

JUDICIAL OPINION ON THE CRIMINALITY OF SPORTS VIOLENCE IN THE UNITED STATES

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I. INTRODUCTION

Two ugly incidents of unsportsmanlike conduct occurred in 2004 that further pushed the issue of the criminality of sports violence into the media spotlight. On March 8, 2004, Todd Bertuzzi of the National Hockey League’s (hereinafter “NHL”) Vancouver Canucks broke the neck of opposing player, Steve Moore, in a senseless act of sports violence.¹ While Bertuzzi’s hit left Moore with a potentially career-ending injury, the criminal case against him terminated after the court accepted his guilty plea for assault sentencing him to a year of probation and community

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1. Associated Press, *Canucks Winger Charged after on Ice Punch* (Sept. 1, 2004), available at <http://sports.espn.go.com/nhl/news/story?id=1872666> (last visited Nov. 14, 2004).

service.² Bertuzzi is appealing his indefinite suspension from the NHL and faces a possible civil suit by Moore who has hired an attorney to review the matter.³

On November 19, 2004, during a National Basketball Association (hereinafter "NBA") game between the Detroit Pistons and the Indiana Pacers, a brawl broke out involving several players and spectators resulting in several injuries, arrests and suspensions.⁴ Numerous players from both teams were given suspensions ranging from one game to the most severe penalty in league history, a 73-game suspension for Pacer Ron Artest, which will sideline the troubled athlete for the remainder of the season at a cost to him of nearly \$5 million.⁵ As a result of the brawl, nine fans were treated for injuries, and the police investigated the possibility of filing criminal charges against both the fans and the players involved.⁶ While the Pacers-Pistons incident did not involve sports violence as between players, which is the focus of this article, it does remind those involved in the sports violence debate that on-the-field violence can have greater societal effects.

These most recent incidents of sports violence again raise the question of whether such acts should be handled by the justice system or the leagues that govern each sport. Opinions on this matter are widely divergent, even among professional athletes. Hockey Hall of Fame inductee, Mike Bossy recently stated, "Our tolerance for illegal acts on the playing field is astounding, and our acceptance of them unacceptable."⁷ Conversely, retired NHL player Nick Kypreos commented, "You've asked athletes to be confined in an arena that's 200 feet by 85 feet, and asked them to battle each other within the established N.H.L. rules. . . . Think

2. ESPN, *Bertuzzi Seeks Forum with Bettman* (Dec. 30, 2004), at <http://sports.espn.go.com/nhl/news/story?id=195594> (last visited Jan. 9, 2005) (claiming that Bertuzzi is now seeking a hearing with the NHL commissioner to determine whether his indefinite suspension should be lifted).

3. Terry Frei, *Moore Faces Tough Decision* (Dec. 30, 2004), at <http://sports.espn.go.com/nhl/news/story?id=1955978> (last visited Jan. 9, 2005) (reporting that Moore may in fact commence a civil action against Bertuzzi if he is unable to recover and eventually return to the NHL).

4. Associated Press, *Union Calls Decision a Significant Change* (Dec. 5, 2004), available at <http://sports.espn.go.com/nba/news/story?id=1939316> (last visited Jan. 9, 2005) (noting that the NBA players' union filed for a grievance hearing to appeal the suspensions handed out by Commissioner David Stern).

5. ESPN, *Suspensions Without Pay, Won't Be Staggered* (Nov. 21, 2004), available at <http://sports.espn.go.com/nba/news/story?id=1928540> (last visited Jan. 9, 2005) (noting that the 73 game suspension is the longest in league history, surpassing the 68-game suspension given to Latrell Sprewell).

6. *Id.*

7. Mike Bossy, *NHL Was Too Tolerant of Bertuzzi's Brutal Act*, N.Y. TIMES, Mar. 14, 2004, sec. 8, at 10.

they'll be able to draw a line between what's acceptable and what's not? Fat chance!"⁸

The debate regarding who is properly equipped to address sports violence is not a new one, and given the increasing frequency of violent incidents, the United States is clearly at a crossroads on the issue.⁹ The two most recent incidents of sports violence, particularly the Bertuzzi incident, showcase the various strategies on how to address this growing problem and hotly debated issue.¹⁰ Some legal scholars believe that imposing criminal penalties is appropriate when offenders commit violent acts that are outside the scope of the game.¹¹ The premise of this argument rests on the notion that players who consent to play the sport do not, and cannot, consent to excessively violent acts that are outside of the game.¹² Athletes, coaches, and team owners, who argue that the leagues are better suited and equipped to handle excessive sports violence incidents, generally oppose the use of the judicial system to deter sports violence.¹³ Arguably, this is because there is an inherent element of violence and aggressiveness that is part of every sport.¹⁴ Taking away such aggressiveness by imposing criminal sanctions would destroy a fundamental aspect of athletics.¹⁵ Proponents for both sides agree, however, that sports violence is a growing problem in the United States and must be addressed.¹⁶

Excessive violence is a major threat to the integrity of professional

8. Jason Diamos, *Total Control is Impossible in Playing a Physical Game*, N.Y. TIMES, Mar. 14, 2004, sec. 8, at 10.

9. See Press Release, Indiana University, *Violence in Sports Reflects Society Says IU Professor* (July 2, 2002), at <http://newsinfo.iu.edu/news/page/print/449.html> (last visited Feb. 3, 2005) (Indiana University Associate Professor Lynn Jamieson has conducted studies showing direct correlations between the rise of societal violence and incidents of sports violence.).

10. At the time of this publication there were approximately 20 law review/journal articles and numerous newspaper columns written on the issue of sports violence. See, e.g., Gregory Schiller, *Are Athletes Above the Law?*, 10 SPORTS LAW. J. 241 (2003); Debra Feldman, *Pandora's Box Is Open: Criminal Prosecution Implemented*, 2 VA. SPORTS & ENT. L.J. 310 (2003).

11. See generally Schiller, *supra* note 10; Daniel Karon, *Winning Isn't Everything, It's the Only Thing: Violence in Professional Sports: The Need for Federal Regulation and Criminal Sanctions*, 25 IND. L. REV. 147 (1991); Bradley Nielsen, *Controlling Sports Violence: Too Late for Carrots – Bring on the Big Stick*, 74 IOWA L. REV. 681, 686 (1989).

