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# Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law

by  
CAROLYN B. RAMSEY\*

## Introduction

Despite the media's glorification of risk<sup>1</sup> and a nationwide trend in tort law toward sheltering sports co-participants from civil negligence liability,<sup>2</sup> an exhilarating trip down a ski slope is increasingly likely to land a skier in jail if he collides with and kills another person.<sup>3</sup> During the past few years, prosecutors have shown new zeal in pressing charges against individuals in a variety of recreational contexts from horseback accidents at riding stables to jet-skiing fatalities on reservoirs.<sup>4</sup> These decisions constitute a remarkable exercise of prosecutorial discretion, given the countervailing influence of popular culture and tort reform. Although the most aggressive criminal charging has occurred in states that allow civil negligence liability in some suits between sports co-

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\* Associate Professor of Law, University of Colorado School of Law; J.D., Stanford Law School; A.M. Stanford University. I would like to thank Allison Eid, Bill Pizzi, Michael Ramsey, Kevin Reitz, and Pierre Schlag for insightful comments. I am especially grateful to Dennis J. Hall (Senior Deputy District Attorney, First Judicial District, Jefferson & Gilpin Counties, Colorado) and Jane Thompson (Head of Faculty Services for the University of Colorado Law Library) for their help in locating files for criminal cases that resulted in plea bargains. This Article also benefited from research assistance by Ryan Lessmann and technical editing by William DeFord and the staff of the *Hastings Law Journal*.

1. See *infra* text accompanying notes 20–36 (analyzing depiction of recreational risk in advertising and in television and newspaper coverage of sporting events).

2. See *infra* text accompanying notes 70–134 (analyzing negative trends for plaintiffs in tort suits involving recreational injuries and deaths).

3. See, e.g., *People v. Hall*, 999 P.2d 207, 210–11 (Colo. 2000) (reversing dismissal of reckless manslaughter charges against Vail employee who fatally collided with another skier); *People v. Hall*, 59 P.3d 298, 301 (Colo. Ct. App. 2002) (affirming jury's verdict of guilty for lesser offense of criminally negligent homicide). For several ski fatalities that resulted in plea bargains, see *infra* note 138.

4. See *infra* text accompanying notes 137–41, 162–249, 286–331 (analyzing criminal prosecutions arising from recreational accidents).

participants,<sup>5</sup> the trend is likely to spread to jurisdictions where a defendant could not be held liable in tort.<sup>6</sup>

The expanding category of recreational crimes, carved out of existing negligent homicide and involuntary manslaughter statutes, demonstrates that a societal penchant for thrill-seeking has not erased the desire to assign blame for catastrophic harm. Prosecutors, both in the United States and overseas, are unwilling to view recreational accidents as examples of sheer bad luck. Even the Europeans, renowned for mixing wine with unmarked obstacles on the slopes, refuse to shrug off ski deaths with a fatalistic, "C'est la vie."<sup>7</sup> Instead, like several American jurisdictions, European courts have convicted and sentenced defendants on negligent homicide charges arising from recreational accidents.<sup>8</sup>

Such prosecutions represent more than an interesting bit of sports-law trivia. Rather, they provide grist for analyzing three vital and interrelated aspects of the criminal justice system. First, while several legal scholars complain about the statutory expansion of the criminal law into areas that they believe should be regulated by tort,<sup>9</sup> the use of long-

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5. See, e.g., *infra* text accompanying notes 107, 308 (discussing concord between criminal and civil liability of skiers in Colorado).

6. California exemplifies a state with the potential for substantial incongruity between a defendant's civil and criminal exposure. Tort plaintiffs in California face daunting hurdles to recovering damages from a sports co-participant. The California Supreme Court has stated:

The overwhelming majority of the cases, both within and outside California, that have addressed the issue of coparticipant [tort] liability in such a sport, have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport . . . and that liability properly may be imposed on a participant only when he or she *intentionally* injures another player or engages in *reckless* conduct that is *totally outside the range of ordinary activity involved in the sport*.

*Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (emphasis added). However, despite the contraction of tort liability for recreational injuries, defendants in California and other states may face criminal charges for a homicide arising from their gross negligence. See, e.g., *Sea Horse Ranch, Inc. v. Superior Court of San Mateo County*, 30 Cal. Rptr. 2d 681, 686 (Cal Ct. App. 1994) (stating that the offense of involuntary manslaughter encompasses criminal negligence, which is measured objectively). For a complete discussion of limits on tort liability, see *infra* text accompanying notes 70–134.

7. See *Prosecutors Close Inquiry into Cavagnoud's Death*, AGENCE FRANCE-PRESSE, June 13, 2002, available at 2002 WL 2430007 (reporting that three German coaches were exonerated from criminal liability in death of French skiing champion Regine Cavagnoud in Austria, but that investigation of French coaches would continue); see also *French Ski Team to Be Questioned over Cavagnoud Death*, AGENCE FRANCE-PRESSE, Jan. 8, 2002, available at 2002 WL 2311296 (discussing potential charges of criminally negligent manslaughter against three French and three German ski trainers after Cavagnoud's death on Pitzal Glacier near Innsbruck); Astrid Andersson, *French Team Face Probe over Death*, DAILY TELEGRAPH (London), Jan. 4, 2002, at P6, available at 2002 WL 3272221 (stating that fatal crash that killed Cavagnoud was originally blamed on ski racer with whom she collided, but later attributed to "communication breakdown between the [French and German] teams").

8. See *infra* text accompanying notes 198–225 (discussing European criminal convictions of defendants for recreational accidents in bungee jumping, tobogganing, whitewater rafting, and canyoning).

9. See, e.g., John C. Coffee, Jr., Symposium: Punishment, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1875, 1880 (1992) [hereinafter Coffee, *Paradigms Lost*] (arguing that criminal law is being extended into civil

standing doctrines derived from the common law to punish recreational risk-taking highlights the power of prosecutorial discretion to stretch boundaries without writing new laws. Deaths that one might consider to be simple accidents, unaccompanied by moral culpability in a retributivist sense,<sup>10</sup> recently have been prosecuted as criminal homicides under existing penal codes.

Second, the conflicted attitudes of the media, industry pressure groups, and victims' families toward the relationship of risk and blame indicates that prosecutors must make charging decisions guided by principle, not driven by the caprice of a public that cannot decide whether sports crash-and-burn footage should be used to sell products or secure convictions.<sup>11</sup> Theorists offer a variety of justifications for the prosecution and punishment of offenders, including incapacitation, rehabilitation, special and general deterrence, retribution, and denunciation.<sup>12</sup> This Article adopts what Michael Moore calls a "mixed theory" of punishment, in contrast to his own pure retributivism.<sup>13</sup> My arguments stem from a belief that an offender is justly punished only if he deserves it *and* the punishment achieves a net social gain by

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areas, for example, by making willful violation of agency rules a federal felony); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193, 193-99, 219 (1991) [hereinafter Coffee, *Does "Unlawful" Mean "Criminal"?*] (identifying "dominant development in substantive federal criminal law" in the 1980s as blurring of line between crime and tort, including creation of regulatory offenses, some of which impose strict liability, and upgrading such offenses to felonies). Writing in the 1950s and 1960s, several prominent scholars began to criticize the expansion of the criminal law. See generally HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) (criticizing proliferation of victimless offenses and arguing that criminal law must be used sparingly to preserve its socializing impact); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (expressing disagreement with trend toward criminal statutes imposing strict liability); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (disagreeing with use of criminal law to regulate economic life).

10. Michael Moore writes that "[t]o serve retributive justice, criminal law must punish all and only those who are morally culpable in the doing of some morally wrongful action." MICHAEL MOORE, *PLACING BLAME* 35 (1997).

11. Compare *infra* text accompanying notes 41-42 (discussing popular appeal of extreme sports crashes as a marketing and audience-grabbing tool) with *infra* text accompanying notes 230-49 (describing conflicted views of American service providers, victims' families, and journalists toward criminal charges against persons who cause recreational fatalities). For divided attitudes toward Swiss prosecutions, see *infra* text accompanying notes 220-21.

12. MOORE, *supra* note 10, at 84.

13. See *id.* at 92-94.

condemning the wrongfulness of his conduct.<sup>14</sup> Appropriate charging decisions aspire to play an educational role, communicating moral norms to the people, rather than merely reflecting their preferences.<sup>15</sup> If prosecutors remain inconsistent in their attitude toward recreational risk, the “public” nature of the district attorney’s office creates false confidence that prosecutorial decision-making is more just than that of the stereotypically greedy tort plaintiff.<sup>16</sup> Eventually, that confidence will be undermined. Moreover, confusion about what types of killings are wrongful will thwart the goal of stimulating moral conduct and deterring transgressions.

Third, in making decisions about risky sports cases, prosecutors wield a tool—the criminal law—that is poorly equipped to analyze the problems that such cases pose. Unlike tort, the criminal law generally does not ask whether victims assumed the risks they faced, or whether they consented to their own deaths. Indeed, in economic terms, recent recreational homicide prosecutions treat as violations of inalienability rules intrusions that tort law often does not compensate with damages.<sup>17</sup> Tensions between trends in criminal and civil adjudication of sports

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14. For influential “mixed theories” positing the educational or symbolic function of criminal punishment, see Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 176, 179–80 (1952) (describing “moralizing effect” of criminal law as type of deterrence); JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98 (1970) (identifying “symbolic significance” of criminal punishment as feature distinguishing it from mere penalty); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 208 (1996) [hereinafter *The Criminal-Civil Distinction*] (“[A] distinct criminal justice system is the only way to effectively express condemnation and to gain the practical benefits of doing so.”). According to Feinberg:

That characteristic, or specific difference [between a punishment and a penalty], I shall argue, is a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of either the punishing authority himself or those “in whose name” the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing in other kinds of penalties.

FEINBERG, *The Expressive Function of Punishment*, *supra*, at 98.

15. *But see* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS OF THE CRIMINAL LAW xv–xvi (1995) (making argument, based on empirical research, that differences between community norms and penal codes undermine moral authority of criminal law).

16. Several writers recoil at proposals to allow victims a greater role in the criminal justice system. *See, e.g.*, John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 569 (1994) (discussing potential for misconduct by private prosecutors); Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357, 413–14 (1999) (“For private vindication, there remains the civil tort, but there is not a place for victims in the criminal justice process.”). However, it is not clear that the public role of the prosecutor, either today or in the nineteenth century, has translated into the even-handed pursuit of justice. *See* Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1311–12, 1315–16, 1321, 1393 (2002) (contending that public nature of prosecutor’s office does not guarantee fairness, since rise of public prosecution historically stemmed from strong law and order perspective).

17. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

fatality cases thus necessitate a reexamination of the boundaries of the criminal law and its relationship to civil liability.

Although this Article acknowledges economic factors, it explicitly embraces non-efficiency considerations shaping the criminal law. Criminal liability should function independently from tort, rather than serving as an auxiliary kick to drive home tort law's deterrence of non-market transactions.<sup>18</sup> Indeed, even a mixed theory like mine contains a strong retributive requirement of culpable choice that is absent from the corrective justice goals of tort.<sup>19</sup> Given the differing aspirations of the two legal regimes, there is no inescapable reason why a prosecutor should not step into the breach when tort law abandons its effort to compensate or deter. However, he ought to step carefully, for he faces a daunting task in cases that present issues, such as assumption of risk, which are foreign to the criminal law. To justify his decision to press charges, the prosecutor ought to be able to argue that the defendant displayed an anti-social attitude deserving of public condemnation.

This Article discusses the relationship between popular culture, tort law, and the discretion to prosecute recreational risk-takers for crimes. Part I analyzes the popularity of risky sports through the lens of press coverage and advertising. The exaltation of thrill-seeking exceeds the popularity of a short list of events represented in extreme sports competition. Rather, a devil-may-care attitude pervades contemporary conceptions of desirable conduct for young people and seemingly offers older weekend warriors a fountain of youth in risk. Part II demonstrates that tort reform has shrunk plaintiffs' opportunities to recover for injuries in sports deemed inherently dangerous and that the economic clout of service providers, such as ski areas, has spurred a trend that also shields sports participants from civil negligence liability in many states. Part III highlights a nearly polar development in criminal litigation—the charging and conviction of individuals deemed responsible for recreational fatalities—and assesses the conflicted response to such cases.

Part III further suggests that, to justify the tension between tort and crime, prosecutors must make charging decisions that delineate morally blameworthy indifference from inadvertent harm-creation. They must seek punishments for the former that clarify the “public” nature of criminal liability, instead of merely providing an alternate regime for victim restitution. The fact that it has become more difficult for plaintiffs to recover in tort does not provide a proper basis to haul sports

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18. See Jules L. Coleman, *Crime, Kickers, and Transaction Structures*, in 27 NOMOS: CRIMINAL JUSTICE 313, 318 (1985) (“[In classical economic analysis], the criminal law is parasitic upon tort law: crimes are defined in terms primarily of torts. Criminal sanctions are ‘kickers’ imposed in addition to tort liability to foster compliance.”). Coleman argues that “the key moral notions of criminal responsibility—of guilt and fault—are simply absent from the economic infrastructure.” *Id.* at 323; see also Stephen J. Schulhofer, *Is There an Economic Theory of Crime?*, in 27 NOMOS: CRIMINAL JUSTICE 329 (1985) (making similar argument).

19. Cf. Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 331 (1996) (making similar observations from pure retributivist vantage).

enthusiasts into criminal court. This argument does not completely preclude prosecutors from filing charges against individuals who cause death in the context of a risky recreation; however, it cautions that the road maps provided by criminal law doctrine and theory make these sports cases very difficult to navigate. The challenge is to identify the cases in which prosecution elucidates, rather than distorts, the criminal law's condemnatory and retributive function in punishing blameworthy conduct. To this end, this Article proposes a new approach to charging based on whether the defendant made choices that placed him outside the ordinary bounds of the sport, thus revealing an impermissible lack of empathy for other participants' safety.

## I. Extreme Sports and the Culture of Risk-taking

### A. Marketing Risk to the Mainstream

Risky sports sell products. Old Spice cologne has replaced its whistling sailor with an inline skater,<sup>20</sup> and Nissan Xterra—a sport utility vehicle that includes its own first-aid kit<sup>21</sup>—explicitly targets Generation X car-buyers toting mountain bikes, kayaks, skis, and other insignia of an “extreme . . . on-the-edge” lifestyle.<sup>22</sup> One Nissan commercial even shows a male athlete wiping his bloodied arm on the Xterra's console after a spectacular bicycle accident. The ads communicate the message that the four-wheel-drive vehicle “is definitely—and defiantly—not for those who are married with children.”<sup>23</sup> Rather, the stunts grab the attention of young people who want to convey the image that an SUV with containers for sports equipment and emergency supplies seems to suggest: that the Xterra owner is athletic, rugged, and in “connection to the earth . . . [s]ometimes face first.”<sup>24</sup>

So pervasive is the use of risky sports as a marketing tool that advertising industry insiders worry about keeping the images fresh, not about whether viewers have sufficient familiarity with extreme sports.<sup>25</sup>

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20. See Brendan I. Koerner, *Extreeme: The Peril, the Thrill, the Sheer Rebellion of It All*, U.S. NEWS & WORLD REP., June 30, 1997, at 50, available at 1997 WL 8332292 (noting that Old Spice man who wins blonde woman now inline skates, instead of walking off ship and into bar); Dennis Tuttle, *On the Cutting Edge: Radical Sports Find a Foothold*, WASH. POST, Jan. 11, 1998, at Y6 [hereinafter Tuttle, *On the Cutting Edge*] (describing same change in Old Spice's ad campaign).

21. See *Road Tests: Long-Term Test: 2000 Nissan Xterra SE*, at <http://www.edmunds.com> (last visited Jan. 15, 2003).

22. Michael McCarthy, *Xterra Discovers Extra Success: Nissan SUV Selling More than Company Expected*, U.S.A. TODAY, Feb. 26, 2001, at 4B available at 2001 WL 5456205; see 2001 Nissan Xterra: *Why Mess With a Winner?*, at <http://www.autobuyguide.com/> (last visited Jan. 15, 2003) (associating the Nissan Xterra with “kayakers, windsurfers, hikers, climbers, Alpine and Nordic skiers, mountain bikers, fishermen, and horse people”).

23. Cathy Luebke & Tom Jensen, *Nissan's Xterra Not for Married With Children*, BUS. J., May 1, 2000, at <http://jacksonville.bizjournals.com> (last visited Jan. 15, 2003).

24. 2001 Nissan Xterra: *Why Mess With a Winner?*, *supra* note 22.

25. See *The Extreme Generation*, BRANDWEEK, Sept. 1, 1997, at 19, available at 1997 WL 8799174 (“We are already beginning to expect the sight of flying bodies on skateboards and snowboards or skydivers when a product aimed at [the 18- to 34-year-old] audience is advertised.”).



Yet, despite concerns that their message will be diluted by overuse, companies hawking products associated with high-risk adventure have enjoyed a great deal of success.<sup>26</sup> Americans brandish their credit cards to purchase athletic equipment, as well as the cars that get them to the mountains and lakes where they test their mettle. Indeed, extreme sports have captured an expanding piece of the \$40 billion pie that Americans' annual sporting goods purchases comprise.<sup>27</sup>

The cash value of risk has not been lost on the television networks. ESPN televises the X Games, attracting "more viewers [in their teens, twenties, and early thirties] than any sporting event, including the Super Bowl."<sup>28</sup> Less than a decade old, the X Games have already sparked vigorous competition among cities to host—and commercial enterprises to sponsor—the events.<sup>29</sup> In a similar fashion, NBC coverage of the 2002 Winter Olympics turned the spotlight on America's dominance in three new types of competition—snowboarding, freestyle skiing, and skeleton<sup>30</sup>—and lent prime-time legitimacy to athletes previously known only in daredevil, anti-establishment circles. Mainstream acceptance is relevant to the question of criminal liability. As these sports move out of the shadows occupied by illegal activities like drag racing on public streets, a participant's first contact with the law is increasingly likely to take place after an injury or death has occurred, rather than because the activity itself violates any statute.

The phrase "extreme sports" encompasses a loosely defined set of dangerous pastimes. First held in Rhode Island in 1995, the Summer X Games originally featured twenty-seven events, including downhill inline skating, sky surfing, skateboarding, mountain and dirt biking, sport climbing, a number of water events, and a cross-country orienteering race.<sup>31</sup> ESPN soon took the concept to colder climes. The Winter X

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26. For example, the Nissan Xterra outstripped sales projections, selling about 30,000 more vehicles per year than Nissan initially estimated. See *Xterra Discovers Extra Success*, *supra* note 22, at 4B.

27. Koerner, *supra* note 20, at 50.

28. Tuttle, *On the Cutting Edge*, *supra* note 20, at Y6. The X Games began in 1994 and have "quickly evolved into a flagship enterprise for the Disney-owned network [ESPN]." Koerner, *supra* note 20, at 50. In the summer of 2002, the X Games attracted about 63 million viewers. See Ralph Frammolino, *ESPN Picks L.A. to Host the X Games in 2003, '04*, L.A. TIMES, Nov. 22, 2002, at C1, available at 2002 WL 103219292.

29. See *id.*

30. Dennis Tuttle, *Games Feature Youthful Daring; Extreme Sports Get a Prime-Time Network Showcase at the Olympics*, WASH. POST, Feb. 3, 2002, at Y7, available at 2002 WL 10945779 [hereinafter Tuttle, *Games Feature Youthful Daring*].

31. See *Extreme Games: Encore Performance in R.I.*, PROVIDENCE J.-BULL., Oct. 11, 1995, at D2; Tom Meade, *R.I. Wins Extreme Games Again by Offering Package of Promises*, PROVIDENCE J.-BULL., Oct. 12, 1995, at D2, available at 1995 WL 10522830. The 1996 X Games added the sport of wakeboarding, which resembles "'a combination of skate-boarding and snow-boarding on water.'" Meade, *supra*, at D2. The Asian X Games, also orchestrated by ESPN, currently feature aggressive inline skating, bicycle stunts, skateboarding, sport climbing, wakeboarding, and a motocross exhibition. See Glen Peters, *Young: Popularity Rising*, NEW STRAITS TIMES, Nov. 8, 2002, at 22, available at 2002 WL 102301492.

Games showcases freestyle skiing, snowmobile snocross, ski boarding, ice climbing, snowboarding, and snow mountain biking.<sup>32</sup> These events may sound like a laundry list of the foolhardy and the bizarre. But, in fact, they fall in the middle of a spectrum on which BASE jumps—illegal plunges by parachutists from buildings, bridges, antennae, and cliffs<sup>33</sup>—occupy the most death-defying spot, while other pastimes like snowboarding offer comparatively routine thrills for ordinary Americans. One publication for the advertising industry informs its readers about the value of ads featuring heart-racing stunts: “What these activities cum ‘extreme sports’ have in common is that they involve a high risk of injury and even death, and are extremely attractive to men 18 to 34, the most elusive and difficult demographic for marketers and advertisers.”<sup>34</sup>

Extreme sports have ill-defined boundaries. They spill over into crowded ski slopes and high-traffic public reservoirs where enthusiasts influenced by their X Games idols share space with more risk-averse participants, including senior citizens and very young children. The cultural and legal impact of extreme sports far exceeds the specific competitions televised on ESPN. Attitudes associated with high-speed races have percolated into less skilled areas of youth culture, fueling the fantasies of young males and “a smaller but growing number of women.”<sup>35</sup> Teenagers who have not mastered aerial maneuvers on snowboards or skis can buy lift tickets at winter resorts. These days, they can even pretend that they are extreme sports competitors while jumping on state-of-the-art pogo sticks that allow users to do double rotations.<sup>36</sup> Indeed, the broad appeal of speed, height, and danger in a variety of contexts—rather than a handful of truly extreme, competitive events—increases the chances of fatal collisions and falls in recreational settings. It is useful to analyze the growing appeal of risky athletic endeavors without focusing exclusively on sports designated “extreme” for the purposes of competition. Hence, this Article discusses the legal regulation of risk in a variety of recreations that involve inherent dangers.

## B. Rates of Death and Injury

Observers differ over how many young people actually risk life and limb by engaging in extreme sports, although such activities undeniably

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32. Tuttle, *On the Cutting Edge*, *supra* note 20, at Y6 (listing events that composed second annual Winter X Games in Crested Butte, Colorado).

33. The acronym “BASE” derives from the objects off which BASE jumpers leap: buildings, antennae, spans (i.e. bridges), and the Earth. See Karl Taro, *Life on the Edge: Is Everyday Life Too Dull?*, TIME, Sept. 6, 1999, at 28, available at 1999 WL 25725124.

34. *The Extreme Generation*, *supra* note 25, at 19.

35. *Id.*

36. See Elizabeth Bernstein, *Here's Yet Another Toy That Lets You Spend More Time in the Air*, WALL ST. J., Aug. 10, 2001, at B1, available at 2001 WL-WSJ 2872307 (discussing growing sales of new “extreme” pogo sticks). Even in the relatively unexciting pastime of pogo-ing, accidents happen: A 24-year-old contestant on MTV's *Jackass* show fractured his finger and knocked himself temporarily unconscious while attempting stunts on a pogo stick. See *id.*

have experienced a growth surge.<sup>37</sup> Journalists who emphasize the risky nature of extreme sports can point to increases in emergency room visits by 33% for skateboarders, 31% percent for snowboarders, and 20% for mountain climbers over a one-year period.<sup>38</sup> The relative safety and regulation of modern society may have fostered a hunger for recreational risk among members of the young, male demographic that advertisers target.<sup>39</sup> Athletes ape matinee idols like James Bond and Indiana Jones by scaling mountains or leaping into thin air.<sup>40</sup> Less talented aficionados, in turn, ape the extreme sports competitors, and those on the couch

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37. The majority of news reports and editorials located for this Article discuss the rapid growth of extreme sports. See, e.g., Robert Johnson, *Extreme-Sports Industry Faces Risky New Challenge*, WALL ST. J., July 17, 2001, at B2, available at 2001 WL-WSJ 2869813 (using extreme sports camp with waitlist of 2,200 names as example of popularity of extreme sports among teenagers); Koerner, *supra* note 20, at 50 (reporting that inline skating “was the fastest growing sport of 1996 and the most popular of any sport among children and teens”; that rock-climbing devotees grew from 50,000 in 1989 to a half-million in 1997; and that wakeboarding expanded from 100,000 participants in 1991 to nearly a million in 1995); Taro, *supra* note 33, at 28 (reporting that “[s]nowboarding has grown 113% percent in five years and [boasted] nearly 5.5 million participants [in 1999]”); Tuttle, *On the Cutting Edge*, *supra* note 20, at Y6 (reporting that popularity of inline skating increased 635 percent between 1987 and 1998 and that there were 22 million inline skaters in 1998); *Taking It to Extremes*, TORONTO STAR, Aug. 20, 1999, available at 1999 WL 23988325 (stating that extreme sports were fastest growing youth athletics of 1990s); see also Larissa Dubecki, *The Knowledge*, THE AGE (Australia), Sept. 8, 2000, at 12, available at 2000 WL 24427798 (noting that international tourism is “an important spin-off of extreme sports” and that 36 percent of British visitors to Australia want to try whitewater rafting). The growth curve for extreme or adventure sports coincides with a decline in more traditional athletic “activities like baseball, touch football, and aerobics.” Taro, *supra* note 33, at 28.

However, a few skeptics argue that, despite media coverage, extreme sports have not become widespread, nor are they particularly dangerous. See, e.g., Aaron Kuriloff, *Extreme Danger?*, NEW ORLEANS TIMES-PICAYUNE, June 14, 2000, at D1, available at 2000 WL 21264564 (“[J]ust as low participation in extreme sports belies the attention they get, the number of serious accidents lags far behind the hype”).

