Consent in Criminal Law: Violence in Sports

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The amount of violence in the National Hockey League has increased significantly during the past several years. This trend did not receive much popular attention until, for the first time in the United States, an incident that occurred during a professional sporting event resulted in a criminal prosecution for assault. In January 1975, David Forbes struck Henry Boucha with a hockey stick causing serious injury to Boucha's face and eyes. Because of the egregious character of the widely publicized incident, Forbes was prosecuted under the Minnesota criminal assault statutes. The question of his culpability, however, was not resolved: The jury could not agree upon a verdict, and the prosecutor declined to retry the case.

The frequency and seriousness of violent incidents in professional hockey undoubtedly invites future criminal prosecutions. Although violence in hockey has attracted the greatest attention, similar incidents in other sports have also caused widespread concern, suggesting both the inadequacy of disciplinary mechanisms of professional leagues and the need for some form of increased deterrence. The increasing violence also calls into question many of the assumptions that society has about athletic contests, notably the belief that

2. Although there have been no other prosecutions in the United States, three National Hockey League (N.H.L.) players have been tried for criminal assault in Canadian courts. See Regina v. Green, [1971] 16 D.L.R.3d 137 (1970) (discussed in text at notes 43-46 infra); Regina v. Maki, [1971] 14 D.L.R.3d 164 (1970) (discussed in text at notes 45-46 infra); Regina v. Maloney (discussed in Kennedy, supra note 1, at 17-18). The defendants were acquitted in all three cases.
4. The incident took place after Forbes had been sitting in the penalty box for several minutes. After leaving the box, he skated directly to Boucha and struck him in the face. See id.
7. Clarence Campbell, the Commissioner of the N.H.L., expressed great concern over the situation: "Something must be done to control the violence in our game. I hear at least 10 discipline cases each week. And over the course of a season, I suspect I hear at least 10 cases where the civil authorities might think a crime was committed. Without doubt this has been our worst year ever for sheer violence on the ice." Kennedy, supra note 1, at 16.
injuries in sports are not the product of a malicious intent to injure. These assumptions are particularly suspect in professional hockey, where, as even a casual observer knows, physical intimidation is commonplace.9

Because there have been few criminal prosecutions for violence in sports, there are several difficult issues that have received only cursory analysis. This Note will focus on one such issue—the existence and effect of the consent of the injured party. In section I, it will analyze the various general theories relating to the nature of actual consent and will suggest that the current theoretical framework's emphasis on ascertaining the victim's subjective state of mind is, in some contexts, ill-conceived and unhelpful. It will argue that societal interests involved in human interactions should become a major focus of any analysis, particularly in the sports context where a traditional inquiry into subjective state of mind is most inappropriate. In section II, the Note will explore what effect such consent has on the liability of a person charged with criminal assault, both in general and in connection with conduct in a sports contest. It will demonstrate that analysis of effectiveness must also expressly consider societal interests both in allowing sports to flourish and in limiting violence.

I. ACTUAL CONSENT

A. General Theories of Consent

The ultimate problem in any case where consent is at issue has traditionally been to discern whether the victim possessed the requisite subjective state of mind regarding the conduct or injury in question. Any analysis of consent theory therefore requires a determination of what mental states have been subsumed under the concept "actual consent."10

Victims unquestionably possess varied states of mind with respect to harms inflicted upon them. Among all of these different attitudes, there is a range that might be characterized as actual consent, which Prosser defines simply as a "willingness that [an act] shall occur."11 Presumably, "willingness" includes every attitude from indifference to intense longing.

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9. See Kennedy, supra note 1, at 18. Presumably one of the problems that prevented prosecutions in the past was the inability to prove malicious intent. See N.Y. Times, July 19, 1975, at 17, col. 3, quoting a Forbes juror: "Three of us . . . did not feel he [Forbes] intended to inflict any bodily harm."

10. Since this Note is concerned with actual consent in the context of sports, it is necessary to discuss only those aspects of the general theory of actual consent that may apply to sports. For a general discussion of actual consent, see W. Prosser, HANDBOOK OF THE LAW OF TORTS § 18, at 103-08 (4th ed. 1971).

Willingness, like all other subjective mental states, cannot be directly discerned by a factfinder. Instead, the factfinder is necessarily limited to considering objective indications which serve as evidence of the subjective mental state. Thus, in determining whether actual consent existed, the factfinder must decide whether the objective indications sufficiently suggest that the victim did, in fact, consent.

This objective test to determine subjective, and thereby actual, consent must be limited in two important respects. First, even if the factfinder decides that the victim did not consent, the defendant may still have a valid defense if the defendant had mistakenly but reasonably believed that the victim did consent. Thus, although the objective indications, as viewed by the court or jury, may not sufficiently support a finding that the victim consented, the defendant nevertheless may have interpreted the victim’s behavior as manifesting consent. If the defendant’s mistaken interpretation is reasonable and the offense charged requires that the act be done without

12. In both the criminal and tort setting, the factfinder must look at all the evidence to determine whether the victim in fact consented. This similarity is important because much more treatment has been accorded actual consent issues in civil tort cases than in criminal cases. Since the issue of the party’s subjective state of mind is the same, the resolution of problems concerning actual consent that arise in the civil context applies equally to those problems that arise in a criminal trial.

This is not to say that the law of consent is identical for both civil and criminal cases. While the substantive issue of whether consent existed is the same, the effect of that consent, if present, may be different, since the state has an interest in criminal cases that is absent in civil cases. Theoretically, the civil tort case involves the interests of only the two parties before the court; the only question is whether the plaintiff has incurred an injury for which the defendant should have to compensate him. If the plaintiff actually consented, little reason exists to make the defendant compensate the plaintiff. The common-law maxim volenti non fit injuria expresses the idea that a willing party is not injured. Generally then, in a torts case, the court should not be concerned with “effective consent” matters, which, because of the interests of the state, are present in a criminal case. See text at notes 47–54 infra.

However, there is no unanimity on this point. In some states consent cannot operate as a defense in a civil suit for battery if the conduct consented to was illegal. See W. Prosser, supra note 10, § 18, at 107; Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 COLUM. L. REV. 819, 826–29 (1924) (explaining the historical developments that led to this split in jurisdictions).

13. An interesting problem is presented when the victim has subjectively consented but the perpetrator is unaware of this fact. In tort, the plaintiff probably cannot recover since, as a consenting party, he has not been injured. See W. Prosser, supra note 10, § 18, at 101 & n.36. In a criminal context if A assaults B without knowing that B has subjectively consented, then, if consent is a defense, A cannot be found guilty of assault; it is arguable, however, that A can be found guilty of attempted assault.

14. It is arguable that if society is sincere about the necessity of a guilty mind for criminal responsibility, there is no reason to require that the defendant’s good faith mistaken belief be reasonable. The mind of a defendant who possesses an unreasonable good faith mistaken belief is no more guilty than the defendant who has a reasonable, good faith, mistaken belief. It can be argued that if the mistaken belief were unreasonable, a jury is not likely to find that it was a good faith belief. This practical solution, however, is not the answer to the theoretical objection. In a recent
the victim's consent, then the defendant may lack the intent necessary for conviction.\footnote{See \textit{w. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW} 357-58 (1972). Some crimes, however, may define the requisite mens rea as not requiring any fault with respect to one aspect of the crime. One such crime is selling liquor to minors, where a reasonable belief that the child was of age is not a defense. \textit{See id.} at 359.}

Second, situations may exist where it is unreasonable for the perpetrator to assume that the victim possesses a state of mind amounting to actual consent \textit{even though} all available objective indications suggest that the victim is actually consenting.\footnote{But cf. \textit{W. PROSSER, supra} note 10, \S\ 18, at 101: "If the plaintiff expressly says, 'It's alright with me,' he will of course not be permitted to deny that he did consent."} In such cases, the nature of the conduct or harm may so offend fundamental notions of reasonableness that the factfinder may decide the victim could not have consented to the acts or injuries notwithstanding his contrary indications. A classic example is \textit{People v. Samuels},\footnote{250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967), cert. denied, 390 U.S. 1024 (1968).} where the defendant, who was charged with assault for whipping another person, advanced a consent defense to avoid conviction. The defendant argued that the victim was a masochist who received pleasure from the pain the defendant inflicted upon him. The court answered: "It is common knowledge that a normal person in full possession of mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."\footnote{250 Cal. App. 2d at 513-14, 58 Cal. Rptr. at 447. While one might disagree with the court's application of this principle in \textit{Samuels}, it would be difficult to dispute its applicability under facts such as those presented in \textit{State v. Fransua}, 85 N.M. 173, 510 P.2d 106 (1973), where the defendant told the deceased that if he had a gun he would kill him. The deceased produced a gun, placed it on the bar, and said "Go ahead." The defendant did. Rather than resolving the case on the basis of whether consent existed, the court held that even if there were such consent, it would not be a defense.}

\textit{Samuels} reveals that a factfinder has not been limited to observing objective indications when deciding whether an individual actually consents. Instead, under accepted doctrine, he may consider whether a "reasonable person" would consent to certain acts. Accordingly, if it appears that a person would never consent to an act or harm, a factfinder will probably conclude that there was no consent. This result can be based on two different rationales. First, if the victim were a reasonable person, it follows that the victim could not have consented to the harm or conduct, and no person could ever reasonably believe that he did in fact consent. Second, if the victim did acquiesce to an act or harm, it follows that he must have been insane or otherwise mentally disabled, which the defendant should
have realized, and therefore was incapable of giving a consent cognizable at law.