12. See Linda S. Calvery Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127 (1996).

13. See Schiller, *supra* note 10, at 247.

14. See *id.*

15. See *id.* at 244.

16. See *id.*; Feldman, *supra* note 10; 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, 1158 (2000).

sports leagues.¹⁷ Given scientific advances in dietary supplements, like creatine, and new knowledge on body physiology, athletes have become bigger, stronger and faster than ever before, thus elevating the likelihood that there will be extremely violent hits, both legal and illegal.¹⁸ Athletes realize that a team's success, both financially and competitively, may depend on their aggressiveness and ability to intimidate the other team.¹⁹ Sports violence could also pose a significant threat to our society as everyday amateur athletes, particularly children, may feel encouraged to replicate the senseless acts of sports violence that are replayed ad nauseam on sports programs such as ESPN's SportsCenter.²⁰

As discussed below, regulating sports violence seems to be an inherently difficult task, as each case is factually different and contains different levels of consent and foreseeable violence, leading to few prosecutions of and/or meaningful punishments for offending athletes. For example, does a batter in a baseball game consent to being intentionally struck by a pitcher with a 90 m.p.h. fastball? What liability can be placed on that pitcher if a fight breaks out among rival fans in the stands? If there is a bench-clearing brawl as a result of the pitch, should the pitcher be charged with inciting a riot? Drawing the line between acceptable levels of violence is even more difficult in contact sports such as football and hockey. Is a hockey player who slashes the opposing player after the whistle is blown criminally liable? Under the rules, if that incident had happened thirty seconds earlier the player would have been assessed a two-minute penalty to the cheers of the fans.²¹

17. This paper uses sports leagues to refer to the major four in the United States and Canada: Nation Hockey League (NHL), National Basketball Association (NBA), Major League Baseball (MLB) and the National Football League (NFL).

18. Jody A. Brylinsky, *Increase in Sports Violence Part Real, Part Perception*, W. MICH. NEWS, May 2, 2001, available at <http://www.wmich.edu/wmu/news/2001/0105/0001-ma66b.html> (last visited Nov. 14, 2004) (stating that current athletes' bodies are bigger and stronger, and thus, contact between athletes today is more violent in nature than sport contact between smaller athletes of prior years).

19. See Jonathan Katz, *From the Penalty Box to the Penitentiary-The People Versus Jessie Boulerice*, 31 RUTGERS L.J. 833, 837 (2000).

20. See Ismat Abdal-Haqq, *Violence in Sports*, at http://www.childdevelopmentinfo.com/health_safety/violence_kids_sports.html (last visited on Nov. 14, 2004). This article makes reflections on sports violence research that indicates that the mass media is in a "paradoxical position." *Id.* (citing WILBERT MARCELLUS LEONARD, A SOCIOLOGICAL PERSPECTIVE OF SPORT (3d ed. 1988)). By exposing sports violence on a regular basis it may provide children with inappropriate examples to follow, but on the other hand, it may stimulate efforts to "control and prevent such behavior." *Id.*

21. See NHL Rulebook, Rule 85, *Slashing*, available at <http://nhl.com/hockeyu/rulebook/index.html> (last visited Nov. 14, 2004); NHL Rulebook, Rule 26, *Minor Penalties*, available at <http://nhl.com/nhlonline/nhl?service=page&context=StaticContentPage&location=/hockeyu/ruleboo>

The issue of how to handle excessive sports violence has primarily been debated by sports columnists, legal scholars, league officials and athletes. This article injects a fresh perspective into this debate by presenting national survey results and opinions of 400 trial court judges. Judicial opinion on this topic is particularly important, as judges are likely the most appropriate source for determining the criminality of these acts and whether the judicial system is equipped to handle such cases. Before presenting results from the judges we surveyed, a brief history of the evolution of sports violence and the laws that may govern it would be helpful.

Part II of this paper briefly outlines the history of sports violence cases and explains why sports violence is a major concern to society in general. Part III discusses possible ways to handle cases of excessive violence and whether the legal system, both criminal and civil sectors, or the sports leagues are better suited to resolve these cases. Finally, Part IV provides the results of a nationwide survey of trial judges, a majority of whom agree that sports violence is a significant problem in the United States.

II. HISTORY OF SPORTS VIOLENCE IN THE UNITED STATES

Violence, in various degrees, has become commonplace in both professional and amateur sports in America, or so it seems after watching nightly television.²² Although violence in sports is not a new phenomenon, there are several indications that violent acts on “the field” are becoming more frequent and injuries are becoming more severe.²³ For some sports, such as hockey and football, aggression is a key component of the game, thereby increasing the chance of incidents of extreme violence.²⁴ Basketball and baseball, sports with rules permitting less player-to-player

k/rule26.html&print=true (last visited Feb. 7, 2005).

22. See Nielsen, *supra* note 11, at 683-86; Schiller, *supra* note 10, at 244. See also Brylinsky, *supra* note 18 (asserting that sport has actually become more civil than it used to be, but because of the media’s constant televising of violence acts in sport, the public has seen more images of sports violence than ever before, thereby possibly creating a false perception that violence in sports has increased).

23. See Hilary Findlay, *Violence in Sport: Policy Considerations for the Amateur Sport Organization* (Aug. 2002), available at <http://www.sportlaw.ca/articles/other/article9.html> (last visited Nov. 14, 2004). Ms. Findlay provided the results from a March 2000 edition of the Canadian Medical Association, which documented that “243 severe spinal injuries had occurred in hockey games,” professional and amateur, over the previous thirty years. *Id.* Sixty-three of those injuries resulted in death or paralysis; however, of those sixty-three, only two had occurred prior to 1982, thereby providing at least some empirical data showing that sports have become increasingly violent in the past thirty years. *Id.*

24. See Nielsen, *supra* note 11, at 686.

contact also had bouts with excessive violence.²⁵ One need only remember the cases involving baseball player, Juan Marichal, who struck a player in the head with his bat or basketball player, Kermit Washington, who all but ended all-star Rudy Tomjanovich's playing career with a punch to his head that caused leakage of spinal fluid from the brain cavity.²⁶

While the November 2004 Pacer-Piston brawl highlights several aspects pertaining to the issue of sports violence, it does not specifically encompass the issue of "on the field" sports violence as between players, which is the focus of this article. The most recent high-profile act of player-to-player sports violence occurred in 2004 when 235-pound NHL player, Todd Bertuzzi, "sucker punched" an opposing player in the back of the head and fell on top of him causing the player's neck to break in multiple spots.²⁷ In December of 2004, Bertuzzi accepted a plea bargain with the Vancouver prosecutor's office wherein he will only be put on probation for one year and will not have any criminal record.²⁸ As for Bertuzzi's NHL and civil punishments, they remain unknown as he awaits a meeting with the NHL Commissioner to review his indefinite suspension and until Steve Moore's decision regarding commencement of civil action.²⁹

Similar to the recent Bertuzzi incident, a criminal court in Canada tried Marty McSorley of the NHL's Boston Bruins for a single count of assault with a weapon after hitting a player in the head with his stick.³⁰ McSorley's hit left the player unconscious.³¹ Moreover, it seems to be a weekly occurrence that professional football commissioner, Paul Tagliabue, is handing out fines to players for illegal hits; some of these hits have been so violent that they have ended a player's season.³²

25. See Nielsen, *supra* note 11, at 684-85; Schiller, *supra* note 10, at 245.

26. Kevin Fritz, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L.J. 189, 191 (2002).

27. Charles McGrath, *Just a Little Violence Among Enemies*, N.Y. TIMES, Mar. 14, 2004, § 4, at 14.

28. *Bertuzzi Seeks Forum with Bettman*, *supra* note 2; Moore "Disappointed" by Crown's Plea Bargain (Dec. 24, 2004), available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1103804243938_183/?hub=TopStories (last visited Feb. 8, 2005).

