Changing the Play: Football and the Criminal Law After the Trial of Jason Stinson

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I. Introduction

On a sweltering August day in Louisville, Kentucky, Pleasure Ridge Park High School's football coach was upset with his Panthers, and they were paying for it.[1] The team had been practicing outside for an hour, and Coach Jason Stinson did not like their effort. [2] At 5:30 p.m., in 94-degree heat, [3] he set the boys to running "gassers"—consecutive sideline-to-sideline sprints across the football field, about 200

[1] *See* Jason Riley, *Stinson Trial: Players Describe Difficult Practice*, COURIER-J. (Louisville, Ky.), Sept. 9, 2009, *available at* http://www.courier-journal.com/article/20090909/NEWS01/909090390 (describing player testimony at Stinson's trial that the coach was "angry" and "yelling at players").
[2] *Id.*
[3] *See* Stephanie Steitzer, *Gilpin's Mother Backs Sports Safety Bill*, COURIER-J. (Louisville, Ky.), Feb. 13, 2009, *available at* http://www.courier-journal.com/article/20090213/NEWS0101/902130382/.

meters.[4] The Panthers varsity ran at least three gassers in full gear and at least six more without helmets and pads.[5] Before the sprints stopped, several players had vomited on the field.[6] Eyewitnesses later could not agree on the exact time fifteen-year-old sophomore Max Gilpin collapsed, but most put it between 5:45 and 5:55 p.m.[7] After trying to cool Max down with a water hose, coaches called 911 at 6:17.[8] Three days later, on August 23, 2008, Max died at the hospital;[9] his body temperature had reached 109.4 degrees at its peak.[10]

Jefferson County prosecutors indicted Stinson the following January,[11] the first time a coach has ever been criminally charged for his on-field conduct,[12] and a jury found him not guilty of reckless homicide and wanton endangerment in September.[13]

The Stinson trial may have been unique, but the circumstances leading up to it are not. The American Football Coaches Association has kept track of football-related heat illness fatalities since the middle of the last century.[14] There were 125 such deaths between 1955 and 2008, even though "[t]here is no excuse for any number of heat stroke deaths since they are all preventable with the proper precautions."[15]

This Note argues that the criminal law can and should play a role in helping to prevent such deaths. Without questioning the jury's verdict in the Stinson trial, this Note argues that measured and thoughtful criminal prosecution of coaches in similar circumstances is appropriate. Part I outlines the too-common nature of heat-related illness and death in football, discusses the nature of a coach's legal duty to care for his players, and examines how that duty may affect a coach's criminal liability. Part II acknowledges the legitimate arguments of coaches against the imposition of criminal law in this area and describes some of the obstacles prosecutors face. Part II nonetheless argues that the criminal law does have a role to play in helping to shape coaches' actions on the practice field. Part III proposes that the current criminal law, without modification, is capable of productive use in such situations if prosecutors advance a negligent homicide theory based on the coach's failure to provide medical care. This solution

[4] *See* JEFFERSON COUNTY BD. OF EDUC., FINAL INVESTIGATIVE REPORT: PLEASURE RIDGE PARK HIGH SCHOOL—FOOTBALL PRACTICE AUGUST 20, 2008 at 19 (June 19, 2009), *available at* http://www.supportourstinson.com/jcps-report.php (describing "gassers" as "200 meter runs").
[5] *See* JEFFERSON COUNTY BD. OF EDUC., *supra* note 4, at 15 (summarizing statements of an assistant coach).
[6] *Id.*
[7] Transcript of Deposition of Craig A. Webb at 62, Crockett v. Stinson (Jan. 16, 2009) (No. CI-08-10031), *available at* http://www.wlky.com/download/2009/0123/18550750.pdf (fixing the approximate time of Max's collapse at between 5:45 and 5:55 p.m. according to eyewitnesses and PRP's athletic director).
[8] *See* JEFFERSON COUNTY BD. OF EDUC., *supra* note 4, at 17.
[9] *Tragedy at PRP: A Timeline*, COURIER-J. (Louisville, Ky.), Sept. 17, 2009, http://www.courier-journal.com/article/20090917/SPORTS05/90918001 [hereinafter *Tragedy at PRP*].
[10] *See* Jason Riley, *Heat Expert: Max Gilpin Would Have Survived if Treated Correctly*, COURIER-J. (Louisville, Ky.), Sept. 10, 2009, *available at* http://www.courier-journal.com/article/20090910/SPORTS05/909100328 (reporting testimony of heat stroke expert who calculated Max's body temperature).
[11] *Tragedy at PRP*, *supra* note 9.
[12] *See* Antoinette Konz & Jason Riley, *PRP Coach Indicted in Football Player's Death*, COURIER-J. (Louisville, Ky.), Jan. 23, 2009, *available at* http://www.courier-journal.com/article/20090123/NEWS01/901230444/ (describing this as "the first time a criminal charge has been filed in such a case involving a high school or college coach in the United States, according to sports experts").
[13] *Tragedy at PRP*, *supra* note 9.
[14] *See* FREDERICK O. MUELLER & BOB COLGATE, ANNUAL SURVEY OF FOOTBALL INJURY RESEARCH 1931–2008, at 23–24, *available at* http://www.unc.edu/depts/nccsi/FootballAnnual.pdf.
[15] *See id.* at 8 (counting five deaths from heat stroke before 1960 and 120 between 1960 and 2008).

has two broad benefits—it provides a credible threat of criminal liability for coaches, thereby encouraging them to provide medical care during the early stages of player distress and ultimately saving young lives, but it also ensures that coaches will not be sent to prison simply for demanding effort from their players. Such a solution protects coaches from unjustified prosecutions based solely on common coaching activities that result in tragedy, and helps provide for the safety of young athletes by making it more likely that charges, when brought, will stick.

II. FOOTBALL-RELATED HEAT ILLNESS, THE DUTIES OF COACHES, AND WHERE CRIMINAL LAW COMES IN

The sheer brutality of severe heat illness received perhaps its clearest exposition in the 1970 case of *Mogabgab v. Orleans Parish School Board*:

> [H]eat damage works its wreckage upon the body in a continuum, causing progressive internal changes in the human system much as it causes progressive organic changes in a boiling egg. At some indefinite point in this continuum, the process of heat damage becomes irreversible and past that point little can be done. All of this means that if appropriate medical assistance is available early, the chances of survival are good. If it is long delayed, there is little hope. Once symptoms appear each minute that passes without medical attention measurably reduces the chances of survival.[16]

This stark formulation provides the backdrop for examination of the recurring problem of heat illness in football, the duty of coaches to prevent and mitigate such illness, and the relationship of that duty to the criminal law.