The second rationale that explains *Samuels*—that an individual who suffers from a mental incapacity cannot give consent—falls within the concept "meaningfulness of the consent." Even though a victim may have possessed a subjective state of mind amounting to "willingness," his acquiescence will not be deemed to have legal meaning and will not be recognized as the basis of a consent defense if a specific reason exists to protect him. In particular, willingness and acquiescence may not constitute meaningful consent if the perpetrator exploited a weakness of the victim. Thus, if the perpetrator induces the victim's acquiescence by deceiving him concerning the nature of the conduct, the conduct's likely result, the perpetrator's intent, or by threatening or using force, there may not be meaningful consent.

The principle that a perpetrator's deception about the nature of his conduct may render the victim's consent unmeaningful is best illustrated by Prosser: If *A* agrees to a boxing match with *B*, and *B*, without *A*’s knowledge, uses brass knuckles, *A*’s consent is not meaningful. Indeed, the fact that *B* inflicts the same injury upon *A* as if he had hit him with a bare fist does not make *A*’s consent meaningful. 19 Similarly, deception about result may cause a victim's consent to be unmeaningful. For example, a woman who allows a doctor to take "indecent liberties" with her because the doctor said it was necessary to cure her ailment has not given a meaningful consent.

Situations where deception as to intent renders consent unmeaningful are relatively infrequent, since the victim often acquiesces in certain conduct without caring about the perpetrator's motives. In such instances, the fact that the perpetrator engaged in the conduct with an intent differing from that which the victim assumed is irrelevant and does not render the consent unmeaningful. In some cases, however, deception about the nature of the perpetrator's intent may subject him to liability notwithstanding the victim's willingness and acquiescence. As illustrated by Prosser's boxing hypothetical, 21 the fact that a resulting injury does not differ from the harm the victim might have suffered if the perpetrator had not deceived him does not make the consent meaningful. Presumably one rationale supporting this conclusion is that a greater force increases the probability of harm to the victim. 22 Similarly, if *A* agrees to certain

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19. W. PROSSER, supra note 10, § 18, at 103 n.54.
20. See, e.g., Bartell v. State, 106 Wis. 342, 82 N.W. 142 (1900).
21. See text at note 19 supra.
22. In other words, the defendant, by using brass knuckles, subjected the victim to a risk of harm greater than that of which the victim had been aware.
conduct by $B$, and $B$'s intent, unknown to $A$, is to injure $A$, it may well be that $B$'s engaging in the conduct with the intent to injure makes a harmful result more probable. It is quite plausible that consent to conduct that is undertaken with an intent about which the victim was deceived increases the risk of harm to the victim and should not be considered meaningful, even though the nature of the conduct and the severity of the harm are the same as that which could have transpired had the perpetrator possessed the assumed intent.

To recapitulate, it is apparent that meaningfulness reflects a societal concern for protecting individuals who fall prey to types of deception of which society does not approve, who are coerced by force or threats of injury, who suffer from some incapacity that makes them particularly susceptible to a perpetrator's inducement, or who are simply weaker than the perpetrator and hence deserving of protection. Such individuals may possess the "willingness" normally associated with a subjective state of mind amounting to actual consent; however, society allows them to recover against the perpetrators of harm by considering their consent unmeaningful.

It is frequently the case that tortious or criminal acts where consent is at issue can be usefully analyzed as both a question of actual consent or "willingness" and as a question of meaningfulness of the consent. For example, whenever a perpetrator's conduct differs from what he led the victim to expect, it could be argued that the conduct exceeded the scope of what the victim had actually acquiesced in—that there was no "willingness" at all. Alternatively, it could be argued that even if the victim were found "willing," the exaction of acquiescence through deception made the victim's consent unmeaningful.

However, despite the fact that in many situations objective indications clearly define the scope of the victim's consent, in other cases, using scope of consent analysis has only limited utility since it is extremely difficult to draw a fine line delineating the conduct to which the victim is, in fact, willing to acquiesce. Moreover, the meaningfulness test is helpful only in those cases where the victim has actually consented. Thus, in some cases, either test may be applicable and dispositive in determining whether the perpetrator's defense should be recognized; in other cases, however, neither test has utility, since the scope of actual consent cannot be discerned in the first instance and the meaningfulness question therefore cannot be faced.

In particular, scope of consent provides little assistance in explaining the outcome in situations where the victim voluntarily undertakes an activity involving definite risks of injury because his de-

23. Of course a court could assume arguendo that actual consent existed and then hold that such consent would not be meaningful.
sire to achieve a certain end or goal outweighs his desire to avoid the harm associated with the goal’s attainment. In one sense, an individual who participates in such an activity is “willing” to suffer all foreseeable consequences whenever he voluntarily places himself in a position where those consequences may result. In effect, the individual is willing because his participation is voluntary: The victim could simply have refused to take part in the activity. This does account for the noncontroversial result in the simple case of a person riding a bus: Even though the bus passenger may desire to disembark at a point between stops, he cannot successfully claim he is being falsely imprisoned if the driver refuses to discharge him.

Scope of consent cannot, however, effectively distinguish or explain other situations where the activity is undertaken voluntarily and the infliction of harm is foreseeable but where society nonetheless refuses to find actual consent. In other words, it is clear that although a victim may be willing to risk all foreseeable consequences, he will not be held to have consented to every foreseeable occurrence. For example, a person who strolls through Central Park at midnight should foresee that he could well be mugged. It cannot be said that he consented to the mugging despite the fact that he voluntarily undertook the stroll and realized he might be waylaid.

Thus, there is some element besides voluntariness of the undertaking and foreseeability of the infliction of harm that must be present before the victim will be deemed to have consented. It could be argued that the “reasonable man” standard is the missing element that distinguishes the bus passenger and the midnight stroller. It may be asserted, citing Samuels, that a reasonable person simply does not consent to certain acts—such as a mugging in Central Park—and that a reasonable person does consent to other invasions—such as confinement on a bus between stops. The reasonable man approach so applied, however, is being used in different manners. In Samuels, the mental state of the victim was unknown and the reasonable man standard was used to draw the inference that the victim did not have a mental state amounting to consent. In the Central Park hypothetical, the mental state of the victim concerning the infliction of injury is known to as great a degree as it ever can be—he was, at the very least, willing to risk injury. What is considered the “right result,” namely finding that the stroller did not consent,

24. There is also an analytical problem of whether one can properly speak of consent to the possibility of some harm. Generally, it seems that when one voluntarily exposes himself to certain risks, it is better to speak in terms of assumption of risk than in terms of consent. See W. Prosser, supra note 10, § 68, at 439-57. However, if the injury-causing action of the perpetrator is an intentional tort, it may nonetheless be proper to speak in terms of consent. See id. § 68, at 440.

25. This hypothetical has been frequently used by German writers in support of the doctrine of “Sozialadäquanz” discussed in text at note 122 infra. See, e.g., J. Baumann, Strafrecht Allgemeiner Teil 185 (6th ed. 1974).
contradicts his known mental state. Thus, the use in the Central Park hypothetical of the reasonable man test, which is typically used to infer a state of mind rather than to reject a known one, is an inappropriate means of reaching the correct result.26

More importantly, the reasonable man standard does not expressly focus on the fundamental considerations that must be taken into account in determining a person’s culpability for a violent act. As illustrated by the Central Park hypothetical, an individual should not be forced to tolerate the infliction of harm by others merely because he has “consented” in the sense of demonstrating a willingness to risk such harm. The bus hypothetical, however, demonstrates the complementary notion that an individual must tolerate certain harms so that society may function in an orderly manner.27 Thus, the goal of any analysis is to indicate at what point the individual interest in not suffering harm is outweighed by the societal interest in facilitating the interaction of its members. This accommodation, which is fundamentally a matter of public policy, has been discussed by several German legal scholars under the name of Sozialadäquanz.28 This approach does not require deciding whether the victim actually consented. It has nothing to do with the victim’s subjective state of mind but instead focuses on what inconveniences society will require individuals to tolerate. German writers use the concept, which can be roughly translated as “societal adequacy,” to distinguish otherwise analogous situations, such as the bus passenger and the midnight walker in Central Park. Although the doctrine has been criticized,29 it appears to be descriptively, if not analytically, accurate:

26. One might also try to distinguish the bus hypothetical from the Central Park hypothetical on the basis of the certainty of the “injury.” However, it may not be completely certain that the bus driver would not make a special stop for a passenger if requested to do so.

27. Prosser would analyze the bus hypothetical by saying that there is an assumption of consent in such cases: “The defendant is sometimes at liberty to infer consent as a matter of usage or custom, and to proceed on the assumption that it is given. . . . [C]onsent may be assumed to the ordinary contacts of daily life . . . .” W. PROSSER, supra note 10, § 18, at 102 (footnote omitted). However, resolution of such cases does not turn on notions of whether or not the “victim” was willing to suffer the particular “intrusion” or “injury.” Rather these cases turn on questions of public policy regarding whether society can afford to allow people to object to certain conduct.