29. *Bertuzzi Seeks Forum with Bettman*, *supra* note 2.

30. Bossy, *supra* note 7, at 10.

31. Nancy Marrapese-Burrell, *Incident Will Stick with McSorley, Suspension Likely to End His Season*, BOSTON GLOBE, Feb. 23, 2000, at F1.

32. ESPN, *Commissioner: Stop the Violence or Face Consequences* (Nov. 3, 2002), at <http://espn.go.com/nfl/news/2002/1103/1455110.html> (last visited Feb. 3, 2005) (noting that Dallas Cowboys safety Darren Woodson was fined \$75,000 for an illegal hit and Philadelphia Eagles safety Brian Dawkins received a \$50,000 fine for a hit that ended a New York Giants receiver's season).

Players in the NFL and NHL often brag about their ability to place a punishing hit, both legal and illegal, on another player: hits that are encouraged by some coaches.³³ In leagues like the NHL, some players are put on the roster solely because they have a willingness to fight and be the team enforcer or intimidator.³⁴ Certain athletes in other professional sports leagues have had repeated problems with violent behavior on “the field” that has gone relatively unpunished. For example, Ron Artest and Rasheed Wallace, both all-stars in the NBA, have had chronic problems with aggression on the court, not including the most recent Pacer-Piston brawl in which both players were involved.³⁵ Not including his most recent season long suspension, Ron Artest had been suspended numerous times during his short NBA career, including one incident in 2003 when he tossed a television monitor and smashed a television camera during a nationally viewed game.³⁶ Since the 2000 season, Rasheed Wallace has led the NBA in technical fouls, a foul for committing an unsportsmanlike act. In one instance, Mr. Wallace received a seven game suspension after he threatened a referee.³⁷ But why does any of this matter to the public at large? Is sports violence a problem that is confined to the leagues themselves, or is it a broader cultural and judicial issue?

Some argue that sports violence is different from “everyday” violence as athletes consent to excessive violence on the field and thus, it is not criminal in nature.³⁸ Others oppose this dismissal of the far reaching effects of sports violence, contending that violence in sports may encourage violence in other areas, noting that “[v]iolence in sport is the father to violence in everyday life.”³⁹ Scientific studies have been conducted analyzing the negative impact that sports violence has on

33. See Fritz, *supra* note 26, at 192, 196-97.

34. See Feldman, *supra* note 10, at 313-14.

35. See Joe Simon, *Players Deserve Harsher Punishment for Violence*, THE JAMBAR, Feb. 11, 2003, available at <http://www.thejambar.com/news/2003/02/11/SportsAndRecreation/Players.Deserve.Harsher.Punishment.For.Violence-365611.shtml> (last visited Nov. 11, 2004); see also Chris Sheridan, *Artest Suspended for Season After Brawl*, THE DAILY TEXAN, Nov. 22, 2004, available at <http://www.dailytexanonline.com/news/2004/11/22/Sports/Artest.Suspended.For.Season.After.Brawl-812984.shtml> (last visited Feb. 3, 2005).

36. Simon, *supra* note 35.

37. *Id.*

38. ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 680 (2d ed. 1993).

39. R. v. Ciccarelli, [1989] 54 C.C.C. 3d. 121 (quoting a Canadian jurist on the issue of whether sports violence impacts society), cited in J.C.H. Jones & Kenneth Stewart, *Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorley Decisions*, 12 SETON HALL J. SPORT L. 165, 174 (2002).

society.⁴⁰ While none of these studies have provided a “clear, unequivocal, and quantitative connection running from sports violence to general societal violence,” there is substantial evidence of a relationship.⁴¹

An unfortunate byproduct of our media frenzied society is that those sitting at home transform some so-called “professional” athletes, who consistently act unprofessionally and illegally, into heroes.⁴² Young athletes learn at an early age to emulate their favorite sports stars by wearing their favorite player’s jersey and by mimicking that player’s moves/acts on the field, both legal and illegal.⁴³ Adults also mimic the behaviors of their sports heroes while participating in their own amateur sports leagues.⁴⁴

Sports play a major role in American society, as indicated by the willingness of major corporations to pay millions of dollars for thirty-second advertisement slots during the Superbowl.⁴⁵ In turn, American society encourages competition and instills in children the idea that being the best is a desirable trait.⁴⁶ Intense competition and aggressiveness eventually become learned and accepted behavior.⁴⁷ Athletes are taught at an early age to use aggressiveness and hostility to their advantage.⁴⁸ Eventually sports violence transforms into societal violence, which may be because children fail to recognize that aggressiveness acceptable on the field is not tolerated off of the field.⁴⁹

Young athletes and their parents may also fail to realize that violent acts occurring on the professional level are not handled in the same manner as amateur athletic violence.⁵⁰ For example, in 1999, a San Antonio High School basketball player intentionally elbowed an opposing player in the face requiring the victim to seek plastic surgery.⁵¹ Although intentional and violent acts take place in the NBA and are repeatedly replayed on television, the consequences for the professional and the

40. See Nielsen, *supra* note 11, at 686.

41. Jones & Stewart, *supra* note 39, at 174.

42. See Fritz, *supra* note 26, at 195-96.

43. See Mike Mooneyham, *Bad Behavior Teaches Kids Wrong Lesson*, CHARLESTON POST & COURIER, Aug. 24, 2000, at 1.

44. See *id.*

45. George Raine, *Advertisers Pull Out All Stops for Super Bowl; Millions Worldwide Find Ads More Entertaining Than Game*, S.F. CHRON., Jan. 18, 2004, at 11.

