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## Why Public Health Policy Should Redefine Consent to Assault and the Intentional Foul in Gladiator Sports

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**WHY PUBLIC HEALTH POLICY SHOULD  
REDEFINE CONSENT TO ASSAULT  
AND THE INTENTIONAL FOUL  
IN GLADIATOR SPORTS**

JENNIFER A. BROBST<sup>1</sup>

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## I. INTRODUCTION

Aggressive gladiator sports,<sup>2</sup> such as boxing, martial arts, and American football, are legally permitted to exist in part due to the consent to assault defenses in criminal and civil law.<sup>3</sup> However, these defenses have always been tempered by required avoidance of permanent injury and death, an unreasonable level of harm to which no one may legally consent.<sup>4</sup> The rules of the game reflect this, where what constitutes a foul and corresponding penalty are motivated by both fair play and player safety.

Unfortunately, in practice the intentional foul undermines this effort.<sup>5</sup> This tradition of bending the rules for strategic gain conflicts with the efforts of an array of new public health measures focused on player safety, particularly those aimed at preventing traumatic brain injury. However, calling for a ban on persistently dangerous sports for recreation, amateur and professional play at all ages is premature.<sup>6</sup> In order to preserve these sports, which provide excitement, confidence building, and health benefits, a more balanced reform measure could instead call for restrictions on the overly generous consent defense to assault in sports when intentional misconduct is involved, while continuing with ongoing efforts to improve prevention of accidental injury.

State legislatures have adopted an abundance of new mandated training provisions for youth safety in the wake of heightened public awareness of contact sports-related traumatic brain injury.<sup>7</sup> Within the individual governing athletic bodies are safety-related reexaminations of the rules of the game, such as defining interference or helmet

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<sup>2</sup> The author acknowledges that the term aggression has little, if any, legal meaning. However, it is a useful, commonly known umbrella term for the context of intentionality in gladiator sports. In psychology and sociology, for example, aggression has been defined as “intra-species behavior carried out with the intent to cause pain or harm,” and may be hostile and retaliatory or instrumental and predatory. HELEN GAVIN & THERESA PORTER, *FEMALE AGGRESSION I* (Wiley-Blackwell 2015). As will be discussed throughout this article, the intent to engage in the aggressive conduct in sports is essential to understanding the limits of the defense of consent to assault.

<sup>3</sup> See generally PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 115 (Ashgate 2004) (explaining the Roman and English common law origins of the maxim “*volenti non fit injuria*” (“To a person who consents, no harm is done”)).

<sup>4</sup> See *infra* Part III(C).

<sup>5</sup> See, e.g., *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714, 728 (D. Md. 2014) (granting and denying in part the defendant’s motion to dismiss plaintiff’s claim asserting that professional football players were paid to deliberately injure opposing players). Note that the District Court dismissed this case on October 29, 2015, following a settlement agreement in Case 8:13CV01961.

<sup>6</sup> See, e.g., Dan Diamond, *Want to Save Kids’ Brains? Then Ban Tackle Football for Preteens*, FORBES (Jan. 28, 2015, 7:54PM), <http://www.forbes.com/sites/dandiamond/2015/01/28/want-to-save-kids-brains-then-ban-tackle-football-for-ages-12-and-under/>; Andrew J. Kane, Note, *An Incomplete Pass: Inadequacies in Ohio’s Youth Concussion Legislation and the Ongoing Risk for Players*, 28 J.L. & HEALTH 201, 219 (2015) (noting resistance to the medical professional call for banning rough contact in sports).

<sup>7</sup> See *infra* Part II(C).

specifications or stricter penalty provisions.<sup>8</sup> Without enforcement of safety related rules, however, such measures are minimally effective. If personal injury liability were to attach more readily to players who intentionally violated the rules of the game, as well as to trainers and coaches who advocate intentional foul use risking player safety, then a symbolic impact of a handful of cases could have far-reaching benefits.<sup>9</sup> In the most severe cases of deliberate sports injury, greater judicial willingness to apply criminal penalties would achieve a similar effect.<sup>10</sup>

Gamesmanship could improve while retaining the longstanding personal and community benefits of a long tradition of exciting American gladiator sports. In basketball, for example, apart from the risk of injury, intentional foul strategies have been deemed highly disruptive to the enjoyment of the sport:

But *why* are [free throws] a part of the game [of basketball]? Free throws were created as a deterrent to fouls, not as a supplementary skill test to determine the best team. Free throws exist to prevent defenders from beating the Holy Hell out of prospective scorers on every possession. Free throws and the fouling system (including the six-foul limit) are simply deterrents against overly physical play.

... In a perfect world, there would be no fouls and there would be no reason for free throws. Watching actual offenses face actual defenses is way more fun than watching anyone shoot uncontested set shots.<sup>11</sup>

Achieving success in sports through skill, bravery, and strength within the rules of the game is gamesmanship; not strategically subverting the rules, which is essentially cheating and inviting reckless and unpredictable dangerous conduct.

One of the primary goals of legal reform to improve gladiator sport safety should be to avoid and provide redress for intentional acts causing a significant risk of death or serious bodily injury; that is, the current, but inconsistently enforced, standard for

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<sup>8</sup> See, e.g., Michael David Smith, *NFL passes 5 player safety rules*, NBC SPORTS (March 24, 2015, 3:06PM), <http://profootballtalk.nbcsports.com/2015/03/24/nfl-passes-five-player-safety-rules/> (“The NFL continues to add rules designed to make the game safer”); Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 4<sup>th</sup> International Conference on Concussion in Sport, Zurich, November 2012*, 48 J. ATHLETIC TRAINING 554 (2013) (outlining the history and current status of European athletic and athletic training organizations to agree on concussion prevention practices since 2001 for sports such as soccer and rugby), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3715021/>.

<sup>9</sup> See *infra* Part III(B).

<sup>10</sup> See *infra* Part III(A).

<sup>11</sup> Tom Ziller, *End intentional fouling and save basketball from itself*, SB NATION (May 7, 2015, 10:41AM), <http://www.sbnation.com/2015/5/7/8564791/nba-intentional-foul-hack-a-shaq-must-be-removed>. But see Steve Perrin, *Intentional fouls off the ball: Not effective, not smart, not basketball*, SB NATION (Feb. 21, 2015, 9:46AM), <http://www.clipsnation.com/2015/2/21/8080937/intentional-fouls-off-the-ball-not-effective-not-smart-not-basketball> (remarking on the negative impact on the flow of the game with professional basketball intentional foul rules). “Hell, you should probably foul a good FT shooter . . . And if the clock is winding down and you’re behind, of course you have to foul to extend the game. But Popovich’s strategy to foul early in games, to foul in close games, and even to foul when his team is in the lead, is brutal.” *Id.*

liability.<sup>12</sup> For some sports, such as boxing, one might assume that if one could not consent to a serious risk of traumatic brain injury, then the entire sport must be inevitably banned. But as will be shown below, existing and improved policies and laws related to training, monitoring, and rule enforcement could influence a shift to a more reasonable level of risk in the most dangerous of sports. This approach would improve informed consent, respect the autonomy of choice to participate, and avoid the need to eliminate the longstanding and valued American tradition of dangerous but exciting gladiator and non-gladiator sports.

This article will consider in Part II below the status and influence of public health research regarding the safety risks of gladiator sports, and the field's tendency to neglect the sports' recognized medical and mental health benefits. In Part III, the historical trends in judicial interpretation of the scope of the criminal consent defense and civil doctrines of a privilege of consent to assault and assumption of the risk in the sports context will be addressed. Finally, Part IV will assert the need to reform the civil and criminal defenses to intentional misconduct in sports through agency, judicial, and statutory reform, for the purpose of eliminating the strategic use of the intentional foul to better enforce the new medically informed safety regulations and sports rules, while protecting the tradition of a wide array of gladiator sports.

## II. SEEING RED: HOW PUBLIC HEALTH POLICY HAS NEGLECTED TO BALANCE THE HEALTH RISKS AND BENEFITS OF GLADIATOR SPORTS<sup>13</sup>

In developing public policy regarding the safety of players in more dangerous sports, the public and professional conversation to date has not focused on a balance of health risks and benefits, because the arguably unacceptable level of risk has overshadowed the conversation.<sup>14</sup> An additional layer of analysis requires recognition of the role of individual autonomy in providing legal consent; i.e., whether an adult should be able to consent to be punched in the abdomen or head, knowing all of the attendant medical risks.<sup>15</sup> Of course, for some, the law has established a lesser right to consent due to vulnerability factors such as age of minority or intellectual capability.<sup>16</sup> As public health research continues to advance, revealing a new understanding of neurological harm and organ failure from severe repetitive contact, the law must take these advances into account. In doing so, other competing legal and social concepts must also be taken into account, including an understanding of the role of natural human aggression and the legal system's measured tolerance of it.

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<sup>12</sup> See *infra* Part III.

<sup>13</sup> "Seeing red" is sometimes deemed to have originated as a reference to the bull's anger when seeing the matador's cape. However, one of the first known expressions of the phrase in print, as it is used today, had no reference to sport at all. "Lucas Malet, the pseudonym of Charles Kingsley's daughter Mary St. Leger Harrison, wrote the romance *The [H]istory of Sir Richard Calmady* in 1901, which included this line: Happily violence is shortlived, only for a very little while do even the gentlest persons 'see red'." THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/see-red.html>.

<sup>14</sup> See *infra* Part II(D).

<sup>15</sup> See *infra* Part II(B)(2).

<sup>16</sup> See *infra* Part III(C).

*A. Research on Human Aggression and Self-Restraint*

Legal authorities have long attempted to regulate violent human conduct, using authorized violence and restraint to do so.<sup>17</sup> The legal approach to use violence to curb some, but not all, violence reflects the political and social acceptance that humanity is violent by nature, but also capable of self-regulation and checking of violent impulses. Gladiator sports, such as wrestling and boxing, originate from traditions in every culture since recorded history to exemplify power<sup>18</sup> and the need for strong warriors in the interests of social survival.<sup>19</sup> The persistent prevalence of violent conduct in society is indisputable,<sup>20</sup> but is the assumption that violent character is a heritable trait correct? Should a parent blame herself for poor parenting the first time her infant bites or scratches someone?

In the 1960s, a theory popularized by Konrad Lorenz hypothesized that aggression is an adaptive trait of all animals in their fight for survival.<sup>21</sup> In the face of continued societal violent crime and warfare affecting every continent, learning the skill to physically defend oneself and others is no doubt justifiable. Women were legally permitted to enter the professional boxing ring in 1993, the year after professional boxer Mike Tyson was arrested for raping a young woman.<sup>22</sup> As one advocate for women's participation in gladiator sports argues: "Women and girls in the 1990s, even more than in the 1970s, needed the self-defense skills that boxing had always claimed to provide in order to protect themselves from men – even boxers like

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<sup>17</sup> See generally Jennifer A. Brobst, *The Parental Discipline Defense in New Zealand: the Potential Impact of Reform in Civil Proceedings*, 27 N.C. CENTRAL L.J. 178 (2005) (providing an international comparative review of the array of authorized uses for corporal punishment in the courts, schools, athletics, and in the home in British common law nations); LARRY RAY, *VIOLENCE & SOCIETY* 7 (Sage 2011) ("While violence is generally thought of as illegitimate and illegal, by contrast with the 'legitimate' force exercised by the state, the most destructive and extensive instances in recent history have been state organized and sanctioned.") (emphasis in original).

<sup>18</sup> See generally Ray, *supra* note 17, at 12 ("[a] central theme in much theorization of violence is that it is intimately connected with power").

<sup>19</sup> See generally SARAH K. FIELDS, *FEMALE GLADIATORS: GENDER, LAW AND CONTACT SPORT IN AMERICA* 121 (University of Illinois Press 2005).

<sup>20</sup> Although violent crime rates have steadily decreased in the United States in recent decades, by 2002 the FBI's Uniform Crime Reports still indicated "an aggravated assault occurs every 34.6 seconds; a forcible rape, every 5.8 minutes; and a murder every 33.9 minutes." LISA A. RAPP-PAGLICCI, ALBERT R. ROBERTS, & JOHN S. WODARSKI, *HANDBOOK OF VIOLENCE* xiii (John Wiley & Sons, Inc. 2002). See also Amer Madhani, *Several big U.S. cities see homicide rates surge*, USA TODAY (July 10, 2015, 10:06AM), available at <http://www.usatoday.com/story/news/2015/07/09/us-cities-homicide-surge-2015/29879091/> (surmising that a significant and rapid increase in homicide rates in major United States cities in 2015 is due to tight state budgets, expanded conceal carry firearm laws, and the rise of synthetic drug manufacturing).

<sup>21</sup> GORDON W. RUSSELL, *AGGRESSION IN THE SPORTS WORLD: A SOCIAL PSYCHOLOGICAL PERSPECTIVE* 219 (Oxford University Press 2008). See also Gavin, *supra* note 2, at 166 ("Aggression as an evolved adaptation is obvious as a need for survival when fighting predators or competitors is necessary.").

<sup>22</sup> Fields, *supra* note 19, at 127 (noting that the United States Amateur Boxing Federation conceded to permitting female competition after being faced with a successful preliminary injunction by 16-year-old Jennifer McCleery, known as boxer Dallas Malloy).

Tyson.”<sup>23</sup> Social learning theory, therefore, has utility to explain the degree of human aggression expressed, either repressing or enhancing the innate aggressive tendency, sometimes in very specific situations.<sup>24</sup> Research data from the 1930s to the 1980s by the National Hockey League (NHL) has found that penalties and player aggression increase in relation to the number of times any two teams have played against each other in a given season, each learning to engage the other more strategically.<sup>25</sup>

Biological research continues to assert that humans are born aggressive, with some eventual environmental influences on both aggression and self-restraint.<sup>26</sup> Men are biologically more physically aggressive than women, with one debatable argument asserting that boys’ testosterone development during pregnancy “makes them more aggressive for the rest of their lives.”<sup>27</sup> However, this comparative fact does not mean that women are not aggressive, but simply that they are somewhat less physically aggressive than men.

The connection between testosterone levels and aggression is far from conclusive, however, with studies indicating directly conflicting results.<sup>28</sup> Nevertheless, among men as a whole, some research indicates that higher levels of testosterone are found among violent offenders, antisocial military recruits, and the most aggressive athletes in contact sports.<sup>29</sup> Variations in natural aggression and impulsivity among any group of men or women could be caused by inherited DNA controlling serotonin levels, or by conditions in the womb, such as malnourishment or exposure to tobacco or alcohol, causing aggression associated with ADHD or fetal alcohol syndrome.<sup>30</sup> By the age of the mid to late 20s, the prefrontal cortex becomes fully formed, allowing for greater self-restraint against ongoing impulsive tendencies.<sup>31</sup>

Culture and social influence play a part as well. One of the organizers of the World Finals rodeo championships explained that many girl riders dropped out in the older age groups, usually at their parents’ requests, but not before they exhibited equal

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<sup>23</sup> *Id.*

<sup>24</sup> *See generally* Russell *supra* note 21, at 222.

<sup>25</sup> *Id.* at 227.

<sup>26</sup> *See generally* D.F. SWAAB, WE ARE OUR BRAINS: A NEUROBIOGRAPHY OF THE BRAIN, FROM THE WOMB TO ALZHEIMER’S (Jane Hedley-Prôle trans., Spiegel & Grau 2014).

<sup>27</sup> *Id.* at 172. *See also* Gavin, *supra* note 2, at 2 (“[It] is reflected in every major theoretical perspective on aggression; comparative, evolutionary, biological, psychological and social models all reiterate that men/males are the aggressors.”).

<sup>28</sup> Swaab, *supra* note 26, at 65. “The general public has unreservedly embraced the idea of a causal relationship between high levels of testosterone and aggressive behavior in many areas of human endeavor, including sports. However, the evidence for such a relationship is far from conclusive.” *Id.* *See also* DAVID CHURCHMAN, WHY WE FIGHT THE ORIGINS, NATURE, AND MANAGEMENT OF HUMAN CONFLICT 37 (2d ed. 2013) (“It is unclear whether hormones facilitate aggression or encourage social dominance, competitiveness, and impulsiveness that result in aggression.”).

<sup>29</sup> Swaab, *supra* note 26, at 175.

<sup>30</sup> *Id.* at 173; *see also* *Fetal Alcohol Syndrome Spectrum Disorders (FASDs)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncbddd/fasd/facts.html> (causing intellectual delays, hyperactivity, and poor impulse control).

<sup>31</sup> Swaab, *supra* note 26, at 174.

determination. He described the success of his seven-year-old daughter as an anathema to her male competitors: “The boys hate . . . losing to a girl. But little girls develop faster than little boys, and Shayne is fearless, man. She likes rubbing their noses in it.”<sup>32</sup> Women have also been found to exhibit significantly more indirect aggression than men in the form of verbal and social aggression, isolation, and manipulation.<sup>33</sup>

A degree of learned behavior impacting levels of aggression is confirmed through years of research, identifying lack of empathy and bullying behavior in youth who themselves are treated this way at home.<sup>34</sup> Self-regulation of violent behavior is epitomized by the state’s ability to regulate contact sports and trust the athletes to abide by the rules of the game. Gladiator sports offer a means for player and spectator to more safely express violent tendencies in a controlled environment:

Sports institutionalizes calculated violence without loss of self-control, while spectators have the opportunity to vicariously enjoy the excitement of contest without the actual violence of earlier spectacles such as gladiatorial struggle. Thus, ‘we no longer regard it as a Sunday entertainment to see people hanged, quartered, broken in the wheel. We watch football, not gladiatorial contests.’<sup>35</sup>

In contrast to a street fight without rules, which often involves fighters continuing to feel animus for each other well after the fight, athletes in the most aggressive and dangerous sports agree to abide by safety rules and to end the fight with a handshake and other expressions of respect. This contrast in tone, structure, and state authorization have led criminologists to argue that organized contact sports are less de-humanizing than unregulated aggression outside the bounds of the law.<sup>36</sup>

Anthropologist Magid Shihade writes a poignant analysis of a soccer game in 1981 between two neighboring Palestinian Arab teams in Galilee, in which a moment of sectarian Arab-Christian violence broke out between fans during the game, but the

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<sup>32</sup> Burkhard Bilger, *The Ride of Their Lives: Children prepare for the world’s most dangerous organized sport*, THE NEW YORKER, Dec. 8, 2014, at 46, 58.

<sup>33</sup> See generally Russell *supra* note 21, at 62.

<sup>34</sup> Rapp-Paglicci, *supra* note 20, at 249 (“Aggression is transmitted from the family to the child, and flows through generations.”).

<sup>35</sup> Ray, *supra* note 17, at 48 (citing N. ELIAS & E. DUNNING, *QUEST FOR EXCITEMENT, SPORT AND LEISURE IN THE CIVILIZING PROCESS 2* (Oxford University Press 1986)).