A. The Recurring Problem of Football-Related Heat Illness

Media coverage of football-related heat illness reached a peak in 2001 after the heat stroke death of Minnesota Vikings offensive lineman Korey Stringer in training camp that August.[17] Stringer, though, was the first and only player in professional football history to die of a heat-related illness.[18] Max Gilpin's death in Kentucky reflects the more common scenario: heat illness afflicting high school athletes.[19]

Resultant civil litigation peppers case reporters going back several decades. Those cases help shed light both on how heat illness actually occurs and the different ways in which coaches react when players exhibit its symptoms. One such case arose out of the death of a seventeen-year-old Indiana boy, Travis Stowers, who died in an Indianapolis hospital on August 1, 2001, [20] just hours after Korey Stringer's death in Minnesota.[21] Stowers had collapsed during a water break at football practice the previous day,[22] during which the high temperature was 90 degrees.[23] The *Stowers* court rejected the plaintiffs' motion for summary judgment on negligence liability, noting that Stowers' coaches had

[16] 239 So.2d 456, 460 (La. Ct. App. 1970).
[17] *See, e.g., Outside the Lines: Training Athletes to Death* (ESPN television broadcast Aug. 5, 2001).
[18] *Id.*
[19] *See* Harris *ex rel.* Harris v. McCray, 867 So.2d 188, 194 n.2 (Miss. 2003) (McRae, Presiding J., dissenting) (describing an eight-year span in which twenty-one football players died from heat stroke, sixteen of whom were high schoolers).
[20] Stowers v. Clinton Cent. Sch. Corp., 855 N.E.2d 739, 742 (Ind. Ct. App. 2006).
[21] Stringer died at 1:50 a.m. on August 1. 94 AM. JUR. 3D *Proof of Facts* 271, § 9 n.3. Stowers died at approximately 4:00 a.m. *Stowers*, 855 N.E.2d at 744.
[22] *Stowers*, 855 N.E.2d at 744.
[23] The Old Farmer's Almanac.com, Weather History for Indianapolis, Indiana, http://www.almanac.com/weather/history/zipcode/46201/2001-07-31 (last visited Jan. 19, 2010).

"responded to the heat" by shortening intense periods of practice, eliminating sprints, emphasizing the importance of hydration and allowing players to get water at any time, and permitting water breaks every ten minutes.[24] Coaches also asked Stowers how he was feeling when he exhibited signs of stress during the morning practice, and during the coaches' conference at lunch agreed to keep a close eye on him during the afternoon practice.[25] When Stowers collapsed in the afternoon, coaches working in tandem removed his helmet and shoulder pads, took him back to the locker room in a golf cart, and placed him in a cold shower with ice around him, calling 911 immediately thereafter.[26]

Jeremy Tarlea, a fifteen-year-old[27] Michigan boy who was in the "best shape of his life," died on August 16, 2000, one week after collapsing just across the finish line of a one-and-a-half mile run during preseason football practice. [28] The temperature that day was 71 degrees, with 93 percent humidity.[29] Like Stowers', Tarlea's coaches emphasized the importance of hydration and water breaks, made water available at any time, and allowed players to sit out drills—even the run that led to Jeremy Tarlea's death was optional, not timed, and players who chose to start the run were allowed to stop to rest at any time.[30] Tarlea did not rest during the run; his knees buckled immediately after finishing.[31] Coaches immediately drove him to a hospital, where his body temperature peaked at 108 degrees.[32] He never regained consciousness.[33]

The *Mogabgab* case, cited above, involved a boy of sixteen who died after a football practice in New Orleans on August 16, 1966.[34] Robert Mogabgab collapsed during wind sprints at 5:20 p.m.[35] Two other players helped him stumble, vomiting, to the team bus, which arrived back at Benjamin Franklin Senior High School at 5:40.[36] There, concerned players began undressing a mute Mogabgab on a blanket on the cafeteria floor.[37] Coaches and teammates put Mogabgab in a lukewarm shower shortly afterward,[38] and then, at 5:50, laid him back down on a blanket, with another blanket on top of him.[39] A coach gave him an ammonia tablet and tried unsuccessfully to make him drink some salt water.[40] Mogabgab was breathing heavily, his skin pale and clammy.[41] Nearly an hour later, another player's father, Howard Wissner, arrived at the school to pick up his son and saw Mogabgab lying on the cafeteria floor, "grayish-blue" in color.[42] Wissner demanded that the coach call a doctor, and threatened to do so himself if the coach did not.[43] The coach refused, and Wissner left the school to make good on his threat.[44] Only then, at 6:45, did coaches call Mogabgab's mother, who immediately summoned a doctor herself.[45] The doctor

[24] *Stowers*, 855 N.E.2d at 746.
[25] *Id.* at 744, 746.
[26] *Id.* at 744.
[27] *Outside the Lines: Training Athletes to Death* (ESPN television broadcast Aug. 5, 2001).
[28] Tarlea v. Crabtree, 687 N.W.2d 333, 337 (Mich. Ct. App. 2004).
[29] *Id.*
[30] *Id.*
[31] *Id.* at 338.
[32] *Id.*
[33] *Id.*
[34] Mogabgab v. Orleans Parish Sch. Bd., 239 So.2d 456, 458 (La. Ct. App. 1970).
[35] *Id.*
[36] *Id.* at 459.
[37] *Id.*
[38] *Id.* at 458.
[39] *Id.* at 459.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

arrived at 7:15 and observed a boy who was "unconscious, cyanotic, cool, clammy, actively sweating, with no pulse in any of his major vessels, no evidence of pressure, [whose] pupils were widely dilated, fixed, and not responsive to light."[46] Robert Mogabgab was finally taken to a hospital at 7:30, more than two hours after his initial collapse.[47] He died early the next morning.[48]

Some players, luckier or better cared for than Stowers, Tarlea and Mogabgab, survive their heat illness.[49] But even successful treatment of players who display symptoms represents a failure of sorts, since heat-related deaths are always preventable.[50] Coaches can help players avoid heat illness by providing regular rest periods and decreasing the intensity of practice in hot weather.[51] Players themselves can fend off heat illness by drinking plenty of water.[52] Precautions aside, though, many factors determine whether a given player will succumb to heat on a given day; carriers of the sickle-cell trait are more susceptible to heat illness,[53] for example, and the defense in the Stinson trial contended that Max Gilpin's heat stroke was likely caused not by a difficult practice, but by his use of the dietary supplement creatine, his prescription for Adderall, and a viral illness he may have had the day of his collapse.[54]

Notwithstanding the various inputs that determine whether heat illness occurs, its symptoms are eventually visible and there is a critical window of time in which proper action can drastically reduce the damage done to the player.[55] Coaches should watch for incoherence, vomiting, flushing and unsteadiness.[56] By rapidly cooling the player with immersion in cold water and immediately calling for medical help upon assessing the problem, coaches can generally save players from the most devastating effects of heat illness.[57]

B. The Coach's Duty of Care

It is well established that amateur coaches can be held civilly liable for injuries to athletes under their supervision.[58] Such actions are generally based on negligence theories—that a coach has breached a