46. Clarke, *supra* note 16, at 1158.

47. *Id.*

48. *Id.*

49. Nielsen, *supra* note 11, at 687.

50. See *Texas Judge Declines to Cut 5-Year Term in Sports Case*, N.Y. TIMES, Mar. 11, 2000, at A12.

51. *Id.*

amateur offender are vastly different.⁵² The San Antonio High School player in the above example was sentenced to five years in prison, whereas his NBA counterpart may only be fined \$20,000.⁵³

III. LAW OR LEAGUE? WHO SHOULD REGULATE SPORTS VIOLENCE?

Legislators, legal commentators and professional sports leagues have attempted a number of different approaches to dealing with sports violence. Legislators have attempted to bring consistency and to provide guidance in this area.⁵⁴ Alternatively, some commentators assert that the issue should be addressed by the judicial system, either in criminal or civil court.⁵⁵ A final way to address incidents of excessive violence is to allow the various leagues to handle the punishments themselves.⁵⁶ This “keep-it-in-the-family” notion of justice can produce results during the infraction or immediately thereafter, as opposed to the lengthy procedures involved in criminal and civil litigation.⁵⁷ But are the interests of the victim and the sport fairly represented?

A. Legislation

In 1980, Congress proposed legislation that attempted to amend Title 18 of the United States Code and would have provided for criminal sanctions on players using “excessive violence during professional sports events.”⁵⁸ The bill subsequently failed, as many professional sports league representatives believed its language and potential penalties were overly vague and inconsistent.⁵⁹ The executives of the professional sports leagues, who stressed that they should be in charge of disciplining violent players, not the government, strongly opposed the bill.⁶⁰ Again in 1983, then United States House Representative Thomas Daschle, proposed the

52. *See id.*

53. *Id.*

54. *See* Karen Melnik, *Giving Violence a Sporting Chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports*, 17 J. LEGIS. 123 (1990).

55. *Id.* at 125-31.

56. *Id.* at 124-25.

57. Schiller, *supra* note 10, at 247.

58. The Sports Violence Act of 1980, H.R. 7903, 96th Cong. (2d Sess. 1980).

59. *See* Melnik, *supra* note 54, at 131.

60. *The Sports Violence Act of 1980: Hearings on H.R. 7903 Before Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong. (1980), cited in Diane V. White, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1054 n.9 (1986) (statements of John A. Ziegler, Jr., Pres. of the NHL; Bowie W. Kuhn, Comm. of MLB; Phillip A. Woosnam, Comm. of the North American Soccer League; Lawrence O'Brien, Comm. of the NBA).

Sports Violence Arbitration Act which was very similar to the 1980 legislation.⁶¹ However, this bill proposed creating a “sports court” to handle acts of sports violence.⁶² This legislation failed due to various uncertainties regarding the application of the bill and arbitration process.⁶³ Since the failure of the federal legislation, there has been little activity on the state or national level in sports violence legislation.⁶⁴

B. Criminal Case Law

Athletes are infrequently prosecuted for violent acts during sporting events, as indicated by the recent Bertuzzi case wherein he was given a plea bargain resulting in a mere one year probation.⁶⁵ Prior to the 2004 Bertuzzi case, the 2001 Canadian prosecution of McSorley had been the first time in twelve years that an NHL player had faced criminal charges due to on-ice conduct.⁶⁶ There are several factors that have limited the use of criminal courts in sports violence cases.⁶⁷

Demarcating the fine line that exists between aggressive legal behavior and excessive illegal behavior is perhaps the greatest difficulty in criminal prosecution.⁶⁸ Each incident of excessive sports violence is unique. There are specific circumstances in each case that may severely limit the prosecutor’s ability to prove that the offending player had the requisite intent or mental state to satisfy the extremely high burden of proof, namely guilt beyond a reasonable doubt.⁶⁹

The limited number of prosecutions for sports violence have involved charges of assault and battery.⁷⁰ Convicting someone for assault and battery is extremely difficult in sports violence cases, as the prosecutor must prove that the individual “purposely, knowingly or recklessly caused

61. Nielson, *supra* note 11, at 693. The major difference with Representative Daschle’s bill was that his was civil, while the Sports Violence Arbitration Act addressed criminal problems in sports. *Id.*

62. The Sports Violence Arbitration Act, H.R. 4495, 98th Cong. (1983); *see also* Nielson, *supra* note 11.

63. *See* Nielson, *supra* note 11, at 693-94.

64. Hanson & Dornis, *supra* note 12, at 151.

65. *Id.* at 141-42; Frei, *supra* note 3.

66. *See* Feldman, *supra* note 10, at 310.

67. *See* Fritz, *supra* note 26, at 208.

68. *See* Hanson & Dornis, *supra* note 12, at 135.

69. *See* Fritz, *supra* note 26, at 208.

70. Hanson & Dornis, *supra* note 12, at 141-42. Most recently, the British Columbia Ministry of the Attorney General’s criminal justice formally charged Todd Bertuzzi with assault causing bodily harm for his March 2004 hit on Steve Moore. Bertuzzi will be tried for his assault in January 2005 in British Columbia, Canada. *See Canucks Winger Charged After on Ice Punch, supra* note 1.

bodily injury to another.”⁷¹

Unlike street violence, where it is not the norm for people to tackle, check or slash each other, these acts are an acceptable part of every amateur and professional football and hockey game. Consequently, criminal juries often find difficulty in discerning legal and illegal violence in the sports setting.

Another substantial hurdle for a prosecutor is the affirmative defense of consent that may be raised by the defendant.⁷² Participation in the game or consenting to specific acts within the game may often imply consent on the part of the victim.⁷³ Consent is often defined as whether the victim “impliedly consent[ed] to a ‘reasonably foreseeable’ amount of physical violence.”⁷⁴ In sum, one must ask whether the victim consented to the violent act due to the fact that he knowingly participated in a violent game or intentionally encouraged a fight with the defendant.

Two fine lines exist, one between legal and illegal sports violence, and a second between reasonably foreseeable and unforeseeable amounts of violence.⁷⁵ Did Todd Bertuzzi’s victim reasonably foresee that by hitting Bertuzzi’s team captain in a prior game he would be retaliated against during a later meeting between the teams?⁷⁶ Depending on certain factors, such as rivalry between the teams, the atmosphere of the stadium or the types of players involved, the foreseeable nature of sports violence can become an unclear issue.⁷⁷

Other factors limiting a prosecutor include hesitation on the part of the victims to seek prosecution and a court system that already has dockets overflowing with cases, both criminal and civil.⁷⁸ Even if the prosecution of a professional athlete is successful, such as in the McSorley case, the penalties handed out by the criminal system have been mere slaps on the wrist, failing to deter future acts.⁷⁹ Although judicial opinion clearly

71. MODEL PENAL CODE § 211.1(a) (1962), cited in Fritz, *supra* note 26, at 203.

72. See Fritz, *supra* note 26, at 208.

73. John Timmer, *Crossing the (Blue) Line: Is the Criminal Justice System the Best Institution to Deal with Violence in Hockey?*, 4 VAND J. ENT. L. & PRAC. 205, 210 (2002).