<sup>36</sup> WILLEM SCHINKEL, *ASPECTS OF VIOLENCE: A CRITICAL THEORY* 70 (Palgrave MacMillian 2010). Compare the United States Supreme Court’s assertion that repetitive participation in violent video gaming activities are not conclusively damaging to mental health or levels of aggression, despite the games’ stylized and realistic representations of uncontrolled and random aggression without rules. See *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1682 (2015) (“This Court has not been shy to enforce the First Amendment in recent Terms—even in cases that do not involve election speech. It has accorded robust protection to depictions of animal torture, sale of violent video games to children, and lies about having won military medals.”); *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729, 2731-32 (2011) (“Psychological studies purporting to show a connection between exposure to violent video games and harmful effects on children do not prove that such exposure causes minors to act aggressively.”).



game continued to the end without further incident.<sup>37</sup> Once the game ended, mass violence broke out among the fans, including the throwing of a hand grenade into the crowd.<sup>38</sup> In contrast, Shihade chastises state sanctioned or at least state neglect in permitting sectarian violence to erupt, violence of a nature designed to demoralize the opponent: “Fomenting chaos, whether controllable or not, can never be a healthy recipe for peace, prosperity, and security from a realistic perspective and is abhorrent morally.”<sup>39</sup> Here the crowd demonstrated the ability to choose when to be aggressive, while the mutually respectful structure of the soccer game required there to be no violence among players during the game itself.

Some have noted that humanity’s desire for exposure to “surrogate bloodshed”, through enjoyment of violent sports, films, or video games, cushions the realization that life will come to an end eventually, particularly in an increasingly sanitized and sheltered society.<sup>40</sup> The gift of humanity’s awareness of its own mortality is “the *idea* of death, which ultimately motivates us to live with greater passion and intensity knowing that our time is so precious.”<sup>41</sup> Thus, it is not only mutual aggression that is experienced through vicarious violence, but a desire to live fully, with freedom and excitement. Most legal scholars would understandably focus on the serious health risks rather than the benefits of gladiator sports.<sup>42</sup> In public health policy and law, no legal tenet defines or places a value on such amorphous, but vital, traits as the capacity for excitement, love, or joy in an otherwise dangerous activity.<sup>43</sup> As will be discussed below, public health concerns regarding the serious risks of gladiator sports have unfairly overshadowed considerations of the benefits of such sports in public policy discussions. In addition, contrary to logic, intentional misconduct violating the rules of the game and endangering other players, should warrant much greater public policy attention.

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<sup>37</sup> See MAGID SHIHADÉ, NOT JUST A SOCCER GAME: COLONIALISM AND CONFLICT AMONG PALESTINIANS IN ISRAEL xi (Syracuse University Press 2011).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 151.

<sup>40</sup> JEFFREY A. KOTTLER, THE LUST FOR BLOOD: WHY WE ARE FASCINATED BY DEATH, MURDER, HORROR, AND VIOLENCE 27 (Prometheus Books 2011).

<sup>41</sup> *Id.*

<sup>42</sup> One author recently wrote about why public health policy should decline to extend most favorable tax status to sports organizations hosting activities that could seriously injure players, particularly young players. See William A. Drennan, *Should Organizations Promoting Dangerous Sports Enjoy Maximum Tax Benefits?* 51 SAN DIEGO L. REV. 509 (2014). “If a court or the IRS someday determines that an organization sponsoring dangerous activities fails to provide a sufficient public benefit to justify most favored tax status, it should declare that the organization is ineligible because it has a substantial recreational or social purpose.” *Id.* at 551.

<sup>43</sup> Athletes in extreme sports are exuberant about their love of the sports. When Harry Parker, BASE jumper, was interviewed and asked why he did it, he replied “incredulously: ‘Why? Because you can!’” Clare Davidson, *The World’s Most Dangerous Sports*, FORBES (Aug. 7, 2002), available at <http://www.forbes.com/2002/08/07/0807sport.html>.

### B. The Tenuous Influence of Public Health Research on Sports Policy

Despite the obvious risks of most contact sports, few sports have been permanently banned by American legislatures, other than deliberately lethal sports such as dueling or fencing without protection.<sup>44</sup> This is due in part to doctrines of consent to assault and battery in criminal and civil law, permitting consent to a risk of a lesser degree of injury.<sup>45</sup> In turn, public health police power intervention, to curb an identified widespread and serious risk of violence, is tempered by the protected interest of personal autonomy; that is, the consenting adult's choice to engage in dangerous activities.<sup>46</sup> New developments in public health research, particularly with regard to concussion and traumatic brain injury,<sup>47</sup> are drawing attention to gladiator sports that arguably may now fall within a sufficiently serious level of risk to warrant government intervention.

#### 1. Risks of Serious Injury in Gladiator and Non-Gladuator Sports

To understand the relative risks of injury in gladiator sports, it is useful to consider them in the context of sports injuries generally. Common categories of sports injury may be defined by their cause, for example: direct injury (external contact, e.g., hit by a hockey stick or contact with the ground in a fall); indirect injury (internal injury, e.g., torn ACL or back strain); and overuse injury (repetitive injury, e.g., tendonitis).<sup>48</sup> In addition, sports injuries may be categorized by the body part injured, including a hard tissue injury (impacting bone and teeth) or a soft tissue injury (impacting non-hard tissue body parts, such as the brain, skin or other organs).<sup>49</sup> Most sports injuries, such as a sprained wrist in wrestling or a cut lip in rugby, would not fit the definition of serious injury warranting legal restrictions on an adult's choice to participate in the sport.<sup>50</sup>

Clearly, not all gladiator sports are equally dangerous. Some of the most aggressive sports result in a significant number of minor lacerations and bruises, but surprisingly few instances of death. For example, Mixed Martial Arts (MMA) permits

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<sup>44</sup> Most early dueling appellate cases involved sanctions against attorneys. *See, e.g.*, *Ex parte Wall*, 107 U.S. 265 (1883) (providing that an attorney dropped from the rolls of Kentucky, for illegally engaging in a duel and thereby committing murder, could also be dropped for good cause from the rolls of Tennessee, although the latter state had no statute banning dueling) (citing *Smith v. State*, 9 Tenn. (1 Yer.) 228 (1829)); *Ex parte Garland*, 71 U.S. 333, 343 (1866) (addressing, as an example of an *ex post facto* law, an 1826 Alabama statute requiring that licensed attorneys must take an oath that "they had never been engaged in any duel, and that they never would be"); *Smith v. State*, 9 Tenn. 228, (1 Yer.) 228, 237 (1829) ("By the laws of God, the laws of England from the days of the Edwards; by the laws of Kentucky and Tennessee, and every civilized land, he [the duelist] is declared to have been guilty of wicked and malicious murder, and a felon fled from justice.").

<sup>45</sup> *See infra* Part III.

<sup>46</sup> *See infra* Part II(B)(2).

<sup>47</sup> *Id.*

<sup>48</sup> *See generally* *Option 3: Sports Medicine*, NSW HSC ONLINE, [http://hsc.csu.edu.au/pdhpe/options/medicine/4035/3-1/op3\\_1\\_1.htm](http://hsc.csu.edu.au/pdhpe/options/medicine/4035/3-1/op3_1_1.htm).

<sup>49</sup> *Id.*

<sup>50</sup> *See infra* Part II(B)(1).

head blows and knock outs, like boxing; and yet, in the last 20 years, MMA has seen common minor injuries from cuts, but only eight recorded deaths including several in unregulated bouts.<sup>51</sup> Professional boxing, however, recorded approximately 339 mortalities between 1950 and 2007, with a significant decline after 1983.<sup>52</sup> MMA today is highly structured and regulated, with shorter and fewer rounds than boxing.<sup>53</sup> Boxing, however, has single fighters in much longer, multiple rounds, who potentially have to fight for over an hour in the ring.<sup>54</sup>

In fact, the largest number of sports-related serious injuries and deaths occur not in combat sports, but in solo recreational activities for personal fitness rather than competition.<sup>55</sup> In 2014, among youth aged 15-24, general exercise equipment caused over 245,000 reported injuries, while bicycle riding caused approximately 198,000, football 158,000, basketball 94,000, hockey 22,000, and boxing 7,000.<sup>56</sup> The highest number of sports-related deaths are from bicycle riding (head injuries from collisions with motor vehicles), followed by drowning while swimming, and skiing.<sup>57</sup> Many more marathon runners have died of race-related cardiac arrest than athletes who have played gladiator sports.<sup>58</sup> An even higher risk of death occurs for those in 5K races,

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<sup>51</sup> Kirik Jenness, *Fatalities in MMA: 1993 – present*, UNDERGROUND, <http://www.mixedmartialarts.com/news/436658/Fatalities-in-MMA-1993--present/>.

<sup>52</sup> L.C. Baird et al., *Mortality resulting from head injury in professional boxing*, 67 NEUROSURGERY 1444 (2010) (evaluating the Velasquez Mortality Collection), available at <http://www.ncbi.nlm.nih.gov/pubmed/20948404>.

<sup>53</sup> See Marc Raimondi, *Bellator: Dynamite tournament loser would advance if winner gets injured*, MMA FIGHTING (Sept. 2, 2015, 10:00AM), <http://www.mmafighting.com/2015/9/2/9243043/bellator-dynamite-tournament-loser-would-advance-if-winner-gets> (discussing the survivor rule which allows a MMA competition bout's loser to move forward if the winner is injured, but not if the loser injured the winner by an intentional foul); Erica Y. Mills, *MMA: Misunderstanding My Art*, RESEARCH PAPERS, Paper 181 (2011), <http://opensiuc.lib.siu.edu/gsrp/181> (interviewing MMA fighters in Southern Illinois). According to one fighter, "It is extremely brutal. There is a lot of physical contact and injuries, [but] [t]here's not that many major injuries." *Id.* Mills concluded that "[d]ue to the numerous safety precautions and measures taken by MMA organizations, MMA fighters believe that such a combative and aggressive sport is well worth the risk." *Id.* at 23.

<sup>54</sup> *Id.* See also, Gregory H. Bledsoe et al., *Injury in Professional MMA Competitions*, J. SPORTS SCIENCE & MED. 5 (July 2006) (documenting injuries in all 121 sanctioned MMA fights between 2001-2004 and finding 40% of bouts ended with some fighter injured, primarily facial lacerations).

<sup>55</sup> For example, since 2003, there have been an average of 3 deaths per year from exercising on treadmills. NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM (NEISS), U.S. CONSUMER PRODUCT SAFETY COMMISSION, <http://www.cpsc.gov/en/Research--Statistics/NEISS-Injury-Data/> (reporting treadmill injury data from U.S. hospital emergency departments from 2003-2012).

<sup>56</sup> *Id.*

<sup>57</sup> *Sports Injuries*, available at [http://www.scientificpsychic.com/fitness/sport\\_injuries.html](http://www.scientificpsychic.com/fitness/sport_injuries.html) (compiling 2006 data from the National Electronic Injury Surveillance System (NEISS) from the U.S. Consumer Product Safety Commission).

<sup>58</sup> See generally Jonathan H. Kim et al., *Cardiac Arrest During Long-Distance Running Races*, 366 NEW ENG. J. MED. 130 (2012) (the RACER study).

rather than marathon races, possibly due to the lack of training and preparation and the existing ill health or obesity among short distance runners.<sup>59</sup> Nevertheless, in both MMA and marathon running, one a gladiator sport and the other a solo recreational sport, the risk of death is present, albeit low. Arguably, there is no inherent significant risk of immediate death warranting a ban of either sport. None of today's legally sanctioned sports is comparable to humanity's history of deadly medieval jousting or the gladiator sports among the enslaved in pre-Colombian or Roman arenas.<sup>60</sup>

Then how should policy makers measure the risk of dangerous sports to the individual athlete? By number of deaths per year? By rate of serious injury in the sport?<sup>61</sup> The law provides no answer, and should not defer to a medical or politically charged public health leadership that has yet to reach an internal consensus on the topic of cause or rate of risk. In terms of rate alone, some research indicates that football is most dangerous for men and cheerleading most dangerous for women in terms of the risk of catastrophic soft tissue brain injury in college athletics.<sup>62</sup> As of 2013, the risk of catastrophic brain injury among youth appears to be greater among ice hockey players and cheerleaders than football players.<sup>63</sup>

Naturally, if wide discretion is provided to public health policy makers, then the answer to the question of how to measure an acceptable level of risk is highly influenced by public perception and tolerance of risk. The rate of medical risk is not always the defining factor in a governmental call for restricting a dangerous sport. The cultural and moral attitudes toward violence and aggression, irrespective of risk of injury, are also at play. The 1997 Tyson vs. Holyfield WBA Heavyweight bout, for example, in which Tyson bit off Holyfield's ear, did not create a lethal risk, nor was it permitted under the rules. Nevertheless, the public perception of boxing as an unacceptably dangerous and brutal sport gained considerable traction, despite the fact that bicycle riding or running in a 5K annually kills far more people.

With respect to the government's right to intervene in the interests of public health and greater medical knowledge,<sup>64</sup> identifying an unacceptable level of risk should consider both numbers and rate of injury, as well as the seriousness of the injury at risk. For example, promoters of bull riding tout it as the most dangerous of all sports, at least by rate of serious injuries per competitor.<sup>65</sup> Marketing the sport by

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<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., FIK MEIJER, *THE GLADIATORS: HISTORY'S MOST DANGEROUS SPORT* (Liz Waters trans., Thomas Dunnes Books ed. 2007).

<sup>61</sup> See Esteban On, *11 Most Dangerous Sports*, TOTALPROSPORTS.COM (Dec. 7, 2014), <http://www.totalprosports.com/2012/06/08/11-most-dangerous-sports/> (arguing that the rate of injury among boxers and MMA fighters is likely extremely high, but the number of participants, and therefore injuries, is still relatively small).

<sup>62</sup> Jim Thomas, *Frequency of Injury Among College Athletes*, LIVESTRONG.COM (June 22, 2015), <http://www.livestrong.com/article/513231-frequency-of-injury-among-college-athletes/> (compiling the NCAA and National Athletic Trainers' Association data since 2004).

<sup>63</sup> *Youth Sports Safety Statistics*, YOUTH SPORTS SAFETY ALLIANCE, available at <http://www.youthsportssafetyalliance.org/sites/default/files/docs/Statistics-2013.pdf>.

<sup>64</sup> See *infra* Part II(B)(2).

<sup>65</sup> See generally Burkhard Bilger, *The Ride of Their Lives: Children prepare for the world's most dangerous organized sport*, THE NEW YORKER, Dec. 8, 2014.

highlighting such a risk to riders may not be wise, considering that the current movement toward increased legal intervention to ensure public health and safety is highly focused on seriousness of harm as well as rate of injury.

Also, rates of injury for a particular sport may not remain static over time. Therefore, monitoring and identifying trends in sports practices and levels of dangerousness should be key in public health research. Here, bull riding again provides a useful example. Rodeo bulls are now bred to be much fiercer than in previous decades, with the income from breeding for violence greater than the income from spectators viewing the bulls being ridden.<sup>66</sup> Some professional football players have been allegedly paid by their teams to deliberately injure opposing players.<sup>67</sup> Observers argue that commercialization has resulted in more intense competition and risk in many professional sports, eroding the joy of the sport and the benefits of camaraderie, fair play, and gamesmanship.<sup>68</sup> Thus, it is no surprise that the improved public health research on concussions in contact sports has influenced public health policy makers to more closely monitor inherent and foreseeable risks in professional football and boxing, or heading the ball in soccer, to attempt to take restrictive legislative action in the face of massive commercial success.

As discussed by many scholars and researchers, particularly in the last decade, the risk of concussion and traumatic brain injury from impacts to the head in some gladiator sports is justifiably concerning because of the risk of permanent, irreversible injury from a single hard blow or repeated minor blows.<sup>69</sup> Once injured, the brain is not easily able to repair itself, and secondary brain injuries can develop from brain swelling, displacing other brain tissue and injuring the brain stem.<sup>70</sup> Research has indicated that 10% of cases of a single acute brain injury are irreversible, but repeated traumas significantly increase such risks.<sup>71</sup> Public health policy makers would do well to note that traumatic brain injury, from all causes such as motor vehicle collisions, warfare, and sports, is now the leading cause of death and disability in young adults.<sup>72</sup>

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<sup>66</sup> *Id.* at 55.

<sup>67</sup> See *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714, 728 (D. Md. 2014). Note that the District Court dismissed this case on October 29, 2015, following a settlement agreement in Case 8:13CV01961.

<sup>68</sup> See Ray, *supra* note 17, at 100; Edward Grayson, *Medicolegal aspects of deliberate foul play in rugby union*, 30 J. SPORTS MED. 191-92 (1996) (“The spirit of the game, identified as a Corinthian ethic of fair play, runs throughout.”). Note that Grayson was the President of the British Association for Sport and Law.

<sup>69</sup> The terms concussion and traumatic brain injury are not used synonymously here. Concussion is discussed and defined medically as “the mildest of the severity continuum for mTBI [mild traumatic brain injury].” Sarah A. Raskin, et al., *Mild Traumatic Brain Injury*, in UNDERSTANDING TRAUMATIC BRAIN INJURY: CURRENT RESEARCH AND FUTURE DIRECTIONS, 370, 370 (Harvey S. Levin, David H.K. Shum, & Raymond C.K. Chan eds., 2014).

<sup>70</sup> EELCO F.M. WIDJICKS, RECOGNIZING BRAIN INJURY, CORE PRINCIPLES OF ACUTE NEUROLOGY 1, 8 (2014). See also Raskin et al., *supra* note 69 (explaining distinctions between concussion and postconcussion syndrome).

<sup>71</sup> See Eelco, *supra* note 70, at 14.

<sup>72</sup> UNDERSTANDING TRAUMATIC BRAIN INJURY: CURRENT RESEARCH AND FUTURE DIRECTIONS 3 (Harvey S. Levin, David H.K. Shum, & Raymond C.K. Chan eds., Oxford University Press 2014).

In addition, the residual cognitive and behavioral effects present tremendous challenges for the traumatic brain injury survivors and their families.<sup>73</sup>

But here lies the risk of overgeneralization, for neurologists and neuropathologists caution policy makers to avoid assuming that the risks associated with mild traumatic brain injury in the sports context are the same as for other dangerous impacts, such as motor vehicle collisions.<sup>74</sup> “Sports concussion subjects are younger, healthier, and more likely to minimize complaints post injury”; thus, research specific to sports concussion may not easily compare to other forms of mTBI (mild traumatic brain injury, including concussion).<sup>75</sup> Unexpected impacts to the head from criminal assault, car accidents, or slips and falls, for less fit persons without any protective headgear, logically tend to result in greater injury than most sports concussions.<sup>76</sup> Thus, the concern remains, but the national conversation on traumatic brain injury should take care to present a focus on sports specific and age specific risks.

Public health intervention also needs to consider the degree of research consensus or lack of consensus in the field. “At present, there is no single set of generally endorsed or utilized diagnostic criteria for mTBI,” which interferes with researchers’ ability to compare studies of incidence and severity rates.<sup>77</sup> For example, mTBI is “arbitrarily” defined as exhibiting posttraumatic amnesia (PTA) for less than 24 hours, while in moderate and severe traumatic brain injury it may last for days or weeks.<sup>78</sup> This causes uncertainty in making timing decisions on admitting injured persons to hospital for observation.<sup>79</sup> Neurological research specific to sports concussions, which should help educate policy makers addressing the risks of gladiator sports, is clearly still in development.

While it is understood that the majority of those suffering from concussion and mTBI will recover, no consensus has emerged on best practices in mental health treatment for the condition.<sup>80</sup> New return-to-play guidelines to avoid exacerbating concussion symptoms also lack data on the long-term effects of these policies and whether they do, in fact, reduce injury.<sup>81</sup> Research on chronic traumatic encephalopathy (CTE), the progressive neurodegenerative disorder associated with repeated head trauma in high contact sports, currently provides “no clear consensus

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<sup>73</sup> *Id.*

<sup>74</sup> Raskin et al., *supra* note 69, at 372.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 377.

<sup>77</sup> *Id.* at 374 (noting that even the World Health Organization, Centers for Disease Control and Injury Prevention, national American rehabilitative organizations, and international bodies on concussion in sports have not been able to create agreed upon criteria).

