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JURIDIFICATION OF THE FOOTBALL FIELD: STRATEGIES FOR GIVING LAW THE ELBOW.

SIMON GARDINER & ALEXANDRA FELIX*

There is increasingly a view that the law should be involved more prominently in the regulation of sport.¹ The area of concern is wide-ranging, with issues such as performers’ contracts, restraint of trade, the control of drug abuse, and the rights of broadcasters, especially in the international global village. This juridification of an area that has traditionally been seen as essentially of a private nature raises issues concerning the legitimacy of legal involvement. In the context of the developing comodification of sport, this pressure for increased involvement of the law is not perhaps surprising.²

We do not deny the justification of legal involvement in some of these areas. However, the specific area upon which this article will focus is the on-the-field activities of sportsmen, an area in which we challenge the legitimacy of legal regulation. This discussion needs to be seen with the background of increasing concern of physical contact in many sports. In Britain, the two sports which have perhaps elicited the most publicity, and calls for the law to have a greater role, are association football and rugby football. The 1993 rugby union tour of the United Kingdom by the New Zealand ‘All Blacks’ led to concerns and criticisms of their tough and physical style of play.³ But it is football that has perhaps

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¹ This view is well expressed by The British Association for Sport and Law, when in their inaugural presidential address they take the view that the rule of law in sport is as essential for civilisation as the rule of law in society generally. Without it anarchy reigns. Without it in sport, chaos exists.

² The European Commission has estimated that sport accounts for two and a half per cent of world trade and annual sponsorship amounts to $5 billion. See Sport Runs with the Community, THE TIMES, July 13, 1993.

³ Will Carling, the English captain was quoted as saying: “[t]hey will be remembered mostly as a dirty side. Some of their play has been beyond the conventions we obey and they have damaged rugby’s image,” THE GUARDIAN, December 15, 1993. There is a general concern over the increase of injuries on the rugby union field, as evidenced by the injuries to England players Jonathan Callard and Lawrence Dallaglio on the recent tour of South Africa.

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There have been a number of recent incidents, especially the perception of an increased use of contact of elbows with opposing players. The clash between John Fashanu, then of Wimbledon, and Gary Mabbutt of Tottenham Hotspur which caused serious injury to Mabbutt led again to calls that the general law should be involved in controlling this type of activity rather than leaving it solely to the internal supervisory body, in this instance the English Football Association. The action by Paul Elliot for personal injuries against Dean Saunders transposed the sports field to the court room, complete with giant Subbuteo pitch. However, perhaps in comparison to some other sports in other countries, the levels of violence are comparatively low. Additionally, although it is outside the scope of this article, no discussion of the legal regulation of violence in sport can fail to allude to the paradoxical position in boxing where the very goal of the sport is to disable the opponent.

This article will critically evaluate the legitimate role of both the civil and criminal law in regulating and controlling activities of players. Although we will focus on football, we will endeavour to suggest an exemplar of how on-the-field physical contact can be best regulated without formal legal mechanisms. Much of the case law concerning liability for assaults in Britain focuses upon football and rugby, and a useful comparison can be made between them. They are both contact sports and inevitably involve physical force between individuals which the rules

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4. We will use football rather than soccer throughout our article, even though there are problems of distinguishing it from other forms of football, e.g., rugby and American. We believe that in Britain it is the correct social and cultural term.

5. There is a large amount of literature concerning the legal intervention in "violent" contact sports in North America. The games of American "gridiron" football has perhaps the most visible and serious example of on-the-field violence. It is estimated that each player suffers a serious injury each season. Ice hockey is seen as the most vicious professional sport with the use of sticks and fists to intimidate opposing players. Interestingly, the single most dangerous action in American sport is seen as the "beanball" in baseball, where a pitch is thrown intentionally at the batter's head, a delivery similar to the "beamer" in cricket. Perhaps a distinction can also be made between England and the other home countries in terms of degree of legal regulation. In Scotland there seem to be higher numbers of prosecutions than in England for sports assaults. For example, a shinty player was recently charged with assaulting an opposing player on the head with his stick. See The Guardian, July 19, 1993.

permit in certain defined ways. A distinction is that rugby can be seen as a heavy contact sport where the use of physical contact and force plays an integral role, such as scrums. In comparative terms, the contact in football is not so central.

We believe that it is important to deconstruct the way the term “violence” is used in current discourse. It is invariably used pejoratively to describe situations where the force is considered to be excessive and therefore in need of control by the law. The reality is that physical contact and force is an integral part of many sports and it needs to be carefully distinguished from situations where physical contact is viewed as excessive and undesirable.

We argue that the involvement of law with on-the-field physical contact should be generally resisted and should only intervene within very specific terms. There needs to be the development of non-legal mechanisms comprised of representative and appropriate parties that can be used to reconcile disputes that arise between players on the field. It seems that sport is fast becoming the latest battle ground or “turf war” for the involvement of lawyers. It will be argued that the involvement of the law and lawyers poses dangers for what we value as the distinctive nature of sport. We will argue that this current juridification of on-the-field physical contact needs to be understood within the cultural context and representation of such popular sports as football. An examination of the changing social and cultural framework of football exposes the developments that have led to the contemporary social pressures supporting greater legal regulation of the game.

I. FOOTBALL - THE PEOPLE’S GAME

The cultural significance of football is enormous. Its ubiquity as the world’s premier sport provides it with a unique position. Laurence Kitchen has called football the only “global idiom” apart from science. It is truly a global sport with the majority of the world’s nations members of the Federation Internationale de Football Associations (FIFA). The influence of FIFA should not be understated. From its Geneva headquarters it has direct contacts with many heads of state. It has in the

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7. Laurence Kitchen, *The Contenders*, The Listener, Oct. 27, 1966, at 607. One concern that exists with the notion of globalisation is that in an increasingly homogenised world, it becomes synonymous with Americanization. This is nicely illustrated with the rule changes that were proposed by the American organisers to FIFA in the time leading up to the 1994 World Cup, such as wider goals and the game not being a game of two halves, but four quarters.
past applied for observer status at the United Nations. The President, Joao Havalange, has largely been responsible for elevating the influence of FIFA and accommodating external pressures such as television. He was nominated for the Nobel Peace Prize in 1988. Bill Shankly's often quoted belief that “football is not just a matter of life or death- it is more important,” may seem an exaggeration of reality, but for many its influence is as profound as any fundamentalist religion. For example, in 1964, during a match between Peru and Argentina in Lima, it was estimated that 318 people died in rioting that was initiated largely due to the result. The murder of the Colombian player, Andres Escobar, after his own goal in the 1994 World Cup, displays the extreme response that can be engendered by failure.

Football has grown from a plethora of similar types of “folk games” played in the middle ages in this country and on the continent. The term football can be traced back to the fourteenth century but many other names have been used such as “camp ball” in England and “Knappan” in Wales, “La Soule” in France and “Gioca della pugna” in Italy. During these centuries, references stress the game’s physicalness and the danger it provided to the “corporeal integrity of both players and spectators as well as to the peace and property of the vicinity.”

It was in the mid-nineteenth century that a regulated and recognisable form of football began to emerge in Britain. This regulated game was initially mainly confined to public schools and then later spread to be played amongst upper and middle class male adults with whom it became a popular recreational sport. Eric Dunning sees the bifurcation between the two types of football, rugby and association, developing in the 1820s, primarily due to the emergence of carrying the ball as a legitimate practice at Rugby School. Rugby has continued in this country to be identified primarily with the higher strata of the social hierarchy, although there was a split at the end of the nineteenth century between rugby union as the mainly middle class and amateur game in the South and rugby league as the working class and professional game in the North. An exception to this is in South Wales, where the working class were absorbed into rugby union, largely as Hargreaves suggests, due to the game’s represen-

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tation and articulation of "Welshness" against the English, outweighing any class antagonism.  