74. Katz, *supra* note 19, at 858.

75. See Hanson & Dernis, *supra* note 12; Fritz, *supra* note 26, at 193.

76. See McGrath, *supra* note 27.

77. See Katz, *supra* note 19; Hanson & Dernis, *supra* note 12; J.C.H. Jones et al., *Blood Sports and Cherry Pie: Some Economics of Violence in the National Hockey League*, 52 AM. J. ECON. & SOC. 63 (1993).

78. See Timmer, *supra* note 73, at 209.

79. See generally Fritz, *supra* note 26. In one criminal case involving NHL star player Dino Ciccarelli in 1988, “Ciccarelli became the first NHL player to be incarcerated for on-ice violence.” Fritz, *supra* note 26, at 206-07. He was convicted in an Ontario court for assaulting Toronto Maple Leaf’s Luke Richardson during a game. *Id.* His penalty was minor however, a one day jail sentence

indicates that athletes cannot consent to illegal violent acts and that instigators of such acts should be brought before a criminal court,⁸⁰ there are numerous factors limiting the ability and desire of prosecutors to handle excessive violence cases.⁸¹ In conclusion, several aspects of the law must be developed and further defined before criminal prosecution of excessive sports violence becomes a viable option.

C. Civil Case Law

In a sports violence case, there are three claims under civil law where a plaintiff may sue a defendant: 1) intentional tort, 2) recklessness, or 3) negligence.⁸² Unlike criminal actions where a prosecutor brings charges against the defendant with the hope of conviction, jail time and deterrence, a civil plaintiff/victim commences a lawsuit against the defendant with the hope of obtaining monetary damages for his injuries.⁸³ The second important difference between the two actions is the burden of proof on the prosecutor/plaintiff.⁸⁴ In a criminal action, the prosecutor must convince a jury beyond a reasonable doubt that the athlete was guilty of the crime charged.⁸⁵ A much lower, "preponderance of the evidence" standard is used in civil cases, making a plaintiff's burden less cumbersome than a prosecutor's.⁸⁶

Although actions under intentional tort and negligence are both feasible options for a plaintiff, a jury will more likely award damages under the recklessness theory.⁸⁷ Courts often reject lawsuits based on negligence because it cannot be proven that the defendant breached the ordinary care standard of conduct that all players must abide by.⁸⁸ Actions brought under an intentional tort are rare because consent is often the major issue at play, and consent is an issue that becomes blurred in the sports context.⁸⁹

and a \$1,000 fine. Fritz, *supra* note 26, at 207.

80. See discussion *infra* Part IV for information on judicial opinions of sports violence.

81. See Timmer, *supra* note 73, at 209.

82. See Fritz, *supra* note 26, at 197-98.

83. See, e.g., *Nabozny v. Barnhill*, 334 N.E.2d 258, 259 (Ill. App. Ct. 1975) (requesting damages for personal injuries obtained due to the negligence of a player during a soccer game).

84. See Hanson & Demis, *supra* note 12, at 143.

85. *Id.*

86. *Id.*

87. See Nielson, *supra* note 11, at 698.

88. *Id.* at 699-700.

89. Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants Be Required to Be Reasonable?*, 5 SETON HALL J. SPORT L. 253, 255 (1995); see also Nielson, *supra* note 11, at 698.

The seminal case applying the recklessness standard to a sports violence incident was *Hackbart v. Cincinnati Bengals, Inc.*⁹⁰ The Court in *Hackbart* held that the recklessness standard was appropriate in sports violence cases because players could not consent to conduct that violated either the established or “unwritten” rules of the game.⁹¹ Several courts have followed the recklessness standard and have defined it as “conduct which falls somewhere between an intentional act and a negligent act.”⁹² Reckless conduct may take place when one player intended to commit the act, but he did not, per se, intend to harm the player.⁹³ Civil judgments have been somewhat more successful than criminal prosecutions as each of the four major sports have had cases involving the award of monetary judgments.⁹⁴

Just as there are significant hurdles for prosecutors in criminal actions, there are several limiting factors facing potential plaintiffs in excessive violence civil suits. Perhaps the most critical issue in a civil suit involving sports violence is whether the defendant’s actions were outside the scope of the game.⁹⁵ Once again, a blurry line develops between conduct that was recklessly violent and actionable and violent conduct that was still within the parameters of the game.⁹⁶ After observing an NHL or NFL game, one would quickly realize this dilemma and would understand the difficulty of defining what is and what is not “part of the game.”⁹⁷

Other factors limit the ability and desire for a victim of sports violence,

90. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979). The plaintiff in the case, Hackbart, was kneeling on the field after the play was over when the defendant struck Hackbart in the back of the head with his forearm, fracturing the plaintiff’s neck. *Id.* at 519.

91. *Id.* at 524.

92. *Hanson & Dornis*, *supra* note 12, at 146.

93. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965).

94. NBA: In *Tomjanovich v. Cal. Sports, Inc.*, No. CIV.A.H-78-243, 1979 U.S. Dist. LEXIS 9282 (S.D. Tex. Oct. 10, 1979), the jury awarded \$3.1 million for the plaintiff. R.L. YASSER, TORTS AND SPORTS: LEGAL LIABILITY IN PROFESSIONAL AND AMATEUR ATHLETICS 26 (1985). MLB: Defendant Juan Marichal paid \$7,500 to Johnny Roseboro for hitting him over the head with a bat in 1965. *Hanson & Dornis*, *supra* note 12, at 144. NFL: In *Hackbart v. Cincinnati Bengals*, 601 F.2d 516 (10th Cir. 1979), parties settled out of court for \$200,000 before case was retried under the recklessness standard. *Hanson & Dornis*, *supra* note 12, at 144. NHL: A court awarded plaintiff \$850,000 for a violent hit to the face with a stick during a hockey game. Jeff Miller & Mike Heika, *Hockey Violence*, THE DALLAS MORNING NEWS, May 9, 2004, at 1C, available at LEXIS, News Library, DALNWS File.

95. See generally *Nabozny v. Barnhill*, 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975) (outlining several factors to consider when determining whether the player’s violent act was “part of the game,” including whether the incident occurred during the game, the type of play involved, the rules of the sport, the level of skill and the competition involved along with the sport involved).