<sup>78</sup> Pieter E. Vos and Dafin F. Muresanu, *In-hospital observation for mild traumatic brain injury*, in *TRAUMATIC BRAIN INJURY* 71, 76-77 (Pieter E. Vos & Ramon Diaz-Arrastia eds., 2015).

<sup>79</sup> *Id.*

<sup>80</sup> Raskin et al., *supra* note 69, at 399, 402.

<sup>81</sup> See Kathleen E. Bachynski & Daniel S. Goldberg, *Youth Sports & Public Health: Framing Risks of Mild Traumatic Brain Injury in American Football and Ice Hockey*, 42 *J. L., MED. & ETHICS* 323, 325 (2014).

on the number of events or severity of each trauma that is required to cause CTE, although some authors suggest it can occur after a single TBI.”<sup>82</sup> Due to the progressive and severe symptoms of CTE, including disorientation, headaches, violent outbursts, and motor functioning impairments, studies have been limited as some with CTE have tragically died an early death from suicide, accidents, or drug overdoses.<sup>83</sup> Also, studies related to adult professional players may not be applicable to the more limited duration of youth sports activities.<sup>84</sup>

Different sports are more likely to risk impact to different parts of the head. For example, the location of brain injuries impacts resulting trauma symptoms and diagnoses, such as the risk of posttraumatic stress disorder (PTSD).<sup>85</sup> With respect to complex PTSD, researchers would have difficulty determining whether brain injury symptoms of depression or excessive aggression among athletes were caused by a prior traumatic event, such as childhood abuse, or a violent sports contact, or both.<sup>86</sup> Overall, research results on traumatic brain injury risks in gladiator sports are certainly concerning and worthy of the public attention they receive. This is particularly true for youth whose brains are in a stage of rapid development and who lack the ability to provide lawful informed consent to the risks they face on the field. However, public health research still leaves numerous questions as to causality and treatment, matters which should directly impact the course of future legislative and administrative reform for player safety.

## 2. Legal Doctrines Justifying Public Health Intervention for Gladiator Sport Safety

Based on gains in public health research, the question arises regarding the extent to which the state should respond and legally enforce greater safety measures to protect players. In general, pursuant to state police power, public health policy and law intervene when the interests of the many outweigh individual interests and rights.<sup>87</sup> In athletics, a public health focus is often warranted when there are

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<sup>82</sup> Raskin et al., *supra* note 69, at 382-83.

<sup>83</sup> *Id.* at 383-84.

<sup>84</sup> Diamond, *supra* note 6 (noting a recent study by Boston University researchers highlighting professional football players’ cognitive declines, while also stressing “that their findings apply only to NFL players, and it’s too soon to know the effect of youth football on boys who only played tackle football through high school or college”).

<sup>85</sup> Michael J. Perrotti, Ph.D., *Posttraumatic Stress Disorder (PTSD), Suicide, Personality Alterations, and Dementia in Athletes: A Call for Change and Reform*, EXPERTS.COM, <http://www.experts.com/Articles/Athletes-Posttraumatic-Stress-Disorder-Suicide-Personality-Alterations-Dementia-Call-for-Change-By-Michael-Perrotti>.

<sup>86</sup> *Id.*

<sup>87</sup> Most scholars would begin this analysis with *Jacobson v. Comm. of Mass.*, 197 U.S. 11, 38 (1905) (confirming the authority of state police power to ensure public health and safety, in the context of compulsory vaccination state laws, authority which would supersede individual autonomy). “Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors.” *Phillips v. City of N.Y.*, 775 F.3d 538, 542 (2d Cir. 2015) (rejecting plaintiff’s constitutional substantive due process challenge based on the strength of the state’s public health police power).

documented risks to spectators or other third parties, such as a lack of netting or fencing behind home plate in baseball.<sup>88</sup>

The dangers to the players themselves present a more tenuous link to a justification for government restriction in the interests of public safety, because the players consent to the risk in a structured environment with safety precautions, invoking their right to personal autonomy.<sup>89</sup> As will be explained below,<sup>90</sup> as long as there is no breach of the peace, adults have a right to legally consent to assault and battery and the risk of non-lethal injury. This is the case in sports, sex, medical care, employment, and any other lawful activity. In contrast, youth sports present a greater justification for public health intervention, based not only on state police power and its role in protecting the public interest, but on the *parens patriae* doctrine requiring state protection of its most vulnerable individual citizens, particularly when not in the direct care of their parents or legal guardians.<sup>91</sup>

Based on these concepts, if public health research unveils greater individual safety risks to individual athletes than previously known, the support for governmental use of its police power to restrict or ban the sport may weigh heavily in favor of protecting youth, but may mean little to restricting adult sports. Indeed, even if universal risks of a premature death from traumatic brain injury were invoked to ban boxing or football, the police power of state legislatures should not support the ban's infringement on personal autonomy to play, because the risk would not be sufficiently immediate or urgent.<sup>92</sup> Thus, to curb the health risks of violent sports, what public

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<sup>88</sup> See Catherine Cloutier, *How often are baseball spectators injured during game play?*, THE BOSTON GLOBE (June 9, 2015), available at <https://www.bostonglobe.com/metro/2015/06/09/how-often-are-baseball-spectators-injured/bVBG1iYz8u0dy1DLGx0cml/story.html> (“the number of injuries sustained by fans at Fenway Park ranged from 36 to 53 per season”). “But no one has surveyed how many unprotected seats are close to home plate at all of the MLB’s ballparks. . . . Despite the danger of sitting so close to the action, demand for these unprotected field seats — and their pricetag — was high” *Id.*

<sup>89</sup> See generally April L. Cherry, *Shifting our Focus from Retribution to social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm their Fetuses*, 28 J.L. & HEALTH 6, 58-59 (2015). “If social justice means anything, it means that the dignity of the individual and of communities are to be respected. In the context of public health, dignity and respect is Kantian. This means that individual and groups are to be treated as an end in themselves and not as a means to the ends of others. Dignity means that individual autonomy is respected, . . .” *Id.*

<sup>90</sup> See *infra* Part III(A).

<sup>91</sup> See, e.g., *BJ’s Wholesale Club, Inc. v. Rosen*, 435 Md. 714, 742, 80 A.3d 345 (Md. Ct. App. 2013) (recognizing *parens patriae* jurisdiction over the protection of minors in juvenile delinquency and termination of parental rights cases, but not in a negligence action for a child injured in a store’s child play area). See also *Alfred L. Snapp & Son, Inc. v. P. R., ex rel., Barez*, 458 U.S. 592 (1982) (articulating a state’s right to sue in its *parens patriae* capacity in the interests of the health and well-being of its citizens).

<sup>92</sup> See *State v. Mayor of Knoxville*, 80 Tenn. 146, 151 (Tenn. 1883) (upholding the state’s right to burn bedding and clothing during a smallpox epidemic, when it “would be deemed in this age a mark of a crude and undeveloped civilization” to fail to exercise the state’s police power in the interests of public health). But see *California ex rel. Brown v. Villalobos*, 453 B.R. 404, 411 (D. Nev. 2011) (following the 5th and 8th Circuit Courts, which do not limit the state’s police power to imminent and identifiable harm to public health and safety).



health officials and well-meaning politicians are left with are often public awareness campaigns that do not infringe on individual autonomy. The same barriers to more direct government intervention have been seen in anti-smoking and anti-obesity awareness campaigns, rather than bans on the activities of smoking or eating unhealthy foods.<sup>93</sup>

In addition to the need to demonstrate an urgent and widespread public risk, public health intervention, with its limited resources, involves consideration of trends in public attitude, tradition and political choices. As with the complaint against the tobacco companies for hiding the dangers of smoking, when everyone knew there was a cancer risk,<sup>94</sup> the public has long known of the dangers of traumatic brain injury from a myriad of sports, such as rugby, boxing, cheerleading, skateboarding, and downhill skiing. For example, with respect to boxing, since 1928 when the term “punch-drunk” described boxers who were unsteady and moved slowly, the medical profession has documented boxers’ high risk of *dementia pugilistica*, now known as chronic traumatic brain damage with connections to dementia and Parkinson’s disease.<sup>95</sup>

The risk of overly aggressive and emotionally unbalanced players was also historically well known. Sports psychology emerged in the 1920s and 1930s, testing prospective athletes for intelligence, reaction time, and personality traits, including the ability to control emotions in stressful situations.<sup>96</sup> No policy maker could fail to understand that many gladiator sports carried a risk of brain damage from impacts to the head, with certain players showing a higher risk of inflicting such injury.

Nevertheless, the primary source of litigation against sports bodies recently is that they should have done more to protect players against concussion. According to one attorney who filed a 2011 lawsuit against the NCAA: “The NCAA, for years, turned a blind eye to the concussion problem and never addressed the issue.”<sup>97</sup> While the NCAA Manual had provisions to inform players about identifying concussion and removal from play, some argued that it should have added limits on contact in practice, screening for brain injuries, specific return to play guidelines related to brain trauma, and “most importantly, there are no consequences if a member school fails to come up with a plan and enforce it.”<sup>98</sup>

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<sup>93</sup> See Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government’s Failing Public Health Campaign*, 112 PENN. ST. L. REV. 529, 537 (2007) (“Although information-based health behavior change campaigns are appealing for a variety of reasons, they are rarely effective in modifying complex behaviors such as dieting and exercise.”).

<sup>94</sup> See generally Patrick Luff, *Regulating Tobacco Through Litigation*, 47 ARIZ. ST. L.J. 125 (2015).

<sup>95</sup> Swaab, *supra* note 26, at 235. See also KEN REED, HOW WE CAN SAVE SPORTS: A GAME PLAN 38 (2015).

<sup>96</sup> Stephen T. Graef, Alan S. Kornspan, & David Baker, *Paul Brown: Bringing Psychological Testing to Football*, in PSYCHOLOGY GETS IN THE GAME: SPORT, MIND, AND BEHAVIOR, 1880-1960, 230, 231 (Christopher D. Green & Ludy T. Benjamin Jr. eds 2009).

<sup>97</sup> Reed, *supra* note 95, at 38.

<sup>98</sup> *Id.* at 38-39. See also Charles (Oli) Barwald, Note, *Practicing Concussion Prevention: Enacting State Legislation Regulating contact in High School Football Practices*, 37 T.

The early 20<sup>th</sup> century practice of personality testing to screen for emotionally-balanced “championship material” players has been suggested to be unlikely to occur in today’s overly aggressive climate: “Nor, given the frequent misconduct by professional football players, would most coaches agree with [their] emphasis on character.”<sup>99</sup> Such overgeneralization is perhaps unfair, but not without its examples, as seen in *Green v. Pro Football, Inc.*, addressing a claim of liability against a professional football team for an alleged bounty program, paying players to deliberately injure opposing players.<sup>100</sup> With today’s improved brain research, pre-testing of professional athletes for high risks of traumatic brain injury could include gathering reliable mental health information on whether the athlete has a history of mood disorders and alcohol or drug abuse, because these are risk factors for more severe symptoms of postconcussion posttraumatic amnesia, agitation and aggression.<sup>101</sup>

While NFL athletes have agents and union representation, college athletes have been reliant on the protections the NCAA is willing to provide,<sup>102</sup> an organization formed in part from the early 1900s in response to concerns by President Theodore Roosevelt to “gruesome injuries and deaths” occurring in college football.<sup>103</sup> President Roosevelt himself, however, along with many other Ivy League students of his generation, was proud of being an elite college boxer.<sup>104</sup> Thus it is clear that a certain degree of selective disdain, if not hypocrisy, accompanies the discussion of whether it is really the level of violence or injury that creates disfavor regarding a particular sport, or other cultural considerations, such as race, gender, or class constructs.

The relationship between Americans and boxing has been a complicated mixture of enthusiasm and revulsion. At times prizefighting in any form has been officially banned, but the lure of the ring has remained sufficiently

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JEFFERSON L. REV. 337, 339 (2015) (discussing the class action litigation by former NFL players against their team management for concealing the risks of traumatic brain injury).

<sup>99</sup> Graef, et al., *supra* note 96, at 248.

<sup>100</sup> See *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714, 728 (D. Md. 2014) (granting and dismissing the defendant’s motion to dismiss, but ultimately resulting in a settlement and dismissal); see also Matthew Leach, *Major Bans Across Sports, History*, MLB.COM (Aug. 5, 2013), <http://m.mlb.com/news/article/55965130/> (noting the season suspension of New Orleans Saints football coach Sean Payton for his role in a bounty program involving his players).

<sup>101</sup> Vos, et al., *supra* note 78, at 79 (Wiley Blackwell 2015).

<sup>102</sup> See also K. Adam Pretty, Note, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359 (2014). “The concern over the consequences of long-term head injuries has prompted legislators, medical professionals, and recently the NFL to take steps to address the issue. While the NCAA made some limited changes to its concussion policy in 2010, its attempts remain insufficient to address the scope of the problem.” *Id.* at 2367.

<sup>103</sup> Reed, *supra* note 95, at 38-39.

<sup>104</sup> Fields, *supra* note 19, at 122.

strong to maintain at least minimal interest in the sport, and boxing's popularity and legality have always reemerged.<sup>105</sup>

Despite greater governmental willingness today to protect players from concussion through regulation and public health policy, that commitment pays selective attention to only certain sports and may be relatively ineffective even for those selected.

*C. Recent State Regulatory Measures to Increase Safety in Gladiator Sports*

The highly regulated nature of official gladiator sports supports both monitoring and regulation reform as needed. Although the media focus on regulating the safety of gladiator sports tends to address sports like boxing or football, many other combat sports are regulated. For example, Minnesota's State Office of Combative Sports specifically defines combatant as "an individual who employs the act of attack and defense as a boxer, tough person, or mixed martial artist while engaged in a combative sport."<sup>106</sup> Given a need to regulate an expanded public interest in a variety of martial arts and mixed martial arts, a 2015 bill in the Minnesota legislature sought to amend the above definition of combatant to include martial artist, and to add a provision specifically defining martial artist as follows:

Subd. 4h. Martial art. "Martial art" means a variety of weaponless disciplines of combat or self-defense that utilize physical skill and coordination, and are practiced as combat sports. The disciplines include, but as not limited to, Wing Chun, kickboxing, Tae kwon do, savate, karate, Muay Thai, sanshou, Jiu Jitsu, judo, ninjitsu, kung fu, Brazilian Jiu Jitsu, wrestling, grappling, tai chi, and other weaponless martial arts disciplines.<sup>107</sup>

Among the regulated sports, primary safety concerns vary, with anti-concussion legislation taking a clear lead. The development of anti-concussion legislation in the United States is well documented.<sup>108</sup> In brief, in 2009 Washington State became the

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<sup>105</sup> *Id.* at 121.

<sup>106</sup> MINN. STAT. § 341.21(2)(a) (2015). The state regulatory authority over combative sports contests in Minnesota encompasses such sports as professional boxing, professional and amateur tough person contests, and professional and amateur mixed martial arts contests, including ultimate fighting contests. *See* MINN. STAT. § 341.28 (2015).

<sup>107</sup> 2015 MINN. HOUSE FILE 1555. This proposed bill remained in committee was not passed in the 2015-16 regular session.

<sup>108</sup> *See, e.g.,* Whitney Johnson, Note, *Deception, Degeneration, and the Delegation of Duty: Contracting Safety Obligations between the NCAA, Member Institutions, and Student-Athletes*, 49 VAL. U. L. REV. 1045 (2015); Kane, Note, *supra* note 6, at 28 J; Kathleen E. Bachynski & Daniel S. Goldberg, *Youth Sports & Public Health: Framing Risks of Mild Traumatic Brain Injury in American Football and Ice Hockey*, 42 J. L., MED. & ETHICS 323 (2014); Christine M. Baugh et al., *Requiring Athletes to Acknowledge Receipt of Concussion-Related Information and Responsibility to Report Symptoms: A Study of the Prevalence, Variation, and Possible Improvements*, 42 J. L., MED. & ETHICS 297 (2014); Jacob (Jake) J. Key, *Sports Law – Requiring High School Coaches to Attend Courses for the Prevention, Care, and Management of Concussions and Brain-Related Injuries – Mann v. Palmerton Area School Dist.*, 38 AM. J. TRIAL ADVOC. 443 (2014) (providing a 50 state survey of youth sports anti-concussion legislation).

first state to legislate measures to decrease the incidence of concussions in youth contact sports.<sup>109</sup> By 2013, all 50 states had passed some form of anti-concussion legislation. Most require mandatory additional training on concussion detection, removal from play, and parental consent to return. The version created by Washington provided extensive medically informed policy language:

(1)(a) Concussions are one of the most commonly reported injuries in children and adolescents who participate in sports and recreational activities. The centers for disease control and prevention estimates that as many as three million nine hundred thousand sports-related and recreation-related concussions occur in the United States each year. A concussion is caused by a blow or motion to the head or body that causes the brain to move rapidly inside the skull. The risk of catastrophic injuries or death are significant when a concussion or head injury is not properly evaluated and managed.

(b) Concussions are a type of brain injury that can range from mild to severe and can disrupt the way the brain normally works. Concussions can occur in any organized or unorganized sport or recreational activity and can result from a fall or from players colliding with each other, the ground, or with obstacles. Concussions occur with or without loss of consciousness, but the vast majority occurs without loss of consciousness.

(c) Continuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and even death. The legislature recognizes that, despite having generally recognized return to play standards for concussion and head injury, some affected youth athletes are prematurely returned to play resulting in actual or potential physical injury or death to youth athletes in the state of Washington.<sup>110</sup>

In 2014, *Ingram v. U.S.* became the first appellate decision applying the Lystedt Law in Washington.<sup>111</sup> The federal district court held as a matter of law that the defendant high school coaches and administrators were not liable under the Federal Tort Claims Act for the head injury to plaintiff, a high school football player; an injury he received during spring training, which may have led to stroke due to an embolism.<sup>112</sup> According to the court, the medical evidence of causation was inconclusive and the coaches had fully complied with all requirements of the Lystedt

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<sup>109</sup> WASH. REV. CODE ANN. § 28A.600.190 (West 2009) (known as the Zachary Lystedt Law). For a more recent example, see 25 ILCS 25 (enacted June 27, 2016) (amending the Illinois Interscholastic Athletic Organization Act and mandating promulgation of rules requiring a training course on concussion prevention for high school coaches and trainers).

<sup>110</sup> WASH. REV. CODE ANN. § 28A.600.190(1) (West 2009).

<sup>111</sup> *Ingram ex rel. D.I. v. U.S.*, No. C12-5892RBL, 2014 WL 934363 (W.D. Wash. Mar. 10, 2014).

<sup>112</sup> *Id.* at \*5 (referring to the Federal Tort Claims Act, [28 U.S.C. §§ 1346\(b\)](#) and [2671 et seq.](#)).