29. See Schroeder, Sport und Strafrecht, in SPORT UND RECHT 32 (F. Schroeder & H. Kauffman ed. 1972); H. SCHULTZ, EINFÜHRUNG IN DEN ALLGEMEINEN TEIL DES STRAFRECHTS 174 (1973). The strongest criticism is that of Baumann who argues that this concept is inadequate because it lacks specificity. He maintains that analysis of whether certain conduct constitutes a crime requires intensive consideration of specific defenses such as consent and self-defense, and that Socialadäquanz is an attempt to avoid difficult analytical problems. See J. BAUMANN, supra note 25, at 185-86.
it is desirable because it dispenses with unsatisfactory analytical approaches. It would, in fact, make it possible to avoid entirely the difficulties inherent in consent analysis—difficulties that, as will be seen, are especially apparent in the sports context.

B. Actual Consent of Sports Participants

Sports contests pose particularly troublesome questions for determining the scope of actual consent under traditional analysis. The number of objective indications available to evaluate the mental state of the participant in this context is limited. Indeed, the existence of the player's consent to a particular act, a question of fact, must usually be inferred from his voluntary participation in the game. Given this limitation, juries, courts, and commentators have attempted to establish parameters that fairly circumscribe the scope of consent in sports.

Because all professional and most well-organized sports have specific, announced rules, and because participants in such contests are assumed to be familiar with the rules of their own game, some commentators have concluded that these rules accurately delineate the scope of actual consent. Illustratively, Professor Beale states that "[i]n a foot-ball game, for instance, each player consents in advance to such injuries as he may suffer, so long as they are inflicted

30. In professional sports, as elsewhere, conduct may be either intentional or unintentional. With respect to injuries caused by the intentional conduct of others, it seems proper to speak in terms of consent; with respect to injuries caused by the unintentional or inadvertent conduct of others, it seems proper to speak in terms of assumption of risk. See note 24 supra. Some courts have considered the entire problem as one of assumption of risk. "Generally, the participants in an athletic event are held to have assumed the risks of injury normally associated with that sport." McGee v. Board of Educ., 226 N.Y.S.2d 329, 331, 16 App. Div. 2d 99, 101 (1962).

31. In professional sports, the only information that can be considered in determining scope of consent is participation in the game. The anomalous result is that a player may often have a strong desire that his opponent not engage in certain conduct; yet the player may be held to have consented to the conduct. For example, if A is running with the football and B tries to tackle him, A may find the tackle most undesirable, especially if he is injured. However, this anomaly may be explained by saying that when a person participates in a game, he consents to his opponent's hitting him in certain ways, even though he may wish to avoid such contact at a given point in the course of the game.

32. In less structured games such as pick-up football, the rules are not as clear. However, there is to some extent a tacit understanding among the players concerning the type of conduct that is permissible. In such cases, the gray area with respect to scope of consent will be larger than in the more structured games.

Similarly, in these informal games, an individual participant may have more power to determine what type of conduct will be tolerated. In professional sports, the individual participant cannot change the scope of actual consent by stating that he does not consent to certain conduct that is, for example, within the rules of that game. This could be because the subjective willingness of the individual participant is unimportant; A is voluntarily entering a preestablished system and must accept it as a whole. Such an explanation is consistent with the doctrine of Sozialadäquanz. See text at notes 28-29 supra.
by one acting within the rules of the game; but an injury caused by unfair play is not consented to. 33

Other commentators, however, have attributed little significance to the rules. For example, one commentator states that in games with considerable contact, such as football, "the consent by the players to the use of moderate force is clearly valid, and the players are even deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game." 34 The position that the injured player has consented if the hazard was "foreseeable" has been adopted by the drafters of the Proposed Federal Criminal Code (PFCC). 35 As ex-

33. Beale, Consent in the Criminal Law, 8 HARV. L. REV. 317, 323 (1895), citing Regina v. Bradshaw, [1878] 14 Cox Crim. Cas. 83. Beale's reliance on Bradshaw is questionable because the court was not talking about the rules as indicators of scope of consent, but rather as indicators of the intent (or motive or purpose) of the defendant.

According to Prosser, a person consents to those "physical contacts consistent with the understood rules of the game." W. PROSSER, supra note 10, § 18, at 102. Alternatively, Professor Bohlen has stated: "Consent to suffer such contacts, though involving more danger of injury, as permitted from the rules of the game, can be inferred from engaging therein, but consent will not be inferred therefrom to violence not permitted by the letter and spirit of the rules." Bohlen, Consent as Affecting Civil Liability, 24 COLUM. L. REV. 819, 822-23 n.9 (1924). The Restatement Second of Torts offers still another formulation:

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


See Recent Important Decisions, Assault and Battery—Liability for Injuries Received in Athletic Contests, 26 MICH. L. REV. 322 (1927) (discussing the similar section of the First Restatement). Although the Restatement is concerned with civil cases, the inquiry into the existence of actual consent should be the same for both civil and criminal cases. See note 12 supra.

34. Williams, Consent and Public Policy, 1962 CRIM. L. REV. (Eng.) 74, 81 (1962). Williams' position is supported by Fitzgerald v. Cavin, 110 Mass. 153, 154 (1872), where the judge instructed the jury, in part, as follows: "[i]f the parties were lawfully playing with one another, by mutual consent, and the force used by the defendant was no greater than the plaintiff had good reason to believe would be in such play, the defendant is not liable." (Emphasis original.) Cf. Perkins, Non-Homicide Offenses Against the Person, 26 B.U. L. REV. 119, 123 (1946) ("the player by entering the contest consents to such physical contact as is properly incident to the game").

35. § 1619. Consent as a Defense.

(1) When a Defense. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:

(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport . . .

FINAL REPORT OF THE NATL. COMMN. ON REFORM OF FEDERAL CRIMINAL LAWS § 1619, at 182 (1971) [hereinafter PFCC].

The Model Penal Code has a strikingly similar provision:

(2) Consent to Bodily Harm. When conduct is charged to constitute an of-
plained by the drafters' Working Papers, the PFCC "specifically pro-
vide[s] a defense to criminal prosecution whenever the injury in-
flicted or risked is a 'reasonably foreseeable hazard' of a sports com-
petition . . . ."36

Both of these approaches are subject to criticism. The first ap-
proach—that the rules of the game delineate the scope of actual con-
sent—appears too narrow. Strict reliance on all rules of the game
is unreasonable because some rules are designed not to protect the
players but instead to make the game more exciting or competitive,
such as the rule in football prohibiting a player from crossing the
line of scrimmage before the ball is hiked. As the Restatement (Sec-
ond) of Torts recognizes, it would be inappropriate to assert that
an injury caused by the player who is offside exceeds the scope of
the injured player's consent simply because a rule has been vi-
olated.37 Furthermore, some infractions of the rules occur quite fre-
quently and are not thought by the players to be serious.38 It may
not be improper to consider such violations as part of the game; thus,
a player may be deemed to have consented to such actions although
a rule designed to protect the players has been violated.

On the other hand, the position of the PFCC appears too broad.
The Code's position, in effect, is that consent equals voluntary par-
ticipation plus knowledge that certain consequences might result.

36. 2 WORKING PAPERS OF THE NATL. COMMN. ON REFORM OF FEDERAL CRIMINAL
LAWS 851 (1970) [hereinafter WORKING PAPERS]. Although the Code provision
states merely that consent to foreseeable hazards is a defense, it does not expressly
state whether actual consent is assumed to exist. In such cases, however, the Work-
ing Papers make clear that the Commission assumed that actual consent existed if
the conduct and injury were foreseeable.

37. See RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1963). Thus, al-
though relying on the rules provides a "bright-line" standard, it begs the basic
question of whether the victim was "willing" for this conduct to occur. The "offside"
example in the text typifies those occurrences that violate the rules but which the
participant is presumably willing to suffer. Another example of apparent willingness
is the personal foul that is committed whenever one basketball player slaps the arm
of another player who is in the act of shooting.

38. See Regina v. Green [1971] 16 D.L.R.3d 137, 140 (1970), where the judge,
in analyzing the significance of a blow struck by a hockey player's glove, cites the facts
that such blows are a common occurrence and that the players think nothing of them to support the view that players consent to them or, as the judge stated, that
they assume the risk of them. See text at note 45 infra.
However, as discussed earlier, voluntary participation plus knowledge of the probable consequences does not always amount to consent. An athlete who voluntarily participates in a sports event arguably should foresee that an opponent might intend to injure him through either legal or prohibited conduct. It does not necessarily follow that the player consents to being injured in such a manner.

Neither the rules-of-the-game approach nor the voluntariness-

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39. See text at notes 24-29 supra.

This conclusion has even greater potency in the professional sports context where the participants are uniquely motivated. After all, a professional may vehemently oppose violence in his sport but may nevertheless participate in order to earn his livelihood. In that sense, his participation is involuntary, and it seems particularly inappropriate to apply a standard that is premised on voluntary participation. An analogy can be drawn to the fortunately extinct practice of duelling. It has been observed that the person challenging another or being challenged to a duel usually did not really desire to engage in a duel. Instead, he felt compelled to do so because of societal conceptions of honor. By convicting a few gentlemen for duelling, the state was able to make clear that duelling was not an honorable thing. Individuals were thereby given an excuse for refusing to take part in a duel without appearing cowardly. See supra note 34, at 78 n.10. Likewise, in professional hockey there are many players, such as Bobby Hull, who disapprove of the amount of violence in the game. Yet notwithstanding the large number of provocateurs in professional hockey, a player is forced to play a similarly violent game. See Comment, The Consent Defense: Sports, Violence and the Criminal Law, 13 AM. CRIM. L. REV. 235, 245 n.65 (1975).