38. Taro, *supra* note 33, at 28 (citing percentage increases between 1996 and 1997). Another journalist reports that, in 1995, about 105,000 people went to the emergency room to get treatment for inline-skating injuries. Koerner, *supra* note 20, at 50.

39. See *Child-Proof the World*, WASH. TIMES, July 10, 1997, at A2, available at 1997 WL 3677645 (“Perhaps a harbinger of [children’s rebellion against over-protection] is the rising popularity of extreme sports and increases in teen smoking. . . .”); Koerner, *supra* note 20, at 50 (quoting radical skier Kristen Ulmer as saying, “American culture is real scaredy-cat culture [characterized by clean toilets and well-cooked hamburgers], and people are sick of it”); *The Extreme Generation*, *supra* note 25, at 19 (“Perhaps it is because this age group has not had to go to war, the ultimate proving ground for men. Perhaps the appeal is a byproduct of living in a risk-averse time in America—safe sex, controlled drinking, avoidance of smoking.”); Paul Roberts, *Risk*, PSYCH. TODAY, Nov./Dec. 1994, at 50, 52 (“In an unsettling paradox, our culture’s emphasis on security and certainty—two defining elements of a ‘civilized’ society—may not only be fostering the current risk taking wave, but could spawn riskier activities in the future.”); Taro, *supra* note 33, at 28 (“Previous generations didn’t need to seek out risk; it showed up uninvited and regularly: global wars, childbirth complications, diseases and pandemics from the flu to polio, dangerous product and even the omnipresent cold war threat of mutually assured destruction.”).

40. See Koerner, *supra* note 20, at 50 (citing psychology professor emeritus Keith Johnsongard for view that extreme athletes strike romantic chord with their “unwavering cool in the face of extraordinary circumstances”).

watch televised competitions “for the crash-and-burn factor.”<sup>41</sup> ESPN often shows footage of dramatic wipeouts to promote the X Games.<sup>42</sup> Thus, even in peacetime, violence and bodily harm play a role in recreation.

Skeptics take a different view. They argue that scholastic football causes fatal injury or paralysis more often than rock climbing or skydiving.<sup>43</sup> The deaths of several celebrity skiers in the past five years focused acute media attention on the risks of snow skiing, but the fatal head and spinal injuries that Michael Kennedy and Sonny Bono suffered are relatively rare.<sup>44</sup> The National Ski Area Association (“NSAA”) reported only .83 deaths per million skier or snowboarder visits in 2001–2002.<sup>45</sup> An average of thirty-nine people per year have died while skiing or snowboarding in the past decade, and forty-five deaths occurred during the 2001–2002 season.<sup>46</sup> These statistics pale by comparison to the number of deaths that the NSAA reports for 2001–2002 in several other sports: ninety-one for recreational scuba diving; 701 for recreational boating; 800 for bicycling; and a staggering 1200 for swimming.<sup>47</sup> Moreover, participants in true extreme sports make up a small segment of the American population, dwarfed by adherents of traditional pastimes like bowling and freshwater fishing.<sup>48</sup> Finally, the extreme sports label has been appropriated in many completely safe, non-athletic contexts. Youth-oriented events that call themselves “extreme” often feature copious safety precautions,<sup>49</sup> and for the truly sedentary, fashion

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41. Jeanine Stein, *Extremists Extraordinaire*, L.A. TIMES, July 24, 1995, at 1, available at 1995 WL 2068175 (quoting California State University sports philosophy instructor Ken Ravizza).

42. *See id.*

43. Kuriloff, *supra* note 37, at D1.

44. *See* Susan Schmidt & Curt Suplee, *Despite Recent Deaths, Snow Skiing Is Relatively Safe, Experts Say*, WASH. POST, Jan. 7, 1998, at A12, available at <http://www.patrol.org> (last visited Jan. 31, 2003).

45. <http://www.nsaa.org> (last visited Jan. 31, 2003). A skier/snowboarder visit is defined as “one person visiting a ski area for all or any part of a day or night.” *Id.*

46. *See id.*

47. *Id.*; *see also* Schmidt & Suplee, *supra* note 44, at A12 (reporting very similar figures in 1998). The NSAA has a vested interest in showing that skiing is less hazardous than other sports, but academic researchers have also studied the issue. One professor told the press that more than half of all ski deaths result from collisions with trees; 90 percent of the skiers killed each year are male; and 90 percent of deaths occur on intermediate trails. *See* Ted Alan Stedman, *Head Check: Resorts Stress Safety for Skiers and Snowboarders*, ROCKY MTN. NEWS, Dec. 6, 2000, at 16C, available at 2000 WL 6615196 (citing Rochester Institute for Technology professor Jasper Shealy, who has studied ski injuries for 30 years).

48. *See* Schmidt & Suplee, *supra* note 44, at A12 (reporting that only two percent of U.S. population participated in either indoor or outdoor rock climbing in 1998). According to the National Sporting Goods Association Web site, the ten sports in which the most Americans participated more than once in 2001 were exercise walking, swimming, camping, fishing, exercising with equipment, bowling, bicycle riding, billiards, basketball, and golf. *See* <http://www.nsga.org> (last visited Jan. 31, 2003).

49. *See, e.g.*, Dan Eggen, *Hot Times at Extreme Games; Teens Climb, Leap Outside Mainstream*, WASH. POST, Sept. 27, 1998, at B1, available at 1998 WL 16558768 (describing local event, which was loosely inspired by extreme sports, but which appeared “plenty safe for youths of all ages” due to safety harnesses, inflatable structures, and padding).

and electronics borrow the emblems of thrill-seeking. An individual who has never performed a bicycle or skateboard stunt in his life can get a piece of the action by wearing clothes designed to look like a motocross jersey<sup>50</sup> or simulating high-speed events on a PlayStation videogame console.<sup>51</sup>

Such observations do not refute the cultural and legal importance of the extreme sports craze, however. Quite the contrary. If catastrophic accidents occur infrequently, amateur adventurers will be more inclined to strap on their equipment without considering that they might grievously injure or kill a co-participant (or themselves). Moreover, they sometimes share recreational space with individuals who do not buy into the same thrill-seeking norms. At least one study indicates that knowledge of ski fatalities decreases risk-taking behavior on the slopes, but that skiers under the age of twenty-five are less likely to have heard about such deaths.<sup>52</sup> Indeed, 47% of skiers in the study's sample were unaware of recent fatalities.<sup>53</sup> The likelihood that many enthusiasts lack full appreciation of the risks of their chosen activity makes the regulatory question all the more interesting and difficult.

### C. Regulating Risk in an Anti-Regulation Culture

The term "recreation" implies self-expression and freedom from the constraints of the working week. Extreme sports enthusiasts are especially likely to be associated with hostility toward efforts to impose uniformity or rules upon them. For example, several snowboarders boycotted the debut of their sport at the 1998 Winter Olympics in Japan because the International Olympic Committee chose "events that [they] felt didn't truly reflect the sport" and required "team members, accustomed to expressing themselves through their clothes" to wear uniforms.<sup>54</sup> In the sport of alpine skiing, campaigns by resorts to inform

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50. See *The Extreme Generation*, *supra* note 25, at 19 (describing influence of extreme sports on fashion).

51. Top extreme sports competitors like skateboarder Tony Hawk often have action figures and video game characters named after them. See *X Marks the Spot: Winter Games Inching Closer to Mainstream Acceptance*, L.A. TIMES, Jan. 26, 2003, at D7, available at 2003 WL 2380893; see also Jeff Ostrowski, *Cashing in on the Craze*, PALM BEACH POST, Aug. 18, 2002, at 1F, available at 2002 WL 25417114 (noting success of Pro Skater videogame "featuring skateboarding's clean-cut superstar," Tony Hawk).

52. See Reed L. Levine & Bernard S. Gorman, *Skiers' Perceptions of Danger as a Function of Awareness of Fatalities*, 17 J. SPORT BEHAV. 17, 22 (1994).

53. See *id.* Convicted skier Nathan Hall claimed, for example, that he "didn't know that fast skiing could kill someone." Deborah Frazier, *Vail Skier Says He Didn't Know Risks*, ROCKY MOUNTAIN NEWS, Jan. 30, 2001, at 7A, available at 2001 WL 7362317 [hereinafter Frazier, *Vail Skier*]. Alan Cobb's fiancée, who was on the mountain with Cobb when Hall killed him, stated, "I just never dreamed this could happen skiing." Ed Douglas, *Crunch Time: Princess Caroline's Painful Collision Shows Once Again that Skiing Can Be Dangerous*, THE GUARDIAN, Feb. 16, 2001, available at 2001 WL 13635272 (discussing the Colorado case, in addition to celebrity ski accidents).

54. Joe Miller, *Extreme Sports*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 24, 1998, at 15, available at 1998 WL 6135797.

skiers about safety codes<sup>55</sup> coexist with pressure to expand extreme terrain.<sup>56</sup> Despite the increased emphasis on safety, few resorts in the United States require skiers or snowboarders to wear helmets.<sup>57</sup> And such safety equipment has proven unpopular with adolescents in sports like inline skating and downhill mountain biking, for which helmets are often required.<sup>58</sup> Furthermore, safety awareness programs have had little impact on either the attitude of some participants or the incidence of fatalities and grievous injuries. During a week of increased patrolling and educational efforts by ski resorts nationwide in 2001, four men died and two others survived crashing into trees.<sup>59</sup>

Tensions escalate when recreational safety becomes the subject of litigation and other law enforcement activities. As this Article will show, some commentators involved in the world of risky sports view tort suits, or even the criminal law, as appropriate weapons for combating injuries and fatalities.<sup>60</sup> Yet, others firmly reject legal efforts to reduce risk. Before tort reform erected substantial protections for venue operators and service providers,<sup>61</sup> a ski-film star expressed his hyperbolic opinion that “people who sue ski areas should be shot”<sup>62</sup> because tort judgments increase lift-ticket prices and force movie producers to film their stunts overseas. In 1993, law professor Donald Judges offered a more sympathetic and reasoned view of tort plaintiffs, but nevertheless complained, “[w]e’ve reached the point where it’s not simply more expensive to enjoy life, but where activities bearing any risk are being removed from the market.”<sup>63</sup> Based on empirical and anecdotal

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55. See Charles J. Sanders & Jacqueline Gayner, *The Cold Truth: Have Attorneys Really Chilled the Ski Industry?*, 2 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 125, 135 (1992) (noting that ski areas post skier’s code of responsibility, which about half of states have enacted in legislation); see also Peter Hardy, *Big Brother Goes Downhill*, DAILY TELEGRAPH (London), Jan. 6, 2001, available at 2001 WL 2905809 (reporting on duties of Vail’s Yellow Jacket patrol, as well as creation of speed traps on slopes, in wake of criminal prosecutions); Stedman, *supra* note 47, at 16C (discussing steps taken by Colorado resorts during National Ski Safety Awareness Week).

56. See Sanders & Gayner, *supra* note 55, at 132 (discussing pressure to expand extreme terrain). It is worth noting, however, ski areas justify terrain parks as a means of increasing safety by limiting “areas where kids are jumping.” Fletcher Doyle, *Slippery Slope Colorado Ruling May Open Door to Criminal Charges for Collisions on Ski Trails*, BUFF. NEWS, Feb. 22, 2001, at C1, available at 2001 WL 6336592.

57. Bob Ortega & Emily Nelson, *Skiing Deaths May Fuel Calls for Helmets*, WALL ST. J., Jan. 7, 1998, at B1, available at 1998 WL-WSJ 3478003 (discussing lack of helmet requirements for alpine skiers, but stating that ski areas often mandate helmet usage by downhill mountain bikers in summer months).

58. Kuriloff, *supra* note 37, at D1 (stating that adolescent male skaters dislike wearing helmets because they fear peer ridicule more than physical injury).

59. Doyle, *supra* note 56, at C1.

60. See *infra* text accompanying notes 228–29.

61. See *infra* text accompanying notes 90–127.

62. Sanders & Gayner, *supra* note 55, at 126 (quoting Scott Schmidt); see Robert I. Rubin, *Ski Liability Cuts New Trails*, TRIAL, Oct. 1990, at 112 (“In general, skiers are not sympathetic to other skiers who have brought personal injury lawsuits.”).

63. Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 3–4 (1993).

evidence, he concluded that service and equipment providers in the early 1990s suffered an indirect, negative impact from tort law.<sup>64</sup>

This Article will show that, under pressure from various recreation industries, a majority of states have adopted assumption of risk doctrines and sports-safety statutes that are unsympathetic to plaintiffs.<sup>65</sup> Several sources indicate that this trend has been germinating for some time and that many ordinary Americans support it. A downward spiral in recovery rates for ski plaintiffs, starting in the 1970s, stems in part from the fact that “jurors usually believe that plaintiffs cause their own injuries by hotdogging or skiing beyond their ability.”<sup>66</sup>

Criminal enforcement is also controversial. Skateboarders chafe under the watchful eye of the police.<sup>67</sup> Journalists criticize prosecutors who pressed charges against a father for the river-rafting death of his son.<sup>68</sup> And skiers argue about whether Nathan Hall, an expert who split the skull of an intermediate skier in a collision at Vail, should be incarcerated for his negligence.<sup>69</sup> The sentiment that weekend warriors who cause death ought to spend time in jail competes with the fear that criminal prosecution will chill participation in sports that simply cannot be made safe.

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64. See *id.* at 34–38 (admitting that no plaintiffs had filed suit against most service and equipment providers that he surveyed). The concerns of his survey group largely related to rising insurance rates. See *id.* at 34.

65. See *infra* text accompanying notes 70–134.

66. Rubin, *supra* note 62, at 112; see Jean Hellwege, *Criminal Verdict in Skier Case Could Help Plaintiffs in Civil Suits*, TRIAL, Feb. 1, 2001, at 16 available at 2001 WL 12692405 (quoting tort plaintiffs’ lawyer Jim Chalut for view that “there’s been prejudice in the jury box against [ski] plaintiffs”).

67. See Heather Ratcliffe, *Skating on Pavement: Area Skateboarders Clash With Police Officers About When and Where They Can Hit the Concrete*, TULSA WORLD, July 14, 1997, available at 1997 WL 3643244 (reporting that skateboarders “say they are athletes but are treated like criminals” when police chase them out of areas where pedestrians are at risk). When this news story was written, violation of laws against skateboarding in garages and on sidewalks in Tulsa, Oklahoma, carried the potential for a thirty-five- to fifty-dollar fine. See *id.*

68. See *infra* text accompanying notes 242–49, 326–31 (discussing charges against Paul Gallegos in Jefferson County, Colorado).

69. For the facts of *Hall* case, see *People v. Hall*, 999 P.2d 207 (Colo. 2000) (reversing dismissal of reckless manslaughter charges against Hall). See also *infra* text accompanying notes 286–303, 312–13. For controversy over the appropriateness of Hall’s reckless manslaughter charge and subsequent negligent homicide conviction, compare Brian E. Clark, *Homicide Conviction a Chilling Reminder to Skiers*, SAN DIEGO UNION-TRIB., Jan. 21, 2001, at C13, available at 2001 WL 6434939 (noting San Diego Ski Council president’s concern that people will “let this one incident persuade them not to take up skiing or snowboarding”), and Gene Sloan, *Reckless-Skiing Conviction Sends Message on Slopes*, U.S.A. TODAY, Feb. 16, 2001, at 1D, available at 2001 WL 5455446 (quoting *Ski* magazine editor, Rick Kahl, who worries that Hall’s criminal conviction will spur tort suits and eventually diminish sport of alpine skiing), with Clark, *supra* (asserting reporter’s opinion that Hall “got what he deserved”), and Hellwege, *supra* note 66, at 16 (quoting tort plaintiffs’ attorney Jim Chalut, who views Hall’s conviction as “a step toward protecting victims’ rights in the civil arena”), and Editorial, *Skier Penalty Warranted*, DENVER POST, Feb. 6, 2001, at B10, available at 2001 WL 6742901 (expressing opinion that Hall’s conviction and sentence were appropriate), and Sloan, *supra* (noting Chalut’s positive view of Hall’s conviction, as well as opinion of prosecuting attorney that criminal regulation is necessary due to increasing number of irresponsible skiers on slopes).

## II. Shrinking Tort Liability

### A. Types of Liability Limits

It is getting harder for recreational accident victims or their survivors to recover in tort for injuries or wrongful deaths. Driven by pressure from recreation industry lobbies,<sup>70</sup> tort law has developed in a manner that reinforces the media's love affair with daredevil recreation, shielding venue operators and service providers from many negligence claims and allowing co-participants wide latitude to seek thrills before being found liable for reckless harm-creation. A sports enthusiast who watches competitions and advertising on television will encounter little tension between the risk-embracing culture of extreme sports and tort doctrines that circumscribe the ability to recover damages for recreational accidents.

While a number of factors, including recreational use statutes,<sup>71</sup> narrow plaintiffs' window of opportunity in such cases, three developments have had the most significant impact on conduct that borders on criminality. These developments are the reduced standard of care for sports co-participants; courts' willingness to uphold exculpatory contracts exempting service providers, venue operators, and coaches from civil negligence suits; and the codification of tort liability limits in sports-safety statutes. Together they lend a legal stamp of approval to the media's promotion of risky recreations and send a message very different from that communicated by criminal prosecutors.

The first of these pro-defendant doctrines, which is based on primary assumption of risk principles, relieves sports co-participants of any duty to avoid negligent conduct and imposes a recklessness standard instead.<sup>72</sup> Courts often place cases in which the plaintiff voluntarily encounters a known risk caused by the defendant's breach under the rubric of "secondary assumption of risk," which merges with comparative fault schemes.<sup>73</sup> By contrast, in primary assumption of risk cases, the

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70. See *infra* notes 103–06 and accompanying text.

71. All states have adopted recreational use statutes that encourage property owners to open their land to activities like hiking, fishing, hunting, and snowmobile riding by reducing their civil liability for the injuries that a recreational user sustains. These statutes limit the property owner's duty of care to that of avoiding willful or malicious failure to warn against dangerous conditions. See Terence J. Centner, *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities*, 9 BUFF. ENVTL. L.J. 1, 2 (2001); Terence J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1, 12 (2000). From its inception, recreational use legislation has withheld tort protections from entities that charge fees; hence, the statutes do not shield commercial providers like ski areas from plaintiffs' verdicts. See Centner, *Tort Liability for Sports and Recreational Activities*, *supra*, at 30. Instead, ski areas and other commercial providers seek shelter under common law assumption of risk doctrines, see *infra* text accompanying notes 90–94, sports-safety statutes, see *infra* text accompanying notes 109, 111–14, 118–27, and liability waivers, see *infra* text accompanying notes 95–98.

72. See, e.g., *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992); *Crawn v. Campo*, 643 A.2d 600, 607 (N.J. 1994).

73. See *Knight*, 834 P.2d at 708.



defendant's lack of a duty completely bars the plaintiff's recovery.<sup>74</sup> Thus, it is helpful to think of primary assumption of risk as the "no duty" rule because a sports co-participant breaches no duty when he merely acts in a way that an objectively reasonable person would not act.<sup>75</sup> Primary assumption of risk precludes the plaintiff from recovering damages without regard to comparative fault—that is, without considering "whether . . . [the plaintiff's] conduct in undertaking the activity was reasonable or unreasonable."<sup>76</sup>

Like California, which clarified the applicability of assumption of risk doctrines to recreational accident cases in *Knight v. Jewett*,<sup>77</sup> a majority of states now require reckless or willful conduct by a sports co-participant for a plaintiff to prevail.<sup>78</sup> In this context, courts treat the careless behavior of others as an inherent risk of the sport.<sup>79</sup> *Knight* involved a tort suit against a player in a rough-and-tumble touch football game.<sup>80</sup> Despite the fact that Kendra Knight asked the defendant, Michael Jewett, "not to play so rough," Jewett caused such a severe fracture to Knight's finger that it had to be amputated.<sup>81</sup> The court rejected the plaintiff's claim because "a party cannot change the inherent nature and risk of a sport by making a unilateral request for other participants to play less vigorously."<sup>82</sup>

Although the *Knight* case involved a competitive contact sport, courts have adopted its holding in contexts ranging from alpine skiing to sport fishing.<sup>83</sup> Applying the recklessness standard to co-participants in

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74. See *id.* at 704, 707.

75. See *id.* at 710 (noting that majority of states take this approach).

76. *Id.* at 704.

77. *Id.*

78. See *Crawn v. Campo*, 643 A.2d at 603 ("Most courts have determined that the appropriate duty players owe to one another is not to engage in conduct that is reckless or intentional."); Carla N. Palumbo, *New Jersey Joins the Majority of Jurisdictions in Holding Recreational Sports Co-Participants to a Recklessness Standard of Care*, 12 SETON HALL J. SPORT L. 227, 227 (2002).

79. *Knight*, 834 P.2d at 708.

80. See *id.* at 697–98.

81. *Id.* at 697.

82. *Record v. Reason*, 86 Cal. Rptr. 2d 547, 554 (Cal. Ct. App. 1999) (discussing the *Knight* court's reasoning). In *Record*, an inner tuber who sustained a spinal injury unsuccessfully sued the boat driver who was towing his tube, complaining that he had asked the defendant to "take it easy." *Id.* at 555. The court rejected this argument, citing *Knight*. See *id.* at 554.

83. Like *Knight*, an influential New Jersey case involved a contact sport. *Crawn*, 643 A.2d at 607–08 (N.J. 1994) (requiring reckless harm-creation for civil damages against co-participant in informal softball game). California has taken the lead in applying a recklessness standard to other types of recreation. See *Cheong v. Antablin*, 946 P.2d 817, 819 (Cal. 1997) (holding that snow skier may not sue another snow skier for simple negligence, but rather must show that fellow skier caused injury intentionally or recklessly); *Ford v. Gouin*, 834 P.2d 724, 728 (Cal. 1992) (holding that primary assumption of risk doctrine applies to water skiing and that defendant only had duty to avoid reckless or intentional injury to plaintiff); *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 189–92 (Cal. Ct. App. 2001) (holding that skier and snowboarder were co-participants and that defendant only owed plaintiff duty to avoid reckless or intentional injury, not to avoid negligence); *Bjork v. Mason*, 92 Cal. Rptr. 2d 49, 52, 53–54 (Cal. Ct. App. 2000) (holding that driver of boat towing inner tube and individual riding on inner tube were co-participants, who had no duty to avoid negligent conduct); *Record*, 86 Cal. Rptr. 2d at 556–57 (same); *Shelly v. Stepp*, 73 Cal. Rptr. 2d 323, 328 (Cal. Ct. App. 1998) (holding that co-

inner tubing on a lake, for example, one court stated: “[A]n activity falls within the meaning of ‘sport’ if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.”<sup>84</sup> Primary assumption of risk principles underpin judicial hostility toward tort claims involving “risk-laden” activities like skydiving,<sup>85</sup> even when an accident results in death.<sup>86</sup> Yet, just as positive media coverage of extreme sports encourages thrill-seeking beyond the confines of the X Games, judge-made protections for defendants also extend to relatively tame pastimes. For example, when a sport fisherman struck a co-participant in the eye with a sinker as he tried to free his line from some kelp, the *Knight* doctrine barred negligence liability.<sup>87</sup>

Suits against co-participants in which the court rejects the plaintiff’s claim often involve conduct that borders on recklessness—that is, the facts indicate that the defendant was aware that his speed or lack of control could lead to injury to himself or to another person. A California skier who collided with a friend admitted: “I was skiing faster than I was comfortable with, in that I felt I was skiing too fast for existing conditions.”<sup>88</sup> Nevertheless, the court held that his conduct was not “so

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participants exercising racehorses do not owe duty to avoid negligent infliction of injury); *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 593 (Cal. Ct. App. 1997) (applying primary assumption of risk doctrine to golf); *Mosca v. Lichtenwaller*, 68 Cal. Rptr. 2d 58, 60 (Cal. Ct. App. 1997) (holding that primary assumption of risk doctrine applies to sport fishing and that defendant had no duty to avoid negligently injuring defendant with flying sinker); *cf. Schick v. Ferolito*, 767 A.2d 962, 968 (N.J. 2001) (extending recklessness standard to all recreational sports, including golf).

Earlier versions of the recklessness standard, prior to the *Knight* holding, typically arose in the context of contact sports. *See Gauvin v. Clark*, 537 N.E.2d 94, 97 (Mass. 1989) (applying recklessness standard to college hockey game); *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982) (remanding case involving church-related softball game for re-trial on recklessness theory); *Dotzler v. Tuttle*, 449 N.W.2d 774, 782 (Neb. 1990) (applying willful or reckless disregard for safety standard to injury arising in pickup basketball game); *Marchetti v. Kalish*, 559 N.E.2d 699, 704 (Ohio 1990) (applying recklessness standard to game of kick-the-can); *Oswald v. Township High School Dist. No. 214*, 406 N.E.2d 157, 159 (Ill. Ct. App. 1980) (applying recklessness standard to basketball game during gym class); *Nabozny v. Barnhill*, 334 N.E.2d 258, 260–61 (Ill. Ct. App. 1975) (holding, in case involving soccer player kicked in head by co-participant, that civil liability only attached to conduct that was “deliberate, willful [sic] or with a reckless disregard for the safety of the other player”); *see also Allen v. Donath*, 875 S.W.2d 438, 440 (Tex. Ct. App. 1994) (applying recklessness standard to golf); *Connell v. Payne*, 814 S.W.2d 486, 489 (Tex. App. 1991) (applying recklessness standard to polo).

84. *Record*, 86 Cal. Rptr. 2d at 554.