Law, including obtaining a signed medical authorization to play from the plaintiff and his parent before play.<sup>113</sup>

To reduce brain injury among athletes, most in the medical field are recommending pre and post-season cognitive assessments, improved sports equipment, and training in the identification of concussions.<sup>114</sup> PET scans of players would provide a baseline on their cognitive status before play should there be a need to assess the presence and impact of concussion and traumatic brain injury later, or determine the need for treatment and the readiness for return to play.<sup>115</sup> Also, engineering advances in the use of safety equipment, including gold-standard SLAM (Simultaneous Localization and Mapping) technology, is recommended by those in sports medicine. SLAM is a robotic mapping technology.<sup>116</sup>

Many are skeptical regarding whether this new array of anti-concussion public health legislation, influenced by medical and technological advances, will be effective. In a study of 35 of the 42 states that had enacted anti-concussion legislation for youth sports, the authors noted that “uniformity ‘on the books’ obscures a tremendous amount of variation of the laws ‘in practice.’”<sup>117</sup> The focus is on secondary prevention, not primary prevention, seeking to avoid exacerbation of existing concussive symptoms and postconcussive syndrome. One of the reasons for this secondary prevention focus is that preventing concussion through improved helmet design is impossible.<sup>118</sup> According to one of the creators of the ImPACT concussion test: “The brain is still moving around within the skull when somebody has a concussion, and that’s what causes them . . . . We can’t put a helmet directly on the brain.”<sup>119</sup> Other proposed measures for better prevention of head trauma in youth sports, for example, include adopting regulations limiting contact during practices and

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<sup>113</sup> *Id.* at \*3-4.

<sup>114</sup> Perrotti, *supra* note 85.

<sup>115</sup> *Id.*

<sup>116</sup> “Published approaches are employed in self-driving cars, unmanned aerial vehicles, autonomous underwater vehicles, planetary rovers, newly emerging domestic robots and even inside the human body.” SIMULTANEOUS LOCALIZATION AND MAPPING, [https://en.wikipedia.org/wiki/Simultaneous\\_localization\\_and\\_mapping](https://en.wikipedia.org/wiki/Simultaneous_localization_and_mapping).

<sup>117</sup> Kerri McGowan Lowrey and Stephanie R. Morain, *State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact*, 42 J. L., MED. & ETHICS 290, 296 (2014).

<sup>118</sup> A different, but related, focus of discussion addresses lawsuits against sports equipment manufacturers for product liability causes of action such as negligence, breach of implied warranty, breach of express warranty, and strict liability. *See generally* Russ VerSteeg, *Product Liability and Commercial Law Theories Relating to Concussions*, 10 J. BUS. & TECH. L. 73 (2015).

<sup>119</sup> Reed, *supra* note 95, at 45 (quoting Dr. Mark Lovell).

training<sup>120</sup> and requiring increased monitoring of changes in safety equipment standards.<sup>121</sup>

Thus, some advocate banning gladiator sports, such as full contact football or boxing, from all youth sports. “Unlike other sports, you can’t make football significantly safer for the brain without changing the nature of the game (e.g., banning blocking and tackling).”<sup>122</sup> In short, no public health educational campaign will change the fact that a player in a gladiator sport may be hit repeatedly in the head hundreds of times in a single season. Middle and high school sports teams could engage in less aggressive forms of adult gladiator sports to develop the necessary skill and ability among players to play full contact later. Adult MMA fighters serve as an example, with many able to build upon their skills learned as youth in less aggressive martial arts forms. However, legislators may not be effective in protecting youth if the ban on gladiator sports focuses on public school athletic programs alone. Private after school and club sports offered to minor athletes may be the most competitive and aggressive of all.

Granted, most gladiator sports are highly regulated, requiring licensed supervision to maintain health and safety standards of both players and spectators. Nevertheless, if those in charge neglect their duties to ensure player safety and curb unauthorized violence in the ring or on the field, they risk not only liability in tort,<sup>123</sup> but revocation of licensure depending on the state jurisdiction.<sup>124</sup>

However, these regulatory methods provide no saving grace. “Despite the use of protective helmets, one in eight amateur boxing matches leads to concussion.”<sup>125</sup> Moreover, regarding psychometric tests and brain imaging, “[b]y the time changes show up, it’s too late.”<sup>126</sup> Acute brain injury is often due to head trauma, causing immediate irreversible damage according to neurologists: “once a neuron is lost, very little can be done because regeneration in the central nervous system is poor and disorganized.”<sup>127</sup> Therefore, facing the reality that training on concussion detection, brain imaging, and equipment changes make little difference, some neuroscientists have increased their advocacy to ban certain gladiator sports, particularly boxing, “this

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<sup>120</sup> See Charles (Oli) Barwald, Note, *Practicing Concussion Prevention: Enacting State Legislation Regulating contact in High School Football Practices*, 37 T. JEFFERSON L. REV. 337, 367-68 (2015) (“By enacting the proposed legislation in this Note, which limits the amount of contact at practice, high school football players will be properly protected and have a cognizable claim against coaches who exceed their power.”).

<sup>121</sup> See Kane, *supra* note 6, at 238 (2015) (proposing statutory reform “to empower the Department of Health to consult with experts and neurologists to establish renewable baseline standards, which would be enforceable against non-compliant school districts and athletic organizations”).

<sup>122</sup> Reed, *supra* note 95, at 50.

<sup>123</sup> See *infra* Part II(B)(2).

<sup>124</sup> Note that the discussion of licensure and vicarious liability is beyond the scope of this article.

<sup>125</sup> Swaab, *supra* note 26, at 235.

<sup>126</sup> *Id.*

<sup>127</sup> Eelco, *supra* note 70, at 1.

embarrassing remnant of our primitive evolutionary past.”<sup>128</sup> Of course non-combat sports, such as ice-skating or horse-back riding, involve even more serious risks of injury, which has led one neurologist to muse: “If sports were banned, all our [emergency room] waiting lists would disappear overnight.”<sup>129</sup>

*D. Recognition of the Physical, Social, and Mental Health Benefits of Gladiator Sports*

Despite the fact that competitive sports, and gladiator sports specifically, require some of the most demanding training and physical fitness, the recent public and professional discussion of combat sports has generally ignored these and other benefits, focusing primarily on safety risks and the perceived immorality of violence. Gladiator sports are not inherently violent, just as winning is not inherently violent.

The Oxford English Dictionary definition of “violence” is first given a negative connotation in terms of the mental state of the actor: “The deliberate exercise of physical force against a person, property, etc.; physically violent behaviour or treatment; (*Law*) the unlawful exercise of physical force, intimidation by the exhibition of such force. Formerly also: †the abuse of power or authority to persecute or oppress (*obs.*).”<sup>130</sup> Even when the term violence is used without malice, such as the violence of a natural disaster, the definition imbues the word with a negative connotation focusing on resulting harm: “2. Great strength or power of a natural force or physical action, esp. when destructive or damaging; violent motion or effect.”<sup>131</sup> Yet, there is no word in the English language that captures the positive and historically revered concept of physical aggression in sports. Combat is associated with war and harm. While the term force in law is not necessarily negative, it does not really capture the interpersonal nature of aggressive contact sports.

Nevertheless, athletes in gladiator sports recognize and promote the benefits of their sports. For example, in addition to the physical training involved in a contact sport such as basketball, one might expect to hear sports advocates identify associated traits of self-discipline, self-respect, work ethic, determination, and leadership and motivation of others. Indeed, in studying over 400 top-level female executives in five countries, only 3% had never played sports and over half had played sports at the collegiate level.<sup>132</sup> Olympic gold medalist swimmer and sportscaster, Donna de Varona, explained:

If you try out for a basketball team but quit in the middle of the first game, or if you choose not to pass the ball to your talented teammate because you don't like her, or if you are unwilling to spend extra hours to work on a weakness, you aren't going to get very far. Sports teaches fundamentals

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<sup>128</sup> Swaab, *supra* note 26, at 236.

<sup>129</sup> Swaab, *supra* note 26, at 239-40.

<sup>130</sup> OXFORD ENGLISH DICTIONARY, at <http://www.oed.com/view/Entry/223638?rskey=kigfXy&result=1#eid> (last visited Jan. 26, 2016).

<sup>131</sup> *Id.*

<sup>132</sup> Nanette Fondas, *Research: More Than Half of Top Female Execs Were College Athletes*, HARV. BUS. REVIEW Oct. 9, 2014, <https://hbr.org/2014/10/research-more-than-half-of-female-execs-were-college-athletes>.

for success and that is why both men and women executives like to hire athletes.<sup>133</sup>

In the most aggressive contact sports, such as boxing or mixed martial arts, the athletes promoting their sport highlight the traits of self-awareness, bravery, and the conquering of fear. These sports are not hobbies:

You have to commit to boxing. You can't do it when the mood takes you. Boxing is not like skiing or scuba diving - it is not something you can do once a year on holiday. Boxing is not even like football or tennis - you can't do it on the odd sunny day in the park. Boxing - even at the strictly amateur, recreational level - requires dedication, discipline and grit.

And here is what is special about boxing training - your physical fitness is just the start. Boxing is really about your mental fitness. Because boxing makes you calmer. Boxing teaches you control.<sup>134</sup>

Faced with the reduction in athleticism of American youth, and the rise of morbid obesity,<sup>135</sup> the national conversation may actually minimize the physical health risks of sports generally, other than to address concussions in gladiator sports. In fact, due to the physical stress of higher metabolisms, research has shown that top athletes are likely to live shorter lives than those who regularly engage in more moderate exercise.<sup>136</sup> Yet realistically weighing the physical risks and benefits of sports does not dispatch with the debate, for mental health benefits continue to sustain the encouragement of sports from a young age to build character.<sup>137</sup> Through learning and abiding by the rules of the game, “[p]hysical play provides a context for the exploration of children’s morality.”<sup>138</sup> While acknowledging that organized sports do not appeal to all youth, numerous research studies have linked sports participation with a wide array of positive results for youth at risk of delinquency, including

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<sup>133</sup> *Id.*

<sup>134</sup> Tony Parsons, *Boxing should be taught in every school*, GQ MAGAZINE (Sept. 6, 2013), <http://www.gq-magazine.co.uk/comment/articles/2013-09/06/tony-parsons-boxing-mike-tyson-carl-froch>.

<sup>135</sup> “The percentage of children aged 6–11 years in the United States who were obese increased from 7% in 1980 to nearly 18% in 2012. Similarly, the percentage of adolescents aged 12–19 years who were obese increased from 5% to nearly 21% over the same period.” CENTERS FOR DISEASE CONTROL AND PREVENTION, *Childhood Obesity Facts, Adolescent and School Health*, <http://www.cdc.gov/healthyyouth/obesity/facts.htm> (internal citations omitted).

<sup>136</sup> Swaab, *supra* note 26, at 241.

<sup>137</sup> See STEVEN J. OVERMAN, *THE YOUTH IN SPORTS CRISIS: OUT-OF-CONTROL ADULTS, HELPLESS KIDS 14* (Praeger 2014) (“Touted character traits include initiative, responsibility, social cohesion, persistence, and self-control.”).

<sup>138</sup> *Id.* at 15.



physical health, mental health, and social wellbeing.<sup>139</sup> As one young man in custody at a youth detention center in Great Britain expressed:

When I was in school an' that I was quite lazy. But ever since I've come in here I've been doing lots of sport an' stuff. It gives me a real buzz, running about an' that. . . . Boxing is the main that that made me do it . . . instead of just doin' weights . . . 'cos they all [other residents] wanna do weights and just get big, but it's about stayin' fit on the inside; . . . All that running and training. It's just pushin' me to the limit.<sup>140</sup>

Several research studies since the 1980s have shown an inverse relationship between the learning of lethal physical skills in martial skills with the incidence of physical aggression outside of the sport in daily life.<sup>141</sup> In fact, martial artists have been found to “become increasingly less aggressive as they advance through the ranks,” when the training involves the traditional philosophical components of inner peace and harmony.<sup>142</sup> In contrast, newer forms of Tae Kwon Do, eliminating the philosophical components of nonviolence, have been shown to create a significant increase in aggressiveness.<sup>143</sup>

Excessive and inappropriate applications of these goals of aggressive learning “have been linked to a pattern of attitudes and behaviors that include violence, homophobia, sexism, and drug abuse.”<sup>144</sup> Indeed, the criminal activity of athletes from high school to professional sports has been the focus of numerous debates on causal factors for societal aggression.<sup>145</sup> The evidence of a link to criminality with more violent sports is thin and perhaps more media generated perception than reality.<sup>146</sup> While studies have shown that NFL players have relatively low arrest rates for violence, 40% of American born NBA players in 2001-2002 were found to have had criminal complaints filed against them for a serious crime, primarily involving persons who “tell them no,” such as women or law enforcement officers.<sup>147</sup> College and professional athletic departments excusing the criminal misconduct of their

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<sup>139</sup> Andrew Parker & Rosie Meek, *Sport, physical activity and youth imprisonment, in YOUTH SPORT, PHYSICAL ACTIVITY AND PLAY* 70, 71 (Andrew Parker & Don Vinson eds. Routledge 2013).

<sup>140</sup> *Id.* at 74.

<sup>141</sup> *See generally* Russell *supra* note 21, at 57.

<sup>142</sup> *Id.* at 57-58.

<sup>143</sup> *Id.* at 57.

<sup>144</sup> *See* Overman, *supra* note 137, at 136. *See also* CHRISTOPHER S. KUDLAC, *FAIR OR FOUL: SPORTS AND CRIMINAL BEHAVIOR IN THE UNITED STATES* 7 (Praeger 2010) (noting that the media and anti-violence advocates have influenced public perception to question whether professional athletes may be more likely to commit domestic violence and date rape).

<sup>145</sup> *See, e.g.,* Kudlac, *supra* note 144, 5-6 (explaining through sociological theory and research that excessive self-importance fostered by athletic leadership may create perceptions among athletes that they are above the law).

<sup>146</sup> *Id.* at 52.

<sup>147</sup> *Id.*

players, hiring attorneys for players, and colluding with prosecutors remains a concern.<sup>148</sup>

Yet evidence tends to support the argument that the sports environment does not inherently create positive or negative character, but reinforces and heightens existing desired character traits in individual athletes.<sup>149</sup> Coaches, trainers, managers, and team captains directing the character lessons learned through sports foster the character traits they choose to present.<sup>150</sup> For example, when college athletic departments insert themselves into the criminal investigations of their star players, and local prosecutors collude with them to dismiss charges, the message to athletes on desired characteristics is reprehensible.<sup>151</sup> Victim witnesses reported being intimidated by collegiate programs and players, team lawyers are appointed for the players before they even request an attorney, and the high national profile of the teams was reported to influence prosecutorial decision-making.<sup>152</sup> Use of a particular sports team ethos by those in charge may encourage, for example, respect for others or a dangerous sense of entitlement resulting in brutal hazing of other students.<sup>153</sup>

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<sup>148</sup> See Paula Lavigne, *Lawyers, status, public backlash aid college athletes accused of crimes*, ESPN (June 15, 2015), [http://espn.go.com/espn/otl/story/\\_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges](http://espn.go.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges) (conducting an extensive survey from 2009-2014 of ten major college football and basketball programs).

<sup>149</sup> See Overman, *supra* note 137, at 22. See also DENISE M. HILL ET AL., *YOUTH SPORT, PHYSICAL ACTIVITY AND PLAY* 55, 58 (Andrew Parker & Don Vinson eds., Routledge 2013) (citing research findings that physical activity only enhances self-esteem in adolescents if the activity is presented in a positive manner and encourages “a sense of success, mastery, autonomy and acceptance”); Kudlac, *supra* note 144, at 7 (noting that research on the effect of sports to increase personal self-control in athletes is equivocal and complex).

<sup>150</sup> Kudlac, *supra* note 144, at 143 (“The [antisocial] problems . . . related to athletes and fans have to do less with what takes place on the field (violence) than with the other peripheral things that come with sports in our culture,” such as excessive status and reward for athletic success).

<sup>151</sup> See, Lavigne, *supra* note 148 (reporting on the results of an Outside the Lines investigation from 2009-2014 of 10 major male basketball and football college sports programs across the U.S., demonstrating that male athletes at some schools evaded indictment or had charges dropped in more than half of criminal cases).

<sup>152</sup> *Id.*

<sup>153</sup> The number of sports-affiliated hazing incidents on college and high school campuses have included vicious sexist, racist, and homophobic language and acts of sexual and non-sexual violence. See, e.g., Kudlac, *supra* note 144, at 8 (associating homophobia and misogynistic sexualized locker room conversations with the most aggressive sports such as football and hockey); Emily Sweeney, *Workshop tackles sports hazing head on*, THE BOSTON GLOBE (Aug. 24, 2014), available at <https://www.bostonglobe.com/metro/regionals/south/2014/08/23/tackling-hazing-head-high-school-officials-learn-about-hazing-and-how-prevent-young-athletes-from-becoming-victims/025r19edAkjXDveDZRFRK/story.html> (finding in a recent comprehensive study of high school hazing that 1.5 million students are hazed each year, with the highest number (24%) occurring on sports teams). Moreover, in a number of school-based shootings by students or former students, the shooters reported histories of being bullied by athletes from contact sports teams. See, e.g., Ross Ellis, *Mass Murders in School and Bullying: What We Can Do to Help Stop the Carnage*, HUFFPOST IMPACT, June 13, 2014 (2:37PM ET, updated Aug. 13, 2014), available at [http://www.huffingtonpost.com/ross-ellis/mass-murders-in-schools-a\\_b\\_5492873.html](http://www.huffingtonpost.com/ross-ellis/mass-murders-in-schools-a_b_5492873.html).

When athletes are encouraged by coaches to use illegal techniques like tripping or holding another player, this doesn't promote following the rules of the game, or of society. Character traits – positive and negative – acquired on the football field carry over to other settings. Football can promote learned dishonesty. The Josephson Institute in a 2007 survey found that school athletes are more likely than non-athletes to cheat in their school work. The most prolific cheaters were football players.<sup>154</sup>

If this research on the character building potential of gladiator sports, or any sports for that matter, is accurate, then the violent or nonviolent nature of the sport itself does not greatly impact the individual's moral character. Rather, it is the way the athletes are treated by others in the sport that influences the character of players.<sup>155</sup> Subsequent to the enactment of Title IX, the gender divide in how sports build character is more apparent with more women competing across the country.<sup>156</sup> Some argue that women and girls who play sports appear to continue to reap the traditional benefits of athletics, without negative risks attendant to success among male athletes, in part because they are treated with greater respect by their management in the sport.<sup>157</sup> Legislators, litigators, and policy makers who have the power to hold athletic management accountable for fostering misconduct in players should address this first, before blaming the purported violence of gladiator sports as inherently brutal and uncivilized.

Public health policy will naturally balance any conflict between the interests of the individual and the public, but it is never an even balance. The core interests of the herd must, by necessity, win if there is a significant public risk, whether related to interests in health or social order, or to a lesser extent to morality. As will be shown below,<sup>158</sup> the legal approach to curbing safety risks in contact sports has been meek at best, deferent to public policy initiatives from those outside the legislature and courthouse.

Gladiator sports provide one of the relatively rare examples of moral focus in public health law, as the safety risks and benefits of the sports have not received the usual balanced review. Without social science research available on the subject, it is easy to speculate on whether the American public's moral attachment to violence in sports is in any way reflected on a grander scale with the public's attitude towards the violence of conflict on the global political scene. Sociologists have connected the reduced level of warfare in the 18<sup>th</sup> century between nation states in Europe to the

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<sup>154</sup> See Overman, *supra* note 137, at 192.

<sup>155</sup> See Kudlac, *supra* note 144, at 27 (noting the privileges given to male college athletes in the form of scholarships, tutoring, and attention from alumni and media distorting their sense of self and ability to respect others, particularly women).

<sup>156</sup> MICHAEL SOKOLOVE, WARRIOR GIRLS: PROTECTING OUR DAUGHTERS AGAINST THE INJURY EPIDEMIC IN WOMEN'S SPORTS 2 (Simon & Schuster 2008) (noting that 300,000 girls participated in high school sports in 1972, when Title IX was enacted, compared to more than 3 million girls in 2008).