96. See Erica K. Rosenthal, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 *FORDHAM L. REV.* 2631, 2659 (2004).

97. See *id.*

particularly professionals, to bring an action against a fellow league member.⁹⁸ First, fellow players may ostracize the player bringing a suit for violating the unwritten “macho code” of the league that mandates disputes be settled “on the field.”⁹⁹ For example, commentators on the possible Bertuzzi/Moore case have indicated that Moore has a very difficult decision to make as to whether to sue Bertuzzi in a civil action for monetary damages.¹⁰⁰ One writer specifically stated that “if Moore sues, he will be ostracized” and “he would be blackballed” by fellow players, coaches and team owners, thereby jeopardizing his own career.¹⁰¹ Team owners and coaches have traditionally disfavored the use of the judicial system to remedy on-field incidents of violence.¹⁰² A player commencing a civil action may be reprimanded by a coach or owner who may limit the athlete’s playing time or may even trade the athlete altogether.¹⁰³

As discussed in this section, civil law places a lower burden on a potential plaintiff and therefore, increases the probability that the defendant will be found guilty.¹⁰⁴ Yet several factors remain that limit a civil case involving excessive sports violence. Reluctant plaintiffs, affirmative defenses and league sanctions against plaintiffs all act as severe deterrents to victims of excessive sports violence from bringing forth their action in the civil courts.¹⁰⁵

D. League Control

Currently, the various leagues handle the majority of the excessive sports violence cases by themselves, using suspensions and fines levied against offending players to deter future acts.¹⁰⁶ For a multitude of reasons, the most important of which is public image, the leagues have attempted to dissuade prosecutors and players from using the court system

98. See Hanson & Dernis, *supra* note 12, at 148-49.

99. *Id.* at 149.

100. See Frei, *supra* note 3.

101. *Id.*

102. Hanson & Dernis, *supra* note 12, at 149.

103. See Melnik, *supra* note 54, at 127; see also Frei, *supra* note 3 (noting that former NHL player Henry Boucha filed a civil suit for an on-ice incident occurring in 1975 and was not given much chance to play after that because he had broken the league’s “macho code” by filing the lawsuit).

104. Hanson & Dernis, *supra* note 12, at 143.

105. See Katz, *supra* note 19, at 864. See also Diane V. White, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1031-34; Nielson, *supra* note 11, at 697; Fritz, *supra* note 26, at 228.

106. See Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL’Y 145, 152 (2002).

to settle claims of excessive violence.¹⁰⁷ League commissioners currently have broad discretion to handle sport violence, this allows them to hand out suspensions and fines that will work to promote the “best interests of the game” but will not necessarily produce the best results for the victims or integrity of the sport.¹⁰⁸ Those in favor of league control argue that leagues can appropriately fine and suspend more accurately than the courts.¹⁰⁹ Commentators state that leagues are better able to determine whether a player’s conduct “crossed the line” and whether it was a reasonably foreseeable incident.¹¹⁰

Another argument for league self-control is that the leagues can suspend and penalize players more quickly than any court.¹¹¹ Vancouver Canuck Todd Bertuzzi was suspended indefinitely for his violent act only two days after the incident.¹¹² Similarly, NBA Commissioner David Stern took only two days to suspend the various players involved in the Pacer-Piston brawl in November 2004.¹¹³ The suspensions of Bertuzzi and the Pacer and Piston players will result in millions of dollars in lost salary including \$5 million to Ron Artest alone.¹¹⁴ Although each league usually has a maximum fine, which is quite minimal compared to the player’s exorbitant salaries, game suspensions can result in a player’s loss of millions of dollars as demonstrated by the Artest suspension.¹¹⁵ Clearly, leagues want to retain control over sports violence punishments to ensure a positive public image that promotes fan interest and protects revenues for the team owners.¹¹⁶ Therein lies the greatest argument against league self-control since leagues clearly have a biased financial interest in how and when to mete out punishment.

Instances of excessive violence are a component of almost every professional hockey and football game.¹¹⁷ The marketing of and profiting

107. See generally Katz, *supra* note 19, at 863-66 (discussing the following reasons for maintaining control with the league: 1) people involved in the sport have a better understanding of all the conditions than a court, and 2) the league can create immediate penalties and decisions).

108. Chris J. Carlson and Matthew S. Walker, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399, 440 n.11 (1982) (proposing that the “best interest of the game” is profitability and questioning whether violence increases profitability).

109. Hanson & Demis, *supra* note 12, at 151-52.

110. *Id.*

111. See Katz, *supra* note 19, at 864.

112. Diamos, *supra* note 8.

113. Sheridan, *supra* note 35.

114. *Id.*

115. See Timmer, *supra* note 73, at 213; Katz, *supra* note 19, at 865.

116. See Timmer, *supra* note 73, at 213.

117. See generally *Commissioner: Stop the Violence or Face Consequences*, *supra* note 32; McGrath, *supra* note 27.

from sports violence is a major argument against allowing leagues to regulate cases of sports violence.¹¹⁸ As stated by a recent columnist, "Many fans, and the NHL, consider fighting [and other violence] to be an integral part of pro hockey" as indicated by the fact that the NHL rulebook "devotes five pages" to fighting.¹¹⁹ Violence sells, particularly in United States sports arenas, and there is empirical evidence supporting the notion that fans prefer more flagrant forms of violence.¹²⁰ As one commentator concluded, "Crowds are attracted and revenue is increased by the exercise of violence."¹²¹ To this end, league officials in hockey argue that, "[e]nding hockey violence will cause the league to lose attendance," and thus lose money.¹²² Lost in all of the concern over the financial gain to be had are the interests of the victims and the maintenance of the integrity of the sport.

Ultimately, the dilemma is whether to allow the biased leagues to resolve excessive violence cases or to mandate that the judicial system resolve all violent sports cases.

IV. RESULTS OF THE NATIONAL SURVEY OF JUDGES

A. Method of Judicial Assessment

To assess the attitudes of judges towards sports violence, a three-page mail survey was sent to a national sample of trial court judges.¹²³ The survey was designed with the hope of gaining an understanding of the attitudes of state trial court judges in the United States towards the criminal and legal status of violence in professional sports. Judges were asked a series of closed-ended questions about their prior knowledge of sports violence cases and their policy and legal attitudes towards sports violence.¹²⁴ At the end of the survey, judges were asked to offer any open-ended comments they had concerning this area of the law.¹²⁵ The survey

118. Jones & Stewart, *supra* note 39, at 177.

119. Jeff Merson, *NHL Needs to Carry a Big Stick Here*, ESPN's "Writers' Bloc," at <http://sports.espn.go.com/espn/page2/story?page=bloc/040310> (last visited Mar. 14, 2004).