Moreover, the type of conduct that a participant can reasonably expect to occur in some of today's professional sports markedly differs from the type of conduct he could have reasonably expected in the days when the participants played for the love of the game. At that time there was not the strong motivation to win that exists in professional sports today. A participant could expect that fellow players would conduct themselves in a manner that was in keeping with the letter and spirit of the rules. Today, the economic rewards or losses from winning or losing encourage players to adopt the attitude that one must do almost anything to win.

The fact that professional athletes are not playing solely for the love of the game undermines another basis of support for the voluntary-participation-plus-knowledge-equals-consent approach. When the players were truly amateurs, a participant could assume not only that his fellow players would conduct themselves in a manner within the letter and spirit of the rules, but also that the mental state of his fellow players was in keeping with the spirit of the game. In professional hockey as it is played today, it is often obvious that a player who is attacking another does so out of anger or a desire to injure, or both. There is precedent for the proposition that consent to certain conduct engaged in with a particular intent or purpose is not consent to the same acts carried out with a different intent or purpose: "[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 going 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 the implied consent." Agar v. Canning, [1965] 54 W.W.R. (n.s.) 302, 304 (Q.B.) (Man.), affd., [1966] 55 W.W.R. (n.s.) 384 (C.A.).

It is interesting to note that prize-fights, one of the few forms of "professional sport" that existed prior to the middle of the 19th century, were illegal. In the words of one commentator of that era, prize-fights were unlawful because "in such cases, the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained." I E. EAST, A TREATISE: PLEAS OF THE CROWN 270 (1806).
plus-foreseeability standard can deal equitably with the various occurrences in sports in which consent is an issue. Hence, an alternative approach is needed to explain adequately when consent should be recognized as having been given to the intentional or knowing infliction of injury in athletic contests.

The fundamental consideration in these sports cases is identical to that in those consent cases discussed earlier involving a voluntary undertaking of a risky activity. As a general matter, members of society must tolerate certain inconveniences to sustain a modicum of social order. Similarly, the athlete is a member of a smaller society or "the game," and he is expected to suffer certain inconveniences (injuries) so that the game may be played. The game, however, is a part of the larger society, and it must necessarily conform to the standards of that society. 40

Any player's conduct that is not consistent with society's notions of how the game should be played should not be considered "part of the game." Thus, this concept can serve as a standard for defining the scope of a participant's consent: An athlete consents only to that conduct which is a part of the game. Such an approach is in accord with the notion of *Sozialadäquanz*. 41 The athlete who participates in the game must tolerate certain inconveniences or injuries so that the game may be played in the manner that society demands or allows it be played.

It is true that "part of the game" could be viewed in empirical terms so as to include any conduct that occurs with sufficient frequency. However, "part of the game" so interpreted would not differ in approach or results from the "foreseeability" standard found in both the Model Penal Code (MPC) and the PFCC. Since the foreseeability approach is undesirable, "part of the game" should be understood as including only conduct that either is consonant with the ideal of the game or is an unavoidable concomitant of playing the game with an attitude that is consistent with the ideal of the game. Conversely, conduct that is inconsistent with society's standards as to how the game should be played should not be a part of the game. Also, conduct undertaken with an intent inconsistent with the ideal of the game—such as an intent to injure born of hatred for the opponent as opposed to a sportsmanlike desire to win—should not be considered a part of the game. When the intent is inconsistent with so-

40. This point is hardly profound. Fighting between gladiators was once viewed as a sport. When gladiators entered the arena, they were expected to take certain risks, such as death or maiming, so that the game could be played. If played today, however, the game would be part of a larger society that views the nature of the game as repugnant to basic standards of human decency. Accordingly, such fighting is not permitted.

41. See text at notes 28-29 supra.
cietal standards, the rationale for immunizing the conduct through a finding of actual consent is nonexistent.

The "part of the game" standard is concededly of limited usefulness when attempting to decide close questions of whether consent exists. However, this limitation is inherent in any standard, whether it be foreseeability, reasonableness, or some other approach. The advantage of using part of the game is that it focuses on the controlling consideration—the extent to which society will tolerate injury-causing activity in the sports context.

Although no American cases involving the scope of consent in professional sports have been reported, two Canadian trial court opinions have been published. Both attempt to define the scope of actual consent that can be inferred from an individual's participation in a professional hockey game. The two cases, which were decided in 1970, were based on the same incident—a brief fight between Wayne Maki of the St. Louis Blues and Ted Green of the Boston Bruins. Green was charged with assault for hitting Maki with his glove and stick; Maki was charged with assault for attacking Green with his stick. The facts remain unclear since the judge in Maki made findings contrary to those of the judge in Green. Nevertheless, both opinions can be read to support the "part of the game" standard, although they do use some language suggestive of reasonableness and foreseeability as well. Green was acquitted ostensibly because his action was deemed a necessary part of the game and therefore within the scope of Maki's consent. The judge stated:

I think within our experience we can come to the conclusion that this is an extremely ordinary happening in a hockey game and the players really think nothing of it. If you go behind the net of a defenceman, particularly one who is trying to defend his zone, and you are struck in the face by that player's glove, a penalty might be called against him, but you do not really think anything of it; it is one of the types of risk one assumes.

42. The problem of line-drawing in this context is well-recognized:
One now gets the most difficult problem of all, in my opinion: since it is assumed and understood that there are numerous what would normally be called assaults in the course of a hockey game, but which are really not assaults because of the consent of the players in the type of game being played, where do you draw the line?


44. The main conflicting findings were on the issue of whether Maki struck Green before Green swung at Maki with his stick. Compare Regina v. Green, 16 D.L.R.3d at 138, with Regina v. Maki, 14 D.L.R.3d at 164-65.

45. 16 D.L.R.3d at 140. The judge went on to find that Green's swinging his stick at Maki was "instinctive" and that Green "had no intent to commit an assault." 16 D.L.R.3d at 142. In another Canadian case, Regina v. Leyte, [1973] 13 Can. Crim. Cas. (n.s.) 458 (Kent Provincial Ct.), where one handball player hit another with his fist breaking the other's nose, the judge held that

the players in competitive sport such as this game must be deemed to enter into
Maki was acquitted not as a result of his consent defense but because his act was considered to be in self-defense. In dictum, however, the judge proceeded to analyze the consent questions that had been raised. He stated that a player does not consent to being viciously attacked with a hockey stick. The commission of such an act with a malicious intent is not, at least in the view of this judge, properly a "part of the game." The judge stated:

[A]ll players, when they step onto a playing field or ice surface, assume certain risks and hazards of the sport, and in most cases the defence of consent as set out in s. 230 of the Criminal Code would be applicable. But . . . there is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack. 46

II. THE EFFECTIVENESS OF CONSENT

A. General Theories of Effectiveness

Under traditional consent analysis, even if the existence of actual consent is demonstrated, it is by no means certain that the consent is a valid defense to a criminal charge. In a civil case, it is arguable that consent should always be a defense. 47 However, in a criminal case, the state may possess interests, for instance the preservation of healthy citizens, that are stronger than the individual's own interests in being free to allow any intrusions that he wishes (i.e., to give effective consent). Although an individual can waive his own interests, he cannot waive those of the state. 48 Thus, while a victim may

such sport knowing that they may be hit in one of many ways and must be deemed to consent thereto so long as the reactions of the players are instinctive and closely related to the play and whether or not a foul is being committed. However, where there is a significant time interval between the termination of play and the blows struck, and where the players by their conduct have after the stoppage of play ceased to be aggressive so that their subsequent actions should no longer be instinctive, then the players cannot be deemed to consent to assaults at that stage.

13 Can. Crim. Cas. (n.s.) at 459. In Leyte, the defendant bumped the victim into a wall, and the victim raised his hands to ward off any further interference. At that point, the defendant struck him twice with his fists.

From these cases, it appears that whenever a player's actions are closely related to the playing of the game (i.e., are "part of the game"), his instinctive reactions should not expose him to liability. This result is consistent with the rationale for having "part of the game" as the standard. In other words, if society wants the game to be played in a certain manner, society must accept certain unavoidable deviations such as instinctive reactions. As illustrated by these cases, one can determine that players' instinctive reactions are protected because either (1) players consent to the instinctive reactions of others, or (2) if the action were instinctive, the perpetrator lacks the requisite intent.

46. 14 D.L.R.3d at 167.
47. See note 2 supra.
48. "[T]hough a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public. . . . He may compromise his own civil rights, but he
actually consent to the infliction of harm, separate criteria are used to determine whether the consent is "effective"—that is, whether it should operate as a defense.

Consent is effective only if its existence sufficiently satisfies the state's interests in making the conduct criminal. Thus, if the predominant state interest is, for example, protecting the individual from unwanted acts that cause the individual harm, the consent of the "victim" should be a complete defense. Accordingly, consent is a complete defense in prosecutions for rape or larceny, since giving it "destroys the otherwise antisocial character of the accused's act." On the other hand, if making an act criminal is intended to protect society rather than individuals, consent is irrelevant, as in the case of treason and tax evasion.

Between these two classes of offenses lies a third category where the interest in protecting individuals against harm-causing acts is accompanied by a state interest in prohibiting antisocial behavior. The victim can consent and thereby satisfy the state's interest in protecting individuals from unwanted intrusions. His consent, however, cannot satisfy any other interests of the state. Thus, the question in this type of crime is whether the particular conduct so infringes these other societal interests that the perpetrator should be punished, notwithstanding the victim's consent.