[46] *Id.*
[47] *Id.* at 458.
[48] *Id.*
[49] *See, e.g.*, Prince v. Louisville Mun. Sch. Dist., 741 So.2d 207, 209 (Miss. 1999) (player alleges he suffered permanent injuries from heat stroke during football practice); Harris *ex rel.* Harris v. McCray, 867 So.2d 188, 189 (Miss. 2003) (player suffered injury from heat stroke during football practice and incurred $68,000 in medical bills).
[50] *See* MUELLER & COLGATE, *supra* note 14, at 8; *see also Outside the Lines*, *supra* note 17 ("It's even more tragic because it is preventable.").
[51] *See* MUELLER & COLGATE, *supra* note 14, at 8.
[52] *See id.* at 9.
[53] AMERICAN COLLEGE OF SPORTS MEDICINE, ACSM'S RESOURCE MANUAL FOR GUIDELINES FOR EXERCISE TESTING AND PRESCRIPTION 507 (4th ed. 2001).
[54] Jason Riley, *Former Medical Examiner Testifies Max Gilpin's Death Was an "Accident,"* COURIER-J. (Louisville, Ky.), Sept. 15, 2009, *available at* http://www.courier-journal.com/article/20090915/SPORTS05/909150331/ (reporting testimony of two defense experts).
[55] *See* Mogabgab v. Orleans Parish Sch. Bd., 239 So.2d 456, 460 (La. Ct. App. 1970) ("[I]f appropriate medical assistance is available early, the chances of survival are good. If it is long delayed, there is little hope.").
[56] *See* MUELLER & COLGATE, *supra* note 14, at 10.
[57] *See* Tom Moreau, *Heatstroke—Predictable, Preventable, Treatable*, J. AM. ACAD. PHYSICIAN ASSISTANTS, Aug. 1, 2005.
[58] *E.g.*, *Mogabgab*, 239 So.2d at 461 (rendering judgment of $41,634.75 in damages in favor of Robert Mogabgab's parents against two of his coaches and the Orleans Parish School Board); Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 49 (Cal. 2003) (holding that summary judgment in favor of defendants coach and school district was improper on the question of "whether [the coach] breached a duty of care owed to plaintiff, thereby causing her injury, by engaging in conduct that was reckless in that it was totally outside the range of ordinary activity involved in teaching or coaching the sport of competitive swimming").

duty to the player, and that the player has been injured as a result.[59] A coach has a "duty to exercise reasonable care for the protection of the athletes under his or her supervision," a duty which is "satisfied by providing proper instruction in how to play the game and by showing due concern that the athletes are in proper physical condition."[60] The Florida Fifth District Court of Appeal in *Leahy v. School Board of Hernando County* offered a formulation stating that school coaches owe athletes a duty of care with five general attributes: giving adequate instruction in the sport or activity, supplying proper equipment, ensuring that participants are reasonably selected or matched against one another, providing "nonnegligent supervision" of a given activity, and caring for injured athletes so as to avoid aggravation of the injury.[61]

Importantly in the heat illness context, the duty to avoid aggravation of the injury includes a duty not only to stabilize the player's condition where possible, but to promptly summon professional medical assistance where a delay might "either exacerbate[] the injury or result[] in death."[62] A coach need not act as an insurer against all injury to the player, and certain risks simply inhere in sports participation; the coach's obligation is to prevent aggravation of those risks.[63] At the same time, a coach must be aware that an athlete of high-school age cannot be expected to behave with the "discretion, judgment, and concern for . . . safety" of a full-grown adult.[64]

The general formulation of a coach's duty of care does not change in heat illness cases. The *Mogabgab* court opined that coaches have a duty to provide all necessary and reasonable safeguards to prevent injury to players and to provide for prompt treatment when injuries occur.[65] The court went on to hold that Robert Mogabgab's coaches had plainly breached that duty by "denying the boy medical assistance and in plying an ill-chosen first aid."[66] The *Stowers* court applied an Indiana state law which requires school employees (including coaches) to use ordinary and reasonable care for the safety of children under their authority.[67] Each court, as others have done, contemplated that providing proper medical attention to injured players is within the scope of a coach's general duty of care.[68]

C. Negligent Homicide and the Criminal Significance of the Civil Duty of Care

As the Stinson case demonstrates, the most likely criminal charge against a coach when heat illness causes a player's death is probably negligent homicide—the Model Penal Code's term for a killing caused by a person who fails to perceive a risk that an objectively reasonable person would have

[59] Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7, 12–13 (1996).
[60] Cym H. Lowell, *Liability for Injuries in Sports*, *in* LAW AND AMATEUR SPORTS 40, 61–62 (1982).
[61] 450 So.2d 883, 885 (Fla. Dist. Ct. App. 1984) (citation omitted).
[62] James C. Kozlowski, *Coaches Delay Emergency Treatment for Player Suffering Heat Stress*, PARKS & RECREATION, Jan. 1992, at 26, 26.
[63] *See* Lowell, *supra* note 60, at 40, 61–62 (1982).
[64] Dailey v. Los Angeles Unified Sch. Dist., 470 P.2d 360, 364 (Cal. 1970); *see also* Rupp v. Bryant, 417 So.2d 658, 668–69 (Fla. 1982) ("[B]oys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years.").
[65] Mogabgab v. Orleans Parish Sch. Bd., 239 So.2d 456, 457 (La. Ct. App. 1970).
[66] *Id.* at 460.
[67] Stowers v. Clinton Cent. Sch. Corp., 855 N.E.2d 739, 745 (Ind. Ct. App. 2006) (citation omitted).
[68] *See Stowers*, 855 N.E.2d at 746 (citing the coach's immediate provision of medical attention, including placing the player in a cool shower and calling 911, as a factor in whether the defendant school district was negligent as a matter of law); Prince v. Louisville Mun. Sch. Dist., 741 So.2d 207, 212 (Miss. 1999) (noting that coaches must "judg[e] whether or not an individual player is injured and then, whether the player should report to the trainer or seek other medical aid"); *Mogabgab*, 239 So.2d at 460.

perceived—or its jurisdictional equivalent.[69] Kentucky, where Stinson was prosecuted, does not recognize a crime called "negligent homicide," but defines "reckless homicide" in terms that make it substantially the same as negligent homicide in the Model Penal Code.[70] Negligent homicide statutes do not require that the defendant have subjectively realized the risk he or she caused.[71] In other words, a coach theoretically need not be aware that a player may succumb to heat stroke at a certain level of exertion in order to be found guilty of negligent homicide. Under negligent homicide statutes, when a coach's alleged negligence results in a player's death, the viability of criminal charges turns on whether the death resulted from sufficiently severe negligence on the part of the coach.[72] The objective standard asks whether the coach's actions or omissions warrant homicide charges because of a sufficiently grave deviation from the standard of care expected of a reasonable person in the same situation.[73]