85. *Dare v. Freefall Adventures, Inc.*, 793 A.2d 125, 131 (N.J. Super. 2002) (describing skydiving as “a popular, ‘risk-laden’ recreation sport”).

86. *See, e.g., Paralift v. Super. Ct. of San Diego*, 29 Cal. Rptr. 2d 177, 180 (Cal. Ct. App. 1993) (treating liability release form signed by skydiver as analogous to primary assumption of risk under *Knight* and holding that release constituted complete defense to wrongful death action). For further discussion of release forms, *see infra* text accompanying notes 95–98. For a case applying the primary assumption of risk doctrine to claims against a fellow skydiver, *see Dare*, 793 A.2d at 128, 131; *see also Chieco v. Paramarketing, Inc.*, 643 N.Y.S.2d 668, 670 (N.Y. 1996) (“[E]ven apart from the waiver and release agreement, the record demonstrates that by participating in a relatively dangerous sport such as paragliding, the plaintiff necessarily assumed the risk that he might sustain the type of injury which he ultimately sustained.”).

87. *See Mosca*, 68 Cal. Rptr. 2d at 60–61.

88. *Cheong*, 946 P.2d at 819.

reckless as to be totally outside the range of ordinary activity involved in the sport” and affirmed summary judgment in his favor.<sup>89</sup>

The *Knight* decision also discusses the liability of venue operators, service providers, and coaches, who must adhere to a higher standard of care than co-participants because of their differing role in the sport.<sup>90</sup> The skier assumes the risk that she will crash into a mogul or that another skier will collide with her;<sup>91</sup> the whitewater-rafting client consents to the possibility that he will fall into the rapids and drown.<sup>92</sup> However, while courts only hold sports co-participants to the recklessness standard, venue operators, service providers, and coaches may be deemed to have created dangers beyond the intrinsic ones if they act negligently.<sup>93</sup> For example, a ski area must not maintain its tow ropes in a negligent fashion because allowing equipment to become unsafe increases the risks of skiing.<sup>94</sup>

The liability exposure of venue operators, service providers, and coaches is often more hypothetical than real, however, due to a second kind of protection for tort defendants—the prevalent practice of requiring clients to sign liability release forms. In the context of “high risk sports activities,” courts rarely declare exculpatory agreements void as against public policy.<sup>95</sup> Rather, such agreements almost always

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89. See *id.* (citing *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992)).

90. See *Knight*, 834 P.2d at 710 (“[I]n the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.”).

91. See *id.*; see also *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 189, 191 (Cal. Ct. App. 2001) (indicating collisions on ski slopes are inherent to skiing and snowboarding).

92. See *Fairchild v. Amundson*, No. 45563-0-I 2001, Wash. App. LEXIS 149, \*9–\*12 (Wash. Ct. App. Jan. 29, 2001) (unpublished) (affirming summary judgment for defendant whitewater rafting company on ground that plaintiff assumed risk of falling out of raft). Similarly, a woman who bumped her head while taking photographs from the back of a whitewater raft could not recover from the rafting company, since the company did not increase the inherent risks of rafting by allowing her to sit in the back. See *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 68–69 (Cal. Ct. App. 1995).

93. See *Knight*, 834 P.2d at 709; see also *Galardi v. Seahorse Riding Club*, 20 Cal. Rptr. 2d 270, 274 (Cal. Ct. App. 1993) (holding that trainer had duty not to increase risks of horse jumping by creating jumping course beyond ability of horse and rider).

94. See *Knight*, 834 P.2d at 709 (discussing scenarios in which service providers can be liable for negligence).

95. *Hulsey v. Elsinore Parachute Ctr.*, 214 Cal. Rptr. 194, 199–200 (Cal. Ct. App. 1985) (citing *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981), for holding that exculpatory agreements required by providers of non-essential services like skydiving do not violate public interest); see *Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 735 (D. Hawaii 1993) (stating that, in recreational settings, liability releases “are generally held to be valid”); *Schutzkowski v. Carey*, 725 P.2d 1057, 1060–61 (Wyo. 1986) (enforcing exculpatory agreement in skydiving context because “[p]rivate recreational businesses generally do not qualify as services demanding a special duty to the public, nor are their services of a special highly necessary nature”); *Manning v. Brannon*, 956 P.2d 156, 159 (Okla. Civ. App. 1997) (same). But see *Spencer v. Killington*, 702 A.2d 35, 35 (Vt. 1997) (holding that exculpatory agreement between ski resort and amateur ski race was contrary to public policy); *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995) (voiding exculpatory agreement requiring season pass holder to release ski area from liability due to ski area’s negligence); *Berlangieri v. Running Elk Corp.*, 48 P.3d 70 (N.M. Ct. App. 2002) (deeming exculpatory agreement between plaintiff and provider of horseback-riding expeditions to be unenforceable as against public policy).

constitute a complete defense, unless the defendant acts with gross negligence, recklessness, or in a "willful and wanton" manner.<sup>96</sup> Indeed, as long as the sport is not regulated by statute,<sup>97</sup> only a conscious disregard for risk voids a waiver in many jurisdictions. For example, Colorado defines "willful and wanton conduct" as "conduct which an actor *realizes* is highly dangerous and poses a strong probability of injury to another but nevertheless *knowingly* and voluntarily chooses to engage in."<sup>98</sup>

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96. For more examples of negligence liability releases that were upheld in recreational contexts, see *Livingston v. High Country Adventures, Inc.*, Nos. 97-5600; 97-5692, 1998 U.S. App. LEXIS 17781, at \*7, \*8 (6th Cir. July 30, 1998) (unpublished) (holding that liability release precluded ordinary negligence claim arising from rafting injury); *Street v. Darwin Ranch, Inc.*, 75 F. Supp. 2d 1296 (D. Wyo. 1999) (holding that release signed by trail rider was valid because "trail rides are a recreational, nonessential service"); *Lahey v. Covington*, 964 F. Supp. 1440, 1444 (D. Colo. 1996) (upholding exculpatory agreement between whitewater rafting company and client on grounds that release form was unambiguous and whitewater rafting was nonessential service); *Paralift v. Super. Ct. of San Diego*, 29 Cal. Rptr. 2d 177, 181 (Cal. Ct. App. 1993) (stating that skydiving liability releases are not contrary to public policy); *Poskozim v. Monnacep*, 475 N.E.2d 1042, 1043 (Ill. App. Ct. 1985) (stating that exculpatory agreement signed by skydiver would be meaningless if it did not bar negligence claims); *Shumate v. Lycan*, 675 N.E.2d 749, 753 (Ind. Ct. App. 1997) (enforcing exculpatory agreement signed by plaintiff who was kicked by horse during trail ride, even though plaintiff did not read release form); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 729-31 (Minn. Ct. App. 1986) (affirming summary judgment for defendant skydiving facility on basis of liability waiver); *Cain v. Cleveland Parachute Training Ctr.*, 457 N.E.2d 1185, 1187 (Ohio Ct. App. 1983) (same). Courts do not require the release form to describe the specific risk that the plaintiff encounters, and many enforceable contracts expressly exempt the defendant from liability for ordinary negligence. See, e.g., *Lahey*, 964 F. Supp. at 1445. (enforcing agreement to release defendants from liability "for any injury . . . whether or not such injury . . . was caused by their negligence") (emphasis added). For examples of cases where the court distinguished waivers of negligence liability, which are enforceable, from waivers of liability based on gross negligence or recklessness, which violate public policy, see *Wheelock v. Sport Kites, Inc.*, 839 F. Supp 730 (D. Hawaii 1993) (holding that release was invalid as to gross negligence claims); *Falkner v. Hinkley Parachute Center, Inc.*, 533 N.E.2d 941, 946 (Ill. App. Ct. 1989) (declining to enforce exculpatory agreement as to allegations of willful or wanton conduct); see also *Livingston*, 1998 U.S. App. LEXIS 17781, at \*8 ("Although a party may not contract out of liability for its own gross negligence . . . Tennessee law allows contracts against liability for ordinary negligence, and public policy favors the freedom to enter such contracts."); cf. *Lahey*, 964 F. Supp. at 1445 (stating that exculpatory agreement would not cover willful or wanton conduct but that defendant did not act willfully or wantonly); *Saenz v. Whitewater Voyages, Inc.*, 276 Cal. Rptr. 672, 677-78 & n.9 (Cal. Ct. App. 1990) (enforcing exculpatory agreement releasing whitewater rafting company from negligence liability, but noting that agreement did not cover gross negligence, which, in any event, California does not recognize as distinct cause of action); *Harmon v. Mt. Hood Meadows, Ltd.*, 932 P.2d 92, 95 (Or. Ct. App. 1997) (noting that "through a concern for public policy considerations, courts generally have only enforced exculpatory provisions that are limited to ordinary negligence").

97. A court may refuse to enforce an exculpatory contract that seeks to release the defendant from liability for a breach of statutory duty. See, e.g., *Murphy v. N. Am. River Runners*, 412 S.E.2d 504, 512 (W. Va. 1991) ("[W]hen a statute imposes a standard of care, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for failure to conform to the statutory standard is unenforceable."); see also *Pecce v. N. Outdoors, Inc.*, No. CV-97-47, 1999 Me. Super. LEXIS 15, at \*7 (Me. Super. Ct. Jan. 18, 1999) (denying defendant's motion for summary judgment on such grounds).

98. *Lahey*, 964 F. Supp. at 1445 (emphasis added); see also *Livingston*, 1998 U.S. App. LEXIS 17781, at \*9 ("Gross negligence is not characterized by inadvertence, but rather it is 'negligent act done with utter unconcern for the safety of others.'").

Finally, a majority of states have codified assumption of risk principles in sports-safety statutes, which typically limit recovery for horseback-riding, snow-skiing, and roller-skating injuries.<sup>99</sup> Other recreations—including snow mobiling, hang gliding, sport shooting, hunting, ice skating, and whitewater rafting—receive protection in a few jurisdictions,<sup>100</sup> and a handful of states have adopted comprehensive legislation covering all sports.<sup>101</sup> Like judge-made law, sports-safety statutes stem from the perception that some recreations cannot be made completely safe<sup>102</sup> and that transforming the recreation to reduce risk is undesirable, especially if it serves as a cash cow for the state's economy. Outdoor adventure sports bring money to states known for their rugged scenery, and the rejection of equal protection challenges to several sports-safety statutes explicitly rests on the legislation's economic basis.<sup>103</sup> Ski areas successfully lobbied for legislative protections for their industry, which the case law portrays as a lucrative source of tourism revenue for almost every state that has hills and snow.<sup>104</sup> Statutes limiting

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99. See John O. Spengler & Brian P. Burket, *Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation*, 11 J. LEGAL ASPECTS SPORT 135, 135 (2001). As of 2001, forty-one states had codified assumption of risk principles for horseback riding, and twenty-six states had statutes addressing the inherent risks of snow skiing, see *id.* at 160. Eleven states had limited liability for injuries sustained during roller skating, while five state statutes contained omnibus clauses covering the risks inherent in all recreational activities, see *id.* at 162–63.

100. See *id.* at 135.

101. See Noreen L. Slank, *A Symposium on Tort and Sport: Leveling the Playing Field*, 38 WASHBURN L.J. 847, 861 (1999) (stating that Hawaii, Vermont, Wyoming, and Wisconsin have “ditched the sport-by-sport approach in favor of a more comprehensive revamping of sport tort law”); see also Spengler & Burket, *supra* note 99, at 163 (making similar observation but also including Utah's sport safety statute).

102. The view that some sports cannot be made safe underpins primary assumption of risk doctrines. A California appeals court noted in *Yancey v. Super. Ct.*, 33 Cal. Rptr. 2d 777, 781 (Cal. Ct. App. 1994):

[T]he limited duty rule applies when the plaintiff engages “in a potentially dangerous activity or sport.” Duty is constricted in such settings because the activity itself involves inherent risks which cannot be eliminated without destroying the sport itself. For example, sky diving is inherently dangerous and cannot be made completely safe without altering the nature of the sport.

103. See, e.g., *Schafer v. Aspen Skiing Corp.*, 742 F.2d 580, 584 (10th Cir. 1984) (“The ski industry makes a substantial contribution, directly or indirectly, to the Colorado economy. The state has a legitimate interest in its well-being and economic viability.”); *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671, 679 (Colo. 1985) (holding that Colorado Ski Safety Act “is rationally related to the legitimate state interest of preserving an important area of the state's economy”); *Northcutt v. Sun Valley Co.*, 787 P.2d 1159, 1165 (Idaho 1990) (rejecting equal protection claim on grounds that statutory liability limitations were rationally related to legislative purpose of preserving sport that “is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho”); *Grieb v. Alpine Valley Ski Area, Inc.*, 400 N.W.2d 653, 655 (Mich. Ct. App. 1986) (holding that Michigan Ski Area Safety Act did not violate equal protection because it represented rational solution to problem of balancing need for safety against “uncertain and potentially enormous ski area operators' liability”); cf. *Shukoski v. Indianhead Mtn. Resort*, 166 F.3d. 848, 850 (6th Cir. 1999) (“The purposes of the [Michigan Ski Area Safety] Act include, *inter alia*, safety, reduced litigation, and economic stabilization of an industry which contributes substantially to Michigan's economy.”) (emphasis in original).

104. See *supra* note 103.

civil liability also assist less widely known industries. For example, horse- rental stables persuaded legislators that they would have to close their barn doors due to the rising cost of insurance if legislation were not enacted to protect them from lawsuits.<sup>105</sup> Similar concerns about the dwindling number of roller rinks nationwide prompted skating statutes.<sup>106</sup>

The sports-safety acts do the same work as judge-made assumption of risk doctrines. Liability limitations in alpine skiing are illustrative. Although the Colorado Ski Safety Act allows skiers to sue each other for injuries stemming from crashes,<sup>107</sup> other states bar skier-against-skier suits on statutory or judge-made grounds.<sup>108</sup> Moreover, even in Colorado, a ski area cannot be held liable for collisions between its guests.<sup>109</sup> The designation of such crashes as an inherent risk of skiing tracks equestrian provisions that characterize injury caused by a fellow rider's negligence in losing control of her horse as an inherent risk.<sup>110</sup>

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105. See *Amburgey v. Sauder*, 605 N.W. 2d 84, 93 (Mich. Ct. App. 1999) ("It is evident that the Legislature enacted [the Equine Activity Liability Act] . . . to curb litigation and the correlative rising costs of liability insurance and to stem the exodus of public stable operators from the industry.").

106. See *Calhanas v. S. Amboy Roller Rink*, 679 A.2d 185, 187 (N.J. Super. Ct. App. Div. 1996) (discussing New Jersey legislators' concern about disappearance of more than one thousand rinks nationwide, partly due to prohibitive cost of liability insurance, and citing such concern as basis of Skating Rink Safety and Fair Liability Act). The legislative history further noted the significant economic contribution of roller skating to the state economy. See *id.*

107. COLO. REV. STAT. § 33-44-109(1) (2002) ("[T]he risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another."); *Ulissev v. Shvartsman*, 61 F.3d 805, 809 (10th Cir. 1995) (noting that Colorado Ski Safety Act creates presumption that "the uphill skier . . . had the better opportunity to avoid the collision").

108. See, e.g., *Hopkins v. Obermeyer*, No. X07CV990076715S, 2002 WL 173162, at \*1 (Conn. Super. Ct. Jan. 9, 2002) (unpublished) (interpreting Connecticut statute to bar negligence claims by one skier against another, including cases where defendant was ski-area employee). In California, common law primary assumption of risk bars negligence suits between skiers and suits between skiers and snowboarders. See *Cheong v. Antablin*, 946 P.2d 817, 819 (Cal. 1997); *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 189-92 (Cal. Ct. App. 2001).

109. The Colorado Ski Safety Act lists "collisions with other skiers; and the failure of skiers to ski within their own abilities" as inherent risks and provides that "[e]ach skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from the inherent dangers and risks of skiing." COLO. REV. STAT. §§ 33-44-103(3), -109(1) (2002). Courts interpret these provisions to preclude a tort suit by a skier against the resort operator for harms arising from a collision between skiers. See *Glover v. Vail Corp.*, 955 F. Supp. 105, 107 (D. Colo. 1997), *aff'd*, 137 F.3d 1444 (10th Cir. 1998). For similar rulings in other states, see *Northcutt v. Sun Valley Co.*, 787 P.2d 1159, 1163 (Idaho 1990) (holding that collisions between skiers are not responsibility of ski area); *Hughes v. Seven Springs Farms, Inc.*, 762 A.2d 339, 340, 344 (Pa. 2000) (holding that Pennsylvania's Skier Responsibility Act barred recovery from ski area for collision between skiers); *McCormick v. Go Forward Operating Ltd. P'ship*, 599 N.W.2d 513, 515 (Mich. Ct. App. 1999) ("[B]y statute, the Legislature has determined the collisions with other skiers, without regard to the area in which the collision occurs, is a necessary and obvious danger of skiing for which the ski area operator is not liable"); cf. *Saldarini v. Wachusett Mtn. Ski Area, Inc.*, 665 N.E.2d 79 (Mass. 1996) (holding that icy conditions allegedly leading to collision between skiers were inherent risks enumerated under Massachusetts Ski Safety Act); *Nolan v. Mt. Bachelor, Inc.*, 836 P.2d 770, 771 (Or. Ct. App. 1992) (noting that statute shields ski operators from liability for collisions between customers).

110. See, e.g., COLO. REV. STAT. § 33-44-103(3)(V) (2000) (stating that "[t]he potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability" constitutes an inherent risk); ALA. CODE § 6-5-337(b(6))(e) (2000) (same). Statutes in Delaware, Florida,

With regard to injuries stemming from dangerous terrain, ski resorts are less uniformly protected. First, the resort must meet certain statutory duties regarding care of the slopes: It must mark trails, mark or pad manmade obstacles, and warn guests about grooming procedures.<sup>111</sup> Second, although at least fifteen statutes specifically list the inherent dangers of skiing,<sup>112</sup> case law is inconsistent about whether such lists preclude recovery as a matter of law for collisions with lift towers and accidents caused by rough terrain. Several state courts have held that the question of inherent danger must be submitted to a jury.<sup>113</sup> The line between questions of law and questions of fact remains blurred for other recreations, as well. At least one state makes its law friendlier to plaintiffs by allowing jurors to determine whether getting bucked off a horse constitutes an intrinsic risk of equestrian sports.<sup>114</sup>

New trends in civil liability thus shelter service providers from liability for harms arising from inherent dangers and give thrill-seekers freedom to take risks, providing little or no compensation for injury. A few statutes like the Colorado Ski Safety Act allow claims for co-participant negligence, and in doing so, they recognize that once ski areas fulfill their duties to keep trails marked and equipment in working order, the uphill skier should bear the onus of avoiding collisions. Yet, many states reject this view, imposing a recklessness standard instead.

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Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Rhode Island, Texas, and Wisconsin each contain a nearly identical clause.

111. See, e.g., COLO. REV. STAT. §§ 33-44-106, -108 (2002).

112. See Spengler & Burket, *supra* note 99, at 161 (noting that Alaska, Colorado, Connecticut, Idaho, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Tennessee, and Utah list inherent risks).

113. Compare *Graven v. Vail Assoc., Inc.*, 909 P.2d 514, 520 (Colo. 1995) ("Not all dangers that may be encountered on the ski slope . . . are inherent and integral to the sport, and this determination cannot always be made as a matter of law."), and *Mead v. MSB, Inc.*, 872 P.2d 782, 789 (Mont. 1994) (holding that jury must decide whether exposed rocks are inherent risk of skiing under statute), and *Clover v. Snowbird Resort*, 808 P.2d 1037, 1045 (Utah 1991) (stating that there must be case by case determination of whether ski area could have eliminated hazard, even if hazard is explicitly listed in statute), with *Shukoski v. Indianhead Mtn. Resort, Inc.*, 166 F.3d 848, 853 (6th Cir. 1999) (barring recovery for plaintiff's crippling injuries because variations in terrain constitute inherent dangers under statute), and *Glover v. Vail Corp.*, 955 F. Supp. at 108-09 (stating that court was unconvinced by holding of the Utah Supreme Court in *Clover* that inherent dangerousness is jury question), and *Collins v. Schweitzer*, 774 F. Supp. 1253, 1260 (D. Idaho 1991), *aff'd*, 21 F.3d 1491 (9th Cir. 1994) (holding that plaintiff expressly assumed risk of colliding with lift tower and that ski area owed no duty to plaintiff regarding layout of racecourse or padding of lift tower), and *Nutbrown v. Mt. Cranmore, Inc.*, 671 A.2d 548, 553 (N.H. 1996) (stating that, since statute listed "variations in terrain" and "surface or subsurface snow or ice conditions" as inherent risks of skiing, statute barred plaintiff's negligent trail design and maintenance claims).

114. In 1995, the Wyoming Supreme Court reversed summary judgment for a dude ranch on the ground that a jury must decide whether being thrown from a bucking steed constituted an inherent danger of horseback riding. See *Halpern v. Wheeldon*, 890 P.2d 562, 564 (Wyo. 1995). The amended statute, drafted in response to the *Halpern* decision, jettisoned the inquiry into whether the defendant could eliminate a given risk through reasonable measures, but retained the jury's power to define "inherent risk." See *Cooperman v. David*, 23 F. Supp. 2d 1315, 1317 (D. Wyo. 1998) (discussing effect of statutory amendment).

Furthermore, the widespread appeal of outdoor adventure has converted jet-set pastimes into activities in which young adult participants may lack the assets or insurance coverage to pay damages. This means that, even in the few jurisdictions that allow co-participant negligence suits, the right to recover may prove illusory. News reports indicate, for example, that convicted skier Nathan Hall experienced difficulty earning the approximately \$18,000 in victim restitution that a Colorado court sentenced him to pay after a negligent homicide verdict against him.<sup>115</sup> Hence, unless he had liability insurance covering ski accidents, Hall would have made a poor choice of defendant for a plaintiff seeking civil damages.<sup>116</sup> Plaintiffs in a recent wrongful death suit may face similar impediments to their \$75,000 claim against a skier who allegedly caused a fatal collision at Breckenridge Ski Resort in Colorado, for the defendant works as a scaffolder and is unlikely to have deep pockets.<sup>117</sup> In short, avenues for tort compensation have narrowed in recent years due to the changing demographics of the participants themselves, as well as because of judge-made and statutory restrictions.

## B. Rationales

It is helpful to unpack the concerns underlying recreational tort trends individually, although such concerns are, in fact, intertwined in the legislative history and judicial endorsement of liability reform. One rationale behind defendant-protective laws acknowledges the role of risk in defining the essential nature of these economically important<sup>118</sup> sports. Skiing again serves as an example. As the Sixth Circuit noted in *Shukoski v. Indianhead Mountain Resort, Inc.*, “[i]t is safe to say that . . . if the dangers listed in the [Michigan Ski Area Safety Act] . . . do

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115. See *Skier May Be Back in Court*, ROCKY MTN. NEWS, Feb. 16, 2002, at 2B, available at 2002 WL 9092895 (reporting Hall was behind on restitution payments but that his lawyer denied that he had not complied); see also Deborah Frazier, *Skier Goes to Jail for Causing Vail Death*, ROCKY MTN. NEWS, Mar. 1, 2001, at 5A, available at 2001 WL 7365247 [hereinafter Frazier, *Skier Goes to Jail*] (reporting that Hall began ninety day jail term, while appeal was pending, because stigma of upcoming incarceration impeded employment necessary to pay court-ordered restitution).

116. The victim's family settled for \$309,000 from Vail Associates, the deep-pockets entity that employed Hall. See Associated Press, *Ruling to Make Snow Skiing More Dangerous*, GREENSBORO NEWS & RECORD (Greensboro, N.C.), Feb. 14, 1999, at C13, available at 1999 WL 6931407 (reporting on civil settlement, in addition to subsequently overturned dismissal of indictment against Hall). Yet, the Tenth Circuit subsequently affirmed a ruling that makes such a settlement unlikely today. According to *Glover*, a collision between a guest and a ski area employee—even an employee observed going excessively fast in a slow zone—constitutes an inherent danger of skiing that bars recovery from the employer. See *Glover*, 955 F. Supp. at 107. To combat the problem of judgment-proof co-participants, Colorado, Utah, and Vermont recently adopted legislation prohibiting insurance companies from denying coverage to skiers and snowboarders. See Steven K. Paulson, *New Laws to Take Effect Wednesday Include Ski Insurance, Gun Measures*, DENVER POST, Dec. 31, 2002, at 4B (discussing Colorado Senate Bill 107).

117. See Deborah Frazier, *British Skier Freed, Will Not Face Charges*, ROCKY MTN. NEWS, Mar. 7, 2003, 24A available at 2003 WL 6356968 [hereinafter Frazier, *British Skier Freed*].