<sup>157</sup> *Id.* (“Girls indulge in far less posturing than boys, less look-at-me chest beating, less taunting of opponents,” which results in “formidable” models of leadership in their future careers).

<sup>158</sup> See *infra* Part IV(B).

emergence and popularity of what was termed “sports” in the West, essentially a safe and controlled expression of conflict.<sup>159</sup>

Today, is it a coincidence that the United States media has been willing, finally, to discuss and possibly address a long known risk of concussion in football at a time when Americans are weary of being in one of the longest running military conflicts in American history? The United States has been fighting in the Middle East for over 14 years, since October 7, 2001, approximately five years longer than the Vietnam War.<sup>160</sup> Or is it that soldiers returning with high rates of traumatic brain injury allowed the medical community to create greater public awareness of the risks of concussion generally?<sup>161</sup> According to some in neurology: “Increased dissemination of information about TBI in the media has been related to the high incidence of TBI in soldiers during the recent wars in Iraq and Afghanistan and the proliferation of studies on the acute and long-term effects of concussion (i.e., another term for mild TBI) sustained by athletes while engaged in contact sports.”<sup>162</sup>

The American public’s acceptance of blood sports has swelled and waned over time, from a ban on boxing in the 1920s to the rise of mixed martial arts today. If anything, the mental health risks of a sedentary society, with high attendant rates of depression and anxiety, call for promotion of the mental health benefits of sports, including the courage and tempering of rage taught in gladiator sports.

What happens when kids box? Fat kids lose weight. Bullies learn humility. Girls are empowered. The weak become stronger. The timid find courage. The wild kids learn control. The unhealthy get fit. And everybody learns that boxing has no room for anger.<sup>163</sup>

Some assert that even untempered rage on the sports field is not necessarily harmful or against public policy, depending on the rules and structure of the sport.<sup>164</sup>

The question arises then -- what is the value of a life well lived? The law should not engage in a determination of this value, but should enforce the right to autonomy over this decision of those with the capacity to decide. In short, in a civilized society one should have the right to seek an exciting, but possibly shorter life, or a long but uneventful life, or something in between.

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<sup>159</sup> Eric Dunning, *Civilizing Sports: Figurational Sociology and the Sociology of Sport*, in *SOCIOLOGY OF SPORT AND SOCIAL THEORY* 15, 21 (Earl Smith ed., Human Kinetics 2010).

<sup>160</sup> Rick Hampson, *Afghanistan: America’s Longest War*, 5/28/2010 (updated 10:56AM), USA TODAY, available at [http://usatoday30.usatoday.com/news/military/2010-05-27-longest-war-afghanistan\\_N.htm](http://usatoday30.usatoday.com/news/military/2010-05-27-longest-war-afghanistan_N.htm). As of May 2010, the United States had been at war in Afghanistan for 104 months, compared with the length of conflicts in Vietnam (103 months), Iraq (83 months), the Revolutionary War (81 months), the Civil War (48 months), and World War II (44 months). *Id.*

<sup>161</sup> See Levin et al, *supra* note 72, at 4.

<sup>162</sup> *Id.*

<sup>163</sup> Parsons, *supra* note 134.

<sup>164</sup> See C. Antoinette Clark, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1192 (2000) (“Rules of the various sports prohibit specific kinds of conduct that pose abnormal risks of injury or that are likely to inflame volatile tempers.”).

### III. DEVELOPMENT OF THE CRIMINAL CONSENT DEFENSE AND CIVIL PRIVILEGE TO ASSAULT AND BATTERY IN GLADIATOR SPORTS

The limits of the consent defense in gladiator sports vary by jurisdiction, but its common law roots reflect the same approach in the United States and other British commonwealth nations, such as Canada, Great Britain, Ireland, Australia and New Zealand: “where the inflicted injury is clearly intentional and reckless to the extent that it is *beyond the rules and norms of the game* in question, the criminal law’s threshold of toleration will be breached.”<sup>165</sup> As will be discussed below,<sup>166</sup> civil personal injury claims at times share a similar focus on defining consent as consent within the bounds of the rules of the sport.

Not only will the law condone and forgive certain violent actions as warranted through self-defense or provocation, but the court system continues to enact violence itself under color of law in sentencing in the form of physical punishment, including corporal punishment and the death penalty.<sup>167</sup> Legally authorized forms of violence by government officials and citizenry are permitted as a matter of longstanding public policy in both criminal and civil legal systems, based in British common law.<sup>168</sup> For example, to promote discipline and the preservation of social order, British common law permitted unilateral (non-mutual/non-consenting) forms of violence in the death penalty, the husband’s right to beat or rape his wife, and the caretaker’s right to corporally punish a child.<sup>169</sup> Unilateral, but consenting, violence is permitted in the form of sadomasochism<sup>170</sup> and surgery or other painful medical treatment. Three justification defenses permit mutual combat: (1) status-based authorized assault, such as restraint by law enforcement and emergency personnel; (2) self-defense and defense of others; and (3) assault with consent, such as backyard play and contact sports.<sup>171</sup> All forms of authorized violence are tempered by theories of reasonableness, sometimes culturally or morally defined, but always defined in part by physical safety considerations.

In short, assault causing lethal or grievous harm is not justified except in very limited circumstances, such as self-defense and the death penalty. For the third justification, consent to assault, causing or risking lethal or grievous harm with the

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<sup>165</sup> Jack Anderson, *Citius, Altius, Fortius? A Study of Criminal Violence in Sport*, 11 MARQ. L. REV. 87, 105-06 (2000) (emphasis added).

<sup>166</sup> See *infra* Part III(B).

<sup>167</sup> See generally Brobst, *supra* note 17, at 178 (providing an historical international comparative perspective on legally authorized assault in the form of corporal punishment).

<sup>168</sup> See, e.g., Jack Anderson, *The Right to a Fair Fight: Sporting Lessons on Consensual Harm*, 17 NEW. CRIM. L. REV. 55 (2014) (focusing on the consent defense in boxing in England and Wales); Anderson, *supra* note 165, at 87 (focusing on the Anglo-Irish contact sports and the defense of consent to assault).

<sup>169</sup> See, e.g., Westen, *supra* note 3, at 122 (describing California’s justification defense to rape, followed by a complete bar to spousal rape in 1993).

<sup>170</sup> See, e.g., Brian Bix, *Consent, Sado-masochism and the English common law*, 17 Q.L.R. 157 (1997).

<sup>171</sup> See generally Marin Roger Scordato, *Innocent Threats, Concealed Consent, and the Necessary Presence of Strict Liability in Traditional Fault-based Tort Law*, 37 PEPPERDINE L. REV. 205 (2010).

consent of the person at risk has never been justified until recently in some highly regulated cases of assisted suicide.<sup>172</sup> In the context of sports, however profitable or regulated, consent to such a risk of lethal or serious harm is never justified under the law. The gladiator sports of old, fought to the death with lions in the ring, are long gone; and the lethal gladiator sports of the imagined future, as seen in the films *Death Race*<sup>173</sup> or *Rollerball*<sup>174</sup> are mere figments of the imagination.

#### A. Consent Defense to Criminal Assault

Consent has a long tradition as a defense to assault in criminal law.<sup>175</sup> A few jurisdictions, however, have held that while consent may alleviate one of liability in tort, it cannot provide a defense for intentional criminal acts.<sup>176</sup> The majority of courts have held that consent is a defense to criminal assault, with the exception of assault causing serious injury or death.<sup>177</sup> The public policy for the restriction has several bases, according to the Montana Supreme Court:

In particular, we recognize that this type of conduct not only puts the combatants at risk, but also jeopardizes the safety of the police, emergency personnel, and bystanders. It also consumes public resources and imposes on society various costs, such as medical expenses and the inability of individuals to feel safe and secure in their persons.<sup>178</sup>

Even in the privacy of one's own home, where a breach of the peace is not at issue, the restrictions on the consent defense for assault risking or causing serious injury are

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<sup>172</sup> Compare *State v. Mackrill*, 345 Mont. 469, 191 P.3d 451 (2007) (holding as a matter of public policy that a crime victim may not consent to aggravated assault), with *Baxter v. State*, 354 Mont. 234, 224 P.3d 1211 (2009) (distinguishing consent to assault in assisted suicide cases involving no breach of the peace, with consent to criminal assault in physical fights or sports events causing breaches of the peace).

<sup>173</sup> This film, directed by Paul W.S. Anderson, portrays lead actor Jason Statham as a former Speedway Champion in a car race of prisoners, in which the drivers try to kill each other during the race and the surviving winner is promised freedom. See *Death Race* (2008), IMDB, at <http://www.imdb.com/title/tt0452608/>.

<sup>174</sup> This film, directed by Norman Jewison, depicts James Caan playing to the death in a corporate-controlled game similar to roller derby. "The year is 2018. There is no crime and there are no more wars. Corporations are now the leaders of the world, as well as the controllers of the people. A violent futuristic game known as Rollerball is now the recreational sport of the world . . ." See *Rollerball* (1975), IMDB, at [http://www.imdb.com/title/tt0073631/plotsummary?ref=tt\\_str\\_y\\_pl](http://www.imdb.com/title/tt0073631/plotsummary?ref=tt_str_y_pl).

<sup>175</sup> See J.H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (1895).

<sup>176</sup> *State v. Brown*, 143 N.J. Super. 571, 573, 364 A.2d 27, 28 (N.J. Super. 1976) ("So, while the consent of the victim may relieve defendant of liability in tort, this same consent has been held irrelevant in a criminal prosecution, where there is more at stake than a victim's rights.").

<sup>177</sup> See, e.g., *State v. Mackrill*, 345 Mont. 469, 481, 191 P.3d 451, 460 (2007) (addressing injuries caused in a bar fight).

<sup>178</sup> *Mackrill*, 345 Mont. at 481. See also *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. Ct. App. 2013).

consistently applied, such as in cases of mutual domestic violence, sadomasochism, or rough backyard play.<sup>179</sup>

Historically, when athletes seriously injure each other, criminal courts consider both the explicit and implicit rules of the game to define what behavior is subject to the consent defenses.<sup>180</sup> An intentional foul, violating such rules, could potentially open the door to criminal liability to assault and battery.<sup>181</sup> Nevertheless, a generous consent defense has restrained the courts from intervening, perhaps because, as some have recently argued, “[b]rutality and intimidation beyond the rules are integral parts of strategy.”<sup>182</sup> This modern attitude is far more accepting of overly aggressive play than early common law applying the consent defense to criminal offenses. As one legal scholar asserted in 1895:

A game which involves a physical struggle may be a commendable and manly sport, or it may be an illegal contest in which all the participants are or may become criminals; this depends upon whether it is a game which endangers life. Thus, in a prosecution for a death which was caused accidentally in playing the game of foot-ball, it was left to the jury to say whether the game was dangerous; for if so, consent on the part of the players to submit to what the game had in store for them would not protect a player from prosecution. “No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land, and the law of the land says you shall not do that which is likely to cause the death of another.” *And where death happened accidentally while two parties were fencing with sharp foils, protected with buttons at the tips, the killer was held guilty of manslaughter.*<sup>183</sup>

In modern contrast, as the dissenting justice of the Supreme Court of Mississippi in *Durr v. State* cautioned in 1998, when disagreeing with the majority’s focus on the

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<sup>179</sup> See, e.g., *U.S. v. Arab*, 55 M.J. 508 (U.S. Ct. Crim. App. 2001) (holding that a wife, even in a sadomasochistic sexual encounter, may not consent to being cut with knife, burned by a cigarette, stabbed, or dragged by the hair); *Durr v. State*, 722 So.2d 134 (Miss. 1998) (holding, in a manslaughter prosecution, that a prisoner who died in a gang initiation ritual from being punched repeatedly over the heart could not give lawful consent to a “reckless infliction of bodily injury”).

<sup>180</sup> See, e.g., *State v. Floyd*, 466 N.W.2d 919, 922 (Iowa Ct. App. 1990) (finding fighting conduct during a basketball game to fall outside the parameters of the consent defense to assault); *State v. Brown*, 143 N.J. Super. 571, 576 364 A.2d 27, 30 (N.J. Super. 1976) (applying the consent defense to assault to protect activity that is “reasonably within the rules or purview of the sports activity”).

<sup>181</sup> See Clark, *supra* note 164 at 1149 (asserting the need for limited involvement by the criminal justice system in sports violence). “To premise criminal liability on behavior that is an accepted norm in the relevant society - the society of athletes and coaches - counters a fundamental precept of criminal law: only the blameworthy should be punished.” *Id.* at 1152.

<sup>182</sup> *Id.* at 1159. Cf. Diane V. White, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1034 (addressing a greater willingness for Canadian criminal courts to find violent hockey players criminally liable than American courts).

<sup>183</sup> See Beale, *supra* note 175, at 317 (emphasis added).

rules of sports to define the scope of the consent defense: “Is this to say that any injury arising from a foul amounts to a non-consensual battery? One would hope not.”<sup>184</sup>

In cases involving consent to assault and battery, the criminal courts place a stronger emphasis on risks to the public due to unlawful breaches of the peace, rather than risks to the players; therefore, permitting public gladiator-like sports only in controlled settings.<sup>185</sup> “A personal injury inflicted by consent may harm the public if it tends to cause a breach of the peace, or severe bodily harm to the injured party. A prizefight, therefore, or any public fight, is criminal, in spite of the consent of the parties to it to permit injury, because it tends to a breach of the peace.”<sup>186</sup>

Few criminal appellate cases exist examining the defense of consent to intentional injury in a sports context. Identifying the scope of risk has, and perhaps always will be, a matter of wide discretion among judges:

[I]t might be suggested that the continuing and unquestioning lenience to the sport of professional boxing, which also has many regulatory faults and attracts significant criticisms from the legal profession, possibly tells us more about the tolerance of the society we live in toward public displays of personal violence, than it does about the technicalities of the criminal law.<sup>187</sup>

At minimum, however, is the continuing principle since early common law that minor injury will not warrant criminal charges in contact sports.<sup>188</sup>

*B. Combating Civil Liability through the Consent Privilege and Assumption of the Risk*

In both criminal and civil contexts, the courts essentially give a wink and a nod to a measured acceptance of humanity’s violent nature, particularly in structured, socially acceptable forms of gladiator sports. Our common law history does not ban violence altogether, but merely considers there to be an acceptable degree.<sup>189</sup> Where to draw the line is, of course, the difficult question, and the civil courts have historically been reluctant to draw the line at all for sports-related injuries. However, a greater willingness should emerge among the judiciary in crafting tort reform that is

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<sup>184</sup> *Durr v. State*, 722 So.2d 134, 136 (Miss. 1998) (McRae, J., dissenting).

<sup>185</sup> See *People v. Jackson*, 58 Cal. 4th 724 (2014) (“Voluntary mutual combat outside the rules of sport is a breach of the peace”); *Baxter v. State*, 354 Mont. 234, 242 (2009) (discussing the consent defense in sports when permitting quiet, controlled physician assisted suicide, as an exception to the limitation on the consent defense for acts causing death); *Helton v. State*, 624 N.E.2d 499, 513 (Ind. Ct. App. 1993) (prohibiting consent as a defense to a gang initiation causing serious injury and risking a breach of the peace); *State v. Burnham*, 56 Vt. 445 (Sup. Ct. 1884) (prohibiting sparring or boxing if there is a breach of the peace).

<sup>186</sup> See Beale, *supra* note 175, at 325.

<sup>187</sup> Anderson (2014), *supra* note 168, at 74.

<sup>188</sup> See Joseph H. Beale, *Justification for Injury*, 41 HARV. L. REV. 553, note 8 (1928) (discussing *R. Bradshaw*, 14 Cox C.C. 83 (1878), which provided that one may consent to a “non-dangerous manly sport”).

<sup>189</sup> See Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 172 (2007) (discussing the gradual restriction on the individual right to consent to conduct as the power of state regulation increased).



more reliant on the guidance of the defined safety rules of gladiator sports, rules now better informed by advances in medical research.<sup>190</sup>

### 1. History of the Restatement of Torts Approach to Civil Liability for Sports Injury

In the 1934 American Law Institute (ALI) Restatement of the Law of Torts, the interest in freedom from offensive or harmful bodily contacts is circumscribed, along with interests in freedom from confinement and freedom from emotional distress.<sup>191</sup> Of these, “the interest in freedom from bodily harm is given the greatest protection.”<sup>192</sup> Protection in tort law is provided against intentional battery, negligent conduct causing bodily harm, and unintentional and non-negligent conduct in activities so dangerous that the law imposes strict liability.<sup>193</sup>

In 1934, the Restatement defined battery involving harmful contact in section 13 as:

An act which, directly or indirectly, is the legal cause of a harmful contact with another’s person makes the actor liable to the other, if

*The act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and*

*The contact is not consented to by the other or the other’s consent thereto is procured by fraud or duress, and*

The contact is not otherwise privileged.<sup>194</sup>

The scope note and comment accompanying this section states that the common law remedy for acts intentionally causing bodily harm was trespass for battery; while trespass on the case was the defined remedy for conduct causing bodily harm indirectly and unintentionally or “by an activity which, no matter how carefully carried on, is carried on at the risk of answering for harm caused by it.”<sup>195</sup> The 1934 First Restatement distinguishes its definition of battery in section 13 from the common law by the Restatement’s expansion of the claim to include both direct and indirect harmful

<sup>190</sup> Grayson, *supra* note 68, at 192 (“Together we should persuade sports medical practitioners and others concerned with sport that the belief that all is fair in love and war, and in sport too, is criminally and civilly liable in court.”).

<sup>191</sup> See RESTATEMENT (FIRST) OF TORTS (1934) [hereinafter RESTATEMENT (FIRST)] (addressing “Intentional Invasions of Interests in Personality” in Volume I, Chapter 2).

<sup>192</sup> *Id.* § 15. The Restatements define bodily harm to include “any impairment of the physical condition of another’s body or physical pain or illness.” *Id.*; see also RESTATEMENT (SECOND) OF TORTS (1965) at § 15 [hereinafter RESTATEMENT (SECOND)] (providing the same substantive definition, but slightly reworded).

<sup>193</sup> RESTATEMENT (FIRST), *supra* note 191, at Ch. 2, Topic 1 (“The Interest of Freedom from Harmful Bodily Contact” introductory comments). Strict liability is imposed on abnormally dangerous activities, activities not of common usage, and would not apply to commonly played gladiator sports. See RESTATEMENT (THIRD) OF TORTS, § 20 (2010).

<sup>194</sup> RESTATEMENT (FIRST), *supra* note 191, at § 13 (emphasis added).

<sup>195</sup> RESTATEMENT (FIRST), *supra* note 191, at § 13.

contact, rather than merely direct contact.<sup>196</sup> Both common law and the First Restatement require that battery involve proof of intention to bring about the contact, but “it is immaterial that the actor is not inspired by any personal hostility to or the desire to injure the other.”<sup>197</sup>

Note that in the First Restatement lack of consent is an express element of the claim, in section 13(b), which must be proved by the plaintiff. By the Second Restatement of Torts in 1965, section 13 was amended, omitting the express consent element:

An actor is subject to liability to another for battery if he acts intending to cause a harmful or offensive contact with the person of the other or a third person or an imminent apprehension of such a contact, and a harmful contact with the person of the other directly or indirectly results.<sup>198</sup>

Nevertheless, the comment to section 13 in the Second Restatement makes clear the plaintiff must continue to prove absence of consent, following the common law approach that lack of consent is a “matter essential to the cause of action” for trespass for battery.<sup>199</sup> Consent is a privilege, defined by section 10 of the First Restatement as follows:

- (1) The word ‘privilege’ is used throughout the Restatement of this Subject to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances, does not subject him thereto.
- (2) A privilege may be based upon
  - a. the consent of the other affected by the actor’s conduct, or
  - b. irrespective of the other’s consent . . . .<sup>200</sup>

Thus, intentional harm caused by some activities in gladiator sports, such as a knock out in boxing, would have found a reliable remedy in tort for merely following the agreed upon rules of the sport, had it not been for the availability of the common law privilege of consent to civil battery.<sup>201</sup> Since the First Restatement of Torts, consent to an act “which he knows is intended to inflict an invasion of *any* of his interests of personality under this Chapter or if he consents to an act which, to a substantial certainty, will result in such an invasion, such consent prevents the actor’s conduct from being tortious and, therefore, prevents it from subjecting him to liability

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<sup>196</sup> RESTATEMENT (FIRST), *supra* note 193.