Criminal assault (which includes both assault and battery) is cannot compromise the public interests." Regina v. Coney, [1882] 8 Q.B.D. 534, 553. See I. McLean & P. Morfish, Harris's Criminal Law 454 n.14 (22d ed. 1973).

49. It may seem at first blush that if the court determines that the victim's consent could not vitiate the offense because of some legitimate state interest, the court need not consider whether there was actual consent. However, it can be argued that if there is consent, then at least one of the state's interests—that of protecting an individual from unwanted attack—has been satisfied and the presence of consent may act as an extenuating factor that should be considered in determining the proper punishment. See P. Noll, "ÜBERGESETZLICHE RECHTFERTIGUNGSGRÜNDE IM BESONDEREN DIE EINWILLIGUNG DES VERLETZEN" 88 (1955). There is also some authority in civil cases for the proposition that the consent of the victim, where it does not act as a complete defense, is admissible into evidence on the issue of damages. See Logan v. Austin, 1 Stew. (Ala.) 476 (1828); Adams v. Waggoner, 33 Ind. 531 (1870); Bartholm v. Wright, 45 Ohio St. 177, 12 N.E. 185 (1887). In short, consent may sometimes act as a complete defense, sometimes as a partial defense (partially effective), and sometimes as no defense whatsoever (not even a mitigating factor). Noll, however, feels that consent must act as a mitigating factor in every case: "In all cases in which the consent is deemed not to negate the criminality of the injury, it should still be considered as an extralegal mitigating circumstance." P. Noll, supra, at 88 (translated from German).


51. The Model Penal Code divides criminal assault into two categories:

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
such an offense. An assault or battery that does not cause or threaten bodily injury should be treated in the same manner as rape and larceny. In such a case, the sole state interest is the protection of individuals from unwanted acts that cause them harm. If the victim consents, the objectives of the state are satisfied. However, if the perpetrator's conduct causes or threatens bodily injury, both state interests—protecting individuals from unwanted intrusions and preserving healthy citizens—are infringed. If the victim consents, the state interests in preventing unwanted intrusions is satisfied, but the interest in protecting the well-being of society's members might not be met and, accordingly, the victim's consent might not be effective.

(b) negligently causes bodily injury to another with a deadly weapon; or
(c) attempts by physical menace to put another in fear of imminent serious bodily harm.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:
(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
(b) attempts to cause or purposefully or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.


52. Only a few states have a separate statute for criminal battery. See, e.g., CAL. PENAL CODE § 242 (West 1970); FLA. STAT. ANN. §§ 784.03, 784.045 (1975).

53. Most jurisdictions do not extend criminal assault to cover assaults and batter·
ies that in no way involve or threaten bodily harm. See, e.g., N.Y. PENAL CODE § 120.00 (McKinney 1975). However, some jurisdictions have statutes that make the intentional touching of another against his will a criminal offense. See, e.g., FLA. STAT. ANN. § 784.03 (1975). Massachusetts incorporates this principle in its common law. See Commonwealth v. Campbell, 352 Mass. 387, 226 N.E.2d 211. The Model Penal Code and the Proposed Federal Criminal Code both require bodily injury. See MODEL PENAL CODE § 211.0 (Proposed Official Draft, 1962); PFCC § 1611, at 176.


It is also the general rule that consent is not a defense to a charge of criminal assault if the conduct causes or threatens to cause a breach of the peace. "It is generally conceded that a state enacts criminal statutes making certain violent acts crimes for at least two reasons: one reason is to protect the persons of its citizens; the second, however, is to prevent a breach of the public peace." State v. Fransus, 85 N.M. 173, 174, 510 P.2d 106, 107 (1973). See 1 BISHOP, CRIMINAL LAW § 258 (9th ed. 1923); Annot., 58 A.L.R.3d 662 (1974).

If the legislature has enacted a separate statute covering offenses constituting breaches of the peace, it would seem reasonable that the prosecution be for violation of that statute rather than for criminal assault. See W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 5.14, at 318-19 (6th ed. 1958). Some courts have used the term "breach of the peace" to include general policy considerations. See, e.g., Taylor v. State, 214 Md. 156, 133 A.2d 414 (1957) (regarding a sexual
It is apparent, therefore, that whether consent is effective depends largely upon the strength of society's interest in having a healthy and productive citizenry. This interest was recognized as early as 1604 in *Wright's Case*, where a "lustie rogue" engaged another person to cut off his hand. That court held: "[A] person who . . . procures another to maim him, that he may have more colour to beg; or disables himself to prevent being pressed for a soldier; is subject to fine and imprisonment at common law; and so is the party by whom it was effected at the other's desire."55

The principle that the state may foster a strong, productive citizenry is widely recognized56 and is supported by several compelling arguments. As suggested by *Wright's Case*, the state certainly has a legitimate interest—though admittedly of lessened importance today due to the nature of modern warfare—in preventing the injury of citizens who might be required to serve in the military. Moreover, the state has a strong interest in preventing citizens who are capable of being productive members of society from disabling themselves if they or their dependents57 would be forced to rely either on the gifts of others or on the state itself for support. In essence, the state desires healthy individuals who can fend for themselves and lend aid to others in need.

Yet the authority of the state to encourage a healthy citizenry is not unlimited. Perhaps the most important countervailing consideration is the individual's interest in being allowed to make decisions on matters that affect only himself. This interest, which is essentially a matter of individual freedom,58 always emerges when consent is found to exist. An individual who has knowingly and voluntarily consented to the infliction of bodily harm has presumably decided

55. *Wright's Case*, 11 Jac. 1, Co. Litt. 127 (1604), discussed in 1 E. East, supra note 39, at 396 (emphasis added).

56. "[T]he public has an interest in the personal safety of its citizens, and is injured where the safety of any individual is threatened, whether by himself or another." Beale, supra note 33, at 325. See *Roe v. Wade*, 410 U.S. 113, 148-50, 162-63 (1973) (state interest in health of mother "compelling" after first trimester of pregnancy); *Bohlen*, supra note 12, at 820 n.1.

Some courts have recognized that the state interest in human life and health is so great that it may justify a court order for medical treatment even without the consent of the patient. See, e.g., *John Fitzgerald Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); cases cited in W. Prosser, supra note 10, at 102 n.47.

57. The state has a particularly strong concern for protecting those who directly depend on other individuals for support. For example, the state may seek to prevent parents from disabling themselves because of the hardship that would be imposed on their children. See, e.g., *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964).

that some value is more important than bodily health. Thus, whenever the consent of the victim is deemed not an effective defense, the law is, in effect, restricting individual freedom. Although American jurisprudence has traditionally placed considerable value on such freedom, it has also accepted the tenet that government has the power to prohibit certain actions for purely paternalistic reasons. Thus, determining the scope of the state's power to ensure a strong citizenry involves more than merely balancing state interests infringed when a person is injured against the interests in individual freedom. Even if state interests are not significantly impaired, the government can protect an individual, such as the "lustie rogue" in Wright's Case, from the consequences of unwise decisions that he may later regret. By holding that consent in such a case will not operate as a defense, the law neither relies exclusively on the tendency of an individual to act in his own best interests nor assumes that biopsychological forces—such as pain—that tend to deter self-destructive behavior will always be effective. Nonrecognition of the consent defense forces individuals who are contemplating certain acts to consider whether society will approve them and serves as a deterrent, for punishment may ensue despite their victims' consent. In this way paternalism necessarily reduces the strength of the individual liberty interest.

Although there is some support for the position that the individual's right to make informed decisions causing harm only to himself is inviolable, no one seriously questions the state's interest in fostering a healthy and productive citizenry. The remaining question, therefore, is when an injury is to be deemed so severe that state interests outweigh individual interests, thereby rendering consent ineffective.

Certain activities involving bodily injury are so important that the need for them outweighs the state's interest in promoting the health of its citizens; in these cases, consent should be considered effective.

59. Either the victim will be subject to conviction for making this decision along with the perpetrator or only the perpetrator will be so subject. In the latter case, it will be difficult for the would-be victim to find a willing party to carry out his desires.


61. It would appear that the justification for paternalism is greatest when the "victim" did not engage in reasoned decision-making, for example, when there was uncertainty about whether injury would result from the conduct to which the "victim" consented. The less likely it is that the injury would result, the more likely it is that the "victim" may not have given due consideration to the possibility of injury.


63. See note 56 supra.
and the perpetrator should not be punished. However, most conduct that causes bodily harm is not considered beneficial, and it is rare that the question of whether the benefits to society from the conduct's occurrence outweigh the state interests in preventing bodily injury is raised. Usually, the sole consideration is at what point, in the absence of any benefits, this latter interest is sufficiently infringed to render consent ineffective. In this regard, courts and commentators have devised standards that attempt to delineate the type of conduct to which consent will be recognized as a defense.

At common law until approximately the nineteenth century, consent was an effective defense to a charge of criminal assault if the injury or threat of injury was less than mayhem. However, by the late 1800s, the judiciary had shifted the standard to "bodily injury" or "serious bodily injury." In 1934, the British Court of Criminal Appeal articulated this position in *Rex v. Donovan.* Initially, the court noted that "in early times when the law of this country showed remarkable leniency toward crimes of personal violence," consent was a defense to anything short of maiming. The court, however, referred to evolving societal standards and stated that consent would

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64. Examples of conduct which have sufficient social utility to justify tolerance by the state of the injuries that accompany it include:

1) surgery—state's interest in the health of its citizens;
2) scientific research—state's interest in advancement of scientific knowledge;
3) dangerous but essential occupations (e.g., coal mining);
4) war;
5) sports (see text at notes 78-116 infra);
6) police using force to keep the public peace;
7) chastisement by private citizens—parents' power to spank children. (Some cases have allowed consent to be a defense when an adult requested that another adult chastise him. *See, e.g.*, State v. Beck, 1 Hill (S.C.) 233, 19 S.C.L. Rpts. 363 (1833).)