118. For a discussion of the economic rationale behind sports-safety statutes, see *supra* text accompanying notes 103–06.



not exist, there is no skiing.”<sup>119</sup> Allowing plaintiffs’ verdicts to go unchecked would force resorts to straightjacket their guests with safety precautions.<sup>120</sup> Many decisions based on release forms or common law tort doctrines share this view that potential danger is a desirable ingredient of modern recreation. For instance, an appellate court refused to hold that the metal frame of a whitewater raft increased the risk of injury to a plaintiff because requiring “[a] significant change in the type of watercraft [used in the industry] to enhance safety would necessarily reduce the challenge of the sport.”<sup>121</sup>

Moreover, courts emphasize that plaintiffs consciously seek hair-raising thrills, whether or not they actually absorb the information that they could be grievously injured or killed. In a recent Washington case, a man participated in a whitewater rafting adventure that included two Class IV rapids because, by his own admission, he wanted a more exciting trip.<sup>122</sup> When his raft overturned in a challenging rapid called the Gorge, he was thrown into the water and injured so badly that he needed cardiopulmonary resuscitation and a trip to the hospital.<sup>123</sup> Affirming summary judgment for defendant Wild Water Raft Tours (“WWRT”), the appellate court stated:

[Plaintiff] could have chosen to take a slower rafting trip. He could have elected to forego whitewater rafting altogether. He could have chosen not to continue with the trip once he reached the starting point or gotten out when his raft stopped and the WWRT guides walked on the bank to scout the Gorge.<sup>124</sup>

In another river-running case, a judge noted that the plaintiff had elected to proceed with the trip, despite being warned that “whitewater rafting is not a Disneyland ride and you can get hurt and even die.”<sup>125</sup>

The risks embedded in sports that spark tort litigation are thus a matter of consumer preference. Venue operators and service providers must balance legal concerns against the demands of clients who equate

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119. *Shukoski*, 166 F.3d at 851 (affirming summary judgment for ski area against snowboarder rendered quadriplegic by poorly executed jump on ground that Michigan Ski Area Safety Act also covered snowboarding).

120. A New Mexico Court of Appeals judge argued that safety requirements shielding skiers from harmful collisions with inanimate objects might lead to absurdity. *Lopez v. Ski Apache Resort*, 836 P.2d 648, 665 (N.M. Ct. App. 1992) (Bivins, J. dissenting). Although Judge Bivins dissented against a holding that was unusually sympathetic to ski plaintiffs, his views reflect those embodied in majority holdings in many states. *Id.* According to Judge Bivins:

[I]f we are to say that a plainly visible lift tower should be padded, how can we not say similar devices must also be placed around all rocks, trees, other forms of forest growth, or the like? An appellate court should not construe statutes in a way that will achieve an absurd result or defeat the intended objective of the legislature.

*Id.*

121. *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 70 (Cal. Ct. App. 1995).

122. *See Fairchild v. Amundson*, No. 45563-O-1, 2001 Wash. App. LEXIS 149, at \*7-8 (Wash. Ct. App. Jan. 29, 2001) (unpublished).

123. *See id.* at \*3.

124. *Id.* at \*11.

125. *Saenz v. Whitewater Voyages, Inc.*, 276 Cal. Rptr. 672, 674 (Cal. Ct. App. 1990).

“dangerous” with “cool.” For instance, the owner of an extreme sports camp near Pittsburgh describes himself as “wary of making the place too tame” and indicates that teenage campers initially complained about an air bag cushioning a difficult bicycle jump.<sup>126</sup> Without liability-limiting reforms, such business people arguably would face the Scylla and Charybdis. They could preserve the sport’s risky features and be crushed financially by rising insurance premiums.<sup>127</sup> Or they could attempt to alter the sport in a way that makes it safer—a project that might be futile, unpopular with customers, or both. The regulatory problem stems from the desire of some sports enthusiasts to have excitement without injury and daredevil stunts without the reality of an occasional death. Participants in risky recreations do not express a unified opinion about acceptable dangers. Although some embrace the particularized risks to their own health and safety,<sup>128</sup> others do not. Instead, they seek to assign blame for injuries, filing tort suits against adventure companies or fellow participants. Consumer demand for thrills thus adds another dimension to the financial concerns of venue operators and service providers, and in the eyes of many courts and legislatures, justifies legal efforts to curb tort suits.

What about limitations on the liability of co-participants? Jurisdictions that preclude verdicts against co-participants for negligence do so to avoid chilling participation in the sport.<sup>129</sup> They follow the logic that a friend, family member, or even a stranger who stays within the bounds of a recreational activity characterized by white-knuckle speed should not be required to pay damages if she causes harm. Water-sports cases illuminate judicial reasoning in this area. For example, a California court described inner tubing behind a speedboat as “a variation of waterskiing designed to accommodate those eager to experience *the force*

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126. Johnson, *supra* note 37, at B2 (quoting Gary Ream, one of four owners of Woodward Camp, where boys can skateboard, inline skate, and do stunts on their bicycles).

127. See *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671, 679 (Colo. 1985) (“The legislative history [of the Colorado Ski Safety Act] indicates that one of the purposes underlying the presumption [against ski area liability] is to reduce the number of frivolous lawsuits, and, accordingly, the rapidly rising cost of liability insurance to ski area operators.”).

128. For example, “radical skier” Kristen Ulmer credits the appeal of life-threatening risk not only with inspiring her skiing, but also with driving her to engage in other daredevil pastimes. Koerner, *supra* note 20, at 50. She recalls that she “got a kick out of” a solo hitchhiking odyssey across Alaska during which a driver threatened to take her life. *Id.* Similarly, ice climber Nancy Pritchard and BASE jumper Frank Gambalie appear to be enticed by the inherent dangers of their respective sports. See *id.* Pritchard acknowledges that she “expect[s] to lose three to four friends a year” to the perils of scaling ice walls. *Id.*

129. See, e.g., *Dare v. Freefall Adventures, Inc.*, 793 A.2d 125, 131 (N.J. Super. Ct. App. Div. 2002) (stating that imposing “simple negligence standard [on co-participants] may invite a floodgate of litigation” that would chill “vigorous participation” in skydiving). In *Dare*, an experienced, licensed skydiver suffered injuries attempting to avoid another skydiver who jumped a few minutes earlier. See *id.* at 128. When the plaintiff sued both the co-participant and the skydiving facility, a New Jersey court held that the plaintiff had not shown that the co-participant’s conduct was reckless. See *id.* at 130–32. For further discussion of the rationale behind limiting plaintiffs’ ability to recover damages from sport co-participants, see *infra* text accompanying notes 133–34.

of whipping around wakes but lacking the ability to water-ski.”<sup>130</sup> It further noted that hanging onto the tube as it darts across the water requires a “steadfast grip.”<sup>131</sup> Accordingly, it affirmed summary judgment for the boat driver, whom the plaintiff complained towed him at “great velocity and [with] a whipping sensation.”<sup>132</sup> Several courts have been satisfied that boat drivers who speed to increase the enjoyment of water skiing are simply operating the boat “in a manner that is consistent with, and enhances the excitement and challenge” of the sport.<sup>133</sup> Any result besides summary judgment for the defendant might deter participation. The appellate court in *Ford v. Gouin* argued:

Imposition of legal liability on a ski boat driver for ordinary negligence in making too sharp a turn . . . or in pulling the skier too rapidly or too slowly, likely would have the same kind of undesirable chilling effect on the driver’s conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. . . . Additionally, imposing such liability might well deter friends from voluntarily assisting one another in such potentially risky sports.<sup>134</sup>

Statutory and common law assumption of risk doctrines, combined with judgment-proof defendants, mean that the tort regime now offers cold comfort to an athlete paralyzed in an accident or the family of an individual killed when a recreational activity goes catastrophically awry. Some observers envision a solution in social insurance programs, which are administered on a nationwide basis beyond American borders.<sup>135</sup> Others have turned to the criminal law.

### III. Expanding Criminal Prosecution

#### A. Charging Power and the Trend Toward Prosecution for Recreational Fatalities

The unpleasant surprise for weekend warriors or service providers who leave a trail of blood behind them comes not from tort lawyers, but from criminal prosecutors. Indeed, the past few years have witnessed a new trend toward prosecution for deaths arising from risky sports. When a jury convicted Nathan Hall of negligent homicide after his trial on a reckless manslaughter charge in 2000, he became the first snow skier to

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130. *Record v. Reason*, 86 Cal. Rptr. 2d 547, 554 (Cal. Ct. App. 1999) (emphasis added).

131. *Id.*

132. *Id.* at 549.

133. *Ford v. Gouin*, 834 P.2d 724, 728 (Cal. 1992); see, e.g., *Bjork v. Mason*, 92 Cal. Rptr. 2d 49, 54 (2000) (stating that defendant’s alleged speeding to have “fun with the kids” did not preclude application of primary assumption of risk doctrine); *Record*, 86 Cal. Rptr. 2d at 554–55, 556–57 (holding that defendant’s conduct in allegedly driving boat at “great velocity” did not constitute recklessness).

134. *Ford*, 834 P. 2d at 728.

135. See Judges, *supra* note 63, at 125–29 (advocating social insurance in lieu of tort liability); cf. Alfred W. Cortese, Jr., & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 184–85 (1989) (noting prevalence of social insurance as alternative to tort litigation in foreign countries).

go before a jury for killing a co-participant.<sup>136</sup> Prior to *People v. Hall*,<sup>137</sup> a few other skiers had pled guilty, but none had ever gone to trial.<sup>138</sup> Moreover, American prosecutors recently have pressed charges against a wide array of recreational homicide defendants: minors who killed sports co-participants,<sup>139</sup> parents who put their children into deadly situations,<sup>140</sup> and service providers that exposed their employees or clients to lethal risks.<sup>141</sup>

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136. See *People v. Hall*, 59 P.3d 298, 301 (Colo. Ct. App. 2002) (affirming jury's verdict of guilty for lesser offense of criminally negligent homicide); *Court Upholds Sentence of Skier*, A.P. ONLINE, Oct. 10, 2002, available at 2002 WL 101560521 (stating that Colorado Court of Appeals upheld "the nation's first conviction of a skier for killing another person in a collision on the slopes"); Doyle, *supra* note 56, at C1 (stating that "Hall was the first person convicted at trial of killing another skier").

137. See *People v. Hall*, 999 P.2d 207 (Colo. 2000) (reinstating indictment against Hall and sending case to trial).

138. The district attorney of Grand County, Colorado, charged a Texas man, Howard Hidle, with reckless manslaughter and felony child abuse after a fatal collision with an eleven-year-old girl at Winter Park ski area in Colorado. See Am. Compl. & Information, *People v. Hidle*, 89F38 (County Ct., Grand County, Colo., Mar. 24, 1989) (copy on file with author). Hidle subsequently entered a plea of no contest to criminally negligent homicide, pursuant to a plea agreement, in the face of evidence that he plowed into the child as he sped through a flat area in a racing tuck. See Min. Order (filed July 21, 1989) (entering Hidle's guilty plea); Ex. C. (filed Apr. 19, 1989) (providing signed eyewitness testimony), *People v. Hidle*, 89CR68 (copies on file with author); see also Edward Vela, *Tarrant Skier's Conviction a First in Western United States*, DALLAS MORNING NEWS, July 23, 1989, at 33, available at 1989 WL 6115383 (describing case and plea of no contest). The following year, a man from Steamboat Springs, Colorado, pled guilty to reckless endangerment and leaving the scene of a ski accident, after initially being charged with felony child abuse and second-degree assault on crushing a child's leg in a ski accident. See Min. Order (filed June 27, 1990); Compl. & Information (filed Mar. 22, 1989), *People v. Coghlan*, 89CR44 (Dist. Ct., Routt County, Colo.) (copies on file with author).

139. For example, in a recent Colorado incident, prosecutors charged a fourteen-year-old jet skier with criminally negligent homicide after she struck and killed a nine-year-old girl who was riding in an inner tube behind a boat. The defendant pled guilty and was sentenced to two years' detention in a juvenile facility. See Charley Able, *Two-Year Sentence for Teen on Jet Ski*, ROCKY MTN. NEWS, June 7, 2003, at 11A, available at 2003 WL 6365757; Sue Lindsay, *Cover-Up Alleged in Jet Ski Death*, ROCKY MTN. NEWS, Aug. 14, 2002, at 4A, available at 2002 WL 9109488. A similar fatality in Nebraska resulted in criminal charges against a fourteen-year-old boy. See Ron Franscell, *Jet Ski Death Brings Neb. Charges: Arvada Boy Accused in Accident*, DENVER POST, Aug. 29, 2002, at B3, available at 2002 WL 6574539 [hereinafter Franscell, *Jet Ski Death Brings Neb. Charges*].

140. Several examples come from water sports. A Maryland man was convicted of four counts of reckless endangerment and nine counts of violating state boating regulations after he allowed six children under the age of fourteen to pilot jet-skis without proper certification. One of the children died when her watercraft collided with that of another child. See Dail Willis, *Man Convicted in Watercraft Crash*, BALT. SUN, June 15, 1996, at 1B. In a 2001 Colorado case, a father who placed his son and stepchild in a rubber raft in a fast-moving section of the South Platte River and then failed to save them after the raft capsized pled guilty to criminally negligent homicide and knowing or reckless child abuse. See Pet. to Enter Plea of Guilty, *People v. Gallegos*, 01CR844 (Dist. Ct., Jefferson County, Colo., Jan. 21, 2003) (copy on file with author). For more on the Gallegos case, see *infra* text accompanying notes 242-49, 326-31.

141. John Glennon pled guilty to criminally negligent homicide after his employee, William Brotherton, died in a test jump from a hot-air balloon that Glennon piloted. See Min. Order (filed May 16, 1995) (entering guilty plea to criminally negligent homicide); Def.'s Statement (undated) (providing defendant's signed statement of facts); and Police Case Summary (filed June 27, 1993) (describing police version of facts), *People v. Glennon*, 94CR1142 (Dist. Ct., Adams County, Colo.) (copies on file with author); see also Marilyn Robinson, *Bungee-Jump Firm Charged in Fatal Fall*, DENVER POST, Apr. 27, 1994, at B4, available at 1994 WL 8643137 [hereinafter Robinson, *Bungee-*

The question of whether (and under what circumstances) prosecutorial charging decisions should deviate from norms conveyed by tort law and popular culture merits analysis because it implicates broader concerns about the respective functions of civil and criminal liability. Courts have long asserted that the assumption of risk doctrine “has no place in the criminal law in which the wrong to be redressed is a public one—a killing with the victim’s consent is nevertheless murder.”<sup>142</sup> Yet, even in recreational contexts where the defendant clearly caused the victim’s death (by crashing into her, for example), criminal liability is inappropriate, as a normative matter, if the charged conduct does not involve sufficient moral blameworthiness. In such cases, a criminal charge might lead to a guilty plea or a conviction where the killer lacked culpable indifference to the threat she posed and societal norms condemned the act only in hindsight. Recreational fatalities thus underscore prosecutors’ ability to use their discretionary powers to shape or distort justice.

Prosecutors enjoy vast discretion to charge individuals with criminal offenses, which in turn gives them control over plea-bargaining.<sup>143</sup> Constrained by the probable cause standard and exhortations from the American Bar Association (“ABA”) to consider such factors as the proportionality of the authorized punishment and the existence of

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*Jump Firm Charged*] (reporting that Adams County prosecutors charged Glennon with criminally negligent homicide and describing facts of case).

142. *Commonwealth ex. rel Smith v. Myers*, 261 A.2d 550, 558 (Pa. 1970) (making this statement in context of felony murder rule); see *Commonwealth v. Godin*, 371 N.E.2d 438, 443 (Mass. 1977) (affirming manslaughter conviction of fireworks manufacturer and noting that “[d]octrines such as contractual assumption of risk have no place in the criminal law”). Physician-assisted suicide cases affirm a similar principle: that the criminal law proscribes the killing a human being, notwithstanding the consent of the deceased. See *People v. Kevorkian*, 527 N.W.2d 714 n.71 (Mich. 1994) (maintaining “a distinction between killing oneself and being killed by another”); *State v. Sexson*, 869 P.2d 301, 304 (N.M. Ct. App. 1994) (“It is well accepted that ‘aiding,’ in the context of determining whether one is criminally liable for their involvement in the suicide of another, is intended to mean providing the means to commit suicide, not actively performing the act which results in death.”); see also MODEL PENAL CODE, § 210.5 cmt. 7 at 106 (1980) (stating that assisted suicide provision applies “only when the actor goes no further than aid or solicitation; if he is himself the agent of death, the crime is murder notwithstanding the consent or even the solicitation of the deceased”).

143. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1526 (1981).

reasonable doubt,<sup>144</sup> prosecutors nevertheless obtain indictments on evidence that would not necessarily sustain a conviction. They enjoy the greatest discretion over minor crimes like petty theft,<sup>145</sup> but a significant aspect of their power involves charging offenses on the borderline, where clouded and troubling determinations about the defendant's state of mind make the difference between murder, manslaughter, negligent homicide, and no charge at all.<sup>146</sup> The district attorney's office expands the reach of the criminal law when it pursues the conviction of a new class of individuals, formerly sued only in tort, for a time-honored offense like manslaughter. It does so, not by re-writing the penal code, but by attempting to change public perceptions about what counts as criminal negligence. When legal scholars lament the statutory expansion of crimes,<sup>147</sup> they should devote equal time to the aggrandizing effects of prosecutorial charging decisions.

Bringing a defendant to court for a homicide committed during a recreational activity does not lack precedent. Indeed, as early as the twelfth century in England, the *Leges Henrici Primi* included the following discussion of sports homicide:

If a person in the course of a game of archery or some exercise kills anyone with a spear or as the result of some accident of this kind, he shall pay compensation for him. For it is a rule of law that a person who unwittingly commits a wrong shall consciously make amends. He ought however to be the more accorded mercy and compassion at the hands of the dead man's relatives.<sup>148</sup>

Since the medieval reign of Henry I, governments and courts have sought to control recreation, often with the aim of enforcing a religious or class-based agenda. In early modern England, for example, the Crown's struggle with its Puritan opponents made sports and leisure a flashpoint: The early Stuart kings published the *Book of Sports*, promoting Sunday sports and festivals that many Puritans condemned as

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144. See ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9 ("Discretion in the charging decision").

According to these standards:

[T]he factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or offender;
- (vi) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

*Id.*

145. See Vorenberg, *supra* note 143, at 1531.

146. See *id.* at 1528.

147. See, e.g., Coffee, *Paradigms Lost*, *supra* note 9, at 1875, 1880.

148. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 827 (1980) [hereinafter Robinson, *A Brief History*] (quoting *Leges Henrici Primi*).

occasions for Sabbath-breaking and debauchery, and ordered that it be read from the pulpit.<sup>149</sup> Historically, the regulation of sports has not only tapped into broader currents of religious and social control, but also implicated questions of public safety. Prior to the very recent cases discussed in this Article, recreational deaths occasionally resulted in criminal cases. For example, district attorneys' offices in the nineteenth and twentieth centuries brought prosecutions in at least two regulated areas—hunting and boating. Case law and statutes criminalizing homicide during the operation of a vessel stemmed from concern about commercial disasters in the 1800s,<sup>150</sup> but increasingly implicated recreational boating as pleasure-seekers crowded rivers and lakes in the second half of the twentieth century.<sup>151</sup> The pervasive problem of pilots driving watercraft while intoxicated resulted in criminal legislation that punishes boating under the influence of alcohol.<sup>152</sup> For decades, if not

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149. For a complete discussion of political and religious conflict over sports and leisure in Stuart England, see, for example, DAVID UNDERDOWN, *FIRE FROM HEAVEN: LIFE IN AN ENGLISH TOWN IN THE SEVENTEENTH CENTURY* 104–06, 173–74, 191, 248–49 (1992) (describing Puritan efforts to suppress games and sports in Dorchester, England, and Stuart endorsement of such pastimes in the *Book of Sports*); DAVID UNDERDOWN, *REVEL, RIOT, AND REBELLION: POPULAR POLITICS AND CULTURE IN ENGLAND, 1603–1660* 44–77 (1985) (analyzing tensions over popular sports and festivities, running gamut from dancing to football and stoolball).

150. See, e.g., *United States v. Warner*, 28 F. Cas. 404, 407–08 (D. Ohio, 1848) (No. 16,643) (stating, in jury instructions, that Congress passed statute defining death due to negligent steamboat navigation as “manslaughter” to deter “numerous steamboat disasters . . . attended with a melancholy loss of human life”); *State v. Welch*, 36 N.E. 328, 332 (N.Y. 1894) (holding that state court had jurisdiction to convict steam tugboat operator of second-degree manslaughter for drowning death of yachtsman in collision). Commercial operators continued to be charged with manslaughter under state law in the twentieth century. See generally *State v. Arnold*, 27 A.2d 81 (Del. 1942) (recording jury instructions in involuntary manslaughter case against tugboat operator whose craft passed over fishing boat, throwing deceased into bay).

151. This footnote provides citations to a representative sample of twentieth century cases: Prosecutors have not hesitated to bring charges based on alleged criminal negligence in the context of recreational boating. See generally *State v. Tranby*, 437 N.W.2d 817 (N.D. 1989) (affirming conviction on two counts of negligent homicide); *State v. Pittera*, 651 A.2d 931 (N.H. 1994) (upholding conviction for negligent homicide); *Allen v. Maryland*, 389 A.2d 909 (Md. Ct. Spec. App. 1978) (upholding criminally negligent manslaughter conviction); cf. *Commonwealth v. Gilliland*, 422 A.2d 206 (Pa. Super. Ct. 1980) (reversing involuntary manslaughter conviction due to insufficient evidence of gross negligence or recklessness). Defendants have also faced manslaughter charges based on their alleged recklessness. See generally *Hoopengartner v. United States*, 270 F.2d 465 (6th Cir. 1959) (affirming conviction of defendant for operating motorboat recklessly on Lake St. Clair and negligently running the boat without lights, thus causing death of victim); *Benham v. Indiana*, 637 N.E.2d 133 (Ind. 1994) (denying motion to dismiss involuntary manslaughter charges based on recklessness); *State v. Gorman*, 648 A.2d 967 (Me. 1994) (affirming convictions for reckless or criminally negligent manslaughter, aggravated assault, and reckless conduct).

152. For instance, the defendant in *Cameron v. State*, 804 So. 2d 338, 340–41 (Fla. Dist. Ct. App. 2001),

[W]as charged with six counts of manslaughter while . . . (boating) under the influence of alcohol (BUI), six counts of manslaughter with an unlawful blood alcohol level (UBAL), one count of BUI injury, one count of UBAL injury, one count of BUI property damage, and one count of UBAL property damage.

After he was convicted on all charges and sentenced to eighty-five years in prison, he successfully sought reversal of the BUI counts; however, the appellate court affirmed the UBAL manslaughter convictions. See *id.* at 340–43. Cf. *State v. Hudson*, 483 S.E.2d 436, 439 (N.C. 1997) (reinstating

centuries, prosecutors have also charged hunting deaths as manslaughter<sup>153</sup> or brought cases under specific criminal statutes governing hunting accidents.<sup>154</sup>

Two qualifications about legal authority for the criminalization of recreational risk are salient, however. First, although English law did not sharply separate civil and criminal liability in medieval times,<sup>155</sup> even the hoary *Leges Henrici Primi* suggests a distinction between willful and accidental harms and indicates the appropriateness of mercy for defendants who kill by accident.<sup>156</sup> It also offers more support for the extraction of monetary damages than for the imposition of stigmatic penal sanctions where harms are inadvertent.<sup>157</sup> Second, although precedents exist for criminal charges related to hunting and boating, these two activities are often viewed differently than other forms of leisure. Some of the most defendant-protective tort regimes in the nation exclude hunting from assumption of risk principles for reasons

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defendant's conviction on three involuntary manslaughter counts because driving boat while intoxicated, or "DWI," is not lesser included offense of manslaughter and, consequently, defendant was not entitled to "DWI" instruction).

153. For examples of hunting cases dating back forty years or more, see generally *People v. Joyce*, 84 N.Y.S.2d 238 (N.Y. County Ct. 1948) (reversing manslaughter conviction of deer hunter for shooting victim wearing fawn-colored boots because defendant did not disregard risk that he was shooting human being); *State v. Horton*, 51 S.E.2d 945 (N.C. 1905) (reversing manslaughter conviction of defendant who mistook victim for turkey because defendant's unlawful presence on land was not valid basis for holding accidental death to be criminal); *State v. Lewis*, 225 P.2d 428 (Wash. 1950) (affirming manslaughter conviction of experienced hunter for fatally shooting woman whom he mistook for deer); *State v. Green*, 229 P.2d 318 (Wash. 1951) (affirming manslaughter conviction of defendant who killed another hunter, whom he mistook for bear).

154. For example, in 1956, a defendant in Maine was charged under a statute that provided in pertinent part:

Whoever, while on a hunting trip or in the pursuit of wild game or game birds, negligently or carelessly shoot and wounds, or kills any human being, shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than 10 years.

*State v. Jones*, 126 A.2d 273, 274 (Me. 1956) (sustaining appellant's claim that trial court improperly instructed jury on civil negligence standard); see generally *State v. Crace*, 289 N.W.2d 54 (Minn. 1979) (affirming conviction under section of Minnesota second-degree manslaughter statute pertaining to "shooting another with a firearm or other dangerous weapon as a result of negligently believing him to be a deer or other animal"); *People v. Dawson*, 133 N.Y.S.2d 423 (N.Y. Special Term 1954) (dismissing indictment that charged defendant with "criminal negligence while engaged in hunting, resulting in death of another" under New York penal laws).

155. See David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. REV. 103, 103, 110 (1996) (arguing that distinction between tort and crime is historically contingent and noting that medieval felonies were private actions); Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 L. & HIST. REV. 1 n.1 (2001) (indicating that privately prosecuted crimes in medieval England may have included some offenses now considered to be torts).

156. Robinson believes that the distinction between "willful" and "accidental" was recognized and perhaps even partially implemented during Henry I's reign. See Robinson, *A Brief History*, *supra* note 148, at 829-33. However, he contends that it did not achieve formal acceptance until the thirteenth century and may not have seen frequent use for another three hundred years. *Id.*

157. It is worth noting, however, that "[a]s early as the late tenth century, bot [or monetary compensation] seems to have been payable to church, king, or community at large, rather than to the injured kin." Klerman, *supra* note 155, at 6.



related to firearms policy.<sup>158</sup> Similarly, states like California distinguish boating, which implicates broader issues of transportation safety, from jet skiing, inner tubing, and water skiing.<sup>159</sup> Courts in civil cases analogize boats to cars, whereas they lump whitewater rafts, jet skis, and inner tubes under the rubric of thrill-seeking equipment.<sup>160</sup> It is tempting to view this as a distinction without a difference, since “hot boats” that can travel in excess of one hundred miles per hour are most frequently used for pleasure.<sup>161</sup> Yet, because negligent homicide convictions for hunting and boating fatalities seldom involve the incongruity of prosecution in the face of shrinking civil liability, this Article will not consider them in detail.