<sup>197</sup> RESTATEMENT (FIRST), *supra* note 191, at § 13.

<sup>198</sup> RESTATEMENT (SECOND), *supra* note 192, at § 13.

<sup>199</sup> RESTATEMENT (FIRST), *supra* note 193, at § 13.

<sup>200</sup> RESTATEMENT (FIRST), *supra* note 191, at § 10.

<sup>201</sup> See RAYMOND L. YASSER, *TORTS AND SPORTS: LEGAL LIABILITY IN PROFESSIONAL AND AMATEUR ATHLETICS* 4 (Quorum Books 1985) (“In sports, the consent privilege looms large.”).

for an ‘assault,’ ‘battery’ or ‘false imprisonment.’”<sup>202</sup> The broad American approach to the privilege of consent under the Restatements differs from the British common law, which sought to limit the consent defense to narrow clearly defined categories of conduct, such as contact sports, but not sadomasochism.<sup>203</sup>

Consent is defined in the First Restatement as follows:

To constitute a consent to an intended invasion of an interest of personality, there must be

- (a) an assent to the particular invasion suffered,
- (b) given
  - (i) to the person invading the interest,
  - (ii) by one who is capable of giving consent thereto and whose assent has neither been procured by such duress as makes it inoperative as a consent nor given under a mistake as to the validity of an asserted legal authority.<sup>204</sup>

The assent to the particular invasion in section (a) is to the invasion and not merely to the act causing the invasion.<sup>205</sup> As an illustration, the Restatement explains:

If two persons engage in a boxing match, neither of them assents to receiving any particular blow, since each hopes to avoid his adversary’s blows by dodging, sidestepping or blocking. However, he does sufficiently express a willingness that the other shall try to hit him, and the expression of such willingness is a sufficient assent to those blows which he is unable to avoid, since while he may avoid some blows, he is substantially certain to receive others.<sup>206</sup>

The First Restatement defines assent to include actual and apparent assent.<sup>207</sup> Actual assent looks to the injured party’s “words or conduct which are intended to express a willingness to submit to the invasion and are so understood by the person invading the interest.”<sup>208</sup> Apparent assent by words or conduct, “while not intended to express a willingness to submit to the invasion, would be understood by a reasonable man to be so intended and are so understood by the person invading the

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<sup>202</sup> RESTATEMENT (FIRST), *supra* note 191, at Ch. 3 (“Privileges Arising from Consent to Intended Invasions of Interests of Personality” introductory comments). *See also* RESTATEMENT (SECOND), *supra* note 192, at 84.

<sup>203</sup> *See* Brian Bix, *Consent, Sado-masochism and the English Common Law*, 17 Q.L.R. 157, 175 (1997) (“[W]hen the House of Lords in *Brown* did not find express mention of ‘sado-masochism’ in prior cases dealing with the defense of consent, it concluded that there was no law to apply or interpret.”).

<sup>204</sup> RESTATEMENT (FIRST), *supra* note 191, at § 49. *See also* RESTATEMENT (SECOND) OF TORTS, *supra* note 192, at § 892(A) (specifying that consent must be given “by one with capacity to consent or by a person empowered to consent for him” and that acts that exceed the scope of consent are not protected by the privilege of consent).

<sup>205</sup> RESTATEMENT (FIRST), *supra* note 191, § 53.

<sup>206</sup> RESTATEMENT (FIRST), *supra* note 191, at § 52.

<sup>207</sup> RESTATEMENT (FIRST), *supra* note 191, at § 57.

<sup>208</sup> RESTATEMENT (FIRST), *supra* note 191, at § 50(1).

interest.”<sup>209</sup> The Second Restatement maintained the concepts, but conceptualized the division as “consent in fact” and “apparent consent” confirming that one is as effective as the other.<sup>210</sup>

Those engaged in recreational sports or high-risk activities for entertainment purposes have had to consider the differing criminal and civil approaches to consent to risk. For example, in the highly profitable 2002 film *Jackass: The Movie*, in which Johnny Knoxville and others engaged in ridiculous acts that put them in or appeared to put them in harm’s way, some acts had to be edited out to avoid liability.

One example of this is in the "Riot Control Test" skit. In this skit, Johnny Knoxville is shot at with a beanbag projectile from a pump-action shotgun.

. . . The first time Knoxville is shot at, it misses him making him extremely nervous. The scene was later edited out as, while the "Jackass" crew could waive civil liability, they could not waive criminal liability. Hence, should Johnny or any cast member have been killed or grievously injured as a result of a stunt, the producers of the film could be held liable on the grounds of negligent or reckless homicide or battery.<sup>211</sup>

Moreover, whether or not the activity was a competitive game or merely play, Knoxville could not have provided legal consent to an action that involved a likelihood of endangering his life or causing permanent injury, such as blindness.<sup>212</sup>

In contrast to the privilege of consent for the intentional tort of battery, consent to negligent conduct may be covered instead by the doctrine of assumption of the risk.<sup>213</sup> Both consent and assumption of the risk would serve as a complete bar to liability claims against the more aggressive player. For over a hundred years, in civil actions, the doctrine of assumption of the risk has been more likely to justify contact sport injuries than the privilege of consent in battery.<sup>214</sup> As with the consent privilege and defense in civil and criminal cases respectively, the rules of the game inform the courts in determining what risk is being assumed. In 1934, the Restatement commented:

*Assumption of risk.* Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty *as are permitted by its rules*

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<sup>209</sup> RESTATEMENT (FIRST), *supra* note 191, at § 50(2).

<sup>210</sup> RESTATEMENT (SECOND) OF TORTS, *supra* note 192, at § 892.

<sup>211</sup> *Jackass: The Movie*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jackass: The Movie](https://en.wikipedia.org/wiki/Jackass:_The_Movie) (last visited 7/15/2015). *See also* Durr v. State, 722 So.2d 134, 135 (Miss. 1998) (internal citations omitted) (following the reasoning of both the New Mexico and Indiana Supreme Courts which refused to permit a consent defense to a victim who asked to be shot by a gun). “While we entertain little sympathy for either the victim’s absurd actions or the defendant’s equally unjustified act of pulling the trigger, we will not permit the defense of consent to be raised in such cases.” *Id.*

<sup>212</sup> *Cf.* State v. Hiott, 97 Wash. App. 825, 987 P.2d 135 (Wash. Ct. App. 1999) (holding that juveniles, one of whom lost an eye, could not lawfully consent to shoot BB guns at each other, as it was not a generally accepted sport or game, and created a breach of the peace).

<sup>213</sup> RESTATEMENT (SECOND) OF TORTS, *supra* note 192, at § 892.

<sup>214</sup> *See* RESTATEMENT (FIRST), *supra* note 191, at § 50, cmt. (c).

*or usages*. Participating in such a game does not manifest consent to contacts which are prohibited by 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 so although the player knows that those with or against whom he is playing are habitual violators of such rules.<sup>215</sup>

As with apparent consent to intentional invasions, the assumption of risk to negligence involves a reasonable person standard: that is, would a reasonable person have interpreted the injured party's actions as an expression of willingness to participate?<sup>216</sup> For example, in *Bourque v. Duplechin*, the Louisiana Court of Appeals held that while a baseball player may assume the risk of obvious and foreseeable events, it would not serve as an affirmative defense for "unexpected or unsportsmanlike" conduct recklessly endangering other players.<sup>217</sup> Here, the Court did not permit the defendant to avail himself of assumption of the risk when he went out of his way at full speed, nearly five feet from the plate, and raised his arm into the chin of the plaintiff in an admitted attempt to block him.<sup>218</sup> In contrast, the same court subsequently held that a softball player sliding into second base, injuring the second base player's ankle, was not negligent under a duty/risk analysis, rather than through assumption of the risk. "The risk of the type of accident which occurred, whether Ms. Mongrue slid head first, feet first, or ran to second base, is inherent in the game."<sup>219</sup>

Legal scholar, Heidi Hurd, argues in her review of Peter Westen's recent work, *The Logic of Consent*:

[T]here is a substantial difference between the scope of a consent defense and the scope of an assumption of risk defense, and unless and until we can sort out why women who dress provocatively do not assume the risk of rape while hockey players who enter an amateur game assume the risk of being cross-checked, we will not be in a position to specify when and why the

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<sup>215</sup> See RESTATEMENT (FIRST), *supra* note 191, a§ 50, cmt. (c) (emphasis added).

<sup>216</sup> See RESTATEMENT (FIRST), *supra* note 191, at § 50 ("[T]he other's intention to manifest willingness to submit to a particular invasion is immaterial if his words or conduct are such that the actor as a reasonable man ignorant of the other's actual intention would interpret them as being intended to express willingness.").

<sup>217</sup> *Bourque v. Duplechin*, 331 So.2d 41, 42 (La. Ct. App. 1976), abrogated by *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1135 (La. 1988) (assessing sports injury litigation only through examination of duty and risk, and eliminating use of the fiction of an assumption of risk doctrine).

<sup>218</sup> *Id.*

<sup>219</sup> *Picou v. Hartford Ins. Co.*, 558 So.2d 787 (La. Ct. App. 1990) (applying a duty/risk analysis, rather than assumption of the risk). "Under a duty risk analysis, there are the following inquiries: (1) What, if any, duty was owed by the defendant to the plaintiff? (2) Was there a breach of the duty? (3) Was that breach a substantial cause in fact of the injury? (4) Was the risk and harm within the scope of the protection afforded by the duty breached?" *Id.* at 790 (internal citations omitted).

law ought to impute consent or otherwise transfer losses to persons who assume the risk of others' wrongdoing.<sup>220</sup>

In answer to Hurd, there should be no permissible assumption of risk to crosschecking, if it is an illegal maneuver and intentional foul, or to rape under any circumstances, as these are intentional rather than negligent harmful acts. Note, again, that some confusion and resulting disfavor attend interpretation of the assumption of risk doctrine generally and in sports specifically.<sup>221</sup> For example, one critic has argued: "Accurate analysis in the law of negligence would probably be advanced if the term [assumption of risk] were eradicated and the cases divided under the topics of consent, lack of duty, and contributory negligence."<sup>222</sup> Approaches to distinguishing between types of assumption of risk have informed the jurisdictional split.<sup>223</sup> Today, the majority rule is that implied assumption of risk is collapsed into comparative fault, with some statutory exceptions.<sup>224</sup>

Finally, although it is beyond the scope of this discussion, it is important to recall that insurance restrictions on coverage for intentional torts<sup>225</sup> would incentivize plaintiffs to file claims in negligence rather than battery. Even with the risk of comparative fault or contributory negligence doctrines reducing or precluding recovery for the plaintiff injured in a basketball game or MMA match, a wider array of defendants with deeper pockets may be available to the plaintiff under negligent

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<sup>220</sup> Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westin's The Logic of Consent*, 103 MICH. L. REV. 1329, 1346 (2005).

<sup>221</sup> See John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contracting Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717 (1991) (identifying judicial complaints about inconsistent interpretations since the 1940s).

<sup>222</sup> *Id.* at n.1 (1991) (quoting Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961)).

<sup>223</sup> See Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 285 (1987) ("The problem, I believe, is the vagueness of 'acquiescence' and the uncertainty about *what* one must accept or acquiescence in.").

<sup>224</sup> See JOHN C. P. GOLDBERG, ANTHONY J. SEBOK, & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 408 (Aspen 2004).

<sup>225</sup> See generally Christopher C. French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65 (2012) (explaining that it is against public policy in many states to agree to indemnify damages caused by willful conduct for it would encourage misconduct for profit). Note that the few exceptions permitting insurance coverage of intentional torts do not include battery. *Id.* at 68-69.

supervision theories,<sup>226</sup> than for claims of battery, which only hold against the person actually committing the battery.<sup>227</sup>

## 2. Common Law and the Minimal Duty of Care to Avoid Sports Injury

Although state jurisdictions have always varied in their approaches to finding liability for deliberate or reckless sports injury, some courts have found a very minimal or nonexistent duty of care and a generous assumption of risk in all contact sports. In 1992, the California Supreme Court in *Knight v. Jewett* declined to find a general duty of care in touch football, relying on a deliberately selective array of judicial opinions from the 1940s to the 1980s from across the United States.<sup>228</sup> The court reasoned that “[t]he risk of physical contact and the possibility of resulting injury is inherent in the game of football, no matter who is playing the game or how it is played.”<sup>229</sup> In *Knight*, a group of friends watching the 1987 Super Bowl decided to play touch football during half time.<sup>230</sup> The defendant allegedly played too roughly, knocking the plaintiff down and injuring her finger so severely it required surgery and amputation.<sup>231</sup> For the reasons stated above, under a theory of implied assumption of the risk, the court held that the trial court properly granted defendant’s motions for summary judgment on plaintiff’s claims for assault and battery and for negligence.<sup>232</sup>

What was not made clear in *Knight* was which sports would carry such an implied risk of injury and what constitutes ordinary, inherent risk. The majority states, “in the heat of an active sporting event like baseball or football, a participant’s normal energetic conduct often includes accidentally careless behavior.”<sup>233</sup> However, all sports are active to a degree. The California Supreme Court does not explain what part of the activity renders or defines the conduct as active. Is it person-to-person contact? More than once the *Knight* court cited judicial examples of downhill mogul skiing cases to support a no duty standard of care in dangerous sports, a sport that is

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<sup>226</sup> See, e.g., *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714, 728 (D. Ct. (Md.) 2014) (interpreting *Tomjanovich v. California Sports, Inc.* 1979 WL 210977 (S.D. Tex. 1979) (unreported)). Tomjanovich, a professional basketball player who played for the Houston Rockets, sued the Los Angeles Lakers team after one of the players for the Lakers hit the plaintiff in the face, shattering his jaw and other facial bones during a fight. *Id.* See also Marc T. Wolin & Robert D. Lang, *Legal Liability for Sports Referees in Today’s Litigious World – If You Can’t Kill the Ump Then Sue Him*, 15 U. DENVER SPORTS & ENT. L.J. 83 (2013).

<sup>227</sup> “To make the actor liable for a battery under the rule stated in § 13, the harmful bodily contact must be caused by an act done by the person whose liability is in question.” RESTATEMENT (FIRST) OF TORTS (1934) at § 14.

<sup>228</sup> *Knight v. Jewett*, 3 Cal. 4th 296 (1992).

<sup>229</sup> *Id.* at 323.

<sup>230</sup> *Id.* at 301.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 324. Note that the dissenting opinion argued that summary judgment should have been denied on the basis that genuine issues of material fact existed with regard to whether the plaintiff “knew and appreciated the risks she faced or that her injury resulted from a risk inherent in the game.” *Id.* at 325 (Kenard, J., dissenting).

<sup>233</sup> *Id.* at 318.

clearly not an interpersonal gladiator sport.<sup>234</sup> Is it unpredictability? One jurisdiction has held that inherent risks of being hit occur for sports involving projectiles.<sup>235</sup> At least one other jurisdiction interpreting *Knight* has summarized its holding as applicable to both contact and non-contact sports: “While the genteel game of golf can hardly be described as a ‘competitive contact sport,’ we believe the reckless and intentional standard is every bit as appropriate to conduct on the links as it is to conduct on the polo field.”<sup>236</sup>

Also, the conduct assessed in *Knight* was arguably intentional or at least reckless, even if the court based its holding on a no duty of care for ordinary conduct standard in an undefined category of sports activities. The plaintiff in the touch football game argued that, before the injury occurred, she had warned the defendant to calm down, although no rules were ever agreed upon by the group of friends.<sup>237</sup> Instead, in 1992, the *Knight* court defers to sporting bodies to internally discipline misconduct, suggesting that litigation does not provide the proper remedy for dangerous conduct in sports:

The cases have recognized that, in such a sport, even when a participant’s conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.<sup>238</sup>

However, this argument for internal and consistent regulation does little to protect players in the informal touch football game the court addressed in the *Knight* decision.

In 1999, the Michigan Supreme Court in *Ritchie-Gamester v. City of Berkley* asserted that it followed the majority approach of *Knight* and other state jurisdictions and would not find a duty of care for ordinary risks in sports, but would find a duty of care and a breach of that duty for reckless and intentional sports-related injury.<sup>239</sup> However, in contrast to the reasoning in *Knight*, the court in its majority and concurring opinions limited its holding by acknowledging a respect for the rules and regulations of the sport that ensured player safety.

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<sup>234</sup> See *id.* at 316.

<sup>235</sup> See *Allen v. Dover Co-Recreational Softball League*, 148 N.H. 407 (2002) (holding that there was no duty of care to avoid throwing an errant softball in a recreational game in which another player was hit in the head).

<sup>236</sup> See *Ritchie-Gamester v. City of Berkley*, 461 Mich. 73, 88 (1999) (examining liability for injuries caused by one ice skater injuring another).

<sup>237</sup> See *Knight*, 3 Cal. 4th at 301.

<sup>238</sup> *Id.* at 318 (emphasis in original).

<sup>239</sup> *Ritchie-Gamester* at 81-83. “We believe that the line of liability for recreational activities should be drawn at recklessness. Recklessness is a term with a recognized legal meaning and, more importantly, is a term susceptible of a common-sense understanding and application by judges, attorneys, and jurors alike in the myriad recreational activities that might become the backdrop of litigation. Just as important, our standard more nearly comports with the common-sense understanding that participants in these activities bring to them.” *Id.* at 94-95.



The act of stepping onto the field of play may be described as “consent to the inherent risks of the activity,” or a participant's knowledge of the rules of a game may be described as “notice” sufficient to discharge the other participants' duty of care. Similarly, participants' mutual agreement to play a game may be described as an “implied contract” between all the participants, or a voluntary participant could be described as “assuming the risks” inherent in the sport. No matter what terms are used, the basic premise is the same: When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity.<sup>240</sup>

The concurring opinion in *Ritchie-Gamester* most clearly suggests that players only assume the ordinary risks of injury from activities that comply with the rules of the sport. That is, players who violate the rules of the game, thereby causing injury to another, should be considered liable under a recklessness standard. According to Justice Brickley, “[i]ndeed, it would likely be a great surprise to the millions of participants in Michigan's recreational sports and activities that, by participating, they were legally consenting to their coparticipants' breach of the safety rules of those activities.”<sup>241</sup>

As recently as 2010, the Iowa Supreme Court expressed sympathy for a more generous contact sports “no duty” standard, even if the rules of the sport were violated:

[T]he violation of a sport's rules creates a risk of injury to participants that would not necessarily exist without the infraction, such as when players run into punters in football, midfielders are high-sticked in lacrosse, basketball players are fouled, batters are hit by pitched balls in baseball, and hockey players are tripped. Yet, such contact is nevertheless inherent in each game because no participant can play the game error free. Thus, players accept risks of harm inherent in a sport both derived from activities that are executed as contemplated by the sport and activities that are improperly executed.<sup>242</sup>

However, the Iowa Supreme Court failed to distinguish between sporting errors caused by intentional or reckless conduct and errors caused by negligent conduct.