Football spread in the latter half of the nineteenth century to much wider social circles in an increasingly regulated form. The origins of the Football Association (FA) Cup competition in 1871 was the catalyst for the beginning of the end of the gentleman amateur-athleticist ethos. An increasing number of Northern clubs with working class players entered, and the victory of Blackburn Olympic in the 1883 final saw the end of the southern amateurs' domination. The FA initially tried to outlaw professionalism, but it was clear that the high levels of working class support for football needed to be accommodated within the game's structure.

Bifurcation was constructed on another basis. The professionalised enclave was allowed to grow and became increasingly commercialised and incorporated with the economic and financial control of League clubs being taken over by local business interests. This was accommodated within the continued overall formal control of the "bourgeois amateurism" of the FA. This formal control persists today with the FA council comprised of individuals who almost exclusively have risen up through the amateur game.

The player's union, the Professional Footballers' Association has its origins at the end of the nineteenth century. Perhaps contrary to expectations of a strong working class union, Dabscheck argues that it is "a classic example of weak, business unionism." It has been criticised by some as often ineffective and having encouraged the development of gross inequalities between the security of the highest paid and the insecurity of those at the bottom of the profession. The PFA has, however, been seen more recently as challenging some of the more obvious commercialisation of the game. The professional game expanded at speed. In 1888, there were twelve clubs in the Football League which was born in 1885; by 1914 there were forty. Murphy and others see these developments at the end of the nineteenth century as the key start to a "civilising process" in the evolution of the sport. What emerged, they argue, was a game, "[c]haracterised by limited numbers that were equalised be-


tween the contending sides and which involved written, national rules which demanded from the players the exercise of strict self-control over physical contact and the use of physical force.\textsuperscript{16}

Alternative accounts of the development of football such as that by Ian Taylor highlight the way that it has been incorporated and transformed from an essentially democratic and local activity to one exploited by entrepreneurs and developed as a form of social control of working class males.\textsuperscript{17} This suggests that football as a very specific microcosm of sport in general, has been used as a form of power-domination over mass society. However it is important not to present this as through a classical Marxist paradigm, where sport and specifically football, have facilitated the management and conformity of the masses.

This clearly disregards the way that the working class culture has had great influence on the development of football. As Hargreaves argues, neither liberal or Marxist paradigms can explain the cultural complexity of football.\textsuperscript{18} He presents a Foucauldian-type view of the sport-power relation, with power going beyond the parameters of the state-individual dichotomy and existing in the interstices of civil society. He sees the evolution of modern organised sport occurring simultaneously during the nineteenth and twentieth century, with “the expansion and elaboration of civil society.”\textsuperscript{19} This presents sport as a powerful constituent of the structure of power, albeit one that “lacks visibility.”

The relationship between sport and formal politics is however conversely best categorised as one that “lacks invisibility.” Although sport in general, and football in particular, have been projected as autonomous from political values, they have been used both in terms of liberation and the soliciting of legitimacy. The role of sport in the war against apartheid in South Africa cannot be overstated. Conversely there are a number of examples of the role sport has played in deception and distortion of political reality. The Brazilian national football teams have been used to symbolise harmony and well-being in general life. The “beautiful game” can be easily used to promote the beautiful life. In 1970, the winning of the World Cup was used to distract concern away from the injustices of military rule. Today similarly, the exploits of Romario, Babeto, and their teammates, and the winning of another World Cup, have

\begin{itemize}
\item[16.] Id. at 6.
\item[17.] Ian Taylor, 'Football Mad': a Speculative Sociology of Football Hooliganism, in THE SOCIOLOGY OF SPORT: A SELECTION OF READINGS (Eric Dunning, ed. 1971).
\item[18.] HARGREAVES, supra note 12, at 3.
\item[19.] Id. at 4.
\end{itemize}
been used to attempt to deflect national and international concern away from the infanticide being practised by the "Justiceros" vigilante squads. Ironically, one sure way for street kids to escape the likelihood of an early death is to excel at football.

What cannot be refuted, however, is the growth of football as the global game, and essentially in most countries, as an important element of working class culture. As with other mass participation and spectator sports, football is highly significant in popular discourse. Both in national and international contexts, football personifies the secretarianism of class, regional and national rivalry. The mass media play a crucial role in its representation, magnifying the significance of these competitive elements. Football has undergone many changes. Commercialisation has brought incremental change. Today, it is increasingly commodified and developing as an integral part of the leisure industry. Perhaps the epitome of this is in Italy, where many clubs are owned and controlled by multi-national companies and magnates, and able to attract the best players in the world. In England, the emergence of the Premier league or "Premiership" as "a whole new ball game," reflects the view of football's potential as a big money maker. Players have also been the winners with incomes changing the financial contours of the game.

The culture of football is dynamic. Although change is endemic, and it has variously been described as bourgeoisification, intellectualisation,
tion and Pavarottisation; the icon of football is stronger than ever. The game on the field reflects these changes. There has been the development of higher levels of skill and tactical appreciation, but the downside has been an increasing “winning is all” mentality and the cynical refining of strategies that legitimise the bending of rules and intimidation against opposing players. There is undeniably more pressure on all those involved in football to get results, and the increased rewards for success put pressure on participants to cut corners. But there are perhaps more fundamental tensions surrounding modern football. There is a crisis of ownership between those who have located it as a commodified product within consumer culture, and those who continue to view football as an essential component of working class and popular culture. The proliferation of fanzines and attempts by supporters’ groups to “reclaim the game” and exert pressure on club owners, are examples of this phenomenon to search for a lost authentic football.

We believe that the pressure for greater legal regulation of the football field reflects the change in the game which has emphasised the commercial and media interests, who covet a slick, sanitised sport for global consumption. The increase in the pace of the game has been promoted; attempts to reduce physical contact are a similar consequence. We think that this form of regulation should be resisted.

II. Is the Game More Violent?

The support for greater involvement of the law in regulating conduct on the football field is predicated on the belief that the game is increas-

26. A term used to describe the peripheral development of middle-class interest in football and a respectable body of literature on football culture. See, e.g. Arthur Hopcraft, The Football Man: People and Passions in Football & Hunter Davies, The Glory Years; or the more recent books such as, Paul Davies, All Played Out-The Full Story of Italia '90 (1990), and Nick Hornby, Fever Pitch (1992). Literary reviews such as the London Review of Books and Granta have had special issues on football literature with the latter featuring “Gazza Agonistes,” an analysis of the phenomenon that is Paul Gascoigne (see Goalkeeper’s Fear of the Penseur, The Guardian, June 30, 1994). A new wave of ‘lifestyle’ football magazines such as ‘Kick It City’ and ‘Four-Four-Two’ have been added to the more standard fare of ‘Shoot!’ A number of fanzines such as ‘When Saturday Comes’ have gained national distribution. TV and radio has also got in on the act with ‘Fantasy League Football.’ The spectacularisation of football is being reflected in the virtual reality of fantasy football.