More important for our purposes is the trend toward criminal charges for deaths in sports that tort law often deems inherently risky. Recent prosecutions in this area are remarkable in their diversity. Some defendants allegedly acted under the influence of alcohol or illegal drugs,<sup>162</sup> but in other cases, the state offered no evidence of intoxication.<sup>163</sup> Many defendants like Hall (a former ski racer) possessed

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158. See *Knight v. Jewett*, 834 P.2d 696, 711 n.7 (Cal. 1992) (stating that hunting is not governed by primary assumption of risk due to “the special danger to others” that it poses); *Mosca v. Lichtenwalter*, 68 Cal. Rptr. 2d 58, 61 (Cal. Ct. App. 1997) (noting that primary assumption of risk does not apply to hunting accidents). Recreational use provisions often exempt landowners from tort liability for injuries or death due to hunting. See, e.g., MISS. CODE ANN. § 89-2-23 (2001). However, as noted above, these liability limitations do not apply to fellow hunters.

159. See *Shannon v. Rhodes*, 112 Cal. Rptr. 2d 217, 224 (Cal. Ct. App. 2000) (holding that riding in pleasure boat is not “sport” within meaning of primary assumption of risk doctrine, but rather is “nothing more than a mode of transportation” similar to “being a passenger in a car on your way to work”). Despite a decline in the number of boating deaths since the establishment of the Federal Boating Safety Act in 1971, “[r]ecreational boating fatalities are still second only to highway fatalities” on the National Transportation Safety Board’s list of areas needing safety improvements. National Association of State Boating Law Administrators, <http://www.nasbla.org> (last visited June 24, 2002).

160. See *Shannon*, 112 Cal. Rptr. 2d at 223. For discussion of rulings that water-skiing and jet-skiing are “sports” for the purposes of primary assumption of risk, see *supra* text accompanying notes 83–84.

161. Bill Bleyer & Eric Nagourney, *LI’s Troubled Waters*, NEWSDAY, Aug., 15, 1988, at 7, available at 1988 WL 2970877 (reporting that inadequately trained boaters are purchasing such performance craft, which many insurance companies refuse to cover due to dangers stemming from their high speed).

162. See *Indictment, People v. Gallegos*, 01CR844 (Dist. Ct., Jefferson County, Colo., May 4, 2001) (copy on file with author) (alleging, in Count Three of indictment, that defendant unlawfully, knowingly, and feloniously used methamphetamine); *Edwards v. State*, 755 So. 2d 443, 446 (Miss. Ct. App. 1999) (reversing negligent manslaughter conviction of parents whose toddler drowned on camping trip on grounds that state had insufficient evidence that adults’ beer consumption proximately caused the toddler’s death). For further commentary on allegations of intoxication or drug use, see *infra* text accompanying notes 248–49, 312–15, 321–31.

163. In the *Hide* case, the district attorney made no allegation that the defendant was under the influence of alcohol or drugs. See *People v. Hide*, 89F38 (County Ct., Grand County, Colo., Mar. 24, 1989) (copy on file with author). Neither did alcohol or drugs play a role in the bungee-jumping death for which John Glennon was charged. See *Presentence Report* at 2, *People v. Glennon*, 94CR1142 (Dist. Ct., Adams County, Colo., Apr. 25, 1994) (copy on file with author) (“There is no evidence of substance abuse either as a factor in the present case, or in this defendant’s past history.”). While Nathan Hall was convicted of possessing marijuana and possessing or consuming alcohol while under legal drinking age, his blood alcohol level after the fatal accident measured only .009, or less than the

expertise in the relevant recreation;<sup>164</sup> on the other hand, a few defendants were novices.<sup>165</sup> Some indictments alleged conscious awareness of a substantial and unjustifiable risk, but frequently the evidence at most supported a criminal negligence conviction.<sup>166</sup> Judges have imposed sentences across a wide range. While many convicted defendants face only a few months in jail<sup>167</sup> or simply probation and court-ordered restitution,<sup>168</sup> Robert Leon Magby—a wrangler who caused the horseback-riding death of a child—got a twelve-year prison term.<sup>169</sup> Luckily for Magby, the New Mexico Supreme Court reversed his conviction and remanded the case for a new trial.<sup>170</sup>

Besides recreation and death, two common threads bind cases in this new area of prosecutorial activity. The fatalities occurred in the context of recreations to which danger is intrinsic, like snow skiing, jet skiing, and horseback riding.<sup>171</sup> And the prosecutions rarely, if ever, involve professional contact sports—a world that American law

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legal limit for driving an automobile in Colorado, and a drug test came out negative. *People v. Hall*, 59 P.3d 298, 299 (Colo. Ct. App. 2002) (affirming conviction); *see also* *People v. Hall*, 999 P.2d 207, 211 (Colo. 2000) (reporting results of blood-alcohol and drug tests performed following Hall's fatal collision with Alan Cobb). *See also* *infra* text accompanying notes 312–15 (discussing prosecutor's decision to charge Hall with petty offenses related to marijuana and alcohol possession).

164. *See* *People v. Hall*, 999 P.2d at 212–13, 220 (noting former ski racer's expertise, talent, and safety training and stating that such factors could be used to infer conscious disregard of risk); Brian Massey, *Ruling to Set Chaves Man Free*, ALBUQUERQUE J., Nov. 18, 1998, at D3, *available at* 1998 WL 16512710 (reporting that court documents described man convicted of negligent child abuse in horseback riding death as “wrangler and experienced cowboy”). For the appellate opinion reversing the conviction in this horseback riding case, *see* *State v. Magby*, 969 P.2d 965, 968 (N.M. 1998) (holding that jury instruction may have confused jury about meaning of criminal negligence).

165. At least two recent jet skiing fatalities have involved children under the age of sixteen who lacked proper safety training. *See* Brian D. Crecente, *Teen-Ager Arrested in Fatal Boating Crash at Chatfield*, ROCKY MTN. NEWS, June 26, 2002, at 4A, *available at* 2002 WL 9104267; Franscell, *Jet Ski Death Brings Neb. Charges*, *supra* note 139, at B3. For a discussion of whether skill should be used to determine moral blameworthiness, *see* *infra* text accompanying notes 286–311.

166. *Hall*, 59 P.3d at 301 (affirming jury's verdict of guilty for lesser offense of criminally negligent homicide after trial on reckless manslaughter charge). For a more complete discussion of the tension between the charges and the mental state of such defendants, *see* *infra* text accompanying notes 286–331.

167. *See, e.g.*, text accompanying note 182.

168. *See, e.g.*, text accompanying note 178.

169. *See* *Magby*, 969 P.2d at 966–67.

170. *See id.* at 970.

171. In the *Magby* case, for example, a witness opined that “the only horse that is totally predictable is one that is ‘stuffed.’” *Id.* at 966. This testimony was used to show that the defendant acted negligently in removing a horse's bridle, as a joke, before a four-year-old girl and her mother dismounted. *See id.* (discussing evidence at trial). But, with slightly different facts, it might have cut the other way, demonstrating how the panic-instinct of an otherwise “sweet and gentle” animal can lead to catastrophe without any human fault. *See id.* (noting that witnesses uniformly described the horse that fatally threw toddler to ground as “real sweet and gentle” and that no one, including victim's mother, “observed anything that might have spooked the horse”). For analysis of the relationship between criminal liability and intrinsic recreational risks, *see* *infra* text accompanying notes 198–201 (tobogganing), 202–05 (canyoning), 213–20 (snow skiing), and 286–302 (jet skiing).

enforcement usually ignores, even when the violence appears to be intentional.<sup>172</sup>

## B. Service Providers as Criminal Defendants

### (I) Prosecutions in the United States

The filing of criminal charges against service providers constitutes the least controversial aspect of district attorneys' increased involvement in American leisure time because, at least so far, these cases have seldom presented the asymmetry of criminal prosecution where tort damages are unavailable in many states. When Harold Morris—the owner of a South Carolina company, Beach Bungee, Inc.—pled no contest to two counts of involuntary manslaughter, for instance, his criminal case coincided with massive civil liability.<sup>173</sup> In this case, two young men died when a cable snapped, causing the bungee-jump cage in which they were riding to plunge to the earth.<sup>174</sup> Morris' manslaughter plea created no tension with tort law's view of the incident, for the parents of seventeen-year-old Zachary Steinke won a \$12 million verdict, subsequently reduced to \$6 million, against Beach Bungee, Inc.<sup>175</sup> The jury in the civil case

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172. For instance, American prosecutors failed to file any criminal charges against boxer Mike Tyson for biting opponent Evander Holyfield's ear in 1997. See Beverly Smith, *Keep Courts Out of Sport—Lawyer*, GLOBE & MAIL (Toronto), Aug. 21, 2002, at S2 (contrasting American tolerance of professional sports violence with conviction, in Canadian court, of Boston Bruins enforcer for assaulting Vancouver player with hockey stick); see also C. Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1168 & n.122 (2000) (indicating that criminal prosecutions for violence in sports like ice-hockey are much rarer in U.S. than in Canada); Note, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1034 [hereinafter Note, *Sports Violence*] (same); cf. Jonathan H. Katz, Note, *From the Penalty Box to the Penitentiary—The People Versus Jesse Boulerice*, 31 RUTGERS L.J. 833, 849 (2000) (“The criminal courts in Canada also have had little success in prosecuting professional hockey players for violence on the ice.”). For further discussion of the failure to prosecute professional athletes for assaults in the United States, see *infra* text accompanying notes 266–83.

173. See Kim Wise Quintal, *Bungee Owner Enters Plea of No Contest*, POST & COURIER (Charleston, S.C.), Mar. 29, 1995, at A17. For information about the tort judgment, see *infra* text accompanying notes 175.

174. See *id.*

175. See *Steinke v. Beach Bungee, Inc.*, 105 F.3d 192, 195, 197 (4th Cir. 1997) (affirming judgment but remanding case to district court to apply South Carolina law to claim of excessive damages). For the Fourth Circuit order affirming a reduction of the damages award to \$6 million, see *Steinke v. Player*, 145 F.3d 1325 (4th Cir. 1998) (unpublished). The Steinke also recovered \$1 million from the state of South Carolina for failing to properly inspect the amusement ride. See *High Court Awards \$1M in Bungee-Jumping Death*, HERALD (Rock Hill, S.C.), Sept. 8, 1999, at 7A, available at 1999 WL 9650693. In the criminal case, Beach Bungee owner Harold Morris was sentenced to one year's probation and a \$10,000 fine, part of which was set aside for the state victims' assistance program. See Quintal, *supra* note 173.

The civil jury's finding of recklessness in *Beach Bungee* was not anomalous. A Missouri appellate court affirmed a \$5 million award to Marty Hatch, who sustained serious back injuries when workers failed to attach the bungee cord to the crane from which Hatch plunged. See *Hatch v. V.P. Fair Found., Inc.*, 990 S.W.2d 126 (Mo. Ct. App. 1999) (affirming finding of recklessness and holding that damage award was not excessive); *Man Gets \$5 Million in Bungee-Jump Mishap*, ST. LOUIS POST-DISPATCH, Apr. 25, 1997, at 15C, available at 1997 WL 3337987. In Missouri, the recklessness

determined that the defendants acted recklessly in hiring a shrimp-boat repairman who had no engineering degree or experience with amusement rides to install an apparatus marked "not suitable for lifting persons."<sup>176</sup> In both the civil and criminal contexts, conscious disregard for the victims' lives underpinned the result.

A bungee-jumping homicide in Colorado and a skydiving prosecution in Oregon also involved facts in which criminal sanctions overlapped with potential tort liability. In the Colorado case, John Glennon (the owner of Bungee America) pled guilty to negligent homicide after an employee crashed to his death.<sup>177</sup> Although Glennon faced as many as eight years' imprisonment under the statute, the court only sentenced him to three years' probation, 200 hours of community service, and almost \$1,500 in victim restitution.<sup>178</sup> The fatal accident occurred because the hot-air balloon from which the victim leapt floated too low for the length of the cord; the bungee apparatus was improperly connected; and the defendant provided inadequate communication between the balloon and the ground crew, who desperately shouted warnings to the pilot.<sup>179</sup> Since the victim worked for Bungee America, any exculpatory contract he signed would have violated public policy.<sup>180</sup> Hence, a wrongful death suit by his family was not precluded. In the Oregon case, Ted Mayfield—a sky-dive operator implicated in the death of thirteen parachutists in twenty-two years—pled guilty to negligent homicide after supplying a client with a backup parachute device that he *knew* was defective.<sup>181</sup> He received a sentence of five months in jail, plus three years' probation. The court also required him to pay \$5,675 in restitution and to refrain from any future involvement with skydiving.<sup>182</sup>

Prosecutors did not ambush these defendants with criminal charges; the defendants also faced civil liability arising from their conscious risk-

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standard "looks to the tortfeasor's state of mind" and requires that his conduct be "something more than unreasonable," indeed that it be "so far from a proper state of mind that it is treated in many respects as if [the harm] were so intended." *Hatch*, 990 S.W.2d at 139.

176. See *Beach Bungee*, 105 F.3d at 195.

177. See Min. Order, *People v. Glennon*, 94CR1142 (Dist. Ct., Adams County, Colo., May 15, 1995) (copy on file with author)

178. See *id.* (recording all aspects of sentence with restitution order redacted); Conditions of Probation, *People v. Glennon*, 94CR1142, (Dist. Ct., Adams County, Colo., May 15, 1995) (copy on file with author) (including amount of court-ordered restitution).

179. See Fawn Germer, *Dead Bungee Jumper's Cord 70 Feet Too Long*, ROCKY MTN. NEWS, July 1, 1993, at 4A, available at 1993 WL 4354076 (discussing findings of engineer's report on Bungee America fatality in Arvada, Colorado). The criminal charges against Glennon for the death of William Robert Brotherton closely followed a settlement between Glennon and the Occupational Safety and Health Administration, which charged Bungee America with four federal violations, including failure to keep a fire extinguisher in the hot-air balloon. See Robinson, *Bungee-Jump Firm Charged*, *supra* note 141, at B4.

180. See, e.g., *Pittsburgh, C.C. & St. L. Ry. Co. v. Kinney*, 115 N.E. 505, 508 (Ohio 1916) (holding contract by which employee assumed risks incident to employment to be "clearly in conflict with the sound and humane public policy of the state").

181. See *Man Gets Jail in Sky-Diving Deaths*, PORTLAND OREGONIAN, May 19, 1995, at B4, available at 1995 WL 3601458.

182. See *id.*

taking or, at least, gross negligence. In the light most sympathetic to Glennon and Mayfield, their victims died because of behavior that assumption of risk doctrines do not shelter—the creation of dangers beyond those inherent in the sport.<sup>183</sup> But more significantly for the purposes of this Article, the service providers all engaged in risk-taking that showed a reprehensible indifference to the safety of their clients and employees. They did not simply impose costs on others; they also did so in a manner that revealed their stunted or non-existent moral judgment. In the *Beach Bungee* case, for instance, a civil jury found that the defendants were subjectively aware that the ramshackle elevator was unsafe for human passengers, but nonetheless used it to make a buck.<sup>184</sup> In *Glennon*, the defendant claimed that he simply misread the altimeter in the hot-air balloon,<sup>185</sup> but prosecutors possessed evidence of other nearly fatal incidents caused by Bungee America, each involving a failure to perceive dangers related to the balloon's height.<sup>186</sup> Given the repeated nature of such incidents, a prosecutor might surmise that Glennon *chose* not to investigate and rectify height problems.

Conduct for which a plaintiff can recover civil damages, as the victims could in these service-provider cases, arguably forms a stronger basis for a criminal charge than an incident where tort recovery is either precluded as a matter of law or so dubious that a plaintiff's lawyer working for contingency fees would not want to waste his time.<sup>187</sup> Yet conversely, some might contend that criminal prosecution is less necessary where tort law effectively performs a deterrent function than where it fails to do so.

In my view, because the criminal law should not be parasitic on tort, the goal of synchronizing the two legal regimes is a weak reason for endorsing criminal charges against defendants like Glennon, Mayfield, and Morris. A better yardstick for measuring the appropriateness of prosecuting American service providers, under both retributive and mixed theories, is the fit between their actions or omissions and the concept of the morally culpable mental state. Regardless of whether criminal charges bolster tort liability, or substitute for it, they are

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183. See *supra* text accompanying notes 90–94.

184. See *Steinke v. Beach Bungee*, 105 F.3d 192, 197 (4th Cir. 1997) (affirming jury's finding of recklessness).

185. See Def.'s Statement, *People v. Glennon*, 94CR1142 (Dist. Ct., Adams County, Colo., undated) (copy on file with author) ("I had transposed the numbers for calibrating one of my altimeters.").

186. See Notice of Intent to Introduce Other Act Evidence, (Dec. 23, 1994) *People v. Glennon*, 94CR1142 (copy on file with author) (informing court and defense counsel of district attorney's intent to introduce evidence of two bungee jumps from Glennon's balloon in which jumpers came within less than ten feet of smashing into earth).

187. See, e.g., *State v. Uhler*, 402 N.E.2d 556, 558 (Ohio Misc. 1979) ("A person legally responsible for his acts in a criminal court will generally be found to be liable in a civil court for injuries caused by the same criminal actions; however, the reverse is not always true."). *But cf.* *Coffee, Does "Unlawful" Mean "Criminal"?*, *supra* note 9, at 204 (criticizing cases in which corporate officials "have been convicted of a federal felony on facts that would have been unlikely to support civil liability in a derivative suit").

illegitimate unless they further the criminal law's separate role in punishing blameworthy, anti-social behavior. The service-provider cases discussed above constituted good discretionary decisions because they did not involve charges that exceeded the defendants' mens rea; at worst, the defendants accepted plea bargains that were too mild for their conduct.

The use of victim restitution in sentencing deserves less applause, however.<sup>188</sup> All American states have passed statutes allowing judges to order restitutionary remedies in criminal cases, and by the late 1980s, more than half the states required judges to do so unless there was ample cause not to issue a restitution order.<sup>189</sup> These developments ought to be unpalatable, especially to retributivists. Unlike fines paid into government coffers, restitution has the flavor of compensation, rather than punishment and hence exacerbates the myth that desert-based punishments aim to satisfy the victim's desire for vengeance or to restore the status quo.<sup>190</sup> Retribution is based on just deserts; mixed theories contain the additional concept of social utility; but neither endorses the inexact compensation or vengeance embodied in restitutionary remedies. Criminal restitution can never approximate the enormous sums awarded by civil juries, and as one proponent concedes, "there is little rational relationship between [a life taken] . . . and \$20,000."<sup>191</sup> More importantly, the restitution paradigm stems from a wrongheaded notion that, because the criminal harms the victim, he owes a debt to her, rather than to society.<sup>192</sup>

Even when fatalities arise from inherent dangers that tort law fails to compensate, surviving family members should not be shunted into criminal court for monetary remedies. The current victim-based approach inappropriately allows the recreational accident victim or her family a role in the criminal process without the corresponding liabilities found in tort law. In other words, the victim is allowed to satisfy her desire for compensation, but the criminal law remains reluctant to inquire into her state of mind, assumption of risk, contributory negligence, and the like. Victims may want sports service providers or

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188. Randy Barnett explains, for instance, that the restitution paradigm "views crime as an offense by one individual against the rights of another," rather than as a harm to society. Randy A. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in *CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS* 392 (Michael J. Gorr & Sterling Harwood eds., 1995). According to Barnett: "Restitution provides some tangible, albeit inadequate compensation for personal injury. Punishment provides none at all." *Id.* at 395.

189. See Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 410 (1999); David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 42-43 (1989).

190. See MOORE, *supra* note 10, at 89 ("Retributivism is not the view that punishment of offenders satisfies the desires for vengeance of their victims."); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 75 (1999) (arguing that retributivists who advocate victim-oriented sentencing have turned into advocates of corrective justice).

191. *Id.*

192. See Barnett, *supra* note 188, at 392 ("The armed robber did not rob society, he robbed the victim. His debt, therefore, is not to society; it is to the victim.") (emphasis removed).

co-participants to be prosecuted,<sup>193</sup> although this is not always the case.<sup>194</sup> Yet, whatever their desires, their voices are not the main ones to which the criminal system properly responds, nor should that system be simply part of a broader corrective justice scheme in which it serves as an extension of, or a substitute for, tort law. A prosecutor should press criminal charges only if she can identify a “public” wrong in the defendant’s conduct.

The term “public” has become a shibboleth; elsewhere I have criticized its overuse in describing the ethical duties of prosecutors.<sup>195</sup> The remainder of this Article will explore the difference between mere inadvertence, which tort law governs, and conduct that I believe constitutes a “public” wrong. I will contend that prosecutors and the substantive law itself, both in the United States and abroad, often fail to respect this normative boundary. I will also propose a new approach to charging in recreational accident cases that helps define the proper role of the “public” criminal law.

## (2) *Beyond American Borders*

Americans have a reputation for being both litigious and risk-averse, compared to individuals in other nations. We are surrounded by a collage of warning labels, protected from dizzying cliffs by guard rails, and yet still prone to point the finger when we get injured or lose a loved one in an accident.<sup>196</sup> International observers often say that they do not want to become like us,<sup>197</sup> but in the realm of criminal prosecution for recreational accidents, they already have. Indeed, criminal cases against

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193. See *infra* text accompanying notes 220 (discussing victim support for prosecution of adventure tour operator in Switzerland), text accompanying notes 235 (describing pressure by family of victim to prosecute juvenile defendant for jet-skiing fatality), text accompanying notes 236–38 (noting that bereaved families participated in and approved of conviction and sentencing of skiers).

194. See *infra* text accompanying notes 239.

195. Ramsey, *supra* note 16, at 1316–23, 1391–93.

196. Myriad warnings inundate the marketplace in the United States. In contrast, individuals in other countries receive less warning information and are also less likely to view injuries or deaths as wrongs compensable through tort litigation. See Cortese & Blanner, *supra* note 135, at 184–85 (stating that “European and Japanese cultures have what has been described as ‘an overriding predisposition . . . against litigation,’” compared with Americans’ “near zero-risk tolerance” and frequent lawsuits); see also Hanson Hosein, *UNSETTLING: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT’L & COMP. L. REV. 285, 300 (1993) (explaining that in India, individuals view catastrophic harms for which Americans would seek tort damages as a “vicissitude of life in another culture to be absorbed into the ‘karmic fatalism’ that characterizes [Indian] culture”). Government-run social insurance programs providing compensation and medical care also suppress tort litigation in foreign countries. See Cortese & Blanner, *supra* note 135, at 184–85.

197. See P.S. Atiyah, *Tort Law and Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1002 (1987) (“For a variety of reasons, people and institutions in other countries feel threatened by what happens in America. They worry that litigiousness will spread beyond America and engulf the world.”); see also *Wake-Up Call from U.S. on Need for Insurance*, TRAVEL TRADE GAZETTE, Jan. 22, 2001, at 53, available at 2001 WL 10638609 (UK & Ireland) (quoting British marketer who said of American ski tort suits and regulations: “I don’t want Europe to become like the U.S. You would lose the freedom of what skiing is about.”)

service providers in Europe raise more troubling issues than those in the United States. Several European prosecutions have targeted fatalities that arguably stemmed from the inherent risks of the recreation—being swept over a weir in a whitewater raft, crashing into a tree on a toboggan.<sup>198</sup> In the tobogganing case, an Austrian coroner's court determined that a schoolgirl "was the victim of 'negligent homicide.'"<sup>199</sup> However, the defendant's relatively minor role in creating the conditions that led to the girl's death presented troubling issues of causation and mens rea. Although the girl was not wearing a helmet when the fatal collision occurred, witnesses maintained that "trained safety advisers" had given the children full instructions, including the proper method for stopping.<sup>200</sup> Nevertheless, the toboggan on which victim rode ploughed into a tree—the type of risk that sports-safety statutes in the United States often list as inherent. It seems likely that the venue operator's allegedly criminal mental state at most involved an awareness of the intrinsic dangers of tobogganing and a failure to insist on the use of helmets, which few winter sports venues require, even in the United States.<sup>201</sup>

A "canyoning" disaster near Interlaken, Switzerland resulted in the most widely known European prosecution. Eighteen tourists and three guides perished and several other adventurers were badly injured in a flash flood when they descended the Saxeten Gorge under gathering thunderheads.<sup>202</sup> Swiss authorities convicted three directors, the general manager, and two staffers of the tour operator Adventure World on negligent manslaughter charges, arguing that they should have canceled the trip when the weather turned stormy.<sup>203</sup> Instead, company guides led an international group of young people into the gorge for a day of sliding and rappelling.<sup>204</sup> Testimony conflicted as to whether the guides had proper weather instruction; whether the storm appeared to be dissipating when the tour group reached the canyon; and whether checking an Internet weather service would have averted the fatalities.<sup>205</sup>

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198. See *Briton Guilty in Rafting Deaths*, TIMES (London), July 11, 2001, at 14, available at 2001 WL 4913586 (reporting that rafting guide and manager of Taxenbach Rafting Center were convicted of manslaughter for deaths of four whitewater-rafting clients). For the information on sentencing in the toboggan case, in which the Taxenbach Club was also implicated, see *infra* note 209.