Since these decisions, other courts, such as the Indiana Supreme Court in *Pfenning v. Lineman*, explicitly declined to uphold a no duty of care rule for sports-related injury claims based in negligence.<sup>243</sup> In 2011, the court in *Pfenning* sought a compromise, permitting a lesser duty of care for ordinary sports activities to ensure continued encouragement of physical activity, but with consideration of reasonableness and the possibility of finding a breach of duty of care:

But in cases involving sports injuries, and in such cases only, we conclude that a *limited new rule should apply* acknowledging that reasonableness

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<sup>240</sup> *Id.* at 96-97 (1999) (Brickley, J., concurring).

<sup>241</sup> *Id.* at 105 (Brickley, J., concurring).

<sup>242</sup> *Feld v. Borkowski*, 790 N.W. 2d 72, 77 (Iowa 2010).

<sup>243</sup> *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011) (providing an overview of jurisdictional distinctions in whether or not a duty of care is upheld for recreational sports).

may be found by the court as a matter of law. As noted above, the sports participant engages in physical activity that is often inexact and imprecise and done in close proximity to others, thus creating an enhanced possibility of injury to others.<sup>244</sup>

The Indiana Supreme Court specifically held that “intentional or reckless infliction of injury may be found to be a breach of duty.”<sup>245</sup> However, keep in mind that even at the time of *Knigh*t in the 1990s, some jurisdictions were contemplating the application of liability for negligence in the sports context.<sup>246</sup> That is, recent attention to medical advances in sports safety, particularly with respect to concussion risks, has not been the sole influence on the courts in finding liability for unnecessary roughness.

Most recently, in *Green v. Pro Football, Inc.*, the federal District Court in Maryland held that New York Giants defensive linebacker, Barrett Green, may have had a lawful claim for intentional injury against Pro Football, Inc., the owner of the Washington Redskins.<sup>247</sup> Allegedly, Washington Redskins player Robert Royal was encouraged by team managers to injure Green, a strong defensive player.<sup>248</sup> The claim alleged that during play in 2004, Royal lowered his helmet and dove straight for Green’s knee, which was known to be slightly injured, immediately disabling him. “Although Green underwent surgery when the season ended, he never recovered his form and his football career was effectively over.”<sup>249</sup> Royal was sued in 2013 for battery and negligence, while Pro Football, Inc. was sued under theories of vicarious liability and negligent supervision.<sup>250</sup> The district court held that the fraudulent concealment exception to the statute of limitations allowed the claims related to the bounty program to proceed:

The discovery that Royal's hit was conceivably legally actionable was first raised by outside events, i.e., by the news articles disclosing the alleged bounty program. In an injury case involving professional football players in the course of play, such as purportedly occurred here, given that strong,

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<sup>244</sup> *Id.* at 403 (emphasis added).

<sup>245</sup> *Id.* at 404 (affirming summary judgment on behalf of the defendant golfer who hit the ball injuring plaintiff, a minor spectator, but dismissing summary judgment with respect to the club which held the golfing event and the estate of the plaintiff’s grandfather, who had brought the girl to the event and supervised her care).

<sup>246</sup> See, e.g., *Estes v. Tripson*, 188 Ariz. 93, 932 P.2d 1364 (1997). “There is no evidence that Tripson did anything as a baserunner to increase or exacerbate the inherent risks that Estes faced as a catcher in a softball game. As a baserunner intent on scoring, Tripson simply did not act negligently-did not *breach* a duty of reasonable care under the circumstances-in failing to perceive or make minute adjustments in his course that might have avoided contact with a catcher attempting to tag him out. To hold otherwise would unreasonably chill participation in recreational sports.” *Id.* at 96, 932 P.2d at 1367.

<sup>247</sup> *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714, 728 (D. Ct. (Md.) 2014). Note that the District Court dismissed this case on October 29, 2015, following a settlement agreement in Case 8:13CV01961.

<sup>248</sup> *Id.* at 719.

<sup>249</sup> *Id.* at 718-19.

<sup>250</sup> *Id.* at 719.

even violent physical impact is part and parcel of the game, it would not be immediately apparent that a player's "dignitary interest" had been invaded. A number of nonliability hypotheses could explain the hit, such as the reasonable belief that Royal was telling the truth following the game that his hit was unintentional, as well as Green's own Coach's reassurance that the hit was unintentional.<sup>251</sup>

However, the court also held that the statute of limitations barred Green's claims against Royal for pure intentional battery or negligence, because all of the elements were known to the plaintiff when the injury occurred in 2004.<sup>252</sup>

Although worthy of examination, it is not yet clear in the sports context whether a trend is emerging to eliminate the no duty or minimal duty of care in contact sports, or at least to more readily find a breach of duty of care for reckless or intentional injury. Subsequent to *Knight's* deferential approach to rough play in sports regardless of rule violations, the California courts refused to extend the *Knight* holding.<sup>253</sup> Yet other jurisdictions continue to assert a no duty of care rule for ordinary risks in contact sports.<sup>254</sup> The current era of better public health research and understanding of serious risks in sports, however, should influence courts and legislatures to consider more uniformity in encouraging respect for the safety rules of the game. As will be discussed in Part IV, public health policy should discourage strategic use of the intentional foul, by permitting a finding of liability for more cases of reckless and intentional bad sportsmanship causing injury.

### C. The Criminal and Civil Liability of Minor Athletes in Gladiator Sports

Children and adolescents may or may not bear heightened risks of injury from concussion due to their developmental stages.<sup>255</sup> However, their liability when causing injury to each other through overly aggressive play is likely to be more limited than it would be for adults.

In criminal cases, the age of criminal responsibility would restrict the reach of the criminal justice system, for at least the youngest players. Moreover, the debate regarding legal approaches to violent sports is occurring at a time when lawmakers are acknowledging new research on adolescent brain development and the subsequent need to raise the minimum age of criminal responsibility. By 2016, all states, except North Carolina and New York, would prosecute those under the age of 18 as minors,

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<sup>251</sup> *Id.* at 724.

<sup>252</sup> *Id.* at 725.

<sup>253</sup> See, e.g., *Eriksson v. Nunnik*, 191 Cal. App. 4th 826 (2011) (distinguishing, in a wrongful death case, equestrian training from the contact sports addressed by *Knight* in finding a duty of care related to the dangers of horse behavior). "But here we are dealing not with a sports participant, but with an instructor who is training a student how to become a participant". *Id.* at 840. Cf. *Ritchie-Gamester v. City of Berkley*, 461 Mich. 73, 81-83 (1999) (asserting in a state comparative analysis that the majority standard provides an implied assumption of risk for ordinary risks in sports, but not for reckless or intentional risks).

<sup>254</sup> See, e.g., *Feld v. Borkowski*, 790 N.W. 2d 72 (Iowa 2010) (applying the contact sports exception to foreclose a finding of a duty of care for otherwise negligent conduct in a high school intramural softball game, in which a thrown bat hit another player in the head).

<sup>255</sup> See *supra* Part II(B)(1).

rather than as adults.<sup>256</sup> Even so, the juvenile justice system's approach to charges of battery or aggravated battery for a sports-related injury would more likely differ in sentencing than in a finding of criminal liability or application of the consent defense.

In civil cases, minors or their parents continue to be potentially subject to liability for sports-related torts. In 1959, the Louisiana Court of Appeals held that a ten-year-old boy, who swung a bat backwards in an informal backyard game, hitting a four-year-old girl in the face, was liable in negligence for her injuries because he should have taken more precautions to look out for the young girl.<sup>257</sup> With an approach still common today, the court asserted: "[W]e think it is clearly established, under our jurisprudence, that a parent is liable for damages caused by the act of his minor child in using a dangerous instrumentality where surrounding circumstances indicate that damage may result; or in using any instrument in a negligent or careless manner, even if it be not inherently dangerous."<sup>258</sup>

Soon after, the same court followed the Restatement of Torts in also highlighting the influence of immaturity levels on the duty of care: "A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is rather to be judged by the standard of behavior to be expected from a child of like age, intelligence and experience."<sup>259</sup> In this case, a bat flying out of the hands of the defendant batter in a youth baseball game, injuring another player, was found not to be an act of negligence. According to the Louisiana Court of Appeals, the players assumed the risk of this type of injury: "[T]he injured minor, an alert, intelligent, young athlete, had previously played baseball many times, had played 'Little League Baseball' and was thoroughly familiar with the danger of being struck by flying balls or bats."<sup>260</sup> Therefore, while some consideration is given to

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<sup>256</sup> See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *State v. Riley*, 110 A.3d 1205, 1214, 1218 (Conn. 2015) (noting the state split in authority with some but not all jurisdictions reforming sentencing procedures to require consideration of neurologically developmental youth-related mitigation factors pursuant to *Miller*). See also RAISE THE AGE NY, *Raise the Age Campaign Fact Sheet*, <http://raisetheageny.com/get-the-facts> (last accessed 8/20/2016) ("New York is one of only two states in the country that have failed to recognize what research and science have confirmed – adolescents are children."). See also CRIMINAL JUSTICE CENTER, SAM HOUSTON STATE UNIVERSITY, *Age and Criminal Responsibility*, 18 (66) CRIME & JUST. INT'L. (Oct. 2002) ("In the early 1990s, 44 states and the District of Columbia changed their transfer laws so that it was easier to transfer more and younger juvenile offenders into the adult system."), at <http://www.cjimagazine.com/archives/cji9e43.html?id=25>. By 1997, 22 states transferred juveniles to adult court per judicial discretion without a minimum age, while in other states the average minimum age of criminal responsibility was 14 years old. *Juvenile Justice, State Law*, FRONTLINE, WSIU, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/states.html>. By 2009, 33 states had no minimum age of criminal responsibility, although in most a capacity test would apply; while those with a minimum age ranged from age 7 (North Carolina) to age 10 (Wisconsin). CHILD RIGHTS INT'L NETWORK, *Minimum Ages of Criminal Responsibility in the Americas*, <https://www.crin.org/en/home/ages/Americas>.

<sup>257</sup> *Polk v. Trinity Universal Ins. Co. v. Dallas, Tex.*, 115 So.2d 399, 401 (La. Ct. App. 1959).

<sup>258</sup> *Id.*

<sup>259</sup> *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So.2d 831, 833 (La. Ct. App. 1961) (quoting section 283, cmt. (e) of the Restatement of Torts).

<sup>260</sup> *Id.* at 834. See also Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 VILL. SPORTS & ENT. L.J. 1 (2010) (discussing the wide

reducing legal responsibility based on competency and immaturity, the courts have also noted that minors are some of our most skilled athletes, more than capable of understanding fair play and the safety rules of the game.

#### IV. SAVING THE GLADIATOR: RESTRICTING THE INTENTIONAL FOUL

If the secondary prevention methods put forth by the wave of anti-concussion state legislation cannot prevent injury from occurring in the first place, as discussed in Part II(C), it is crucial that policymakers consider whether primary prevention is possible. More stringent legal restrictions on dangerous rule violations in the form of flagrant fouls and intentional fouls should be in every policy discussion related to traumatic brain injury in gladiator sports. According to some in sports medicine, with a focus on soccer:

The primary means in which rates of TBI incidence in sports will reduce is through rule changes to minimize head impacts moving forward. Penalizing, fining, or suspending athletes who intentionally impact another player's head are means to discourage brain trauma. No longer allowing football (soccer) players to head the ball removes a large risk factor as it has been shown that heading accounts for around 50% of brain injuries in sport.<sup>261</sup>

Therefore, the rules of the game may be changed by sports bodies to reflect current medical understandings of risk. State regulatory reform may impact prevention and training measures. But statutory and judicial reform may also significantly influence sports safety by opening the door to legal intervention to enforce such rules. As will be discussed below, a combined policy approach may help ensure that the intentional foul in gladiator sports no longer constitutes an unpredictable and dangerous practice without legal redress.

##### A. Athletic Rules and Judicial Reform Sanctioning the Intentional Foul

Examining the rules of gladiator sports and their specific sanctions and disciplinary measures for player misconduct is informative when assessing the efficacy of the common law reliance on game rules for the criminal consent defense to assault, as well as theories of consent to civil battery.<sup>262</sup> Does a focus on points and winning for flagrantly intentional, violent and unruly conduct adequately reflect the official's duty to maintain the safety and wellbeing of players? The recent changes to NFL rules provide monetary penalties and game suspensions for deliberate hits to the head.<sup>263</sup>

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prevalence of youth participation in American sports and its influence on the attitude and perspective of the judiciary who often value athletic competition).

<sup>261</sup> Christopher S. Sahler & Brian D. Greenwald, *Traumatic Brain Injury in Sports: A Review*, REHAB. RES. & PRAC. (July 9, 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3400421/>.

<sup>262</sup> See *supra* Part III.

<sup>263</sup> K. Adam Pretty, Note, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2369 (2014) (citing N.F.L. Rules, Rule 12, § 1, art. 9(c)). "The primary means in which rates of TBI incidence in sports will reduce is through rule changes to minimize head impacts moving forward. Penalizing, fining, or suspending athletes who intentionally impact another player's head are means to

In MMA, the survivor rule in competition bouts does not allow the loser of a bout to move forward if he or she caused the winner to become injured through an intentional foul.<sup>264</sup> However, historically few “major bans” have occurred for rule-breaking violence during the game.<sup>265</sup> Below is a table of various sanctions for the most dangerous intentional fouls in gladiator sports in the United States. Certainly other sanctions are available as necessary, but a common pattern is exhibited in which the sanction is focused on removing a strategic advantage. That is, the remedy addresses the players’ respective ability to win the game.

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discourage brain trauma. No longer allowing football (soccer) players to head the ball. . . .” Sahler, *supra* note 261.

<sup>264</sup> See Marc Raimondi, *Bellator: Dynamite tournament loser would advance if winner gets injured*, MMA FIGHTING (Sept. 2, 2015, 10:00AM), <http://www.mmfighting.com/2015/9/2/9243043/bellator-dynamite-tournament-loser-would-advance-if-winner-gets>. “If a fighter is injured due to an intentional foul, the perpetrator will not advance. Instead, the winner of the reserve match will compete in the finals.” *Id.*

<sup>265</sup> See Matthew Leach, *Major Bans Across Sports, History*, MLB.COM (Aug. 5, 2013), <http://m.mlb.com/news/article/55965130/>. Note that Billy Coult is claimed to be the only player banned for life from the NHL, after he attacked two officials during the 1927 Stanley Cup Finals game. *Id.*

RULE SANCTIONS FOR INTENTIONAL FOULS  
IN AMERICAN GLADIATOR SPORTS

SPORT	INTENTIONAL FOUL	POTENTIAL SANCTIONS
American Boxing Association <sup>266</sup>	<ul style="list-style-type: none"> <li>• If the intentional foul is severe enough to terminate the bout</li> <li>• If the intentional foul results in an injury that stops the bout in a later round</li> </ul>	<ul style="list-style-type: none"> <li>• The fouling boxer shall lose by disqualification</li> <li>• The injured boxer may win on a technical decision if had more points at the time the injury stops the bout</li> </ul>
Mixed Martial Arts (MMA)/ Ultimate Fighting Championship (UFC) <sup>267</sup>	<ul style="list-style-type: none"> <li>• Kicking the head of a player on the ground</li> <li>• Attacking opponent after the bell has sounded</li> <li>• Clawing or pinching</li> <li>• Hair pulling</li> <li>• Groin attacks</li> </ul>	<ul style="list-style-type: none"> <li>• Points are deducted from the fouling player's scorecard</li> <li>• If the foul was committed from a bottom player, the contest will continue if there is no injury</li> <li>• Possible termination of fouling player from the match</li> </ul>
American Football <sup>268</sup>	<ul style="list-style-type: none"> <li>• Illegal use of hands, arms, or body by the offense</li> <li>• Illegal holding by the defense</li> <li>• Striking, kicking, kneeling, or unnecessary roughness</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of 10 yards</li> <li>• Loss of 5 yards/ automatic first down</li> <li>• Loss of 15 yards/ possible disqualification</li> </ul>
National Basketball Association (NBA) <sup>269</sup>	<ul style="list-style-type: none"> <li>• Profanity, taunting, deliberately throwing an elbow, physically taunting an official</li> <li>• Fighting with other players</li> </ul>	<ul style="list-style-type: none"> <li>• Technical Foul, ball awarded to the team when the technical foul was committed/Free throws</li> <li>• Ejection from game</li> </ul>
American Soccer <sup>270</sup>	<ul style="list-style-type: none"> <li>• Serious foul play, violent conduct, attempting to kick another player</li> </ul>	<ul style="list-style-type: none"> <li>• Fouling player gets a red card/ ejected from the game/ team must play a player short for the remainder of the game</li> </ul>

<sup>266</sup> AMERICAN BOXING ASSOCIATION, *Unified Rules for Boxing*, ASS'N OF BOXING COMMISSIONS, <http://www.abcboxing.com/unified-rules/> (amended July 29, 2014) (last visited Aug. 20, 2016).

<sup>267</sup> *Unified Rules and other MMA Regulations*, RULES AND REGULATIONS, <http://www.ufc.com/discover/sport/rules-and-regulations#15> (last visited August 20, 2016). See also 2017 *Unified Rules of MMA "FOULS"*, ASS'N OF BOXING COMMISSIONS, <http://www.abcboxing.com/unified-rules/> (amended August 2016) (last visited Aug. 20, 2016).

<sup>268</sup> *Official Player Rules of the National Football League*, NATIONAL FOOTBALL LEAGUE (2016), <http://operations.nfl.com/the-rules/2016-nfl-rulebook/> (last visited August 20, 2016) (Rule 12, Player Conduct). Note that in 2016, an amendment to Rule 12-2-3 made all chop blocks automatic fouls.

<sup>269</sup> NATIONAL BASKETBALL ASSOCIATION, *Rule No. 12 - Fouls and Penalties*, [http://www.nba.com/analysis/rules\\_12.html?nav=ArticleList](http://www.nba.com/analysis/rules_12.html?nav=ArticleList) (last visited Aug. 20, 2016).

<sup>270</sup> U.S. SOCCER, *2016-2017 Laws of the Game*, <http://www.ussoccer.com/referees/laws-of-the-game> (last visited Aug. 20, 2016) (Law 12 – Fouls and Misconduct).

If the rules of the game are not sufficiently clear and the speed of the game makes it difficult to determine fault, then players will have difficulty providing adequate informed consent if they are not sure what is deemed safe conduct. In 1977, in *Hackbart v. Cincinnati Bengals, Inc.*, the United States District Court of Colorado found no liability for a professional football player's deliberate blow with his right forearm to the back of the opponent plaintiff's head, when the plaintiff was kneeling on the ground and the play was complete.<sup>271</sup> The court was persuaded that the plaintiff had assumed the risk, knowing how the game had come to be played: "that the level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant."<sup>272</sup>

The Tenth Circuit in *Hackbart* disagreed, reversing and remanding the lower court ruling.<sup>273</sup> The Circuit Court relied on the fact that the player's conduct violated the rules of football and remanded with instructions to the court to base its decision on considerations of liability due to recklessness, rather than social policy that "the game was so violent and unlawful that valid lines could not be drawn . . . ."<sup>274</sup> In a clear holding, applying civil liability to intentional and reckless conduct in the most violent gladiator sports, the Tenth Circuit supported the need to rely on the safety rules of the game:

Contrary to the position of the court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it.

