable, there is no criminal liability for accidents, and injury is excused. Neither legal tradition nor the rules of the games adequately address strategic acts of criminal thuggery masquerading as legitimate sport. The contemporary incidents reviewed in this article should spur thoughts toward developing a criminal jurisprudence to address intentional or reckless actions causing grievous bodily injury on the playing field. The goal of *lex sportiva* is that no athlete should have to suffer intentional or reckless thuggish attacks masquerading as legitimate play. The law that must catch up. This is inevitable. If it was inevitable that the Geneva Conventions would develop rules governing war beyond legitimate war aims, then *a fortiori* there must be a convention to develop rules governing competitive contact sport (simulated war) beyond legitimate sports aims.

References

- Baxter, Angela, *Hockey Violence: The Canadian Criminal Code and Professional Hockey*, 31 MA. L.J. 281 (2005)
- Benard, Howard P., *Little League Fun, Big League Liability*, 8 MARQ. SPORTS L.J. 93 (1997)
- Biedzynski, Kenneth W., *Sports Officials Should Only be Liable For Acts of Gross Negligence: is That the Right Call*, 11 U. MIAMI ENT. & SPORTS L. REV. 375 (1994)
- Brummet, Teri, *Looking Beyond the Name of the Game: A Framework for Analyzing Recreational Sports Injury Cases*, 34 U.C. DAVIS L.REV. 1029 (2001)
- Calvert, Clay & Richards, Robert D., *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 Va. Sports & Ent. L.J. 1 (2004)

Forum on Public Policy

- Carlsen, Chris J., *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S.CAL.L.REV. 399 (1982)
- Clarke, C. Antoinette, *Law and Order on the Courts: The Application of Criminal Liability For Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149 (2000)
- Decker, John F., *Don't Forget to Wear Your Hunter Orange (Or Flack Jacket): A Critique on the Lack of Criminal Prosecution of Hunting "Accidents,"* 56 S.C. L. REV. 135 (2004)
- Doerhoff, Heidi C., *Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go*, 64 MO. L. REV. 739 (1999)
- Fitzgerald, Timothy B., *The "Inherent Risk" Doctrine, Amateur Coaching Negligence, and the Goal of Loss Avoidance* 99 NW.U.L. REV. 889 (2005)
- Fritz, Kevin A., *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L.J. 189 (2002)
- Halcomb, Darryll M., *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L.J. 263 (2002)
- Hanson, Linda S. Calvert & Dernis, Craig, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127 (1996)
- Harary, Charles, *Aggressive Play or Criminal Assault? An In Depth Look at Sports Violence and Criminal Liability*, 25 COLUM. J.L. & ARTS 197 (2002)
- Horton, David, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F.L. REV. 599 (2004)
- Jones, J.CH. & Stewart, Kenneth G., *Hit Somebody: Hockey Violence, Economics, The Law, And The Twist and McSorley Decisions*, 12 SETON HALL J. SPORTS. L. 165 (2002)
- Judges, Donald P., *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1 (1993)
- Karon, Daniel R., *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)
- Lewis, Darryll M. Halcomb & Fortes, Frank S., *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673 (1990)
- Magnusson, Riger S. & Opie, Hayden, *HIV and Hepatitis in Sports: An Australian Legal Framework for Resolving Hard Cases*, 5 SETON HALL J. SPORT L. 69 (1995)
- Mallen, Stefan A., *Touchdown! A Victory for Injured Fans at Sporting Events?--Hayden v. University of Notre Dame*, 66 MO. L.REV. 487 (2001)
- Marder, Jennifer , *Should the Criminal Courts Adjudicate On-Ice NHL Incidents?*, 11 Sports Law. J. 17 (2004)
- Mayer, Michael, *Stepping in to Step Out of Liability: the Proper Standard of Liability for Referees in Foreseeable Judgment-Call Situations*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 54 (2005)
- Mayes, Thomas A., *Tonya Harding's Case: Contractual Due Process, The Amateur Athlete, And The American Ideal of Fair Play*, 3 UCLA ENT. L.REV. 109 (1995)

McCaskey, Anthony S. & Biedzynski, Kenneth W., *A Guide to the Legal Liability of Coaches For a Sports Participants's Injuries*, 6 SETON HALL J. SPORT L. 7 (1996)

McMurray, Erin Elizabeth, *"I Expected Common Sense to Prevail": Vowles v. Evans, Amateur Rugby, And Referee Negligence in the UK*, 29 BROOK. J. INT'L L. 1307 (2004)

Miller, Brendon D., *Hoke v. Cullinan: Recklessness As The Standard For Recreational Sports Injuries*, 23 N. KY. L.REV. 409 (1996)

Miura, Hans R., *Lestina v. West Bend Mutual Insurance Co.: Widening the Court as a Playing Field for Negligent Participants in Recreational Team Contact Sports*, 1994 Wis. L. Rev. 1005 (1994)

Moore, Geoffrey M., *Has Hockey Been "Checked From Behind" North of the Border? Unruh, Zapf, and Canada's Participant Liability Standard*, 5 SPORTS LAW J 1 (1998)

Narol, Mel, *Sports Torts: A Standard of Care Issue*, 134 JUN N.J. LAW 41 (May/June1990)

Narol, Mel, *Sports Participation with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29 (1991)

Nielsen, Bradley C., *Controlling Sports Violence: Too Late for the Carrots--Bring on The Big Stick*, 74 IOWA L. REV. 681 (1989)

Oh, Tracey, *Note: From Hockey Gloves to Handcuffs: The Need for Criminal Sanctions in Professional Ice Hockey*, 28 HASTINGS CO., & ENT. L.J. 309 (2006)

Panagiotopoulos, Dimitriou, *International Sports Rules' Implementation--Decisions' Executability: The Bliamou Case*, 15 MARQ. SPORTS L. REV. 1 (2004)

Rubin, Steven I., *The Vicarious Liability of Professional Sports Teams For On-The Field Assaults Committed By Their Players*, 1 VA. J. SPORTS & L. 266 (1999)

Seiberling, Seiberling, *"Icing" on the Cake: Allowing Amateur Athletic Promoters to Escape Liability Inmohney v. USA Hockey, Inc.* 9 VILL. SPORTS & ENT. L.J. 417 (2002)

Simons, Kenneth W., *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987)

Stephenson, Jr., David J., *Competitive Sports Torts*, 19 COLO.LAW. 2457 (1990)

Timmer, John, *Crossing the (Blue) Line: Is The Criminal Justice System the Best Institution to Deal With Violence in Hockey*, 4 VAND. J. ENT. L. & PRAC. 205 (2002)

Urban, Jay A., *Sports Torts in Wisconsin*, 8 MARQ. SPORTS L.J. 365 (1998)

van der Smissen, Betty, *Legal Concepts Related to Youth Responsibility*, 13 J. LEGAL ASPECTS SPORT 323 (2003)

Yasser, Ray, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants be Required to Be Reasonable*, 5 SETON HALL J. SPORT L. 253 (1995).

Note: *Torts-Negligence in the Protection of Third Parties During Youth Sports Programs--The Duty of an Actor to Control The Conduct of Another so as to Protect a Third Person From Attack Will Arise Only If There is a Special*

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Relationship Between The Actor and That Other Party Whose Conduct Requires Restraint--Hills v. Bridgeview Little League Association, 745 N.E. 2d 1166 (Ill), 12 SETON HALL J. SPORT L. 107 (2002)

Yates, Jeff & Gillespie, William, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL'Y 145 (2002)

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