27. The 1990 World Cup in Italy successfully married the “high culture” of opera and the “three tenors,” with the “low culture” of football.

ingly violent. This may be a popular perception and one that too easily legitimates legal regulation, but, is the game really any more violent than in the past? The modern game has grown out of unregulated and mass participatory games where high levels of violence were customarily tolerated. In Italy, in the middle ages the antecedent of football, the game "gioca della pugna" is described as, "often little better than a pitched battle... a thousand or more men and women joined in the annual stone fight, which became so violent that the authorities attempted to moderate the bloodshed in 1273 by threatening that those who killed their opponents would henceforth be tried for murder."²⁹

In comparison, the modern game is highly regulated and controlled, both by a set of official rules external to players, and by the self-control of the players themselves. A comparison with the recent past indicates that changes in the rules of the game have outlawed practices that were part and parcel of the game in the 1950s, such as shoulder charging of goalkeepers into the net by burly centre-forwards. The use of physical force is, however, an integral part of the game, and has constantly been present in one form or another. In the 1960s and 1970s a number of players became notorious as those who were seen as "hard men" with little skill but a lot of muscle. Every English team seemed to have one, such as Ron "Chopper" Harris of Chelsea and Norman "bite yer legs" Hunter of Leeds United. This has not only been a British phenomenon as illustrated with Barcelona's Andoni Goicoechea, nicknamed "The Butcher of Bilbao."

The reality is that the game of football has always reflected the values of masculinity and competitive force. These characteristics reflect the values of those who have supported this traditional working class sport. Severe physical contact on the football field, although it does exist, must be understood within its temporal and geographical context.³⁰ The modern game continues to display the characteristics that are the reason for its longevity and enduring appeal. As Elias and Dunning argue, the appeal of football reflects a fine balance between a number of independent polarities: the fixity and elasticity of the rules, the use of physical force

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³⁰ A comparison can be made with cricket which has gone through periods of concern over violent and dangerous practices. For example the "Bodyline series" in Australia in the 1930s led to questions being asked in the British Parliament concerning the style of bowling used. In the 1970s and 1980s, the re-emergence of the intimidatory use of short pitch "bouncers" has been controlled, at times in some eyes too restrictively, with a number of rule changes.
and its control; the nature of the game on an individual and team level and the counterpoise between defence and attack.\textsuperscript{31}

Statistics concerning players cautions and sendings-off can perhaps help us determine the veracity of an increase in physical contact;\textsuperscript{32}

\begin{tabular}{|c|c|c|c|}
\hline
Year & Sendings-off & Cautions & Total \\
\hline
1971/72 & 41 & 1685 & 1762 \\
1972/73 & 82 & 2320 & 2402 \\
1975/76 & 100 & 2519 & 2619 \\
1979/80 & 114 & 3520 & 3634 \\
1982/83 & 229 & 3748 & 3977 \\
1983/84 & 163 & 4067 & 4230 \\
1987/88 & 210 & 4001 & 4211 \\
1991/92 & 275 & 4023 & 4298 \\
1992/93 & 254 & 4526 & 4780 \\
1993/94 & 281 & 3866 & 4147 \\
\hline
\end{tabular}

However, it is important not to extrapolate any superficial conclusions that this indicates an increase in foul play. The rise needs to be seen as reflecting a complex interaction between the players, match officials and footballing authorities. In 1972, a campaign to outlaw the “tackle from behind” was initiated and referees were encouraged to penalise offenders more harshly. In 1982, there was a similar campaign against the “professional foul.” Both changes led to a substantial increase in sendings-off. The 1994 World Cup saw referees again instructed to penalise automatically “tackles from behind.” This contributed to a large number of cautions and sendings-off, and with these developments applied to domestic league football, it is speculated that the result will be a significant increase in cautions and sendings-off in the 1994/95 season. The statistics may in fact tell us as much about officials attitudes toward perpetrators, as to actual foul play on the field.\textsuperscript{33} They can however be used as evidence to support arguments for the need to control greater violence. Another statistic to note is the number of professional players needing to retire in a season. In England, it has been consistent at about forty to fifty over the last few years, although some allowance in this


\textsuperscript{32} The figures for the 1993/94 season only include league, league cup and F.A. cup matches and are therefore slightly lower than rest. Statistics from the Football Trust \& Football Information Services.

figure needs to be made for improved medical techniques and facilities. However, compared with sports that seem to have as their rationale the use of physical power and violent physical contact, we agree with the argument,

\[\text{contrast, say, with rugby or American football, both of which are focused more centrally on musculature and physical power (though in the latter case more formally than the former), soccer (sic) still seems intrinsically to be an exemplar of a relatively highly civilised and at least potentially non-violent sport.}\]

The evidence is that the game is no more violent than in the past. True, the modern game is played at a quicker pace with greater reliance on physical fitness and stamina. But the media may well play a key role in highlighting and analysing incidents much more than in the past. This has contributed to a moral panic concerning the amount and degree of violence on the football field.\[34\] Styles of play change as well.\[35\] In Britain, a more direct method of play has been developed and played by some clubs known as the “long-ball game,” or “route one football.” This leads to the ball being in the air for a much longer period than in the past, which may account for the increased injuries in aerial challenges. Together with the increased athleticism of the modern day, the potentiality for the type of incidents that have drawn concern may lead to the consequential result of increased injuries in aerial challenges. It may not be surprising that John Fashanu, who has been involved in a number of well-publicised incidents, was until recently a Wimbledon player, one of the teams who most obviously espouse Route One football. Indeed they are a team who positively and visibly project themselves as a total football machine with a commitment to powerful and intimidating football.\[37\]

Where is the line to be drawn to curb such activity? The Professional Footballers’ Association certainly sees that there is a need to educate professional footballers, and has displayed posters in changing rooms showing the horrendous injuries that can result. We will suggest that internal mechanisms should be developed such as an independent dispute forum to control most effectively the excesses of this type of play.

\[\begin{align*}
34. & \text{Murphy, et. al., supra note 15, at 7.} \\
35. & \text{See Stanley Cohen, Folk Devils and Moral Panics: The Creation of Mods and Rockers 9-10 (1972) (for an explanation and analysis of moral panics).} \\
36. & \text{Chas Critcher, Putting on the Style: Aspects of Recent English Football, in British Football and Social Change: Getting into Europe 67-84 (J. Williams & S. Wagg, eds. 1991).} \\
\end{align*}\]
But perhaps one of the most effective ways to decrease the use of force in football can be achieved by a return to the puritanical way that Brian Clough sees football should be played when he says, "that if God wanted football to be played in the air, he would'n't have put grass on the ground!"

III. THE ROLE OF LAW - SHOULD FOULS BE A CRIME?

Edward Grayson, one of the few writers on law and sport issues in Britain, in a series of articles has consistently argued that "law does not stop at the touchline." He believes that it is axiomatic that both the civil and the criminal law should be involved in incidents such as the Fashanu-Mabbutt one. There is clearly a distinction to be made between the punitive nature of the criminal law and the compensatory character of the civil law. The criminal law's involvement is more contentious. Grayson and Bond argue that the criminal law should be actively involved in the regulation of violence on the sports field and should be prioritised over the intervention of the appropriate supervisory body of the sport in question. Using a similar argument as with football hooliganism, Grayson believes that violence is much more prevalent today on the sports field than in the past and uses this to support his argument for legal intervention.

We unequivocally disagree with his analysis. He harks back with nostalgia to times when those playing contact sports merely played the game and winning was a minor peripheral issue. This mythologised view is reinforced by his support for Corinthian values, where for example, if a penalty was awarded against a team, the goalkeeper would step aside and allow an unhindered shot at goal. This distortion of the reality of the past only confirms an overtly bourgeois and reactionary analysis of the place of sport, and specifically football in social history. Grayson believes that the law will save sport from the violence of today. We believe otherwise.