Indeed, the evidence shows that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that: All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands. . . . Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another. *Therefore, the notion is not correct that all reason has been abandoned, whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation.*<sup>275</sup>

*Hackbart* continues to be cited regularly, including most recently by the United States District Court of Maryland in *Green v. Pro Football, Inc.*<sup>276</sup> The rules of the game matter not only to ensure safety through uniformity and restrictive play, but to

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<sup>271</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352 (D. Colo. 1977).

<sup>272</sup> *Id.* at 356.

<sup>273</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

<sup>274</sup> *Id.* at 526.

<sup>275</sup> *Id.* at 520-21 (emphasis added).

<sup>276</sup> *See supra* note 247.



maximize the benefits of the sport, including the potential positive bonding and character building touted by so many sports enthusiasts.<sup>277</sup>

Players cannot learn self-control or how to form mutually respectful and supportive relationships from athletic participation if they do not share a common understanding of the expectations of fair and safe play. For example, in *State v. Shelley*, in a particularly rough pick-up college basketball game at the University of Washington, the defendant player was convicted of assault, but asserted he had felt so threatened by another player's deliberate rule violations that he punched the aggressive player in self-defense.<sup>278</sup> The defendant testified at trial that "Gonzalez [the victim witness] continually beat him up during the game by fouling him hard."<sup>279</sup>

In conflict management theory, methods without boundaries such as "explaining, persuading, and compromising, often make moral conflicts worse . . . because the parties lack a reasonable, common basis for settling their disagreements."<sup>280</sup> As with play generally in childhood: "In their play, children can experience strong emotions such as anger, fear or disgust in relative safety because the frame is playful rather than 'real'; in order for the frame to hold and the game to continue, the expression of these emotions needs to be understood as playful by all players."<sup>281</sup> Clear, enforced rules are essential to maintaining both fair play and safety in aggressive human contact, particularly in more dangerous gladiator sports.

Some sports lend themselves to easier rule reform than others. For example, checking can arguably be eliminated from the sport of hockey, and the goals of the game and method of scoring would continue to remain as is.<sup>282</sup> However, American football would change fundamentally if all tackling and blocking were prohibited, and obviously boxing or kickboxing would be eliminated entirely if physical blows were disallowed.<sup>283</sup> Nevertheless compromises have already been made, with rule changes ensuring greater protection of quarterbacks in the NFL from hits from behind, hits in the head, and late tackles.<sup>284</sup> By 2013, the NFL amended its rules to require

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<sup>277</sup> See *supra* Part II(D).

<sup>278</sup> *State v. Shelley*, 85 Wash. App. 24, 929 P.2d 489 (1997).

<sup>279</sup> *Id.* at 27, 929 P.2d 490.

<sup>280</sup> See DAVID CHURCHMAN, *WHY WE FIGHT: THE ORIGINS, NATURE, AND MANAGEMENT OF HUMAN CONFLICT* 86 (University Press of America 2013).

<sup>281</sup> Stuart Lester & Wendy Russell, *Utopian vision of childhood and play in English social policy*, in *YOUTH SPORT, PHYSICAL ACTIVITY AND PLAY* 40, 47 (Andrew Parker & Don Vinson eds., Routledge 2013).

<sup>282</sup> See KEN REED, *HOW WE CAN SAVE SPORTS: A GAME PLAN* 41-42 (Rowman & Littlefield 2015).

<sup>283</sup> See, e.g., Graham Houston, *Death in the ring has long been a part of boxing*, ESPN (Nov. 13, 2007) ("To remove all risk would be to turn boxing into something quite different than the sport as we know it -- and I do not think anyone would want that, least of all the boxers themselves.").

<sup>284</sup> MICHAEL SOKOLOVE, *WARRIOR GIRLS: PROTECTING OUR DAUGHTERS AGAINST THE INJURY EPIDEMIC IN WOMEN'S SPORTS* 75 (Simon & Schuster 2008).

independent neurologists to be available on the sidelines to assess for head trauma among players.<sup>285</sup>

With full disclosure of the risks, the essential nature of gladiator sports should be preserved as long as adult athletes wish to continue to play and compete by the rules. However, from both a medical and legal perspective, youth sports require much greater care in enforcing rules, reforming rules, and providing quality medical care to prevent serious long term injury in minors who lack the capacity for meaningful consent to the risks of play. Addressing reform through the public school system is not enough. For example, “the vast majority of non-school-related youth sports leagues, including football, conduct their events without any trainers or trained medical personnel in attendance.”<sup>286</sup>

Also, considerations of negligent supervision remain: “among which dangers, we think, should fairly be included the danger incurred from playing games inherently dangerous for the age-group involved, or likely to become dangerous if allowed to be engaged in without supervision.”<sup>287</sup> For example, while school districts have discretion to promulgate and enforce athletic and recreational rules, a duty is imposed by law on the school district to take certain precautions to protect students from reasonably anticipated dangers, at least while they are in the custody of the public school personnel.<sup>288</sup>

As explained by the Illinois Court of Appeals, in holding a forward in a school soccer game liable for kicking a goalie in the head after the goalie had already caught the ball:

One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control.

Individual sports are advanced and competition enhanced by a comprehensive set of rules. Some rules secure the better playing of the game as a test of skill. Other rules are primarily designed to protect participants from serious injury. [sic]

For these reasons, this court believes that when athletes are engaged in an athletic competition, all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, *a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule.* . . . The defendant contends he is immune from

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<sup>285</sup> K. Adam Pretty, *Note, Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2369 (2014). See also New NFL rules designed to limit head injuries, [www.nfl.com](http://www.nfl.com), Aug. 6, 2010 (5:33PM, updated July 26, 2012, 8:40PM), at <http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries>.

<sup>286</sup> Reed, *supra* note 282, at 43.

<sup>287</sup> *Briscoe v. School District No. 123, Grays Harbor Co.*, 32 Wash.2d 353, 362 (Wash. 1949) (applying the RESTATEMENT (FIRST) OF TORTS to allegations of injury resulting from a game of “keep away” with a football during recess on a school ground playing field).

<sup>288</sup> *Id.*

tort action for any injury to another player that happens during the course of a game, to which theory we do not subscribe.<sup>289</sup>

Thus, those jurisdictions that continue to grant an overly broad consent defense to criminal and civil assault and battery in contact sports should instead follow the more restrictive jurisdictions that hold players accountable for injury caused by intentional or reckless conduct outside the scope of the rules. As sports bodies continue to refine their rules in the interests of safety, judicial interpretation of reasonable and expected conduct in charges and claims of battery and vicarious liability would naturally shift as well. While this approach asks courts to wait for sports bodies to change their own rules in order to expand liability, it also respects an adult athlete's autonomous choice to participate in more dangerous regulated gladiator sports.

*B. Statutory Reform: The Impact of Public Health Police Power on the Intentional Foul*

If sports bodies do not adequately create or enforce rules that protect players from an unreasonable risk of intentional serious harm or injury, state legislatures could act, if only to slightly open the gates of litigation and encourage the sports bodies to step up. For example, statutory reform could impose restrictions on the criminal consent defense to assault and the consent privilege in civil actions. A number of states have already done so. For example, in Texas, consent as a defense to certain criminal assault offenses is restricted as follows:<sup>290</sup>

(a) The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Deadly Conduct) if:

- (1) the conduct did not threaten or inflict serious bodily injury; or
- (2) the victim knew the conduct was a risk of:
  - (A) his occupation;
  - (B) recognized medical treatment; or
  - (C) a scientific experiment conducted by recognized methods.

(b) The defense to prosecution provided by Subsection (a) is not available to a defendant who commits an offense described by Subsection (a) as a condition of the defendant's or the victim's initiation or continued membership in a criminal street gang, as defined by Section 71.01.

Here, there is no stated contact sports exception, and it is therefore clear that reckless or intentional serious bodily injury is prohibited under the doctrine *expressio unius est exclusio alterius*.

In contrast, when states, such as Missouri, use vague language to permit a broader contact sports exception, legal enforcement of public health informed sports safety rules is more challenging. Missouri Revised Statutes section 565.080(1) provides:

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<sup>289</sup> Nabozny v. Barnhill, 31 Ill. App. 3d 212, 215, 334 N.E.2d 258, 260-61 (Ill. Ct. App. 1975) (providing the first written appellate court opinion in the United States involving player on player negligence in soccer).

<sup>290</sup> See, e.g., TEX. PENAL CODE ANN. § 22.06 (West 2007) (Consent as Defense to Assaultive Conduct).

When conduct is charged to constitute an offense because it causes or threatens physical injury, consent to that conduct or to the infliction of the injury is a defense only if:

- (1) The physical injury consented to or threatened by the conduct is not serious physical injury; or
- (2) The conduct and the harm are reasonably foreseeable hazards of
  - (a) The victim's occupation or profession; or
  - (b) *Joint participation in a lawful athletic contest or competitive sport;*

...<sup>291</sup>

At least one court has argued that the broad language of reasonable foreseeability permits the court to find liability for conduct even within the rules of the sport, but this is not a common interpretation.<sup>292</sup> As has been shown throughout this discussion, most courts in jurisdictions without statutory restrictions on the consent defense in contact sports earnestly seek to avoid finding liability.

The authority to enact legislation restricting the consent defense lies in the state's police power,<sup>293</sup> interpreted by the courts with considerable deference. As put forth by the Illinois Supreme Court:

And while, as we have noted, such legislative action is generally subject to judicial review to determine whether it is related to and reasonably necessary and suitable for the protection of the public health, safety, welfare or morals, courts will not disturb a police regulation where there is room for a difference of opinion, but in such case the legislative judgment will prevail.<sup>294</sup>

However, the exercise of police power requires scrutiny of individual interests in autonomy and choice.<sup>295</sup>

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<sup>291</sup> MO. REV. STAT. ANN. § 565.080 (2015) (emphasis added). For comparable statutory language, see Tennessee Code Annotated section 39-13-104 (2015), Hawai'i Revised Statutes section 702-234 (2015), and Alabama Criminal Code section 13A-2-7(b)(2) (2015). These statutes were enacted in the mid-1970s, without subsequent statutory reform, mirroring the language of Model Penal Code section 2.11(2). *See also* Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 174, note 55 (2007) (asserting that the Model Penal Code approach to defining the consent to assault defense does not give much practical guidance).

<sup>292</sup> *See generally* State v. Shelley, 85 Wash. App. 24, 929 P.2d 489 (Wash. Ct. App. 1997) (upholding the assault conviction of a basketball player who punched another player during a college pick-up game, breaking his jaw in three places, because it was not reasonably foreseeable).

<sup>293</sup> *See generally supra* Part II(B)(2). *See also* Kraus v. City of Cleveland, 163 Ohio St. 559, 561, 127 N.E.2d 609, 610 (Ohio 1955) ("The personal liberties granted by the Constitution, although broad and on the whole inviolate, are nevertheless subject to certain qualifications and restraints and are generally held to be subject to a valid exercise of the police power.").

<sup>294</sup> Schuringa v. City of Chicago, 30 Ill.2d 504, 515, 198 N.E.2d 326, 332 (Ill. 1964) (affirming the state's right to fluoridate the public water supply in the interests of dental health).

<sup>295</sup> *See* Chicago, Burlington & Quincy Rd. Co. v. McGuire, 219 U.S. 549, 567, 31 S. Ct. 259 (1911) ("Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.").

The policy approach best suited to addressing humanity's natural physical aggression, including its natural ability to engage in self-restraint, is to first respect personal autonomy among those with the capacity to consent to assault. Does a taekwon do student with head gear and a mouth guard have the right to choose to be hit in the head by a roundhouse kick during practice or a competitive bout if the rules allow it? For competent adults providing informed consent to participate, the answer should be yes. For minors or more vulnerable adults, added statutory restrictions on the consent defense to assault is clearly prudent as a matter of public policy. New Hampshire provides a useful example in its consent defense statute: "Consent [to conduct constituting a criminal offense] is no defense if it is given by a person legally incompetent to authorize the conduct or by one who, by reason of immaturity, insanity, intoxication or use of drugs is unable and known by the actor to be unable to exercise a reasonable judgment as to the harm involved."<sup>296</sup> As in the realm of concussion prevention for accidental injury, statutory reform of intentional injury in gladiator sports could begin with the protection of minors.

For the majority of persons engaged in sports as adults, the autonomous individual's choice to face a degree of personal risk in a structured but dangerous sports environment, one that does not create a breach of the peace and may provide physical, mental, and social benefits, is a choice protected by law. Many have asserted that addressing the law's tolerance of structured violence in any number of forms "begins with the high value placed on individual liberty and autonomy, and then examines reasons why particular consensual activities should be criminalized by way of exception to the general principle."<sup>297</sup> Nevertheless, informed consent does require sufficient clarity in understanding the parameters of the risk. This transparency is one of the benefits of rule-bound sports, but only if its rule based structure is respected and enforced by players, managers, sports bodies, and courts of law. In assessing liability for player on player sports injuries, the courts clearly should consistently embrace the purpose of the rules of the game to create safety and fairness.<sup>298</sup>

When a sports body or a group of informal players do not internally adopt or enforce adequate safety rules, and state legislation is silent, the courts are free to look the other way. For example, in New York in 1998, in a case involving a defendant who checked a hockey player after the whistle was blown, the District Court relied on common law to suggest that intentional fouls causing concussion were an inherent and ordinary risk of the sport:

The idea that a hockey player should be prosecuted runs afoul of the policy to encourage free and fierce competition in athletic events. The people

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<sup>296</sup> N.H. REV. STAT. ANN. § 626:6(III) (2015). Note that this statute also provides that consent is a defense to some injury, but not all: "When conduct constitutes an offense because it causes or threatens bodily harm, consent to the conduct is a defense if the bodily harm is not serious; or the harm is a reasonably foreseeable hazard of lawful activity." N.H. REV. STAT. ANN. § 626:6(II). See also COLO. REV. STAT. ANN. § 18-1-505(3) (excluding authority to assert the consent defense to assault to those who are either legally incompetent or manifestly unable to consent due to immaturity, mental disease or defect, or intoxication).

<sup>297</sup> Brian Bix, *Consent, Sado-masochism and the English common law*, 17 Q.L.R. 157 (1997) (quoting ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 320 (2d ed. 1995)) (emphasis added).

<sup>298</sup> See *supra* Part IV(A).

argued at the hearing that this was a non-checking hockey league. While the rules of the league may prohibit certain conduct, thereby reducing the potential injuries, nevertheless, the participant continues to assume the risk of a strenuous and competitive athletic endeavor. The normal conduct in a hockey game cannot be the standard for criminal activity under the Penal Law, nor can the Penal Law be imposed on a hockey game without running afoul of the policy of encouraging athletic competition.<sup>299</sup>

By ignoring a rule violation in contact sports, a court undermines the public health policy creating rules of safe play, instead encouraging what might constitute reckless or intentional harmful conduct. Also, lack of statutory guidance fosters inconsistent judicial approaches in cases requiring interpretation of liability for contact sports injuries. The Washington Court of Appeals appropriately emphasized the importance of recognizing the rules of the game or sport at issue when considering permitting a consent defense, even in gladiator sports such as “dodgeball, football, rugby, hockey, boxing, wrestling, ‘ultimate fighting,’ fencing, and ‘paint-ball.’”<sup>300</sup>

Finally, concerns regarding a floodgate of litigation with a more restrictive approach to the consent defense and the intentional foul are misplaced, for intentional misconduct is actionable only if serious harm or injury is caused by a reckless disregard for the sport’s safety rules. Numerous intentional fouls that do not cause injury would not, therefore, produce damages and would not be actionable.<sup>301</sup> More importantly, it is the state’s public health duty to act to protect its citizens from the dangers of unwarranted violent conduct.<sup>302</sup> If a sports body wishes to permit particular forms of checking in hockey, similar to boxing or MMA which permit certain blows to the head, then it should change the rules of the sport so that players expressly consent to the risks of this conduct, as long as it does not violate the longstanding common law limitation on the consent defense, prohibiting consent to serious bodily injury or death. If a player’s conduct is a violation of the rules of the sport, causing serious injury or death, then the courts should recognize the conduct’s recklessness and impose liability. Moreover, no rule or tradition of play would warrant legally permitting such a risk of serious bodily injury or death under the

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<sup>299</sup> *People v. Schacker*, 175 Misc. 2d 834, 836, 670 N.Y.S.2d 308, 310 (1998).

<sup>300</sup> *State v. Hiott*, 97 Wash. App. 825, 827, 987 P.2d 135, 136 (Wash. Ct. App. 1999) (holding that “[s]hooting BB guns at each other is not a generally accepted game or athletic contest; the activity has no generally accepted rules; and the activity is not characterized by the common use of protective devices or clothing.”).

<sup>301</sup> See Dan Feldman, *Lebron James scores through intentional foul, flexes* (video) (March 16, 2015, 11:37am, EDT), <http://probasketballtalk.nbcsports.com/2015/03/16/lebron-james-scores-through-intentional-foul-flexes-video/> (showing the ineffectiveness of grabbing basketball player LeBron James, who powered through the intentional foul to score without risk of physical harm; hence the flex).

<sup>302</sup> See Susan Dimock, *Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders*, 9 CRIM. L. & PHIL. 537 (2015). “The state claims a (near) monopoly on violence, and its claim is normatively justified only if it effectively protects its members from the need to resort to violence in self-protection. Should it leave persons who are known to pose a serious risk of inflicting grave bodily injury or death on others at liberty to act violently, it will have failed in its duty to protect its members from unjustified harm. The duty to govern includes the duty to prevent avoidable violence, . . .” *Id.* at 551.

common law. Modern public health policy, applying new medical understandings of risk, should support this long held common law tenet.

#### V. CONCLUSION

Most agree that child and adolescent contact sports should be restricted to prevent traumatic brain injury, because of the serious risks of injury from repetitive contact and because of the inability of minors to give lawful informed consent to such risks. However, with respect to adults with legal autonomy, gladiator sports and non-gladiator sports risking a greater degree of injury, from boxing to baseball to downhill skiing, should be legally permitted to continue to be enjoyed, bound by the medically informed safety rules of the public and private sports bodies involved.

Where enhanced legal intervention is required is with regard to intentional misconduct causing serious injury in all gladiator sports. The legislative and administrative bodies that have shown a willingness to focus on public health sports injury prevention measures should also focus on the need to tailor the current criminal consent defense and civil consent privilege to assault and battery. Courts should no longer hold that there is no duty of care in athletic or recreational sports and that the defense of consent to assault is consent to intentional or reckless conduct violating the safety rules of the sport. Specifically, sports safety legislation and judicial interpretation of civil and criminal sports-related assault cases should place greater value on the express rules of a sport, effectively curtailing the violent and strategic use of the intentional foul. With respect to player autonomy, if sports management drafts improved safety rules and insists that players must succeed within the bounds of the rules, players can then provide informed consent to reasonable contact, knowing they are better protected from intentional and reckless harm.

In an unsettled legal landscape, with courts reluctant to intervene or impose reasonable restrictions on the consent defense in gladiator sports, it is no surprise that unsportsmanlike conduct includes the deliberate injury of opposing players for profit. Medically informed public health approaches to contact sports would have a positive impact to curtail the worst of cases causing intentional harm, as long as the rules of the game are consistently upheld from prevention to litigation enforcement. For the protection of athletes, fair play, and the long valued tradition of gladiator sports, deliberate misconduct need no longer be an unspoken and acceptable strategy to win.