The objective standard therefore holds liable even persons who do not realize that their actions run the risk of causing the resulting harm. In a paradigmatic case, *Commonwealth v. Welansky*, the Massachusetts Supreme Court demonstrated the principle by upholding a nightclub owner's conviction for several counts of involuntary manslaughter through wanton or reckless conduct.[74] A jury found the owner criminally liable because his club had few accessible exits; when a fire started in the building on a night when more than a thousand people were inside, many were killed because they could not find a way out.[75] In refusing to overturn the conviction, the court said that the owner's conduct involved a "high degree of likelihood that substantial harm [would] result to another" and quoted with approval the trial judge's instructions to the jury, which charged them to find the defendant guilty if either he did realize that harm could result from his maintenance of his premises, or if he should have realized it because an "ordinary normal man under the same circumstances" would have.[76]

Importantly, *Welansky* also demonstrates the general principle that an actor can be held criminally liable not just for affirmative acts, but for omissions to act when there is a duty to do so.[77] The failure of the nightclub owner to provide proper fire exits in violation of a duty of care for the safety of his visitors constituted the equivalent of an affirmative act for purposes of the manslaughter charge.[78] The owner's failure to maintain exits in contravention of his duty to do so, in other words, made him criminally responsible for the death of the patrons just as surely as if he had run around the club shooting a pistol with his eyes closed.

The availability of omission-based prosecution provides a second path by which a prosecutor could approach the trial of a football coach, and there are two ways in which the coach's duty of care may be relevant. The first path, which ignores omissions to act and focuses only on affirmative acts, is one by which the prosecutor alleges that the coach caused the death by overworking the player in a criminally

[69] *See* MODEL PENAL CODE §§ 2.02, 210.4 (1962).
[70] KY. REV. STAT. ANN. §§ 507.050.
[71] WAYNE R. LAFAVE, CRIMINAL LAW 723 (3d ed. 2000).
[72] *See* Carolyn Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1645 (2003) (discussing the line between "morally blameworthy indifference," which should be punished criminally, and "inadvertent harm-creation," which should lead only to actions in tort). Of course, a coach cannot be liable for a player's death, either criminally or in tort, when the coach's acts or omissions do not actually cause the death. *See* Commonwealth v. Root, 170 A.2d 310, 314 (1961) (discussing the application of the tort concept of proximate cause to the criminal law, and deciding that in order to find guilt in a criminal prosecution requires the causation must be more direct than the mere proximate cause required by a tort case).
[73] *See* Sanford H. Kadish et al., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 411 (8th ed. 2007).
[74] Commonwealth v. Welansky, 55 N.E.2d 902, 917 (Mass. 1944).
[75] *Id.* at 906–07.
[76] *Id.* at 910.
[77] LAFAVE, *supra* note 71, at 214–15.
[78] *Welansky*, 55 N.E.2d at 909.

negligent manner—that is, by creating a risk (such as requiring excessive running in extreme heat) that the coach failed to perceive.[79] In such a case, the breach or fulfillment of the civil duty of care can be relevant because it serves as *evidence* of whether or not the coach has exercised the care that *Welansky*'s "ordinary normal man" would have.[80] However, the breach of the civilly-imposed duty is not an *element* of the crime.[81]

By contrast, the second path—the one by which the prosecutor alleges that the coach's omission to provide adequate medical care caused the player's death—requires that the alleged omission to provide adequate medical care was itself a breach of a duty imposed by law.[82] In determining whether a coach is guilty of homicide by reason of omitting to provide medical care, it is therefore not just important but crucial to determine whether the coach has breached the civil duty of care. To help make that determination, courts can look to a coach's compliance, or lack thereof, with non-statutory guidelines, which do not themselves determine whether a duty of care has been breached but can provide evidence one way or the other.[83]

There are, then, a couple of available frameworks for the mechanics of a Stinson-like prosecution. The next question is whether pursuing such prosecution is a good idea, and if so, how to make the threat of criminal liability a credible one.

III. Establishing a Credible Threat of Criminal Liability for Coaches: Why and How?

Though the media reported heavily on the Stinson trial, and a prosecutor argued that "good will come" of it notwithstanding the acquittal because coaches will be more aware of the need to give water breaks and monitor player stress,[84] the verdict may fail effectively to deter coaches from overworking players or to encourage them to provide prompt medical care in the way a conviction, or even a case close enough to prompt lengthy jury deliberations, would have.[85] If prosecutors continue to ask juries to convict

[79] *See* MODEL PENAL CODE §§ 2.02, 210.4 (1962).

[80] *See* People v. Hall, 999 P.2d 207, 223 (Colo. 2000) ("A [skier's] violation of [the statute imposing a civil duty to avoid collisions] in an extreme fashion . . . may be evidence of conduct that constitutes a 'gross deviation' from the standard of care imposed by statute for civil negligence.").

[81] *See* MODEL PENAL CODE § 210.4 (1962); *see also* State v. Wheeler, 496 A.2d 1382, 1391 (R.I. 1985) (noting that a certain Rhode Island statute is not criminal or penal, so any act or omission under that statute cannot result in criminal liability and the statute is relevant "only insofar as [it] set[s] a standard of care, the breach of which may be evidence of negligence").

[82] LAFAVE, *supra* note 71, at 214–15.

[83] *See* Ramsey, *supra* note 72, at 1701 (suggesting that a violation of relevant non-statutory guidelines promulgated by an industry or relevant organization may demonstrate a defendant's punishable indifference to the safety of others). For example, Kentucky's high school athletic association promulgates guidelines for coaches on how to adjust the intensity of practices when the heat index reaches different levels. KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION, HEAT RECOMMENDATION (2007), *available at* http://www.khsaa.org/sportsmedicine/heat/kmaheatrecommendation2007.pdf. When the heat index is at 94, as it was on the day Max Gilpin collapsed, coaches are to monitor players closely, but need not decrease the intensity of their practices. *Id.*

[84] Andrew Wolfson and Jody Demling, *Not-Guilty Verdict Won't Lessen Case's Impact, Experts Say*, COURIER-J. (Louisville, Ky.), Sept. 17, 2009, *available at* http://www.courier-journal.com/article/20090917/SPORTS05/909170354.