We do not intend to discuss the relevant criminal and civil legal doctrine at any length, but there are some points we wish to make. As far as the involvement of the criminal law, we hold a clear counter position.\footnote{Simon Gardiner, \textit{Not Playing the Game- Is It A Crime?}, SOLIC. J., July 6, 1993, at 628; \& Simon Gardiner, \textit{The Law and the Sports Field}, CRIM. L. REV. 513 (1994).} The law can legitimately be invoked in clear acts of force where a player deliberately inflicts harm. These are likely to be acts of retaliation and often in off-the-ball incidents which have a clear criminal character; they are not part of the game.\footnote{Head-butting seems to be a favoured form of retaliation! The conviction of Scott McMillan for assault after chasing an opponent and head-butting him during a Scottish major club rugby union match is such an example of an act of clear retaliation (see \textit{THE TIMES}, May 4, 1994). The incident involving Duncan Ferguson head-butting an opponent led to a lengthy suspension by the Scottish FA and a criminal prosecution. Jason Piff was imprisoned for six months on appeal for head-butting an opponent in an amateur football match (see \textit{THE GUARDIAN}, Feb. 2, 1994).} If internal disciplinary mechanisms fail to deter such conduct, the criminal law may be an appropriate though limited tool. The determining factor is consent. As far as the general criminal law is concerned, consent is operative so as to render force lawful within "properly constituted sports." Players give consent to physical force clearly within the rules of football, but also incidental contact, for example, challenges on-the-ball for so called fifty-fifty balls where physical contact is inevitable and a foul may be committed. Such contact may be outside the legalistic interpretation of the rules, but are inside "the code of conduct" or "working culture" of the game.\footnote{See also \textit{THE AMERICAN MODEL PENAL CODE}, for a similar approach. It states that "players consent to reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport." § 2.11 (2) (b).}

\footnote{Glanville Williams, \textit{Consent and Public Policy}, CRIM. L. REV. 74, 81 (1962).} Williams similarly states,

\begin{quote}
the consent by the players to the use of moderate force is clearly valid, and the players are even deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game.\footnote{Glanville Williams, \textit{Consent and Public Policy}, CRIM. L. REV. 74, 81 (1962).}
\end{quote}

The incident involving the elbow of John Fashanu making contact with the face of Gary Mabbutt during an aerial challenge for the ball is typical of situations wherein there have been calls for the criminal laws involvement. Mabbutt suffered four fractures of the cheek-bone and three of the eye socket. Fashanu was not booked in the game, but the referee changed his mind, after subsequently viewing a video replay of the incident, and indicated that it was dangerous play and that he should have issued a caution. Both of the parties were called to a Football Association hearing to determine whether Fashanu should be charged with
“misconduct.” If this had been established he could have been fined and suspended. After hearing four and one half hours of evidence from representatives from both clubs, and after extensive deliberation, they delivered a “not proven” verdict. Gordon Taylor, the Chief Executive of the Professional Footballer’s Association subsequently argued that football authorities cannot keep ignoring the increases in such incidents. He said, “[w]e can’t keep brushing this under the carpet... One of these days it will be too late when someone has lost an eye or suffered brain damage... We want to stress that players have a duty of care to their fellow professionals.”

Over the last few years the law has seemed to get involved more, but the incidents of players appearing in court are still rare. As far as the law of assault and battery is concerned, there have been a number of cases over the last fifteen years with only a small total of these in major club rugby union and professional football. There have been a larger number of prosecutions in amateur football, which reflects a greater likelihood that offences are reported to the police, and that the Crown Prosecution Service will decide to prosecute compared to a professional


46. These recent criminal cases involving assault should be put into context. The criminal law has been used to regulate professional on-the-field sporting activities for a period of time. The offence of breach of the peace has been used against sportsmen on a number of occasions. In football for example, in 1980, Charlie George, the Southampton Town football player, was convicted of behaving in a way that was likely to cause a breach of the peace for behaviour during a match. In 1988, during the Glasgow derby, a number of Glasgow Rangers and Celtic players were charged with breach of the peace after a goalmouth “scrum.” Two players were convicted, one was found not guilty and another had his case “not proven.” Additionally, police have cautioned professional players for swearing, by intervening during the actual commission of the game. These incidents have led to concern about who is in charge of a game—the police or referee?

47. In professional football there have been few successful prosecutions for assault. In 1988, Kamara admitted causing grievous bodily harm to the Shrewsbury Town player, Jim Melrose, whilst playing for Swindon Town. In 1993, Mark Stein of Stoke City was convicted of assault occasioning actual bodily harm for injury caused to Jim Gannon of Stockport County. Rugby union reported cases primarily concerning appeals against sentence, include, R. v. Gingell, 2 Cr.App. 198 (1980) (Gingell was convicted of inflicting grievous bodily harm, when his assault during a rugby match led to a fractured cheekbone, jaw and nose. His sentence of six months was reduced to two on appeal.) In R. v. Johnson, 8 Cr.App. 343 (1986), Johnson was convicted for biting off part of an opposing player’s ear during a rugby match and received a six month sentence. Also see Bishop (1986 unreported Court of Appeals, U.K.); R. v. Lloyd, 11 Cr.App. 36 (1989); & R. v. Chapman, 11 Cr.App. 93 (1989). In 1992, a well publicised case involved the Rugby Union player Gary Rees of Nottingham and England who was acquitted of causing grievous bodily harm when an incident left Stefan Marty of the London Irish club, with a broken jaw.
incident. In 1992, in similar circumstances to the Fashanu-Mabbutt incident, a criminal prosecution ended in acquittal.

A distinct subjective view as to the effect of consent on liability to assault offences seems to have developed. We believe the rules of sports are a crucial guide and they must have a clear determining role as to the criminal law’s intervention. The Law Commission has however proposed that this subjective construction of consent should be replaced by an objective test. If the legal test is formulated with reference to a set of objective criteria, a player would necessarily need to evaluate the dangerousness of an act before undertaking it during play. This may marginally reduce the frequency of serious injury, but as Horrow asserts, “it could alter drastically the manner in which games are played.” Players who know that certain conduct will subject them to prosecution are likely to avoid anything that remotely resembles the conduct.


49. See Not Playing the Game, supra note 41, at 628. It involved the Brentford footballer, Gary Blisset who was charged with causing grievous bodily harm under S.20 of the Offenses Against the Person Act 1861 to the former Torquay United player, John Uzzell. Blisset was involved in a flying collision when both he and Uzzell were challenging to get possession of the ball. Uzzell suffered a fractured eye socket and cheekbone, and subsequently was released by Torquay and has not played professionally since. The referee saw the incident and Blisset was sent off. A prosecution was commenced by the Crown Prosecution Service after the case was reported by the police. Blisset said at his trial that what had occurred was an accident, as the two players had jumped for a fifty-fifty ball. He had tried to avoid colliding with Uzzell when he realised he was not going to avoid the ball.


52. These objective criteria were seen in Cey, 48 C.C.C.(3d) at 490-491 as:
1. The conditions under which the game in question is played;
2. the nature of the act which forms the charge;
3. the extent of the force employed;
4. the degree of the risk of injury;
5. the state of mind of the accused.

ing a similar argument for intervention of law in ice hockey, it has been stated that,

it is very difficult in my opinion for a player who is playing hockey with all the force, vigour and strength at his command who is engaged in the rough and tumble of the game, very often in a rough situation in a corner of the rink suddenly to stop and say, 'I must not do that.' I must not follow up on this because maybe it is an assault; maybe I am committing an assault.\(^5\)

The objectifying of consent will present too rigid a framework for players to operate within, and make it too easy for the law to intervene. The development of law in this country on the basis of the position in a different jurisdiction, such as North America, with differing cultural perspectives on sport, is problematic.\(^5\) There is a greater propensity to physical contact, often in a gratuitous and retaliatory form. There is also a tendency to reify the role that violence on the field may have on wider social problems. Bradley Nielsen argues that "spectator violence is almost exclusively the result of observed on-the-field injustice."\(^5\) This seems to be in clear contradiction to the British writings on the aetiology of football hooliganism. Goldstein & Arms seemed to imply the contagious effects of watching aggressive contact sports by claiming that they could have "the effect of rousing to a greater extent than any other spectacle the excitement and partisan spirit of the spectators."\(^5\) However, although Dunning and his co-authors recognise that violence on the pitch may trigger crowd disorder, it can also, "be 'sparked' by refereeing

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that is perceived to be biased and unfair, by police interventions. . .or by because fans wish to halt a match which their team is losing.  