In most of these settings, the conduct is tailored both to serve the relevant state interest and to minimize the likelihood of injury. Such activities with the exception of war usually occur in a controlled atmosphere that minimizes the risk of injury and contains violence at the lowest level possible. One of the aims of assault statutes, for example, is to stop conduct that could escalate into much more serious violence. Thus, there is, in addition to the interest in preserving the well-being of individuals, a preventive interest. There is also a presumption, except during periods of warfare, that the parties are acting without a malicious intent to injure, even if they do know that their conduct is likely or even certain to cause bodily injury.

65. "Everyone has a right to consent to the infliction upon himself of bodily harm not amounting to maim." J. Stephen, Digest of the Criminal Law art. 206, at 148-49 (4th ed. 1887). "A maim at common law is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary: but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem." 1 E. East, *supra* note 39, at 393. *See* Hughes, Consent in Sexual Offenses, 25 Mod. L. Rev. 672, 673 (1962).


69. 2 K.B. at 507.
not be a defense if the conduct were undertaken with an intent to cause bodily harm or with knowledge that bodily harm would probably result. It then proceeded to define bodily harm: "For this purpose we think that 'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the [victim]. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling." American courts that have addressed this question have held that consent is not a defense when bodily injury results, but have generally refrained from defining bodily injury.

The Donovan standard appears overbroad because it renders consent ineffective in cases where the injuries do not seem serious enough to affect adversely the state interest in fostering healthy, productive citizens. The individual's interest in being allowed to submit voluntarily to harm should cause consent to be considered effective in the absence of significant infringement of the state's interests.

Both the MPC and the PFCC adopt the position that if the injury caused or threatened by the conduct is not serious, the consent of the victim is effective, and, if the harm is serious, consent is effective only in certain circumstances.

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70. 2 K.B. at 509. The case involved a male defendant who had "caned" a 17-year-old girl for sexual satisfaction. The court, consequently, may have been influenced by the facts in drawing its rather broad definition of the degree of harm that precludes a consent defense.


72. For example, the Donovan formulation might render consent to being tattooed ineffective.

73. Model Penal Code § 2.11(2)(a) (Proposed Official Draft 1962); PFCC § 1616(1)(a), at 182. The Model Penal Code defines bodily injury as "physical pain, illness or any impairment of physical condition," § 210.0(2), and serious bodily injury as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." § 210.0(3).

With respect to the PFCC provision, the Commentary states, "As well as dealing with many normal participatory risks of work or play, this provision would primarily affect prosecutions for assault in consensual fistfights or scuffles or in cases of private sadomasochistic relationships, if no participant suffers substantial harm. These petty and personal affairs are not of such public interest or federal concern as to warrant federal criminal prosecution." 2 Working Papers 850-51.

74. Both the MPC and the PFCC consider consent a defense if the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport. See Model Penal Code § 2.11(2)(b) (Proposed Official Draft 1962); PFCC § 1619(1)(b), at 182. The MPC has decided to expand its provision to cover "any concerted activity of a kind not forbidden by law." Model Penal Code (Changes and Editorial Corrections) (Proposed Official Draft, 1962). The PFCC also allows the defense whenever the conduct and injury are reasonably foreseeable hazards of an occupation, a profession, or of medical or scientific experimentation (with certain restrictions). PFCC § 1619(1)(c), at 182.
these terms with relatively specific language, attempts to distinguish those harms that sufficiently impair state interests from those that do not.

In sharp contrast to the approach of the Codes is the position suggested by Noll, who argues that the purpose of those who engage in the conduct must always be considered, even in cases of minor bodily harm. The conduct's purpose may be sufficiently worthy to justify the particular injury, thereby rendering consent effective. However, consent to any conduct undertaken with a purpose that society condemns is ineffective regardless of the nature of the injury. Although Noll's subjective approach is more faithful to the underlying policy considerations, his position can be criticized. His approach requires the factfinder to investigate the subjective purpose of the perpetrator; such a process not only has inherent difficulties but also is subject to abuse by both judge and jury. In contrast, the objective approach of the Codes is easier to apply and ensures a greater uniformity of decision.

B. The Effectiveness of Consent in Sports

The difficulties that emerge in a general evaluation of the effectiveness of consent are particularly acute in the sports context. As a result, courts and commentators have frequently differed on whether consent should ever be effective in athletic contests. One of the earliest known commentaries on this dispute is that of Michael Dalton, writing in 1655:

Playing at Hand-Sword, Bucklers, Foot-ball, Wrestling, and the like, whereby one of them receiveth a hurt, and dieth thereof within a year and a day; in these cases, some are of the opinion, that this is Felony of Death: some others are of opinion, that this is no Felony of Death, but that they shall have their pardon, of course, as for misadventure, for that such their play was by consent, and again, there was no former intent to do hurt, or any former malice, but done only for disport, and triall of Man-hood.

75. P. NOLL, supra note 49, at 87. "The minor bodily injury of a consenting party is only unlawful when the purpose (or goal) of the conduct warrants condemnation." Id. (translated from German). Noll states that if the injury is serious, consent will be a defense only if the severity of the injury seems justified by the goal or purpose of engaging in the conduct. Id.

76. One student commentator argues that the threat of abuse is so great that the court should not be allowed to consider the social utility of the conduct involved. See 81 HARV. L. REV. 1339 (1968).

77. One problem with Noll's formulation is defining the purpose underlying any given conduct. For example, in a sadomasochism case such as Samuels, one could argue that the objective of the parties was mutual pleasure.

78. M. DALTON, THE COUNTRY JUSTICE Cap. 96, 246 (1635). In 1681, Sir John Chichester was "playing at foils" with his servant. Sir John was using a sword in its scabbard and the servant was using a bed-staff. As Sir John thrust at his servant, the servant parried, knocking off the chape of the scabbard but not
Historically, the dispute among English courts and commentators as to whether consent is a defense has focused on the intent of the perpetrator. In the mid-1700s, Lord Hale took the position that death resulting from joint participation in a contact activity such as cudgels or wrestling is not "excusable homicide." Hale said that participants in such a sport intend to harm each other; accordingly, he concluded that the death of one participant would render the other guilty of manslaughter.79 Contrary to Hale's view was that of Lord Foster, who contended that two individuals who "engage by mutual consent" in such activities do not intend to harm each other. Foster concluded that the death of one participant would not subject the other to a manslaughter charge.80

In the nineteenth century, courts retreated from the absolutist, irreconcilable positions adopted by Hale and Foster. Instead, whether a participant in a sport possessed a malicious intent was considered a question of fact rather than a matter of law. In effect, juries would decide whether the Hale or Foster position would control a particular case. This evolution is apparent in the 1878 case of Regina v. Bradshaw,81 where the defendant had kneed the deceased in the stomach during a soccer game. Lord Bramwell instructed the jury as follows: "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."82 Bramwell's approach allowed the jury to make a case-by-case determination of the mental state of the perpetrator. When making this judgment,
the jury necessarily decided whether the conduct in question was acceptable to society. Positions similar to Bramwell's were adopted in other major cases of the same period as well.\footnote{20 years later Regina v. Moore, [1898] 14 T.L.R. 229, presented a similar fact situation. Judge Hawkins instructed the jury that "(1) persons playing soccer must be careful to restrain themselves so as not to do bodily harm to any other person, and (2) no one has the right to use force which is likely to injure another, and if the prisoner used such force and death resulted, he was guilty of manslaughter." 14 T.L.R. at 229-30. The defendant was found guilty.}

The English treatment of the consent defense contained certain anomalies. On the one hand, it was frequently true that whenever a defendant in a criminal assault case not involving sports asserted the defense, the courts espoused the rule that it was not to be recognized \textit{unless} the conduct was part of a lawful sport.\footnote{"[Sports is one of the] well established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act." Rex v. Donovan, [1934] 2 K.B. 498, 508. "[C]onsent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling." People v. Samuels, 250 Cal. App. 2d 501, 513, 58 Cal. Rptr. 439, 447 (1967), cert. denied, 390 U.S. 1024 (1968).} These opinions suggested a broad exception from the criminal assault rule for sports participants. On the other hand, decisions in \textit{Bradshaw} and other sports cases used the \textit{same} test as those cases not involving sports: Courts considering assaults in athletic contests ruled that defendants who acted in a manner that was intended or was likely to cause injury to another would lack a valid consent defense and would be guilty of assault.\footnote{See cases cited note 83 supra. The cases also held that whether the conduct was within the rules or outside the rules was unimportant in determining whether the conduct was likely or intended to cause injury. In \textit{Bradshaw}, however, the judge stated that if the conduct were within the rules, the jury might consider an indication that the defendant was not "actuated by any malicious motive or intention, and that he [was] not acting in a manner which he [knew would] be likely to be productive of death or injury." 14 Cox Crim. Cas. at 84. It appears, however, that nothing short of death in the arena resulted in criminal prosecution until the \textit{Maki} and \textit{Green} cases in 1970. This, of course, does not include prosecutions for engaging in unlawful sports such as prizefights. People v. Fitzsimmons, 34 N.Y.S. 1102 (Ct. Sess. 1895); Regina v. Coney, [1882] 8 Q.B.D. 534. "Sparring exhibitions" could apparently be legally performed by boxers if sparring skills were the object of the contest but not if the fight were to end in one participant being defeated by injury or fatigue. See Regina v. Orton, [1878] 39 L.T.R. 293. Judges and commentators described prize fights in terms that would appear to apply equally well to professional sports of today: "Nothing can be clearer to my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage." Regina v. Coney, [1882] 8 Q.B.D. 534, 553. Even more applicable to today's professional sports is this statement by East: But the latitude given to manly exercises of the nature above described, when conducted merely as diversions among friends, must not be extended to legalize prize fightings, public boxing matches, and the like, which are exhibited for the sake of lucre, and are calculated to draw together a number of idle disorderly}
ing that sports were excepted from general assault principles, courts apparently applied the same standards to sports contests as they did to assault cases generally.