[85] *See id.* (quoting an athletic training professor as saying she is "nervous" that coaches will not change their behavior in the wake of Stinson's acquittal). Jurors deliberated for less than 90 minutes before returning the not guilty verdict. Jason Riley, *Stinson Found Not Guilty in PRP Player's Death*, COURIER-J. (Louisville, Ky.), Sept. 17, 2009, *available at* http://www.courier-journal.com/article/20090917/SPORTS05/909170320.

football coaches for doing things that people generally expect coaches to do, they will have to continue to define "success" as surviving the defense's motion for a directed verdict of acquittal.[86]

There are three good reasons for this. First, coaches have legitimate arguments that they must be able to push players to exert themselves physically at practice to help ensure the athletes' safety. Second, American society—including the government—generally strongly supports amateur athletics and the coaches involved with it. Third, prosecutors could point to no specific precedent for holding coaches like Stinson criminally liable. These factors make it difficult, as one Stinson prosecutor acknowledged, to convince jurors to convict a football coach.[87]

Nonetheless, it is important to establish the credible threat of criminal prosecution for coaches who negligently allow players under their supervision to die of heat-related illness. The powerful deterrent effect of the criminal law may be able change coaches' behavior, both to decrease the intensity of practices when weather dictates and to promptly provide adequate medical care to injured players, ultimately serving the goal of saving athletes' lives.[88] The devastating nature of severe heat illness, coupled with the effectiveness of simple preventative measures and swift treatment, makes the goal of drastically reducing its incidence both important and eminently achievable. The question is how.

A. *A Viable Threat of Criminal Negligence Liability Creates a Strong Deterrent Effect*

Criminal punishment in America generally aims to achieve one or more of four main goals, one of which is the deterrence of future crime.[89] Punishment can deter the person being punished from committing crimes in the future.[90] It can also create a deterrent effect among the public at large by raising awareness that certain conduct will be punished.[91]

Some commentators argue that negligent conduct, by its very nature, cannot be deterred.[92] Many, however, accept that punishment can deter negligent conduct when the likelihood of punishment is sufficiently high[93]—particularly when that conduct is of a sort that can reasonably be deterred.[94] Because football heat stroke deaths are preventable,[95] and coaches are in the best position to prevent them at practices,[96] the imposition of criminal liability could theoretically save players' lives if it created a sufficient likelihood of punishment.

However, criminal punishment for negligence may be unjust if it punishes socially useful conduct.[97] For that reason, legitimate arguments against criminal liability must be carefully considered.

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[86] *See* Riley, *supra* note 85 (reporting that the verdict disappointed prosecutors, but that one cited the judge's refusal to issue a directed verdict as evidence that prosecutors "did [their]" job).
[87] *See id.*
[88] *See* LAFAVE, *supra* note 71, at 25 (explaining that "[t]he magnitude of the threatened punishment is clearly a factor [in deterrence], but perhaps not as important a consideration as the probability of . . . punishment").
[89] GEORGE F. COLE & CHRISTOPHER E. SMITH, CRIMINAL JUSTICE IN AMERICA 258 (2008).
[90] *Id.*
[91] *Id.*
[92] For a discussion of these arguments, see Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 883–86.
[93] *See* LAFAVE, *supra* note 71, at 25; *see also* COLE & SMITH, *supra* note 89, at 259–60 ("To be generally deterrent, punishment must be perceived as relatively fast, certain, and severe."); State v. Hazelwood, 946 P.2d 875, 883 (Alaska 1997) ("[I]t cannot be disputed that the threat of punishment necessarily deters.").
[94] *See* Garfield, *supra* note 92, at 912.
[95] COLGATE & MUELLER, *supra* note 14, at 8.
[96] *See* Transcript of Deposition of Craig A. Webb, *supra* note 7, at 136–37 (statement of athletic director of Pleasure Ridge Park High School that "our head football coach [is] responsible for his practices").
[97] *See* Garfield, *supra* note 92, at 886.

An appropriate framework for coaches' criminal liability must tread a thin line: it must make criminal punishment sufficiently likely to deter the negligent conduct that can lead to player deaths, but it must not punish the ordinary conduct of coaches that society has deemed desirable.

B. *Coaches Must Have the Freedom To Ask Players To Push Themselves Physically*

Coaches understandably balk at the idea of being prosecuted for demanding that players physically exert themselves, something coaches think of as simply part of the job.[98] Proper conditioning is an essential part of football for safety reasons, not just competitive ones, and conscientious coaches must ensure that players are in adequate shape to meet the physical demands of intense game action.[99] In fact, they have a legal duty to do so.[100] If coaches were to approach conditioning drills tentatively for fear of criminal prosecution, they may successfully reduce occurrences of injury and death at practices only to see them become more common in games.[101] Furthermore, since providing for proper player conditioning is part of a coach's legal duty,[102] failing to do so may expose the coach to at least civil liability. These are not trivial concerns.

American courts also recognize that high school football coaches need to be able to maintain team discipline by physical means. In *Harris ex rel. Harris v. McCray*, a high school football player who suffered non-fatal heat stroke sued his coach and the school district for the damages caused by the injury.[103] The player told the coach he was feeling weak and needed water; in reply, the coach offered his belief that the player was "faking it."[104] The Mississippi Supreme Court, holding that the Mississippi Tort Claims Act immunity protected both the coach and the school district, displayed sensitivity to the ramifications of a verdict for the plaintiff and cited concerns about team discipline and morale.[105]

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[98] *See* Brett Barrouquere, *Coaches Focus on Safety After Colleague Acquitted*, SEATTLE TIMES, Sept. 18, 2009, *available at* http://seattletimes.nwsource.com/html/sports/2009895540_apusplayerdeathfallout.html (describing an Indiana high school football coach who "knows running and conditioning are part of preparing football players for a game" and quoting the executive director of the Minnesota State High School Coaches Association as saying "no coach . . . has gone into the profession to hurt kids").

[99] *See* MUELLER & COLGATE, *supra* note 14, at 7–8, 11 (asserting that "excellent physical conditioning" has "played a major role in reducing fatalities and serious brain and neck injuries in football," and that coaches should "emphasize proper, gradual and complete physical conditioning").

[100] Lowell, *supra* note 60.

[101] *See id.* at 7–8; *see also* Tarlea v. Crabtree, 687 N.W.2d 333, 340 (noting that preseason practices without pads took place in order to prepare players to play in August and September games "in worse conditions in terms of heat and humidity").

[102] Lowell, *supra* note 60.

[103] 867 So. 2d 188, 188 (Miss. 2003).

[104] *Id.* at 192.