IV. THE CIVIL LAW - PLAYER SUING PLAYER

A second area to consider is the civil law which is also available as a regulatory mechanism, and has increasingly become seen as a legitimate remedy for those whose career may be adversely effected or even ended.  Players whose careers end as a result of injuries suffered on the pitch surely must be entitled to compensation like any other person who can no longer work as a result of injuries sustained. Although we argue that alternative compensatory mechanisms need to be developed, the civil law may be seen as having a more legitimate role to play than the criminal law. There have been two cases involving professional footballers that have reached court in 1994 and there are reportedly a number of similar actions being pursued. The two cases were those involving Paul Elliot in his action for personal injury against Dean Saunders and John O'Neill suing John Fashanu. The latter case was settled after only three days into the trial.  The failure of the action in the former case has lead to questions as to whether such incidents should be dealt with in court. Nonetheless, it has been argued by Jahn that, "[t]ort law is the best way to deter violent conduct among athletes and provide them an adequate remedy for their injuries. Tort law imposes financial liability on the athlete. . .and this will hit him where it hurts the most- in his pocket."

58. DUNNING, ET. AL., supra note 40, at 15.
59. See Alistair Duff, Civil Actions and Sporting Injuries, 144 NEW L. J. 639 (1994), where he notes that there have been few cases involving professional players. He notes three in Scotland, none of which ran their course. For example, in 1993, the Glasgow Rangers player Ian Durrant settled an action on the day before the trial was due to be heard, with Aberdeen football club and their former player Neil Simpson, for an estimated 225,000 pounds plus 80,000 pounds for legal expenses as compensation for being out of the game for almost three years. In England, until 1994, the only example is that of Danny Thomas of Tottenham, who in 1988 received 30,000 pounds for injuries sustained due to an illegal tackle that ended his career.

60. The amount paid was 70,000 pounds on the basis of being "without admission of liability." He had been seeking 150,000 pounds and was reported to have spent 150,000 pounds on legal costs. See John Mullin, High Court Replay Despite Soccer Deal, THE GUARDIAN, Oct. 14, 1994.
The current position is that players may have an action in negligence or in trespass to the person. Whether there is a cause of action in any given situation will turn on the issues of consent. An action in trespass to the person, more specifically a battery, requires an intentional application of force to another. The intention must be as to the touching and the defendant need not intend the harm in fact sustained by the defendant. This action can be negated by the defense of consent to the act complained of.

The question which arises then, is to what do footballers consent? Do they say “I consent to a battery within the rules of the game and no more.” This surely cannot be the case. Clearly a foul is outside the rules of the game and we cannot allow every foul to give rise to an action in trespass to the person. Therefore, it may be said that not only do players consent to contact within the rules of the game, but also within the culture of the game. Football is a game which is fast and furious and it involves bodily contact; anyone participating must be aware of the kind of contact likely to take place. The issue must then turn on, at what point can it be said that a player is no longer consenting to particular contact? Clearly, if a player is kicked or punched off the ball, i.e. outside play, there is an actionable battery. What though of the so-called fifty/fifty balls which result in injury to one player? Where two players jump for the ball and one is elbowed in the head by the other unintentionally but nevertheless negligently? In English law, there cannot be an unintentional trespass to the person. In such a situation the action must be in negligence. The defence of volenti, that is, not only is there consent but also an assumption of risk, is also relevant here.

Can it be said that a player is assuming the risk of injury and therefore that player cannot sue when he suffers injury as a result of negligence on the part of the defendant? This cannot be a correct analysis of the issue of consent. We accept that a player consents not only to injuries suffered as a result of tackles within the rules of the game but also within the culture of the game. But the risk that a player is assuming is not that his opponent may be negligent; instead, he assumes the risk that he may suffer injury as a result of contact within the rules of the game or the culture of the game. Therefore, he is not barred from an action in

64. In Letang v. Cooper, 2 All E.R. 929 (1964), Lord Denning said, “[w]hen the injury is not inflicted intentionally, but negligently, I would say the only cause of action is negligence not trespass.”
negligence when the defendant raises the defence of volenti. The fact that players owe each other a duty of care has clearly been established.\textsuperscript{65}

In North America, a test of reckless disregard has developed, which is regarded as providing a balance between the safety of players and the competitive edge of the sport.\textsuperscript{66} We believe that British law should reflect this development. It should not be enough to merely show negligence on the part of the defendant. The affect of making the defendant liable only in these circumstances, would be to lower the standard of care owed by a defendant to a plaintiff thus making it more difficult for a plaintiff to establish liability on the part of any defendant. This it seems to us, is entirely appropriate given the element of consent involved in sporting situations. In the United States, Narol argues that a trend has emerged across a number of states for the need for reckless disregard to be established.\textsuperscript{67} The test is seen as being that the player knows an act is harmful and intends to commit that act, but does not intend to harm his opponent by that act.\textsuperscript{68} Thus it falls somewhere between an intentional trespass and negligence, and the issue of negligent trespass to the person will no longer arise.

\textsuperscript{65} Condon v Basi, 2 All E.R. 453 (1985) (see Hayden Opie, \textit{Case Notes: Condon v Basi}, 15 \textit{Melbourne U. L. Rev.} 756 (1986). To have a cause of action there must also be a breach of duty and damage resulting. It is this requirement of breach of duty which is the subject of much discussion in relation to injuries on the sports field. The current position in English law, is that players must meet the standard of care, in all the circumstances required of them. It was stated in \textit{Condon} that though the standard is an objective one, it was one that changes in the circumstances of the case, "[t]hus, there will of course be a higher degree of care required of a player in a First Division football match than of a player in a local league football match." \textit{Id.} at 454. In \textit{Elliott v Saunders}, unreported transcript High Court, June 10, 1994, Drake J. rejected this approach stating, the fact that players are top professionals with very great skills, is no doubt one of the circumstances to be considered, but in my judgement, the fact that the game is in the premier league rather than at a lower level, does not necessarily mean that the standard of care required is different. . (Thus). . an intentional foul or a mistake, or an error in judgement, may be enough to give rise to liability on the part of the defendant, but whether or not it does so, depends on the facts and circumstances of each individual case. \textit{Id.} transcript at 5.


\textsuperscript{67} Narol, \textit{supra} note 66, at 21.

However, a recent decision has rejected this approach adopting the ordinary negligence standard. A distinction was made here that the case only concerned “recreational sports.” The court took the view that there was, “no need to adopt a recklessness standard... when the negligence standard properly understood and applied is sufficient.” We argue that the ordinary negligence standard may well be applicable to amateur football, but the issue is different when considering professionals. The reckless disregard test should be applicable, thereby lowering the standard of care, since professionals must be taken to fully understand and assume the risks inherent in their sport.