120. Jones et al., *supra* note 77 (hypothesizing, through a positive correlation between attendance records and violence, that hockey fans enjoy violence).

121. See Jones & Stewart, *supra* note 39, at 171.

122. Karon, *supra* note 11, at 151.

123. See *infra* app. A, "Survey of Judicial Attitudes Towards Sports Violence." The survey sent to the judges included a stamped, self-addressed return envelope, and respondents were told the information was to be used for an academic journal and would remain confidential.

124. See *infra* app. A.

125. *Id.*

was kept brief and avoided personal questions about the judges' general ideology so as to increase the response rate.

Ultimately, the survey was mailed to one thousand randomly selected state judges across the United States. The names and addresses of the judges were drawn from the *2001 Edition of BNA's Directory of State and Federal Courts, Judges, and Clerks*. The initial survey was followed up with a reminder postcard. At the conclusion of the survey period, we received three hundred ninety-three completed surveys. When taking into account surveys that were returned because the judge had either retired or moved to a new position, our response rate was 40.6 %, which is excellent for an elite level mail survey.¹²⁶

B. Judicial Attitudes Towards Sports Violence

In considering judicial assessments of this complex area of law, we first turn to judicial attitudes about whether sports violence is a significant social problem. Judges were asked whether they considered sports violence to be a serious problem and whether sports leagues are capable of handling this problem. Table 1 shows that almost two-thirds of judges agree that sports violence is a significant problem. Second, judges almost unanimously agree that athletes do not bear the burden of consent to sports violence by their mere presence in the game. Perhaps most importantly, a clear majority of the judges do not think that the sports leagues are able to effectively govern the problem of sports violence.¹²⁷

126. See R.L. Fox & R. Schuhmann, *Gender and Local Government: A Comparison of Women and Men City Managers*, 59 PUB. ADMIN. REV. 231, 233-34 (1999) (providing information on how the author conducted a mail survey of city managers); M. Hojnacki & D.C. Kimball, *The Who and How of Organizations' Lobbying Strategies in Committee*, 61 J. POLS. 999, 1008 (1999) (where elite mail survey response rate was 33%).

127. See *infra* table 1. See generally Fritz, *supra* note 26, at 229 (claiming that sports leagues are inadequate to handle the problems of sports violence); Jeffrey Schalley, *Eliminate Violence from Sports Through Arbitration, Not Civil Courts*, 8 SPORTS LAW. J. 181, 192-93 (2001) (claiming that league rule books do not provide sufficient recourse for players that are victims of sports violence).

TABLE 1 – JUDICIAL ATTITUDES TOWARDS THE PROBLEM OF SPORTS VIOLENCE

Percent who agree sports violence is a significant problem	64%
Athletes do not consent to intentional acts of violence beyond the scope of the rules.	93%
The professional sports leagues do a poor job of dealing with violence in their respective sports.	60%
Having a biased decision-maker, such as a commissioner within a professional sport, results in inconsistent judgments about punishment.....	67%

Note: Sample size for each question ranged from 360 to 375.

Judges are in agreement with those commentators that conclude leagues are biased decision makers and have a history of poorly regulating sports violence. The critical question in this analysis is how these general attitudes towards sports violence influence the legal question of whether incidents of sports violence belong in criminal court.

C. Is Sports Violence a Crime?

To assess judicial attitudes towards the criminality of sports violence, we asked judges their opinions on various aspects of the issue and asked for their reaction to a hypothetical sports violence case. First, judges were asked four questions regarding the seriousness and criminality of excessive sports violence. The responses to these questions are presented in Table 2. As indicated in their responses, judges acknowledge the difficulty of assessing the criminality of sports violence cases. Overall, the results demonstrate a sharp divide among judges regarding ways to assess sports violence. Almost 60% of judges recognize that sports violence cases are different from other types of violence cases. More than half of the judges surveyed agreed that sports violence is less serious than other types of violence and, 60% agreed that, from a legal standpoint, it would be difficult to distinguish between tolerable and intolerable levels of sports violence. A Montana trial court judge summed up the feelings of many judges by stating, "Some sports are inherently violent, i.e. hockey and football. Tackling and checking require substantial force directed towards another person, but are clearly not criminal. At some point, though, athletes can cross that line of acceptable violence, but the line is very difficult to pinpoint." Despite these difficulties in assessing sports

violence, more than three-quarters of the judges thought that instances of “excessive sports violence” should be handled in the criminal courts.

TABLE 2 – JUDICIAL ASSESSMENT OF THE CRIMINAL STATUS OF SPORTS VIOLENCE

Percent who agree sports violence cases are no different than any other type of violence cases.	39%
Violence that occurs in sporting competition is less serious than violence that occurs on the street.	54%
From a legal standpoint it is difficult to differentiate between excessive sports violence and tolerable levels of sports violence.	60%
Excessive sports violence cases should be handled in the criminal courts.	77%

Note: Sample size for each question ranged from 375 to 377.

To further assess judicial attitudes, the respondents were presented with a hypothetical sports violence case. The case involved a hockey scenario that was similar to a number of cases that the public has seen.¹²⁸ In the hypothetical, a player hit another player from behind with a hockey stick, and the incident caused severe face and head injuries, much like the McSorley incident. Consistent with their previous responses, 75% of the judges believed the case belonged in criminal court. Sixty percent of the judges thought the case warranted the serious charge of assault with a deadly weapon. Only 25% of respondents believed that this type of case should be left to either the leagues’ discretion or the civil courts.

How do we explain the judicial consensus that excessive sports violence is a matter for the criminal courts? First, we attempted to assess whether attitudes about sports violence might be attributed to some of the judges’ personal characteristics and experience with sports violence cases. As the results of Table 4 indicate, the consensus that sports violence is criminal conduct is shared almost equally among judges regardless of age, sex, and knowledge of sports. There were some modest differences among judges who had direct experience with and knowledge of sports violence cases. Roughly ten percent of the judges previously had a sports violence case in front of them, and almost 38% were aware of a sports violence case within their area. Judges who had dealt with sports violence cases, or who

128. See *infra* table 3.

knew of such cases, were significantly more likely to think the conduct was criminal.

TABLE 3 – JUDICIAL RESPONSE TO HYPOTHETICAL SPORTS VIOLENCE INCIDENT

Hypothetical Case: “While skating down the ice, Player Smith pushes Player Thomas in the back of the head. Player Thomas turns around and follows Player Smith down the ice. He wildly swings his stick and slashes Player Smith in the face causing massive hemorrhaging in the brain and a need for minor reconstructive surgery of the face.”