[105] *Id.* at 193 ("High school football coaches around the state would lose their ability to control their football teams. Discipline of a football team would become non-existent. . . . [C]oach[es] would be very much aware of the fact that [they] would be running the risk of being successfully sued . . . should [a] player later suffer physical/medical problems related to the coach's failure to cow to the player's every whim and wish. On the other hand, if the coach, in fear of a successful lawsuit, should cow to the player's every whim, wish and demand, then the coach would lose the respect of the players, and discipline and morale would be lost."). For another example of judicial concern with the implications of finding coaches liable for injury to players, see Barry *ex rel.* Pellonpaa v. Ishpeming-Nice Cmty. Sch., 2005 WL 3050647, at *4 n.2 (Mich. Ct. App. Nov. 15, 2005) ("Our opinion does not prevent coaches from coaching their players and teams with full force and vigor; it merely recognizes that, like with anything in life, matters or actions can be taken too far . . . ."). The somewhat cynical dissenting opinion in the *Barry* case recommended, in light of the majority's reversal of summary judgment in favor of a coach who injured a player during a blocking drill, that coaches "approach their teams as a nervous chemistry teacher cautiously approaches an advanced placement lab, guarding their every word and deed against mistake or misunderstanding," because "[i]t is

The court thus recognized the need of coaches to be able to control and discipline their football teams by physical means. As a point of reference, the *Harris* coach's "control" consisted of accusing Harris of faking dehydration and heat exhaustion, forcing him to continue to go through playbook drills and wind sprints after he had already begun staggering from the early stages of heat stroke, and refusing to let teammates help Harris, who at the time could not walk under his own power, back to the locker room after practice ended.[106]

C. *Coaches Enjoy Firm Government and Community Support, Making Prosecution Difficult*

The non-judicial branches of government, too, have demonstrated a clear policy supporting competitive amateur sports. Laws prohibiting physical discipline in schools are common, but states make exceptions when that discipline comes as part of athletic training.[107] Proud legislators introduce resolutions lauding the exploits of their hometown players and coaches.[108] Governors lavish praise upon young athletes for their will and toughness.[109] Legislative and executive support of interscholastic athletic competition, and the power structure inherent in it, helps lead courts to the *Harris*-like conclusion that coaches should have wide discretion to control their teams.

Longstanding government approval also probably helps create the widespread community support that football coaches often enjoy. Jason Stinson, after all, inarguably contributed to the death of a player by exhorting him to perform beyond his physical capabilities, but that seems to have done little to erode his reputation in his community.[110]

Jury members are comfortable with the idea that coaches push athletes to or past their physical limits in order to tap their full potential—in fact, they expect it.[111] Jurors, who are overwhelmingly likely

better that coaches take their losses on the field rather than in their bank accounts." *Id.* at *7 n.6 (O'Connell, J., dissenting).

[106] *See* Appellant's Brief at 56, *Harris*, 867 So. 2d 188 (No. 2001–CA–01627).

[107] *See, e.g.*, CAL. EDUC. CODE § 49001 (West 2006) (excluding "physical pain . . . caused by athletic competition" from the definition of prohibited corporal punishment).

[108] *See, e.g.*, H.R. Res. 179, 147th Gen. Assem., Reg. Sess. (Ga. 2003) *available at* http://www.legis.state.ga.us/legis/2003_04/fulltext/hr179.htm (commending the "motivation" of Georgia's Class A high school football champions and the "excellent training" provided by their head coach, and proclaiming that "interscholastic athletics offer young people a valuable opportunity to master core principles and relationships that are elementary to adult living and create memories that will long be remembered by students and family and cherished by the players forever").

[109] *See, e.g., Governor Cheers On Hawai'i High School Football Champions*, GOVERNOR'S E-NEWSL. (State of Haw. Governor's Office, Honolulu, Haw.), Dec. 28, 2006, at 5, *available at* http://hawaii.gov/gov/news/enewsletters/2006/December%202-8,%202006.pdf (describing Hawaii Gov. Linda Lingle's attendance at the 2006 state football championship games, her presentation of the trophies for the Division II champion and the runner-up, and her commendation of the teams for their "tremendous effort").

[110] *See* Facebook | Supporters of Coach Jason Stinson, http://www.facebook.com/group.php?gid=50669001253 (last visited Nov. 21, 2009) (3,001 people in a Facebook group formed to support Stinson after his indictment); Support Our Stinson S.O.S.: The Jason Stinson Legal Defense Fund, http://www.supportourstinson.com (last visited Nov. 21, 2009) (seeking donations from the community to fund Stinson's defense and listing hundreds of "registered supporters"). The "Support Our Stinson" site purports to have the backing of several coaching organizations, including the Indiana High School Baseball Association, the Minnesota State High School Coaches Association, the North Dakota High School Coaches Association, and the South Carolina Athletic Coaches Association; it also includes a tab unsubtly labeled "Commonwealth v. Football." *Id.*

[111] *See* Bob Cook, *Update on the Stinson Trial: Are the Jurors Watching "The Biggest Loser"?*, YOUR KID'S NOT GOING PRO, Sept. 17, 2009, http://trueslant.com/bobcook/2009/09/17/update-on-the-stinson-trial-are-the-jurors-watching-the-biggest-loser/ (noting that "even if [a given set of jurors were] never yelled at by a football coach, they're familiar with trainers and coaches who push, cajole, and, yes, yell, as a means of inspiration and drawing out the best in somebody").

to have at least *some* connection to amateur sports,[112] may be generally reluctant to convict coaches who are often (and often accurately) perceived to be regular people doing a public service for little or no pay.[113] Jury reluctance to convict coaches is not necessarily a problem in and of itself; the problem arises if such reluctance dilutes the potential deterrent effect of the criminal law by rendering prosecution a toothless threat. It is therefore important to conceive a prosecutorial framework under which guilty verdicts against coaches are at least a realistic possibility, bearing in mind the legitimate arguments of coaches against the draconian intrusion of criminal law.

II. THE SOLUTION: PROSECUTE COACHES FOR FAILURE TO PROVIDE MEDICAL ASSISTANCE, NOT FOR DEMANDING TOO MUCH FROM THEIR PLAYERS

Some prosecutors may conclude that, given the difficulties inherent in prosecuting a coach for the death of a player, the criminal law simply has no place in this arena and that initiatives to improve player safety should emanate from elsewhere, if at all.[114] This would be the wrong reaction to the Stinson case. The unique power of the criminal law to influence decisions—particularly those of people who are not "expert criminals"[115]—can and should be brought to bear to save young lives in the future by deterring coaches from grossly overextending players and encouraging them to respond quickly to players who exhibit signs of heat illness.[116] The law probably need not provide for *severe* punishment in order to have the desired deterrent effect,[117] and arguably should not.[118] Negligent homicide (or a jurisdictional equivalent which prohibits causing the death of another person by inadvertence to objective risk)[119] is the best option currently available to prosecutors in most cases, providing a broad deterrent effect without imposing draconian sentences on unintentional offenders.

New legislation targeted at coaches would, of course, overcome many of the obstacles inherent in their prosecution today, but is extraordinarily unlikely. It may also compromise player safety by causing coaches fearful of criminal prosecution to shy away from properly conditioning players. The best solution is for prosecutors to use existing law and focus on coaches who fail to act notwithstanding their duty to provide medical care to the players under their supervision.

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[112] *See* Laura Hilgers, *Youth Sports Drawing More than Ever*, CNN.COM, July 5, 2006, http://www.cnn.com/2006/US/07/03/rise.kids.sports/ (estimating that 41 million American children played competitive youth sports in mid-2006).