If there is recourse to the civil law, perhaps the best way to prevent violence on the pitch is to put the onus on the clubs. Players are employees of clubs, and thus it would seem appropriate to hold clubs vicariously liable for the actions of their players. Clubs make profits out of the activities of their players, and therefore, it seems logical that they should also bear the losses which arise out of the activities they make a profit from. Furthermore, if the aim of the exercise is compensation, then it should be the deepest pocket the plaintiff goes after. If none of these seem an appropriate justification for vicarious liability, then legitimacy can be seen for it in “social convenience and rough justice.” The advantage of holding clubs liable is that this will put pressure on them to ensure the behaviour of their players.

We support the development of a more favourable approach which was suggested in Elliott, that is the development of a “no-fault” compensation scheme. Under such a scheme, every injured player would receive full compensation irrespective of whether the injury was a result of someone’s fault or a result of an accident. Though it has been rejected as being useful in all personal injury cases, we agree that such a scheme

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70. Id. at 33.
71. ICI v Shatwell, 2 All E.R. 999, 1029 (1965).
72. See John Gardiner, Should Coaches Take Care?, 143 NEng L. J. 1598 (1993). It is not only the club who may be vicariously liable, but also coaches, especially where they teach or encourage players to use potentially dangerous techniques.
73. Additionally, in Elliott an alternative scheme was the requirement that clubs compulsorily insure players for potential claims for personal injury was seen as a possible development. However, as DrakeJ pointed out in the case, the company, “who has to meet the injured parties claim, would be likely to want to sue the player who has caused the injury in order to recover the compensation they had paid out, so the dispute would still end up in the law courts.” Elliott, unreported transcript High Court, at 2.
should be introduced for professional players.\textsuperscript{74} With regard to the funding of such a scheme, we suggest contributions from players and clubs run in conjunction with a major insurance scheme. The cost may be high but should cost no more than comprehensive insurance. It would remove the vagaries of negligence which depends on the establishing of fault and on the interpretation of an objective test.\textsuperscript{75} A "no-fault" scheme will ensure that all victims of injury will be winners and not only those who evidentially have a persuasive case. These problems of evidence were highlighted in \textit{Elliot}, where there were many expert witnesses and the use of video evidence, though allowed by the judge, was not eventually the deciding factor. Such a scheme could be administered by a tribunal to determine the amount to be awarded in a particular case.

V. Possible Solutions

So where is that line to be drawn for the involvement of the law? The rules must play a vital role. As far as football is concerned, the rules are those laid down and implemented by the English Football Association under ultimate international authority of FIFA and the International Football Association Board. One of the enduring qualities of football is the relatively simple regulatory structure illustrated by the small number of rules or laws that exist, and the small number of changes that have been made during the period since the modern rules were drawn up. There were only fourteen basic laws drawn up in 1863 compared with fifty nine at the inception of the rugby union. There are currently only seventeen. This can be compared with more than 1800 rules that regulate modern American Football. Law 12 indicates what amounts to foul play. This can lead to a possible cautioning or sending-off for the offender. The vast majority of relevant incidents involve physical contact, and what distinguishes such incidents which are to be penalised, are those which are "intentional." These rules show that it is an issue of interpretation that the officials "refereeing and supervising"


\textsuperscript{75} See \textit{Pressure on for Players Compensation Scheme}, THE INDEPENDENT, October 14, 1994.
games need to apply. A solution to the issue of leaving such matters as
dangerous play open to the interpretation of the match official may be to
distinguish between rules which are for the promotion of the game and
those which may be classified as being safety rules. Where a player is
found to be in breach of a safety rule, this should be dealt with by a
sending-off and a subsequent disciplinary action by an independent
mechanism.

We believe that the rules of sports are a crucial guide and they must
have a clear determining role as to the intervention of both the criminal
and civil law. They are designed to avoid serious danger of injury. In
contemporary football, as with other contact sports, there is a continued
risk of injury. Participants who cause injury to others within the reason-
able application of the rules of the sport, in the absence of a deliberate
aim to injure, can rely on the victims consent to potential harm within
the rules. So the commission of fouls in football due to “illegal tackles”
and the consequential injury resulting from these fouls, are likely to be
seen as consensual. They have inevitability been seen this way, although
they are outside the legalistic interpretation of the rules, and instead are
inside “the code of conduct” or “working culture” of the game. There is
an implicit understanding that conduct in football is not restrained by
the formal written rules. As Murphy and others said, “[I]ike any social
activity, it can be conducted in terms of a ‘spirit’ or ethos which con-
dones rule infractions to a greater or lesser degree.” In football there
are two main strategies which need to be explored to minimise the dan-
ger of intervention of the criminal and civil law. Of primary importance
is the development of a more effective resolution mechanism for discipli-
nary and compensatory issues, but firstly we consider the need to expand
definitions of misconduct and dangerous play that leads to punishment
and changes to the actual policing of the sport.

VI. THE WAY AHEAD - RECKLESS PLAY

There may be a need for a widening out of the test of violent play
within the rules of football to provide more effective internal policing
and penalise reckless, rather than intended dangerous play. As DiNicola
& Mendeloff argue, “rule reform presents the least intrusive opportunity
to regulate conduct on the playing field.” Currently there is a need for

76. MURPHY, ET. AL., supra note 15, at 18.
77. Ronald A. DiNicola & Scott Mendelof, Controlling Violence in Professional Sport:
Rules Reform and the Federal Professional Sports Violence Commission, 21 Duq. L. Rev. 843,
intent to be proved on the part of the individual. Law 12 indicates that intentional violent conduct or serious foul play can lead to a player being cautioned or sent off. In the referee’s rule book it is stressed that it is vital to establish this intent. We believe that recklessness on the part of the player should also lead to penalizing, certainly against the use of elbows. Recklessness has been recognised as being the basis of legal liability in both the criminal law of assaults and civil liability for personal injuries. However, it needs to be acknowledged that the legal meaning of recklessness has admittedly been notoriously problematic in criminal law doctrine. The definition proposed by the Law Commission in the Draft Criminal Code would be an ideal meaning to adopt as it provides a clear subjective meaning. FIFA has started a dialogue concerning the broadening out of the test for dangerous play to include liability on recklessness.

This of course leads to a discussion concerning to what extent and frequency the rules of games should be modified. One argument is that changes are merely tinkering and are often carried out with the aim of short-term expediency. This is often to placate external pressures, such as sponsors and television, and may run the danger of curbing excellence of participants. Barnes argues this is so with the changes in the rules of Formula One motor racing, largely to curb the past dominance of the Williams team. Similarly, the constant changes in cricket, to the short pitch delivery rules have been carried out to control the dominance of the West Indies over the last twenty years. Muted cries of racism are not difficult to substantiate. The opposing argument is that rule changes are needed to secure the integrity of modern support in the context of the commodification and globalisation of sport. Coaches and players are under increasing pressure to succeed, and therefore, they exploit the limitations of existing rules. Rule changes are then required to try to re-

78. The problem of making a distinction between the orthodoxy of subjective recklessness and the radical development of objective recklessness has plagued the criminal law since the latter's development by the House of Lords in R. v. Caldwell, A.C. 341 (1982), 1 All E.R. 961 (1981).

79. Draft Criminal Code Bill 1993, cl. 1, a person acts:-
(b) "recklessly' with respect to-
(i) a circumstance, when he is aware of a risk that it exists or will exist, and
(ii) a result when he is aware of a risk that it will occur, and it is the circum-
stances known to him, unreasonable, having regard to take the risk.

80. S. Barnes, Do Not Change the Balls or Tinker With the Rules Please, THE TIMES, July 6, 1994, at 42.

establish the vitality and balance in a particular sport. New skills and strategies are then developed to confront the new rules. This allows the sport to be dynamic and reflects the character of rules as being both certain and pliant.