What is the most appropriate action to take against Player Thomas?:

A fine and/or suspension is enough punishment.	16%
Case should be handled in civil court.	28%
Criminal court proceeding with charge of assault with a deadly weapon.	60%
Criminal court proceeding with charge of criminal negligence.....	15%

Note: Sample size is 386. Column totals more than 100% because some judges checked more than one response.

TABLE 4 – EXAMINING THE JUDICIAL DIVIDE ON WHETHER SPORTS VIOLENCE CASES SHOULD BE HANDLED IN CRIMINAL COURT

	Percent Who Believe Sports Violence Cases Should be Handled in Criminal Courts
Total Sample	77%
<u>Sex:</u>	
MALE.....	78%
FEMALE	77%
<u>Age:</u>	
UNDER 50	50%
50 – 59.....	82%
OVER 60	70%
<u>Sports Knowledge:</u>	
HIGH.....	78%

MODERATE	76%
LOW	79%

History with Sports Violence Cases:

Has had a sports violence case in their court.....	85%
Has not had a sports violence case in their court.....	76%
Aware of sports violence case in their area	85%
Not aware of sports violence case in their area	70%
Familiar with high-profile sports violence cases	82%
Not familiar with high-profile sports violence cases.....	76%

Note: Sample size for each question ranged from 375 to 377.

Ultimately, the clearest insight for why judges believe sports violence cases should be viewed as criminal emerged in the open-ended comments. Many thought sports violence had a significant impact on society. An Illinois trial court judge who presided over a sports violence case offered this typical comment: “If there was an immediate and certain penalty, it would go far to keeping such disputes out of the courts – if not, the courts must be involved because this spreads to children and parents when they see pro athletes do it and nothing happens.” A Missouri judge commented, “By definition, sports are for the sportsmen. There is no room for any violence of any kind. . . . This is because the youngsters in sports are learning by imitating the professionals.” A California judge noted, “The attitude among the participants and the leagues has to change – the lesson, especially for children, of not holding athletes accountable is too damaging for society to tolerate.” Throughout the open-ended responses, judges pointed to the societal impact of sports violence on children as the prevailing rationale for why it must be considered criminal conduct.

V. CONCLUSION

Sports have become intertwined with American society on both the professional and amateur levels over the past century. The professional sports industry is a multi-billion dollar industry that has been receiving increasing amounts of media attention and fan support. Also on the rise in both professional and amateur sport leagues, however, are the incidents of excessive sports violence that could be considered criminal in nature, raising concerns of the impact of sports on societal violence. The 2004 Pacer-Piston brawl that involved numerous spectators provides a prime

example of this increasing concern. But how will the United States address this issue in the Twenty-First Century?

This paper presented a new study suggesting that trial judges throughout the United States believe that sports violence is a significant societal issue that must be addressed. Judicial opinion is clear on several aspects of sports violence cases. First, judges overwhelmingly believe that athletes do not consent to violence that is outside the scope of the sport.¹²⁹ Second, cases involving non-consensual acts of sports violence should be handled in criminal courts due to the fact that biased sports leagues do not properly handle these situations.¹³⁰ Judges also recognize, however, that it is very difficult to differentiate between excessive sports violence and tolerable sports violence.¹³¹ Therein lies a major dilemma that must be addressed. If biased leagues cannot properly handle sports violence cases involving criminal conduct, but the courts cannot differentiate between acceptable and unacceptable levels of violence, how will this growing societal problem be remedied? Sports will undoubtedly remain a vital source of entertainment for both spectators and participants in the years that follow, and the longevity and economic success of professional sports may depend on how the issue of sports violence is ultimately addressed.

APPENDIX A

JUDICIAL OPINION SURVEY ON SPORTS VIOLENCE

** Note – Accompanying this survey was a letter requesting the judges' assistance in completing this project and assuring them of complete anonymity if they were to complete the questionnaire. **

Part I – General Questions on Sports Violence in Society

Please rate your level of agreement with the following statements using the scale below:

- 1 = strongly agree
- 2 = somewhat agree
- 3 = somewhat disagree

129. *See supra* Table 1, question 2.

130. *See supra* Table 1, questions 3, 4.

131. *See supra* Table 2, question 3.

4 = strongly disagree

- _____ Sports violence is a significant problem.
- _____ Athletes do not consent to intentional acts of violence beyond the scope of the rules.
- _____ The professional sports leagues do a poor job of dealing with violence in their respective sports.
- _____ Having a biased decision-maker, such as a commissioner within a professional sport, results in inconsistent judgments about punishment.

Part II – Judicial Assessment of the Criminal Status of Sports Violence

Using the scale above please rate your level of agreement with the following statements:

- _____ Sports violence cases are no different than any other type of violence cases.
- _____ Violence that occurs in sporting competition is less serious than violence that occurs on the street.
- _____ From a legal standpoint it is difficult to differentiate between excessive sports violence and tolerable levels of sports violence.
- _____ Excessive sports violence cases should be handled in the criminal courts.

Part III – Assessing a Hypothetical Sports Violence Case

Based on the brief description of facts identified below, please mark what you think would be the most appropriate course of action in a case such as this. Certainly we are aware that for you to offer a judgment in such a case you would need many more facts – but we are only asking for your general impressions of what should happen in such an incident.

Hypothetical Case:

“While skating down the ice, Player Smith pushes Player Thomas in the back of the head. Player Thomas turns around and follows Player Smith down the ice. He wildly swings his stick and slashes Player Smith in the face causing massive hemorrhaging in the brain and a need for minor reconstructive surgery of the face.”

What is the most appropriate action to take against Player Thomas?

_____ A fine and/or suspension is enough punishment.

_____ Case should be handled in civil court.

_____ Criminal court proceeding with charge of assault with a deadly weapon.

_____ Criminal court proceeding with charge of criminal negligence.

Part IV – Experience with Sports Violence Cases and Personal Demographics

Are you familiar with the basic facts surrounding the case of Wayne Maki?

Yes

No

Are you familiar with the basic facts surrounding the case of Marty McSorely?

Yes

No

Are you familiar with the basic facts surrounding the case of Kermit Washington?

Yes

No

Generally speaking do you consider yourself to be a sports fan?

Yes

No

Generally speaking how knowledgeable are you about sports?

_____ Highly knowledgeable

_____ Somewhat knowledgeable

_____ Not very knowledgeable

Have you ever had a sports violence case come before your court?

Yes

No

Are you aware of a sports violence case in your area or community?

Yes

No

What is your gender?

Male

Female

What is your age? _____

**** Thank you very much for participating in this survey. Please
enclose your responses in the self-addressed stamped envelope. ****