[113] *Cf.* LAFAVE, *supra* note 71, at 727 (discussing the difficulty of obtaining manslaughter convictions in automobile fatalities because in those cases "juries are apt to think, 'There, but for the grace of God, go I'"). *See generally* Support Our Stinson S.O.S.: The Jason Stinson Legal Defense Fund, http://www.supportourstinson.com/call_to_coaches.php (last visited Nov. 21, 2009) (praising the "sacrifices" and "love of the game" of coaches who do not receive "financial compensation for the time [they] put[] in").

[114] *Cf.* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 543–44 (1996) (noting that prosecutors "may decline, dismiss or otherwise refuse to try cases that, although supported by probable cause and sufficient evidence to convict, would nonetheless be difficult cases in which to secure convictions").

[115] *See* LAFAVE, *supra* note 71, at 25.

[116] *See* CHRISTINE T. SISTARE, RESPONSIBILITY AND CRIMINAL LIABILITY 140–41 (1989) ("[Criminal] negligence liability can be a useful tool in molding individual conduct . . . by prompting agents to take care when engaging in legitimate activities . . . .").

[117] *See* LAFAVE, *supra* note 71, at 25 (explaining that "[t]he magnitude of the threatened punishment is clearly a factor [in deterrence], but perhaps not as important a consideration as the probability of . . . punishment").

[118] *See* Ramsey, *supra* note 72, at 1696 (arguing that even involuntary manslaughter charges are too severe, and that "[e]xcept in extraordinary circumstances, prosecutors should not charge risky sports participants with any crime greater than negligent homicide").

[119] *E.g.*, MODEL PENAL CODE § 210.4 (1962) (defining the crime of "negligent homicide"); KY. REV. STAT. ANN. §§ 507.050, 501.020(4) (West 1974) (defining the crime of "reckless homicide," with "recklessness" meaning "fail[ing] to perceive a substantial and unjustifiable risk," which is an objective standard).

A. *Legislatures Are Unlikely To Come to the Aid of Prosecutors*

States have learned that when juries are reluctant to use a general homicide statute to brand as a criminal a person alleged to have caused a death, one solution is to pass a more specific law that reassures jurors of the legislature's intent to use the criminal law to punish a certain set of actions; the existence of vehicular homicide statutes clearly demonstrates this principle.[120] Before the advent of such statutes, prosecutors tried and largely failed to secure convictions in cases of automobile-related fatalities because jurors were simply unwilling to call such deaths homicides.[121] If states enacted laws against "homicide by forced overexertion," prosecutors could more easily secure convictions, rightly or wrongly, in cases like Stinson's. Such a law could be phrased roughly as follows: "Any person who, while in a position of recognized authority over a minor person, without design to effect death and with gross negligence, requires such minor person to physically exert himself or herself beyond his or her capabilities and thereby causes the death of the minor person, is guilty of homicide by forced overexertion."[122]

A solution of that sort is almost certainly untenable, though. For one thing, it would be difficult to pass a law that would be perceived as anti-coach (or, worse, anti-football) in the face of government's strong support of interscholastic athletics.[123] For another, such a law could be criticized as redundant,[124] since the elements of the crime would be virtually identical to those of negligent homicide or similar crimes, except that the hypothetical statute would specifically define "forced overexertion" as the means of causing the death of another person.[125] Governments passed such potentially redundant laws in the vehicular homicide context simply because they wanted to secure convictions;[126] the governmental policy supporting football sharply contrasts with the policy against vehicular homicide and helps explain why a homicide-by-forced-overexertion law is so unlikely to pass. It is also not clear that such a law would serve the ultimate goal of improving player safety, since coaches may overcompensate by failing to properly condition their players to perform in intense game situations.[127]

B. *Prosecution Based on the Failure to Provide Medical Assistance Is a Just, Effective Solution*

As one commentator has noted, the criminal law is a tool generally ill-suited to dealing with the unique problems posed by sports—for example, issues of inherent violence and assumed risk.[128] At the

[120] *See* LAFAVE, *supra* note 71, at 727 ("Because of difficulties experienced in obtaining juries willing to convict the death driver of manslaughter . . . a number of states have enacted statutes creating the new crime of homicide by automobile.").

[121] *See id.*; National Highway Traffic Safety Administration, *The Facts: Vehicular Homicide and the Impaired Driver*, http://www.nhtsa.dot.gov/people/outreach/safesobr/13qp/facts/facthom.html (last visited Nov. 21, 2009) ("Vehicular homicide statutes were enacted so prosecutors could avoid the obstacles they faced in using murder and manslaughter statutes to prosecute vehicular fatalities (i.e. convincing jurors that a vehicle is just as much a weapon as a gun . . .).").

[122] Some language is borrowed from South Dakota's vehicular homicide statute, *see* S.D. CODIFIED LAWS § 22-16-41 (2010).

[123] *See* GA Gen. Assem., *supra* note 108; Governor's E-Newsl. note 109.

[124] *See* SUSAN W. BRENNER, LAW IN AN ERA OF "SMART" TECHNOLOGY 88–89 (2007) (arguing that vehicular homicide laws are "redundant and, therefore, unnecessary" and that "the particular instrumentality one uses to take a life is irrelevant to the offense itself").

[125] *Cf.* National Highway Traffic Safety Administration, *supra* note 121 ("The only difference between a vehicular homicide and other homicides is the use of a motor vehicle as a weapon, as opposed to a gun or knife.").

[126] *See* LAFAVE, *supra* note 120.

[127] *See* LOWELL, *supra* note 101.

[128] Ramsey, *supra* note 72, at 1644.

time of the Stinson trial there was absolutely no precedent for convicting a coach in his situation, and now the only attempted prosecution of a coach has resulted in an acquittal. Finally, prosecutions of football coaches face the additional hurdles of jurors' comfort with the image of the coach as demanding taskmaster, and of general societal approval of competitive amateur sports.[129]

The best way to overcome these obstacles without abrogating the governmental policy in favor of competitive amateur sport is for prosecutors to base negligent homicide charges not on the theory that a coach affirmatively caused a death by overworking a player, but that the coach failed to carry out his duty to provide medical care once the player began to exhibit signs of heat-related illness.

1. Precedent Suggests Juries Are Willing To Convict Defendants on Homicide Charges for Failing To Provide Medical Care

Because coaches have a duty to care for the players under their supervision, prosecutors can bring charges against them based on an omission to act in accordance with that duty.[130] Juries have convicted defendants on homicide charges based on the failure to provide medical care in numerous cases.[131] To overcome juries' reluctance to convict football coaches, prosecutors should cite the long history of convictions for failure to provide medical care.[132] They could then argue that the prosecution of a football coach on that theory is not as novel as it first seems.