We consider that this is a very finely balanced debate. Rules certainly do have an elasticity and together with the players "working culture," are only one part of the regulation of the sport. Without this acknowledgment and the ability to modify rules, sports are subject to predictability and ossification. But, in most sports, rule changes have significantly accelerated in the last thirty years. Increasing external pressures may well be the cause. We agree that too many changes can be counterproductive and damage the balance of sports. In football, we have stressed the simplicity that is derived from a small number of rules.

The changes introduced in football since the 1990 World Cup are significant. They include; the back-pass rule, the interpretation of the off-side rule favouring the attacker, three points for a win, automatic cautions for the "tackle from behind" and as Barnes jests, "red cards for having a nasty look in your eye!" These rules changes can be seen as favouring attacking play and assisting the fluidity of the game, allowing the skillful to shine. Some are not fundamental changes in the rules, instead they are different interpretations of existing ones. Other suggested changes that have been so far resisted may well go too far. The Americans had wanted FIFA to introduce wider goals and four quarters rather than two halves to distribute television commercial breaks more frequently. A proposal that has been experimented with is the replacement of throw-ins with kick-ins. This will, if adopted, result in making the game even quicker. This can bring its own pressures and not inevitably result in subtle and skillful play. Rule-modification is as Mitchell argues "a subtle science." Although some of the refereeing was abominable, the changes in the 1994 World Cup were universally seen as positive. There is, however, a danger that football will become increasingly sanitised for mass global consumption. It must not be forgotten that it is a contact sport and the rules must provide space for such contact.

There also needs to be a review of the actual policing of the game on the field. There has been increasing criticism of the inconsistencies in refereeing during the past few seasons, often pertaining to referees failing to penalise dangerous and violent conduct, but cautioning and send-

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82. Barnes, supra note 80.
ing off players for using abusive language in earshot, or kicking the ball away in dissent after an unfavourable decision. The act of refereeing is inherently difficult and fallible, and in the increasingly rapid modern game, just keeping up with the play is an achievement in itself. However, mistakes based on human error can cost clubs and players large amounts of money. There have been calls for a professional body of referees. There has also been a suggestion that there should be two referees - one for each half of the pitch.

Football can perhaps learn from other sports. In rugby union, the two touch judges (linesmen in football) have much greater power to assist the referee in penalising fouls and acts of violence and can raise their flag and stop the play by entering the field of play. In international cricket, there have been developments of a “third umpire” in the stands who has a television monitor to make a decision in particular circumstances when there is doubt as to whether a batsman is out, and an off-the-field “match referee” who can subsequently penalise players for conduct on the field. In football the use of video evidence has begun to be used after games, both to overturn cautions given by the referee during the game, and to penalise players for foul play which was missed by the official. These are not perfect solutions, but we would argue that the football authorities should consider thinking about changes. A balance needs to be struck during the refereeing of a game. If the official intervenes too readily and interprets the laws in a very narrow way, just as with overtly oppressive rules, the dynamics of the game can be adversely effected. Officials ultimately do need to be in control and interpret the rules. Better a man with a whistle regulating the game than a man with a wig!

84. In 1993, Ian Wright of Arsenal was fined and suspended after being found guilty of misconduct after video evidence clearly showed Wright punching an opposing player. There is a danger that video evidence can, however, undermine the decision of the referee. Recently video evidence has been used by the Football Association for the first time to allow an appeal by a player against a booking. In the 1994 World Cup, video evidence was used to penalise players who were not cautioned during the match, most notably with the Italian player, Mauro Tassotti who was banned by FIFA for an unprecedented eight matches for elbowing Spain’s Luis Enrique. Conversely however, video evidence was not allowed to overturn a cautioning or sending-off unless the appeal concerned a three match ban or more. In Australian Rules Football, the use of video evidence has been used more specifically in penalising foul play. Every match is videoed and then examined by an expert panel with a view to disciplining foul play that the match official has missed.
VII. The Way Ahead - Arbitration

Secondly, there is a need for more effective internal mechanisms to regulate foul play and violence within the particular sport. We argue that a more independent arbitral disciplinary mechanism, comprised of representative parties in addition to the supervisory body, will be more effective in achieving consistent and just decisions. This is clearly contrary to Grayson and Bond’s claim that “the concept that sporting supervisory bodies should usurp the power of the courts and the system of British justice cannot be supported by any cogent argument.” This development will allow the courts to be effectively displaced. The current disciplinary mechanism administered solely by the FA is that, in addition to any cautions that the referee dispenses during the game, the player can be charged with misconduct. Such a charge can be brought against players, managers and clubs; for players it must be proved that the player “violated the Laws of the Game.” All cases of misconduct likely to bring the game into disrepute must be reported to the FA by the referee. Any player then charged with misconduct has a right to a hearing before a commission. If misconduct is proved, a number of penalties are available. The PFA has recently called for the setting up of an Independent Disciplinary Commission, independent from the FA to replace the current disciplinary committee, with PFA members contractually bound to consult it. Such independent commissions or tribunals are commonly used in many areas of society. They ordinarily are tripartite in structure with representatives from the different sides of the dispute. The PFA have suggested that representatives could come from players, referees, managers and FA disciplinary officials. The use of video evidence will allow close examination to be made of these incidents. Such a tribunal could also deal with issues of compensation and perhaps administer the “no-fault” compensation scheme discussed earlier. The participation of insurance experts in this aspect would seem appropriate.

85. The FA’s disciplinary tribunal has levied tough punishment in the past. For example, the fighting during the Arsenal v. Manchester United match in 1990 led to league points being deducted and fines levied after being charged with bringing the game into disrepute.
86. Grayson & Bond, supra note 38, at 693.
88. Id. at Rule 25. Under Rule 32, complaint may also be made by players, clubs, or referees.
89. Id. at Rule 26(d).
Arbitration and voluntary self-regulation is considered to have the advantages of, as Samuel and Gearhart argue, "lower costs, privacy, the presence of expertise on the tribunal and rapidity." Inglesby stresses caution in suggesting that compulsory alternative dispute resolution mechanisms may not always be the most desirable way of solving a particular kind of dispute. Arbitration has developed in a number of sporting contexts. In 1983, the Court of Arbitration for sport was set up by the International Olympic Committee (IOC) to provide a dispute resolution service for general sporting disputes of members of the IOC. Subsequently the IOC has indicated it is going to create a new Independent Supreme Council of International Sport Arbitration with a primary aim of reducing the amount of civil litigation. In the United States, there are a number of arbitration mechanisms that have been developed in certain sports, including American football and baseball, especially concerning employment issues such as freedom of contract. In Britain, the Central Council of Physical Recreation has plans to devise a sports arbitration body. The involvement of lawyers is of course a vital issue. It has been argued that there is a risk that their association adversely effects the efficacious qualities of such mechanisms. Foster sees that the development of arbitration will not, "stem the tide of juridification.


92. See The Times, June 22, 1993. It is planned that the individuals will be obliged to refer appeals to arbitration and that this will allow the arbitration council decisions to be accepted by courts, especially the American courts. The on-going dispute between the American athlete Butch Reynolds and the International Amateur Athletic Federation could be the kind of dispute avoided. Also see Lisa Bingham, *Arbitration of Disputes for the Olympic Games; a Procedure that Works*, 7 Arb. J., Dec. 1992, at 33; Ian Blackshaw, *Resolving Sports Disputes by ADR*, 142 New L. J. 1753 (1992); & Anthony Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future of the Settlement of International Sporting Disputes*, 8 Emory Int'l L. Rev. 347 (1994).


94. See The Guardian, Nov. 30, 1991; 1 British Association for Law and Sport and Law Newsletter (Summer 1993).
Lawyers will still be used, legal concepts employed, and conflicts of interest will be defined and processed in a quasi-legal manner.  