Nevertheless, prosecutions and convictions for sports conduct were very rare. This cannot be adequately explained by the assertion that sports activities were excepted from the law of criminal assault. Instead, there are two more plausible explanations: Either the participants lacked the requisite mens rea or their conduct did not involve a sufficient likelihood of injury.

The first explanation—that assault in sports may differ from other kinds of assault because the participants are thought not to possess the requisite mens rea—is eminently sensible. The popular view is that people participate in athletics out of love for the game, not out of a malicious desire to harm an opponent. It is not unlikely that courts embraced this view and presumed that participants possess an intent consonant with the idea of the game. This presumption is significant: If the courts had instead assumed that the participants possessed intent to injure, convictions for sports conduct would have been more frequent. Such results could be based, using contemporary terminology, on several considerations: the victim's consent may not be meaningful; the conduct of the perpetrator may be outside the "part of the game" standard, thereby exceeding the scope of consent; or, the benefits to society from sports do not outweigh the societal interest in protecting persons from the intentional infliction of injuries.

The second explanation—that courts deemed sports conduct not to involve a sufficient likelihood of injury—is even more plausible.

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86. The rationale for this position is that either they are not aware that their conduct is likely to cause injury or they do not intend to cause injury. See Regina v. Bradshaw, [1878] 14 Cox Crim. Cas. 83, 85.

87. "In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to the charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football [soccer], and the like." Regina v. Coney, [1882] 8 Q.B.D. 534, 549.

88. "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 be productive of death or injury." Regina v. Bradshaw, [1878] 14 Cox Crim. Cas. 83, 85.

89. See text at notes 18-22 supra.

90. This is true if the Sozialadäquanz doctrine with respect to sports is accepted. See note 28 supra and accompanying text. Since injuries inflicted with a malicious intent are not one of the necessary concomitants of having the game played in the ideal way, the victim should not be deemed to have consented.

91. See text at notes 98-102 infra.
When describing the likelihood of injury necessary to render consent ineffective in sports cases, courts, although purporting to use the same principles that they would employ in nonsports cases, usually required a showing of greater injury. In *Bradshaw*, the court insisted on evidence of "serious injury."⁹² In *Regina v. Moore*, the court required "bodily harm."⁹³ In *Regina v. Coney*, Judge Stephen articulated a standard that would consider consent effective even when considerable force was used as long as there was no "serious danger" to "life and limb."⁹⁴

On the other hand, courts in nonsports cases would find consent ineffective when a lesser injury or threat of injury was shown. In *Donovan*, for example, the court defined the amount of bodily harm necessary to render consent ineffective as "any hurt or injury calculated to interfere with the health and comfort" of the victim.⁹⁵ If this standard were applied to sports, much of the conduct in lawful games would be deemed criminal. Conversely, the standards expressed in *Bradshaw*, *Moore*, and *Coney* would appear to allow a consent defense in nonsports cases where consent has historically been considered ineffective.⁹⁶ Thus, it appears that the sports cases are, in fact, exceptions: Although these decisions purport to apply the same legal standards when determining whether consent existed, the courts actually recognized the defense far more often in sports by insisting upon a greater showing of injury.⁹⁷

One possible reason why consent has been deemed effective more frequently in sports than in other contexts is that athletic events have beneficial aspects that justify society's toleration of certain in-

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⁹². 14 Cox Crim. Cas. at 85.
⁹³. [1898] 14 T.L.R. 229, 230. It may have been this particular difference in the standard used that caused Bradshaw to be acquitted and Moore to be convicted. In both *Bradshaw* and *Moore*, the courts stated that the act must have been likely or intended to cause [serious] bodily injury or death for the defendant to be found guilty.

⁹⁴. (1882] 8 Q.B.D. 534, 549. "It is generally assumed that where bodily injuries are inflicted in the course of games, the nature of which is such that the likelihood of grievous bodily harm is absent, consent to the potential injury operates as a defense." Strauss, *Bodily Injury and the Defense of Consent*, 81 S. Afr. L.J. 179, 334 (1964) (emphasis added).


⁹⁶. In *Donovan*, for example, the prosecution's evidence of the severity of the injury consisted of (1) testimony by a doctor that after she had been "caned," the victim had "seven or eight red marks upon her body" and (2) testimony by the victim's sister that on the night of the incident the victim returned home "looking pale and ill." 2 K.B. at 503.

⁹⁷. The argument that sports are not really an exception because the players do not intend to cause injury is unpersuasive because the players sometimes have knowledge that their conduct is likely to cause injury; for purposes of criminal assault, knowledge that injury is likely to result has been treated as equivalent to intent that injury result. See *Regina v. Bradshaw*, [1878] 14 Cox Crim. Cas. 83, 84-85; *Regina v. Moore*, [1898] 14 L.T.R. 229, 230; *Model Penal Code* § 211.1 (Proposed Official Draft 1962); text at notes 108-10 infra.
juries. Society is thought to benefit in several ways when individuals actively participate in sports or merely act as spectators. Sports help maintain the citizenry's physical fitness, provide an outlet for frustrations and aggressive tendencies,\textsuperscript{98} satisfy the need and desire of people to prove their self-worth, provide for recreation and the pleasurable use of leisure time, and, at least with regard to team sports, train individuals to sacrifice themselves for the good of the group.\textsuperscript{99} Indeed, sports have become a central part of the American culture.\textsuperscript{100} One commentator has observed that the widespread interest in sports among diverse economic, social, geographic, and racial groups serves as a valuable unifying force in society.\textsuperscript{101} Sports, both professional and amateur, are important to the economy and provide a livelihood for many people.\textsuperscript{102}

If society decides that, because of these benefits, it will allow sports to continue, then society must accept the fact that, given the basic nature of many kinds of games, some injuries will occur. However, it is beyond dispute that society can demand that the possibility of injury be minimized. That the state interest in preserving a healthy citizenry may be infringed by participants inflicting harm upon each other is one justification for the state's requiring measures to minimize the incidence and severity of injury.\textsuperscript{103} Society can also justify curbing injury-causing behavior because of the effect such conduct has on those who observe it. Since both the coverage and dissemination of information about sports events are extensive, egregious conduct in the arena that causes serious injury is inevitably brought to the attention of millions of people. Players are emulated by many "young aspiring athletes who look to the professionals for guidance and example."\textsuperscript{104} The external effects of sports violence may well justify prosecution of the perpetrators in order to eliminate the implication of a privilege for such conduct.

\begin{itemize}
\item \textsuperscript{98} "[T]he main function of sport today lies in the cathartic discharge of aggressive urge . . . ." K. Lorenz, \textit{On Aggression} 271 (1967).
\item \textsuperscript{99} "The noble warrior's typical virtues, such as his readiness to sacrifice himself in the service of a common cause, disciplined submission to the rank order of the group, mutual aid in the face of deadly danger, and, above all, a superlatively strong bond of friendship between men, were obviously indispensable if a small tribe of the type we have to assume for early man was to survive in competition with others." K. Lorenz, supra note 98, at 272. For the most part, these virtues would also appear to be desirable characteristics from a modern society's point of view.
\item \textsuperscript{100} See R. Boyle, \textit{Sport—Mirror of American Life} 3-5 (1963).
\item \textsuperscript{101} A German commentator emphasizes this last point as one of the chief benefits of spectator sports. Werner, \textit{Sport und Recht}, 366 RECHT UND STAAT IN GESCHICHTE UND GEGENWART 3-4 (1972). Werner also recognizes that sports provide society with much-needed "heroes." Id. at 4.
\item \textsuperscript{102} See J. Betts, \textit{America's Sporting Heritage: 1850-1950}, at 312-14 (1974).
\item \textsuperscript{103} It is part of the doctrine of \textit{Sozialadäquanz} that the "dangers" involved in socially beneficial activities be kept to a tolerable minimum. See E. Schmidhauser, supra note 28, at 233-34.
\end{itemize}
The extent to which the state should demand a certain standard of behavior in athletics depends in part, however, on the ability of leagues and associations to regulate their own sports. Organized sports generally contain safeguards that seek to control the game's atmosphere and thereby reduce the frequency and severity of injuries. Rules of the various sports usually prohibit specific kinds of conduct that pose abnormal risks of injury or that are likely to inflame volatile tempers. Although it is inevitable that the passions of players will at times be aroused, officials, such as referees or umpires, are typically vested with the authority to discipline the players. These officials have broad discretion to impose penalties against a player or his team for any misconduct during the game. Such penalties, when compared to those given perpetrators for the same conduct outside the sports context, are minor: At best, the player may be suspended from the game and fined. However, the punishments are quick and certain. This is thought by some criminologists to be more effective in deterring undesired behavior than is the imposition of severe penalties.