Many defendants in trials involving the failure to provide medical care are parents.[133] This is no obstacle to prosecution of coaches on the same theory, however. Parents unquestionably have a duty to provide medical care for their children,[134] but the duty of coaches extends to providing medical care as well.[135] Coaches may, in fact, stand *in loco parentis* and bear many of the same duties parents do;[136] in any event, coaches' duty of care includes the duty both to provide initial first aid and to call for medical assistance, since coaches are unquestionably in charge of practices.[137]

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[129] *See* Riley, *supra* note 85 (quoting Stinson's defense attorney as telling jurors that Stinson was "a man looking at prison time [just] for being a football coach").

[130] *See* LAFAVE, *supra* note 71, at 214–16.

[131] *E.g.*, People v. Steinberg, 595 N.E.2d 845, 848 (N.Y. 1992) (upholding conviction of adoptive parent for first degree manslaughter based on failure to provide medical care); People v. Thomas, 272 N.W.2d 157, 160 (Mich. Ct. App. 1978) (upholding conviction of a school supervisor for involuntary manslaughter based on failure to provide medical care after disciplinary beating of uncooperative student).

[132] *See, e.g.*, Vasquez v. State, 272 S.W.3d 667, 672 (Tex. Ct. App. 2008) (affirming a conviction for causing serious bodily injury to a child based on failure to provide adequate food or medical care); Ball v. State, 173 P.3d 81, 92–93 (Okla. Crim. App. 2007) (affirming a conviction for child neglect based on failure to provide medical care for burns caused by boiling water); Bustillos v. State, 2003 WL 1386948, at *5–*6 & n.3 (Tex. Ct. App. Mar. 20, 2003) (affirming a conviction for criminally negligent homicide based on failure to provide food, shelter, medical care or protection to a newborn child); State v. Valley, 571 A.2d 579, 584–85 (Vt. 1989) (affirming a conviction for manslaughter based on failure to obtain appropriate medical care for a seven-month-old infant); Kohler v. State, 713 S.W.2d 141, 142–43 (Tex. Ct. App. 1986) (affirming a conviction for murder based on failure to provide food and medical care to a three-month-old); Ahearn v. State, 588 S.W.2d 327, 336–337 (Tex. Crim. App. 1979) (affirming a conviction for injury to a child based on failure to provide food or medical care).

[133] *See, e.g.*, *Steinberg*, 595 N.E.2d at 845.

[134] *See* LAFAVE, *supra* note 71, at 215.

[135] *See supra* Part I.B.

[136] JAMES A. BALEY & DAVID L. MATTHEWS, LAW AND LIABILITY IN ATHLETICS, PHYSICAL EDUCATION, AND RECREATION 60 (1984).

[137] *See* RESTATEMENT (SECOND) OF TORTS § 314A; *see also* Transcript of Deposition of Craig A. Webb, *supra* note 7, at 136–37 (statement of athletic director of Pleasure Ridge Park High School that "our head football coach [is] responsible for his practices, and that's supervision of players").

Prosecutors may be able to draw even more support from military cases because of the strong conceptual links between football and war,[138] despite the differences between the military and civilian justice systems. For example, Marine Captain Victor Arana was convicted of dereliction of duty because a reservist under his command died of heat illness brought on by a conditioning hike.[139] Another military officer was found guilty of involuntary manslaughter when, while conducting water survival training, he refused to allow a recruit to get out of the water despite his obvious distress, and further refused to allow other recruits to help him out of the water.[140] These cases provide little or no legal help to prosecutors attempting to secure convictions against coaches, of course, but they may have some value in convincing jurors that criminal liability is proper.

2. Coaches Retain the Ability To Conduct Physically Demanding Practices Under the Proposed Solution

If prosecutors restrict themselves to prosecuting coaches based on a failure to provide medical care in contravention of the duty to do so, they will have to show in each case that the coach failed to act in accordance with the duty.[141] This serves as a safeguard for coaches who act conscientiously to care for heat-sick athletes as soon as they exhibit symptoms. Thus, the coaches in the *Stowers* and *Tarlea* cases would avoid criminal liability because they acted quickly and appropriately to treat athletes who died despite the coaches' best efforts. By contrast, the coaches in the *Mogabgab* case may well face prosecution and conviction, given their apparently casual approach to treating a player who did not reach the hospital until more than two hours after his collapse. Coaches who do all in their power to help the player as soon as possible will not be held criminally liable for failing to provide medical care regardless of the player's ultimate death or survival because there was no failure to act. Because heat illness is detectable and treatable within a certain window of time,[142] the law should be able to mandate that coaches who have assumed control over young players make sure they are competently cared for as soon as possible.

This framework will almost certainly require adjustments on the part of coaches. Ice and cold water should be available at all times to cool players in the critical early stages after heat illness manifests, for example. It is not too much to ask, though, that coaches be equipped and prepared to respond when players succumb to heat.

The prosecutor must show not only that the defendant had a duty to provide such care, but that failure to provide care caused the death.[143] This protects coaches from being held liable for player deaths that are not related to their efforts on the football field.

Under this prosecutorial regime, a coach can conduct demanding practices, even in hot weather, without fear that a player's susceptibility to heat illness will result in the coach's criminal prosecution. The coach can help ensure players' physical fitness and maintain control and discipline over the team. The only requirement—and it seems little enough to ask given the stakes—is that the coach be willing and able to act quickly to summon medical help when a player succumbs to the heat.

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[138] For a brief tongue-in-cheek look at the phenomenon, see Jim Caple, *All's Fair in War and Football*, ESPN.COM PAGE 2, Nov. 11, 2003, http://a.espncdn.com/page2/s/caple/031111.html.
[139] *Marine Found Guilty in Death During Hike*, N.Y. TIMES, Apr. 9, 2000, § 1, at 20.
[140] United States v. Taylor, 44 M.J. 254, 254–55 (C.A.A.F. 1995). After Taylor's conviction of involuntary manslaughter by court-martial, the convening authority reduced the conviction to one for negligent homicide. *Id.* at 254. The Court of Appeals for the Armed Forces subsequently overturned the conviction altogether due to an erroneous evidentiary ruling by the lower court. *Id.* at 257–58.
[141] *See* LAFAVE, *supra* note 71, at 214.
[142] *See* Mogabgab v. Orleans Parish Sch. Bd., 239 So.2d 456, 460 (La. Ct. App. 1970).
[143] LAFAVE, *supra* note 71, at 222.

CONCLUSION

There are many reasons to hesitate before imposing the considerable power of the criminal law on football coaches whose players die from heat illness. Those coaches need to maintain control of their teams and discipline their players, and they also need to ensure that players are physically fit so that they are not injured or killed in intense game situations. However, because heat illness is treatable and preventable, and because it has caused enough injuries and deaths over the years to be widely known (especially among coaches), it is appropriate to consider a measured use of the criminal law to help ensure player safety. When prosecutors do decide to bring charges, they should proceed on the theory that the coach is guilty by reason of failing to act on the duty to provide the player with medical care. Doing so will help ensure that coaches are vigilant in monitoring player health, ultimately keeping young athletes safer.