199. See Chris Millar, *Teachers 'Not to Blame' over School Trip Toboggan Death*, EVENING STANDARD (London), July 3, 2002, at 7, available at 2002 WL 21776014.

200. See David Williams & Christian Gysin, *Sledge Crash Horror of Girl on School Holiday*, DAILY MAIL, Feb. 21, 2001, at 9, available at 2001 WL 14119730. For a discussion of collisions with objects, such as trees, as an inherent danger of snow sports under American tort law, see *supra* text accompanying notes 112–13.

201. See *supra* text accompanying note 57.

202. See Naomi Koppel, *Six Guilty in Swiss Canyoning Deaths*, A.P. ONLINE, Dec. 11, 2001, available at 2001 WL 31684714.

203. See *id.*

204. See *id.*

205. See Paul Daley, *For the Parents, the Pain Persists*, SUNDAY AGE (Australia), Dec. 9, 2001, at 4, available at 2001 WL 7779480 [hereinafter Daley, *For the Parents*].



As in the United States, criminal justice systems in Europe allow some degree of victim participation. Victims in Austria and Switzerland may join criminal proceedings as civil claimants, seeking compensation, and are especially likely to do so in cases that involve negligent physical injury.<sup>206</sup> Injured parties can also instigate private prosecutions for a limited number of offenses or take over criminal proceedings if the public prosecutor discontinues the case or refuses to take it all.<sup>207</sup> However, the obligation of a private or subsidiary prosecutor to bear his own expenses during the evidentiary phase, and the expenses of both parties if he loses, discourages this type of victim participation.<sup>208</sup>

Although injured parties can play a role in European criminal cases, the sentences that resulted from the prosecutions discussed above did not reveal a compensatory orientation. Rather, they indicated that European judges wanted to convey a message about the moral blameworthiness of the recreational service providers' misconduct. The convicted persons received suspended sentences, rather than immediate jail time, and were ordered to pay fines, not victim restitution.<sup>209</sup> Academic literature has made few strides toward explaining suspended sentences or probation in economic terms; rather, their primary function seems to be

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206. See ERNESTINE HOEGEN & MARION BRIENEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS 77-78, 929 (2000). Any comments about the Swiss system must necessarily be quite general, as Switzerland leaves criminal justice administration to each of its twenty-six cantons. See *id.* at 916. Because France, unlike the United States, has an inquisitorial system, its criminal trials can also accommodate the participation of a civil party. See Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 820-21 (2001). The civil party may be involved in the pretrial investigation, as well as the trial, in which she can represent herself or pay for an attorney's services. *Id.* Monetary compensation from the defendant, or from a public fund in cases of indigent defendants, satisfies successful civil claims, which may be joined to the criminal prosecution. *Id.*; see also Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 616 (1990) (discussing victims' role in French criminal procedure). Victims in Germany also enjoy more extensive rights than they do in the United States, including the right to join certain types of cases as an auxiliary prosecutor who plays a relatively passive role; the right to conduct the prosecution personally for assault and battery and several other offenses; and the right to file a claim for civil damages, which the judge considers along with the criminal charges. See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 350-51 (1995) (describing rights of crime victims in Germany).

207. See HOEGEN & BRIENEN, *supra* note 206, at 79, 929-30.

208. See *id.* at 78-79, 930. Subsidiary prosecution, in which the victim takes over a case that the public prosecutor has dropped, "is more or less non-existent in Switzerland." *Id.* at 930.

209. All of the Adventure World defendants convicted in Swiss Court for the canyoning disaster received suspended sentences, ranging from three to five months, and four were required to pay fines. See Koppel, *supra* note 202. None will actually serve jail time. *Id.* An Austrian judge gave the Taxenbach rafting guide a twelve month suspended sentence and the company manager a fifteen-month suspended sentence for the whitewater-rafting deaths. See *id.*; see also *Raft Chief Gets Suspended Jail Sentence Over Deaths*, EVENING STANDARD, July 11, 2001, at 6, available at 2001 WL 22296224. The farmer who owned the toboggan run in the other case involving the Taxenbach Club received a two month suspended sentence and was ordered to pay costs. See Millar, *supra* note 199, at 7.

condemnatory.<sup>210</sup> In Austria, suspended sentences are encouraged as an alternative to imprisonment due to high incarceration rates,<sup>211</sup> but their function is also moral and educative. Similarly, while fines arguably price, rather than prohibit undesirable conduct, they still express society's disapproval and cannot be viewed as compensatory because the money flows to the state, instead of to the victim. Finally, judges in European countries with national health insurance schemes<sup>212</sup> may feel less pressure than their American counterparts to provide crime victims with restitution. If this is true, then social insurance increases the focus on the criminal law's role in transmitting moral norms and decreases the notion that the defendant owes the injured party a debt.

However, the chilling impact of criminal liability makes it imperative that the moral norms being enforced are clear, and the proscribed conduct extreme, so that service providers can avoid behavior that results in convictions. Criminal sanctions have stigmatic effects beyond the specific ones that the sentencing judge imposes. For example, Adventure World ceased business, and sixty of its employees lost their jobs in the wake of convictions for negligent homicide in the Saxeten Gorge disaster and a separate bungee-jumping death.<sup>213</sup> The criminalization of recreational accidents thus gives substance to the fear that over-regulation will remove risk from the market.<sup>214</sup> Adventure World spokesman Leo Caminada indicated that other companies would take over the "less risky" sports that Adventure World once offered.<sup>215</sup> But, as of July 2001, only three firms had passed the rigorous new safety regulations that became a Swiss industry standard for canyoning, river running, and bungee jumping after the Interlaken fatalities.<sup>216</sup> An exodus of adventure companies from the market is desirable only if society seeks

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210. See Schulhofer, *supra* note 18, at 337-38.

211. See HOEGEN & BRIENEN, *supra* note 206, at 61.

212. Switzerland instituted mandatory health insurance, officially called "social insurance," in 1994. Swiss social insurance is provided by private companies, which must offer comprehensive benefits to qualify for the program. See Paul J. Donahue, *Federalism and the Financing of Health Care in Canada and Switzerland: Lessons for Health Care Reform in the United States*, 21 B.C. INT'L & COMP. L. REV. 385, 423-25, 434 (1998) (describing Swiss system).

213. See Swiss "Extreme Sports" Firm Closes, A.P. ONLINE, May 19, 2000, available at 2000 WL 20910346. In addition to the convictions of Adventure World directors and staffers for the canyoning deaths, two of the company's guides pled guilty to negligent manslaughter charges arising from a bungee-jumping accident that killed an American man. See *Around the World: 2 Get Suspended Sentences in Death of Bungee Jumper*, SEATTLE TIMES, Dec. 15, 2000, at A19, available at 2000 WL 5567291 (describing defendants' guilty pleas and sentences). The guides convicted in the bungee-jumping death were not involved in the canyoning case, except through their association with Adventure World. See *Man Falls to Death in Bungee Accident*, WASH. TIMES, May 16, 2000, at C4, available at 2000 WL 4155853. For more information on the bungee-jumping case, see Onna Coray, *Rope Too Long in Bungee Death*, A.P. ONLINE, May 15, 2000, available at 2000 WL 20908743 (reporting that fatality occurred because bungee cord was too long for height of cable car from which victim jumped).

214. See Judges, *supra* note 63, at 3-4.

215. See Swiss "Extreme Sports" Firm Closes, *supra* note 213.

216. See Daniel Friedli, *Swiss Flood Victims Get Memorial*, A.P. ONLINE, July 27, 2001, available at 2001 WL 25487805.

to prohibit the services they offer as morally reprehensible and devoid of social utility.<sup>217</sup>

Does the prosecution of service providers for fatalities in inherently dangerous sports target behavior that is plainly wrongful? The fact that four newsworthy European cases involved only two adventure-trip operators tends to corroborate the argument that the companies deviated in a shocking manner from reasonable safety precautions and that they did so repeatedly.<sup>218</sup> Yet, given the horrific manner in which a wall of water drowned and pummeled the Interlaken victims, ultimately smashing their bodies against a concrete dam,<sup>219</sup> hindsight may have made routine, bargained-for thrills seem like culpable risk-taking.

Because the tourists entered the Saxeten Gorge of their own volition, the prosecution of the Adventure World staff polarized the Interlaken community. Survivors of the flood felt angry about the acquittal of two guides who did not tell the group to turn back, even after they saw the water rise and change color.<sup>220</sup> However, some Interlaken residents believed that the defendants “did all they could to ensure that a dangerous sport was carried out as safely as possible.”<sup>221</sup> Canyoning provides thrills that one volunteer-rescuer describes as “better than drugs.”<sup>222</sup> It also exposes enthusiasts to the risk of flash floods, for storms brew unexpectedly and water levels can rise ten feet in a few minutes.<sup>223</sup> A prominent American sports magazine reports that in Utah’s Zion National Park alone, ten people have been swept to their deaths.<sup>224</sup> If no one had died or been grievously hurt in the Saxeten Gorge, Adventure World’s conduct at worst might have been deemed ordinary negligence and at best celebrated as great fun.<sup>225</sup>

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217. Coffee associates “soft-edged” terms like “negligence” with pricing, rather than prohibiting conduct and indicates that sanctions can be imposed “to force the [criminally negligent] defendant to internalize the costs he imposes on others.” Coffee, *Does “Unlawful” Mean “Criminal”?*, *supra* note 9, at 228. However, once potential liability outweighs the financial benefits of running a business, so that firms leave the market, criminal sanctions arguably cross the line between pricing and prohibiting. In this scenario, it makes little difference whether or not the court deems the defendant to have had a subjective awareness of risk. *But see id.* (indicating that breakpoint between pricing and prohibiting usually occurs at boundary between existence and non-existence of criminal intent).

218. The Taxenbach Club was involved in both a whitewater-rafting prosecution and a sledding prosecution. *See supra* note 209. For a discussion of the bungee-jumping fatality for which Adventure World was responsible, in addition to the Saxeten Gorge deaths, *see supra* note 213.

219. *See Daley, For the Parents*, *supra* note 205, at 4.

220. *See Koppel, supra* note 202.

221. *See Paul Daley, Swiss Trial to Focus on Guides*, THE AGE (Australia), Dec. 3, 2001, at 7, available at 2001 WL 28701127.

222. Kelley King, Lars Anderson, & Troy Patterson, *The Hole Truth: Canyoneering is Roping in Thousands of New Adrenaline Addicts, But How Safe is it?*, SPORTS ILLUSTRATED, May 28, 2001, at 31, available at 2001 WL 8024973 (quoting Bo Beck).

223. *See id.*

224. *See id.*

225. Although the Model Penal Code drafters took the view that results should be irrelevant to criminal liability, the majority of state penal codes distinguish between inchoate crimes and crimes where the desired or risked harm actually occurs. *See Paul H. Robinson, Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation*

Unlike the service-provider cases brought thus far in the United States, these European prosecutions raise concerns about the proper boundary between risk-taking, inadvertent killing, and the type of moral wrongdoing that ought to be the criminal law's focus. To analyze such concerns in greater detail, this Article next considers criminal sanctions against sports co-participants—individuals whom most American tort regimes merely require to avoid reckless or intentional harm-creation.<sup>226</sup>

### C. Sports Co-Participants as Criminal Defendants

#### (1) *Conflicting Signals from the Public*

If prosecutors depend on the winds of public opinion to guide them, they will continue to steer a meandering course with regard to the prosecution of sports co-participants. Anecdotal evidence culled from newspaper accounts of recent cases indicates not only that the public holds erratic views about the appropriateness of criminal sanctions for recreational fatalities, but also that there is no unified public that speaks with one voice. More accurately, distinct groups like service providers, victims' families, lawyers, and journalists observe, discuss, and even participate in the proceedings. While some commentators describe professional contact sports as "a world unto itself" in which players and fans expect a high level of aggression and even fighting on the field,<sup>227</sup> people involved in amateur recreations do not unanimously reject anti-violence norms. There are always crosscurrents.

Aside from district attorneys who openly seek to send an educational message that discourages extreme behavior,<sup>228</sup> tort lawyers express the highest level of enthusiasm for punishing co-participants. They fervently hope, for example, that criminal verdicts against negligent skiers will result in changes favoring plaintiffs in the civil arena.<sup>229</sup>

Other groups in society appear to be less sure about the value of prosecuting co-participants. Such prosecutions deflect blame from

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*Offenses*, 4 THEORETICAL INQUIRIES IN LAW 367, 374–77 (2003) [hereinafter Robinson, *Prohibited Risks*]. This distinction arises from the common popular opinion that causing harm involves greater moral blameworthiness than merely desiring or risking it. See Gail L. Heriot, *Harm v. Culpability: Which Should be the Organizing Principle of the Criminal Law*, 1994 J. CONTEMP. LEGAL ISSUES 145, 147 (1994) ("[M]any, if not, most members of the public share the intuition that punishment for actually causing a harm should be greater than punishment for attempting but failing to cause an identical harm."); Robinson, *Prohibited Risks*, *supra* (quoting John H. Mansfield, *Hart and Honore, Causation in Law—A Comment*, 17 VAND. L. REV. 487, 494–95 (1964)); see also MOORE, *supra* note 10, at 191–247 (arguing that culpable mental state and harm itself are two independent desert-bases and surveying views of those who disagree with him).

226. See *infra* text accompanying notes 74–89.

227. Clarke, *supra* note 172, at 1167; see also *id.* at 1157, 1192.

228. For instance, District Attorney Mike Goodbee, who prosecuted Nathan Hall told reporters: "[T]he message [that the criminal case sent] is that skiers don't need to ski in an extreme fashion to enjoy the sport. When you choose to do that, you endanger yourself and others, and that's not fair." Sloan, *supra* note 69, at 1D.

229. See Hellwege, *supra* note 66, at 16 (quoting plaintiffs' lawyer Jim Chalal, who hopes that the Hall case "shows the tide is slowly turning against defendants in ski injury cases").

service providers, allowing their representatives to censure fast skiers and other out-of-control clients by mentioning jail time.<sup>230</sup> Nevertheless, service providers display ambivalence toward the involvement of the state. Indeed, prosecutors have experienced difficulty in bridging the chasm between their offices and winter resorts, which want to minimize bad publicity about the dangers and possible criminal repercussions of skiing.<sup>231</sup> Colorado district attorneys have replaced the requirement that ski areas report recklessness (and, hence, act as adjuncts of the police) with the less uncomfortable task of informing law enforcement officials about fatalities and life-threatening injuries. Thus, ski areas no longer must make mens rea determinations that favor criminal charges; they merely have to let the authorities know when serious harm occurs.<sup>232</sup> Tensions persist, however, despite efforts to accommodate the concerns of service providers. After the Colorado Supreme Court's decision in *People v. Hall*,<sup>233</sup> a representative of the Ski Areas of New York stated: "[W]e felt it was being blown out of proportion. Collisions are things people have to deal with on the slopes. . . ."<sup>234</sup>

Nor do the families of victims unvaryingly drive zealous prosecution. Research for this Article unearthed only one case in which a deceased's family clearly pressured the state to bring a criminal case. When seventeen-year-old Samantha Rader was killed by a teenage jet skier who crashed into her inner tube, her parents spent months arguing with law enforcement about the slow pace of the investigation and the mild nature of the charges.<sup>235</sup> Other families either passively accept the discretionary decisions of prosecutors and courts as the embodiment of justice, or indicate discomfort with the criminal punishment of an inadvertent killer. Many refrain from pressuring the district attorney to prosecute, but still adopt an approving view of the criminal proceedings. For example, in the *Hall* case, the victim's fiancée made several courts appearances and publicly chastised Hall for appealing the guilty verdict.<sup>236</sup> Another ski case shows family support for a sentencing

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230. See Doyle, *supra* note 56, at C1 (quoting Stacy Gardner, spokesperson for the NSAA, who commented: "Ski patrollers can actually say, 'You could go to jail.' It is no longer just a ski area issue.").

231. See Rubin, *supra* note 62, at 110 (stating that ski areas worry that they will "lose business if aggressive skiers stay home for fear of criminal prosecution").

232. See *id.*

233. 999 P.2d 207 (Colo. 2000) (ordering skier to stand trial on reckless manslaughter charges).

234. Doyle, *supra* note 56, at C1 (quoting Dirk Gouwens). Cf. Sloan, *supra* note 69, 1D (reporting that *Ski* magazine editor, Rick Kahl, worries that criminal convictions will enhance ability of tort plaintiffs to sue ski areas and thus hurt sport of skiing).

235. See Ron Franscell, *Neb. Parents Irked at Probe's Pace: Daughter Killed by Jet Ski*, DENVER POST, Aug. 22, 2002, at B2, available at 2002 WL 6574095 [hereinafter Franscell, *Neb. Parents Irked*]; Julia McCord, *Probe in Lake Death Too Slow for Family*, OMAHA WORLD-HERALD, Aug. 18, 2002, at 1A, available at 2002 WL 5341664. For further discussion of this case, see *infra* text accompanying notes 303-04, 306-07.

236. Rep.'s Partial Tr. of Proceedings, (Nov. 13, 2000) (recording that fiancée Christi Neville took witness stand to testify about fatal accident); Sentencing (Jan. 31, 2001) (recording that letter from victim's family was read and fiancée Christi Neville spoke to court at sentencing), *People v. Hall*,

decision. A judge ordered Howard Hidle—a skier who killed a child at Winter Park—to serve a month-long sentence in jail and sixty days of house arrest; perform 400 hours of community service; and reimburse the family for \$15,000 in medical and burial expenses.<sup>237</sup> After sentencing, the victim's parents said they felt "the sentence that [the defendant] . . . got was very fair, even though . . . [they] realize[d] that it was an accident."<sup>238</sup>

However, surviving relatives who view recreational fatalities as calamitous mistakes sometimes disfavor prosecution. The father of a Colorado boy fatally shot when he and a friend engaged in a mock duel on a hunting trip opposed criminal charges against the teenager who killed his son and the youngsters who staged a cover-up: "Byron's death is tragedy enough. I don't think those boys should be charged. What they did was stupid and careless, but Byron participated in it. It was just a horrible accident."<sup>239</sup> The issue has the power to divide families. While the mock-duel victim's father opposed criminal charges, his mother believed that they were warranted.<sup>240</sup>

The press appears to be equally conflicted. Several newspapers ran editorials praising the district attorney who tried Nathan Hall for killing a total stranger on the ski slopes.<sup>241</sup> In this co-participant scenario, they found criminal liability appropriate. Yet, when Paul Gallegos put his son and stepson into in rock-strewn, rapid section of the South Platte River in a rubber raft purchased at K-mart,<sup>242</sup> journalists expressed outrage at

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97CR167 (Dist. Ct., Eagle County, Colo.) (copies on file with author). Associated Press, *Fatal Run Lands Skier in Jail*, CHI. SUN-TIMES, Feb. 1, 2001, at 5, available at 2001 WL 7215937 (quoting Cobb's fiancée as saying: "I was absolutely appalled and shocked at their decision to appeal . . . I was very satisfied with the sentence of 90 days and probation, but their decision to file an appeal negates everything they said today.").

237. See Min. Order, *People v. Hidle*, 89F38 (County Ct., Grand County, Colo., July 21, 1989) (copy on file with author) (recording defendant's sentence).

238. Vela, *supra* note 138, at 33.

239. Kit Miniclier & Sean Kelly, *Dad: Don't Charge Son's Pals in Death*, DENVER POST, Dec. 21, 2001, at B1, available at 2001 WL 2764583; see Coleman Cornelius, *Friend Charged in Fatal Gun 'Duel'*, DENVER POST, Dec. 27, 2001, at B1, available at 2001 WL 27674583 (reporting that "teenage victim's father has said the emotional trauma was punishment enough," but that chief deputy district attorney wanted "to make it clear to the community that behaving that [allegedly reckless] way is going to have consequences"). For legal documents related to the case, see generally *People v. Blackmon*, 01CR364 (Dist. Ct., Morgan County, Colo., Dec. 19, 2001) (copy on file with author). Robinson and Darley's empirical study of community attitudes toward criminal prosecution indicates that ordinary people generally believe that hunting accidents should result in criminal liability, but would punish the inadvertent shooting of a human, whom the hunter mistakes for an animal, with less jail time than the death of a sick child for whom the caretaker fails to seek medical attention. See ROBINSON & DARLEY, *supra* note 15, at 119.

240. See Cornelius, *supra* note 239, at B1.

241. Clark, *supra* note 69, at C13 (asserting reporter's opinion that Hall "got what he deserved"); Editorial, *Skier Penalty Warranted*, *supra* note 69, at B10 (expressing opinion that Hall's conviction and sentence were appropriate).

242. See Indictment, *People v. Gallegos*, 01CR844 (Dist. Ct., Jefferson County, Colo., May 4, 2001) (copy on file with author).

the prosecutor's decision to press reckless child abuse and negligent homicide charges. The *Rocky Mountain News* complained:

The criminal charge of child abuse resulting in death exists to punish violent, sick, malicious, cruelly indifferent or dangerous people. It does not exist—or at least we shudder to think it exists—to punish a parent who plans a spring-break week of activities for himself and his son, only to see it collapse into tragedy.<sup>243</sup>

The media's criticism of this excessive display of "muscle-flexing by the state" stemmed from the "common sense" view that the bereaved father had suffered enough.<sup>244</sup> Even though Gallegos (a parent with a greater legal duty than a stranger) failed to provide life jackets for his boys (who could not swim) or board the raft before it slipped away in water so rough that highly skilled kayakers used it for training,<sup>245</sup> the press responded: "Give the guy a break."<sup>246</sup> One letter to the editor hinted that the decision to charge Gallegos, who is Hispanic, stemmed from racism and asked why he had been arrested, whereas a woman who ran over her grandchild with a lawn mower faced no criminal charges.<sup>247</sup>

Editorials on the case often left out a key fact, however: Gallegos was under the influence of illegal methamphetamine when he put the children's raft into the river.<sup>248</sup> Thus, while he may not have adverted to the risk that the raft would capsize in the cold, fast-moving river, his drug-clouded state arguably constituted the "sinister side to the tale" that the press demanded to hear.<sup>249</sup> Yet, journalists hastily lambasted the district attorney's office without bothering to get the facts straight.

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243. *Rubbing Salt in the Wound? The Issue: Jeffco Police Arrest Father of Drowned Boy*, ROCKY MTN. NEWS, Apr. 4, 2001, at 29A, available at 2001 WL 7368768.

244. *Id.* ("The parents of children who die in such accidents are already fated to grieve in guilt for the rest of their lives.")

245. See Indictment (May 4, 2001); Aff. of Investigator Kelly Black (Mar. 30, 2001), *People v. Gallegos*, 01CR844 (copies on file with author).

246. John Ingold, *Father of Dead Raftier Flees Raid*, DENVER POST, Jan. 13, 2002, at B2, available at 2002 WL 6557952.

247. See *Letters: Double Standard?*, ROCKY MTN. NEWS, Aug. 14, 2001, at 28A, available at 2001 WL 7380122 (publishing letter from Terry Quinn of Eagle, Colorado).

248. See Indictment, *People v. Gallegos*, 01CR844 (May 4, 2001) (copy on file with author) (alleging that Gallegos was under influence of methamphetamine). As of Jan. 21, 2003, Gallegos had signed a plea agreement in which he pled guilty to one count of criminally negligent homicide and one count of knowing or reckless child abuse resulting in bodily injury, in exchange for the dismissal of a felony controlled substance charge and one felony count of knowing or reckless child abuse resulting in death. See Pet. to Enter Plea of Guilty, *People v. Gallegos*, 01CR844 (Jan. 21, 2003) (copy on file with author). Colorado newspapers often demonstrated ignorance of the controlled substance charge. For example, one editorial that did not report that Gallegos was high on methamphetamine repeatedly asked: "Is there something else to the story that would justify his arrest? . . . [I]s that all there is to the story?" *Rubbing Salt in the Wound?*, *supra* note 243, at 29A.

249. *Id.* Gallegos' methamphetamine use on the morning of the rafting trip resembles the conduct of a drunk driver who chooses to drive to the bar, knowing that he may drive home and that his subsequent ability to perceive risk will become impaired by alcohol. In some jurisdictions, the defendant's conscious disregard of the risk that he will drive drunk satisfies the mens rea requirement for reckless manslaughter. See, e.g., *People v. Watson*, 637 P.2d 279, 285–86 (Cal. 1981). The Colorado rule is even harsher, making vehicular homicide a strict liability offense when the defendant was intoxicated or under the influence of drugs. COLO. REV. STAT. § 18-3-106(1)(b)(I) (2002). For

In short, it is difficult to define the public that influences prosecutorial decision-making and even harder to identify a coherent lay view of sports co-participant fatalities. While the concerns of some service providers and surviving family members lend counterweight to the steady diet of risky stunts that consumers of popular culture digest, prosecutors cannot rely solely, or even primarily, on signals from the voters who put them into office. Such signals are too conflicted, and too likely to be polluted by bias, to imbue charging decisions with the consistency that justice requires.<sup>250</sup>

“Public” wrongs are not necessarily actions that inflame the emotions of the people. Even pure retributivists admit that a direct connection between punishment and popular feelings of rage, fear, and hatred is likely to result in injustice—in discrimination against marginalized groups, such as ethnic minorities, for example.<sup>251</sup> Instead, the notion of public wrongdoing calls upon the state to make judgments that transcend the vengeance-based blood lust of the multitude. For pure retributivists, the punishment that results from such judgments is an end in itself; it gives the offender what he deserves.<sup>252</sup> In my view, the criminal law (and the discretionary use of it) should aspire to a utilitarian function, as well as a retributive one: It must not only identify and punish moral wrongdoing, but also seek to educate people about the difference between acceptable and wrongful behavior.