It is by no means certain, however, that private organizations themselves are capable of adequately protecting societal interests without judicial or other governmental involvement. When self-regulating mechanisms prove inadequate, the state may intervene to protect its interests by deeming consent to certain acts ineffective. The remaining question is, therefore, what standard best accommodates the state's interest in preventing the infliction of bodily harm upon its citizens with the societal interests furthered by sports.

One possible standard is found in the MPC and the PFCC, which hold that consent is effective when given either (1) to conduct that does not threaten or cause serious injury or (2) to foreseeable conduct that results in foreseeable harm. This approach, however, is weak, for it fails to distinguish conduct engaged in with a malicious intent to injure from conduct undertaken with an intent consistent with the spirit of the game. There are certain kinds of conduct that a player expects to take place and that society chooses not to punish. Yet if this same conduct is undertaken with a malicious intent it is better to criminalize the conduct. For example, it is certainly foreseeable that a batter in baseball may be hit by a pitch. However, if a pitcher, motivated by a malicious desire to injure, intentionally hits a batter and causes serious harm, the pitcher should be criminally liable.

105. Common-law judges were particularly concerned with this problem. See Regina v. Coney, [1882] 8 Q.B.D. 534, 553-54.
107. MODEL PENAL CODE § 2.11(2)(a), (b) (Proposed Official Draft, 1962); PFCC § 1619(1)(a), (b).
A second possible standard is suggested by the English cases of *Bradshaw* and *Moore*: Consent to any conduct that is either intended or likely to cause serious bodily injury is ineffective. The first element of this approach, which holds that intentional infliction of harm is not privileged, avoids the principle weakness of the Codes. Thus, under the English cases, a pitcher who intentionally hits a batter would be guilty of assault. In some sports, however, this standard is overbroad because it fails to require a malicious intent. Although this may be of small consequence in the baseball hypothetical, it is a definite problem in some sports, most notably boxing, where the intent is necessarily to injure an opponent. In boxing, for example, the participant's intent is presumed not to be malicious. Application of the *Bradshaw* and *Moore* standard to such a sport would surely render it illegal.

The second element of this approach, which holds that knowingly engaging in conduct that is likely to cause serious harm is not privileged, is also problematical. In stark contrast to the Codes' foreseeability standard which recognizes consent to expected conduct that is likely to cause harm, the *Bradshaw* and *Moore* standard requires a player, not motivated by any malicious intent, to evaluate at his own peril the dangerousness of any act before undertaking it. Making the players accountable in this way would probably reduce the frequency of serious injury; however, it could alter drastically the manner in which games are played. Having competitive, vigorous contact games may well be incompatible with asking players continuously to evaluate the harmful potential of their conduct.

A third standard that avoids the disadvantages of alternative approaches is *Socialadiquanz*. This approach recognizes that if society wants the game to be played in a certain way, it must tolerate certain harms. It follows that if society does not choose to accept

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108. See notes 92-93 supra and accompanying text.

109. On the importance of the requirement that the intent be malicious, see State v. Beck, 1 Hill (S.C.) 233, 19 S.C.L. Rpts. 363 (1833), a chastisement case, where the court found the defendant not guilty because he was not motivated by any malicious intent.

110. Indeed, prizefights were illegal at the time of *Bradshaw* and *Moore*. See note 85 supra.

111. An announcement that certain conduct will subsequently make a player subject to criminal prosecution might not only eliminate or reduce the frequency of the undesirable conduct, but will also eliminate some desirable conduct necessary to the continued vigor and popularity of the game. Players who know that certain conduct will subject them to prosecution are likely to avoid doing anything that remotely resembles the conduct. "It is very difficult in my opinion for a player who is playing hockey with all the force, vigour 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 not follow up on this because maybe it is an assault; maybe I am committing an assault.' " Regina v. Green, [1970] 16 D.L.R.3d 137, 141.

112. See text at note 28 supra.
these harms, it may demand that the game be played in a different way. Thus, if a player possesses an attitude consistent with the ideal of the game, then any injury he causes his opponent while playing is justified, and the player whose conduct caused the injury would have a defense. Conversely, if a player who causes injury to his opponent is participating with an improper attitude, that is, a mental state not consistent with the spirit of the game, it may well be that the injury was not an unavoidable concomitant of playing the game, and therefore consent would not be a defense.

With regard to whether players should be criminally responsible for knowingly engaging in conduct likely to cause harm, Socialadiquanz offers a solution that avoids both the extreme position of the Codes, which imposes no responsibility on the players, and the standard of the English cases, which imposes a strict standard of accountability. Socialadiquanz requires that society tolerate those injuries that are unavoidable concomitants of playing the game the way society desires it to be played. Accordingly, if requiring the players to consider the consequences of their acts will prevent the sport from being played in the way society desires it to be played, then society may not hold players who knowingly inflict injury on their opponents criminally responsible. For example, a football player should not refrain from making a tackle for fear of injuring the runner. To hold the tackler strictly accountable for such conduct would prevent football from being played with the vigor society desires. On the other hand, if requiring the player to consider the results of his acts will not change the way the game is played, then society may properly hold the player criminally responsible.

Criticisms of such an application of Socialadiquanz do exist, but they lack substantial force. It is arguable that intent should not be the factor determining the effectiveness of consent: A perpetrator

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113. An historical example of society's demanding and effectuating a change in the way a sport is played is provided by the evolution of football in the United States. In the late 1800s football was a much rougher game than it is today. Players wore no helmets or other protective padding and mass plays such as the flying wedge were common. Because of the frequency of serious injury and death, "[t]he public demanded the end of all mass play." A. Danzig, The History of American Football 27 (1956). Efforts by various colleges to reform the game proved unsuccessful and as of 1905 the situation had not improved. Statistics for 1905 "showed 18 dead and 159 more or less serious injuries" [sic]. Id. at 29. As a result President Theodore Roosevelt called together the representatives of several colleges and threatened to abolish football unless the game adopted safeguards. These representatives, and those of other schools, met and agreed on numerous changes that saved the game. See id. at 22-29. This experience demonstrates that a standard based on society's view of the "ideal of the game" can be used to distinguish effective from ineffective consent and permissible from impermissible conduct.

114. This is consistent with general Socialadiquanz theory since the fact that society is willing to tolerate certain harms in order to avail itself of perceived benefits does not preclude society from attempting to minimize the risk of such harms. See note 103 supra.
could claim that the injury might have occurred even if his attitude had been proper. However, this position has little force, since one who intends to cause injury is usually more likely to produce that result than an individual who does not possess such an intent.115

A second, more difficult objection challenges Socialadäquanz to the extent it criminalizes acts not prohibited by the rules but which are undertaken with a bad intent. It is arguable that the rules delineate what society considers to be within the spirit of the game. According to this argument, rules that are designed to prevent injury automatically designate how much injury society will tolerate. Thus, conduct—regardless of the intent with which it is undertaken—should be privileged if it is within rules. This criticism gains added strength from the related objection that athletes, particularly professionals, need some sort of immunity to play the game correctly.116 In effect, players need to know that so long as they obey the rules, they will not be subject to criminal prosecution.

This second criticism, however, overlooks the fact that society tolerates injury-causing conduct in sports because it is assumed that players do not participate with a malicious intent. Presumably if society were to discover that athletes participate in sports only to injure their opponents, it would not tolerate sports at all, even though the players adhere to the rules.

In addition to creating these theoretical problems, this criticism of Socialadäquanz has little practical significance. First, prosecutions for malicious acts that do not violate any rules will be rare because prosecutors will have great difficulty assembling sufficient evidence of bad intent. Second, rules in most sports are so broadly formulated—for example, "unsportsmanlike conduct" or "unnecessary roughness"—that instances will be rare where maliciously motivated conduct does not in fact violate a rule. Finally, rules are designed in such a way that there are few situations where conduct undertaken with a bad intent but within the rules could cause or threaten serious bodily injury, which is a prerequisite to a criminal act.

Socialadäquanz is an appropriate method of analyzing both the problem of defining the scope of actual consent and the problem of determining whether consent to criminal acts in sports should be ef-

115. See notes 21-22 supra and accompanying text.

It may also be argued that a person who has intended to injure someone possesses anti-social tendencies and is likely to attempt to cause injury again. There is, however, a problem with trying to determine the nature of the intent here, because the players are often—perhaps always—acting with mixed motives. Although in theory one can distinguish an act done with an intent or purpose to injure from an act done in the spirit of the game (even if there is knowledge that it is likely to cause injury), as a practical matter, it may be impossible to make such distinctions, excepting, of course, egregious conduct that is not related to the game.

116. See note 111 supra.
fective. It focuses on the underlying policy considerations involved, such as the state interest in health, the benefits accorded society by sports, the individual liberty interest, and the state paternalistic function. The doctrine thereby avoids the problems inherent in traditional consent analysis by posing the central issue in its most fundamental form: to what extent will society tolerate harms before sacrificing the beneficial aspects of sports. It is conceded that there is room for disagreement concerning the strength of the various policy interests and the point at which certain conduct in sports should no longer be privileged. However, focusing on the central issue elucidated above facilitates a more reasoned appraisal of whether violence in sports should expose players to criminal liability.