VIII. THE ROLE OF LAWYERS

The involvement of lawyers with tribunals of both a legal and a wider quasi-legal nature is a vital issue. As Bankowski and Mungham argue, "[t]he creation and maintenance of legal problems by lawyers follows a...pattern...when 'proper' becomes synonymous with 'legal' and 'paid' then there is created a pressure to abandon extra-legal means of dispute settlement in favour of legal ones." Similarly, Flood and Caiger in their examination of lawyers' rivalry with non-lawyers to control arbitration mechanisms in the construction industry argue "[l]awyers are in a strong position to effect colonisation because of their power over the discourse of legalism. They have the power of appropriation."

In the United States, lawyers have become actively involved in regulating sport. There is big money to be earned, especially where many act as player agents taking percentage cuts of the player's income. In 1990, the big four professional team sports in the United States, American football, basketball, baseball and ice hockey, had lawyers as commissioners or presidents of their respective national associations. Indeed the head of the U.S. Soccer Federation is the lawyer Alan Rothenberg.

In Britain there are a number of specialist solicitors firms, and a British Association for Sports and Law has been initiated. Sports lawyering has many attractions, and this is not an absolute argument to deny the presence of lawyers in this area. We have suggested that there are

100. See John Williams & Richard Giulianotti, Stillborn in the USA, in GAMES WITHOUT FRONTIERS 1 (John Williams & Richard Giulianotti, ed. 1994).
101. A number of solicitors firms are involved in a number of sports related matters. Some firms have specialist lawyers dealing with such issues and there is also the development of specialist firms. See The Legal Eagles Have Landed, THE OBSERVER, Nov. 28, 1993. Sports law is also taught as part of a number of Universities' law degrees including Manchester Metropolitan, Warwick and Westminster Universities.
issues in the regulation of sport where lawyers are needed. But as far as
control of on-the-field violence is concerned, we suggest that consist-
tency, confidence in the process, and fairness are likely to be served bet-
ter by a toughening and increased independence of adjudication within
the context of the supervisory authorities. This approach does not have
the danger of irreparably changing the nature of football that we have
argued is of unique value.

The involvement of lawyers and the law is not inevitably the most
effective facilitator for reform, and may in fact, obfuscate the issues.\textsuperscript{102} Attempts to legislate to fight the "other violence" in football, that of
spectators, with the introduction of compulsory identification cards, was
sensibly jettisoned. Ted Croker, the Chief Executive of the FA in the
1980s, responded to the identification card scheme by suggesting hooli-
ganism was due to wider social problems caused largely by government
policies rather than Margaret Thatcher's belief that hooliganism was
football's problem. It has been recognised that football hooliganism is a
complex social practice with no obvious aetiology and there is a large
body of academic literature.\textsuperscript{103} Initiatives within the game itself, particu-
larly by certain clubs who were perceived as having a particular problem,
have been successful. Another recurrent problem has been that of ra-
cism. The Football Offences Act 1991 made it an offence to chant in an
indecent or racist manner. It may have had some positive effect,
although during its first season of operation in 1991/92, it led to fewer
than one hundred prosecutions. At the start of the 1993/94 season the
Commission for Racial Equality and the Professional Footballers Asso-
ciation jointly launched a campaign to combat racist chanting during
matches and racism generally within the game. Titled "Let's Kick Ra-
cism Out of Football," there are signs that it has been more effective
than any attempted legal prohibition. This perhaps suggests that this
non-legal and educative initiative within football might be likely to have
greater long-term effects on eradicating this disease, more vital perhaps

\textsuperscript{102} Steve Readhead, \textit{Some Reflections on Discourses on Football Hooliganism}, 39 Soc.

\textsuperscript{103} See for example Gary Armstrong & Rosemary Harris, \textit{Football Hooligans: Theory
Murphy, \textit{Hooligans Abroad: The Behaviour of English Fans at Continental
Matches} (2nd ed. 1989); Eric Dunning, Patrick Murphy & Ivan Waddington, \textit{Anthropologi-
cal versus Sociological Approaches to the Study of Soccer Hooliganism: Some Critical Notes},
Revisited, in Sport, Culture and Ideology} (John Hargreaves ed. 1981); P. Marsh, E.
Rosser & R. Harre, \textit{The Rules of Disorder} (1978); & Dick Hobbs & David Robins, \textit{The
at a time when forty percent of professional footballers are black. As Papworth argues, "legislation alone cannot truly eradicate racism at football grounds. For this to happen, something more fundamental is required; a change of attitude and behaviour in those who watch football matches." \(^\text{104}\)

IX. Conclusion

The same argument, we believe, is valid for the role of the law in regulating on-the-field sporting activities. It is easy to see legal regulation as being an appropriate mechanism for on-the-field conduct. However, we have identified that there are three possible levels of regulation of such conduct. The sports' rules, the working culture, and legal rules. These two first levels of regulation are adequate and indeed have a symbiotic and dynamic relationship. Player's actions evolve in partnership with modifications to rules. Increased legal intervention is primarily proposed by those whose financial and positional interests are best served by a highly regulated and predictable game. Television, sponsors, and certainly lawyers have transparent stakes. The support for legal regulation is formulated on the belief that any other form is prone to the vagaries of arbitrariness and inconsistency. Our first footnote which stated that "the rule of law in sport is... essential," should perhaps be understood as the law's rule is essential. \(^\text{105}\) There is no dispute that legal regulation is expanding. Hunt has argued that a more realistic way to understand law in contemporary society, rather than as a "model of rules," is as a form of regulation. \(^\text{106}\) The basic question is to regulate or not? Where is the private/public divide to be drawn on the issue of the sports field?

We recognise that the law cannot be absolutely ousted and that "law does not stop at the touchline." However, we consider that the legitimate role of the law is on the sidelines. We have indicated when it should be allowed access to the field of play and substitute for the existing normative rules. (Boy - so many sporting metaphors to play with!). We have suggested what modifications should be made to the existing regulatory framework of the rules, and how new resolution machinery should be developed. If, as some argue, the civil and criminal law are

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\(^\text{105}\) See note 1.

able to intervene more legitimately, we believe that the law will at best be symbolic. As Chambliss & Seidman argue, the way to identify legal symbolism is to measure the levels of enforcement.\textsuperscript{107} If they are low, symbolism is likely. If the criminal law was able to intervene more readily we believe that there would be few prosecutions and these would be inconsistently selected and be little more than "show trials." Similarly, a proliferation in the use of the civil law will be arbitrary and indiscriminate. So even though we predict the courts would actually be little used, the damaging consequences that we have discussed would be only too apparent. In football a sanitised sport would be the result. We cannot state it any better than DiNicola and Mendeloff as to what is at danger when they argue, "[m]uch of sports appeal comes from its unrestrained qualities, the delight of its unpredictability, the exploitation of human error, and the thrill of its sheer physicalness."\textsuperscript{108}

The ball is in the court (Uh!- legal metaphors), we mean, the half of the football authorities. They must stop continuing to acquiesce to the pressures of the modern game, and develop new mechanisms and approaches to self-regulation of on-the-field conduct. This will provide an exemplar for other contact sports such as rugby. Legal colonisation is the alternative, and as far as this is concerned: "Do we not like that!"\textsuperscript{109}

\textsuperscript{107} William Chambliss & Robert Seidman, Law, Order and Power (2nd ed. 1982.)

\textsuperscript{108} DiNicola & Mendelof, supra note 77, at 845.

\textsuperscript{109} Famous quote by ex-England team manager, Gordon Taylor, in channel 4 T.V. documentary of March 1994, which has subsequently entered common parlance.