Such an argument is, admittedly, vulnerable to criticism. The most trenchant objections center on the tenuous authority underpinning moral judgments. For example, Richard Posner argues that it is difficult to identify moral principles that are not contingent on time, geography, or the self-interested agendas of their proponents.<sup>253</sup> I do not seek to present an ambitious, broad-ranging philosophy in this Article; rather, I offer a modest proposal for assessing the wrongfulness of behavior in the recreational context. Nor do I advocate empowering prosecutors to act like philosopher-kings. I seek to constrain, not augment, their ability to wield discretionary power in a capricious manner. Nevertheless, aside from relatively new statutory provisions that criminalize conduct that few would call immoral,<sup>254</sup> the criminal law—from its common law origins—

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further discussion of Gallegos’s decision to take the illegal drug, see *infra* text accompanying notes 326–31.

250. Cf. Ramsey, *supra* note 16 at 1390–91 (contending that prosecutorial decisions influenced by public desire for retribution and deterrence inconsistently enforced anti-violence norms in late nineteenth century).

251. MOORE, *supra* note 10, at 130.

252. See *id.* at 92.

253. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 3–90 (1999).

254. A variety of scholars, not only retributivists, lament the expansion of the criminal law into purely regulatory areas. See, e.g., Robinson, *The Criminal-Civil Distinction*, *supra* note 14, at 214; Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 4–6 (1996) (expressing concern with “the overall expansion of liability—both civil and criminal—to criminalize types of conduct that had been unquestionably legal before the passage of new law” and pointing to example of new environmental crimes).



has made moral judgments. Accord with popular views is relevant to the legitimacy of such judgments, but it should not be the prosecutor's only compass.

The fact that prosecutors sometimes charge sports participants with crimes despite passivity or actual opposition from victims' families and the press indicates that the district attorney's office is not simply a slave to the voters.<sup>255</sup> Yet, as this Article will suggest, prosecutors' decisions in the recreational context often underemphasize the concept of moral blameworthiness, and guidance from the courts does little to insure consistency and fairness. For this reason, establishing parameters for charging decisions constitutes a critical need.

## (2) *The Nature of the Legal Problem*

The prosecution of sports co-participants raises difficult questions of causation, mens rea, and notice. The hardscrabble game of drag racing—which films like *Rebel Without a Cause* associate with slicked hair, cigarettes, and the wrong side of the tracks—has more in common with the stunts of middle-class Americans than many in the latter group care to admit. At least one dissenting opinion explicitly relates illegal drag racing to recreations that society considers mainstream:

It could be said, for example, that professional racetrack drivers earn their living by consciously disregarding a substantial risk that death will occur on the racetrack. Yet, it would probably strike most people as strange if the surviving drivers were prosecuted for manslaughter following a fatal racetrack accident. . . . And some people engage in recreational activities—everything from skydiving to deep-sea diving—knowing they involve a risk of death. . . . My point is that people frequently join together in reckless conduct. As long as all participants do so knowingly and voluntarily, I see no point in holding the survivor(s) guilty of manslaughter if the reckless conduct results in death.<sup>256</sup>

Few co-participant fatalities resulting in criminal charges pose proximate causation issues as thorny as cases like *Commonwealth v. Root*<sup>257</sup> or *State v. Peterson*.<sup>258</sup> In these illegal drag-racing prosecutions, courts held that a surviving racer did not kill a competitor who collided with another vehicle while passing. Rather, the deceased voluntarily took action that culminated in his fiery death.<sup>259</sup> By contrast, if a skier

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255. Cf. Ramsey, *supra* note 16, at 1331–34, 1365–66 (arguing that, historically, prosecutors have not always followed public demands and that their preference for plea bargaining, despite popular distaste for it, exemplifies their partial independence, but suggesting that, despite heavy use of plea bargains for some offenses, prosecutors in nineteenth-century New York took high percentage of alleged murderers to trial to avoid criticism from press).

256. *State v. Peterson*, 522 P.2d 912, 921 (Or. Ct. App. 1974) (Schwab, C.J., dissenting), *aff'd in part & rev'd in part*, *State v. Peterson*, 526 P.2d 1008 (Or. 1974).

257. *Commonwealth v. Root*, 170 A.2d 310 (Pa. 1961).

258. 526 P.2d 1008.

259. *See, e.g., Root*, 170 A.2d at 314. *But see State v. McFadden*, 320 N.W.2d 608, 613 (Iowa 1982) (declining to impose “the more stringent ‘direct causal connection’ standard” used in *Root* and affirming involuntary manslaughter conviction of surviving racer).

rocketing down a slope kills a slower participant below him on the mountain, it is more difficult for the defense to argue that the deceased's reckless conduct intervened. Furthermore, under Anglo-American law, consent rarely provides a defense to charges of grave bodily harm (let alone death) that the accused intentionally or recklessly inflicted. Even in rare prosecutions involving contact sports like rugby, soccer, or ice hockey, courts in England, Ireland, and Canada have found criminal liability on the part of a player acting outside the rules of the game.<sup>260</sup>

Prosecutors who want to charge the surviving, faster skier nevertheless should think long and hard about mens rea issues: What mental state must a sports participant have to be considered morally blameworthy? The use of the criminal law to regulate inherently dangerous recreations gives new urgency to an old debate about the legitimacy of offenses premised on objectively unreasonable conduct. Given the potential for inadvertent injury and even death in crowded American recreational space, failure to revisit this conversation threatens to label as "criminals" many otherwise law-abiding people who simply make mistakes in their enjoyment of leisure time.

In the early years of the Model Penal Code, Jerome Hall criticized the inclusion of negligence as a culpable mental state, arguing that, "even a dog understands the difference between being kicked and being stumbled over."<sup>261</sup> Hall worried about the blurred line between tort and crime and rejected the view that negligent actors display indifference to social norms defining unacceptable danger.<sup>262</sup> More recently, several legal scholars have argued for the replacement of the criminal negligence standard with the concept of "culpable indifference," which looks not to conscious awareness of a specific risk (as the recklessness standard does), or to what a reasonable person would have done, but rather to the defendant's blameworthy choice not to perceive risks.<sup>263</sup> Although the culpable indifference standard would be preferable to the hazy distinctions between criminal and civil negligence that currently hold sway, lawmakers have not rushed to adopt it.

However, while state legislatures have shunned the culpable indifference standard as a matter of black-letter law, it could still operate

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260. See Jack Anderson, *Citius, Altius, Fortius? A Study of Criminal Violence in Sport*, 11 MARQ. SPORTS L. REV. 87, 97-102 (2000) (discussing criminal prosecutions in England and Ireland); Note, *Sports Violence*, *supra* note 172, at 1039-48 (discussing limits of consent defense in Canadian criminal cases arising from sporting events).

261. Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 634 (1963) (paraphrasing Justice Oliver Wendell Holmes, another critic of criminal negligence liability).

262. *Id.* at 634, 636-37.

263. See Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 365, 388 (1994) (defining culpable indifference as "a desire-state reflecting the actor's grossly insufficient concern for the interests of others" and arguing that it provides the most appropriate threshold for criminal liability); see also Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 211 (1996) (proposing model jury instructions for involuntary manslaughter in which culpable indifference constitutes element of offense).

as an effective screen for identifying the threshold conduct necessary for criminal charges. Charging decisions in recent recreational accident cases accord too much weight to the tragic result, to the defendant's skill, or to indicia of his bad character in a generalized sense.<sup>264</sup> None of these approaches is desirable. Instead, district attorneys' offices ought to have internal standards that require a determination that the potential defendant lacked empathy for his fellow sports participants: Did the individual make choices that reveal indifference toward the welfare of others engaged in the activity, even if he did not advert to the risk of a specific harm? Or did a terrible accident simply result from a failure of athletic skill or a mistake that cannot be deemed anti-social? Unless the prosecutor can answer the first question in the affirmative, she should not charge a sports co-participant with a crime. Such criteria do not offer a panacea, for charging decisions can never be reduced to a rigid set of rules.<sup>265</sup> Yet, given the inherent dangers of the relevant recreations, a standard that instructs prosecutors to look for something more than inadvertent injury takes a step in the right direction.

Just as charging decisions often overestimate the defendant's culpability, they also inconsistently acknowledge cultural forces endorsing risk. This inconsistency may pose a notice problem. The popular media glorifies dangerous but legal recreations in which participants often survive without inflicting harm, and in which past prosecutions have been rare. Moreover, the American criminal justice system routinely turns a blind eye to intentional or reckless violence, ranging from aggressive play to fighting in professional contact sports,<sup>266</sup> even though such violence breaches clearly established duties under tort law.<sup>267</sup> Professional sports fights are usually captured on video<sup>268</sup> and are thus susceptible to slow-motion reconstruction unavailable in many amateur contexts, including the vastness of alpine ski bowls, where there may be no witnesses to a collision and the individuals involved may

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264. See *infra* text accompanying notes 286–325.

265. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553, 561 (1999) (explaining that charging decisions inevitably involve gaps because statutes do not define all relevant factors).

266. See *supra* note 172.

267. See *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524 (10th Cir. 1979) (ruling that trial court erred when it held, as matter of policy, that football player was not liable for injury arising from intentional blow to opponent's head and neck); *Nabozny v. Barnhill*, 334 N.E.2d 258, 261 (Ill. Ct. App. 1975) ("It is our opinion that a [soccer] player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with reckless disregard for the safety of the other player so as to cause injury to that player . . ."); see also *Knight v. Jewett*, 834 P.2d 696, 710–11 (Cal. 1992) (citing incidents in which players in various contact sports intentionally punched opponents as examples of conduct that sports co-participants have civil duty to avoid).

268. In the *Hackbart* case, for instance, "[t]here was a film of the actual injury suffered by plaintiff [Denver Broncos' defensive back, Dale Hackbart]," showing "the sequence of events and also depicted the manner of infliction." *Hackbart*, 601 F.2d at 525.

disappear without identifying themselves.<sup>269</sup> However, greater evidentiary assurances have not translated into more frequent prosecutions; instead, intentional or reckless violence in professional sports remains largely exempt from criminal regulation.

Professional ice hockey is notorious for its brutality, for example. The official rules impose match penalties or game misconducts for a variety of violent acts: head-butting; slashing; checking from behind; deliberate injury or attempted injury to an opponent; harm due to spearing, hooking, or butt-ending with a stick; and head injuries resulting from boarding or charging.<sup>270</sup> Fines against individual players accompany many of these penalties,<sup>271</sup> and teams can be charged as much as \$25,000 if their members become involved in a fight outside the game period.<sup>272</sup> Nevertheless, substantial unwritten encouragement of violence persists. National Hockey League team owners actually “believe that fighting is a necessary marketing tool for the sport,”<sup>273</sup> and the NHL has declined to adopt a rule ejecting all brawlers.<sup>274</sup>

Tolerance for hockey violence militates against criminal regulation. Canadian prosecutors provoked controversy when they got tough with Boston Bruins enforcer Marty McSorley for hitting a Vancouver player, Donald Brashear, in the head with his stick.<sup>275</sup> While some commentators characterized McSorley as a “ruffian” whose behavior richly deserved punishment,<sup>276</sup> other journalists and players rallied to his defense,

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269. See, e.g., *Hit and Run Snowboarder*, BROADCAST NEWS (Canada), Feb. 1, 2001, available at 2001 WL 12004038 (reporting that Royal Canadian Mounted Police were looking for snowboarder who disappeared after injuring woman on Blackcomb Mountain).

270. NAT'L HOCKEY LEAGUE, NHL RULEBOOK, Rules 43(a) (Attempt to Injure), 44(b) (Boarding), 46(b) & (c) (Butt-ending), 47(b) (Charging), 48(a) (Checking from Behind), 52(b) (Deliberate Injury to Opponents), 60(c) (Head-butting), 85(c) (Slashing), & 86(c) (Spearing), available at <http://nhl.com> (last visited July 13, 2003).

271. See *id.* Rule 44(d) (imposing automatic \$100 fine for major boarding penalty).

272. See *id.* Rule 56(g) (Fisticuffs).

273. Comment, *Fighting? It's All in a Day's Work on the Ice: Determining the Appropriate Standard of a Hockey Player's Liability to Another Player*, 7 SETON HALL L. SPORT L. 487, 494 (1997) (stating that, according to one study, positive correlation exists between hockey violence and spectator attendance at games).

274. Rather, the rules punish the instigator most severely. See NHL RULEBOOK, Rule 56(g) (Fisticuffs) (providing that instigator of fight outside game period faces automatic ten-game suspension).

275. A British Columbia provincial court convicted McSorley of assault with a weapon, but gave him a conditional discharge, so that he did not serve jail time or become tarnished by a criminal record. See *NHL Extends McSorley Ban to One Full Year*, NAT'L POST, Nov. 8, 2000, at B13, available at 2000 WL 28909867.

276. NHL Commissioner Gary Bettman denounced McSorley's two-handed slash against Brashear's head, which was delivered from behind: “It is difficult to imagine a more irresponsible or dangerous act on the ice than the one that was involved in this case.” Ira Podell, *McSorley Suspension Extended*, A.P. ONLINE, Nov. 8, 2000, available at 2000 WL 29038990. Many journalists applauded both the criminal conviction and the NHL's suspension of the defendant. For instance, an editorial in an Oregon newspaper described McSorley as a “ruffian” and stated: “It's not enough . . . to make McSorley an example. The NHL needs to continue slapping tough sanctions on any player who resorts to violent or criminal behavior on the ice.” Editorial, *McSorley's Punishment Fits Highly Publicized Offense*, PORTLAND PRESS-HERALD, Nov. 13, 2000, at 6A, available at 2000 WL 25584330.

denouncing the court's intrusion into professional hockey.<sup>277</sup> McSorley's lawyer opined:

The role of criminal justice is to protect society . . . . We don't want judges and prosecutors and police watching sports to determine if a high inside fastball is an assault.<sup>278</sup>

Despite rules banning the behavior in which McSorley engaged, his lawyer argued that such violence was at least informally part of his job.<sup>279</sup>

American jurors are likely to agree. One of the only hockey cases that ever went to trial in the United States—the aggravated assault prosecution of Boston Bruins player Dave Forbes for slashing an opponent in the face with his stick—resulted in a hung jury and, later, a dismissal.<sup>280</sup> No professional hockey deaths have occurred, but given the viciousness of the assaults, an eventual fatality would not come as a surprise. Brashear suffered a grand mal seizure,<sup>281</sup> and similarly, in 1998, a minor league player clubbed an opponent so hard in the head with a baseball-style swing of his stick that the opponent went into convulsions on the ice.<sup>282</sup> Yet, since the *Forbes* case in 1975, American prosecutors have almost completely ignored professional sports violence.<sup>283</sup> When it comes to revenue games, the state makes little effort to counterbalance the zest for risk, or even outright brawling, that the media, the fans, and the players exhibit.

Given this cultural context, can we fairly say that a fast skier has notice of potential criminality? Unlike the hockey player, who escapes criminal charges, the skier does not intend to hit anybody. And unlike

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277. Andrew Herrmann, Editorial, *Violence Not Everything—It's Only Thing*, CHI. SUN-TIMES, Oct. 11, 2000, at 57, available at 2000 WL 6698997 (“McSorley was wrong in the real world way of life, but how could a judge use real world punishments after the testimony of one witness from Fantasyland: A former coach said that NHL players use their sticks to hit each other 200 times per game.”); Jennifer Floyd, *Line Blurs Between Tough Play*, MILWAUKEE J.-SENTINEL, Oct. 22, 2000, at 11C, available at 2000 WL 1267 (“There has been a lot of hand-wringing in hockey circles about court involvement. Players have denounced the court's involvement as a bad thing.”); Dave Lueking, *Following McSorley's Guilty Verdict, Many Players Are Concerned that More Cases Will End Up in Court*, ST. LOUIS POST-DISPATCH, Oct. 8, 2000, at D8, available at 2000 WL 3552672 (“[H]ockey people lined up—including legends Wayne Gretzky and Gordie Howe—to testify on McSorley's behalf. The feeling was that the courts should have no jurisdiction over what happens on the ice, that the NHL does a good enough job of policing violent offenders . . . .”); *Let's Make One Thing Clear: Rule Governing NHL Violence*, NAT'L POST, Oct. 9, 2000, at B12, available at 2000 WL 27960170 (“Since Marty McSorley was found guilty last week for his stick attack against Vancouver Canuck Donald Brashear, the hockey community has circled the wagons and reiterated that the NHL should be able to look after itself without the courts.”)

278. Smith, *supra* note 172, at S2 (quoting Paul Kelly).

279. *Id.*; see also Kostya Kennedy, *Up Against It*, SPORTS ILLUSTRATED, Nov. 20, 2000, at 58, available at 2000 WL 24234841 (reporting that, prior to infamous game against Vancouver, Boston Bruins coach Pat Burns allegedly told his players, “[s]ome of you guys might have to fight.”).

280. See Katz, *supra* note 172, at 845–46.

281. See Kennedy, *supra* note 279, at 58.

282. See Katz, *supra* note 172, at 841.

283. The prosecutions of two hockey players in the late 1990s constitute notable exceptions. See *id.* at 833, 842–48 (discussing criminal charges against Plymouth Whalers player Jesse Boulerice and Phoenix Mustang defenseman Jason McIntyre in 1998).

the drag racer, the skier's conduct immediately prior to the fatal collision may not violate any law.<sup>284</sup> Constitutional notice arguments typically center on *malum prohibitum* offenses,<sup>285</sup> not violent crimes. Yet, because prosecutors currently respond in a conflicted way to sports violence, they further confuse moral norms and make it difficult for people engaged in recreations that involve inherent danger to know what behavior constitutes a criminal offense.

The concept of empathy may provide a path out of this confusion. If a co-participant stays within the bounds of the sport, including its intrinsic risks, it is hard to argue that he lacks sufficient concern for others. He need not be more solicitous of fellow participants than game rules or industry standards prescribe. Permissible tackles in football, body checks in hockey, and conduct in amateur recreations that is considered, within the industry, to constitute an acceptable danger that participants expect to encounter thus should fall outside the proper scope of a criminal charge, even if death results. However, if a participant violates established guidelines for safety, he displays a lack of empathy that subordinates his victim's life to his desire for thrills. In this view, hockey fights and other flagrant fouls that cause death warrant criminal charges, while some collisions between skiers do not.

### **(3) Prosecutorial Discretion and Moral Blameworthiness**

The next section of this Article criticizes recent prosecutorial charging decisions and argues that an approach focused on the defendant's lack of empathy would operate as an effective screening device.

#### **(a) Lack of Empathy versus Lack of Skill**

The Colorado Supreme Court's decision in *People v. Hall*<sup>286</sup> offers a detailed discussion of culpable mental states in the context of recreational homicide. Here, the court reversed the dismissal of a reckless manslaughter charge against Hall—a Vail lift operator and former high-school ski racer who killed another skier when the two collided on an intermediate slope.<sup>287</sup> It held that the prosecutor possessed probable cause to bring the defendant to trial<sup>288</sup> and thus took the precedent-setting step of allowing the state to prosecute an amateur extreme sports enthusiast for manslaughter. The Colorado Supreme Court was constrained by the procedural posture of the case; it could

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284. *But cf. infra* text accompanying notes 308–09 (discussing convicted skier Nathan Hall's alleged violation of civil duties under the comparatively plaintiff-friendly Colorado Ski Safety Act).

285. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding that statute that criminalized a wide range of innocent behavior, such as begging, violated Due Process); *Lambert v. California*, 355 U.S. 225 (1957) (invalidating Los Angeles ordinance that made it crime for any person convicted of felony in California or another state not to register as convicted felon if she remained in city for five days out of thirty).

286. 999 P.2d 207 (Colo. 2000).

287. *See id.* at 224 (remanding case for trial on reckless manslaughter charge).

288. *See id.* (same).

only act as a gatekeeper, deciding whether to allow the matter to proceed to trial. However, its decision was not ideal, for while it contained grains of insight, it failed to offer adequate guidance to prosecutors at the charging stage. As a result, Colorado prosecutors now enjoy great latitude to charge recreational accidents as manslaughter or negligent homicide, and in the wake of the conviction in *Hall*, defendants have incentive to plead guilty. Thus, even if one could be confident that juries will reach sound assessments of sports deaths, many of these cases never go to trial.

According to the Colorado Supreme Court in *Hall*, the lower court erred when it stated that, to be substantial, a risk must pose more than a 50% chance of causing the injurious result. The fact that only two skiers had been killed at Vail in the preceding decade did not preclude a finding that Hall's fast skiing posed a substantial risk of death to others.<sup>289</sup> The more serious the potential harm, the less likely its occurrence must be.<sup>290</sup> The more substantial the risk, the less justification the defendant has in creating it.<sup>291</sup>

Perhaps more importantly, the court also attempted to show how recklessness is to be inferred. First, it distinguished criminal negligence, which merely involves a determination that a reasonable person would have appreciated the risk, from recklessness, in which the defendant must have had actual awareness of it.<sup>292</sup> The court then stated that a jury could infer subjective consciousness of risk either from the defendant's "particular knowledge or expertise" or "from what a reasonable person would have understood under the circumstances."<sup>293</sup> Hall insisted that he did not know fast skiing could kill.<sup>294</sup> Yet, according to the Colorado Supreme Court, a jury might infer that, because he "was one of the top two or three skiers on [his high school] . . . team" and had been taught "to ski safely and under control," he appreciated that skiing straight down a mogul pitch at top speed posed fatal risks to skiers below him.<sup>295</sup>

The opinion places a great deal of weight on Hall's expertise and training—the type of inquiry that early critics of the Model Penal Code warned was mere "guesswork."<sup>296</sup> But nowhere in its analysis does the

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289. See *id.* at 212 (noting testimony regarding two previous fatal collisions), 217 (holding that "[a] risk may be substantial even if the chance the harm will occur is *well below* fifty percent") (emphasis added).

290. See *id.* at 218 (quoting *State v. Standiford*, 769 P.2d 254, 263 n.9 (Utah 1988), for proposition that "only *some likelihood* that death will occur *might create* for most people a 'substantial and unjustifiable' risk") (emphasis added).

291. See *id.* ("Whether a risk is justifiable is determined by weighing the nature and purpose of the actor's conduct against the risk created by that conduct.").

292. See *id.* at 219–20 (distinguishing recklessness from criminal negligence).

293. *Id.* at 220.

294. See Frazier, *Vail Skier*, *supra* note 53, at 7A (quoting Hall for statement that "[i]f I was aware of those risks, there's no way I would have been skiing that fast").

295. *Id.* at 212–13 (quoting Hall's high school ski team coach).

296. See, e.g., Hall, *supra* note 261 (rejecting reliance on education or vocation as basis for determining whether defendants lack sensitivity to social values).

Colorado Supreme Court satisfactorily raise the question of whether Hall lacked empathy for other skiers on the mountain. In many athletic endeavors, an individual loses control, not because he is indifferent to others' safety, but because sometimes only a fraction of a second or a twitch of a muscle separates expertly controlled speed from the inability to stop. The *Hall* court accorded much weight to the testimony of a judge who happened to be skiing on the same run as the defendant when the fatal accident occurred.<sup>297</sup> The judge testified that Hall was "sitting back' on his skis, tips in the air, with his arms out to his sides in an effort to maintain his balance." In his view, "'the terrain was controlling Hall,' rather than the other way around."<sup>298</sup> However, this witness did not observe Hall's entire run; he only watched him for "approximately two or three seconds."<sup>299</sup> Perhaps he did not see the defendant inadvertently "catch an edge" in the wet spring snow—a common mishap for skiers—in a manner that spun him out of control.<sup>300</sup>

The Colorado Supreme Court was simply incorrect when it equated going straight down the fall line with skiing too fast for the conditions.<sup>301</sup> Experts like Hall routinely choose a straight path through moguls; they do not traverse the mountain. Indeed, skiing the proverbial "zipper line" is a skill to which many enthusiasts aspire. If Hall's decision not to traverse the mountain was reasonable for an expert skier, criminal blameworthiness must have attached at the moment when he lost control. But this cannot be right. If Hall only realized that he was going too fast when he lost the ability to stop, the *actus reus* and *mens rea* for the crime coincided for only a few seconds, if at all. Moreover, at this point, Hall may have wanted to stop (to avert harm) without being able to do so. Losing control in this sense was a failure of skill, not a moral failing. Perhaps it only looked like a moral failing in hindsight after the lethal, but unlikely, result occurred. Thus, even if we discredit Hall's claim to ignorance of ski fatalities, his uncontrolled descent may not have stemmed from a conscious decision to ski wildly. The Colorado Supreme Court's decision to remand the case for trial depended on the time frame

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297. See *Hall*, 999 P.2d at 212. The Colorado Supreme Court appeared to view Judge Buck Allen, who described himself as an expert skier, as the quintessential reasonable person. Few defendants are so unlucky as to have the reasonable person present at the time of a fatal injury.

298. *Id.* (quoting Judge Allen).

299. *Id.* Hall's attorney argued in his Colorado Supreme Court brief, "There is no evidence in the record, even in the light most favorable to the prosecution, that (Hall) did anything other than fall after two or three seconds of skiing too fast or out of control." Howard Pankratz, *State High Court to Decide if Reckless Skiing a Crime*, DENVER POST, Feb. 28, 2000, at B4, available at 2000 WL 4454214 (quoting from brief).

300. According to the theory of the case that the defense presented at trial, the change from firm snow to "wet and slushy snow" near the bottom of the ski run caused Hall to get his weight "too far back" and thus to lose control shortly before colliding with the victim. See Jury Instruction No. 17, *People v. Hall*, 97CR167 (Dist. Ct., Eagle County, Colo., Nov. 16, 2000) (copy on file with author) (summarizing defendant's theory for jury).

301. See *Hall*, 999 P.2d. at 222.



that it used—a time frame that the court may have chosen, at least subconsciously, to achieve the outcome that it desired.<sup>302</sup>

An accident involving an unskilled defendant demonstrates a second problem with inferring recklessness from expertise. Under the *Hall* test, an ignorant defendant is much less likely to be deemed reckless than an expert. However, if the defendant's ignorance arose from a deliberate choice not to seek proper training, she is arguably more blameworthy than Hall. Two recent jet-skiing fatalities occurred when teenagers rammed their personal watercraft into children riding on inner tubes.<sup>303</sup> In both cases, the inner tubers were killed. And in both cases, the jet skiers lacked mandatory training for persons under sixteen.<sup>304</sup> A nine-year-old Colorado girl died of head injuries after a youngster traveling against the designated flow of traffic around the Chatfield Reservoir hit her with a jet ski.<sup>305</sup> In a comparable incident, a seventeen-year-old perished in a Nebraska lake when a boy on a personal watercraft overtook the boat that towed her inner tube.<sup>306</sup>

Because neither of these defendants had reached maturity, it makes sense to argue (as the Nebraska victim's father did) that the truly blameworthy actors were the adults who allowed the juvenile defendants to use watercraft without proper training.<sup>307</sup> Suppose, however, that all jet skiers—adults and children—were required to take a safety course. In this hypothetical, an adult who decides not to take the course

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302. Mark Kelman has argued that courts conducting actus reus analyses often make "arational" choices about the relevant time frame to satisfy their desire to either incriminate or exculpate the defendant. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–94, 603–05 (1981).

303. See Crecente, *supra* note 165, at 4A (reporting arrest of juvenile on criminally negligent homicide charge arising from death of child on Chatfield Reservoir in Colorado); Franscell, *Jet Ski Death Brings Neb. Charges*, *supra* note 139, at B3 (reporting on filing of criminal charges against Colorado boy in fatal accident on Nebraska lake); Ann Schrader, *Girl in Boating Accident Dies: More Details Emerge*, DENVER POST, June 27, 2002, at B2, available at 2002 WL 6570450 [hereinafter Schrader, *Girl in Boating Accident Dies*] (describing Chatfield Reservoir incident); Ann Schrader, *Teen Arrested in Hit-Run: Lakewood Girl, 14, Is Questioned in Reservoir Accident*, DENVER POST, June 26, 2002, at B1, available at 2002 WL 6570351 [hereinafter Schrader, *Teen Arrested*] (same).

304. See Franscell, *Jet Ski Death Brings Neb. Charges*, DENVER POST, *supra* note 139, at B3 (reporting that defendant was also charged with failing to get required safety training for underage jet skier); Schrader, *Girl in Boating Accident Dies*, *supra* note 303, at B2 (quoting spokesperson for Jefferson County Sheriff's Office, who stated: "There is no documentation that [the juvenile arrested for the Chatfield Reservoir death] went through the certification training.")

305. See *id.* The fourteen-year-old driver of the jet ski pled guilty to criminally negligent homicide and was sentenced to two years' detention in a juvenile facility and \$5,500 in victim restitution. Her passenger pled guilty to being an accessory to the homicide. The court sentenced the passenger to two years' probation, one hundred hours of community service, and \$7,100 in restitution. Other defendants included an eighteen-year old who took the children to the reservoir and several adults who tried to stage a cover-up. See Able, *supra* note 139, at 11A.

306. See McCord, *supra* note 235, at 1A.

307. See Franscell, *Neb. Parents Irked*, DENVER POST, *supra* note 235, at B2 (quoting victim's father as saying: "I'm not mad at the kid driving the Jet Ski as much as the guy who gave it to him to drive."). Nevertheless, the parents expressed their desire for prosecutors to press criminal charges against the juvenile skier. See *id.* (quoting victim's mother as saying: "It would be a shame if there were no charges against (the boy) at all.").

demonstrates indifference to the danger to others that his lack of skill creates. The proper test of culpability at the charging stage looks not to his expertise or lack thereof, but to the reprehensible attitude he displays when he chooses not to get certification.

Because courts often make cognitive issues like skill determinative of the divide between recklessness and negligence, Hall faced a reckless manslaughter charge, while prosecutors only accused the jet skiers of negligent homicide. The charging decision in the *Hall* case, and the court's approval of it, overestimated the defendant's culpability. Except in extraordinary circumstances, prosecutors should not charge risky sports participants with any crime greater than negligent homicide, for fear of bootstrapping on the unavoidable dangers of a voluntary leisure activity. Critics will respond that this argument inappropriately smuggles assumption of risk principles into criminal law through the back door. However, the world of dangerous sports involves certain shared risks that both victims and defendants at least implicitly acknowledge and embrace; it is a different world from the workplace or the public streets, and those who enter it ought to have correspondingly fewer moral obligations and entitlements. If the criminal law uses the defendant's awareness of inherent risks to impose recklessness charges, it may chill participation by anyone who appreciates such risks and worries that an accident will lead to criminal prosecution. The goal should not be to eliminate the sport, but to separate tragic mishaps from the type of anti-social behavior that represents the proper object of criminal prosecution.

Should Hall have been charged with any crime at all? Letting him escape criminal charges completely would have been too lenient, for this approach ignores a persuasive aspect of the Colorado Supreme Court's analysis. Recall that, in Colorado, a skier has an explicit civil duty to keep a lookout, so as to avoid individuals below him on the slope.<sup>308</sup> This provision of the Colorado Ski Safety Act tracks the Skier's Responsibility Code, which virtually all resorts post, even when it lacks the force of state law and is punishable only by the revocation of a day's skiing privileges.<sup>309</sup> In short, Hall violated one of the established rules of the game. Because he did so, his criminal liability was properly placed before a jury.

The prosecutor overcharged him by alleging recklessness, however—a fact that a jury of snowboarders and skiers recognized when they convicted him of the lesser offense of negligent homicide.<sup>310</sup>

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308. See *People v. Hall*, 999 P.2d 207, 223 (Colo. 2000) (discussing civil duty imposed by COLO. REV. STAT. § 33-44-109(2) (2002)). While resorts are immunized from liability for skier-on-skier collisions, in Colorado, such collisions do not constitute an inherent risk in a suit between skiers. See *supra* text accompanying note 107.

309. See *supra* text accompanying note 55; see also Frazier, *Vail Skier*, *supra* note 53, at 7A (reporting that Skier Responsibility Code was printed on Hall's Vail employee pass).

310. See *Court Upholds Sentence for Skier*, *supra* note 136; see also Editorial, *Skier Penalty Warranted*, *supra* note 69, at B10 (reporting that Hall jury was composed entirely of skiers and snowboarders).

Although overcharging did not produce an undesirable result in the *Hall* case, it might have: District attorneys often use inflated charges to pressure plea bargains, thus risking an outcome in which a guilty plea still overstates the defendant's culpability.<sup>311</sup>

(b) Lack of Empathy versus General Bad Character

This Article urges prosecutors to consider a slightly expanded time frame to assess whether the defendant's choices revealed indifference to the safety of others on the lake, mountain, or riding trail. However, it does not endorse attempts to establish bad character in a general sense. Rather, multiplying charges for illegal conduct too attenuated to show causation or mens rea is a disturbing prosecutorial practice evident in recent recreational accident cases. Admittedly, these additional offenses form the *res gestae* of the killing, but unless they contributed to the lethal result, they should not be used to infer the culpable indifference that this Article proposes as a threshold requirement for a criminal homicide charge.

While some individuals who inadvertently commit homicide are law-abiding citizens, others have criminal records; break laws besides the proscription against killing; or engage in conduct that a jury might consider undesirable. Recreational accident defendants may not be angels, nor should they have to be to escape liability for manslaughter or negligent homicide. A jury found Nathan Hall, who was under twenty-one when he fatally collided with a fellow skier, guilty of possessing or consuming beer and possessing less than an ounce of marijuana in a film container.<sup>312</sup> Yet, after the accident, Hall submitted to a blood test, which indicated that he was not legally intoxicated or under the influence of any drug.<sup>313</sup> Lacking scientific evidence of drug or alcohol impairment, the state could not show that his illegal possession of these substances bore a causal relation to Alan Cobb's death.

Why then did the prosecutor charge him with these minor offenses, in addition to reckless manslaughter? A likely answer is that the drug

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311. For an example, in the *Hidle* case, of how reckless manslaughter charges carrying the potential for lengthy incarceration can prompt a plea to a lesser offense, see *People v. Hidle*, 89F38 (County Ct., Grand County, Colo.) (copy on file with author). Although *Hidle* was probably guilty of some crime, a defendant lacking a criminal mental state might plead guilty to negligent homicide in the face of a more severe charge. *Id.*

312. See *People v. Hall*, 59 P.3d 298, 299 (Colo. Ct. App. 2002) (affirming conviction); see also *Frazier, British Skier Freed*, *supra* note 117, at 24A (comparing Hall's case to another ski death for which prosecutors declined to press charges). Blood tests showed that Robert Wills, a British skier implicated in a ski fatality in March 2003, had not consumed alcohol or drugs. *Id.* A sheriff in Summit County, Colorado, considered this recent case "apples and oranges" to Hall's because the evidence suggested neither illegal substance use nor excessive speed. *See id.*

313. *Hall*, 999 P.2d at 211 (Colo. 2000) ("Hall's blood alcohol level was .009, which is less than the limit for driving while ability impaired. A test of Hall's blood for illegal drugs was negative."). Evidence at trial indicated that the victim, Alan Cobb, also consumed a small amount of alcohol on the day he was killed. See Rep.'s Partial Tr. of Proceedings, *People v. Hall*, 97CR167 (Dist. Ct., Eagle County, Colo., Nov. 13, 2000). His fiancée, Christi Neville, testified that she and Cobb each drank a cup of beer with their lunch, despite the fact that Cobb was a beginning skier. *Id.*

and alcohol charges were designed to create, in the eyes of the jury, an image of Hall as a marijuana-smoking kid who partied too hard and skied too fast. In addition, multiplying charges against defendants with strong chances for acquittal at trial frequently constitutes a ploy to pressure them to bargain.<sup>314</sup> Had Hall shown interest in pleading guilty, the controlled substance and alcohol charges would have given prosecutors greater leverage over him. The chief problem does not lie in the decision to bring multiple charges, although the ABA counsels against accusing a defendant of crimes “greater in number or degree . . . than are necessary to fairly reflect the gravity of the offense.”<sup>315</sup> Rather, there is a danger that prosecutors will focus inappropriately on conduct lacking a causal connection to the homicide as evidence that the defendant made a blameworthy choice.

A comparable strategy may affect the outcome of a jet-skiing case discussed earlier in this Article.<sup>316</sup> Prosecutors charged a fourteen-year old girl with failing to report her collision with an inner tuber, in addition to criminally negligent homicide and underage operation of a personal watercraft.<sup>317</sup> The young defendant behaved badly in the aftermath of the fatal accident—leaving the scene without attempting to help the nine-year-old victim, who later died of massive head injuries; giving manipulative answers to investigators; and plotting with her teenaged friends to conceal information.<sup>318</sup> To multiply the chargeable offenses, the adults responsible for the party of rambunctious water-sports enthusiasts allegedly falsified records to protect the assets of the jet ski’s true owner.<sup>319</sup> As one editorial put it, “[t]he accident might have been chalked up to carelessness[,] . . . [b]ut what followed could not, by any

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314. See Vorenberg, *supra* note 143, at 1535 (stating that prosecutors sometimes multiply charges against defendants with greatest chances for acquittal to pressure them into plea bargain).

315. See ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9(f).

316. See *supra* text accompanying notes 303–05 (discussing fatal collision on Chatfield Reservoir in Colorado).

317. See Lindsay, *supra* note 139, at 4A.

318. See *id.*; Kieran Nicholson, *Charges in Jet Ski Death: 6 Accused of Covering Up Accident that Killed Girl at Chatfield*, DENVER POST, Aug. 14, 2002, at A1, available at 2002 WL 6573568.

319. See Charging Document, filed Aug. 14, 2002, *People v. Aryan*, 02CR2025 (County Court, Jefferson County, Colo., Aug. 14, 2002) (charging the defendant with multiple counts of forgery, solicitation, conspiracy, attempt to influence public servant, and other crimes) (copy on file with author); Petition to Enter Plea of Guilty, filed Mar. 17, 2003, *People v. Aryan*, 02CR2025 (District Court, Jefferson County, Colo.) (recording Aryan’s petition to plead guilty to attempt to influence public servant) (copy on file with author); Charging Document, filed Aug. 14, 2002, *People v. Benoit*, 02CR2026 (County Court, Jefferson County, Colo., Aug. 14, 2002) (charging Benoit with similar offenses as Aryan) (copy on file with author); Petition to Enter Plea of Guilty, filed Mar. 17, 2003, *People v. Benoit* (District Court, Jefferson County, Colo.) (recording Benoit’s petition to plead guilty to being accessory to crime) (copy on file with author); Charging Document, filed Aug. 14, 2002, *People v. Hurtado*, 02CR2027 (County Court, Jefferson County, Colo., Aug. 14, 2002) (charging Hurtado with similar offenses as Aryan and Benoit) (copy on file with author); Petition to Enter Plea of Guilty, filed May 5, 2003, *People v. Hurtado*, 02CR2027 (District Court, Jefferson County, Colo.) (copy on file with author); see also Lindsay, *supra* note 139 (discussing alleged cover-up); Nicholson, *supra* note 318, (same).

definition, be called accidental.”<sup>320</sup> Perhaps the district attorney should not be faulted for pressing charges for these subsequent reprehensible acts. Yet, because they occurred after the fatal collision, they provide little evidence as to its cause and immense power to distort jury perceptions of the homicide.

Prosecutors also try to secure convictions with evidence of bad behavior that does not violate any law. In *Edwards v. State*,<sup>321</sup> for instance, the Mississippi Court of Appeals criticized the state for arguing that a negligent manslaughter verdict in the drowning death of a toddler during a camping trip was based on “entrusting the child’s care to members of the group who had been drinking beer, and simply being around a group of people who were consuming [it].”<sup>322</sup> Prosecutors did not present a clear narrative of how the four-year-old child died in the river near his parents’ camp, nor did they offer evidence that the person who carried the toddler into the water was drunk or, indeed, that anyone in the group had ingested a quantity of alcohol sufficient to impair his ability to function.<sup>323</sup> According to the appellate court: “The obvious problem with these [negligence] theories . . . is that none of them even arguably proximately contributed to the death of Michael Edwards. Thus, though they may give rise to legitimate cause to castigate these parents, they cannot form the basis to sustain a conviction of culpable negligence manslaughter.”<sup>324</sup> Rather, injecting evidence that the group drank alcohol and was “so boisterous in its conduct that a nearby fishing enthusiast became disgusted” only “served the purpose of prejudicing these defendants in the eyes of the jury.”<sup>325</sup>

Painting an unattractive picture of the accused by charging him with other crimes or introducing evidence of some action that a jury might view as immoral ranges far beyond the expanded time frame that this Article suggests for determining blameworthiness for the homicide. A choice that shows indifference to the safety of others must bear a causal relation to the subsequent death. By contrast to *Hall* and *Edwards*, prosecutors in *People v. Gallegos*<sup>326</sup> had convincing evidence that the defendant’s drug use contributed to the drowning death of his child. The indictment alleged that Gallegos smoked methamphetamine on the day of the rafting accident and that shortly thereafter he purchased a small rubber boat packaged in a box that warned against using the boat in moving water.<sup>327</sup> Gallegos placed his children in this rubber raft without life jackets on an extremely wild and cold stretch of river, even though

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320. *Jet-ski Tragedy Deepens*, DENVER POST, Aug. 15, 2002, at B8, available at 2002 WL 6573598..

321. *Edwards v. State*, 755 So.2d 443 (Miss. App. 1999).

322. *Id.* at 446.

323. *See id.* at 448–49.

324. *Id.* at 446.

325. *Id.* at 448.

326. Indictment, *People v. Gallegos*, 01CR844 (Dist. Ct., Jefferson County, Colo., May 4, 2001) (copy on file with author).

327. *See id.*

they could not swim.<sup>328</sup> He subsequently lost control of the raft; broke his leg while clumsily attempting to rescue the boys; and still tested positive for high doses of methamphetamine that night.<sup>329</sup> Like an individual who decides to drink heavily before driving a car,<sup>330</sup> Gallegos chose to use illegal drugs known to impair the senses on a day that he planned to go rafting with his young son and stepson. His blood contained high levels of methamphetamine hours after the fatal accident, showing that he was under the influence of drugs when he put the raft into the water and indicating that he might have used better judgment had his faculties not been impaired. Prosecutors probably brought the controlled substance charge as a bargaining chip.<sup>331</sup> However, unlike the drug and alcohol possession in *Hall* or the evidence of beer consumption in *Edwards*, Gallegos' methamphetamine use presented strong evidence of a lack of empathy that bore a causal relation to his son's death.

#### D. A New Approach to Charging Decisions

The law can neither ignore changes in cultural norms, lest it become trapped "like a fly in amber,"<sup>332</sup> nor bow to every trend that gathers momentum. The key to responding effectively to deaths that occur in any particular recreational activity lies in acknowledging the larger context of risk-taking in sports and the cultural endorsement of extreme behavior. To date, scholarly commentators have confined their analyses to specific athletic endeavors—criticizing the decision to prosecute a snow skier,<sup>333</sup> hockey players who get into brutal stick fights,<sup>334</sup> or contact sports participants in general.<sup>335</sup> But it is a mistake to assume that a game like professional ice hockey remains a hermetic subculture and thus that it should be completely immune from criminal regulation. Fans of professional athletes play in amateur leagues. X Games enthusiasts don snow skis and buy lift tickets, or ride personal watercraft on lakes crowded with vacationers. There is little reason to think that they will always check behaviors observed in professional matches at the door of the community ice rink or keep extreme sports attitudes in a separate

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328. *See id.*

329. *See id.*

330. *See supra* note 249 (discussing effect of intoxication evidence on mens rea determinations in California and Colorado).

331. Gallegos ultimately signed an agreement in which this charge was dismissed in exchange for a guilty plea to child abuse and negligent homicide. *See* Pet. to Enter Plea of Guilty, *People v. Gallegos*, 01CR844 (copy on file with author).

332. Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 9, at 201 (summarizing criticisms of criminal law scholars' traditional focus on blameworthiness).

333. *See generally* Gregory G. Jackson, Comment, *Punishments for Reckless Skiing—Is the Law Too Extreme?*, 106 DICK. L. REV. 619, 642 (2002) (analyzing *Hall* case and concluding that skiing should be regulated, not by criminal law, but by mandatory helmet requirements and licensing).

334. *See generally* Katz, *supra* note 172, at 849 (discussing *Boulerice* assault case arising from hockey-sticking incident); Comment, *Fighting? It's All in a Day's Work on the Ice*, *supra* note 273 (commenting on criminal and civil liability for injuries sustained in hockey fights).

335. *See generally* Clarke, *supra* note 172, at 1150–52 (arguing against criminal liability for contact sports injuries).

compartment from their approach to sharing busy recreational space. Thus, aggression in one sport bleeds into another through a process of cultural transmission that eludes analyses focused tightly on the norms of a particular game. For the same reason, prosecutors' differential treatment of professional and amateur activities causes more confusion than it avoids.

What is needed is a consistent approach to charging that sets meaningful limits to the criminal law's regulation of athletic risk—respecting the standards of the sport to preserve its essence, but also using such standards to deter participants and service providers from engaging in fatally self-regarding and abusive behavior. This Article has suggested that a violation of industry safety standards or game rules that has an actual and causal relation to the lethal result constitutes sufficient evidence for prosecutors to charge a defendant for a recreational homicide. I have confined my analysis primarily to discussion of fatalities, but the test I propose also might be extended to cases in which the victim suffered severe injury, not death. While a violation of industry safety rules does not conclusively show guilt, it *does* allow an inference that, whether the defendant subjectively perceived the risk of death or not, he made a choice revealing indifference to others' safety. This anti-social choice triggers the intrusion of the public criminal law.

The proposed analysis presents some similarities to the standard adopted in tort cases like *Hackbart v. Cincinnati Bengals*, in which the Tenth Circuit looked to the “general customs of football” to determine whether they allowed a player to strike an opponent recklessly or intentionally.<sup>336</sup> However, congruence between civil and criminal liability is not required. Rather, this Article has suggested that prosecutors have a special duty, which tort lawyers do not have, to identify moral blameworthiness. Instead of asking if a cost-benefit analysis justifies the charge, the state should query whether the defendant's act was bad in a moral sense and whether punishing him will educate society about the bounds of permissible behavior. The two regimes may arrive at the same outcome, but for different reasons.

Two possible objections to the proposed charging threshold are salient. First, recreational industries and sports organizations determine their rules or standards without regard to criminal culpability. As a result, they are often very vague, or in the context of competitive games, they may specify violations that have nothing to do with danger. The civil duties of skiers include a few precise safety requirements like the use of retention straps or brakes for stopping runaway equipment and the rule that one cannot ski in a “closed” area or cross a rope tow track, except in designated places.<sup>337</sup> In contrast, a skier's “duty to maintain control of his

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336. *Hackbart v. Cincinnati Bengals*, 601 F.3d 516, 521 (10th Cir. 1979) (concluding that intentional striking was proscribed).

337. See, e.g., COLO. REV. STAT. §§ 33-44-109(3), (6), & (7) (2002).

speed and course at all times”<sup>338</sup> arguably relates to matters of athletic skill, not anti-social behavior indicative of criminal culpability. While this concern has merit, it misses a couple of crucial points about the proposed guideline—that it imposes a *charging threshold*, not a guilt determination, and that it may induce sports industries to establish duties which more clearly involve choices, as opposed to raw ability. With regard to official rules that do not stem from safety considerations (prohibitions against offside passes or icing in hockey, for example),<sup>339</sup> violations are unlikely to bear a causal relation to a fatal incident and, hence, do not satisfy the prerequisites to a criminal charge.

The second possible objection is that industry standards may embrace more violence and risk than ordinary citizens can stomach. In this scenario, prosecutors acting under the proposed guidelines should eschew charging a co-participant or service provider for a fatality, unless some illegal act—drug use, for example—bears a causal relationship to the homicide. The only alternative would be to ban the sport. An outright prohibition makes sense for marginal activities like BASE-jumping or games like drag racing in the streets, which pose lethal risks to non-participants. But criminalizing conduct that does not violate industry rules or safety standards is undesirable for established sports, such as boxing and hockey, or popular risky recreations like river rafting.

By urging district attorneys to acknowledge sports deaths as a phenomenon that demands greater charging consistency, this Article does not postulate a finite level of acceptable risk for all events. Rather, the criminal law must strike a balance between punishing anti-social behavior and adapting to industry norms that promote danger. The proposed guideline may raise the hackles of sports organizations, service providers, or private citizens who resent governmental intrusion into even the most tragic and avoidable cases. But it has the virtue of allowing thrill-seeking, inside limits largely determined by the industries themselves, without abandoning the criminal law’s educative and retributive aspirations. In other words, while the industry standard approach may spark criticism, it is still the best proxy available for understanding the shared environment of risk that all sports participants encounter and for giving prosecutors guidance at the charging stage.

### Conclusion

From advertising footage and televised competitions that show extreme athletes suffering bone-cracking falls to Mary Jane ski area’s trademarked slogan, “No Pain, No Jane,”<sup>340</sup> popular culture revels in inherently dangerous recreation. Industry-driven tort reforms that preclude civil negligence liability on the part of co-participants and limit

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338. *Id.* at § 33-44-109(2).

339. See NHL RULEBOOK, *supra* note 270, Rules 65 (Icing the Puck) & 74 (Off-Sides).

340. <http://www.skiwinterpark.com> (“No Pain, No Jane.” That’s our motto.”) (last visited Feb. 22, 2003).



such claims against service providers in the majority of American states buttress the media's celebration of risk.<sup>4</sup> And yet people still get killed on snowy mountains, in reservoirs, and on dusty horseback rides. When they do, criminal prosecutors increasingly step forward to assign blame.

Charging a defendant with a criminal homicide arising from a recreational accident is not necessarily inappropriate, even where tort reform bars civil damages. The criminal law serves a different function than does tort; its uniqueness lies in its power to condemn. Yet, that power should be consistently reserved for behavior that is bad in a moral sense, and not merely careless. This Article has argued that, before charging a defendant with an offense arising from a sports fatality, the prosecutor should examine whether the defendant made choices, including choices not to perceive risk, that reveal morally blameworthy indifference to the safety of others. Predicating criminal charges on a lack of empathy necessitates a reevaluation of prosecutorial approaches to sports cases. The relationship between criminal law and popular culture should resemble a two-way ratchet: District attorneys must be sensitive the rules of the game, but they can infer criminally culpable indifference from violations of those rules.

The prosecutor's public role remains an empty platitude unless she defines it with the decisions she makes. Adopting an approach that ties criminality to an anti-social attitude—a culpable subordination of other people to the defendant's quest for excitement or victory—preserves the rationale behind the criminal law's usual rejection of assumption of risk doctrines without creating boundless liability where such doctrines have some relevance. Just as there can be too little prosecution if district attorneys bow to a sports organization's desire for exclusive control, or to the destructive individualism of participants, there can be too much prosecution if the criminal law blindly rushes to fill a vacuum left by tort reform. Prosecuting sports defendants for behavior that does not involve a blameworthy attitude undermines the criminal law's role in articulating moral norms and punishing those who violate them.

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